R v Sloan

COURT OF APPEAL

MACDERMOTT AND MCCOLLUM LJJ9 JANUARY, 13 FEBRUARY 1998

- *Road traffic – Dangerous driving – Causing death or grievous bodily harm by dangerous driving – Sentence – Principles of sentencing – Circumstances aggravating offence – Circumstances mitigating offence – Length of appropriate custodial sentence – Road Traffic (Northern Ireland) Order 1995, SI 1995/2994, art 9.*

On 24 August 1996, S crashed a vehicle which he had been driving at speeds between 85 and 90 mph on a stretch of road subject to a 30 mph limit. He had consumed alcohol and had continued to drive at excessive speeds despite requests from his passengers to slow down. S's car struck four other cars in the collision in which his passengers sustained injuries, particularly S's best friend who sustained severe injuries. A police officer who attended the scene detected a strong smell of intoxicating liquor on S's breath. S, however, refused to provide a specimen. At the time of the accident S was under a suspended sentence of three months' imprisonment which had been imposed on 12 October 1995 for reckless driving and was disqualified from driving for a period of two years for the same offence. S had an extremely bad driving record which included five convictions for careless driving since 1991, and a further conviction of reckless driving on 26 March 1992 for which he had been disqualified for one year. S was charged with, inter alia, dangerous driving causing grievous bodily harm contrary to art 9 of the Road Traffic (Northern Ireland) Order 1995. On his arraignment on 6 June 1997 S pleaded not guilty to all charges. He was rearraigned on 19 September 1997 and pleaded guilty to all charges. The recorder adjourned sentence so that a probation report could be prepared. The report referred to a head injury sustained by S in 1989, that S had limited intellectual powers, some personality difficulties and would probably require considerable supervision for the rest of his life. On 3 October 1997, the recorder imposed a sentence of three years and nine months' imprisonment in respect of the charge of dangerous driving causing grievous bodily harm together with other concurrent sentences for related road traffic offences arising out of the same incident. Additionally, the recorder directed that the suspended sentence of three months' imprisonment for reckless driving to which S had been subject at the time of the accident should be put into operation and served consecutively to the sentence of three years and nine months. S appealed against sentence contending that the sentence of three years and nine months was manifestly excessive and that in imposing such a sentence the recorder had overemphasised the aggravating features of the case and had failed to give adequate weight to the mitigating factors in the case such as the fact that S had pleaded guilty, the fact that the victim was S's best friend and S suffered genuine remorse for what had occurred, and S's personality and state of health as recorded in the probation report. S also asserted that he had been the victim of the devious intent of another individual who have given him two

[1998] NI 58 at 59tablets which were not headache tablets and therefore, he was not fully to blame for what had happened.

Held – In determining the length of sentence to be served for an offence of causing grievous bodily harm by dangerous driving contrary to art 9, the task of the court on appeal, as it was of the recorder imposing sentence, was to seek to balance the aggravating and mitigating features of the offence. A guilty plea had always been a relevant mitigating factor but the earlier a guilty plea was entered the greater would be the discount. Credit had been given by the recorder for S's plea of guilty but not as much as would have been received had S pleaded guilty on arraignment. Moreover, friendship with the victim was also a relevant mitigating factor if the offender had been affected by what he had done. However, genuine remorse was best evidenced by the guilty plea for which credit had already properly been given. Moreover, remorse flowed from a realisation of wrongdoing and a sense of responsibility. However, the evidence did not indicate that S acknowledged his guilt, the probation report did not advert to the question of remorse, indeed S persisted in his claim that he had been the victim having been given tablets and that he was not fully to blame for what had happened. The recorder would have been aware of S's submissions, and, while not mentioning them, would have given them such weight as might be appropriate. However, they were not matters of great moment in the circumstances of the instant case. It was clear beyond question that the instant case contained many aggravating features. S had consumed some alcohol and he had refused to give a specimen when called upon. He drove at a grossly excessive speed in a speed restricted area when people were present on and about the road. He had been warned to slow down by one of his passengers. He was driving while disqualified. He had numerous convictions for bad driving. S was shown to be a man who was determined to continue to drive badly despite his past experiences. Balancing the aggravating features and the mitigating features, S's driving was indeed highly dangerous and before mitigation was taken into account would have warranted a sentence of five to six years. In reaching a sentence of just under four years the recorder had made an appropriate allowance for all the mitigating factors. In the circumstances that was a proper course to take and a significant discount was justified by reason, inter alia, of the matters set out in the probation report. Accordingly, the application for leave to appeal would be refused and the appeal would be dismissed.

Cases referred to in judgment
A-G's Ref (*No 30 of 1995*) [1996] 1 Cr App R (S) 364, CA.
A-G's Ref (*No 66 of 1996*) [1998] 1 Cr App R (S) 16, CA.
A-G's Ref (*Nos 24 and 45 of 1994*) (1995) 16 Cr App R (S) 583, CA.
R v Boswell [1984] 3 All ER 353, [1984] 1 WLR 1047, CA.
R v Morris [1997] 2 Cr App R (S) 258, CA.

Application
The applicant, Ian Kyle Sloan, applied for leave to appeal against a sentence of three years and nine months' imprisonment imposed by the Recorder of Belfast (His Honour Judge Hart QC) at Belfast Crown Court on 3 October 1997 in respect of a charge of dangerous driving causing grievous bodily

[1998] NI 58 at 60harm arising out of an incident on 24 August 1996. The applicant received other concurrent sentences for related road traffic offences arising out of the same incident. Additionally, the recorder directed that a suspended sentence of three months' imprisonment imposed at Newtownabbey Magistrate's Court on 12 October 1995 for reckless driving should be put into operation and served consecutively to the sentence of three years and nine months. The facts are set out in the judgment of the court.

A P Gogarty (instructed by *Fearon and Steele*) for the applicant.
R K Weir (instructed by the *Office of the DPP*) for the Crown.

Cur adv vult

13 February 1998. The following judgment of the court was delivered.MACDERMOTT LJ.
The applicant, Ian Kyle Sloan, seeks leave to appeal against a sentence of three years and nine months' imprisonment imposed by the Recorder of Belfast, His Honour Judge Hart QC, at Belfast Crown Court on 3 October 1997. The sentence was in respect of a charge of dangerous driving causing grievous bodily harm which arose out of an incident on 24 August 1996. The applicant received other concurrent sentences for related road traffic offences arising out of the same incident. Additionally, the recorder directed that a suspended sentence of three months' imprisonment imposed at Newtownabbey Magistrate's Court on 12 October 1995 for reckless driving should be put into operation and served consecutively to the sentence of three years and nine months.

The background facts
The applicant is a young man of 27 years. In August 1996 he lived with his wife and three young children on the family farm at Mallusk, County Antrim. In 1989 he had been the victim of a serious assault and Dr Alec Lyons in his report dated 8 September 1997 described the applicant 'as a young man who has limited intellectual powers and some personality difficulties'. The applicant had an extremely bad driving record and not only was he under a suspended sentence but at the court in October 1995 he had been disqualified from driving for a period of two years.

During the evening of 24 August 1996 and some time after 10.00 pm the applicant drove up in a Nissan Sunny car to a group of friends and asked if anyone wanted to go for a drive into the Woodvale area of Belfast. Two brothers, Victor William McCall and Kenneth Bates McCall, got into the car—the former in the front passenger seat and the latter in the rear seat. The applicant drove by country roads to the Ligoniel Road and what happened next is graphically described by Victor McCall:

'Suddenly Ian just floored it spinning the wheels as he turned onto the Ligoniel Road and drove off at high speed. I told Ian to slow down as I became scared as the road is very steep and bendy. Ian continued to drive fast like a crazy madman. As we drove

into the built up area of Ligoniel I saw a car double parked outside the Village Tavern Pub. I thought Ian was going to overtake as there was plenty of room for him to do so, but Ian braked very hard skidding his car. I closed my eyes and put my hand over my face the next thing I was getting out of the motor.'

[1998] NI 58 at 61At this time Peter Nicholas Lynch was speaking to the driver of a taxi which had stopped outside the Village Tavern on the Ligoniel Road. He described what happened in this way:

'I looked up the road just after talking with Thomas and I was about to make my way back on to the footpath when I saw a car travelling at very high speed citywards towards me. I thought initially that the car was going to pull out round me but instead it swerved in the opposite direction and smashed into the back of a trailer attached to a car parked at the side of the road. The car smashed the rear driver's side lights of the trailer before crashing into another car parked outside the pub. The car then spun round and I think it was the back of the car which crashed into the back of the taxi. As it was crashing I was between the parked car it hit and the taxi. I received injuries to my ear as a result of flying glass and my left wrist was hurt. Shortly after that a police car came down the road.'

The police car had been parked on the Ligoniel Road and the crew had a grandstand view of the applicant's driving down that road. Constable Lockyer described it thus:

'I then observed a blue Nissan Sunny registration number BXI 1446 pass us at high speed travelling citywards. I estimated the speed of the Nissan Sunny to be 85–90 miles per hour. The Nissan Sunny was travelling at such a high speed that the police vehicle shook as it drove past. Constable Quinn then proceeded to follow the Nissan Sunny. After we had travelled approximately 100 yards I observed, approximately 150 yards ahead, the Nissan Sunny spinning in the road outside the Village Tavern Public House. I also observed the Nissan Sunny striking several parked vehicles …'

In all, four different cars were struck and damaged by the applicant's Nissan. Providentially no one was killed but the McCall brothers were injured. Kenneth who is named in the charge, suffered a broken jaw and multiple lacerations. As the recorder rightly said this was 'an appalling piece of driving' and it occurred on a portion of road which is subject to a 30 mph limit.

The course of the proceedings

On his arraignment on 6 June 1997 the applicant pleaded not guilty to all charges. He was rearraigned on 19 September 1997 and pleaded guilty to all charges. The recorder adjourned sentencing so that a probation report could be obtained and the matter returned to court on 3 October 1997 when the recorder imposed the sentences already recorded having before him Dr Lyons' report, the report of Mr McAnallen, a probation officer, dated 26 September 1997, and letters from officers of the Lower North Belfast Community Forum with whom the applicant had been involved since the previous July.

The applicant's case
Mr Gogarty appeared for the applicant in this court as he had in the court below. He submitted that the sentence of three years and nine months was

[1998] NI 58 at 62manifestly excessive and that in imposing such a sentence the recorder overemphasised the aggravating features of the case and failed to give adequate weight to the mitigating factors in the case.

Mr Gogarty from the outset of his carefully prepared and presented submission realistically accepted that the applicant had been guilty of a particularly bad piece of driving. Nevertheless there were mitigating features which, he submitted, should persuade this court that the imposed sentence was excessive. He emphasised:

1. The fact that the applicant pleaded guilty.

As has long been accepted in this jurisdiction a guilty plea is always a relevant factor and the recent statutory provision (art 33 of the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160) confirms that this is so and emphasises the fact that the earlier a guilty plea is entered the greater will be the discount.
Understandably the recorder fully appreciated this factor and expressed himself in this way:

'He pleaded guilty to all counts when rearraigned and the case has been put back until today to enable reports to be produced on the defendant. He is, therefore, entitled to some credit for his plea of guilty, but not as much as he would have received had he pleaded guilty on arraignment; particularly given the overwhelming nature of the case against him.'

In the circumstances of this case this appears to us to be a very fair formulation of the principle.

2. The fact that Kenneth McCall was the applicant's best friend and he suffers genuine remorse for what occurred.

Friendship with the victim—whether deceased or injured—is a relevant factor if the offender has been affected by what he has done. But that proposition must be viewed in the relevant context. Thus where the offender deliberately placed his friends at risk by driving when disqualified, by driving at a furious speed and by ignoring his friend's cry to slow down the weight to be attached to this point must decrease.

Genuine remorse is always a factor and is best evidenced by the guilty plea for which credit has already properly been given. Remorse flows from a realisation of wrongdoing and a sense of responsibility and we have looked anxiously at the reports to see if these factors are present. Dr Lyons is an extremely experienced examiner and witness but in this case, significantly, he does not advert to the question of remorse. Mr McAnallen expresses his conclusions in this way:

'The defendant is appearing in Court for serious offences which could have had fatal consequences. He is aware of that but continues to assert that he is the victim of the devious intent of another individual who gave him two tablets which were not headache tablets. He has expressed the view that this was malicious and therefore, although pleading Guilty, leaves him, to an extent feeling not fully to blame for what happened. He repeated and was extremely adamant in asserting that no alcohol had been taken on the evening of the offence. The defendant is aware of the likelihood of imprisonment and knows he could deal with a sentence at the shorter end of the scale. He has told me, however, that he would miss

[1998] NI 58 at 63all his family, especially his three children and feels that they would be vulnerable without him.'

This does not paint the picture of a man who acknowledges his fault—indeed he is persisting in the claim that he is the victim having been given tablets. This is self-deception and Mr Gogarty prudently did not pursue this point or challenge the constable's statement that 'I could detect a strong smell of intoxicating liquor coming from his breath'. Mr Gogarty complains that the recorder does not mention these points but we are satisfied that he will have been aware of Mr Gogarty's submissions and given them such weight as might be appropriate but we are bound to say that in the circumstances of this case they are not matters of great moment and we feel it would be kinder to say no more on this topic.

The applicant's personality and state of health

The applicant is clearly one of the weaker members of society. Nevertheless he drove vehicles (albeit frequently badly) and the letters from the Lower North Belfast Community Forum show that he is capable of making a useful and helpful contribution to society. Indeed Mr Gogarty informed us that jobs were available to him.

It is clear that the recorder had this aspect of the case very much in mind and said:

'I have been provided with a report from Dr Lyons who has seen the defendant in the past because of a head injury which he suffered in the course of an assault some years ago. Dr Lyons' view is that the defendant has limited intellectual powers and some personality difficulties and is someone who will probably need considerable supervision for the rest of his life. The probation report says that he receives Disability Living Allowance.'

How should sentencing in respect of offences under art 9 of the Road Traffic (Northern Ireland) Order 1995, SI 1995/2994 (the 1995 Order) be approached?

That article is in these terms:

'A person who causes the death of, or grievous bodily injury to, another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.'

We would make a number of general comments:

(1) 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 courts have been ready to play their
[1998] NI 58 at 64part in trying to make the roads a safer place by imposing sentences which reflect the culpability of the driving and as was said by Roch LJ in *A-G's Ref* (*No 30 of 1995*) [1996] 1 Cr App R (S) 364 at 367 a proper sentence 'must now have in it elements of retribution and deterrence'.
Before proceeding we pause to note that the equivalent English provision (s 1 of the Road Traffic Act 1988—causing death by dangerous driving) does not refer to causing grievous bodily injury. 'Causing death or grievous bodily injury' has been the formulation in this jurisdiction since at least 1955 and was intentionally continued in that form despite the ongoing English limitation to cases in which death occurred. We have no doubt that the local reference to grievous bodily injury as well as death is both rational and sensible. 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-G's 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.' Thus it appears to us that it cannot be argued that 'causing death' is the major offence and 'causing grievous bodily injury' is the minor offence and that sentencing should reflect such a distinction. Understandably, and rightly, Mr Gogarty did not seek to argue along such lines—if Parliament had intended that such a distinction should be drawn it would have created two distinct offences with different penalties attaching to each.

(2) In seeking to assess the criminality of an offender's driving the court must approach its task objectively and dispassionately. In fatal cases especially emotions may understandably be running high and in all cases sentencers should bear in mind the words of Lord Bingham of Cornhill CJ in *A-G's Ref* (*No 66 of 1996*) [1998] 1 Cr App R (S) 16 at 21:

'It is a feature of cases such as this that the families of the victims feel bitter and vindictive towards the defendant whom they see as the author of their irreparable loss. This case contains such a feature. The family of one of the victims have succeeded in reconciling themselves towards the consequences of this tragedy. The

family of the other victim, as we understand, have not. Their feelings are understandable. 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

[1998] NI 58 at 65impose 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.'

(3) Sentencing in cases of this nature is notoriously difficult and we would echo the words of Staughton LJ in *R v Morris* [1997] 2 Cr App R (S) 258 at 259:

'These offences are some of the most difficult that Crown Court judges and recorders have to deal with. Sometimes, as in this case, the offender is a young man—Morris is aged 22—of previous good character, whom all people speak well of and who, in what as far as we know is an isolated incident, has caused the death of his best friend. The courts find it difficult to be severe in such a case, but the public demands it. Parliament, in recent times, has increased the maximum sentence from five years to 10.'

(4) 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.

Aggravating and mitigating features

One of the first tasks that a sentencer will undertake is to determine whether or not there are aggravating factors in the case. If there are not then a non-custodial sentence may well be appropriate but if one or more aggravating features are present then a custodial sentence is virtually inevitable because a motor vehicle is a potentially lethal instrument and those who drive must realise that and must not drive in an irresponsible or dangerous manner.

What then have been recognised as aggravating features? From *R v Boswell* [1984] 3 All ER 353onwards judges have sought to assist by describing features which are considered to be of an aggravating nature and for our part we would readily adopt the list of features set out in *Wilkinson's Road Traffic Offences* (17th edn, 1995) para 5.212:

'(1) The consumption of alcohol or drugs. This may range from a couple of drinks to a "motorised pub-crawl".

(2) A driver who races; competitive driving against another vehicle; grossly excessive speed; showing off.

(3) The driver who disregards warnings from his passengers.

(4) A prolonged, persistent and deliberate course of very bad driving.

[1998] NI 58 at 66(5) Other related offences committed at the same time, ie driving without ever having held a licence, driving whilst disqualified, driving while a learner while unsupervised and so on.

(6) Previous motoring convictions, particularly offences involving bad driving or excessive consumption of alcohol, ie a man who shows that he is determined to continue to drive badly despite past experience.

(7) Where several people have been killed as a result of the offence …

(8) Bad behaviour at the time of the offence, eg failing to stop, or worse, trying to throw the victim from his car bonnet in order to escape.

(9) Causing death in the course of reckless driving in an attempt to avoid detection or apprehension.'

As the list of possible mitigating features which follows is helpful we set it out as well:

'(a) A "one-off" piece of reckless driving—momentary reckless error or judgment, briefly dozing at the wheel or failing to notice a pedestrian at a crossing; (b) A good driving record; (c) Good character generally; (d) A plea of guilty … (e) the effect of the offence on the defendant; shocked or generally remorseful, particularly where the victim was a close friend or relation and the consequent emotional shock was likely to have been great.'

Needless to say these lists of features are by no means closed—some cases may produce novel features which can properly be described as aggravating or mitigating and to which proper regard must be paid. A further point should be emphasised. Motor vehicles are primarily meant to be used as a means of transport. When so used accidents can and unfortunately do occur—sometimes by reason of careless or reckless driving. On other occasions vehicles are stolen or taken or used

for so called joy-riding. When the pursuit of excitement is the dominant motive driving which causes serious accidents in such circumstances is clearly of an exceptionally high level of culpability and could well attract a custodial sentence in the vicinity of the statutory maximum—ten years.

The present case

It is clear beyond question that this case contained many aggravating features. The applicant had consumed some alcohol and he refused to give a specimen when called upon. He drove at a grossly excessive speed in a speed restricted area when people were present on and about the road. He had been warned to slow down by one of his passengers. He was driving while disqualified. He had numerous convictions for bad driving.

The recorder analysed his record in this way:

'The defendant has a bad record and many offences on that record are road traffic offences. In particular I draw attention to the following, he committed an offence of reckless driving on 26th of March 1992, in respect of which he was subsequently fined and disqualified for twelve months. Secondly, on the 7th of February 1995, he was again guilty of reckless driving for which he was made subject to a suspended sentence imposed on the 12th of October 1995 of three months imprisonment suspended for two years and that suspended sentence was therefore

[1998] NI 58 at 67operative at the time of these offences. He was also disqualified on that occasion for two years and was therefore a disqualified driver at the time and that gives rise to Count 3 on this bill of indictment. Thirdly, I should also draw attention to the fact that his record shows that despite having committed an offence of reckless driving on the 7th of February 1995, he was subsequently detected driving whilst disqualified on the 10th of April 1995.'

Additionally he appears to have had five convictions for careless driving since 1991. To use the language of *Wilkinson's* sixth aggravating feature the applicant is shown to be a man who was determined to continue to drive badly despite his past experiences.

The final balancing exercise

Our task, as it was of the recorder, is to seek to balance the aggravating features which Mr Weir (who appeared for the Crown) emphasised and the mitigating features which Mr Gogarty so fully explained to us.

We can state our conclusion shortly. The applicant's driving was indeed highly dangerous and in our view before mitigation is taken into account would warrant a sentence of five to six years. In reaching a sentence of just under four years the recorder in our judgment made an appropriate allowance for all the mitigating factors. In the circumstances that was a proper course to take and a significant discount was justified by reason inter alia of the matters set out in Dr Lyons' report.

Accordingly the application for leave to appeal is refused and the appeal is dismissed.

Application for leave to appeal refused. Appeal dismissed.