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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **9/1/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DAVID LEE STEWART

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBER 1 of 2016)

Before: Morgan LCJ, Weir LJ and Colton J

MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference by the Director of Public Prosecutions under section 36 of the Criminal Justice Act 1988 in which it is submitted that a determinate custodial sentence of 7 years' imprisonment comprising 3½ years in custody and the same on licence was unduly lenient. The sentence was imposed on the respondent following his plea of guilty on 15 March 2016 to one count of causing death by dangerous driving and separate offences of dangerous driving, failing to provide a specimen, failing to stop and failing to remain contrary to the Road Traffic (Northern Ireland) Order 1995 (the "1995 Order"). In this case we examine the appropriate treatment of aggravating and mitigating factors in the construction of the sentence. Mr McGrory QC and Ms Walsh appeared on behalf of the PPS and Mr Harvey QC and Mr McConkey on behalf of the respondent. We are grateful to all counsel for their helpful written and oral submissions.

Sentencing for dangerous driving causing death

[2] The statutory approach to sentencing for the offence of causing death by dangerous driving in this jurisdiction has broadly kept pace in recent years with the

equivalent legislation in England and Wales. Section 38 (3) of the Road Traffic Act (Northern Ireland) 1955 established the offence of dangerous driving causing death or grievous bodily injury and fixed the maximum sentence at five years' imprisonment. Following the Road Traffic Law Review conducted by Sir Peter North's committee in 1988, England and Wales introduced the offence of causing death by dangerous driving through the Road Traffic Act 1991 with a maximum sentence of 10 years' imprisonment and in this jurisdiction Article 9 of the Road Traffic (Northern Ireland) Order 1995 (the 1995 Order) provided that the offence of causing death or grievous bodily injury by dangerous driving should carry the same penalty.

[3] In R v Sloan [1998] NI 58 the court set out the rationale for the doubling of the maximum sentence:

> "This substantial increase from five to ten years was Parliament's response to the growing carnage on the roads due to dangerous driving (previously described as reckless) which in turn is often due to excessive speed or driving when under the influence of drink or drugs. In taking this course 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 and as was said by Roch LJ in *A-G's Ref (No 30 of 1995)* [1996] 1 Cr App R (S) 364 at 367 a proper sentence `must now have in it elements of retribution and deterrence`."

[4] Section 285 (6) of the Criminal Justice Act 2003 (which came into force on 27 February 2004 by virtue of the Criminal Justice Act 2003 (Commencement No.2 and Saving Provisions) Order 2004) increased the maximum penalty in this jurisdiction for dangerous driving causing death or grievous bodily injury from ten years to fourteen years' imprisonment. The impact that such a change has on sentencing levels was discussed by Sir Igor Judge in R v Richardson and others [2006] EWCA Crim 3186:

> "Statutory changes in sentencing levels are constant. In recent years, maximum sentences have been increased (for example, drug related offences) or reduced (for example, theft). In general, changes like these provide clear indications to sentencing courts of the seriousness with which the criminal conduct

> addressed by the changes is viewed by contemporary society. In our parliamentary democracy, sentencing courts should not and do not ignore the results of the legislative process, and as a matter of constitutional principle, reflecting the careful balance between the separation of powers and judicial independence, and an appropriate interface between the judiciary and the legislature, judges are required to take such legislative changes into account when deciding the appropriate sentence in each individual case, or where guidance is being offered to sentencing courts, in the formulation of the guidance."

[5] This court reviewed sentencing levels for dangerous driving causing death subsequent to the 1995 Order in Attorney General's Reference (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 28. It noted that much heavier sentences could be imposed where death resulted as compared to those cases where the driving was just as dangerous but neither death nor grievous bodily injury resulted. Since 1995 the maximum sentence for dangerous driving has remained at five years' imprisonment. It is clear, therefore, that Parliament regarded the consequences of the dangerous driving as being a relevant sentencing consideration.

[6] The court acknowledged the grave distress to the family of the deceased which the offence causes and accepted that the impact on the family is a matter that the courts can and should take into account. It noted, however, the observations of Lord Taylor LCJ in Attorney General's References (Nos 14 and 24 of 1993) [1994] 15 CAR (S) 640:

> "We wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognise that no term of months or years imposed on the offender can reconcile the family of the deceased victim to their loss, nor will it cure their anguish."

The court also recognised that there is a definite deterrent element in the sentencing policy for it is important to discourage drivers from driving in an irresponsible way, from wilful and reckless behaviour and from impulsive and impatient taking of chances.

[7] In R v Cooksley [2003] EWCA Crim 996 the Court of Appeal in England and Wales identified a series of aggravating and mitigating factors in cases of this type. The aggravating factors related to the culpable standard of driving at the time of the offence, driving which was habitually below acceptable standards, the outcome of the offence and irresponsible behaviour at the time of the offence. The mitigating

factors included a good driving record, the absence of previous convictions, a timely plea of guilty, genuine shock or remorse and the offender's age. Having concluded that a custodial sentence was generally necessary in these cases unless there were exceptional circumstances this court agreed that the cases could be ranked in four categories:

(a) Cases with no aggravating circumstances;

(b) Cases of intermediate culpability, which may involve an aggravating factor such as a habitually unacceptable standard of driving or the death of more than one victim;

(c) Cases of higher culpability, where the standard of the offender's driving is more highly dangerous, as shown by such features as the presence of two or more of the aggravating factors; and

(d) Cases of most serious culpability, which might be marked by the presence of three or more aggravating factors though an exceptionally bad example of a single factor could be sufficient to place an offence in this category.

The appropriate level of sentence for each of these categories was reviewed by this court in R v McCartney [2007] NICA 41 and that case is the guideline case for this reference. It is only material to this case to note that the sentencing range for cases of the most serious culpability was between seven and 14 years' imprisonment.

[8] As is clear from this history there have been significant increases in the maximum sentence for this offence in the last 20 years. That has reflected the debate on the difficult sentencing exercise posed by the nature of the offence. The consequence of the offence is, of course, catastrophic. Unlike, however, most offences of violence, this offence does not involve proof of any intention to injure or even foresight of any form of injury. On the other hand the circumstances of the offending often involve extremely irresponsible behaviour. The debate on the appropriate statutory response continues and on 5 December 2016 the government opened a consultation on whether the maximum penalty for the offence should be increased to life imprisonment in England and Wales.

The circumstances of this offence

[9] The factual background to the offences was not in dispute. On 14 October 2014 at 8:20 pm the respondent entered Lavery's bar in Belfast with a friend. CCTV shows the respondent and this friend drinking beer and shots. The respondent consumed a total of 6 pints of beer, four Jager bombs, one further shot and two unknown drinks. There is also a suggestion that he consumed illegal drugs while in the bar. Subsequent blood tests showed traces of cocaine and benzodiazepines as well as a compound derived from cannabis.

[10] The respondent and this friend left Lavery's bar at 1:15 am and both he and his friend were seen staggering before the respondent got into the driver's seat of his works van. He drove to Donegall Square East and both he and his friend went into Thompson's nightclub leaving at 2:15 am. He got back into the driver's seat of the van and drove off.

[11] The respondent was next seen some minutes later by a motorist who was stopped at a red light at the junction of Malone Road/University Road and Stranmillis Road waiting to travel up the Malone Road. The respondent's van drove through the junction at very high speed going through the red light and travelling up the Malone Road. The van was captured on CCTV driving quickly on the outside lane and slightly across the central white line of the road outside the Wellington Park Hotel. The average speed of the van for the preceding kilometre was calculated at 43 mph and the actual speed outside the hotel was assessed at 44 mph. This entire area was covered by a 30 mph speed limit.

[12] The deceased was an 18-year-old first-year student at Queen's University studying architecture. He was returning to his flat after having had a meal with a friend in a Chinese restaurant. He was walking on the footpath travelling in the same direction as the van which was coming behind him. At 2:20 am the van approached a right-hand bend round which the deceased was walking. It undertook a taxi driving in the outside lane and the taxi driver considered that the van was travelling at somewhere between 50 and 60 mph. The van hit the kerb and mounted the footpath colliding with the deceased on the front offside. The respondent did not stop and the deceased was then carried on the roof of the van for 800 metres before the van mounted the footpath again and came to a halt.

[13] The passenger emerged from the vehicle and saw the deceased. He then returned to the vehicle which drove off in a countrywards direction. It came to a halt at the junction of the Malone and Stranmillis Roads when the respondent lost control of the vehicle, mounted the kerb striking a tree and collided with a lamppost. A police officer came upon the scene and directed an ambulance. Paramedics had already been requested for the deceased. He was removed to the Royal Victoria Hospital but shortly thereafter was pronounced dead.

[14] The respondent was asked to provide a sample of blood at 4:53 am but replied "In the morning". He was warned but refused to provide a specimen. Later that morning the specimen was taken with his consent at 12:20. A back calculation report indicated that the most likely blood alcohol concentration at the time of the incident was three times the legal limit. When interviewed after caution that morning he alleged that he could only remember having consumed 2 pints of shandy while in Lavery's bar.

Victim Impact

[15] We have been provided with a detailed report from Dr Paterson setting out the significant, persisting and debilitating consequences for the family members as a result of the death. The report from the family GP supports the conclusion of Dr Paterson that the deceased's mother developed Post Traumatic Stress Disorder. Other family members have been affected in similarly significant ways and regrettably the impact is likely to be sustained. This was a young man who brought pride and joy to those who were associated with him. The tribute from the school explains in part why that was so. Not alone was he gifted academically but his talents extended into sport, music and art and his maturity and good humour infected all around. As the learned trial judge said, this was a senseless and needless death.

The judge's conclusions

[16] The learned trial judge recognised that he should sentence in accordance with the guidelines set by this court in R v McCartney. He considered a number of aggravating factors. First he addressed the consumption of alcohol and drugs. The level of consumption in this case was extremely high and the additional presence of drugs was such that this factor alone pointed towards this case being in the highest category.

[17] Secondly, there was a long and persistent course of very bad driving. The respondent drove from the city centre and was observed going through a red light at speed, going over the white line at speed when passing the Wellington Park Hotel, passing a taxi on the inside at speed and then hitting the kerb and wall prior to impact. He then drove on for a distance of 800 metres after the collision. The learned trial judge rejected a submission that he should temper this by virtue of the fact that all of these occurred within a short time and within a short distance. We are quite satisfied that he was correct to do so.

[18] Thirdly, the respondent's failure to stop and failing to remain at the scene clearly indicated irresponsible behaviour after the offence. The second charge of dangerous driving following the initial accident could have justified the court in considering consecutive sentences. The learned trial judge, however, considered that as an element of irresponsible behaviour on the evening and concluded that the sentence to be imposed on count one should take into account all of the behaviour on that evening including the subsequent dangerous driving.

[19] Having taken all those factors into account he was satisfied that this was a case of the most serious culpability and in his view the appropriate sentence was towards the upper end of that range. He noted that the respondent appeared to be staggering after emerging from Lavery's bar but still went to another club, drove dangerously up the road, collided with the deceased and then chose to drive off

before stopping only as a result of his collision with the tree. He reached the conclusion of the proper starting point for the sentence in this case was 12 years' imprisonment.

[20] The judge then turned to the mitigating factors. He noted that the respondent had revoked his own bail and was in custody. That supported his claimed remorse. He pleaded guilty on arraignment but it is clear that he was caught red-handed and claimed in interview to have taken only two shandies and not to have used any drugs. The judge accepted that his remorse was genuine. He noted that he had no convictions for driving of the seriousness of this offence but had a criminal record for a number of minor offences prior to 2004. The judge gave him credit for that. He had a stable upbringing and a good educational record and a good working record with a security alarm firm.

[21] The judge reduced the starting point by 25% for the plea to reflect remorse and in respect of his previous good record and his good work and family history he reduced the sentence by a further period of two years resulting in a determinate custodial sentence of seven years. He imposed a 15 month concurrent sentence in relation to the dangerous driving and further concurrent sentences on the other matters.

The submissions

[22] Mr McGrory broadly accepted the aggravating and mitigating factors identified by the trial judge. He did, however, take issue with the suggestion that a number of minor motoring convictions was a mitigating factor. The respondent had three convictions for no insurance, no driving licence and fraudulently using a vehicle registration mark and road fund licence when he was a teenager. Clearly that was not a mitigating factor although not an aggravating factor of particular materiality. He also submitted that the undertaking manoeuvre carried out by the respondent prior to losing control of the vehicle indicated grossly excessive speed having regard to the fact that this was a 30 mph zone. There is no doubt that this was a very bad piece of driving and that the speed of the vehicle having regard to the topography and the fact that this was a built-up area was highly material.

[23] It was submitted that the learned trial judge erred in failing to make the sentence for dangerous driving consecutive. That would have produced an overall starting point of 13 years or perhaps slightly more. Mr McGrory accepted that the prosecution did not invite the judge to approach the sentences as consecutive at the original hearing. He also accepted that the trial judge has discretion as to whether he should reflect totality by the sentence imposed on the most serious offence or whether he should do so by way of consecutive sentences. He submitted that the starting point of 12 years was appropriate before taking into account the subsequent dangerous driving offence.

[24] This was a case in which the respondent had effectively been caught red-handed. In light of the decision in R v Pollock [2005] NICA 43 the discount for the plea ought not to have been as great as in a case where a workable defence was possible. In addition to that the respondent had maintained at interview that he had consumed only two shandies although his case was that he could remember nothing thereafter. This was not, therefore, a case where the respondent made full disclosure of his criminal conduct at police interview.

[25] Finally it was submitted that the learned trial judge's approach to mitigating features was too generous. He gave considerable discount for remorse but that was already reflected in the discount for the plea. The learned trial judge also referred to his previous good record but he had of course previous convictions albeit occurring some 10 years beforehand when he was a teenager. In light of the fact that the sentence was a deterrent sentence the respondent's family history and good work record ought not to have carried great weight.

[26] Mr Harvey accepted that the reduction for the plea should come after the judge determined the impact of all of the aggravating and mitigating factors. Applying the judge's approach to the mitigation in this case that meant that the starting point should have been 10 years and the 25% discount should have been applied to that figure.

[27] He submitted, however, that the mitigation was undervalued in that it was clear that there was very considerable remorse on the part of the respondent. Although the respondent indicated that he had no memory of how much he had drunk during the police interviews he did accept full responsibility. The suggestion that his lack of memory was an indication that he did not accept responsibility was a misrepresentation. The respondent's remorse was supported by the fact that he surrendered himself into custody at the time of his preliminary enquiry.

Consideration

[28] We have come across a number of cases recently where the judge has established a starting point by reference to the aggravating features, has applied the discount for the plea to that starting point and then further reduced the sentence on the basis of the mitigating features. The effect of such an approach is to apply the discount for the plea to the aggravating features but to allow mitigation in full. Such an approach is, therefore, unduly generous to the accused. The proper approach is to identify the impact of all of the aggravating and mitigating factors to determine the starting point before applying the reduction for any plea. In that way both the aggravating and mitigating factors are subject to the same treatment.

[29] We do not accept that any criticism can be made of the learned trial judge for failing to impose a consecutive sentence in relation to the subsequent dangerous driving. He undoubtedly took it into account in determining the appropriate

aggravating factors. Even on Mr McGrory's analysis the appropriate figure for the totality of the offending was within the statutory maximum. It is a matter of discretionary judgement as to whether the judge wishes to arrive at the total figure by way of consecutive sentences or by way of an overall sentence on the most serious charge.

[30] In his consideration of mitigation the judge took into account his good record and his good working and family history. The latter points are clearly material as aspects of personal mitigation. As we have indicated, however, sentencing in this area is intended to deter and in those circumstances the impact of personal mitigation is reduced. We accept that the three driving convictions of the respondent as a teenager establish that he did not have a clear criminal record but we do not consider that those convictions represented a material aggravating factor in this case.

[31] We accept the submission that the discount for the plea generally reflects an element of remorse. Accordingly the degree of mitigation by way of discount for the plea can be higher than would otherwise have been the case if there is positive evidence of remorse. If, however, such discount is included in the plea it should not be repeated by way of personal mitigation.

[32] We consider that the discount of 25% for the plea in this case was overly generous. The respondent pleaded guilty to failing to provide a specimen while at the hospital. He did not, therefore, cooperate at the earliest stage of his engagement with police. This was a case in which he was caught red-handed. Even taking into account the learned trial judge's assessment that his remorse was genuine we consider that the discount should not have exceeded 20%. If such discount had been allowed remorse should not have been included again as an element of mitigation.

Conclusion

[33] Applying the above principles we consider that the starting point when taking into account the aggravating and mitigating factors other than remorse was in or about 12 years. This is a deterrent sentence and personal mitigation can play little part. Allowing appropriate discount for the plea leads to a sentence somewhere between nine and 10 years. Taking into account double jeopardy we have decided to substitute for the sentence on count one a determinate custodial sentence of nine years comprising 4½ years in custody and 4½ years on licence. The legislation prohibits us from identifying any longer period in custody. All other sentences and ancillary orders will remain in place.

[34] Nothing that this court can do can turn the clock back. The disastrous consequences of the early morning of 15 October 2014 will scar the lives of all of those affected. What happened was senseless, needless and entirely avoidable. In cases of this kind it follows that deterrent sentences must continue to be imposed.