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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

EMMET PETER CHRISTOPHER MAGEE

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Before: Deeny LJ, McCloskey J and Huddleston J

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DEENY LJ (delivering the judgment of the Court)

[1] This is an appeal by Emmet Peter Christopher Magee against sentence only which he pursues with the leave of the single judge. He was accused of a series of offences on an indictment charging him with causing grievous bodily injury by dangerous driving. The effective sentence on the first count was one of 9 years and 6 months. No less than 4 young people were seriously injured by his driving so there were other counts on the indictment with concurrent sentences to like effect. The 9 years and 6 months were divided between 4 years 9 months' custody and 4 years 9 months' licence. There were in addition charges of aggravated vehicle taking, possession of a Class B drug, namely cannabis, driving while unfit through drink and using a motor vehicle without insurance or licence, with lesser concurrent sentences.

[2] Following committal to the Crown Court in June 2018 he pleaded guilty on 28 June 2018 on the first opportunity upon arraignment to counts 1 to 5 and 8 to 10 on the indictment and 6 and 7 were subsequently left on the books not to be proceeded with. As counsel clarified this morning he was initially released on bail and was before the court on 13 September 2018 for plea and sentence. The judge having heard counsel adjourned the matter for further information and photographs relating to the victims of his offences and he was remanded in custody and then dealt with on 23 November when he received those sentences.

[3] There were in addition suspended sentences hanging over him which the judge imposed concurrently to one another but consecutively to the sentence of

9 years and 6 months and that sentence was of some 6 months' imprisonment. It is not seriously challenged here today before us by Mr Kearney QC who appears with Mr Holmes for the appellant although he does make the point that the suspended sentence had been imposed because of Magee's failure to comply with a Community Service Order but he had in fact complied with part of the Community Service Order and therefore had served the original sentence to some degree. We think of more relevance is the issue of totality and so we record out of caution that we have taken into account whether the totality of the sentence we are going to impose should have been altered because of the fact that 6 months in addition will have to be served for the suspended sentence.

[4] From the agreed Schedule of Facts, the sentencing remarks of the judge and the pre-sentence report the factual background may be summarised thus. On 31 May 2017 the appellant was driving his mother's Volkswagen Golf along the Bryansford Road outside Newcastle. He was doing so without the permission of his mother, he himself had previously been disqualified and although he had served the period of disqualification he had failed to obtain a new driving licence or become insured for that car. He had his girlfriend with him in the passenger seat. They had been on a day trip from Belfast to Newcastle where they had consumed alcohol. He came up behind a van driven by some men who later made statements to the police and they observed him driving with a full beam behind and in the phrase of one of them "bouncing off the ditch on both sides of the road". Mr Kearney said that cannot have been literally so and no doubt that is right but it is an indication of erratic driving on behalf of this appellant. He then, tragically, decided to overtake the van just before a bend on the road. He was apparently unfamiliar with this country road and he did not realise the bend was there but of course he should have ascertained that before overtaking. Not only that but he was driving at a considerable speed because his speedometer froze at some 73mph following the impact which in the view of this court was a clearly excessive speed at night on a country road with which he was unfamiliar. A Ford Mondeo driven by one of the injured parties was coming in the opposite direction and he hit that vehicle head on. The young lady driving that vehicle and her two passengers were all, like his own passenger, seriously injured in the accident. The men in the van hurried forward to assist and one of them describes the passenger in Magee's car in the following terms:

> "She was bent forward, the male had his knees and hand on her back pushing her further forward, I tried to take his weight off her and help him out, the male kept struggling, I wanted to push him back but he didn't seem to care so I took his weight as much as I could and he got out of the car."

[5] This behaviour on Magee's part, while no doubt influenced by alcohol, is obviously discreditable to him. The police were called and at that point the appellant began a different attitude to this matter, which it is the duty of this court to take into account. He did not attempt to deny he was the driver. He did not come

up with any fanciful stories. He submitted himself to a breath test by the road which established that he had twice the legal level of alcohol in his blood. While this was going on the four passengers in the vehicle had to be cut out of the vehicles. Each of the four passengers sustained grievous bodily injuries in the accident which were summarised in the facts and in medical reports. In deference to the right to privacy of the injured parties I will not set those out in detail but all four had fractures, all required surgery and all have ongoing sequelae, in one case very significant sequelae. Their lives have been significantly affected.

[6] As the learned trial judge rightly pointed out it is a characteristic of our law that there is in existence a Motor Insurers Bureau who will be liable to them to pay them fair compensation for the injuries which they suffered and for the impact on their financial circumstances. It will fall on the Bureau as the appellant was not insured at the time. As the judge pointed out of course the cost of that effectively falls on other road users. But it important to bear in mind that this court is assessing the fairness of the sentence of this appellant and is not in the role of compensating the injured parties which will be done in due course if it has not already been agreed.

[7] The appellant was asked by the police to attend at a police station on 22 August 2017 and he did so and he did so without a solicitor and when he was there he made full admissions to the offences that were put to him. He stated he had limited recollection of the incident but accepted he was drunk and driving dangerously and that the accident and injuries caused were his fault.

[8] The appellant himself suffered injuries in the accident and it is our duty to bear those in mind in considering the sentence upon him. A report from Professor Farnan describes fracture of the vertebral body at L3 and of the L2 spinous process with related ligamentous damage at L1 and L2. He had a dissection of the right common iliac artery with related damage and a laceration of the spleen which, according to the pre-sentencing report at a later date, led to the removal of the spleen. He has required several surgical operations and it would appear that his mobility is to some extent affected since the accident. The defence also produced on his behalf a report of Dr Harbinson, Consultant Psychiatrist, who dealt with some mental health issues on the part of the appellant; those in the past had not been helped by his drink habit and abuse of drugs but, importantly for this case, she gave the opinion that he showed considerable remorse for the injuries he had caused and wished to be punished, anticipating that a prison sentence would alleviate his continuing distress to a certain extent. Bearing her opinion in mind and that in the pre-sentencing report and the other material we are satisfied that this was a genuine remorse. He has a criminal record, not the worst that this court has seen, but a number of offences, all in the Magistrates' Court of which the most serious are one of riotous behaviour in 2006 and very relevant offences in that in 2014 he was convicted of dangerous driving and driving while unfit. Initially, as I have indicated previously, a Community Service Order was imposed but after his failure to complete that it was a 6 months sentence of imprisonment suspended was

substituted for both these charges and that he was ordered to serve by the learned trial judge.

[9] We take into account the pre-sentencing report which was furnished on his behalf. He was unemployed at the time of the accident and for some years beforehand and resided with his mother and an older brother. He left school at 15 with no qualifications and had worked only intermittently since then. Somewhat unusually he is the father of some six children from assorted relationships, as it is put in the papers but he said that he had, hitherto obviously, maintained regular contact with five of those children and again he emphasised his remorse and shame at the consequences of his act.

[10] The learned trial judge dealt with the history of the proceedings, the counts, the factual circumstances, the admissions at interview and considered shortly some of the leading authorities in *R* v *Cooksley* [2003] EWCA Crim 996; *R v Stewart* [2017] NICA 1 and *R v Pollock* [2005] NICA 43. He quite properly considered the consumption of substantial alcohol as a significant aggravating factor and he considered carefully the medical reports on the victims. Having read his sentencing remarks it does not appear that at any stage in November 2018 when he actually sentenced the appellant that he adverted to the injuries of the appellant. The sentencing remarks would indicate he was thinking of the reports relating to the victims. He then determined in accordance with *R v David Stewart* op.cit. a starting point which in accordance with that case should reflect the aggravating and mitigating factors and he set the starting point at 12 years. He then went on to consider discount in the light, in particular of the plea. In connection with that he mentioned one factor in mitigation, namely that between September of 2018 when he was remanded in custody and November 2018 the appellant had entered a mentoring course at the prison. It is an important point to which I will turn in a moment that the learned trial judge, His Honour Judge Grant, did not make any reference to mitigating factors in fixing the starting point, contrary to the judgment of this court in *R v Stewart*.

[11] Mr Kearney QC on his behalf addressed us on three principle grounds. His first attack on the decision of the judge was with regard to the aggravating features which were taken into account. We reject that attack. The learned trial judge had the assistance of a very proper and well-considered note from prosecuting counsel, Mr James Johnston. We consider that Mr Johnston's note was impeccable and correctly set out the aggravating factors. There might be some argument as to whether this was aggressive driving or whether it was greatly excessive speed but there can be no doubt that the judge was perfectly entitled to conclude that there were at least five factors that were relevant to bring this case into the most serious category of culpability in accordance with the decision of *R v Cooksley* and the decision of this court in *Attorney General's References 2, 6 and 7 of 2003* [2013] NICA 28 and the subsequent decisions of this court and we reject those submissions. The second and third points were of more substance. I have indicated that one of them is

the absence of a discount, as counsel put it in the sentencing remarks, for the serious injuries sustained by his client.

[12] It is important to bear in mind that this court has previously opined on this topic. I have already referred to the Attorney General's Reference. The matter is also set out in the judgment of Kerr LCJ in *R v McCartney* [2003] NICA 4 and in his judgment he endorses the view of Carswell LCJto this effect:

> "[20] The Sentencing Advisory Panel propounded a series of possible aggravating factors, which were adopted by the Court of Appeal in R v Cooksley, with the caveat that they do not constitute an exhaustive list. The court also pointed out that they cannot be approached in a mechanical manner, since there can be cases with three or more aggravating factors which are not as serious as a case providing a bad example of one factor."

[13] Mr Kearney, I understand, would also rely on *R v Doherty [2018] NICA 52* and my own judgment to the effect in that case that sentencers must not merely enumerate the aggravating factors in arriving at a starting point but they must evaluate them. In favour of the appellant here is that this court has on several occasions in these cases accepted that there are mitigating features as well, of course, as aggravating features and one of those is to be found at paragraph 12 of the judgment of Lord Carswell, as he became, in the *Attorney General's Reference of 2003* i.e. "the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving". It is unfortunate that that matter was overlooked by the learned trial judge.

[14] We consider that while the judge referred to *R v Stewart* he did not in fact follow its directions. We are satisfied from reading his sentencing remarks set out in the book of appeal that this was overlooked. Mr Johnson was not in a position to gainsay that, but he very properly invited the court to consider whether the injuries were, in the light of the decision of this court in *R v McCartney* [2007] NICA 41, sufficient to justify a reduction. We note that the starting point taken by the learned trial judge of 12 years was close to the maximum that could be imposed by the court of 14 years. It is not suggested that the sentences should have been other than concurrent despite the fact that four young people were, very sadly, injured as there was a single cause. Fixing the sentence at 12 years was at the higher end of the range and perhaps the highest possible starting point in the absence of fatalities. Given that the man had the injuries which I have briefly described and has continuing sequelae the court considers that it is a case where his own injuries and the family circumstances to which I have briefly adverted ought to have been taken into account by the learned trial judge. We consider that therefore the starting point should not have been 12 years but should have been 11 years in all the circumstances including his age and criminal record.

[15] The question, as in *R v Stewart*, then has to be asked as to what discount should be given from that starting point for the accused's plea of guilty and we look at what the learned trial judge said about this in his sentencing remarks:

> "The defendant has pleaded guilty, he has pleaded guilty at the time effectively at the time that he was caught but that was in the face of a large number of witnesses able to say what he did. It was also in the face of the substantial amount of alcohol that he had consumed and the evidence of the disastrous collision that he had caused in this case. To that extent he was caught red-handed and whilst he is entitled to some credit, the judgment of the Court of Appeal in Northern Ireland in *R v Pollock* [2005] NICA 43 makes it perfectly clear that where the defendant does not have what would be termed a workable defence where that is a possibility, which is absent in this case, the degree of credit for his plea must be significantly reduced. In the Stewart case the Court of Appeal took the view that the appropriate level of credit should be no more than 20% and I take the view that it is appropriate to follow the guidance of the Court of Appeal in that case."

[16] This might imply that the learned trial judge thought that some kind of maximum had been laid down by this court in those two cases. We do not consider that to be the case. The court in *R v Pollock* undoubtedly continued to consider, contrary to some decisions in England and Wales, that the fact that somebody was caught red-handed was a relevant factor in assessing the discount. But we do not consider that any maximum credit has thereby been imposed. Mr Kearney in his written skeleton argument referred to paragraphs 21, 24, 31 and 32 of *R v Stewart* and we believe they bear out the submission that there is no maximum level. Counsel properly drew our attention to the decision of this court in *R v Nathan Finn* very recently delivered, [2019] NICA 17. It is true that this court there stood over a discount of approximately only 18% following a plea of guilty but I think it is important to look at the facts at paragraphs 20 and 21 of the judgment in that case of dangerous driving causing death. The court said as follows:

> "[20] The judge then went on to consider what he describes as a number of factors which can properly reduce the sentence. One of those was the plea of guilty, albeit at a late stage. The applicant had failed to remain at the scene, denied his involvement when first questioned by the police and failed to plead guilty at the first arraignment. The judge accepted Mr Mallon QC's point on behalf of the applicant that "on the evidence in this case perhaps different advice might have led to a

> different result, especially with someone who was a young man and showing a degree of immaturity". He went on to say that he was taking into account that the applicant had no previous convictions and that he had expressed considerable remorse and was not considered to be a high likelihood of re-offending. He then decided to allow a discount of two years imprisonment on a starting point of 11 years giving the effective sentence of 9 years imprisonment.
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> [21] Mr O'Donoghue pointed out that this was approximately 18% of a discount which he submitted was too low. If, pursuant to R v Stewart, one takes the issue of the discount at this point as one relating to the plea of guilty and related circumstances alone we cannot accept that submission. The failure to remain at the scene, the failure to admit the matter to the police when first taxed with it and the failure to plead guilty at the first opportunity, albeit perhaps on erroneous advice, did leave it open to the judge to impose a discount of this nature."

[17] That illustrates that this appellant here is in a different position because he did admit at the scene, he did admit it to the police and he did plead guilty at the first arraignment and we consider that the learned trial judge misdirected himself in arriving at the conclusion he did.

[18] Counsel also relied on the decision of this court in *R v Gary McGeown and Han Lin* [2013] NICA 28 at paragraphs 27 and 28 of that judgment:

> "[27] This was a case in which the appellant was detected at the property with the cannabis. He was, in effect, caught red-handed. One of the issues debated before us on the appeal was the degree of discount for the plea which had been allowed in the original sentence. As has been common in this jurisdiction the trial judge did not spell out in her sentencing remarks to what level of sentence she was applying the discount and what amount of discount she was allowing. If the appellate process is to work satisfactorily, the sentencing remarks must enable the appellate court to understand why the judge reached his decision. In the interest of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the

> sentence. Sentencing should be transparent to both the parties and the public.
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> [28] In this jurisdiction the full discount for a plea is generally in or about one third where an offender faces up to his responsibilities at the first opportunity. In appropriate circumstances it can be higher or a non-custodial rather than a custodial sentence may become appropriate. Where, however, the offender is caught in the act the discount is generally reduced because the plea is the product of his being caught rather than his immediate remorse. However, even in such cases, a plea at an early stage can relieve witnesses, vindicate victims, save court time and indicate remorse. In appropriate cases where offenders are caught red-handed the circumstances may justify a discount closer to the full level of discount."

[19] This court, of course, follows its earlier decisions but fully agrees with those sentiments expressed by Morgan LCJ in that decision. We feel Magee is entitled to a more generous discount. We also make one further observation which may be of assistance to sentencers. As we have already mentioned there is a duty to look at the totality of a sentence. It is interesting to compare cases of this kind with those in manslaughter. In *R v Ryan Arthur Quinn* [2006] NICA 27 this court upheld a decision at first instance reported at [2005] NICC 33 and there a sentence of 4 years' imprisonment had been imposed on a plea of guilty to single-blow manslaughter where one young man struck another in the back of the head causing him a fatal injury. The court upheld that judgment. It is fair to say that one seems to see a fair number of sentences for manslaughter at first instance which are significantly less than that. One needs to consider that one should be mindful in imposing sentences in a case of this kind for a brief period of recklessness leading to tragic consequences that are in excess of, sometimes much in excess of, sentences for a deliberate blow, albeit without the intention of causing serious injury, but leading to tragic consequences. It is a little difficult to see why the level of sentencing for dangerous driving over a short period as here leading however unhappily to death or grievous bodily injury should be higher than a deliberate blow leading to death or, even more, grievous bodily injury.

[20] Bearing all these factors in mind we have determined that the proper course to adopt is, starting with our revised starting point of 11 years, to reduce the sentence by approximately 30% i.e. close to the full discount that would be allowable and reduce the sentence to 7½ years on that count and the three other counts relating to dangerous driving causing injury. The provision in the statute is that suspended sentences will normally be imposed. We do not interfere with making the 6 month sentence here consecutive. Considering the totality of the matter we think 8 years is a proper sentence. In arriving at this decision it is perhaps appropriate to say that

the court recognises the very significant injuries sustained by the victims of this driving and the significant effects on their lives. The court has great sympathy with those injured parties but it is our duty to dispassionately consider the just sentence to be imposed on this appellant in the light of established principles and that has led us to reach the conclusion we have.