IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

SEAMUS GERARD MULLAN

MacDERMOTT LJ

At Londonderry Crown Court on 22 September 1997 the appellant (Seamus Gerard Mullan) pleaded guilty to 2 counts:

Firstly, causing the death of Thomas Andrew O'Neill (the deceased) by driving without due care and attention when having excess alcohol in his blood on the Hillhead Road, Toomebridge on 15 December 1996 contrary to Article 14(1)(b) of the Road Traffic (Northern Ireland) Order 1995. Secondly, dangerous driving on the same date contrary to Article 10 of the Order. This latter driving occurred after the fatal accident and is of no real relevance in the present appeal.

On 21 November 1997 His Honour Judge Burgess sentenced the appellant to 6 years' imprisonment on count 1 and to a concurrent sentence of 12 months' imprisonment on count 2. He also disqualified the appellant from driving for a period of 6 years.

The appellant has appealed to this court and on his behalf Mr John McCrudden QC (who appeared with Mr McCreanor) submitted that the 6 year sentence was both wrong in principle and manifestly excessive. As this is the first case under Article 14 to come before the Court of Appeal in Northern Ireland and indeed was the first prosecution under Article 14 for causing death by careless driving when "over the limit" we shall seek to express our views in a manner which not only deals with the present appeal but which may assist sentencers in other cases under Article 14 which created a new offence.

THE BACKGROUND FACTS

The appellant is a young man of 25 who lives at Portglenone, County Antrim - and he has a clear criminal record. On the evening of 15 December 1996 he drove his Peugeot 309 car to O'Neill's Hotel at Toomebridge. The disco in the hotel finished at 1.00 am and he drove off homewards along the Hillhead Road. The road is straight

and close to the Elk Inn he struck the deceased whose body was found lying on the hard shoulder adjacent to the road and on the appellant's nearside at about 1.30 am. The deceased's injuries included a fracture-dislocation between the base of the skull and the top of the spine in the neck with transection of the underlying spinal cord and transection of the aorta. His death must have speedily followed his being struck by the car. Mr Quinn of the Forensic Science Agency was asked to determine the position of the pedestrian in relation to the accident car just prior to impact and he reported:

"In my opinion the position of the paint smears and tears on the pedestrian's outer garments indicates that the pedestrian was upright with his back to the car just prior to impact. The position of the damage to the Peugeot car indicates that the front nearside of the car initially struck the back of the pedestrian's legs causing the pedestrian to be knocked onto the bonnet and into the windscreen. The pedestrian then came off the nearside of the car breaking the nearside door mirror. It is highly probable that the driver of the car did not brake or braked at a very late stage since the pedestrian went onto the car rather than being thrown ahead of the car upon impact. At least the nearside headlight was illuminated on dipped beam at the time of the impact."

The appellant's car was damaged at the near front side and the nearside half of the windscreen was smashed. The appellant must have known that he had struck someone or something but he chose to drive on. He drove some 9 miles to the home of the Henry family hoping to see the girl he had been friendly with. In fact she was not there. The appellant was obviously in a distressed condition and Mr Arthur Henry described him thus:

"He was rocking back and forward on the stairs. He wasn't really making a lot of sense - what he was saying. He was crying very loudly. He was talking about knocking somebody down. He said things like, `What have I done.' I asked him a number of times to tell me. He said something like, `I knocked somebody down at the Elk.' I went up and told Mum what was happening. I went downstairs and I found Shea (the appellant) outside our house lying on the ground near the wall. He was rolling about and crying away. He said to me, `I've knocked somebody down, I've spoilt somebody's life.' He again said that this had happened near the Elk. He was in a very bad state."

He concluded his statement by saying:

"When I asked Shea he said, `No there's no point in hiding anything. I'll just take the consequences coming to me'."

The appellant also spoke to Mrs Henry and her statement records:

"He was in an extremely distressed state. He was shouting out and crying a lot. He was in a very bad way. He was shouting things like `My God what have I done', `God take me away', that type of thing. I asked him what had he done - had he hit somebody. He said `I've hit something a person I think. Get the police, get the ambulance'. I asked him where this had happened. He said `On the Toome line'."

She telephoned the police who arrived about 1.45 am. Constable Millar asked the appellant if he had been drinking and he replied `Yes. Earlier'. The constable also noted that the appellant's eyes were glazed and his breath smelt of intoxicating liquor. The appellant was arrested and taken to Magherafelt RUC Station and at 3.40 am Dr Johnston took a blood sample. Later examination revealed that it contained 150 milligrams of alcohol in 100 millilitres of blood. As the limit is 80 milligrams of alcohol per 100 millilitres of blood the appellant was driving when his blood alcohol level was about twice the permitted limit.

During subsequent interviews the appellant denied that he was aware that he had hit a person. The judge understandably had difficulty in understanding his attitude but accepted the explanation of Dr McDonald, consultant psychiatrist, who examined the appellant on 13 October 1997 and so felt able to say:

"The report of Mr McDonald assists me greatly in trying to understand answers which flew in the face of the obvious and in the face of his own earlier statement. The detailed and reasoned report allowed the court to accept a background where a period of intense denial would be a characteristic of his personality. Therefore the denials will not be treated by the court as a sign of the absence of remorse, remorse which the court can more accurately and genuinely find in the defendant's reaction a short time after the accident and in the reports of the doctor and in the probation report. In saying that, nothing excuses the failure of the defendant to stop the car and the sentence of imprisonment will reflect that failure."

We would here pause to comment on the judge's analysis of the case when passing sentence. It is quite first class. He reviewed the facts thoroughly and objectively. He explained the law clearly and at all times he was sensitive and understanding realising that this case has been, and is, a real tragedy which has affected both the O'Neill and Mullan families.

THE STATUTORY PROVISION AND ITS PURPOSE

Article 14 of the 1995 Order reads:

"Causing death, or grievous bodily injury, by careless driving when under influence of drink or drugs

14.-(1) If a person causes the death of, or grievous bodily injury to, another person by driving a mechanically propelled vehicle on a road or other public place

without due care and attention, or without reasonable consideration for other persons using the road or place, and -

(a) he is, at the time when he is driving, unfit to drive through drink or drugs; or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit; or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of Article 18, but without reasonable excuse fails to provide it,

he is guilty of an offence.

(2) For the purposes of this Article a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Paragraph (1)(b) and (c) shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle."

The maximum sentence on conviction for this offence is one of 10 years' imprisonment. Article 14 replicates Section 3A of the Road Traffic Act 1988 in England and Wales but in this jurisdiction the Article also applies when grievous bodily injury is caused by the driving which for convenience we shall refer to as `careless' driving. Thus in a prosecution under Article 14(1)(b) the Crown has to establish 2 propositions:

(a) That the accused was driving carelessly and that such driving caused death or grievous bodily injury; and

(b) That the accused was "over the limit".

The Crown does not have to prove any causal link between the drink and the death or grievous bodily injury.

Why then was this new provision enacted? The Report of the Road Traffic Law Review (HMSO, April 1988) (known as the "North Report") pointed out that there was a difficulty in dealing with cases where a driver who was unfit through drink caused death by an act of bad driving and concluded that there should be a specific offence to cover such driving (paragraphs 6.18-6.20). At paragraph 6.23 the Review team made further observations regarding this matter:

"We see this offence as being equivalent in seriousness to the section 1 causing death [by dangerous driving] offence. If the elements of the offence: a decision to

drive after drinking, bad driving amounting at least to driving without due care and attention, and the causing of a death, are added together they amount, we believe, to conduct as serious as that covered by an offence causing death by very bad driving. We recommend, therefore that the maximum penalty for this offence should be the same as for the offence of causing death by very bad driving [at that time 5 years but subsequently increased to 10 years] ..."

The Government subsequently addressed this issue in the White Paper "The Road User and the Law" (Cm 576 February 1989) at paragraph 2.25:

"There is particular concern that bad drivers who have been drinking and who cause death are frequently dealt with too leniently under current laws. The changes proposed for the present reckless driving offences will make it easier to bring prosecutions under section 1 in England and Wales against drivers who cause death by an act of very bad driving whether or not they are also over the limit prescribed for alcohol."

At paragraph 2.26 it was pointed out that the Government proposed to further strengthen the law by introducing an offence of causing death by careless or inconsiderate driving while under the influence of drink or drugs - which of course emerged as Section 3A of the Road Traffic Act 1988 from which Article 14 of the Road Traffic (Northern Ireland) Order 1995 is derived.

Judge Burgess was clearly mindful of the background to this new offence when he stated:

"Therefore by the introduction of this new offence Parliament has shown its intention to strengthen the criminal law to reduce death on the roads by increasing the punishment available to the courts and by specifically targeting those who cause death while driving with excess alcohol."

We readily accept that observation which echoes what this court said in Sloan [February 1998] when commenting on the fact that Parliament had seen fit in the 1995 Order to increase the maximum sentence for dangerous driving causing death or grievous bodily injury (Article 10) from 5 to 10 years:

"This substantial increase from 5 to 10 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 Attorney-General's Reference [No.30 of 1995] (Law) [1996]

1 Cr.App.R(S) 364 at 367 a proper sentence `must now have in it elements of retribution and deterrence'."

In targeting what can be conveniently termed "drink driving" Parliament saw fit to relate it to careless driving rather than dangerous driving as careless driving embraces all forms of "bad" driving whereas dangerous driving is "bad" driving of a more culpable form. This simpler formulation is also appropriate because the courts have in recent years repeatedly emphasised that no matter how driving is described - dangerous, reckless or careless - the courts when passing sentence are concerned with the culpability or criminality of the "bad" driving. Thus Lord Taylor CJ said in Attorney-General's Reference [Nos 24 and 45 of 1994] (Rayner and Wing) (1995) 16 Cr.App.R(S) 583 at 586:

"... essentially we have to look at cases in the light of the offenders' criminality."

Before turning to the arguments in relation to the present appeal we would repeat and adopt the words of Lord Taylor CJ in Attorney-General's Reference [Nos 14 and 24 of 1993] (Shepherd and Wernet) 15 Cr.App.R(S) 640 cases in which the accused had pleaded guilty to Section 3A offences. He said at page 643:

"These reforms show an intention by Parliament to strengthen the criminal law, to reduce death on the roads by increasing the punishment available to the courts, and by specifically targeting those who cause death whilst driving with excess alcohol. The 5-year maximum sentence for causing death by dangerous driving has been doubled. In tandem with that, causing death by the less serious form of culpable driving, characterised as careless, carries the same maximum sentence if coupled with driving whilst unfit through drink or over the limit. The latter offences do not require proof of a causal connection between the drink and the death. Thus, under section 3A, whoever drives with excess alcohol does so at his or her peril, and even if the driving is merely careless but death results, the courts' powers to punish are the same as for causing death by dangerous driving."

and later he said:

"The offence under section 3A, although requiring proof only of careless driving rather than dangerous driving, also has built into it the aggravating feature which was the first in the list in *Boswell*, namely consumption of alcohol or drugs. Thus, where a driver is over the limit, and kills someone as a result of his careless driving, a prison sentence will ordinarily be appropriate. The length of sentence will of course depend upon the aggravating and mitigating circumstances in the particular case, but especially on the extent of the carelessness and the amount the defendant is over the limit. In an exceptional case, if the alcohol level at the time of the offence is just over the border line, the carelessness is momentary, and there is strong mitigation, a non-custodial sentence may be possible. But in other cases a prison sentence is required to punish the offender, to deter others from drinking and

driving, and to reflect the public's abhorrence of deaths being caused by drivers with excess alcohol."

Thus in considering the arguments in this and any other case under Article 14 the sentencer will have regard to the extent of the carelessness and the amount the defendant is over the limit together with all aggravating or mitigating circumstances.

THE EXTENT OF THE CARELESSNESS

Salient Factors

1.Location

There was no evidence as to the manner in which the appellant was driving at the time of or immediately before the collision with the deceased. Further there are no brake or skid marks on the road or lay-by to show where the car was. We do know that the deceased was found lying on the hard shoulder clear of the road and that the debris from the car was later found on the hard shoulder. Mr McCrudden argued that it would be wrong to infer that the appellant left the road and was driving on the hard shoulder at the time of impact. The alternative is that the deceased was walking on the road probably near its edge with the hard shoulder. In our judgment the exact position of the deceased matters little as he was clearly in a position to be seen by the appellant if he were keeping a proper look out. This is a long straight portion of road and the appellant does not suggest that he was blinded by the lights of an oncoming vehicle or that the deceased for some reason stepped out in front of him - indeed such a suggestion would be incompatible with Mr Quinn's opinion.

2.Speed

The impact appears to have occurred some 145 feet before the point at which the speed restriction of 40 mph ends. The appellant assessed his speed at 55-60 mph during his interview and the damage to the car and the effect of the impact on the deceased do not suggest that this was an underestimate. Speed must be measured in the context of all the relevant circumstances, for instance (and obviously) a speed which is safe by day may be unsafe at night. This accident occurred some time after 1.00 am and when the investigating police officer (Constable Hargy) arrived at the scene at 2.00 am he noted that it was raining, the road was wet and no moonlight was present.

3.Condition of Vehicle

Another relevant factor is the condition of the car - if it is in poor condition, - especially if the tyres are substandard - it is obvious that it should be driven

comparatively slowly if at all. In this case both front tyres were below the legal tread limit and the nearside rear tyre had no tread for a significant area and the rest of the tread on that tyre was below the legal limit. Mr McCrudden suggested that the judge had over-emphasised the condition of the tyres but we do not agree. Driving at the speed which he accepts on a wet road in rain with defective tyres indicates, of itself, a considerable degree of irresponsibility.

4.Driving after Excessive Drinking

A further factor which Mr Kerr QC (who appeared with Miss Orr for the Crown) emphasised as indicating a high level of culpability was that he chose to drive home in the prevailing conditions when he knew, as he put it, that he was `over the limit'. We know that he was about double `the limit' and he must have been aware before he went to O'Neill's Hotel that he should not have taken the car out at all having regard to the considerable amount of alcohol which he accepts he consumed during the previous day following the ending of his relationship with his girlfriend. At O'Neill's and earlier he appears to have had only 2 or 3 beers but he ought to have known full well that on top of his previous intake he was seriously reducing his capacity to drive safely. Indeed in his history to Dr McDonald he said, "I knew I was over the limit". Nevertheless, he chose to drive home.

THE AMOUNT THE APPELLANT WAS OVER THE LIMIT

As we have already indicated the appellant was not only over the limit but well over the limit - almost double the limit. The fact that much of his intake was the previous day does not affect the matter - those who drink and drive know or ought to know that the effects of alcohol linger on long after drinking has ceased. Further, as we have already pointed out, the appellant accepted that he knew he was over the limit when he chose to drive home.

Mr Kerr argued that having regard to all these matters this was a bad case of careless driving. Mr McCrudden sought to persuade us otherwise. For our part we are satisfied that this was a bad piece of driving with a high level of culpability and criminality being displayed by the appellant. That said we recognise that there could be, and have been, worse cases of this nature and room must be left for such within the statutory framework which limits the sentencer's range of options.

AGGRAVATING AND MITIGATING FACTORS

A serious aggravating factor in this case is that the appellant did not stop when he had obviously hit something or someone. Failing to stop has been recognised as an aggravating factor since the listing of such factors in Boswell [1984] 6 Cr.App.R(S) 257. Mr McCrudden sought to suggest that the appellant drove on out of distraction rather than to avoid detection. Such an analysis overlooks the gravamen of driving on - failing to stop denies to the victim the chance of receiving some assistance

(direct or indirect) from the driver who has struck him down. In this case it is unlikely that even the most immediate assistance could have saved the deceased but the appellant's failure to stop compounds his already high level of culpability.

In mitigation Mr McCrudden very properly emphasised that the appellant had pleaded guilty at the earliest possible opportunity. He also drew our attention to his clear record, and to his standing and character in the community and to his remorse and sadness as highlighted in Dr McDonald's report. For our part we must repeat what Lord Taylor said in Attorney- General's Reference [No. 49 of 1994] [Brown] 16 Cr.App.R(S) 837 at 841:

"We do not wish to sound harsh and unsympathetic, but personal elements of mitigation and matters such as acute guilt feelings and depression of a temporary nature are not matters which should deflect the court from passing a sentence which is appropriate for the gravity of the case".

THE APPELLANT'S ARGUMENTS

Mr McCrudden's first proposition was that the Judge was in error in applying the guideline cases in England and Wales. He submitted that as this court had seen fit not to follow the English Court of Appeal in, for instance, rape cases [R v McDonald, Taggart and Farquhar [1989] N137], and possession with intent of large quantities of drugs [R v McIlwaine March 1998] by preferring a higher starting point we should in relation to drink driving cases elect to choose a lower starting point as such offending is less prevalent in this jurisdiction. We simply cannot accept that argument which may or may not be based on a sound factual basis. We do know that in this jurisdiction drink is a relatively common factor in many accidents. It is a factor which the Government here, (as in England) has sought to target in the hope that severe but appropriate sentences may deter drivers from drinking and so reduce the amount of carnage on our roads. This is a shared problem throughout the United Kingdom and should receive a common judicial response but in this jurisdiction if current sentencing levels are not achieving deterrence then those levels will have to be increased irrespective of what may be the approach in the rest of the United Kingdom.

Thus it is appropriate for sentencers to start their search for the appropriate sentence by remembering what Lord Taylor said in Shepherd and Wernet to which we have already referred - at page 644:

"Since Parliament has thought it right and necessary not merely to increase, but to double the maximum sentence for offences under sections 1 and 3A of the 1988 Act (as amended) the guidelines in *Boswell* need to be reconsidered. Clearly the statements of principle in that case, and the examples of aggravating and mitigating circumstances still stand, but at p. 260 of the report, there appears the following statement:

`Drivers who for example in racing on the highway and/or driving with reckless disregard for the safety of others after taking alcohol should understand that in bad cases they will lose their liberty for 2 years or more.'

In our judgment the phrase `2 years or more' should now read `upwards of 5 years', and in the very worst cases, if contested, sentences will be in the higher range of those now permitted by Parliament."

In passing we would add that some Home Office figures cited by Mr McCrudden suggest that sentences appear to be increasing for this type of offence. Thus sentences in the range of 5-7 years were in 1994 imposed in 2.4% of cases, in 1995 in 5% and in 1996 in 8%.

Mr McCrudden's main submission was that a sentence of 6 years' imprisonment on a plea of guilty was in the circumstances of the present case manifestly excessive. It was evident that both he and Mr Kerr had carefully considered all the reported cases touching on sentencing for this type of case. The only reported case in which a 6 year sentence on a guilty plea has been upheld is R v Jackson [1997] 1 Cr.App.R(S) 34. On its facts that would appear to be a rather worse case than this present case because the driver overrode the attempts of his friends to prevent him driving and ignored his friends' efforts to persuade him to slow down. Comparison of instant cases with reported cases on a factual basis is rarely a helpful exercise and we prefer to seek to assess the culpability of the appellant starting from the proposition that if contested a sentence of at least 5 years would be appropriate as we are satisfied that this was a "bad" case. Here the sentence of 6 years on a plea of guilty could be interpreted as one of about 8 years if the case had been contested. Our immediate reaction is that the Judge placed this case too high on the scale which has 10 years as its upper limit. We must recognise that there will be cases where more alcohol was consumed: there will be more horrific cases involving more than one death: there may be cases where the driver was racing or seeking to avoid apprehension: there will be cases in which there is evidence of a persistent course of bad driving.

It has long been recognised that cases involving the death or serious injury of the victim of a road traffic accident cause many difficulties for the sentencer. He cannot but be aware of the tragedy which has befallen the victim and his family. This Judge was clearly aware of this aspect of the case as are the members of this court. The judicial approach is, however, clear and we adopt what Lord Bingham of Cornhill CJ said in Attorney-General's Reference [No. 66 of 1996] [Spencer] [1998] 1 Cr.App.R 16 at 21:

"No one who has not suffered such a loss is in a position to understand how they feel and it would be entirely inappropriate to disparage or belittle the emotions of those who suffer in this way. It is nonetheless the duty of the trial judge, and of this Court on application or appeal to it, to judge cases dispassionately and to do its best to reach the appropriate penalty, taking account of all the relevant circumstances.

The court must of course take account of the understandable outrage felt against any defendant who has caused consequences such as these. That is a sense of outrage shared by the wider public, which feels acute anxiety about the cruel, avoidable loss of life which is a feature of cases such as this. On the other hand, the court must take account of the interests of the defendant who has often, as here, not intended these consequences and is often, as here, devastated by them. The court cannot overlook the fact that no punishment it can impose will begin to match the deep sense of responsibility which defendants often feel. It is important that courts should do their best to approach their task objectively and dispassionately. They should not be overborne or intimidated into imposing sentences which they consider are unjust".

Bearing these matters in mind together with all the circumstances of the case which have been so helpfully emphasised by Counsel we are satisfied that the sentence of 6 years' imprisonment was too high and reduce it to a period of 4½ years' imprisonment. We appreciate that that remains a stiff but fully deserved sentence for this young man and we also recognise that no term of months or years imprisonment imposed on the offender may enable the family of the deceased to be reconciled to their grievous loss.

Accordingly, the appeal against sentence is allowed, the 6 year sentence on Count 1 will be replaced by one of 4½ years and the period of disqualification will remain at 6 years.