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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

GERARD MARK PAUL

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THE QUEEN

v

JOHN MARTIN BROWN

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CARSWELL LCJ

Introduction

These cases concern sentences imposed at Crown Courts for serious road traffic offences. We decided to hear them together because of the common elements and the need for the court to keep under review its sentencing policy in this field. Each defendant pleaded guilty to an offence under Article 9 of the Road Traffic (Northern Ireland) Order 1995 and was sentenced to a term of imprisonment. Each seeks to appeal against the length of sentence; in Brown's case leave to appeal was given by the single judge, while in Paul's case leave was refused.

Gerard Mark Paul

Paul was charged with and pleaded guilty to a total of five offences, for which he was sentenced as follows by His Honour Judge Lockie on 23 February 2000 in Belfast Crown Court sitting at Antrim:

1. Taking a motor vehicle without the owner's consent, nine months' detention.
2. Causing grievous bodily harm by dangerous driving, two and a half years' detention and five years' disqualification from driving.
3. Driving whilst disqualified, nine months' detention.
4. No insurance, fined £50.00.
5. Failing to report an accident, three months' detention.

The sentences of detention were ordered to run concurrently.

Paul stole a Vauxhall Calibra car in Ballywalter on the night of 8-9 October 1999. He drove through a police checkpoint in Donaghadee, evaded police pursuit in the area of Clandeboye and Craigantlet and proceeded to the Shankill area of Belfast, where he arrived at about 1.45 am. He picked up Lyndsey McCartney, then aged 16, and offered to take her for a "spin", telling her that the car belonged to his uncle. He drove to the Glencairn area and drove round in a dangerous fashion, practising handbrake turns, in the course of which he struck a lamp post. Miss McCartney realised from the absence of ignition keys that the car was stolen and asked him to take her home. As he drove down Forthriver Road about 2.15 am Paul attempted to execute another handbrake turn, but the car crashed into an oncoming taxi. In the collision Miss McCartney was seriously injured, sustaining fractures of the pelvis and

a dislocated hip. The driver and passenger in the taxi also sustained injuries. Paul climbed out of the car through a window and claims that people on the scene attacked him. He ran away and sent his father to the scene, where Miss McCartney was being cut out of the wreckage of the car. He did not report the accident and had no licence and no insurance. He was at the time disqualified from driving. It appears that he handed himself in to police custody, and in interview he made a full admission of his offences.

Paul was born on 16 July 1982 and is still only 17 years of age. He has already an extremely bad record of convictions for road traffic offences and crimes of dishonesty. Between March 1997 and October 1999 he made 15 appearances before the criminal courts, being convicted of 52 road traffic offences and 54 other offences, including theft, burglary, handling, arson, obstructing the police, assault on the police, disorderly behaviour and some 20 cases of criminal damage. He had run through the gamut of probation and training school and had had two sentences of detention in the Young Offenders' Centre. His car-related offending had escalated in the three years prior to October 1999. On 20 October 1999, a few days after the incident the subject of this case, he was sentenced to a further six months' imprisonment for a series of offences and he was still in detention at the time when sentenced for the present offences.

Paul has a very disturbed background of a dysfunctional family, his three younger brothers all having been involved in criminal offences as well as himself. He played truant from school to a considerable extent and has had neither employment nor training since leaving school. This, as the pre-sentence report states, has led to a lack of structure and a sense of non-achievement. The probation officer who prepared

the report gives his opinion of Paul:

> "Mr Paul presents as an open and articulate young man. He is however impulsive and reckless by nature. The defendant appears to have become locked in a cycle of chaotic and anti-social behaviour over the last 3 years. His community, family difficulties, peer group, under achievement at school and lack of prospects have contributed to his propensity to offend. The defendant acknowledges the need to re-assess his lifestyle but to date has not shown the motivation to make the necessary changes."

Paul himself stated that several factors had contributed to his criminal record:

> "1. Paramilitary punishment beating of his father (in retaliation he stole cars belonging to individuals with paramilitary connections).
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> 2. Peer offending group.
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> 3. Excitement and buzz of being `on the run' from paramilitary groups.
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> 4. A fascination with cars.
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> 5. No settled family support.
>
> 6. Impulsivity."

He is said to be under threat from paramilitaries over his offending and unable to return to his home area after his release because of this threat. His response to probation orders was extremely poor and the probation officer considered that it was unlikely that he would benefit from a further period of statutory supervision.

In his sentencing remarks the learned judge enumerated the factors which he regarded as aggravating and mitigating respectively:

> "The aggravating features in your case are as follows:
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> (1) I consider you were showing off to Miss McCartney.

(2) You were travelling at speed at times when you were driving with her in the Forthriver Area and 90 miles per hour and more is mentioned in the Probation Report.

(3) You were driving while disqualified.

(4) You have previous motoring convictions.

(5) It seems to me that driving in that manner was a form of excitement and challenge to you.

(6) You did run away from the crash car and thereby left your friend and the occupants of the taxi without any regard for what had happened to them although you did redeem yourself to a certain extent by going to Antrim Road police station about 6 o'clock that morning.

On the other hand the mitigating factors are:

(1) Your plea of guilty which I have already counted.

(2) The suggestion of remorse in the probation report following your realisation of what had happened to your friend Lindsey McCartney."

He went on to say:

> "You have to appreciate that an offence under Article 9 of the 1995 Road Traffic Order, ie. dangerous driving causing grievous bodily injury, is a very serious offence and in sentencing you I must also reflect the elements of retribution and deterrence. The Courts have also to reflect the concern of the public for this type of offence, its prevalence and its consequences."

The grounds of appeal advanced on behalf of Paul were that the judge failed to take sufficient account of his plea of guilty, his personal circumstances, his co-operation with the police and the fact that he was already serving a sentence of detention.

In relation to the last ground, we would observe that under section 49(1) of the Judicature (Northern Ireland) Act 1978 a sentence is to take effect from the date on which it is pronounced unless the judge orders otherwise. The sentences will therefore take effect concurrently with the residue of the sentence of detention being served by the applicant in October 1999. It is not clear whether the judge appreciated this and we would draw the attention of sentencers to this provision and to the reminder which we gave in *R v Coates* (1998, unreported) that they should consider giving a specific direction that the second sentence be served consecutively to that already being served, bearing in mind the totality principle.

John Martin Brown

Early in the morning of 11 September 1998 Brown set out to drive an articulated lorry loaded with scrap metal from the premises of his employer Callan Enterprises in Coleraine to a consignee in Armagh. He had made this journey regularly since he commenced employment with that employer some four weeks before. He was expected to arrive in Armagh to make the delivery at 8.30 am, but that morning he had overslept and did not leave Coleraine until about 7.15 am, which left him far too little time to make the journey. He attempted to make up the time by speeding, and just before the occurrence of the accident he was travelling, according to the tachograph reading, at 67 miles per hour. He was already late with the delivery, for at the time of the accident just after 8.30 he was still between Dungannon and Moy.

Just south of the hamlet of Drumgold the appellant entered a left hand bend, warning of which was given by road signs indicating narrowing and forthcoming bends and by a "SLOW" sign painted on the road. The tachograph record showed that before the impact his speed was in the range between 53 and 59 miles per hour. As the

lorry proceeded round the bend the trailer overturned to the right and part of its load spilled. The lorry came into collision with a Peugeot 305 car travelling in the opposite direction and it appears that a large piece of metal from the load also struck the car. The car was crushed and its roof was torn off and the two occupants were killed. The lorry's tractor unit struck a Mitsubishi Chariot car, which in turn collided with a Peugeot 106. The driver of the Mitsubishi sustained significant injuries and the occupants of the Peugeot 106 were slightly injured.

It was not in dispute that the lorry was in poor condition and that the trailer had been incorrectly loaded in such a way that there was a danger of its shifting or spilling. Defects in the trailer had developed over a period through bad loading which caused the body to rock or list to one side during driving. These defects were not in themselves an important factor in causing the vehicle to overturn, although the vehicle examiner's view was that they may have been an aggravating factor. He expressed the opinion that the trailer had been incorrectly loaded: the pieces of scrap metal making up the load had been poorly distributed and the load had not been secured at the top. The instability of the trailer would have manifested itself by rocking of the body or listing to one side, particularly if the load shifted. The appellant was aware that the body of the trailer was twisted and out of alignment and that the trailer had capsized three times prior to the date of the accident.

The incorrect loading of the trailer was an important factor in the occurrence of the accident. The primary cause, however, in the opinion of the vehicle examiner, was the speed of the lorry as the driver attempted to negotiate the bend. It would not have overturned if the appellant had done so at a much lower speed. Mr Cinnamond QC for the appellant laid stress on the defects in the vehicle and its loading, which were

not under the direct control of the appellant. He was aware, however, as he admitted in interview, that the load was top-heavy, and as an experienced lorry driver knew that care was necessary in such circumstances. The responsibility lay squarely on him to drive at speed which was safe with the lorry and load of which he was in charge, leaving himself enough time to make his journey at a safe speed.

Brown is aged 32 years. He has a criminal record involving a number of convictions for offences of dishonesty and driving offences from 1980 to date. In 1996 he was sentenced to three months' imprisonment, suspended for two years, for driving while disqualified, and was just outside the period of suspension when he committed the present offence. The pattern of his offending shows a lack of responsibility as a road user which it is unfortunate to find in a regular driver of a heavy goods vehicle.

He has been in constant employment during his adult life and was a long distance lorry driver for eight years before his conviction. Dr Bownes stated in his psychiatric report that he is not indifferent to the consequences of his behaviour for himself or other people. He appears genuinely remorseful and expressed the opinion that he "has the personal skills and resources necessary to learn from his recent experiences and to avoid further similar incidents in the future".

Brown was charged on two counts of causing death by dangerous driving. On arraignment he pleaded not guilty. Before trial, however, he was rearraigned and changed his plea to guilty. On 14 February 2000 at Omagh Crown Court His Honour Judge Foote QC sentenced him to four and a half years' imprisonment on each of the two counts, to run concurrently, and disqualified him from driving for seven years.

Sentencing in Dangerous Driving Cases

We have had occasion in several cases before this court in the last couple of years to express our views on the approach which sentencers should adopt to offences under Article 9 of the Road Traffic (Northern Ireland) Order 1995. In *Attorney General's Reference (No 1 of 1998) (McElwee)* [1998] NI 232 we reviewed the earlier cases. We confirmed the applicability of the lists of aggravating and mitigating factors now set out in *Wilkinson's Road Traffic Offences* (19th ed, 1999, paras 5.214-5.215), which it is not necessary to repeat again in this judgment. The level of public concern about the danger presented by such dangerous driving and the prevalence of the feeling that it must be visited by more severe sentences than in the past, in order to provide proper levels of retribution and deterrence, are matters to which sentencing and appellate courts must pay proper regard.

Counsel did not attempt to furnish us with quantities of sentences from decided cases, of which there are very many examples in the reports, and in that we think that they were right. At the risk of tediously excessive repetition, we would repeat what we said in the *McElwee* Reference at page 238:

> "We have said many times that minute comparison of other cases is of limited assistance in assessing the proper level in any case, and that they ought to provide an avenue of guidance for the sentencer rather than a table or chart on which to locate the instant case. We would draw attention to another passage from the judgment of MacDermott LJ in *R v Sloan* (at 65), where he said:
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> > `It is not possible (it needs hardly be said) to say in advance what the proper sentence should be in any particular case as the appropriate sentence will depend upon the particular features of each individual case and due regard must be paid not only to the circumstances of the offence but to the

> circumstances of the offender. Thus it is unadvisable, indeed impossible, to seek to formulate guidelines expressed in terms of years. What must be sought is a fair and appropriate sentence, a consistent judicial approach to sentencing in this field and the proper discharge of the duty of courts to reflect the concern of Parliament and also, which is sometimes forgotten, the concern of the public about these matters.'"

Conclusions

In Paul's case the judge accurately summarised the many aggravating features and the few mitigating factors when imposing sentence. It is relevant to refer to MacDermott LJ's observation in *R v Sloan* [1998] NI 58 at 66:

> "Motor vehicles are primarily meant to be used as a means of transport. When so used accidents can and unfortunately do occur - sometimes by reason of careless or reckless driving. On other occasions vehicles are stolen or taken or used for so called joy-riding. When the pursuit of excitement is the dominant motive driving which causes serious accidents in such circumstances is clearly of an exceptionally high level of culpability and could well attract a custodial sentence in the vicinity of the statutory maximum - ten years."

In sentencing him to two and a half years' detention the judge imposed a term which was in the lower part of the range which he might have considered and the sentence could not in our view be regarded as in the least excessive, let alone manifestly excessive. The applicant could indeed regard himself as fortunate that the judge did not make it consecutive to that which he was already serving. We see no reason to disturb the sentence and dismiss Paul's application for leave to appeal.

Counsel for Brown emphasised strongly the defective state of the trailer and the inadequacies of the loading. Neither of these could be attributed to the appellant nor could he take any step to remedy the defects. He made a strong plea to us not to

punish Brown for the faults of others or to leave him to carry alone the responsibility for the deaths the blame for which should properly be laid at the door of his employer. We have given full weight to these considerations in assessing the correctness of the learned judge's sentence of four and a half years. We have to bear in mind, however, that the final responsibility lay with Brown to exercise due care in driving this heavy lorry, capable, as events sadly proved, of causing devastating damage if it went out of control. As Ward LJ said in *R v de Meersman* [1997] 1 Cr App R (S) 106 at 109:

> "... deterrence is to be marked the more clearly in this case where it is submitted as a mitigating factor that the appellant drove under unconscionable pressure from his employers ... is no sufficient mitigation to reduce the overwhelming burden that rests upon him alone not to drive when he knows he is falling asleep and when he knows he is in control of a weapon which is as lethal as a huge lorry of this kind is."

We are unable to escape the conclusion that Brown confirmed in his driving on the day of the accident the irresponsible traits visible in his driving record. He failed to report for work in time to leave at an hour which would have allowed him to drive at an appropriate speed to his destination. In order to make up time he drove at grossly excessive speeds and, in the hackneyed phrase, was truly an accident waiting to happen. His remorse is no doubt genuine, but it cannot outweigh the factors which make it necessary for the protection of other road users to impose suitably deterrent sentences in such cases. This was the course which the judge took, and although it could fairly be described as a stiff sentence, we cannot say that it was outside the proper bounds for this offence in all the circumstances of the case or that it should be regarded as manifestly excessive. We must therefore dismiss Brown's appeal.

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JUDGMENT

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