



**THE COURT OF APPEAL**

**Birmingham J.  
Edwards J.  
Hedigan J.**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**Keith Jackson Fleming**

**76CJA/17**

**Appellant**

**Respondent**

**JUDGMENT of the Court delivered on the 31st day of July 2017 by**

**Mr. Justice Birmingham**

1. This is an application pursuant to s. 2 of the Criminal Justice Act 1993 by the Director of Public Prosecutions seeking to review a sentence imposed on the respondent on grounds of undue leniency. The sentence sought to be reviewed is one of four years imprisonment with one year suspended which was imposed at Naas Circuit Criminal Court on 9th March, 2017 in respect of the offences of dangerous driving causing death, driving without a driving license or insurance and failing to give a sample of blood or urine when required to do so.
2. The case has its origin in events that occurred on 28th November, 2015. On that occasion the respondent, Mr. Jackson Fleming, the deceased, Mr. Dara Ooi Cottuli, and a third man, Mr. Declan Martin, were out socialising together. They borrowed a car from Mr. Martin's girlfriend and they went at one stage to the Killeel Inn in Killeel, Co. Kildare. According to the barman, who was a witness on the Book of Evidence, there they purchased rounds of alcohol, a round being two pints of Heineken and a pint of Coors Light lager. They purchased three or four rounds. They were then refused further alcohol as the proprietor was of the view that they had had enough to drink and they then left the premises. Then, at about 22.40, residents of Old Milltown, Kill, Co. Kildare, heard a vehicle being driven fast. Within seconds they heard a loud bang.
3. One resident got into his vehicle and went towards the sound of the bang. On rounding a corner he could see a vehicle in a ditch. When he approached the car he saw a person in the back of the car but it was obvious that his situation was a very serious one indeed. That person in the back of the car was the deceased, Mr. Dara Ooi Cottuli. The person who had made his way to the accident scene described the actions of the front seat passenger who was Mr. Martin. He was described as being "out of his head" on drink and drugs. He was described as leaning over the driver, Mr. Jackson Fleming, and attempting to restart the car notwithstanding that there was an obvious smell of petrol. The car had been crashed into what is described as a pier and hedge. Mr. Jackson Fleming was brought by ambulance to Naas General Hospital. Before leaving the scene Mr. Jackson Fleming was complaining of neck, chest and back pain. He was put on a spinal board and a cervical collar was provided. He was offered pain relief by a paramedic but refused. On route to the hospital the paramedic enquired if he was on any medication and Mr. Jackson Fleming responded that he had taken D10s and Zanex. The sentencing court was told that D10s and Zanex were relaxant medicines, benzodiazepines. There has already been reference to the impression that was formed by those who came on the scene in relation to the front seat passenger, Mr. Martin. A toxicology report in relation to the deceased's blood revealed the presence of alcohol, prescription medication and cocaine.
4. A forensic collision report concluded:
  - (i) that the respondent's vehicle had veered to the right, off the road and struck a ditch;
  - (ii) that the vehicle continued to rotate clockwise, colliding with, and destroying a mature hedge, timber post and rail fence;
  - (iii) that the vehicle then rotated at least 180 degrees before colliding with and destroying a heavy-duty brick and stone pillar (also referred to as a pier) which weighed approximately a tonne;
  - (iv) that the final collision sent the vehicle back across the road where it stopped overhanging a ditch;
  - (v) no other vehicle was involved in the collision;
  - (vi) that the mechanical state of the vehicle had no bearing on the collision;
  - (vii) that the weather conditions did not contribute to the outcome of the collision; and,
  - (viii) that given the amount of damage caused to the vehicle and the surrounds that significant speed was involved with the vehicle going into over-steer resulting in loss of control.
5. Garda Terry Donnelly went to Naas General Hospital in order to obtain a blood or urine sample from the respondent but despite a statutory requirement being made of him, Mr. Jackson Fleming refused to provide a sample. In doing so he committed an offence.
6. At this sentence hearing a very powerful Victim Impact Report prepared by the mother of the deceased, Ms. Kobani, who attended the sentence hearing along with Mr. Cottuli's two sisters was presented. That report spoke about the closeness of the relationship between Dara and his mother and the strength of their bond. Ms. Kobani commented; "I can't help feeling that Dara was given a death sentence and we were given a life sentence".
7. In terms of the accused's background and personal circumstances, he was born on 2nd April, 1991. He had seven previous convictions. These included two for burglary dealt with on the same date in December, 2012 in Baltinglass District Court, one for exceeding the speed limit for which he received a €300 fine which was dealt with in Naas District Court in March, 2015, a charge of

driving a dangerously defective vehicle for which he received a €200 fine, a matter dealt with in Gorey District Court on 9th June, 2016 and a s. 3 and s. 15 Misuse of Drugs Act 1977 case for which he received a sentence of three years imprisonment but suspended on 7th July, 2015 in Naas Circuit Court. It is therefore the case that this dangerous driving causing death offence committed on 29th November, 2015 was committed at a time when the suspended sentence for the drugs matter involving possession of cannabis with a street value of €32,544 was still operative. At the time of the sentence hearing, the court was made aware of the fact that the respondent had pleaded guilty to an offence of dangerous driving which was committed on 12th November, 2016, almost exactly one year after the offence the subject matter of the present application, but that sentencing in respect of it had not been finalised. This later dangerous driving offence occurred on the same road as did the fatality.

### **Grounds of appeal**

8. In essence, the Director advances one ground. It is a very simple and straightforward one. She says that the headline sentence of four years before consideration of mitigation was too low and too low to the extent that it represented a significant error in principle. The Director does not take issue with the fact that one year of the sentence imposed was suspended, accepting that that was an appropriate response to such mitigating factors as were present which the Director, it should be noted, says were limited.

### **The judge's approach to sentencing**

9. The judge's approach to sentencing was to identify the factors that went to the seriousness of the offence. These being:

- (i) the serious nature of the offence;
- (ii) the fact that alcohol was a factor;
- (iii) the fact that inappropriate and excessive speed was a factor;
- (iv) the high degree of fault on the respondent's behalf; and
- (v) the devastating loss and the impact that this has had on family members of the deceased.

10. The judge saw the mitigating factors as:

- (i) the admissions made to Gardaí;
- (ii) the entry of a plea of guilty; and
- (iii) his genuine remorse and regret.

11. He then went on to impose the sentence that he saw as the appropriate one and ordered that Mr. Jackson Fleming be disqualified for a period of ten years from driving, the disqualification to run from his release from prison.

12. The Director makes a number of points. She acknowledges that a plea of guilty was entered though makes the point that it was not an early plea. The case was listed for trial, the jury was sworn and it was two days later that the plea was entered as the trial was about to start. She says that if remorse was present from an early stage, it would and should have been demonstrated by the entry of an early plea of guilty at the first available opportunity.

13. The Director also contends that there were a number of aggravating factors present which were not referred to by the trial judge and she says that the fact that a very low sentence was imposed suggests that these factors were overlooked. She instances the fact that the offence of dangerous driving causing death was committed just four months after Mr. Jackson Fleming had received a three year suspended sentence for possession of cannabis. She draws attention to the admissions to the paramedic of having consumed "D-10s and Zanex", to the fact the offence of dangerous driving was committed when the respondent was not licensed or insured to drive and to the failure to provide a blood or urine sample. She points out that this failure is a matter of continuing relevance in that the respondent's written submissions on the application for review indicate that because no tests were carried out it is not appropriate to proceed on the basis of the consumption of large amounts of alcohol and the taking of illegal drugs. She points out also that while on bail for this offence that a further dangerous driving offence was committed, as it happened, very close to the scene of the fatal collision.

14. The Director is particularly critical of the way in which the judge addressed the two matters that were before him, the s. 99 re-entry in respect of the cannabis offence on the one hand and the imposition of sentence for dangerous driving causing death and the related offences on the other. The judge activated 18 months of the 3 years that had been suspended in relation to the cannabis offence and then directed that the reactivated sentence and the dangerous driving causing death sentence be served concurrently. Counsel for the Director said that was not a permissible approach. He accepts that the judge had a discretion whether to impose concurrent sentences or consecutive sentences. However, he says that the judge should have done one of two things, either make the sentences consecutive or if he did not want to do that then he should have treated the fact that the dangerous driving offence was committed while a suspended sentence was operative as an aggravating factor and then reflected this by imposing a sentence more severe than he would otherwise have done.

15. The respondent, for his part, points out that the onus is on the Director to show that the sentence was unduly lenient. He says that the sentence of four years with one suspended reflects an appropriate balance between the aggravating and mitigating factors. He says that the respondent has been very severely affected by this incident. He was the driver of the car in which one of his best friends died and since this incident, the third man in the car, the front seat passenger, has taken his own life apparently by reason of being unable to cope with his involvement in this terrible incident.

16. At this stage, the principles to be applied by courts when reviewing sentences on grounds of undue leniency are very well known and in reality have not been in dispute since the first such case, that of *People (DPP) v. Byrne* [1999] 1 ILRM 279. This Court has to take as its starting point for its consideration of the application to review that the offences in question here were very serious ones. Three of the classic aggravating factors for dangerous driving causing death cases were present; speed, alcohol and drugs. The fact that the respondent had relevant previous convictions for speeding and for dangerous driving is significant.

17. There is no doubt that the sentence imposed was a lenient one, indeed a very lenient one. Equally, there can be little doubt that a more severe sentence would likely have been upheld. This Court has time and time again made the point that the fact that it would have been minded to impose a different sentence had it been called upon to impose sentence or that individual members of the Court would have been minded to impose a different sentence if called on to do so does not provide a basis for intervention. The question is

whether the sentence imposed falls outside the available range and so constitutes an error in principle, always bearing in mind that the trial judge must be afforded a significant margin of appreciation. Here, the very experienced Circuit Court judge who was called on to sentence was facing a particularly difficult, indeed tragic situation. Three young men had gone out to socialise together. Really bad dangerous driving, with all of the aggravating features referred to, had resulted in the death of a young man bringing devastation upon his family. One of the two young men who survived the crash had taken his own life and the judge was now called on to sentence the sole survivor. Undoubtedly, there would be many who would say that as the person who had caused this situation by the manner in which he drove the car, Mr. Jackson Fleming should face the full rigours of the law. Others would take the view that there was scope for leniency and that a lenient sentence here was a humane one.

18. It is undoubtedly the case that other judges might have dealt with this situation differently and imposed a more severe sentence.

19. However, in the Court's view, the approach decided upon by the sentencing judge was not an impermissible one. In the unusual and particularly tragic circumstances of this case, the Court has not been persuaded that an error has been established requiring intervention by the Court.

20. Accordingly, the Court will refuse the Director's application.