



THE COURT OF APPEAL

Record Number: 103CJA/20

Neutral Citation Number: [2021] IECA 43

**Birmingham P.
McCarthy J.
Kennedy J.**

**IN THE MATTER OF S.2 OF THE CRIMINAL JUSTICE ACT, 1993, AND
IN THE MATTER OF:**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLLCANT

- AND -

SENAN O'FLAHERTY

RESPONDENT

**JUDGMENT of the Court delivered (ex tempore) on the 26th day of January 2021 by
Ms. Justice Kennedy.**

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 20th April 2020. The respondent pleaded guilty to counts of careless driving causing death and serious bodily harm contrary to section 52 (1) (a) of the Road Traffic Act, 1961 as substituted by section 4 of the Road Traffic (No. 2) Act, 2011. The respondent was disqualified from driving for a period of four years and fines of €750 were imposed on each count.
2. By way of background at 9am on the 15th March 2017 a road traffic accident occurred which involved a collision between a Skoda Fabia then being driven by Mr Wall, in which his three-year-old daughter was a backseat passenger and was secured in a baby seat, and a Kia Sportage jeep which was being driven in the opposite direction.
3. A third vehicle, namely a four axle heavy goods truck, being driven by the respondent, was travelling west in an advanced position ahead of the Kia Sportage jeep.
4. Ahead of the respondent's truck was a 35 seater coach. A Ms Kilbane, who was driving a silver Toyota Corolla behind the respondent's truck, observed the oncoming Skoda Fabia coming down the hill in the opposite lane and that the respondent pulled out as if to

overtake the coach. Once the respondent pulled out he jammed on his brakes and pulled straight back in. The respondent was very close to the bus at the time and it's unlikely that the respondent had a view of oncoming traffic until he had in fact pulled out. Ms Kilbane stated that the oncoming car came onto her side of the road as if it lost control, narrowly colliding with her car. A Mr McMahon, who believes he was the eighth car behind the respondent's truck, when coming from the bend observed the truck at an angle as if to suggest the respondent had pulled out and then back in as if he had seen a car approaching. As a result, the Skoda Fabia steered towards the grass verge on his side of the road, lost control and spun across the centre of the roadway and collided with the Kia Sportage.

5. When later questioned by gardaí the respondent stated that the coach in front of him slowed down and appeared to move out over the white line and he believed there could have been a rock or some such on the road and that the coach driver pulled out to avoid it. He stated that he indicated, pulled out and observed a car coming against him at high speed. The respondent stated that he did not see a collision occur and continued on his journey unaware that an accident had taken place.
6. The child sustained horrific injuries and died at the scene of the accident. The driver, her father, sustained a very traumatic brain injury, which included left subarachnoid haemorrhage and diffused axonal injury and multiple rib fractures, a left plural infusion and left sided surgical emphysema.

The sentence

7. In terms of sentencing the judge was of the view that the circumstances of the accident were not clear-cut. He placed culpability at the lower end of the spectrum. The judge noted that the punitive aspect of the mandatory disqualification would have a significant impact on the respondent, taking into account his profession. In terms of aggravating factors, the trial judge identified a previous conviction for driving without due care and attention on the 18th of February 2002 for which the respondent was fined €250 and, the fact that the respondent was driving too close to the bus.
8. In terms of mitigation the trial judge identified the following: the plea of guilty, the expression of remorse and a full appreciation of the victims' suffering as a result of this accident, there was no speed element on the respondent's part when driving, his road traffic documentation was all in order, there was no alcohol or evidence of being under the influence of an intoxicant, and that the respondent had full insurance cover. The vehicle was in a roadworthy condition and played no part in the cause of the accident.
9. The judge disqualified the respondent from driving for four years and imposed a fine of €750 on each count.

Submissions of the appellant

10. The primary submission of the applicant is that the judge erred in seemingly accepting the respondent's proposition that he only moved across out across the white line in order to avoid a perceived obstacle which the coach in front had attempted to avoid. The applicant submits that this proposition was only contended by the respondent himself in

his memorandum of interview. Moreover, it is said that in light of the prosecution evidence, the judge's finding that the respondent's culpability was at the lower end of the spectrum is erroneous and amounts to an error in principle.

11. The applicant argues that the imposition of the least possible disqualification period of driving, even given the resultant consequences for the respondent together with an aggregate fine of €1500 is unduly lenient.
12. The applicant submits that the sentence imposed represents a substantial departure from the norm and refers to *The People (DPP) v. Moran* [2019] IECA 5 where the accused had received a sentence of one year imprisonment suspended for two years following a conviction for careless driving causing death. The appellant further refers to *The People (DPP) v. Healy* [2017] IECA 194 where the accused received a one-year suspended sentence in respect of a careless driving causing death conviction.

Submissions of the respondent

13. In terms of the respondent's culpability, the respondent refers to the remarks of O'Malley J. in *The People (DPP) v. O'Shea* [2017] 3 IR 684 where she considered the offence of careless driving in the following terms:-

"Careless driving comes below dangerous driving on the continuum. The section makes it an offence to drive "without due care and attention". That wording in itself makes it impossible to "read in" a necessity to prove intention or recklessness – the core ingredient of the offence is a lack of the care and attention that a reasonably prudent driver would give when driving in a public place, having regard to the circumstances as they actually exist. It is probably not desirable to attempt to define the matter further, since everything will depend on the factual circumstances. The degree of negligence is lower than that involved in dangerous driving, since the driving does not, for the purposes of this offence, have to create the "direct, immediate and serious" risk that characterises dangerous driving

This does not mean that a "blameless" driver is liable to be convicted and punished. In the first place, a person who drives without due care and attention in a public place is not properly described as "blameless" if harm is caused as a consequence of such driving. On the other hand, a driver may be involved in an accident, and may even have caused that accident, and yet be held blameless if he or she met the standard of the reasonably competent or prudent driver in the circumstances. It is also essential to stress that the fact that a death or serious bodily harm results does not mean that a conviction for careless driving is the same as a conviction for dangerous driving causing the same consequence. The risk created by the careless driver is less than that created by the dangerous driver, and the careless driver is therefore less blameworthy in respect of the result. The question of the appropriate sentence remains a matter for the court, and while it is clear that the consequence of the offence must be taken into consideration, it does not determine the punishment to the exclusion of other relevant factors."

14. It is said that the judge clearly considered the tragic consequences of this offence and properly assessed the culpability of the respondent while taking into account all other relevant factors.
15. There were several considerable mitigating factors which were taken into account by the judge when arriving at the sentence imposed and it is contended that there is an absence of aggravating factors associated with driving offences including speed or consumption of an intoxicant.
16. In relation to the applicant's contention that the respondent's version of events was unsupported by evidence and the resultant conclusion by the judge that the respondent's culpability was low amounts to an error in principle, the respondent submits that nobody could determine what caused the driver of the Skoda to take evasive action which was confirmed by Inspector O'Regan in cross-examination.
17. The respondent refers to *The People (DPP) v. Stronge* [2011] IECCA 79 where McKechnie J. stated that the trial judge was entitled to have regard to alternative possibilities for the cause of accidents in dangerous/careless driving cases.
18. The respondent says that the sentence imposed was a permissible sentence and refers to the remarks of Clarke J. (as he then was) in *The People (DPP) v. O'Shea* [2017] 3 IR 684:-

"Where the driving in any case falls on that spectrum must represent a central feature of a sentencing judge's analysis of the culpability of a person convicted of the offence of careless driving causing death or serious bodily harm. Speaking for myself I would find it difficult to see how, everything else being equal, a person found guilty of careless driving causing death or serious bodily harm, where the bad driving concerned was at the bottom end of the spectrum encompassed by careless driving, could legitimately receive a custodial sentence at least in the absence of aggravating or other unusual factors."

19. In terms of the cases relied upon by the applicant, the respondent submits that *The People (DPP) v. Moran* [2019] IECA 5 involved the presence of the additional aggravating factor of alcohol and *The People (DPP) v. Healy* [2017] IECA 194 involved a higher degree of careless driving.
20. The respondent further submits that the effect of the driving disqualification on the respondent is significant as he is no longer able to work as a truck driver. His rural location and lack of access to public transport has limited his access to society and this has been further magnified due to Covid-19 and the risks associated with traveling with other individuals.

Discussion

21. The jurisprudence in s.2 appeals by the Director is well known commencing with *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279. The principles were summarised in *The People (Director of Public Prosecutions) v. Stronge* [2011] IECCA 79.

The Director must demonstrate that the impugned sentence constitutes a gross departure from what would be the appropriate sentence in the circumstances.

22. In the present case, the judge delivered a comprehensive judgment, identifying and applying the relevant legal principles. He identified two aggravating factors, first, the respondent's previous conviction in 2002 for the same offence and second, that the respondent was driving too close to the 35 seater coach. The judge assessed the evidence and concluded that had the respondent not been driving so close to the coach, it may not have been necessary for him to pull out. It does not appear to this Court that the judge came to a determination whether he pulled out to see whether there was oncoming traffic or because (as the respondent asserted) the coach pulled out to avoid some obstacle. However, he ultimately concluded that the appropriate location on the sentence spectrum was at the lower end.
23. This Court observes that the witnesses observed unusual features in the respondent's driving, most notably that all witnesses were of the view that they believed the truck was about to perform an overtaking manoeuvre or was moving out to see if there was oncoming traffic. Whatever the reason why the respondent pulled out, it seems he certainly pulled in very quickly after doing so, according to Mr Costello SC for the applicant, the entire manoeuvre took one second. According to one witness, he feared the respondent would lose control. We also note that, while the respondent appears to have pulled out on a broken white line, it is surprising that the truck sought to overtake a 35 seater coach at this point in the road, which would have required him to accelerate in order to make his way up an incline after overtaking. In making that comment, we are cognisant of the fact that the road was travelled frequently by the applicant and so we may infer he knows the peculiarities of the route.
24. In the circumstances, having scrutinised the evidence, we are persuaded that the judge erred in principle in placing the respondent's culpability at the lowest level. The judge would have been entitled to conclude that the respondent was seeking to overtake the coach notwithstanding the respondent's assertion to the contrary. None of the witnesses observed any pedestrian, rock or cyclist or indeed any obstacle necessitating the truck to pull out. On the contrary the witnesses were of the belief that the respondent pulled out in order to see if it were possible to overtake the coach.
25. This Court is of the view that that this case falls within the upper end of the mid-range of sentence, the blameworthiness of the respondent was more significant than that identified by the judge. It is hardly necessary to say that the consequences of his driving were catastrophic. Thus in identifying the range as being at the lower end, the penalty imposed constitutes a substantial departure from the appropriate sentence. We are satisfied that it is necessary to impose a sentence in the circumstances of the case, as disclosed on the evidence. We are satisfied that it is necessary to mark the gravity of the offence by the imposition of a sentence to which we will return presently.
26. A fine of €750.00 was imposed in respect of each count, being a total of €1500.00. We have considered whether this fine is appropriate and sufficient to meet the gravity of each

offence and with regard to the circumstances of the respondent. The respondent can no longer work as a driver and works on his small farm, borrowing funds to feed his animals. While such a fine may not be seen as notable for persons of greater means than the respondent, in light of *his* modest means, we are satisfied that the aggregate fine has to be seen as a not insignificant one and therefore proportionate in the circumstances. The fine will have a practical punitive impact on the respondent.

27. Insofar as the period of disqualification is concerned, being that of the minimum period of four years, we have considered whether this is appropriate in the circumstances. We are aware that the respondent is a man in his mid-sixties, his occupation was that of professional driver, he is a widower and he lives in a remote rural area with limited public transport. We are informed that due to Covid-19, he cannot avail of lifts from friends or neighbours and is therefore somewhat isolated. The effect of any disqualification from driving, must have a significant impact on the respondent and indeed will impact more on him than on other individuals in different circumstances. We have therefore decided not to interfere with the period of disqualification.
28. As the judge erred in the manner we have identified, we will now quash the sentence imposed and re-sentence the respondent as follows.

Decision

29. Bearing in mind that the maximum sentence is one of two years' imprisonment, we consider the appropriate sentence to be one of 16 months' imprisonment in addition to a fine of €750.00 on each count, we will hear submissions regarding the time period for the payment of those fines. We acknowledge that there are mitigating factors, and in order to give effect to those factors, we will suspend the sentence on the respondent entering into a bond in the sum of €100.00 to be of good behaviour for a period of two years. We therefore substitute a sentence of 16 months' imprisonment, suspended for a period of two years on the mandatory statutory condition and a fine on each count. The respondent is disqualified from driving for a period of four years.