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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT AT BELFAST

THE KING

v

LAURA ADAIR

Before: McCloskey LJ, Horner LJ and Fowler J

Representation

Appellant: **Mr John Kearney KC and Mr Jonpaul Shields, of counsel, instructed by Higgins Hollywood Deazley Solicitors**
Respondent: **Mr David McNeill, of counsel, instructed by the PPS**

McCLOSKEY LJ (*delivering the judgment of the court*)

Overview

[1] Laura Adair ("the appellant") was the driver of a private motor vehicle which, at around 6:52am on 8 November 2019, struck and fatally wounded a pedestrian aged 40 years on a pedestrian crossing in a suburban area of Belfast. The pedestrian suffered a serious head injury and died the following day.

[2] The appellant was committed for trial for the offence of causing death by dangerous driving. Upon her arraignment she pleaded not guilty to this offence but guilt to causing death by careless driving. Approximately one month later the PPS, with the approval of the family of the deceased, signified that this latter plea was acceptable. The indictment was adjusted accordingly.

[3] The appellant was punished by a sentence of 12 months' imprisonment divided equally between custody and ensuing probationary supervision. A driving disqualification of two years (the minimum) was also imposed. With the leave of the single judge, she appeals to this court. Her case, while invoking formally also a

"wrong in principle" ground of appeal, is in substance that the sentence of 12 months' imprisonment was manifestly excessive.

Basis of Plea

[4] The appellant pleaded guilty and was sentenced on the uncontentious basis outlined in the following paragraphs.

[5] The road in question is a dual carriageway with a pedestrian crossing governed by traffic lights. The deceased was crossing the road with a green light for pedestrians showing. The appellant drove onto the crossing in disregard of a red light for motorists. The appellant was driving on the offside of the two city bound lanes. The road at this location is governed by a speed limit of 40 miles per hour. It is a straight road. The crossing lights are visible from a distance of 280 metres. There is a traffic light warning sign 118 metres away. At a distance of 36 metres there are hazard warning lights, together with the familiar zigzag warning lights on the road surface. There is artificial lighting all along the appellant's approach to the crossing. It was dark at the material time. The weather was cold and dry. The road surface was in good condition. The appellant's vehicle had no relevant defect.

[6] The deceased was crossing both sides of the dual carriageway in accordance with the staggered pedestrian arrangement at this location. Her clothing was unremarkable. She had successfully crossed one side of the dual carriageway, reaching the central railed refuge area. From the appellant's line of approach this area was partially obstructed by a hedgerow some six feet in height. Scientific examination of all available evidence established the following. The green light for pedestrians was exhibited at 6.52.42 hours. The deceased stepped onto the crossing two seconds later. The collision occurred one and a half seconds later, in the offside of the two lanes. The brake lights of the appellant's vehicle were illuminated approximately 0.1 seconds before impact. Her vehicle was travelling at a speed of between 43 and 49 miles per hour upon impact. The traffic lights were exhibiting amber for nine seconds prior to impact and red for six seconds before impact. The terminal position of the appellant's vehicle was in the inside lane, approximately 43.5 metres from the estimated point of impact.

[7] The appellant made an emergency call within seconds. The following recording was made:

> "I was driving the car, I hit her with my car … I was driving on my way to work and she just stepped out in front of me."

At the scene, in the aftermath, the appellant was observed to be extremely upset, hyperventilating, shivering and struggling to articulate. Following caution she stated, inter alia:

> "I was just driving down the road … I can't even remember checking the traffic lights. I can't remember even looking at them and the next thing I know …. I'd hit that lady …. on the side, it was like she just stepped out and I couldn't stop in time not to hit her."

When interviewed, she indicated that there was a podcast playing from her mobile phone at the material time. She had been suffering from anxiety/depression for some time and was taking appropriate medication for this condition. She had also been receiving cognitive behavioural therapy. Negative thoughts about her work, which was evidently a major cause of her anxiety, were occupying her mind.

[8] The evidence assembled for the sentencing of the appellant included the report of a consultant forensic psychiatrist. Within this report there is a review of the records of the appellant's general medical practitioner. These disclose that she has been in receipt of medical attention and medication on account of anxiety and depression since 2009. Interventions included counselling. Approximately one month before the accident an assessment of mild anxiety was made. This was just three months after the appellant had reported panic, low mood, reduced confidence and low self-esteem to an adult mental health doctor. The notional graph was developing positively.

[9] The sentencing materials also included the customary Probation Service report. This contains the following noteworthy passages:

> "During interview [she] expressed genuine remorse for her offending … and was visibly upset …. Whilst in no way attempting to justify her actions, the defendant is of the view that she was so distracted by 'the battle going on in my mind, wanting to control my thoughts' …
>
> She openly admits her culpability and takes full responsibility for causing the death of the victim. She demonstrated an awareness of the impact on the victim's family and she wished to express her deepest apologies and condolences to them … she also spoke of the distress she has caused to her own family and partner."

The author observed:

> "Whilst Ms Adair is clearly able to recognise the harm caused, at the time of offending she gave limited consideration to other road users, or pedestrians, evidencing a lack of consequential thinking and a disregard for road traffic regulations."

The author describes the appellant as "a vulnerable woman experiencing inner turmoil." The risk that the appellant might re-offend was assessed as low.

Sentencing Guidance

[10] The offence of careless driving causing death is punishable by a maximum sentence of five years imprisonment and a minimum driving disqualification period of two years. Sentencing guidance is provided in the decision of this court in *R v Doole* [2010] NICA 11. This court decided that for this particular offence the approach of the Sentencing Guidelines Council of England and Wales (the "SGC") should be adopted in this jurisdiction. Para [9] of the judgment states:

> "A number of key points emerge from the Guidelines in the present context:
>
> (a) As the Introduction clearly states the central feature should be an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created.
>
> (b) The degree to which an aggravating factor is present and its interaction with other aggravating and mitigating factors will be immensely variable. The court is best placed to judge the appropriate impact on sentence. Clear identification of those factors relating to the standard of driving as the initial determinants of offence seriousness should assist the adoption of a common approach.
>
> (c) Imprisonment is only appropriate when there is a level of carelessness which gives rise to real culpability. As para 8 of the Guidelines states:
>
> > 'Where the level of carelessness is low and there are no aggravating factors even the fact that death was caused is not sufficient to justify a prison sentence.'"

[11] It is appropriate to reproduce paras [10]–[13] in full:

> "[10] The range of appropriate sentences in relation to causing death by careless driving put forward by the English Council are as follows:

(a) In respect of careless driving falling not far short of dangerous driving it puts forward a starting point of 15 months with a range of 9 months to 3 years;

(b) In respect of cases of careless driving arising from momentary inattention with no aggravating factors it recommends a community order disposal;

(c) In relation to cases falling between those two ranges it recommends a starting point of 9 months with a range of 2 years down to a community order (high);

Subject to our comments below we agree with the general approach recommended by the Council.

[11] Accordingly there will be occasions where the culpability of the offender will be very low. In such circumstances a custodial sentence will generally not be appropriate even though death has resulted. Such an approach does not fail to recognise the extreme distress and hurt which this offence causes to the families and friends of the deceased. We repeat what was said by Lord Taylor CJ in Attorney General's Reference Nos 14 and 24 of 1993 (1994) CAR (S) 640 at 644.

> "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 a diseased victim to their loss, nor will it cure their anguish."

[12] There are, however, cases of careless driving in which the standard of driving will lie very close to the test for dangerous driving. In those cases, we agree that an appropriate starting point in a contested case for a driver with no previous convictions is 15 months imprisonment. Aggravating and mitigating factors may result in a higher or lower sentence but the range identified by the Definitive Guidelines will generally be appropriate.

[13] The large majority of cases of causing death by careless driving will fall between those categories. Prior to the introduction of this legislation the unintended

tragic consequence of a death was not identified as a material aggravating factor (see Megaw (1992) 11 NIJB 25). The statutory purpose of this legislation was to alter that approach and we agree that in these cases the starting point in a contested case for a driver with no previous convictions is now nine months imprisonment. We stress, however, the pressing need to pay careful attention to culpability in individual cases. This will move the starting point up or down as will relevant aggravating and mitigating factors. In some cases this will result in a sentence well above the starting point but in others it may properly lead to a suspended sentence or non-custodial disposal. In particular, where the application of these principles point to a prison sentence of less than 6 months sentencers should carefully consider whether a non-custodial alternative would be more appropriate and meet the justice of the case. The imposition of a short prison sentence in such circumstances may tend to trivialise the tragedy of the death of the deceased victim but at the same time be a disproportionate penalty for the defendant who may have a completely clear record and good character."

[12] As subsequent decisions of this court confirm, *Doole* continues to be the leading guidelines case. See inter alia *DPP's Reference (No 7 of 2013) (Brannigan)* [2013] NICA 39, *R v McGrade* [2014] NICA 8 and *R v McKeown* [2016] NICA 24.

The Sentencing of the Appellant

[13] Based on the transcript, the judge's route to the imposition of a sentence of 12 months imprisonment may be summarised as follows. The judge devoted much attention to the issue of <u>culpability</u>. The prosecution stance (per counsel's written submission) was that "… this case can be characterised as an example of careless driving falling not far short of dangerous driving. Driving through a red light at a pedestrian crossing is obviously an objectively very dangerous manoeuvre." On behalf of the appellant, counsel's written submission suggested that "… having regard to the limited period of inattention the defendant's level of culpability is … at a relatively low level." In his sentencing decision the judge recorded senior counsel's acceptance that "… it may be in the mid-range" (repeated before this court).

[14] In his resolution of these competing contentions the judge drew attention to the several elements of the objective evidence summarised in paras [5]–[7] above. Next, the judge stated that "distraction by her personal circumstances" did not rank as an aggravating factor. The judge continued:

> "It may be an explanation but if so in my view it is an explanation of high culpability careless driving and significantly high culpability careless driving. The nine seconds of amber, the six seconds of red and all of the warning roadway furniture in the run up to a pedestrian crossing are all created so that a driver approaching a pedestrian crossing has as much awareness [as possible] of the likelihood of vulnerable road users in the form of pedestrians crossing that road. On any analysis my view is that the defendant's driving on that morning is high culpability careless driving."

[15] Next the judge turned to the issue of aggravating factors:

> "Are there any aggravating factors? Well, the culpability, as I have assessed it, is high culpability careless driving. There is a modest increase for a modest speed above the speed limit, I do take it as three miles per hour. Nevertheless, it is a modest increase that I make."

This was followed by:

> "Reflecting the culpability of the driving and the modest aggravating factor, the starting point not of personal mitigation would, in my view, after contest have been 24 months."

[16] The judge, finally, addressed what he described as "the personal mitigation of the defendant", in these terms:

> "She has lived a good life and she finds herself in court for a gravest catastrophic mistake. I give her credit for her previous good character, but to some extent that is weighed against [the factor of deterrence] ….
>
> Had she been convicted by a jury I have no doubt that the minimum sentence that I would have imposed is one of 18 months. I give her full credit for her plea of guilty at the earliest opportunity, which is one third ….."

By the foregoing route the judge reached the terminus of 12 months imprisonment, divided equally between custody and licensed release.

Leave to Appeal

[17] The kernel of the grant of leave to appeal is in the following passage:

> "… it [was] clearly within the remit of the LTJ to adopt a starting point at twenty-four months. However, what is not clear from the LTJ's sentencing remarks is (a) his analysis of all the factors he took into consideration or rejected when coming to his decision that the starting point was in excess of fifteen months; (b) his assessment of the starting point prior to the uplift for modest excess speed; (c) his calculation of the uplift for modest excess speed…
>
> For the reasons given, applying the test in *R v McCaughey* [2020] NICA 37, it is arguable that the sentence of the LTJ was manifestly excessive. "

The Appellant's Case

[18] The core of the appellant's case is expressed in the following passage in counsels' skeleton argument:

> "The LTJ accepted the prosecution submissions that this was a case of higher culpability, rejecting defence submissions that it was a medium category case.
>
> Having determined the category, he then acknowledged that the appropriate starting point was 15 months, but then proceeded to move that starting point by nine months up to 24 months [amounting to a 60% increase] on the basis of excess speed, which he clearly viewed as an aggravator, and which he suggested was a modest excess speed calling for a modest increase in sentence, even though the prosecution had never suggested that the starting point be moved up to reflect aggravating factors, suggesting instead in their written submissions that it had been the combination of the driving through lights along with the speed which together put this case into the higher category. Accordingly, it therefore, in our submission, seems that the modest excess speed was deployed twice, in a clear example of double counting, to put this driving into the higher category and then again to significantly increase the starting point.
>
> Having determined the category, he then acknowledged that the appropriate starting point was 15 months, but then proceeded to move that starting point by nine months up to 24 months [amounting to a 60% increase] on

> the basis of excess speed, which he clearly viewed as an aggravator, and which he suggested was a modest excess speed calling for a modest increase in sentence, even though the prosecution had never suggested that the starting point be moved up to reflect aggravating factors, suggesting instead in their written submissions that it had been the combination of the driving through lights along with the speed which together put this case into the higher category. Accordingly, it therefore, in our submission, seems that the modest excess speed was deployed twice, in a clear example of double counting, to put this driving into the higher category and then again to significantly increase the starting point."

The following interlocking submissions were advanced by counsel: the nature of the appellant's driving is properly linked to, but is not coterminous with, the court's assessment of culpability; the judge did not adequately weigh the reasons for the appellant's aberrations namely her "inner stresses and anxieties"; and that properly evaluated these:

> "… reduced culpability and … placed this case into the middle culpability category, thereby engaging lower sentencing starting points (nine months) … [and a sentence] … which ought to have been less than six months and therefore suspended in light of the clear guidance at paragraph 13 of *Doole*."

Our Conclusions

[19] It is essential to emphasise the function of this court. In a case of this kind, it is one of review of the sentence under challenge. See in particular *R v Ferris* [2021] NICA 60 at paras [36]–[43]:

> "**Deciding the appeal: the correct approach**
>
> …
>
> [40] While s 10(3) is couched in superficially broad terms in practice it has been neither interpreted nor applied liberally by this court. The jurisprudence of this court has, rather, inclined in favour of a restrained approach. This is apparent in one of the leading pronouncements of this court, that of Carswell LCJ in *R v Molloy* [1997] NIJB 241 at 245C/D:

'… It is of rather more assistance first to examine the judge's reasons for deciding on the sentences, as expressed in his sentencing remarks, to see if there is any visible imbalance, and secondly, to stand back and consider whether the sentence is appropriate in all the circumstances of the case, when set against any trend discernible from other cases.'

…

[41] The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus, s10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell* [1975] 4 NIJB at p, referring to successful appeals against sentence:

> 'In most cases the court substitutes a less severe sentence …. the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.'

Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon and others* [unreported, 3 March 1995].

[42] The restraint principle operates in essentially the same way in both this jurisdiction and that of England and Wales, where it has perhaps been articulated more fully. In *R v Docherty* [2017] 1 WLR 181 Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at [44](e):

> 'Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-

> hearing **ab initio**, as is the rule in some other countries; on appeal a sentence is examined to see whether it erred in law or principle or was manifestly excessive …'

In *R v Chin-Charles* [2019] EWCA Crim 1140, Lord Burnett CJ stated at [8]:

> 'The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and, in many instances, have presided over a trial. The Court of Appeal is well aware of that.'

This approach was reiterated more recently in *R v Cleland* [2020] EWCA Crim 906 at [49]. Also, to like effect are *R v A* [1999] 1 Cr App (S) 52, at 56; and *Rogers* (*ante*) at [2]. To summarise, through the decided cases in both jurisdictions the function of the Court of Appeal in appeals against sentence has been described, in shorthand, as one more akin to **review,** rather than appeal, in the typical case. This is the essence of the restraint principle.

[43] It is also instructive to note the contrast provided by appeals against sentence from Magistrates' Courts to the County Court in this jurisdiction. By virtue of the applicable statutory provisions these take the form of full re-hearings: see Article 140 of the Magistrates' Courts (NI) Order 1981; Article 28 of The County Courts (Northern Ireland) Order 1980; and Order 32 Rule 1(2) of the County Court Rules (Northern Ireland) 1979."

[20] The following fallacies in the appellant's arguments are manifest. First, there is an insistence in the appellant's arguments that the judge's point of departure was 15 months imprisonment. This is confounded by the transcript: the judge did not express himself in this way. Furthermore, while there might be some merit in the

contention that this is to be inferred, we shall make clear infra why this does not avail the appellant.

[21] The next demonstrable fallacy in the appellant's case is the fixation upon what we shall describe in shorthand as the "three miles per hour excess" issue ie the judge's treatment of the speed of 43 miles per hour at the moment of impact as a "modest" aggravating factor. This submission entails the application of an incorrect prism. On any fair and objective analysis, the issue was one of excessive speed in the circumstances and conditions prevailing. The real point here is that the appellant's vehicle was driving at a speed of 43 miles per hour when it should have been stationary: added to which the brakes were not applied until 0.1 seconds before impact, the deceased had completed almost half of her crossing, the vehicle did not come to a halt until it had travelled a further 43 metres, the location was well illuminated, driving conditions were satisfactory, there was no mitigating issue related to the clothing worn by the deceased and there were extensive advance warnings of the pelican crossing. Thus, analysed we consider that the judge cannot be faulted for his approach to this discrete issue. The precise terms in which the judge expressed himself in his ex tempore decision are not determinative of this point. It is incumbent upon this court to examine the substance of his approach. More generally, there is probably no ex tempore judicial decision which could not be more felicitously expressed with the benefit of the retroscope: see *Bradley v Hamilton* [202] NICA 18

[22] Furthermore, this aspect of the appellant's challenge rests upon the unexpressed premiss that to drive within, or on the limit of, the governing speed limit is to drive at a safe and appropriate speed. This is manifestly untenable: the prevailing context and circumstances are of overarching importance. We consider that the manner in which this discrete issue developed at first instance, ultimately accruing to the benefit of the appellant objectively analysed, was misconceived. In a nutshell, this too entailed the application of the wrong prism.

[23] The merits of this discrete challenge may also be tested by standing back panoramically – a classic exercise for appellate courts in appeals against sentence (see eg *Molloy* above). The reality of this case is that there was an abundance of objective evidence, summarised in paras [5]–[7] above, establishing beyond per adventure the gravity of the appellant's offending and pointing clearly to an assessment of high culpability. All of this objective evidence is effectively airbrushed in the appellant's case – which, stripped bare, is that her pre-existing stress and anxiety should have been the determinative factor in the sentencing exercise and ought to have impelled a non-immediate custodial disposal. This we consider manifestly untenable.

[24] The appellant's arguments also overlook entirely a passage of considerable importance in *Doole*. At para [6] the Lord Chief Justice stated:

> "A recurring theme in the caselaw of this court is that guideline decisions are only what they purport to be, that is to say guidance to sentencers. They are not prescriptive. They are intended to provide a proper focus for sentencers but not a straight-jacket. Every case must be decided justly in its own factual context taking account of the relevant considerations and evidence. Guidance and guidelines provide useful assistance to sentencers in the proper identification of those considerations. Excessively prescriptive guidelines, whether imposed by the court or by any statutory body, would frustrate the sentencer's duty to decide the case before him or her justly on the merits. The duty of the court under article 6 of the ECHR is to ensure a fair trial by an independent and impartial duty. Excessive prescription has the potential to undermine judicial independence and thus infringe article 6."

We refer also to para [13], reproduced at para [11] above. In substance, the unexpressed premise in the appellant's case is that of the sentencing straight-jacket. This approach, by well-established principle, is misconceived.

[25] The appellant's arguments further overlook the application by the judge of six months credit based on the appellant's previous good character, an approach which is frequently disapproved in decisions of this court (see for example *R v Mongan* [2015] NICA 26) on the basis that this should normally rank as a merely neutral factor. Had this factor been disregarded this would have resulted in a sentence of 16 – rather than 12 months. By well-established principle the judge should, of course, have reckoned <u>all aggravating and mitigating facts and factors</u> in determining his starting point: see *R v O'Toole* [2015] NICA 59. However, his methodology in effect meant the adoption of a starting point of 18 months, which was clearly open to him and harmonious with the decision in *Doole* considered as a whole and through the correct lens.

[26] Finally, the centre-piece of the appellant's challenge to her sentence, namely her pre-existing stress and anxiety, is decisively counterbalanced by a series of facts and factors, in particular: the factor of rational choices: the appellant neither claimed to be nor was assessed unfit for work; she chose to drive her car on the occasion in question; she chose to play a podcast while driving; all of the objective and topographical evidence was overwhelmingly against the appellant; and this was a case of total driver disengagement, outright distraction. Notably the expert medical evidence did not attribute these fundamental failings on the part of the appellant to psychological causes. Added to this the medical evidence is that the appellant had made major strides psychologically during the previous couple of months. Counsels' argument based on suggested "tipping points" must wither abruptly.

[27] Summarising, in "manifestly excessive" appeals against sentence this court accords an appropriate margin of appreciation to the sentencing judge. It is this principle which explains why, in so many appellate sentencing decisions, it is stated that the approach of the first instance court to a certain issue and/or the substantive sentencing outcome lay within the notional range of approaches/outcomes reasonably open to the sentencing judge. The exercise was one of evaluative assessment, giving rise to limited scope for appellate court intervention. We consider that in this case the sentencing judge cannot be criticised on any legitimate legal basis for assessing this case as one of higher culpability. This assessment was reasonably open to him. Thus, we reject the main ground of appeal.

[28] The second ground of appeal entails the contention that the trial judge made the error of double counting. We have already adverted to the flaw in this contention: see para [19] above. While the judge's reasoning should have been more explicit and structured this is merely incidental. The main focus of this court is on terminus. For all of the reasons already expressed we are satisfied that the judge's terminus accords with governing principles. The gross sentence of 12 months imprisonment for this specific offence, committed in all the circumstances and with all the features outlined above, cannot attract the condemnation of manifestly excessive. On the contrary this court considers it unassailable.

[29] The reality of this case is that the appellant's "personal mitigation" (in the judge's words) was very largely reflected at an earlier stage, in the reduction of the single count, with the result that it fell to be balanced with restraint in [a] the judge's assessment of culpability and [b] his further assessment of mitigation apart from the appellant's plea of guilty. We consider that it was more than adequately reflected in the impugned sentence of 12 months imprisonment.

[30] Giving effect to the foregoing analysis and reasoning this court concludes that the sentence of 12 months' imprisonment under challenge was not manifestly excessive. It fell comfortably within the sentencing judge's margin of appreciation. On one plausible view it could not reasonably have been less. Furthermore, no error of principle has been established. It follows that we affirm the decision of the sentencing judge and dismiss the appeal.