Attorney General's Reference (No 1 of 1998)

COURT OF APPEAL

CARSWELL LCJ, NICHOLSON LJ AND MCCOLLUM LJ8 JUNE, 19 JUNE 1998

- *Road traffic – Dangerous driving – Causing death or grievous bodily harm by dangerous driving – Sentence – Principles of sentencing – Circumstances aggravating offence – Length of appropriate custodial sentence on a plea of guilty – Road Traffic (Northern Ireland) Order 1995, SI 1995/2994, art 9.*
- *Sentencing – Custody probation order – Circumstances in which appropriate for sentencer to take account of effect of offender's supervision by probation officer on release – Protection of public from harm or prevention of commission of further offences – Guidance to sentencers – Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160, art 24.*

On 3 April 1998 the offender pleaded guilty to a number of motoring offences which included dangerous driving causing grievous bodily injury, driving without insurance, driving while disqualified and driving while unfit through drink or drugs. The judge imposed terms of imprisonment for the respective offences together with disqualification from driving which were made concurrent, so the effective sentence was one of two years' imprisonment, followed by one year's probation, with eight years' disqualification. The judge also ordered that a sentence of two months' imprisonment for driving while disqualified, which had been imposed at Limavady Magistrates' Court on 2 April 1996 and suspended for two years, be put into effect consecutive to the two-year term. In passing sentence the judge stated that the commensurate sentence was one of three years' imprisonment. He decided, however, to impose a custody probation order under art 24 of the Criminal Justice (Northern Ireland) Order 1996 by reference to a pre-sentence report prepared by a probation officer. He sentenced the offender to two years' imprisonment, plus the two-month suspended sentence put into effect. He also made a probation order to take effect for 12 months immediately following the offender's release from prison. One of the conditions attached to the probation order was that the offender was to participate in an alcohol management programme on ten days during the probation period and while there comply with the instructions given by or under the authority of the person in charge. The Attorney General referred the sentences to the Court of Appeal contending that the starting point of three years' imprisonment was unduly lenient for such grossly irresponsible driving, particularly in the case of an offender with a bad previous record. He also referred to other aggravating factors which applied in the case, namely the heavy consumption of alcohol, the grossly excessive speed, the persistent bad driving and disregard of warnings from his passengers, the commission of associated offences (driving while disqualified, no insurance and driving while unfit

[1998] NI 232 at 233through drink), his previous bad record of driving offences and the causing of serious injuries to several people.

Held – (1) The commensurate sentence assessed by the judge of three years was inadequate to reflect the gravity of the case and the offender's conduct. The case was

one in which the appropriate sentence on a plea of guilty should have been in excess of five years. The sentence in the instant case was therefore unduly lenient. Taking into account the element of double jeopardy, the commensurate sentence should be increased to four-and-a-half years. *R v Sloan* [1998] NI 58 and *R v Mullan* [1998] NIJB 93 applied.
(2) A court which had formed the opinion that a custodial sentence of 12 months or more would be justified for the offence was bound by the terms of art 24(1) to consider whether it would be appropriate to make a custody probation order. Under the terms of art 24(2) the sentencer was to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences. The court should not regard it as correct as a matter of routine to make a custody probation order where a custodial sentence of 12 months or more would be prima facie justified. Still less should it be tempted to resort to it as an easy option or compromise. The court should look for some material which indicated that there would be a need to protect the public from harm from the offender or to prevent the commission by him of further offences. The relevant time at which the existence of that need fell to be determined was the time of his release. In the instant case the probation officer's pre-sentence report provided the judge with material upon which he could properly have taken the view that a custody probation order was appropriate.

Accordingly, the sentences of two years' imprisonment would be quashed and in place of them sentences of three-and-a-half years would be imposed. The probation order would also remain operative.

Cases referred to in judgment
A-G's Ref (*Nos 24 and 45 of 1994*) (1995) 16 Cr App R (S) 583, CA.
A-G's Ref (*No 30 of 1995*) [1996] 1 Cr App R (S) 364, CA.
R v Boswell [1984] 3 All ER 353, [1984] 1 WLR 1047, CA.
R v Mullan [1998] NIJB 93, CA.
R v Sloan [1998] NI 58, CA.
Reference
The Attorney General referred, pursuant to s 36 of the Criminal Justice Act 1988, the sentences imposed upon Robert John McElwee (the offender) by His Honour Judge Smyth QC at Antrim Crown Court on 3 April 1998 to the Court of Appeal for review. It had appeared to the Attorney General that the sentences imposed on the offender in respect of a number of motoring offences, to all of which he had pleaded guilty, were unduly lenient. The facts are set out in the judgment of the court.

[1998] NI 232 at 234*R E Weatherup QC* and *R K Weir* (instructed by the *Office of the Director of Public Prosecutions*) for the Crown.
K R M McMahon QC and *N Rafferty* (instructed by *M S Sandhu & Co* (Limavady) for the respondent.

Cur adv vult

19 June 1998. The following judgment of the court was delivered.CARSWELL LCJ.
In this reference, brought under s 36 of the Criminal Justice Act 1988, the Attorney General for Northern Ireland has referred to the court sentences imposed upon the offender Robert John McElwee, on the ground that the sentencing was unduly lenient. They were imposed at Antrim Crown Court on 3 April 1998 by Judge Smyth QC, when the offender pleaded guilty to a number of motoring offences.
The offences to which he pleaded guilty were the following: three counts of dangerous driving causing grievous bodily injury, contrary to art 9 of the Road Traffic (Northern Ireland) Order 1995, SI 1995/2994 (the 1995 Order); one count of no insurance, contrary to art 90 of the Road Traffic (Northern Ireland) Order 1981, SI 1981/154 (the 1981 Order); one count of driving while disqualified, contrary to art 167(1)(b) of the 1981 Order; one count of driving when unfit, contrary to art 15(1) of the 1995 Order. A seventh count of driving with excess alcohol, contrary to art 16(1)(a) of the 1995 Order, was left on the file.
The judge imposed the following sentences: on each of the three counts of dangerous driving causing grievous bodily injury, the judge made a custody probation order, the sentence being two years' imprisonment followed by one year's probation. The offender was also disqualified from driving for eight years; driving without insurance—fined £50; driving while disqualified—six months' imprisonment; driving while unfit through drink or drugs—six months' imprisonment, with five years' disqualification from driving.

The terms of imprisonment and disqualification were made concurrent, so the effective sentence was one of two years' imprisonment, followed by one year's probation, with eight years' disqualification. The judge also ordered that a sentence of two months' imprisonment for driving while disqualified, which had been imposed at Limavady Magistrates' Court on 2 April 1996 and suspended for two years, be put into effect consecutive to the two-year term.

On 12 July 1997 some friends of the offender attended a band parade in Limavady. After the parade they went to his flat in the town, where he had remained during the parade. During the day he appears to have taken a considerable amount to drink, for when a blood sample taken at 8.35 p m that day was analysed it was found that the concentration of alcohol in his blood was 186 mg per 100 ml, as compared with the statutory limit of 80 mg.

Some of the party wished to return to Coleraine, and the offender offered to drive them there, notwithstanding the fact that he had drunk so much alcohol and was still subject to a two-year disqualification from driving imposed at Limavady Magistrates' Court on 2 April 1996. At about 5.30 p m he was driving between Limavady and Coleraine when his car came into collision with another vehicle, causing a serious accident. On the journey he had been driving very fast—one of his passengers estimated his

speed just before the collision as 'in the region of 90 to 100 miles per hour'—and two of the passengers had asked him, one of them a couple of times, to slow down. On a downhill stretch of road at Springwell Forest the offender was

coming up behind a red Jeep, which was travelling much more slowly. He made to pull out to pass the Jeep, but when he saw that there was a vehicle approaching in the opposite direction he was forced to attempt to pull in behind the Jeep, braking very fiercely. His speed was such that his car struck the rear of the Jeep violently and knocked it across the road, fortunately missing the oncoming vehicle. The offender's car was badly damaged and he and his three passengers were all injured.

The injuries to the passengers were all serious and constituted grievous bodily injury. Gerald Anthony Kennedy sustained a broken right collarbone, two broken ribs, internal bleeding of the intestine, a cut to the right leg, a chipped ankle bone, a possible chip to the jaw and swelling of the face. Martha Ruth Pitchforth required 14 staples to a cut on the top of her head and stitches to cuts on her chin, right elbow, right thumb, right leg and left breast. She sustained nerve damage to lower right leg and left hand. Elizabeth Ann Holmes sustained fractures of the left wrist, right leg and hip and jaw and had facial injuries.

The offender was interviewed by the police, but maintained that he could remember nothing of the incident. He did not say anything during the taped interview which could be regarded as an expression of regret or remorse. He pleaded guilty on arraignment, the first opportunity for doing so.

The offender, who is now aged 44 years, has a criminal record going back to 1968, mostly for offences of dishonesty and road traffic offences. Among them he has two convictions for driving with excess alcohol and two for driving while disqualified. When he was before the court on 2 April 1996, at which he was convicted again of driving while disqualified and other offences, he received a two-month suspended sentence and was disqualified for two years. We would observe that by that time his pattern of offending had become very confirmed and it was apparent that suspended sentences had not had the effect of deterring him from repetition. Courts faced with such offenders should in our view be rather more ready to impose more severe sentences to attempt to break the pattern and mark the disapproval of society of such continuing anti-social behaviour.

The pre-sentence report is largely concerned with the offender's persistent alcohol abuse, which has continued over many years. It does not appear that he has ever had any treatment for his addiction, nor that he has ever attempted to cut out the consumption of alcohol: the most that he has done is to attempt for the first time to reduce his intake since the accident. In interview with the probation officer he appears to have been aware of the extent of his recklessness and the gravity of the consequences of his actions. The probation officer reports that he 'would appear remorseful', but he has given little expression to such remorse as he feels. She made the following recommendation at the end of her report:

'If a custodial sentence is imposed, I do feel the defendant would benefit from support and guidance, in order to assist him with the transitional period he will experience upon his release.'

[1998] NI 232 at 236She went on to discuss the possibility of a community sentence, recommending that if this were adopted a period of statutory supervision over a protracted period would prove beneficial, including a requirement that he attend an alcohol management programme.

In passing sentence the learned judge stated that the commensurate sentence was one of three years' imprisonment. He decided, however, to impose a custody probation order under art 24 of the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160 (the 1996 Order). He sentenced the offender to two years' imprisonment, plus the two-month suspended sentence put into effect. He also made a probation order to take effect for 12 months immediately following his release from prison. One of the conditions attached to the probation order was that the offender was to participate in an alcohol management programme on ten days during the probation period and while there comply with the instructions given by or under the authority of the person in charge.

Mr Weatherup QC on behalf of the Attorney General submitted that a sentence of three years—the starting point in imposing the custody probation order—was unduly lenient for such grossly irresponsible driving, particularly in the case of an offender with a bad previous record. He enumerated the aggravating factors from the list set out in *R v Boswell* [1984] 3 All ER 353 which applied in the present case: the heavy consumption of alcohol, the grossly excessive speed, the persistent bad driving and disregard of warnings from his passengers, the commission of associated offences (driving while disqualified, no insurance and driving while unfit through drink), his previous bad record of driving offences and the causing of serious injuries to several people. Mr McMahon QC for the offender pointed to such matters as he could by way of mitigation, amounting to his early plea of guilty, the relationship of the victims—who remained supportive of him—and such effect as the incident has had upon him.

We have had occasion twice this year already, in *R v Sloan* [1998] NI 58 and *R v Mullan* [1998] NIJB 93, to express our views on the commission of serious motoring offences and the reflection of public concern about them in the substantial increase in maximum sentences in recent legislation. In our judgments in those cases we set out the approach which courts should adopt to serious driving offences, in the light of the shift in the attitude of the public towards them. We do not feel it necessary to repeat what we said in those judgments, to which we would refer, and limit ourselves to setting out two passages from the judgment of MacDermott LJ in *R v Sloan*. In the first, when commenting on the increase in the maximum sentence for dangerous driving causing death or grievous bodily harm, he stated (at 63–64):

'The maximum sentence is one of ten years' imprisonment which is double that provided under the earlier equivalent legislation (art 139(1) of the Road Traffic (Northern Ireland) Order 1981, SI 1981/154). 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
[1998] NI 232 at 237courts 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-Gs 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".'
In the second passage MacDermott LJ referred to the distinction between causing death and causing grievous bodily injury by dangerous driving (at 64):

'The offence is aimed at really bad driving whether described as dangerous or reckless and the culpability of that driving can rarely be judged simply by regarding the fact that serious injury rather than death is the consequence of the dangerous driving. This is a logical approach because the borderline between serious injury and death is often a fine one—some people survive appalling injury others succumb to a comparatively minor injury. As Lord Taylor CJ said in *A-Gs Ref* (*Nos 24 and 45 of 1994*) (1995) 16 Cr App R (S) 583 at 586: "[E]ssentially we have to look at cases in the light of the offender's criminality".'
In *R v Sloan* the court upheld a sentence of three years and nine months' imprisonment imposed for dangerous driving causing grievous bodily harm, to which was added a term of three months in respect of a suspended sentence put into operation. The applicant for leave to appeal had engaged in a grossly dangerous and irresponsible course of driving, culminating in a crash in which several parked cars were damaged and one of his passengers received a broken jaw and multiple lacerations. There was a question of drink, but there was not the requisite evidence to charge him with a drink-related offence. The applicant had a bad criminal record of driving offences. He suffered, however, from the after-effects of a previous head injury which provided an element of mitigation, otherwise the judge would have imposed a longer sentence.
In *R v Mullan* the appellant pleaded guilty to an offence under art 14 of the 1995 Order of causing death by careless driving having consumed alcohol to an extent exceeding the prescribed limit. His alcohol level was 150 mg in 100 ml of blood, and on the evidence he knew that he was over the legal limit, but elected to drive his car. He had run down the deceased while travelling fast along a straight country road, through complete failure to see him as he walked at the edge of the road or on the verge. The appellant must have known that an accident had happened, but chose to drive on some nine miles to his destination. Remorse had then struck him and he acknowledged what he had done and had the police summoned. He had a clear record and good standing in the community. The judge imposed a sentence of six years' imprisonment, which we reduced to four and a half years, as we took the view that a sentence of six years on a plea of guilty would bring the case into the top end of the scale for such offences, whereas we were of the opinion that although it was a bad case it was possible to envisage worse offences of its type.
Counsel on each side referred us to a fairly considerable number of reported cases in England, in which sentences of varying levels, ranging up to six years, had been imposed for comparable offences. Many, if not all, of

[1998] NI 232 at 238these cases were cited to us in *R v Sloan* and *R v Mullan* and taken into account in our decisions. 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:

'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.'

Having carried out this task, we are satisfied that the sentence in the present case was unduly lenient. Leaving out of account the probation order, the commensurate sentence assessed by the judge of three years is in our opinion inadequate to reflect the gravity of the case and the offender's conduct. In the scale of comparisons, we would certainly regard this as a worse case than *R v Mullan*, and one in which we would have regarded the appropriate sentence on a plea of guilty as being in excess of five years. Taking into account the element of double jeopardy, we consider that the commensurate sentence should be increased to four and a half years.
The question then arises whether it was right to make a custody probation order. There is no equivalent in English statute law of art 24 of the 1996 Order, and no assistance is available from any case law. We therefore think it appropriate to attempt to give some guidance to sentencers on the use of this sentencing power.

A court which has formed the opinion that a custodial sentence of 12 months or more would be justified for the offence is bound by the terms of art 24(1) to consider whether it would be appropriate to make a custody probation order. Under the terms of art 24(2) the sentencer is to take account of—

'the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences.'

It hardly needs to be said that the court should not regard it as correct as a matter of routine to make a custody probation order where a custodial sentence of 12 months or more would be prima facie justified. Still less should it be tempted to resort to it as an easy option or compromise.

In our view the court should look for some material which indicates that there will be a need to protect the public from harm from the offender or to prevent the commission by him of further offences. The relevant time at which the existence of that need falls to be determined is the time of his

[1998] NI 232 at 239release. If, for example, the court takes the view that *after his release* the offender is likely to relapse into excessive drinking and to drive under the influence of alcohol, it may consider that a period of probation, with a condition attached that he undergo an appropriate course of treatment, would help to prevent the commission of further drink-driving offences. If so, it would be justified in making a custody probation order. If it took the view, on the other hand, that by the time the offender is released probation would not be likely to help in such a way, it would not in our opinion be right to make a custody probation order.
In the present case the probation officer who prepared the pre-sentence report expressed the opinion that 'a period of statutory supervision over a protracted period would prove beneficial to the defendant if he engaged in a committed and purposeful manner.' She therefore recommended the condition which the judge adopted. It is to be observed that in making this recommendation she was doing so in the context of her suggestion that the court might consider a community sentence, i e immediate supervision. She was not directing herself to the usefulness of such an expedient when the offender would be released, after being in prison for a significant length of time. She did say earlier, however, that 'the defendant would benefit from support and guidance, in order to assist him with the transitional period he will experience upon his release.'

This in our opinion gave the judge material upon which he could properly take the view that a custody probation order was appropriate, and we would not interfere with his exercise of his discretion in that respect. We also consider the periods of disqualification from driving to be proper in the circumstances of the case.

We therefore shall quash the sentences of two years' imprisonment imposed by the judge on each of the first three counts in the indictment and in place of them pass a sentence on each of these counts of three-and-a-half years. The sentences on the other counts will remain unchanged. All these sentences will remain concurrent. We shall leave undisturbed the judge's order putting the suspended sentence of two months into effect, consecutively to these sentences, and the disqualification from driving of eight years on count 1. The probation order made by the judge, subject to the conditions which he attached to it, will also remain operative.

Order accordingly.