THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

144/2016

The People at the Suit of the Director of Public Prosecutions

Respondent

- v -

Anthony Handley

Appellant

JUDGMENT of the Court delivered on the 17th day of February 2017 by Mr. Justice Mahon

Introduction
1. The appellant pleaded guilty and was convicted on 5th April 2016 at Dublin Circuit Criminal Court of dangerous driving causing death or serious bodily harm contrary to s. 53(1) of the Road Traffic Act, 1961, as substituted by s. 4 of the Road Traffic (No. 2) Act, 2011. He was sentenced on 10th May 2016 to two years imprisonment from that date and disqualified from driving for ten years. The appellant has appealed against the severity of his sentence.

The circumstances of the accident
2. Shortly after midday on the 17th of January 2014, the appellant, who had had only four hours sleep overnight, was driving on the Dublin Road towards Balbriggan when he lost control of his car and swerved across the road striking a young mother wheeling her child in a buggy. According to eyewitnesses, his car suddenly moved across the road without braking. The young mother, Olivia Dunne, was killed instantly, and her infant daughter, Éabha, was significantly injured, and without medical intervention would likely not have survived. The appellant was unable to explain why the accident occurred. It was initially suspected that he had suffered a mini-stroke and this possibility was the subject of intense medical scrutiny following the accident. Ultimately the medical evidence suggested otherwise and the only other rational explanation was that he fell asleep. This likely cause was accepted by the appellant prompting him to plead guilty to the offence.

3. The accident occurred in a fairly built up area of north County Dublin, and not far from the appellant's home. Witnesses described how the car veered to the right without warning and without braking. He had had just four hours sleep overnight but maintained that he generally slept for only a few hours. He got up at 5 a.m., had breakfast and went to the gym before dropping his daughter to a nearby location. He was travelling to Balbriggan to collect his son when the accident occurred. These were tasks of a routine nature and would not normally be expected in themselves to result in significant driver fatigue.

The impact on the victims
4. In a victim impact statement, Olivia Dunne's sister, Caroline Clinton, provided a poignant account of how the tragedy has affected, and will continue to affect the deceased's family. Ms Clinton described how her sister was a proud and content new mother, wife and teacher, whose life was "complete." All this came to a sudden and tragic end on the day in question. Her mother will now never see her daughter grow up. She will not celebrate another wedding anniversary with her husband, or enjoy any more precious family moments.

5. As Ms Clinton described, Éabha suffered serious physical injury to such an extent that she was not expected to survive. Although she defied the odds, she has permanent scarring on her leg and continues to walk with a limp. She will require further surgery on her foot. Sadly, Éabha, unlike most of her peers, will grow up never having known her mother. The psychological impact of this is unknown.

6. Mr. Ciarán Dunne has lost his young wife. He has been left severely traumatised, has not returned to work and cannot travel past the scene of the accident. According to Ms Clinton, it took him over a year before he could return to his home. Ms. Dunne's parents, siblings, nieces and nephews have all struggled greatly since her death. Family gatherings are difficult.

The appellant's personal circumstances
7. The appellant is a father of three children and a grandfather in his mid-sixties. He has worked his entire adult life and has no previous convictions. He is separated and has two daughters from his marriage, as well as a son from another relationship. Although separated from his wife for ten years, he moved back into the matrimonial home to help care for her as she has a serious illness and to assist his daughter who had has a child. He has also maintained a supportive bond with his son and on the morning in question was driving him to visit his mother in hospital.

8. For a number of years he has been the primary carer for his estranged wife, who has significant mental and physical health issues. She suffers from a number of ailments, including bi-polar disorder, depression and anxiety, as a result of which she is unable to leave the house. Physically, she is frail and has had a number of falls resulting in fractures which required surgery. She is totally reliant on her family to provide for her. The appellant's daughter, who also has some personal difficulties, is unable to manage her mother alone.

Grounds of appeal
9. The appellant appeals against the severity of his sentence on four grounds:-

> (i) Firstly, that the learned sentencing judge erred in law in failing to strike an appropriate balance between the aggravating and mitigating factors of the offence;
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> (ii) secondly, the learned sentencing judge failed to give any or any adequate or sufficient weight to the mitigating factors in the case and in particular: failed to give adequate weight to the plea of guilty in all the circumstances of the case; erred in holding that the Appellant's legal advisors should have sought medical evidence prior to 25 March, 2015 in circumstances where the Book of Evidence was only served on 3 March, 2015; failed to give adequate weight to the short period during which the Appellant was driving and the absence of other factors which would have created an expectation

of tiredness; failed to have adequate regard to the personal circumstances of the Appellant and in particular to the fact that he was the main carer for his wife who had significant mental health and physical health difficulties and his daughter;

(iii) thirdly, the learned sentencing judge erred in placing undue weight on the concept of general deterrence in the absence of evidence highlighting the need for deterrence in general and in the absence of factors in the Appellant's case which would have created an expectation of fatigue or tiredness, and

(iv) fourthly, the learned sentencing judge erred in holding that the circumstances of the case required an immediate custodial sentence.

The sentencing judgment

10. The learned sentencing judge, in sentencing the appellant to two year's imprisonment, spoke of the need for balance between the wrong committed and the appellant's position and the interests of the community.

11. In analysing where the balance lay, the learned sentencing judge considered a number of mitigating factors identified by counsel for the appellant. Dealing firstly with the absence of aggravating factors such as alcohol or drugs, he stated the following:-

> "It has to be said though that sleep is a factor and an aggravating factor; tiredness and fatigue contribute in a real way to causing accidents as it did on this occasion. Mr. O'Briain, in his submissions to the Court, described this as a sudden onset. However, the expert opinion differs with that concept and that idea, it isn't sudden and it doesn't take a driver unawares. It does creep up and will cause a driver to slow or should slow will he realise that in fact their faculties becoming troubled. And I have no doubt that many of us have experienced the same phenomena of becoming listless, lethargic, finding it difficult to react, rolling the window down and ultimately realising there a moment to pull over or as the campaign recently says take a coffee, get some refreshment and then move on when safe. That didn't happen in this case and that is, to that extent, an aggravating factor. It's what caused this accident. It has to be said it in no way rests in the same degree of culpability or aggravation as that of someone who has taken alcohol or has done some conscious act to render their capacity impaired, there's no suggestion of excessive speed."

12. In response to counsel for the appellant's argument that the accused had entered an early guilty plea, the judge commented as follows:-

> "It has been urged on behalf of the accused that he has entered an early plea and that that is something that is to be considered by the Court. I can't fully accept that as a proposition. The plea was entered on the day of trial, it many then that all of the forces of investigative evidence and otherwise had to be assembled. The family had to come for the umpteenth time expecting all of the facts to be agitated and contested. Mr. O'Briain has very usefully assisted the Court, illustrating the very extensive efforts made by Mr. Handley's solicitor to investigate the medical evidence in the case, to look for a second opinion. That is an accused man's entitlement and right. It hasn't been explained why, though this incident occurred in January 2014, the first letter written speaking medical advice wasn't until March of 2015, a considerable time after the event, which of necessity must have added to the inevitable delays experienced. Nonetheless, a plea is often times something based in conscience. And it is sometimes difficult to appreciate the position of a person who expresses remorse on the one hand and then seeks genuine remorse on the one hand and then seeks to explore the depths of a technical or other type of defence in meeting a case such as this. In any event, as I say, the plea for its reasons came at a time when everyone was assembled for the purpose of a trial and that, I have to say, could not be considered in the circumstances an early plea. Having said what I said I do accept that the accused has expressed genuine remorse and carries with him a deep sense of the wrong he has done."

13. Responding to a plea that the appellant receive only a suspended sentence on account of his personal circumstances, the learned sentencing judge held that:-

> "the scale of the consequences of his driving on this occasion, at a time when I'm satisfied he ought to have been alert to the oncoming presence and impact of tiredness and fatigue, makes me in a position that I must impose an immediate custodial sentence to mark the seriousness of what has occurred and I have to say, to send out to the community a clear message, that fatigue is a phenomenon that has to be in the minds of all drivers and must be reacted to when it presents itself, as otherwise there are serious consequences possible."

Submissions on behalf of the appellant

14. The appellant argues that the sole aggravating factor in sentencing was the tiredness of the accused. The appellant seeks to reply on the decision of *DPP v. Stronge* [2011] IECCA 29. In that case, the defendant, who was convicted of dangerous driving causing death, had been drinking the previous night and was over the legal limit. He also had a number of previous convictions, and had been charged two weeks previously under s. 49(3) of the Road Traffic Act 1961 (as amended) with driving a mechanically propelled vehicle while under the influence of alcohol. An appeal against leniency in respect of his sentence of two years with the final twelve months suspended was dismissed.

15. The appellant further argues that the learned sentencing judge failed to take account of a number of mitigating factors. Though the guilty plea was only entered on the trial date, it is argued that his remorse was evident much earlier. He delayed in entering a guilty plea as he awaited the outcome of a medical report. Further, the appellant argues that the learned sentencing judge failed to take account of the appellant's role as carer for his wife.

16. In *People (DPP) v. Jervis and Doyle* [2014] IECCA 14, Fennelly J emphasised that sentences must be proportionate to the personal circumstances of an accused. The appellant submits that the learned sentencing judge ignored the absence of previous convictions, or good character, and referred to the comment of Hardiman J. in his judgment in *DPP v. Kelly* [2 IR 321, when he said that *"the court clearly has to give very considerable weight to the absence of previous convictions."*

17. In respect of the suggestion that the appellant's tiredness was the sole aggravating factor, the appellant argues that the relatively short period during which the appellant was driving and the absence of other factors which might normally be expected to cause driver fatigue were afforded insufficient weight.

Submissions on behalf of the respondent

18. The respondent argues that it was clear from July 2014 that the appellant had not suffered from any form of stroke in the

moments before the accident. The learned sentencing judge had accepted the explanation regarding the difficulties experienced in engaging medical experts but noted that no explanation was proffered for the delay in seeking a medical opinion. It was therefore appropriate that the plea be considered as being made later than it might otherwise have been.

19. Against the appellant's argument regarding the lack of expectation of tiredness, the respondent pointed to the learned sentencing judge's view that sleep is not a sudden onset, and that there are warning signs of fatigue and which the appellant ignored. The respondent further argues that the learned sentencing judge was entitled to take account of the warnings by the Road Safety Authority in relation to the phenomenon of driver fatigue.

20. The respondent distinguished the instant case from *DPP v O'Donnell* [2015 IECCA 79, 90], where a sentence of 12 months for careless driving causing death was reduced to 200 hours of community service. Firstly, *O'Donnell* was a case of careless as opposed to dangerous driving and as such carried a lower penalty. Secondly, in *O'Donnell*, there was only the possibility of the accused having fallen asleep. There is, it is argued, much stronger evidence of the accused having fallen asleep in the instant case.

21. Finally, the respondent submits that the learned sentencing judge was correct in placing weight on the deterrent element.

Discussion and conclusion

22. It is necessary and appropriate at the outset to acknowledge as indeed the learned sentencing judge did, that the appellant's culpability in this case is significantly less than it would otherwise be if there was evidence of alcohol consumption or prior dangerous driving, or excessive speed. None of these ingredients are present in this case. Some or all of them commonly feature in many dangerous driving causing death or serious injury cases that come before the courts. The appellant appears to have been going about what might be described as ordinary daily activities in the hours immediately prior to the accident. There was no evidence of dangerous or erratic driving prior to his car spinning out of control. He has no previous convictions for road traffic offences, a fact that must stand very much to his credit having regard to the fact that he is in his mid-sixties and has been driving all his adult life.

23. It is clear from the learned sentencing judge's remarks that he was critical of the appellant's delay in seeking medical advice as to a possible medical reason for losing consciousness immediately prior to the accident. He considered the plea of guilty as having been made at a late stage. It is also apparent that the learned sentencing judge considered there to be a conflict between, on the one hand, the appellant's expression of remorse (and which he accepted was genuine), and on the other hand, his quest to identify a medical cause for the accident, which he suggested was an attempt to *"explore the depths of a technical or other type of defence…"*.

24. However, categorising in this way the appellant's efforts to identify a medical explanation for the accident does not, in the court's view, adequately describe or explain the position the appellant found himself in the aftermath of this terrible accident. He had no recollection or explanation as to what occurred in the seconds before the accident. He did not believe that he was tired, and he had had what was for him, a normal nights rest. He also had a significant medical history, having been diagnosed with hypertension and asthma, for which he was on medication. He recalled having a slight headache on the morning of the accident and had taken medication for rheumatic pain. In all these circumstances, it was understandable that the appellant suspected that some medical event had occurred and would wish to pursue a medical explanation for his apparent loss of consciousness, and it is difficult to attribute any fault to him for so doing. An unfortunate consequence of pursuing this line of enquiry, and possibly doing so somewhat belatedly, is that the victim's family were left in an uncertain state for a considerable period as to whether or not there would be a full trial.

25. It is however clear that the possibility, and indeed suspicion, that there was a medical cause for the appellant's loss of consciousness did exercise the minds of his doctors from day one. In the report of Mr. Aidan Gleeson, consultant in emergency medicine, and who was in charge of the appellant's care immediately following his admission to Beaumont Hospital, expressed the view that the appellant *"may have had either a seizure or a cardiac arrhythmia"*. Mr. Gleeson also noted that the appellant had said that he felt unwell approximately fifty minutes before the accident. In his subsequent reports the medical tests carried out on the appellant did not produce any conclusive evidence that he had in fact lost consciousness for some medical reason. In his report dated 10th May 2016 (and which was before the learned sentencing judge), Mr. Niall Tubridy, consultant neurologist, suggested that the appellant may have had an arrhythmia. Wherever the truth lies, it is not the case that the appellant simply embarked on a fishing exercise in the hope of identifying a medical cause for losing consciousness, while at the same time knowing the true cause was that he had fallen asleep at the wheel.

26. Ultimately, albeit it belatedly, the appellant accepted that he must have fallen asleep, and in pleading guilty he accepted legal responsibility for having done so.

27. It is also noteworthy that what might be described as the better known and generally accepted causes of driver fatigue were largely absent in this case. The appellant had had, for him, a normal night's rest, he had been to the gym, he was engaged in relatively short urban journeys for two hours or so prior to the accident and he was not particularly aware of feeling tired while driving. It was not a case of a person driving a long distance late in the day or at night time, and / or driving for a prolonged period on a lengthy monotonous stretch of motorway, features often associated with the onset of driver fatigue.

28. The learned sentencing judge unfortunately did not indicate a headline sentence before discounting for the very evident mitigating factors present in the case, and which he clearly accepted were present. The sentence of two years did not include any suspended element. On the assumption that the two year term represented a net sentence having first allowed for mitigation, it suggests that, and having particular regard to the appellant's personal circumstances, including his role as his wife's main carer, that the headline sentence may have been four years or more. The disqualification of ten years, while justified, is itself, and especially for a person in his mid-sixties, a severe penalty.

29. In the court's view there were errors of principle in the sentencing of the appellant, as follows:-

(i) The learned sentencing judge unfairly penalised the appellant for the delay in pleading guilty;

(ii) the learned sentencing judge erroneously attributed to the appellant a motivation to *explore "the depth of a technical or other defence.."* and deemed his efforts to investigate the medical cause for the accident as in someway diminishing the extent of his remorse;

(iii) the learned sentencing judge attached insufficient weight to the totality of the mitigating factors, and particularly the appellant's role as his wife's main carer;

(iv) the net custodial sentence of two years was unduly harsh.

30. In arriving at these conclusions the court is anxious to emphasise that by any standard this accident was a dreadful tragedy with the most appalling consequences for the family of Ms. Dunne and her young daughter, Eabha.

31. For the reasons stated the Court will allow the appeal and will re-sentence the appellant as of today. In so doing it of course takes account of all the relevant aggravating and mitigating factors, and the testimonials submitted to date. That sentence is one of two years with the unserved portion of that term suspended for a period of one year on condition that the appellant enter into a bond of €100 to keep the peace and be of good behaviour.