



THE COURT OF APPEAL

Sheehan J.  
Mahon J.  
Edwards J.

Appeal No.: 19/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

- V -

Michael O'Shea

Appellant

**Judgment (ex tempore) of the Court delivered on the 15th day of December 2015 by Mr. Justice Mahon**

1. On 12th November 2014, at Naas Circuit Criminal Court, the appellant was found guilty by a majority decision of a jury of one count of careless driving contrary to s. 52 of the Road Traffic Act 1961 (as substituted by s. 4 of the Road Traffic Act No. 2 2011). This is an appeal against that conviction.

2. Following his conviction, the appellant was sentenced on 18th December 2014. He was fined €5,000 (with one year to pay, and three months in default of payment), and he was disqualified from driving for a period of four years. He was also directed to re-sit a driver competency test at the expiry of that disqualification period.

3. The facts of the case can be briefly stated as follows. The appellant, who was at the time aged seventy years, lives in Smithstown, Maynooth, Co. Kildare. On the morning of 9th January 2013 the appellant left his home to attend a funeral, and later in the day was driving on the public road at Graiguesallagh. As he approached roadworks, he collided with a JCB causing the death of Mr. Kevin O'Sullivan. The deceased, who had been on traffic control duty at the roadworks and standing close to the JCB which was being used in the roadworks was struck and pinned between the appellant's car and the JCB. The appellant maintained that he had been blinded by strong sunlight as he approached the locus of the accident, and also that there were no warning signs visible to him as he approached. Both the appellant and the JCB driver tested negative for alcohol. The evidence also indicated that the appellant was not driving at a fast speed and that his car was roadworthy. Other witnesses, including a garda and an ambulance driver, gave evidence that shortly after the accident they noticed while driving to the locus of the accident that the sun was in a low position. The appellant fully co-operated with the garda investigation in that he attended at the garda station and gave a full and complete account of what had occurred.

4. Six grounds of appeal have been filed on behalf of the appellant. They are:-

(i) The learned trial judge erred in law in directing that the offence of careless driving causing death was an offence of strict liability.

(ii) In directing that it was in such a category, the learned trial judge erred in not directing the jury as to the essential ingredients to any offence, *i.e.* that of *mens rea*.

(iii) The learned trial judge erred in law by indicating to the jury that the State did not have to prove that the actions of the accused on the date were either intentional or reckless.

(iv) The learned trial judge erred in law in not directing the jury as to the concept of intention or to the concept of recklessness.

(v) By not directing the jury as outlined above, it is respectfully submitted that the onus of proof, which rests at all stages with the prosecution was cast back onto the defence.

(vi) The learned trial judge erred in law on two occasions by informing the jury that they must not be worried as to the consequences of a guilty verdict. It is submitted that the learned trial judge should have balanced any mention of a possible verdict or the consequences thereof by indicating that they should not be concerned if they were to find the accused not guilty.

5. The offence of careless driving causing death is a relatively new offence and was created by s. 4 of the Road Traffic (No. 2) Act 2011. This provides, at s. 52:-

*52(1) A person shall not drive a vehicle in a public place without due care and attention.*

*(2) A person who contravenes subsection (1) commits an offence and—*

*(a) in case the contravention causes death or serious bodily harm to another person, he or she is liable on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine not exceeding €10,000 or to both, and ...*

6. The offence is the less serious of offences which can arise from a death occurring from the driving of a vehicle; the other, and more serious being that of, as it is commonly referred to, dangerous driving causing death.

7. Five of the six grounds of appeal relate essentially to the criticism of the learned trial judge's charge to the jury, and more particularly his classification of the offence in question as one of "strict liability", and the absence in his charge of any reference to the necessary ingredients of *mens rea*, namely the offence being committed intentionally or recklessly as being necessary for there to be culpability on the part of an accused person.

8. In Blackstone Criminal Practice 2011, the following definition of a "strict liability" offence is provided at para. A4.1.:-

*"... strict liability is most likely to be applied, where, from the acts performed it would be difficult if not impossible for the court to infer that the accused acted with fault, be it intentionally or recklessly (advertently or in-advertently).*

9. Following the completion of his charge to the jury, the learned trial judge was requisitioned in relation to the matters which are the subject matter of the final ground of appeal, but not in relation to the "strict liability" or "mens rea" issues, the subject matter of the first five grounds of appeal. This fact, it is contended by the respondent, should result in the disallowance of the first five grounds of appeal in line with the decision in *DPP v. Cronin* [2006] IESC 9.

10. This court is satisfied that the offences of dangerous or careless driving causing death are not offences of "strict liability". The extract opened to the court from Mr. Pierce's Road Traffic Annotated Legislation 1961-2011 at para. 52 provides a useful insight into the nature of the charge of careless driving causing death:-

*"This RTA 2011 version (RTA 2011, s.4) of this section makes careless driving a much more serious offence than hitherto, especially if death or serious bodily harm occurs. It is an indictable offence when death or serious bodily harm results where a jury does not convict of dangerous driving causing death or serious bodily injury but convicts of careless driving causing death or seriously bodily harm the penalty now open to the judge are much heavier.*

*This new version of criminal careless driving must certainly raise a big issue of whether mens rea arises and at what level or degree it applies to such a serious offence."*

11. *Mens rea* is a necessary pre-requisite to establishing guilty in any indictable offence. In relation to this case specifically, in order to convict, a jury would have to be satisfied that there had been intentional or reckless behaviour in the manner of the appellant's driving. The issue of recklessness was not addressed by the learned trial judge in his address to the jury, and indeed was specifically excluded by him as being relevant to the offence when he declined to discharge the jury on the basis that recklessness had not been established by the prosecution.

12. It is contended by the respondent, although acknowledging that the strict liability reference ought not to have been made in the charge, that the overall effect of the charge was that the jury were left in no doubt that their task was to determine if the prosecution had established beyond all reasonable doubt that the deceased's death had been caused by the appellant's failing to drive his car in a public place with due care and attention.

13. While the court does not agree with the submission for the reasons already indicated, even if the jury had been, in general terms, adequately charged on the issue of *mens rea* the fact that the learned trial judge had elsewhere in his charge specifically and unequivocally classified the offence as a "strict liability" offence, would have, at a minimum, created the very real potential to confuse the jury.

14. It is necessary to briefly refer to the *Cronin* point raised by the respondent to the effect that a matter or issue not raised by way of requisition ought not later form the basis of an appeal. That, as a general proposition, is certainly the case and that same point has informed this court in disallowing a number of appeals. However, the failure to raise the matter by way of requisition should not impede the court in its discretion to consider a ground of appeal which refers to an issue which is fundamental to the fairness of a trial, notwithstanding that the issue had not been raised in the course of the trial by way of requisition.

15. The court is satisfied that this threshold has been reached in this case, and that it would be fundamentally unjust to exclude the first five grounds of appeal for the reason contended by the respondent.

16. The Court will therefore allow the appeal in respect of grounds 1 to 5 inclusive on the basis that the learned trial judge's classification to the offence as being a 'strict liability' offence in the course of his charge to the jury was erroneous and had, at a minimum, the potential to confuse the jury in arriving at a determination.

17. The final ground of appeal is rejected by the Court. The learned trial judge was simply advising the jury to ignore the question of penalty or sentence in the event of a guilty verdict being returned. He did so however in the context of clearly charging the jury as to the choices they had in terms of a verdict. What the learned trial judge said in this context was appropriate in the circumstances of this case.