NICE3156

25 February 2000

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**v**

**GERARD PATRICK GASKIN**

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**NICHOLSON LJ**

**Introduction**

This is an application for leave to appeal against sentence by Gerard Patrick Gaskin who on 17 September 1999 pleaded guilty on arraignment to four counts contained in Bill of Indictment No. 255/99. The first count charged him with the offence of dangerous driving causing death, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995. The maximum penalty is ten years' imprisonment.

The second count charged him with the offence of using a motor vehicle whilst uninsured, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1981. The maximum penalty is a fine of £5,000.

The third count charged him with the offence of taking a motor vehicle without authority, contrary to Article 172 of the 1981 Order. The maximum penalty is one year's imprisonment with a discretionary period of disqualification from driving.

The fourth count charged him with driving whilst disqualified, contrary to Article 167(1)(b) of the 1981 Order. The maximum penalty is one year's imprisonment with a discretionary period of disqualification.

On 21 October 1999 the Recorder sentenced the applicant on Count 1 to a Custody Probation Order of 3 years' detention in the Young Offenders Centre together with a period of probation of two years thereafter. On Count 2 he was fined £250 with an immediate warrant. On Counts 3 and 4 he was sentenced to one year's detention to run concurrently but consecutively to the sentence on Count 1. The totality of the sentences came to 4 years' detention with two years' probation.

**The Facts**

The applicant was born on 4 September 1981. The offences were committed in the early hours of Sunday 24 January 1999 when the applicant was aged 17 years and 4 months. He took a car unlawfully from Kennedy Way, Belfast, in the early hours of the morning and drove it around the Andersonstown Road area, Belfast. At about 4am the car knocked down and killed a 28 year old pedestrian, Mr Patrick Hanna as he was crossing the Andersonstown Road from the left side of the car. The car had been driven at speeds up to 60mph, swerved to the right of Mr Hanna who according to the autopsy report, was likely to have had a marked degree of intoxication. Mr Hanna tried to run to the far side of the road and the car swerved to the right striking him near the offside kerb. His body was thrown some distance and he died almost instantaneously.

The car did not stop although it must have been obvious to the driver that he had struck the pedestrian as the road was well lit and the windscreen was broken. The car was abandoned not far away in a side street. It is probable that four other youths were on board.

It appears that the applicant contacted his mother on Monday 25 January and informed her that he was the driver of the car which had killed Mr Hanna. The applicant also contacted a priest and informed him on Monday evening. On Tuesday the applicant's father went down to Andersonstown Police Station and reported what had happened to the police.

Gaskin went down to Grosvenor Road Police Station on Tuesday evening where he was seen by Sgt McGowan.

With him were his mother and the priest. He was holding his head in his hands and was crying and appeared to be in a very distraught state. Sgt McGowan asked him his name but his reply was incomprehensible and his mother supplied the details including the fact that her son had been the driver of the stolen car which had killed a pedestrian. The priest accompanied Gaskin to a private waiting room with Sgt McGowan. Gaskin cried continually and said words such as "Fuck me - I'm sorry". He was arrested for dangerous driving causing death and cautioned. He replied: "I am very sorry, I didn't mean it, I would do anything to change it". He continued to cry and hold his head in his hands. His mother told the police that she learnt from her son about it on the Monday and neither he nor she had slept since.

On the afternoon of the next day he was interviewed by D/S McCullins and D/C Mitchell. Present was Mr Ferghal McElhatton, Solicitor, for the applicant. It is apparent that Mr McElhatton advised his client not to say anything as he is recorded as saying: "My advice to you stands as before. I advise you not to say anything". Gaskin did not answer any question put to him by the detectives. He was asked: "Can you indicate that the basis on which you are approaching this interview is on the basis of legal advice?" He said: "Yes".

He was interviewed again in the presence of his solicitor three days later. He admitted that he had driven the car but denied that he had been involved in the accident. Forensic evidence established that he had been driving the car at the time when the windscreen was broken. He pleaded Guilty on arraignment to all four counts.

He had a bad driving record, having committed seven or eight offences of taking and driving away, or attempted taking and driving away or allowing himself to be carried. He has also committed two offences of driving while disqualified, two of dangerous driving, one of driving without due care and attention and two of driving whilst unfit through drink or drugs.

Some of these driving offences were committed on the one occasion. He had received training school orders and short periods of detention in the Young Offenders' Centre.

**The Sentencing Remarks**

The Recorder with his usual care and clarity outlined the facts of the driving offence and the events which occurred thereafter. He stated that he considered that the behaviour of Gaskin at interviews with the police forfeited some, though not all, of the credit he would have otherwise received for coming voluntarily to the police. He is recorded as saying to Mr Morgan QC that "he largely forfeited any allowance which he would have received for his quite obvious remorse by the fact that he went back on it". But he made no reference to the fact that Gaskin was acting on legal advice.

He stated that it was not correct to say that if Gaskin had not come voluntarily to the police he might not have been apprehended because his father was the first person to bring it to the knowledge of the police. He did not refer to the fact that Gaskin told his mother and, through his mother, his father that he was involved in the accident.

The Recorder stated that so far as his driving that night was concerned there were a number of aggravating features. Firstly his speed was grossly excessive, up to 60mph in a 30mph speed limit zone. Secondly, he did not remain at the scene. Thirdly, he had taken the car illegally and was uninsured. Fourthly, he was disqualified at that time and fifthly, he had a very bad criminal record which he duly set out. This was said in the context of his driving.

He went on to say: "I consider that the sentence which I should impose on the most serious charge, the first count of dangerous driving causing death should be followed by a consecutive period of imprisonment or detention to mark the fact that this young man was a disqualified driver, that he had taken and driven away a car, and he was not insured". He had listed five aggravating factors in relation to his driving which included taking the car illegally,

driving while uninsured and driving while disqualified and then dealt with them separately, as he was obliged to do.

He considered the mitigating factors such as that he pleaded guilty upon arraignment at the very first opportunity; second, that he showed some remorse but that his conduct thereafter took away a good deal of the credit. He referred to the probation report and the report of Dr McClelland which suggested that for the first time he had some insight into the effects on others of his reckless lifestyle.

He went on to state that the various features to which he had referred made it a case where, on a plea of guilty a sentence in the region of 6 years' imprisonment would be appropriate. He considered it right to make allowance for the fact that Gaskin was not a lot over 17. He decided to impose a custody probation order. He stated that he considered the appropriate sentence would have been one of four years' detention in the Young Offenders' Centre but would impose a custody probation order of 3 years' detention, followed by 2 years' probation. He therefore reduced the period of loss of liberty from 4 years to 3 years and substituted a period of 2 years' probation. In doing so he correctly applied the decision of this Court in The Queen v John Paul Patrick Francis McDonnell (Unreported: 14 January 2000).

On the second count he fined him £250 with an immediate warrant. On the third and fourth counts he sentenced him to 12 months' detention, the maximum in each case and made them concurrent with each other but consecutive to the 3 years' detention.

**The Issues on the Application for Leave to Appeal**

The grounds of appeal were:

(1) that the applicant did not receive adequate credit for his early admissions and plea of guilty;

(2) that the maximum sentences were imposed on Counts 3 and 4;

(3) that the consecutive sentence imposed on Counts 3 and 4 were wrong in principle and should have been concurrent with the sentence on Count 1.

Mr Morgan QC who appeared with Mr Kieran Mallon for the applicant did not argue that the sentence of 3 years' detention with 2 years of probation on Count 1 was wrong in principle or excessive. Indeed there was no appeal against the sentence on Count 1.

However, he drew the attention of the court to the sentencing remarks of the learned Recorder in which he set out the aggravating features of the applicant's driving which included the taking and driving away and the driving while disqualified. There was, he argued, an overlap in the factors taken into account on sentencing for the driving offence on Count 1 and the sentencing on Counts 3 and 4.

Secondly, he submitted that insufficient account was taken of the applicant's conduct after the offence had been committed. If he had not disclosed his guilt to his parents he might well not have been brought to justice and, having shown considerable remorse it was unduly harsh to criticise a young man of 17 who followed his solicitor's advice not to answer questions at interview and then again in the presence of his solicitor made a statement of admission of taking and driving away only.

Thirdly, the imposition of the maximum sentence of 12 months' imprisonment on the third and fourth counts, in view of the fact that he gave himself up to police and that he pleaded guilty at the first opportunity, could not be right in principle.

Fourthly, it was also wrong in principle to impose consecutive sentences in respect of these offences. He referred to Thomas' "Current Sentencing Practice" and the principles governing the imposition of consecutive sentences. They should not, says Thomas, generally be imposed in respect of offences which arise out of a single incident. Mr Morgan cited R v Jones (1980) 2 Cr App R(S) 152. He also referred to R v Wheatley (1983) 5 Cr App R(S) 417 and R v Dillon (1983) 5 Cr App R(S) 439.

**Conclusions**

1. The Sentence on Count 1

In R v Sloan [1998] NI 58 the Court of Appeal upheld a sentence of 3 years and 9 months imposed by the Recorder for causing grievous bodily harm, by dangerous driving. In the course of their judgment the Court stated:

> "The maximum sentence is one of 10 years' imprisonment which is double that provided under the earlier equivalent legislation ... . This substantial increase from 5 to 10 years was Parliament's response to the growing carnage on the roads due to dangerous driving ... which in turn is often due to excessive speed ... In taking this court Parliament was itself responding to a growing volume of complaints by members of the public whose friends and relatives were being killed or seriously injured in increasing numbers on the roads. In their turn the courts have been ready to play their part in trying to make the roads a safer place by imposing sentences which reflect the culpability of the driving."

They went on to refer to a passage in the judgment of Lord Bingham of Cornhill CJ in Attorney-General's Reference (No. 66 of 1996) [1998] 1 Cr App R 16 at 21:

> "It is a feature of cases such as this that the families of the victims feel bitter and vindictive towards the defendant ... Their feelings are understandable. No one who has not suffered such a loss is in a position to understand how they feel ... This is a sense of outrage, shared by the wider public, which feels acute anxiety about the cruel, avoidable loss of life which is a feature of cases such as this. On the other hand the court must take account of the interests of the defendant who has often, as here, not intended these consequences and is often, as here, devastated by them ... It is important that courts ... should not be overborne ... into imposing sentences which they consider are unjust."

The court also listed relevant aggravating features.

In this case the sentence of 3 years' detention with 2 years' probation on Count 1 was entirely appropriate.

2. The Sentences on Counts 3 and 4

We consider that the period of 12 month's detention imposed on the appellant on each of the offences of taking and driving away and driving whilst disqualified is manifestly excessive. It is the maximum penalty for each offence. The longest period of detention previously imposed on the applicant for taking and driving away and for driving whilst disqualified was 3 months' detention, the sentences to run concurrently. As the appellant informed his parents of his responsibility for the death of Mr Hanna and probably realised that his father would inform the police and as he went voluntarily to the police station on Tuesday in the state of distress described by Sgt McGowan and as he pleaded guilty at the first available opportunity, we consider that the sentence for each of the offences should be 6 months' imprisonment. We agree that these sentences should run concurrently.

3. Should the Sentences run Consecutively with Count 1?

There are cases in which it will be appropriate to impose consecutive sentences in relation to one episode of driving. See, for example, R v McMullan (9/2/92 - JSB for NI) and R v Newbury [1975] Cr L R 295. If the learned judge had considered that the count charging dangerous driving causing death had merited 3 years' detention and 2 years' probation, leaving out of account the failure to stop, and there had been a count charging failure to stop, we consider that he would have been justified in imposing a consecutive sentence for that grave offence.

To impose a consecutive maximum sentence of detention in respect of an offence committed on the same occasion in order to make the totality of the sentences conform with the judge's view of the case is we consider, an erroneous exercise of that discretion. In so stating, we have taken into account Article 20(2)(a) of the Criminal Justice (NI) Order 1996.

We consider that the general practice of making the sentence for dangerous driving causing death run concurrently with the sentences for taking and driving away and driving whilst disqualified is appropriate in the circumstances of this case: see R v Skinner (1986) 8 Cr App R(S) 166.

Accordingly we grant leave to appeal. We reduce the sentences on Counts 3 and 4 to 6 months' detention to run concurrently with each other and with Count 1. As a result Gaskin will serve 3 years' detention with 2 years' probation which was the sentence imposed on him by the Recorder on the charge of dangerous driving causing death.

The sympathy of the Court is extended to the family of Patrick Hanna, the victim of this offence. Only those who have suffered as his family have suffered can understand how they feel. They will remember his premature death for the rest of their lives. We hope that the appellant will also remember it.

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**JUDGMENT**

**OF**

**NICHOLSON LJ**

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