THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

52/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Sean Casey

Appellant

Judgment of the Court delivered on the 31st day of July 2015 by Mr. Justice Sheehan

1. This is an appeal against the severity of sentence imposed on the appellant at the Circuit Criminal Court in Cork on the 17th February, 2014.

2. On that date the appellant pleaded guilty to the offence of dangerous driving causing death and 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. The respondent was sentenced to seven years imprisonment for this offence and disqualified from driving for 30 years.

3. The appellant contends that the sentencing judge erred in principal on five separate grounds set out in his submissions in the following manner:

> 1. The learned sentencing judge erred in principle in holding that the circumstances of the dangerous driving in the index case was such as to put it at the "the absolute apex of the dangerous driving" scale meriting ten years imprisonment before applying mitigating factors and in handing down a sentence that was excessive, disproportionate and in all the circumstances inconsistent with precedent sentences imposed by the Court of Criminal Appeal and with other sentences handed down by the learned sentencing judge himself in similar cases.
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> 2. The learned sentencing judge erred in principle in failing to take proper and/or adequate account of the mitigating factors in determining what reduction ought to be applied to the appropriate sentence on taking in such mitigating facts into account namely:
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> (a) the plea of guilty,
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> (b) the accepted genuine remorse of the appellant,
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> (c) the evidence as to the good character of the appellant by Patricia O'Mahony and Michael Dineen,
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> (d) his excellent work record,
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> (e) the fact that he had not come to garda notice for three years since his minor previous convictions nor since the index offences, and
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> (f) the age of the appellant.
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> 3. The learned sentencing judge erred in principal in failing to have proper and adequate regard for the rehabilitation of the appellant both in the length of the sentence (seven years) and the period of disqualification from driving imposed (30 years), moreover having regard to the age of the appellant and the nature of his work in plant hire.
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> 4. The learned sentencing judge erred in principle in his interpretation of the evidence relating to (a) the return of the car keys to the appellant, (b) relating to the unwarranted inference that he was driving a big powerful car, (c) that the appellant was nearly five times over the legal drunk driving limit.
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> 5. That the learned sentencing judge erred in principle in failing to take account of the retributive effect of the loss suffered by the appellant by reason of his conviction with particular reference to his loss of standing within his family and the community.

4. In order to consider these grounds of appeal it is first of all necessary to set out the background to this offence.

5. On Sunday the 7th April, 2013, the appellant and the five passengers in his car, all of whom were friends were out socialising together. They ended up in the Harbour bar in Leap, Co. Cork. The appellant's car key was picked up by one of the bar assistants in the public house where they were socialising and she told the appellant that she was putting it behind the counter to which the appellant consented.

6. At some stage later one of his male friends also being a passenger in the motor car asked the bar assistant for the key on a number of occasions and eventually she relented and gave it to him. Sometime later the appellant drove his car to Skibbereen which was 10kms away. At about 1.45 am he crashed into a lamp post at Marsh, Skibbereen, near the Schull Road Roundabout, otherwise known as Hurley's Roundabout.

7. Megan Johnson, aged 22 years, one of the two female passengers, was pronounced dead at the scene. Kate Petford was treated

at the scene and removed to hospital. She suffered serious spinal injuries and was rendered quadriplegic. All other casualties have made a full recovery.

8. The appellant called the emergency services and then left the scene of the accident. Some time later he was arrested on suspicion of drunk driving and taken to Clonakilty garda station where he provided a blood sample that was found to contain 204mgms of alcohol per 100mls of blood. The drink driving limit at the material time was 50mgms of alcohol per 100mls of blood. The appellant admitted driving and being involved in the accident.

9. Garda forensic investigations established with the aid of CCTV at the roundabout that the appellant's car travelled into the roundabout at approximately 80kms per hour. The speed limit in the area was 50kms per hour. The garda forensic expert also suggested that the maximum speed the vehicle could travel around the roundabout when wet was between 34kms and 42kms per hour.

10. On the 4th May, 2013, the appellant was arrested on suspicion of dangerous driving causing death and was detained and made full admissions in relation to the events surrounding the night of the fatal collision. The investigating garda accepted that he was extremely remorseful.

11. There was no evidence of speed or erratic driving between Leap and Skibbereen other than at the scene of the accident.

12. The court was told that the appellant had two minor public order convictions in 2009 and one conviction in 2010 under s. 107(4) of the Road Traffic Act 1911 for failing to give information to a garda involving the use of a motor vehicle. For this he was fined €1,000.

13. At the time of the accident, the appellant was 26 years old and working for the family plant hire business. His aunt and a fellow employee gave character evidence on his behalf and both confirmed the appellant's remorse. They also stated that he was obliging and hardworking. The appellant also expressed remorse in court.

The victim impact statements

14. A victim impact statement by the parents of the deceased woman Megan Johnson were read to the court by counsel for the Director of Public Prosecutions as was the victim impact statement of Kate Petford. A victim impact statement of the Petford family was also read to the court by the prosecuting garda. These statements were dealt with in some detail by the sentencing judge in the course of his remarks which are now set out.

15. Prior to imposing sentence, the judge stated:-

> "This is an extremely serious case in which the accused comes before the court, pleaded guilty to his driving causing the death of one person and the serious incapacity of another. He says he is riddled with guilt and remorse and so he should be. The courts have dealt with cases of dangerous driving causing death before, but none in my opinion, of this magnitude. I am somewhat constrained in what I can do by a judgment of the Court of Criminal Appeal in the case of *DPP v. Oliver Shovelin*. That is a case in which a colleague of mine gave a sentence seven and a half years which was reduced to five year by the Court of Criminal Appeal. It is a case in which, if you read it, it is breathtaking in relation to the bad driving of Mr. Shovelin. He was observed at various stages driving erratically, driving at high speed, driving with his eyes closed. He was a man who had previous convictions. He may indeed even have been off the road at the time. He went to full trial. There was no evidence in that case of remorse, but the Court of Criminal Appeal reduced the sentence from seven and a half years to five years. It is a case that I read constantly and I would not be reading it that often if I could understand it or the rational in it. However, it does state that in all cases of dangerous driving, the facts turn unique – the decision turns uniquely on its own facts and the Court of Criminal Appeal was emphasising that the trial courts and pointing out that that was necessarily not a bad thing because trial judges are to comply with the directions of Denham J. in the *Sheehy* case and the aggravating factors therein and the mitigating factors.
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> Now if I look at this case and apply both *Sheehy* and the constraints of *Shovelin* the aggravating factors in this case: death was caused, serious permanent incapacitating injury was caused directly by the driving. Speed, there is clear evidence of speed on the garda witness. The manner of driving, which was dangerous to the point of reckless. How can you collide with a roundabout unless you are recklessly driving? And then drink. On the garda evidence he was nearly five times over the legal limit and if that is not bad enough the defence elicited that the keys at some stage earlier in the night had been taken by another girl because apparently someone in the pub saw this man's condition, but he inveigled the keys back and went about his driving.
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> The car was a big powerful car known to him, but it ended up with these consequences. So that is all of the aggravating factors as necessitated to be considered are considered with very negative results as far as Casey is concerned.
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> Mitigating factors, he did plea, that was an early plea. He is remorseful. In relation to previous convictions he has one very relevant previous conviction in relation to the road traffic legislation in this refusing to give information. He has avoided a trial and he is a young man full of remorse and the consequences of a conviction and sentence and the consequential disqualification order which must ensue will have an effect on him into the future in that the courts regard the ability to drive and the ability to get employment as being tied up and if you cannot drive, it might be very hard to rehabilitate yourself once you are released from prison. That is a factor, but in the – there has to be a separate inquiry as to the length of any disqualification order and I will come to that later on.
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> Now sometimes you are almost lost for words when you read a victim impact statement. Kate Petford with all that has been visited on her with all the injury and her rehabilitation, she still thinks of her friend who was killed as being in a worse position. There is no doubt about it but that Ms. Petford must be an extraordinary person to have the heart and the spirit in the face of the overwhelming adversity which she has been presented with to have that in her victim impact statement. How she can find it in herself and from her surroundings to be so positive and hopeful about the future, it is on one level wonderful; one just hopes that she is correct and wishes her absolutely the best, because she is faced as I said with overwhelming adversity as a result of Casey's driving.
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> And then the deceased. The backbone to her mother who is now in bad health and could need and had her support and that is now all gone because of this cruel act. Her support in life is cut off in the prime of life. As I say what words from me or from the court can make up that chasm I can understand. I can try to understand, but I cannot make it good. This is devastation that has been visited on these families by this man and his driving.

> There has to be a prison sentence. I think this case is at the absolute apex of the dangerous driving with all the ancillary aggravating factors and that I think the sentence of seven years of imprisonment from today's date is appropriate. The failing to report and the drink driving I will deal with those separately, but on the dangerous driving causing death and while I am aware that the Superior Courts place great emphasis on letting a person some chance to rehabilitate himself by being able to get a driving licence in the future, in my view, in relation to Sean Casey it should be far and distant into the future and I propose to ban him from driving for 30 years. In relation to the failing to report what are the statutory penalties in relation to that? I do not propose to take of these offences into consideration. I think there should be a separate penalty." The appellant's counsel sought clarification from the learned sentencing judge when he stated "I take it then that the court is not taking into account any of the mitigating factors having regard to the exposition on the *Shovelin* case". To which the learned sentencing judge replied "I have taken all the mitigating factors such as they are into account otherwise this case merited a ten year sentence".

16. Following the imposition of this sentence and a separate sentence in respect of the drunken driving offence as well as a separate sentence in respect of an offence contrary to s. 106 of the Road Traffic Act, leaving the scene of the accident, it was pointed out to the sentencing judge that it was not the appellant who had inveigled the keys from the witness to which the learned sentencing judge replied "very good".

17. At the oral hearing of this appeal, counsel for the appellant focused on the length of the sentence submitting that it was out of line with the comparators contained in the written submissions of the appellant and therefore the sentence imposed constituted an error in principle. Counsel also submitted that the sentencing judge had erred in principle when he mistakenly took into consideration as an aggravating factor that the appellant had inveigled the keys back from the bar assistant who had taken them from him.

18. Counsel for the Director of Public Prosecutions, while acknowledging that the appellant had undertaken a detailed analysis of a number of decisions of the Court of Criminal Appeal in cases involving dangerous driving causing death which was both impressive and commendable, nevertheless contended that the argument advanced was only superficially attractive. Counsel for the Director of Public Prosecutions went on to say that test to be applied by this Court in dealing with this case was whether or not the transcript disclosed an error in principle in the manner in which the sentence imposed was constructed by the learned sentencing judge.

19. In support of that submission, counsel relied on remarks of the Court of Criminal Appeal in *People v. Sheedy* [2000] 1 I.R. 184, in which the court had said:-

> "In view of the particular facts of this case, without considering whether or not any such guidelines should be given by a court, it is not an appropriate case within which to set out any general guidelines. There is no doubt that information on sentencing in similar cases is useful to a court, although each case must be decided on its own circumstances."

20. Counsel on behalf of the Director of Public Prosecutions submitted that the correct approach for an appeal court is to apply the following general propositions:

> 1. This Court ought not to intervene to impose a sentence it might prefer to impose in the absence of error of principle by the sentencing judge.
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> 2. The sentencing judge is in the best place to weigh up the factors in each case, both mitigating and aggravating.
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> 3. Each case must be viewed on its own facts and circumstances and this is particularly so in these types of cases given the wide variety of circumstances surrounding the actual commission of these offences; the wide variety of aggravating factors some or all of which are varying the attendant in each different case; and the wide variety of mitigating features applying with more or less weight in different cases.

Conclusion

21. This is a tragic case which has had horrific consequences. The victim impact evidence which expressed the devastation of two families was profoundly moving. Kate Petford's generosity of spirit in the face of extreme adversity is a lesson for all of us.

22. The task of this Court is to decide whether or not there are errors of principle in the way the sentence in this case was arrived at and whether or not the sentencing judge was correct when he described the case as being at the absolute apex of this type of case requiring the maximum sentence as the starting point on the scale of severity.

23. It is a truism to say that no two cases are the same. That said an appellant is entitled to argue that a sentence is excessive by reference to other decided cases. Indeed one of the cases which the respondent relied on was the judgment in the case of *The People v. Sheedy* already quoted above where the court stated:-

> "There is no doubt that information on sentencing in similar cases is useful to a court, although each case must be decided on its own circumstances."

24. Information on similar cases assists this Court in bringing about a greater degree of consistency in sentencing.

25. In the course of his submissions, counsel for the appellant refers the court to eight cases of dangerous driving causing death which were dealt with by the Court of Criminal Appeal either as appeals against severity of sentence or applications by the Director of Public Prosecutions for a review of sentence on grounds of undue leniency. The following cases were relied on by the appellant:-

> 1. *DPP v. Shovelin* [2009] IECCA 44.
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> 2. *DPP v. Stronge* [2011] IECCA 79.
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> 3. *DPP v. James O'Reilly* [2007] IECCA 118.
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> 4. *DPP v. Naughton* [2008] IECCA 34.
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> 5. *DPP v. Philip Sheedy* [2000] 1 I.R. 184.

6. *DPP v. James Connors* [2008] IECCA 163.

7. *DPP v. Vincent McCormack*, unreported, Court of Criminal Appeal, 27th April, 2006.

8. *DPP v. Ronan Cunningham,* unreported, Court of Criminal Appeal (ex tempore), 1st May, 2014.

26. Sentences of five years imprisonment were imposed on Mr. Connors and Mr. Shovelin. Sentences below five years imprisonment were imposed in the remaining six cases. These comparators suggest to this Court, allowing for a margin of appreciation as it must, that the sentence imposed by the learned sentencing judge in this case was out of line with other decided cases and accordingly the Court holds that the learned sentencing judge erred in principle in holding that this case was at the absolute apex of dangerous driving causing death cases, attracting as a starting point a ten year sentence. The Court also finds that there was no evidence to support the learned sentencing judge in his finding that the appellant had inveigled his keys back from the bar assistant. As the sentencing judge had deemed this to be an aggravating factor, this also resulted in an error of principle in the learned sentencing judge's approach to sentence.

27. In view of these two findings, the Court will set aside the original sentence in this case and will now proceed to impose a new sentence in place of the original one following a further sentence hearing.