THE COURT OF APPEAL

Record No. CA 249/17

Birmingham P.
Edwards J.
McGovern J.

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

DECLAN MORAN

APPELLANT

JUDGMENT of the Court delivered 22nd January 2019 by Mr Justice Edwards.

Introduction
1. The appellant pleaded guilty before Castlebar Circuit Criminal Court on the 27th of June 2017 to three offences involving: (i) dangerous driving causing death, contrary to s.53 of the Road Traffic Act, 1961; (ii) leaving the scene of an accident, contrary to s.106 (1)(a) and (3) of the Road Traffic Act 1961, as amended; and (iii) failing to report an occurrence contrary to s.106 (1)(d) and (3) of the Road Traffic Act 1961, as amended .

2. He was sentenced by His Honour Judge McCabe on the 25th of October 2017 to six years imprisonment on the count of dangerous driving causing death, to date from that date, with the final year of the said sentence suspended for a period of three years on standard conditions. He was also disqualified from driving for a period of ten years. The other two offences were taken into consideration.

3. The appellant now appeals against the severity of the custodial sentence imposed upon him. He does not, however, contest the duration of the driving disqualification.

The Circumstances of the Offence
4. On the evening of Sunday the 8th of May 2016 the appellant, who resides at Carrentrila, Ballina, Co Mayo was driving a Ford Transit van, registration no 07 G 5396, and had been travelling along the N26 towards the town of Ballina when at Ballinahaglish, Ballina he pulled into the hard shoulder and parked in order to make a phone-call on his mobile phone. Having completed his phonecall the appellant then moved off again from where he had been parked and immediately swung to his right in an attempt to perform an illegal "U-turn" on the roadway. In doing he turned across the path of a motorcycle, which was travelling along the N26 in the direction of Ballina, causing the motorcycle to collide with the right side of the van, in the vicinity of the van's "B" pillar.

5. The van did not stop immediately but rather continued for some 18 metres from the point of impact before stopping on the hard shoulder on the far side of the road and facing Foxford. In circumstances where the van did not stop immediately the unfortunate motorcyclist became trapped under the rear axle of the van on the driver's side, and was dragged along the roadway while the van was being driven the said distance of 18 metres from the point of impact.

6. The motor-cyclist was Mr Martin (Morch) Wynne, who worked for the Road Safety Authority, and who resided in Crossmolina. Mr Wynne received devastating and fatal injuries in the accident.

7. The accident was witnessed by several people, all of whom went immediately to the aid of Mr Wynne who remained trapped and who was obviously in a bad way. The emergency services were contacted at 15:37:56 which was estimated to be within a minute of the collision having occurred, and Gardai, the Fire Service and a medical doctor were on the scene within a very short time, but unfortunately Mr Wynne could not be saved and was pronounced dead at the scene.

8. One of the witnesses to the accident saw the appellant get out of his van, walk around the back of it to where the motorcyclist was trapped and then walk away. Several of the witnesses recall the appellant sitting on the adjacent road barrier in the early aftermath of the accident, initially with his head in his hands, and then leaving the scene on foot heading in the direction of Carrentrila. The appellant was known to two of the witnesses. By the time the Gardai arrived the appellant had left the scene, but he was identified to the Gardai as having been the driver by the witnesses in question.

9. A major search was commenced in order to locate the appellant, involving Ballina District Gardaí and other Gardaí from the wider Mayo Garda division, as well as the helicopter of Garda Air Support Unit which was sent from Dublin. While the appellant was a person of interest to the Gardai in connection with their investigation into the accident, there was also concern for the appellant's welfare. Such was the level of concern that the local River Moy Search and Rescue Boat was launched, along with other civilian boats. After just over two hours the appellant was ultimately located by his father at his house at Carrentrila, Ballina and the search operation was stood down.

10. The appellant was arrested at his home at 18.15 on the evening of the 8th of May 2016 on suspicion of dangerous driving causing death. On being informed of his arrest, he responded *"What can I say".* He was taken to Ballina Garda station where he provided a urine sample. This was provided at a time that was 3 hours and 14 minutes after the collision. When this sample was later analysed it showed a reading of 183 milligrammes of alcohol per 100 millilitres of urine. By way of a benchmark, s.4(3) of the Road Traffic Act 2010, which was the law in force on the date in question, provided that:

> "A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her urine will exceed a concentration of—

(a) 67 milligrammes of alcohol per 100 millilitres of urine."

11. The urine analysis also involved a screening for controlled drugs and yielded a positive result for the presence of cocaine.

12. The interviewing of the appellant was postponed for two hours after his arrival at the Garda station on medical grounds, after he was seen by a doctor who recommended the two-hour postponement in circumstances where the appellant appeared to be suffering from shock.

13. The appellant was interviewed under caution and in the presence of a solicitor on six occasions while detained following his arrest. He was unco-operative in the first three interviews which took place on the evening of his arrest. However, in three subsequent interviews on the following day he made a number of admissions including his driving of the vehicle, his involvement in the collision, the fact that he had earlier been drinking in "Hughes's Pub", and his fleeing from the scene. When the finding of a positive result on urine analysis indicating the presence of traces of cocaine was put to him, he admitted that he had taken cocaine a day and a half before the collision but maintained that he had not consumed cocaine on the day of the collision.

14. After the appellant was charged he pleaded guilty at the first available opportunity.

The impact on the victims
15. Mr. Wynne, who was aged 42 at the date of his death, was survived by his wife Marcella, his three-year-old daughter Autumn, his own father, and his two siblings, a brother and sister, respectively. Mrs Marcella Wynne read a powerful and poignant victim impact statement at the sentencing hearing to which we have had full regard. In addition to the immense personal tragedy for herself, for Autumn, and for the rest of Mr Wynne's family that she has so eloquently described, it is clear that she and her daughter have also suffered certain material losses as a result of the accident in as much as she was self-employed running a Beauty Salon at the time of the accident, and Mr Wynne was employed by the RSA, so that theirs was a two income family unit. As a result of Morch's death, they have lost the benefit of his support and assistance in caring for Autumn, and the benefit of his income, but in addition Mrs Wynne has now had to close down her own business so as to be able to devote the necessary time as a single parent to looking after Autumn's welfare. Clearly this material loss pales into insignificance compared to the personal loss and the grief occasioned to them, but it nonetheless a further consequence of the appellant's offending conduct.

The appellant's personal circumstances.
16. The appellant was born on the 24th of August 1978, and accordingly was 37 years of age at the date of the incident, and 39 years of age at the date of sentencing. He is in a relationship and was residing with his partner at the date of sentencing. He was born and raised in Ballina, and was the third of five children. He reports that he had a good childhood, and his family are very supportive.

17. The appellant attended school in Ballina where he was a good student. He studied mechanical engineering at university, but failed one subject which prevented him from getting his degree. He was employed for a period of seven years in a laboratory owned and run by his father in Ballina. He is also a trained entomologist and worked at this for six years. He was unemployed at the date of his sentencing, and was in receipt of jobseekers allowance, while voluntarily helping out his father with certain research he is conducting into poultry vaccines.

18. The appellant has just one previous conviction, but it is a highly relevant one. On the 24th of November 2010 he was convicted of drunken driving, was fined €400 and was disqualified from driving for three years.

19. The appellant commenced alcohol use at 16/17 and up until his early 30's drank every night. Thereafter he had moderated his drinking somewhat. He told his Probation Officer who assessed him shortly before the sentence hearing that, by that stage, he was drinking 3-4 beers a few evenings a week. The Probation Officer has characterised the overall pattern as involving hazardous drinking. It seems the appellant was aware that he has a problem in as much as he attended for treatment at Hope House residential addiction centre in the past. However, although he completed the residential component of the treatment course, he failed to participate fully in the aftercare program. He participated for just a few months in what was supposed to be a two-year aftercare program. While it is acknowledged by his Probation Officer that he has made efforts to substantially reduce his alcohol consumption, the fact he continues to drink at all is described as *"an area of concern"*.

20. Following the incident the appellant developed suicidal ideation and was admitted for treatment to the Mental Health Unit at Mayo General Hospital where he received treatment. He continues to suffer from chronic anxiety, nightmares and to have flashbacks to the incident. The sentencing court was furnished with a report from his General Practitioner confirming that this is the case and that he continues to be prescribed medication and will require monitoring into the future.

21. The appellant is undergoing private counselling, and the sentencing court also had the benefit of a short report from his counsellor which describes him as struggling to cope with a diversity of feelings and emotions resulting from the accident. It is said that he has feelings of deep regret, anger and guilt at having left the scene. The counsellor recommended on-going psychological support.

22. The appellant was assessed by the Probation Service as being at low risk for re-conviction in the twelve months following assessment. However, factors which contribute to his risk were said to be substance abuse and emotional issues, and he required continuation of the counselling he had already commenced, and addiction counselling in the future.

23. The Probation Report noted that the appellant had accepted that he was guilty of the charge, although with a tendency to minimise the contributory factors to some degree. Moreover, he had demonstrated guilt and remorse at the needless loss of life. The report concludes: *"Mr Moran is aware that he is facing a custodial sentence for this offence. He wants the victim's family to know how sorry he is and has struggled with his guilt for taking away the life of their loved one. Should the Court be considering a non-custodial sanction either instead of or as part of a prison sentence, the defendant is suitable for both Community Service and Probation Supervision."*

24. It was submitted on the appellant's behalf at the sentencing hearing that he was profoundly remorseful, and a letter he had written to the Wynne family, expressing his guilt and shame, was read out by his counsel at the sentencing hearing.

The sentencing judge's remarks
25. After re-rehearsing the circumstances of what he characterised as *"this horrific, unnecessary accident", the sentencing judge continued:*

Now, the legislature have mandated in respect of this type of offence, with these type of consequences, a maximum

sentence of 10 years' imprisonment. Now, the accused having consumed alcohol to the extent - in legal terms - that he did, and in legal terms, he was incapable of having proper control of a motor vehicle in a public place, means he should not have been driving; it's a simple as that. Only he knows when he took the cocaine before the accident, but having been previously convicted of drunken-driving, he doesn't appear to have learnt any lesson. While there was no evidence that he deliberately set out to injure anybody, and I don't think anybody suggests that he did, he was seriously reckless.

The headline sentence - that's the first thing I have to do in deciding what a proper and proportionate sentence is in matters like this; and I have to take account of the gravity of the offence, the antecedents of the accused and aggravating factors that can be identified, that's the first step before you consider mitigation. The headline sentence -- and there wasn't evidence of speed in this case, or continued dangerous driving, it was a once-off, momentary incident. That places this offence at the upper range on the scale of gravity for similar offences. The headline sentence is eight years' imprisonment, taking account of the aggravating factors that I've already identified. In mitigation, the accused has pleaded guilty. He accepted responsibility. The Probation and Welfare Service, and I'm equipped with the report from the Probation and Welfare Service, the Probation and Welfare Service note that he appears to be, in their opinion, sincerely remorseful for what he did. They are concerned, in the face of overwhelming evidence that alcohol is a significant problem for him, that he remains a regular drinker. He is assessed by them, nonetheless, as being at a low level of reoffending, with a caveat; and I'll quote from the report, "The level of service inventory revised was applied in this case. Based on one previous conviction, stable family and home life, educational background and history of employment, he's assessed as a low risk for reconviction in the coming 12 months. Factors that contribute to his risk are substance abuse and emotional issues. To address these deficits, counselling is required; which he has commenced. Counselling for addiction will need to be addressed in the future also." He's been assessed by the Probation and Welfare Service as suitable to perform community service. Community service is an alternative that's open to the courts in relevant situations, rather than a sentence of imprisonment. I've considered community service as a possible option in this case, but I'm not satisfied that, in the circumstances, it would be in the interests of justice. A custodial sentence in this case is unavoidable. Sentencing for criminal wrongdoing is not about revenge, it's about punishment for the wrongdoing; deterrence, not just for the individual, but to other persons and, where appropriate, rehabilitation. Here, the accused will be disqualified from driving for a period of 10 years. He will be sentenced to 6 years' imprisonment, bearing in mind the mitigating factors that I've identified. I have identified the plea of guilty as particularly significant and that entitles him, in law - a matter over which I have no discretion - to mitigation and a deduction. As a mixed deterrent to him and an incentive to rehabilitation, I will suspend the final year of the six-year sentence for a period of three years, post release.

There aren't any winners, there are only losers in this situation. People who, by their recklessness, cause the death of others have to accept the consequences of their actions. Here the moral blameworthiness of the accused is heavy and the sentence must reflect this. In respect of the other offences, they all arose out of the same incident, and what I propose to do simpliciter is to take them into consideration.

Grounds of Appeal

26. The appellant appeals against the severity of his sentence and in doing so makes two complaints in his Notice of Appeal. First, he complains that the sentencing judge over-assessed the gravity of the case, and erred in nominating eight years as the appropriate headline sentence or starting point. Secondly, it is complained that an inadequate discount was afforded the reflect the mitigating circumstances in the case.

Discussion and Decision

27. The Court has received helpful written submissions from both sides for which it is grateful, and these were amplified succinctly by counsel in oral argument presented with commendable economy. It is clear that while he was not to be taken as abandoning the complaint based upon alleged inadequate reflection of mitigation, counsel for the appellant's primary focus of attention was on the headline sentence of eight years.

28. It was suggested that a headline sentence of eight years, located as it was at the eightieth percentile on the scale, was excessive having regard to comparators and the degree of the appellant's culpability and the harm done. While not seeking in any way to minimise the appalling consequences of this accident for the Wynne family, and the tragedy which the appellant's offending conduct has visited upon them, the point that was being made in the appellant's written submissions was that it is possible to point to other cases of dangerous driving causing death, where drink was a factor, which have been dealt with more leniently. By way of example, we were referred to *The People (Director of Public Prosecutions) v Reilly* [2007] IECCA 118; *The People (Director of Public Prosecutions) v Connors* [2008] IECCA 163; *The People (Director of Public Prosecutions) v Shovelin* [2009] IECCA 44; *The People (Director of Public Prosecutions) v Stronge* [2011] IECCA 79; *The People (Director of Public Prosecutions) v (Sean) Casey* [2015] IECA 199; *The People (Director of Public Prosecutions) v (Sean) Casey (No 2)* [2015] IECA 278 and *The People (Director of Public Prosecutions) v O'Rourke* [2016] IECA 299.

29. While noting all of the cases to which we were referred by the appellant, and it also bears noting that counsel for the prosecution contends in his written submissions that the each and every one of these cases is materially distinguishable from the present case in one respect or another, it is fair to say that overall we have found the comparators proffered to be of very little ultimate assistance. It is worth recalling that recently, in the case of *The People (Director of Public Prosecutions) v Maguire* [2018] IECA 310, we said:

"97. Comparators are a useful tool in sentencing cases, both at first instance and at appellate level, providing that their limitations are acknowledged and understood. It is trite, and a statement of the obvious, to observe that no two cases are the same and that every case depends on its own facts. Moreover, account must be taken of the ability of judges to exercise legitimate judicial discretion in the imposition of sentences within accepted margins of appreciation. This discretion comes into play at various levels ranging from determining the gravity of the case, to deciding on the extent of mitigation to be afforded, to determining how pursuit of the recognised objectives of sentencing should be balanced in the circumstances of the individual case, to choosing between available penalties and to the structuring of the sentence to best deliver a just and proportionate sentence. Accordingly, any temptation to superficially compare cases, and outcomes, in the hope of discerning a manifestly consistent approach must be resisted as involving a largely meaningless quest. Equally, cases proffered as comparators do not represent binding precedents, at least in terms of assessments of gravity, or the extent of allowances to be afforded in mitigation, or as to outcomes. A judgment in a case offered as a comparator might, of course, have concurrently determined a novel issue of law, and if so could represent a binding precedent for future cases with respect to that issue of law, but not as to factual determinations or outcomes.

98. All of that having been said, comparators can provide evidence of discernible trends in sentencing for different types of offences, and non-binding, but none the less valuable, guidance in terms of how courts in previous cases may have variously approached different aspects of the sentencing exercise, and indications of what weight may have been afforded to different relevant factors."

30. In none of the comparators to which we have been referred in this instance has the single most significant aggravating feature of the present case been present, namely the existence of a previous conviction for drink driving in circumstances where alcoholic consumption was a significant contributing factor on the occasion of the dangerous driving for which the accused was being sentenced.

31. Moreover, quite a number of the comparators cited were not particularly recent cases, and there is anecdotal evidence that over the last ten years there has been a discernible recalibration in how courts, both at first instance and at appellate level, now assess the gravity of dangerous driving causing death as an offence, and how individual contributing factors, particularly those of an aggravating kind, are to be weighed in the assessment of gravity. Accordingly, some of the older cases relied upon may not in fact represent reliable comparators for the purposes of considering whether the sentence imposed in this case was excessive.

32. While in the light of this it might perhaps be desirable for this Court in due course, and in another and more suitable case, to provide up to date guidance on sentencing in cases of this type, we do not consider that the limited review of comparators that has been conducted in this case would allow that to be done in this case. Nor do we consider that the circumstances of this particular case require it.

33. The correct starting point for the sentencing judge was the spectrum or range of penalties available to him. He correctly identified the range as being between non-custodial disposition and actual imprisonment for up to ten years. In truth, having regard to the circumstances of this case, this was a case that would never have merited anything other than a custodial sentence. The appellant himself realises this, as is apparent from the last paragraph of the probation report.

34. It was then a question of locating the appellant's offending conduct at an appropriate point on the spectrum or scale that had been identified. The Court was required to consider the intrinsic culpability of the offending conduct. It was not intentional in the sense that the appellant did not deliberately set out to drive dangerously, but it was much more than the gross negligence that, in itself, would have been sufficient to sustain a charge of dangerous driving. This was not merely a serious failure by the appellant to exercise that degree of care in the conduct of his driving which would be exercised by a reasonable or ordinary driver. The sentencing judge correctly characterised it as *"seriously reckless"*. Recklessness, in criminal law involves culpability that is higher than criminal negligence. It requires that the offender has perceived the risk and that he pressed on regardless. It may reasonably be inferred that this accused knew that he should not have been driving. He had previously been punished for driving while under the influence of alcohol. He well knew the risk involved, yet he drove regardless of the fact that he had consumed a significant quantity of alcohol, as the analysis of the urine sample provided by him in the Garda station confirms. We agree that to have attempted an illegal U-turn on this road, in circumstances where he was under the influence of alcohol to such a degree that alertness, ability to react, and judgment were inevitably impaired, was seriously reckless.

35. On its own this would have merited the location of the offending conduct in the upper half of the mid-range. However, there was in addition the highly aggravating factor that the appellant had been prosecuted previously for driving under the influence of alcohol. That would have moved the needle a considerable distance further along the scale. Moreover, it is a further consideration that the judge decided not to impose discrete sentences on the other two counts on the indictment, but rather to take them into consideration. While he did this at the end of his remarks, he clearly must have had it in mind when he commenced his sentencing. As we have observed in the past, the sentence to be imposed for an offence will usually require to be increased somewhat (providing the scope exists to do so, in terms of the maximum available) as a result of other offences being taken into consideration, not least because failure to do so might result in a perception that the appellant got a "free ride" on the counts taken into consideration. We think it likely that this was an additional factor that influenced the selection by the sentencing judge of eight years as the appropriate starting point.

36. There is no doubt that the headline sentence of eight years fixed upon by the sentencing judge was severe. Indeed, it was probably at the outer limit of what might have been done within the limits of the sentencing judge's legitimate margin of discretion. However, having regard to the intrinsic moral culpability associated with what the appellant did, the dreadful harm done in this case, the significant aggravation of the appellant's culpability by virtue of his previous conviction for a relevant offence, and the fact that two other serious offences were to be taken into consideration, we have concluded that the headline sentence selected, albeit that it was severe, was not excessive. It was within the sentencing judge's legitimate range of discretion to nominate the figure that he did, and it was not an error to do so. We note his comments that *"[h]ere the moral blameworthiness of the accused is heavy and the sentence must reflect this"*, and we do not disagree with him.

37. The judge in this case stated expressly that *"[s]entencing for criminal wrongdoing is not about revenge, it's about punishment for the wrongdoing; deterrence, not just for the individual, but to other persons and, where appropriate, rehabilitation."* Deterrence was clearly to the forefront of the judge's thinking in terms of balancing the penal objectives of retribution, deterrence and rehabilitation, and he considered that it required to be prioritised. A judge is entitled to impose an exemplary sentence for deterrent purposes providing he does not exceed his legitimate range of discretion in terms of what is proportionate in the distributive sense. The judge in this case did not exceed his discretion.

38. We have noted what has been submitted to us concerning mitigation. However, we are satisfied that the mitigating circumstances in the case were adequately, if perhaps not generously, reflected in the discount of two years or 25% from the headline sentence. However, it did not end there. The sentencing judge went on to suspend a further year of the remaining six-year sentence, and gave as his rational for doing so that *"[a]s a mixed deterrent to him and an incentive to rehabilitation, I will suspend the final year of the six-year sentence for a period of three years, post release."* In our view this was entirely appropriate in the circumstances of the case.

39. In conclusion, we are not disposed to uphold either ground of appeal.

40. The appeal is therefore dismissed.