Neutral Citation No: [2019] NICA 28	*Ref:*	**STE10835**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**17/01/19**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

PAUL HOLYWOOD

_____

Before: MORGAN LCJ, STEPHENS LJ and HUDDLESTON J

_____

STEPHENS LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal by Paul Holywood ("the appellant") from that part of a sentence which disqualified him from driving for a period of 4 years. The appellant contends that the length of the disqualification was wrong in principle; that the judge failed to give reasons for the length of the period of disqualification; that the period of disqualification was manifestly excessive and that the judge failed to take sufficient account of the appellant's reliance on his ability to drive in order to return to employment upon release from custody.

[2] The period of disqualification came about as a result of the appellant's prosecution for road traffic offences arising out of a collision which occurred on 7 August 2016. The appellant was arraigned on 12 April 2018 and pleaded guilty to two counts of causing grievous bodily injury by driving carelessly when unfit to drive through drink or drugs contrary to Article 14(1)(a) of the Road Traffic (Northern Ireland) 1995 ("the 1995 Order") and to one count of driving while unfit through drink or drugs contrary to Article 15(1) of that Order.

[3] On 10 May 2018 concurrent determinate custodial sentences of 3 years (half in custody and half on licence) were imposed in relation to the two offences under Article 14(1)(a) together with a concurrent custodial sentence of 6 months in respect of the offence under Article 15(1). On each of these three counts the judge disqualified the appellant from driving for a period of 4 years with each period of disqualification to run concurrently.

[4] Mr Forde appeared on behalf of the appellant and Mr Harvey appeared on behalf of the prosecution.

Factual background

[5] On 7 August 2016 the appellant carried out what we describe as "a motorised pub crawl" starting at midday and involving him consuming alcohol in and then driving between various public houses in County Tyrone. This started in two public houses in Greencastle followed by a public house in Gortin and culminating in a hotel in Newtownstewart. After which at about 9.45pm, at a stage when he was some 2 times over the legal limit for alcohol, he was driving on the Beltany Road, Omagh when on a left hand bend as he was driving "too hard" he lost control of his car crossing to the wrong side of the road narrowly missing one car coming in the opposite direction but colliding head on with the next which was driven by Aine Doherty and in which Andrea Hill was a passenger.

[6] Both Aine Doherty and Andrea Hill sustained grievous bodily injuries in this collision requiring admission to hospital and surgery. Ms Aine Doherty suffered a compound fracture to the medial malleolus of her left ankle. She also suffered a patellar fracture to her knee and an ulnar fracture of the left forearm. Ms Andrea Hill suffered lacerations to her abdomen, damage to her small bowel and a left malleolar fracture. Post-operative complications included the development of deep venous thrombosis.

[7] The victim impact statement prepared by Ms Aine Doherty dated 17 May 2018 describes very significant and ongoing physical and psychological difficulties. The victim impact statement prepared by Ms Andrea Hill dated 30 May 2018 also describes significant and ongoing physical and psychological difficulties.

[8] The appellant also sustained injuries in the collision including a fracture to the mid third of his right clavicle.

[9] When first questioned about the matter by police at the scene the appellant denied having been the driver of the vehicle and attempted to implicate a passenger. The appellant underwent a preliminary breath test which gave a reading of 81mg/ml (the legal limit is 35mg/ml). The appellant subsequently refused to provide an evidential sample.

[10] The appellant has previous convictions for public order offences (disorderly behaviour, assault on the police and resisting police) dating back to October 2013 which were committed in circumstances where he had consumed alcohol. He has a conviction for a driving offence of excess speed committed on 2 July 2016 for which on 3 February 2017 he was fined £200 and received four penalty points. The detection for speeding occurred just five weeks before the episode of driving giving rise to the offences the subject matter of this appeal. It can be seen that two of the

features involved in the offences the subject of this appeal of alcohol and speed had previously been displayed on his criminal record.

[11] The appellant who is now 26 years old was brought up near Gortin being the second youngest in a family of five children. His parents are hard-working respectable members of the community. The appellant attended school until 16 passing several GCSEs with grade Cs. Whilst at school he helped with daily chores on his family's dairy farm and also worked in a local garage. After leaving school:

(a) He attended South-West Regional College in Omagh undertaking concurrently a 2 year course in light vehicle management and a 3 year course in heavy vehicle mechanics.

(b) Whilst at college he was employed in a local garage attending both of the courses on day release.

(c) After 3 years he had obtained an NVQ 3 (City and Guilds) in both courses.

(d) He returned for a fourth year to attend a course in diagnostic mechanics which he paid for himself. He passed this advanced course with an NVQ 4.

(e) In 2014, when he 22, he went to Australia on a 2 year visa initially working on a farm near Perth and then as a mechanical engineer for a local mining operation. This work is described as being a heavy duty mechanic on crushers and other plant. In turn this led to employment at Fort Edna Northern Australia.

(f) Whilst in Australia the appellant completed a number of exams which qualified him to drive diggers and other heavy equipment.

(g) In 2016 he returned to Northern Ireland but prior to his return Inline Engineering (a sub-contractor to Rio Tinto) offered him employment in Australia and to sponsor him for a 4 year visa. The plan was for him to return to Australia once the visa was issued. The visa arrived 2 weeks before these offences were committed.

(h) Upon his return to Northern Ireland the appellant secured employment in a local business as a mechanic and digger driver working in Northern Ireland and in Scotland.

[12] It is apparent from this sequence and from the character references which we have read that the appellant has worked hard to obtain vocational qualifications and experience. We also consider that disqualification from driving will have an adverse impact on the appellant's ability to work and on his employment prospects. The

appellant is a digger driver and many potential employers must require that their employees are able to drive diggers not only on the employer's private property but also on the public roads. We consider that the adverse impact on the appellant's employment prospects and accordingly the adverse impact on rehabilitation is a significant factor in this case.

The judge's sentencing remarks

[13] In arriving at the sentence which we have set out the judge considered the background facts and the personal circumstances of the appellant. He referred in detail to the injuries sustained by Aine Doherty and Andrea Hill.

[14] The judge identified aggravating features as (i) causing of grievous bodily injury to more than one person; (ii) the failure by the appellant to provide a sample after the preliminary breath test had revealed a reading well in excess of the legal limit; (iii) the fact the appellant was on a motorised pub crawl at the time of the offending; (iv) the initial attempt to blame a passenger who had been travelling in the car with him at the time. The judge specifically stated that he was not satisfied to the required standard that *greatly excessive speed* was to be regarded as an aggravating feature in this case (our emphasis).

[15] The judge identified mitigating features as (i) the appellant's plea of guilty at an early opportunity. However, the judge noted that this was not at the first available opportunity; the appellant having denied involvement at the scene and having vacillated in his police interview and (ii) the expression of genuine remorse.

[16] The judge referred to the fact that in the Division in which he was sitting there were far too many serious road traffic accidents and many of them had alcohol as a common denominator. As a result, he considered that the sentence to be imposed must have a deterrent effect and as such personal mitigation cannot weigh as heavily as it might in other circumstances.

[17] The judge in imposing sentence did not give any reasons for the 4 year period of disqualification from driving.

[18] No application had been made to the judge under Article 36 of the Road Traffic Offenders (Northern Ireland) Order 1996 ("the 1996 Order") to reduce the obligatory period of disqualification. This meant that there was no ruling by the judge in relation to an Article 36 application.

[19] In imposing the custodial element of the sentence the judge did not take into account the punitive element of the period of disqualification and the impact that disqualification would have on the appellant.

Grounds of appeal

[20] Mr Forde relying on *R v McKeown* [2016] NICA 24 at paragraph [29] contends that the sole purpose of a disqualification from driving is to protect the public which involves an evaluation of the future risk posed by the offender. On that basis he submitted that the question for any sentencing court should be what period of disqualification is required to protect the public and if the future risk is low then the minimum period of disqualification should be imposed. Mr Forde went on to submit that if the future risk was low yet a period in excess of the minimum is imposed then the sentence is wrong in principle as the disqualification period was being used punitively to further punish the appellant rather than to protect the public.

[21] Mr Forde also submitted that the judge failed to give reasons for his decision in relation to the length of the period of disqualification, that the length of the period of disqualification was manifestly excessive given the protective measures which were in place that diminished the risk to the public and that the judge failed to take into account the impact on the appellant's employment and the adverse impact on rehabilitation.

Legal Principles

(a) Obligatory minimum periods of disqualification

[22] The offences under both Article 14 and Article 15(1) of the 1995 Order involve obligatory disqualification. Article 35(1) of the 1996 Order specifies that the period of obligatory disqualification in respect of the offence under Article 15(1) of the 1995 Order is not less than 12 months. Article 35(4)(a)(iii) specifies that the period of obligatory disqualification in respect of Article 14 of the 1995 Order is not less than 2 years. In this case under Article 41 of the 1996 Order and by virtue of the Road Traffic Offenders (Appropriate Driving Test) Order (Northern Ireland) 1997 the court must order the appellant to be disqualified until he passes an extended driving test.

[23] These obligatory periods are minimum periods so that there is discretion to impose a disqualification greater than the minimum.

(b) Power to reduce an obligatory minimum period of disqualification

[24] Article 36 of the 1996 Order enables the court to reduce the obligatory period of disqualification if by a specified date the offender satisfactorily completes a course approved by the Department. If the court is minded to make a reduction then it shall be for a period of not less than 3 months and not more than one quarter of the unreduced period. This means that in relation to an obligatory period of disqualification of 2 years the court may reduce that period by not more than 6 months and not less than 3 months. However, the latest stage for completion of a

course must be at least 2 months before the last day of the period of disqualification as reduced by the Order.

[25] In this case no application was made at first instance under Article 36. In such circumstances there has been no ruling. An application under Article 36 does not have to be made during the sentencing exercise and indeed we consider that there may be some merit in such applications being made at a later date to determine how the offender has progressed. In any event an application at first instance is necessary in order for there to be an appeal in relation to any issue that might arise under Article 36. If the appellant now wishes to make such an application it should be made to the appropriate first instance court.

(c) The purpose of a period of disqualification

[26] The purpose of a period of disqualification was considered by this court in *R v McKeown*. Keegan J at paragraph [29] in delivering the judgment of the court stated that "the purpose of a disqualification from driving so far as is possible is to protect the public" which involved "an evaluation of the future risk posed by the offender." She then described the exercise to be performed by the sentencing judge in assessing the future risk and stated "that within this exercise the sentencing judge should consider whether or not the disqualification represents an appropriate punishment for the offence." Furthermore, at paragraph [31] she observed that obligatory periods of disqualification applied no matter how low the risk so that there is an element of punishment within any disqualification imposed.

[27] It can be seen that this court in *McKeown* set out the purposes of disqualification as including protection of the public and punishment. We emphasise that the primary purpose is forward looking aimed at the protection of the public but that there are also punitive and deterrent purposes.

(d) Disqualification as a part of the sentence

[28] In *McKeown* Keegan J stated that the "sentencing judge should also consider the disqualification period in the context of the sentence as a whole." We emphasise this point. Disqualification is an integral part of the sentence so that a greater adverse impact of a period of disqualification might be taken into account in arriving at the appropriate length of a custodial sentence. Furthermore, as in *R v Pashley* [1974] RTR 149 the deterrent and punitive purposes of a period of disqualification might be satisfied by the period of imprisonment which was imposed. In that case Scarman LJ considered the period of imprisonment plainly to be a severe sentence so that if it failed to teach the appellant the wisdom of not driving dangerously and not having too much to drink before he gets into his motor car to drive then nothing would.

(e) No consecutive periods of disqualification

[29] There is no power to make a sentence of disqualification consecutive to another period of disqualification, see *R v Meese* [1973] 1 WLR 675. In this case all three offences carried obligatory periods of disqualification but those periods must be concurrent.

(f) The impact of a prison sentence on consideration of the appropriate period of disqualification

[30] The period of disqualification starts to run as soon as it is ordered (save specifically provided for by statute which does not arise in this case), see *R v Meese.* This means that when a disqualification period is imposed together with a custodial sentence the disqualification period runs whilst the offender is in prison and would in any event be unable to drive. It can be seen that the obligatory period of disqualification of 2 years would have entirely expired prior to the offender's release if an offender was sentenced to 4 years in prison (half in custody half on licence).

[31] Amending legislation was passed the aim of which was to avoid offenders who have been disqualified from driving and who had a custodial sentence imposed at the same time serving all or part of that disqualification whilst in custody. The intention of Parliament being that periods of disqualification should be served by the offender whilst he or she is at liberty in the community. The amendments were made by the Coroners and Justice Act 2009 inserting Articles 8A and 8B into the Criminal Justice (Northern Ireland) Order 1980 and Articles 40A and 40B into the 1996 Order. In so far as relevant to this appeal the legislative intent of the amendment by the insertion of Article 40A was to require a court if it disqualified under Article 35 and imposed a custodial sentence to also impose an extension period to the disqualification period which in the circumstances of this case would represent the custodial element of the prison sentence. In this way the court would be required by the imposition of an extension period to provide that the disqualification should be served by an offender whilst he or she is at liberty in the community.

[32] The statutory amendments have not been commenced in Northern Ireland. These new provisions are not in force. At present there is no statutory *requirement* in Northern Ireland to impose an extension period so that the disqualification is served by the appellant whilst he is at liberty.

[33] The present position is that for offences under Article 14 of the 1995 Order there is an obligation on the court under Article 35 of the 1996 Order to impose a 2 years disqualification (subject to the discretion to shorten that period under Article 36). That obligation is fulfilled even if a prison sentence is imposed so that some or all of the disqualification is served whilst the offender is in custody. There is no *requirement* to impose an extension period so that the disqualification is served whilst the offender is at liberty.

[34] Despite the lack of any statutory obligation or requirement the question then arises as to whether in determining the length of the period of disqualification a court *may* take into account that for the whole or part of that period the offender will be in custody. We consider that this is an entirely appropriate matter to be taken into account. Indeed we consider that a sentencing court must have regard to the diminished effect of disqualification both in relation to its protective purpose and also in relation to its punitive and deterrent purposes, if the person who is to be disqualified is also to be detained in pursuance of a custodial sentence. For instance as far as the punitive purpose is concerned there will be no punitive element from disqualification whilst the offender is in prison. In the exercise of discretion a court when imposing a period of imprisonment may impose a disqualification period greater than the obligatory period to allow for the fact that the offender is in prison during part or all of the obligatory period, see *R v Phillips [1955] 3 All ER 272.* In this case there was no *obligation* to impose a period of a disqualification longer than 2 years but consideration should have been given as to whether a longer period of disqualification was necessary as a matter of discretion given that the custodial element of the appellant's prison sentence was 18 months.

[35] The sequence that we adopt is to identify the obligatory period of disqualification which in this case is 24 months then to add the custodial element of 18 months to that arriving at a figure of 42 months. Thereafter, we will give consideration in the exercise of discretion both as to whether that period should be increased or decreased.

(g) Some of the relevant factors to be taken into account in the exercise of discretion

[36] We recognise both as a matter of general principle and because each case is fact specific, that it is not possible to be exhaustive or overly prescriptive in relation to the relevant factors to be taken into account in the exercise of discretion. Subject to those qualifications in the following paragraphs we illustrate the sort of factors to be taken into account when considering imposing a longer period of disqualification than the obligatory minimum period to take into account that the offender will be in prison for the whole or part of that period.

[37] The future risk posed to the public by the offender driving is the primary factor. An assessment of the predictive risk will ordinarily involve a careful analysis of a number of factors. Those factors will include the factual background to the particular offence for which the offender is being sentenced which should be carefully analysed to determine what insight those facts give as to the risks that might occur in the future. Also careful consideration should be given to personal circumstances of the offender, together with an analysis of any criminal record particularly for road traffic offences or offences involving drink or drugs. Other factors would include the offender's driving behaviour between the date of the offence and the date of the sentence, the age of the offender and his driving

experience. In this way predictive factors both as to risk of a future occurrence and as to the protective measures can be analysed.

[38] Another feature is whether the punitive and deterrent effects have been met by the imposition of the prison sentence or whether those purposes should also be achieved by the period of disqualification, see *R v Pashley*.

[39] The financial difficulties, if any created by the disqualification and any temptation to drive whilst disqualified, see *R v Pashley [1974] RTR 149.*

[40] The impact of the period of disqualification upon the aim of rehabilitation, see *R v Ellis [2016] EWCA Crim 593* at paragraph [23].

[41] The effect of the period of disqualification on the offender's ability to get work which may include consideration as to his employment history and consideration as to the availability of public transport, see *R v Ellis* at paragraph [24] and *R v Backhouse [2010] EWCA Crim 1111* at paragraph [21].

Discussion

[42] The first ground of appeal proceeds on the premise that the sole purpose of a disqualification from driving is to protect the public which involves an evaluation of the future risk posed by the offender. The premise is incorrect. There is an element of punishment and deterrence in disqualification.

[43] The judge expressed no reasons for imposing a 4 year period of disqualification. In such circumstances this court should form its own assessment and if the period is manifestly excessive reduce it.

[44] The primary purpose of disqualification is to protect the public from the risk posed by the offender's driving in the future. That risk is informed by the nature of the offences which were committed. These were serious cases of careless driving whilst unfit causing grievous injuries to two members of the public. The appellant's behaviour in going on an extended motorised pub crawl was entirely reprehensible. He is assessed by the Probation Service as presenting a medium likelihood of reoffending. He was also assessed by the Probation Service as not posing a significant risk of serious harm. However, the probation report went on to state that in order to maintain this assessment the appellant needs to exercise appropriate control in respect of his alcohol use, avoid risk-taking behaviours, exercise maturity in his decision-making and avoid complacency regarding the consequences of his offending.

[45] In circumstances where, as here, an offender has demonstrated his capacity to cause serious harm to others by his alcohol related driving behaviour there must be concern about the need to protect the public. Those concerns are endorsed by virtue of the public order offences and by the fact that approximately one month prior to

these offences and on 2 July 2016 the appellant was guilty of a speeding offence. The offences the subject of this appeal not only involve loss of control of a motor vehicle through alcohol but also the appellant was driving "too hard."

[46] There are a considerable number of aspects diminishing the future risk. These include the genuine insight and remorse of the appellant. He accepts the gravity of his offending and in particular how his actions have impacted on the injured parties. He concedes that he was reckless and exercised poor judgment. He recognises that his actions could have resulted in a fatality. He self-reports reducing his alcohol use. He is in a stable relationship and has the support of his parents whom he considers he has let down. A period of 21 months elapsed between the offending and the sentencing without any further road traffic collisions or road traffic offending on the part of the appellant. He has an exemplary record in prison.

[47] It is submitted on behalf of the appellant that he poses a low risk. We do not accept that submission. It appears to us that whilst the appellant has an understanding that his future financially and emotionally depends on him not reoffending that the combination of these offences and the earlier public order and speeding offences gives rise to a greater risk of reoffending than contended for on behalf of the appellant.

[48] The obligatory period of disqualification is at least 2 years. The custodial element of the appellant's sentence was 18 months. If the amending legislation was in force then (subject to a reduced period under Article 36) the overall disqualification would require to have been at least 3 years and 6 months so that the public are protected for a period of at least 2 years whilst the appellant is at liberty.

[49] We consider that the period of 3 years and 6 months should not have been increased given the impact of disqualification on the appellant's employment and employment prospects.

[50] We have given anxious consideration to the question as to whether the period of obligatory disqualification when combined with the custodial element of the prison sentence which amounts to 3 years and 6 months should be reduced. The factor which weighs heavily with us is the significant adverse impact on the appellant's employment prospects and the significant adverse impact on rehabilitation. Taking those factors into account and viewing all aspects of the sentence, we consider that the period of disqualification which ought to have been imposed was one of 3 years.

[51] We consider that the period of 4 years disqualification was manifestly excessive.

Conclusion

[52] We allow the appeal.

[53] On all three counts we reduce the periods of concurrent disqualification to three years.

[54] We also order that the appellant is disqualified until he passes the extended driving test.

[55] The appellant if he so wishes may make an application under Article 36 of the 1996 Order to the appropriate first instance court.