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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICIA McKEOWN

Before: Morgan LCJ, Gillen LJ and Keegan J

KEEGAN J (delivering the judgment of the court)

Introduction

[1] This appeal is in relation to part of a sentence imposed on the appellant on 27 May 2015 in respect of causing grievous bodily injury by driving without due care and attention or without reasonable consideration. The appellant was granted leave to appeal by Burgess J.

[2] On 12 January 2015, the appellant was arraigned and pleaded not guilty to one count of dangerous driving contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 and one count of causing grievous bodily injury by driving without due care and attention or without reasonable consideration contrary to Article 11A of the Road Traffic (Northern Ireland) Order 1995.

[3] It was necessary to obtain forensic evidence given the circumstances of this case. Once the various reports were provided, the appellant applied to be re-arraigned and on the 20 April 2015 she pleaded guilty at the re-arraignment to causing grievous bodily injury by driving without due care and attention or without reasonable consideration. The count of dangerous driving was left on the books and she was subject to interim disqualification with effect from that date.

[4] On 27 May 2015 the appellant was sentenced by a judge sitting at Downpatrick Crown Court to a community service order ordering her to perform 150 hours of community service during the following 12 months. The appellant was also disqualified from driving for three years and required to sit the extended driving test. The appellant appeals against the part of the sentence which imposed

the three year disqualification and the requirement for an extended driving test. Mr McCrudden QC and Mr Michael Campbell appeared for the appellant, Mr Samuel Magee for the prosecution. We are grateful to all counsel for their written and oral submissions.

Background

[5] The incident which is the subject of this appeal occurred in the early afternoon of Saturday 21 September 2013. The appellant was driving her Peugeot 206 motor vehicle along the main Comber to Ballygowan Road. She was on her way to meet her daughter in Hillsborough to assist with the selection of a wedding dress. The appellant missed the turn for Hillsborough and so she pulled into the road on her left where there was a lay by and laneway. This was with the intention of retracing her route in order to take the Hillsborough turn off.

[6] The appellant in her statement states that she indicated left and pulled in and stopped in the layby. She then states that when traffic was clear she indicated right, pulled out, moved forward a short distance and reversed into the laneway. She states that she then moved forward slowly intending to turn right on the road back to the Carryduff junction. She states that she checked right and left and right again before moving out. The main road to her right sloped downwards allowing a view of 180 yards towards Comber. To the left it sloped upwards for 55 metres to the brow of a hill, where the road fell into a dip which extended towards Ballygowan for 355 yards.

[7] David Patton was travelling along the Ballygowan Road towards Comber on his motorcycle. The speed limit on this road is 60 mph. He came to a hill and as he approached the crest, the appellant's vehicle was on his side and a collision occurred. The evidence suggests that the appellant's vehicle was effectively broadside into the Comber lane. Mr Patton could not stop in time and a collision occurred as a result of which he sustained serious injuries.

[8] In the opening note which was submitted to the Crown Court there is reference to the evidence of a collision expert Dr Emerson Callender. The note states that Dr Callender was asked to consider the circumstances of the collision. In his opinion the motorcycle would have been fully visible at 75 metres with the headlight of the bike visible for 121 metres. It was determined possible that the motorcycle was out of the appellant's view when her car started to turn across the Comber bound lane however it was also possible that the motorcycle was in view at the commencement of the manoeuvre.

[9] Dr Callender determined that the motorcycle slid on its side for about 30 metres before impact with the tyre marks suggesting the brakes were applied 41 metres from the impact area. In his opinion Mr Patton was travelling at about 60 mph before applying his brakes. It would have taken the defendant approximately 3 seconds to move from her start position to the point of impact

however it would have taken Mr Patton 4.8 seconds to stop. Mr Patton was therefore given insufficient time to respond and brake to a stop. Dr Callender estimated that the motorcycle had been slowed to approximately 37 to 40 mph by the point of impact with the force of bike (and possibly that of Mr Patton) causing the defendant's vehicle to roll over. In his opinion there was insufficient time for a normal motorcyclist to take evasive action avoiding a collision in these circumstances.

[10] The appellant was making a manoeuvre of turning right across oncoming lanes. This was on a Saturday afternoon when the appellant could expect traffic to be passing at regular intervals. The speed limit on the road was 60 mph. The manoeuvre was undertaken at the brow of a hill where vision is obviously restricted. It follows that a motorist should think carefully as to whether this manoeuvre should be attempted at all in these circumstances. If attempted, the person undertaking such a manoeuvre bears a heavy responsibility to exercise extreme caution and care. Unfortunately, whilst the appellant did make checks, they were not enough and a serious collision occurred as a result of her driving. The victim Mr Patton sustained multiple fractures and significant psychological and emotional trauma which has impacted on him and his family. The victim states that he may never be able to work again. The court is cognisant of the victim's personal statement of 11 May 2015 which was available to the sentencing court and which makes reference to these matters.

Circumstances of the appellant

[11] The appellant was described in a pre-sentence report of 6 May 2015. At the date of the report the appellant was 61 years of age. It was reported that she lived in a privately owned house in Newtownards. She was employed with the Northern Ireland Civil Service for the last 17 years as an Executive Officer. She is described as a divorced woman with two adult children who live independently. The pre-sentence report describes the appellant's settled and stable upbringing and family life. She left school with no formal qualifications but after a period of factory work returned to further education and obtained qualifications which enabled her to apply for and obtain her employment within the Civil Service. It was reported that she had no significant debt management issues and no previous convictions. The applicant was reported to be in good physical health although it was reported that her emotional health had deteriorated following the commission of the offence. The applicant was reported to have no lifestyle problems in relation to alcohol, drugs or other addictive behaviours.

[12] The applicant was assessed as being at low risk of re-offending and the factors supporting this assessment included:

- There was no evidence of any previous convictions or history of motoring offending.

- Absence of pro-criminal attitudes.
- Stable personal circumstances.
- Absence of any chemically addictive behaviour.
- Awareness of victim issues.

[13] The Probation Board of Northern Ireland agreed that the applicant did not have any previous convictions or pro-criminal attitudes and her personal circumstances were stable. The significant serious injury resulting from this offence was noted, however based on the available evidence, the applicant was not assessed as presenting a significant risk of serious harm to the public.

[14] The conclusion of the pre-sentence report refers to this being a "salutary experience" for the appellant who expressed genuine remorse for her offending which had resulted in the serious injury to her victim. Despite the seriousness of the offence, the assessment indicated that the applicant did not require professional intervention and she had the capacity and motivation to avoid further involvement in the criminal justice system of her own volition. In relation to sentencing, the report stated that the court may be minded to consider disposal placing the onus on the applicant to avoid further offending while allowing her to remain in the community. The appellant indicated that she was willing to consent to the imposition of a community service order.

Sentencing Judge's remarks

[15] The learned trial judge accepted the pre-sentence report and was satisfied that the appellant did not present a significant risk of serious harm. Given the guilty plea on re-arraignment after the expert evidence was obtained the judge considered that the appellant was entitled to the maximum credit.

[16] The learned trial judge stated that a motorist conducting a manoeuvre of turning right across an on-coming lane bears a very heavy responsibility and duty of care to ensure it was safe. The learned trial judge considered that the appellant had failed in this duty of care and that the motorcyclist had no opportunity to take evasive action. The learned trial judge referred to the appellant's remorse. He referred to her driving as "a momentary lapse of concentration and an error of judgment". The learned trial judge made reference to the fact that the appellant had no previous convictions, she genuinely did express remorse, that the incident had had a significant effect on her, that she had a good and stable family, and that she had a good work record involving a position of considerable responsibility.

[17] Taking these matters into account and the pre-sentence report, the learned trial judge considered that the appellant presented a low risk. He therefore imposed a community service order. Submissions were made that a disqualification beyond

the 12 month minimum would have a significant impact upon the appellant, but the learned trial judge decided to impose a three year disqualification. The learned judge stated that this reflected the seriousness of the consequences of the offence and the injuries that were sustained. The learned trial judge also stated that an extended driving test was merited.

Consideration

[18] This appeal concerns two issues:

(1) Was the learned trial judge correct to impose a three year disqualification in the circumstances of this case?

(2) Was the learned trial judge correct to impose the extended driving test requirement?

[19] We have been greatly assisted by counsel in dealing with these issues. At the outset in his written argument, Mr Magee on behalf of the prosecution accepted that the learned trial judge may not have been entitled to impose the extended driving test. We have considered this matter in the context of the relevant statutory provisions.

[20] Article 41 of the Road Traffic Offenders (Northern Ireland) Order 1996 deals with the court's power to disqualify offenders until a test is passed as follows:

> "41(1) Where this paragraph applies to a person the court must order him to be disqualified until he passes the appropriate driving test.
>
> (2) Paragraph (1) applies to a person who is disqualified under Article 35 on conviction of –
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> (a) manslaughter by the driver of a motor vehicle, or
>
> (b) an offence under Article 9 of the Order of 1995 (causing death, or grievous bodily injury, by dangerous driving) or Article 10 of that Order (dangerous driving).
>
> (3) Paragraph (1) also applies—
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> (a) to a person who is disqualified under Article 35 or 40 for such period, in such circumstances or for such period and in such circumstances as the Department may by order prescribe, or

(b) to such other persons convicted of such offences involving obligatory endorsement as may be so prescribed.

(4) Where a person to whom paragraph (1) does not apply is convicted of an offence involving obligatory endorsement, the court may order him to be disqualified until he passes the appropriate driving test (whether or not he has previously passed any test).

(5) In this Article—

"appropriate driving test" means–

(a) in such circumstances as the Department may by order prescribe, an extended driving test, and

(b) otherwise, a test of competence to drive which is not an extended driving test,

"extended driving test" means a test of competence to drive prescribed by the Department by order for the purposes of this Article, and

"test of competence to drive" means a test prescribed by virtue of Article 5(3) of the Order of 1981.

(6) In determining whether to make an order under paragraph (4), the court shall have regard to the safety of road users."

[21] The appellant was convicted of an offence of causing grievous bodily injury by careless driving contrary to Article 11A of the Road Traffic (Northern Ireland) 1995. It is therefore clear that paragraph 41(2) of the 1996 Order recited above does not apply. Article 35 of the 1995 Order does apply to the appellant as a person convicted of an offence involving obligatory disqualification. However, it is not the case that the offence of causing grievous bodily injury by careless driving contrary to Article 11A of the 1995 Order has been prescribed. As Article 40 does not apply, it follows that paragraph 41(3) of the Order does not apply. Article 41(4) of the Order is the only applicable provision in this case. That states that the court has the discretion to disqualify until the appropriate driving test is passed. However, an extended test can only be ordered in circumstances that have been prescribed pursuant to Article 41(5)(a). As the index offence has not been prescribed this cannot apply. There is provision in Article 41(5)(b) to impose a test of competence to drive which is not an extended driving test. These provisions require the court to have regard to the safety of road users pursuant to Article 41(6).

[22] Accordingly, we consider that it was not open to the learned trial judge to impose a requirement for an extended driving test. In any event, we consider that the learned trial judge erred in that he did not refer to the safety of road users when reaching his decision. These are matters that sentencing courts should now be alert to.

[23] In relation to the issue of length of disqualification counsel referred us to a number of authorities as follows. The case of R v Cully [2005] EWCA Crim 3483 reiterated a principle which was well established in law in relation to the issue of disqualification. At paragraph [7] of that judgment the court states:

> "We consider that the purpose of a disqualification from driving is so far as possible to protect the public. Often it may be that drivers come before the sentencing court with an appalling driving record. In such cases an extended period of disqualification may be appropriate since the offence indicates the risk to the public and the individual continuing to drive. Where circumstances do not suggest that there is any such risk, a period of disqualification, though inevitable as it is in a case of dangerous driving, can, and should in our view be kept to the minimum."

[24] Two subsequent Court of Appeal cases in England and Wales were referred to us by the prosecution. These cases expand on the principle set out in R v Cully. The first case is a case of R v Geale [2013] 2 Cr App R 17. In that case the appellant pleaded guilty to causing death by driving without due care and attention. The appellant was a coach driver who undertook a dangerous manoeuvre along a single carriageway which resulted in him failing to see a 10 year old boy who was crossing the road and who suffered catastrophic injuries from which he died. The appellant immediately accepted that he had been distracted for a split second by the presence of another vehicle and had turned into the access road because he thought it was clear. He was sentenced to 12 months imprisonment, suspended for two years with an unpaid work requirement and disqualified from driving for three years. He appealed in relation to the period of disqualification. The case of R v Cully was referred to the Court of Appeal in this case.

[25] At paragraph [12] the court refers to the principles set out in Cully that the main purpose of disqualification is to protect the public from the risk posed by an offender driving. The court goes on to say that:

> "Where that risk is very low, a lengthy period of disqualification may be inappropriate, particularly where, as here, the offender is dependent upon driving for the livelihood and hence a lengthy period

> of driving qualification will put particular financial strains upon him."

[26] It is however paragraph [13] of the judgment to which the prosecution principally referred which sets out as follows:

> "However, such risk is not the only relevant criterion for the assessment of length of the disqualification period. In addition, there is or may be an element of punishment; as is apparent from the fact that, even with a future risk as nil, the statutory provisions require a 12 month minimum period of disqualification. Furthermore paragraph 30 of the definitive guidelines makes clear that 'disqualification is a mandatory part of the sentence, subject to the usual very limited exception, and therefore an important element of the overall punishment for the offence'. When considering whether the length of the period of disqualification is manifestly excessive, one therefore has to consider it in the context of the sentence imposed and the ancillary orders as a whole."

[27] The court in that case considered that whilst the culpability of the appellant may have been low it was not the lowest. In all of the circumstances of that case the disqualification was reduced from one of three years to one of two years.

[28] The other case referred to by the prosecution is R v Upton (2015) EWCA Crim 2113. That was a case in relation to an offence of dangerous driving for which the appellant pleaded guilty and received a sentence of imprisonment which was suspended and disqualification for two years and until the mandatory extended driving test was passed. At paragraph [12] of this judgment the court sets out the following:

> "We consider the context of the incident offence. All cases are fact specific. This was a very bad piece of dangerous driving. Fortunately, no one was injured and no damage was caused. The risks of such behaviour were demonstrated by the ensuing episode of driving a month later in which a fellow driver, by reason of his own dangerous driving, was injured. The appellant drove carelessly on that occasion."

In the circumstances of that case, given mitigating and positive features in the appellant's life, the disqualification was reduced to 15 months.

[29] These cases are all fact specific. Nonetheless, the question remains as to how the period of disqualification in a case such as this should be calculated by a sentencing judge. We consider that the purpose of a disqualification from driving so far as is possible is to protect the public. That involves an evaluation of the future risk posed by the offender. The sentencing judge will have to assess this in the circumstances of each case taking into account the level of risk involved and any personal mitigating circumstances. We consider that within this exercise the sentencing judge should consider whether or not the disqualification represents an appropriate punishment for the offence. The sentencing judge should also consider the disqualification period in the context of the sentence as a whole.

[30] This case was characterised by the learned trial judge as a momentary lapse of concentration and an error of judgment. We consider that this is not entirely accurate and that the case should properly be described as that involving an error of judgment. This is because the appellant consciously attempted the manoeuvre in the circumstances described.

[31] The starting point for a disqualification period is a 12 month mandatory disqualification. That applies no matter how low the risk is (save in exceptional circumstances). We consider that by virtue of the fact that there is a 12 month mandatory disqualification that there is an element of punishment within any disqualification imposed. The sentencing judge must consider on the facts of a particular case if an extended period of disqualification is appropriate.

[32] It was open to the sentencing judge to impose a disqualification greater than the mandatory minimum. However, we consider that the learned trial judge erred in his reasoning by imposing the extended disqualification period on the facts of this case. In particular, we consider that the learned trial judge erred by relying upon the consequences of the collision. The disqualification should be related to an assessment of future risk. We wish to stress that this does not detract from the obvious suffering experienced by Mr Patton as a result of the collision. However, a disqualification is intended to be forward looking and preventative. In all of the circumstances of this case the risk is low. There are also extremely strong mitigating factors in favour of the appellant. This was a one off incident for which the appellant displayed immediate remorse. The appellant has an exemplary driving and personal history and this incident has clearly had a profound effect upon her. As such we consider that the disqualification period should be reduced. We consider that a disqualification period of 12 months is appropriate in the particular circumstances of this case. We consider that this period of disqualification represents a sufficient punishment and is consistent with the overall sentence.

[33] Accordingly, the appeal is allowed. A disqualification period of 12 months will be substituted and the requirement for an extended driving test will be removed.