THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Record No.: 276/2015

Between/

The Director of Public Prosecutions

Respondent

- and –

Finbar O'Rourke

Appellant

Judgment of the Court delivered by Mr. Justice Mahon on the 24th October 2016

1. The appellant pleaded guilty and was convicted on 5th May 2015 at the Circuit Criminal Court sitting in Portlaoise, Co. Laois, of one count of dangerous driving causing death or serious bodily harm, contrary to s. 53(1) and s. 53(2) of the Road Traffic Act 1961 as substituted by s. 4 of the Road Traffic (No. 2) Act 2011. On 3rd November 2015 the appellant was sentenced to a term of imprisonment of seven years and six months, to date from 27th October 2015. He was also disqualified from holding a driving licence for a period of twenty years from 3rd November 2015.

2. A second offence, that of driving a mechanically propelled vehicle while exceeding alcohol limits contrary to s. 4(3) of the Road Traffic Act 2010, was taken into consideration.

3. This is an appeal against severity of sentence.

4. On the afternoon of 17th April 2914, Mrs. Gillian Tracey was driving her car on the R419 road between Portlaoise and her home in Portarlington in Co. Laois. At Ballymaurice, Portarlington, she was confronted with a Toyota Avensis crossing the road and colliding head on with her vehicle. That car was being driven by the appellant. Mrs. Treacy sustained very serious personal injuries, and her young son, Ciaran, aged four years, was also seriously injured and in spite of the best efforts of the emergency services, he died that evening at Portlaoise Hospital. Her seven year old son, Sean, thankfully escaped physically unscathed.

5. Forensic evidence suggested that there was no evidence of braking on the part of the appellant's vehicle and that it was being driven at approximately eighty six kilometres per hour in an area in which there was a speed limit of eighty kilometres per hour. Mrs. Treacy recalled observing the appellant shortly before impact, slouched over his steering wheel. Both vehicles were extensively damaged. Immediately following the collision, Mrs. Treacy recalls the appellant approaching her vehicle. However, he then left the scene and walked away in the direction of Portarlington. He was later met on the road by gardaí in a distressed state and was arrested. The appellant told the gardaí that he had consumed just two glasses of wine earlier in the afternoon. When his blood alcohol was tested he was found to have 200mg of alcohol to 100ml of urine. On being informed at the garda station that the young boy, Ciaran Treacy, had died from injuries sustained in the accident, the appellant smashed his head through a glass window in the garda station.

6. Further investigation by the gardaí suggested that the appellant had, prior to the accident, been drinking with a Mr. Smith. According to Mr. Smith, the appellant had consumed between eight and ten pints of cider over a few hours on that afternoon. Mr. Smith also informed the gardaí that while the appellant was walking away from the scene of the collision in the direction of Portarlington, he telephoned Mr. Smith a number of times, in the course of which he told him of the accident and that he believed someone had died. He also asked Mr. Smith to come and collect him.

7. The appellant's grounds of appeal are as follows:-

> (i) By categorising the index case as one *which "in my view this is a particular bad case, taking into account the aggravating factors, and that it is close to the top of the upper end of the offending scale, if not at the top"* and by expressly referring to the statutory maximum sentence of ten years where the learned judge stated *"as I have already indicated the maximum sentence that can be imposed in this country for a charge of dangerous driving causing bodily harm or death is ten years. In structuring sentence, I am constrained by this and also constrained by the Appeal Courts…"* it could be inferred that the learned sentencing judge calculated the sentence at a maximum before reducing the sentence to nine years before applying mitigation. It is submitted that having regard to comparative cases the reduction of one year from the maximum sentence of ten years arriving at a notional sentence of nine years before applying mitigation amounts to an error of principle.
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> (ii) While it is accepted that the learned sentencing judge did expressly acknowledge the majority of the mitigating factors; it is submitted that taking the mitigating factors as a whole insufficient weight was attached to them which reduced the amount of credit the appellant should have received.
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> It is further submitted that the credit that should have been afforded to the appellant was diminished when the learned sentencing judge counter balanced and / or qualified the appellant's plea of guilty in a manner that was objectively unfair to the appellant when he stated:-
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> > *"Given the overwhelming evidence which the State had against the accused, it has to be said that the credit for the plea in this instance is not as substantial as it would be in a case where the State might have difficulty in mounting a successful prosecution."*

It is submitted that the appellant should have been given the maximum credit for his guilty plea, and this should have been given without qualification. The plea of guilty was indicated and followed through at the earliest possible opportunity as illustrated by the timeline below and which saved the bereaved family the obvious trauma of a criminal trial.

(iii) It is submitted that the failure to co-operate (generally) or as described by the learned sentencing judge in the index case is not an aggravating factor per se, it merely denies the appellant the credit he / she would have got from a sentencing judge had he / she co-operated and / or provided material assistance. It is submitted that the learned judge's decision to use this language was unfair and amounts to an error of principle.

With regard to the co-operation of the appellant, it is an undisputed fact that he engaged in conversation with Gda. Nevin at the scene of the accidence and gave an account of his movements prior to the accident occurring.

Furthermore, the appellant made admissions under caution to Gda. Karen Nevin at the scene of the accident, whilst he was intoxicated and never resiled from the admissions at any stage. It was some six weeks later that the appellant was arrested and detained for questioning - and therein he invoked his constitutional right to silence, having received legal advice to do so. It is submitted that in accordance with the principles of *DPP v. Joseph Finnerty* [1999] IESC 130 there should have been no reference or comment of the appellant's decision to invoke his right to silence and it is submitted that to comment on the appellant's right to silence in a critical manner in a sentence hearing amounts to an error of principle.

(iv) The learned sentencing judge described the appellant's actions and the immediate aftermath of the accident as an aggravating factor where he stated:-

> *"A third aggravating factor is the actions of the accused in the immediate aftermath of the accident. Instead of remaining at the scene and rendering assistance to the victims, he proceeded to head off in the direction of Portarlington and to ring Mr. Smith with a request that he come and collect him. In her Victim Impact Statements Mrs. Treacy recalls the accused getting out of his car immediately after the accident and running in the direction of Portarlington. Sgt. Lynam said that when he first saw the accused he was walking in the direction of Portlarlington."*

In the first instance there was no such request by the appellant to his friend, Mr. Smith, that he was to come and collect him. There was no evidence given in relation to any request by the appellant to Mr. Smith to collect him, nor is there any reference to this in the Book of Evidence:-

> *"I got a phone call from Finbarr at 20.36 and then I had another missed call at 20.38 from Finbarr's other phone. I then rang Finbarr back at 20. 38. He told me he was after being in an accident. He said he was in a head on crash and he thinks somebody is dead and he wanted me to come down to him."*

Secondly, the appellant gave un-contradicted evidence under oath at the sentence hearing that he had remained at the scene of the accident, however notwithstanding this, the learned sentencing judge referenced what was stated in the Victim Impact Statement of Mrs. Tracey as being an accurate reflection of the case when it was not.

It is submitted that the learned sentencing judge erred when he expressly referred to the actions of the accused after the accident as an aggravating factor when a more benign reference should have been made, if at all. It is clear that the learned sentencing judge placed reliance on this fact when he arrived at the sentence of seven years six months imprisonment.

(v) and (vi) It is submitted that the emphasis, attention and weight placed on the Victim Impact Statement sentencing judgment was disproportionate and objectively unfair to the accused. It is submitted that the reference to the campaign of the Road Safety Authority generalised matters inappropriately so as to distract from the appellant's right to be sentenced for the offence upon which he [emphasis added] had pleaded guilty to; and not for the ills of society in general with specific regard to drink driving and wider campaigns undertaken by the Road Safety Authority.

Mr. and Mrs. Treacy's victim impact statement

8. In their victim impact statement, Mrs. Treacy detailed her own very severe injuries, including four serious fractures, severe lacerations, and her five week stay in hospital including ten surgical procedures. These injuries were life threatening, and are life long.

9. The statement also speaks in the most moving terms of the extent of the family's terrible loss of their adored young son, Ciaran, and how it has changed their lives forever, as well as the lives of Ciaran's brother Sean, his sister Caoimhe, his grandparents and the extended family.

10. The statement also outlines the severe financial consequences visited on the family in the aftermath of the accident.

11. In his very careful sentencing judgment, the learned sentencing judge identified the mitigating factors as including the following:-

(i) The plea of guilty at a relatively early stage (and which the learned sentencing judge felt was somewhat neutralised by the initial lack of co-operation).

(ii) The appellant's acknowledgement to the gardaí that he was the driver.

(iii) The lack of any previous convictions.

(iv) The expressions of remorse evidenced to some extent by the subsequent post traumatic stress disorder suffered by the appellant.

(v) The fact that since the accident the appellant has actively taken steps to stop drinking alcohol.

(vi) The appellant's consistently good employment history.

(vii) The fact that the appellant was a loving and devoted father to his children.

(viii) The content of the nineteen testimonials lodged in court.

(ix) The probation report's indication of a low risk of re-offending.

12. As to the aggravating factors, the learned sentencing judge identified these as including:-

(i) The high level of intoxication.

(ii) The extremely dangerous driving.

(iii) Leaving the scene of the accident.

(iv) Dishonestly informing the gardaí that he had consumed only two glasses of wine in an effort to minimise culpability.

(v) The failure to co-operate *in a fulsome manner*.

(vi) The devastating effects on the victims, including Ciaran's death

13. The learned sentencing judge also stated:-

"The Victim Impact Statement of Gillian and Ronan Treacy is one of the most powerful, harrowing, vivid and upsetting that I have ever read.

The Victim Impact Statement has, in addition to giving the Court an insight into the consequences of the accused's actions, also highlighted the dire and fatal consequences that can flow from drinking and driving. Anyone who drinks and drives or has been convicted of drinking and driving should read the Victim Impact Statement in this case and following that, they should ask themselves how would they cope if they found themselves in the position which the accused finds himself in today. In many cases these people will have driven with an alcohol level similar to, or greater than that of the accused and have avoided catastrophe by chance.

It is fair to say that over the last twenty five years there has been a sea change in the attitude of the public towards drunken drivers. For most people it is not longer socially acceptable to drink and drive. An enormous amount of work has been done by the Road Safety Authority to highlight the dangers of drinking and driving. The Road Safety Authority's campaign with shock advertising that is broadcast on prime time t.v. has had considerable success. Nevertheless the campaign must continue and be intensified to send a message to those people who still persist in drinking and driving, or think that drinking and driving is not a serious offence, that this clearly is not a sustainable or justifiable position.

The emotion of the Victim Impact Statement in this case and the publicity it has attracted has done the good service of focussing people's minds on the issue. I think it is also fair to say that it has kick started a debate on how we as a society deal with the issue. It would seem to me that in the context of that debate, the issue of punishment and penalty could be usefully re-visited. The maximum penalty provided for the offence of dangerous driving causing bodily harm or death is ten years imprisonment and / or a fine of €20,000. By contrast, in our nearest neighbour, the U.K., the maximum penalty for death by dangerous driving is fourteen years. Our legislation does not provide for a custodial sentence coupled with a community service order. That is something worth looking at as it would allow two of the main pillars of sentencing, namely punishment and rehabilitation to be addressed."

14. The learned sentencing judge went on to state:

"In cases such as this, where alcohol consumption is a major - is the major aggravating factor, deterrents has to play a significant role in the formulation of the sentence. The message has to be sent out that people have no business attempted to drive even with the slightest amount of alcohol in their system. The great the amount of alcohol in the system the greater the culpability of the offender."

15. Rehabilitation which is an integral part of any sentencing process was referred to by the learned sentencing judge on four occasions. Notwithstanding, this it is submitted that the learned sentencing judge failed to actually apply or structure rehabilitation into the sentence sufficiently or proportionally save for the fact that he directed counselling when he stated:

"I am directing that while in prison Mr. O'Rourke is to be provided with the necessary supports to continue on the road to rehabilitation. In particular he should be provided with appropriate counselling.

16. It is submitted that the learned sentencing judge placed undue weight on the principle of deterrents, and punishment, without appropriately balancing the need to rehabilitate the appellant.

Discussion and conclusion

13. The circumstances of this case are quite horrific. A young child was killed, and his mother very seriously injured. This accident occurred as a result of the appellant's reckless behaviour in driving his car having consumed a large amount of alcohol. It is suggested on his behalf that the offence was not pre-meditated. But while the appellant may not have planned to drive with alcohol on board for any great length of time before doing so there was pre meditation in the sense that, having consumed a great deal of alcohol, he made the conscious decision to leave the public house, walk to his car and then drive for some time before the collision occurred. It was not something he did on the spur of the moment or without thinking. The act of driving with a lot of drink consumed was very much a calculated act on his part, and a risk he freely took.

14. The fact that the appellant walked away from the scene of the accident in circumstances where he was aware that someone had probably died in the collision, and in circumstances where he must have been aware that Mrs. Treacy was severely injured are aggravating factors. While he was less than truthful with the gardai as to the amount of alcohol consumed in the immediate aftermath of the accident, it is nevertheless in his favour that thereafter he co-operated with the gardaí. He pleaded guilty at a relatively early stage and he has shown remorse, which the Court accepts is very genuine. Although almost insignificant in comparison to the

devastating and life long trauma visited on the victims in this accident, the appellant will himself have to live with the awful guilt which undoubtedly he feels for the rest of his lifetime.

15. The maximum sentence for the offence in respect of which the appellant pleaded guilty is ten years imprisonment. Interestingly, by contrast in the U.K., it is fourteen years. Acknowledging that he was required to sentence the appellant with due regard to the ten year maximum prison term, the learned sentencing judge considered the gravity of this case and placed it *close to the top of the upper end of the scale, if not at the top*, and proceeded to identify the appropriate sentence at nine years imprisonment, before discounting for mitigating factors.

16. It is of course appropriate and desirable that there be a degree of consistency in sentencing for particular offences. That task is often problematical in circumstances where the facts relevant to these offences will almost always be quite different, and often very much so, and such difficulty is frequently a feature of dangerous driving causing death cases. The only common denominator in such cases is that a death of one or more people is the tragic consequence of the dangerous driving.

17. That effort on the court's part to establish some degree of consistency in sentencing for what might be described as broadly similar offending may appear somewhat clinical or even callous to the victims of such a terrible event, as this was, but it is necessary in the interest of the administration of justice generally, and specifically for the guidance of judges dealing with such cases at first instance, that this Court, as an appellate court, endeavour to achieve as much consistency as is reasonably possible.

18. It is useful at this juncture to briefly look at some of the decided cases to date. The learned sentencing judge also had regard to the decisions of the superior courts in similar cases, and specifically, the decisions of this court in *DPP v. Casey* [2015] IECA 199 and IECA 278. In this case the sentence imposed was one of five years with the final twelve months suspended. That case involved one fatality and another passenger suffering very serious injuries and being left a paraplegic. In *Casey* this Court considered a number of judgments in dangerous driving cause death cases. It noted that in two cases, that of *DPP v. Connors* [2008] IECCA 163 and *DPP v. Shovelin* [2009] IECCA 44, sentences of five years imprisonment were imposed. It identified a further six cases which were decided by the Court of Criminal Appeal, and in which sentences of less than five years were imposed.

19. In *Shovelin,* a sentence of seven and a half years imposed in the Circuit Criminal Court was reduced by the Court of Criminal Appeal to one of five years imprisonment. A feature of that case was evidence of a prolonged period of dangerous driving before the accident which took the life of one of the passengers in the vehicle. In *DPP v. Kelly* [2015] IECA this Court imposed an eight year prison sentence, but suspended the final four years. That case involved a prolonged, persistent and deliberate course of very bad driving, driving at speed and overtaking in a dangerous manner. The ensuing accident resulted in multiple fatalities. In *DPP v. Sheedy*, heard by the Court of Criminal Appeal in 2000, a case which involved excess alcohol and dangerous driving resulting in the death of a pedestrian, the sentence imposed was one of three years imprisonment. Clearly there has been a progressive increase in sentences imposed in dangerous driving causing death cases over the past fifteen years or so. This probably reflects the increased abhorrence of drink driving by the public generally.

20. In *DPP v. M* [1994] 3 I.R. 306, Denham J. (as she then was) at p. 318 stated:-

> *"Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed inter alia in a plea of guilty, which in principle reduces the sentence.*

21. The Court is satisfied that there was an error of principle on the part of the learned sentencing judge in placing the headline sentence at nine years, (having a regard to the fact that the maximum sentence for this offence is ten years), primarily because of the absence of evidence of a prolonged period of dangerous driving or significantly excessive speed. .

22. In those circumstances it is necessary for this Court to re-sentence the appellant as of today. It does so with due regard to the mitigating factors properly identified by the learned sentencing judge, and the many strong testimonials submitted on behalf of the appellant. The sentence it will impose is one of eight years, with the final two years suspended for a period of five years on his entering into a bond to keep the peace and be of good behaviour. The period of suspension is primarily intended as a recognition of the appellant's genuine remorse, his plea of guilty and to incentivise rehabilitation. The Court will also re-impose the disqualification for a period of twenty years.