



THE COURT OF APPEAL

Record No. 136CJA/16

Birmingham J.
Sheehan J.
Mahon J.

In the Matter of an Application Pursuant to s. 2 of the Criminal Justice Act 1993

Between

Director of Public Prosecutions

Appellant

- And -

Eric Ryan Jnr.

Respondent

Judgment (ex tempore) of the Court delivered on the 6th day of February 2017 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted at the Circuit Criminal Court sitting in Dublin on the 4th May, 2016, of one count of dangerous driving causing injury, contrary to s. 53 of the Road Traffic Act 1961 and one count of failing to offer assistance, contrary to s. 106 of the Road Traffic Act 1961. A further three less serious road traffic offences were taken into consideration. The plea of guilty was entered some four months previously. In respect of count No. 1, the respondent received a fully suspended three year prison sentence and a driving disqualification for a period of four years. In relation to the second count, the respondent was ordered to carry out one hundred hours of community service in lieu of a four month prison sentence. That community service has been completed.
2. The appellant seeks a review of the suspended three year sentence imposed in respect of the first count on the grounds that it was unduly lenient, pursuant to s. 2 of the Criminal Justice Act 1993.
3. On the 6th February, 2015, the respondent, who was then aged almost eighteen years and the holder of a provisional driving licence, was driving his father's motor car with his father as a front seat passenger, at the junction of Clanbrassil Street and the South Circular Road in Dublin, when he collided with another vehicle crossing the junction and which had the right of way, causing his car to spin around and collide with a young woman, Ms. Eve Neylon who was lawfully crossing the road, seriously injuring her.
4. At the time of the accident, the respondent was driving in darkness without lights at an excessive speed, estimated at between 50 and 60 km/h, and while under the influence of alcohol. The respondent's father was more heavily intoxicated and prevailed upon the respondent to walk away from the scene of the accident. They were arrested a short time later in the vicinity of St. James Hospital. At the time the respondent claimed that he was unaware that he had struck a pedestrian.
5. Ms. Neylon was very seriously injured. She was propelled under the wheel of a bus which was stationary at traffic lights, and her immediate fear was that the bus would drive away and kill her in so doing. Her main injuries included fractures of her right hip and her right tibia. She has undergone surgery on a number of occasions since the accident. She continues to complain of a right foot drop, a limp in her right leg, pain in her coccyx, pain and aching in her right hip, knee and ankle, a numb right foot and numbness in the sites of scarring. She has significant scarring on her stomach, knee, tibia and ankle. She has early signs of degenerative arthritis in her right hip. As set out in her detailed victim impact statement, the consequences of these injuries for Ms. Neylon have been devastating and life altering. She has ongoing pain and discomfort and has suffered huge loss of confidence. She has significant complaints relating to her ability to perform ordinary daily tasks and activities and is concerned about the effect of some of her injuries on childbirth. She is currently aged 32 years. She has been forced to give up her chosen career, a fact which greatly distresses her. Her inability to fully earn her living and the consequential imposition of additional living costs on her partner has forced both of them to emigrate to Australia.
6. Section 2 of the Criminal Justice Act 1993, provides as follows:-
 - "(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.*
 - (2) An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed.*
 - (3) On such an application, the Court may either:-*
 - (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
 - (b) refuse the application."*
7. On behalf of the appellant, it is submitted that the wholly suspended sentence was unduly lenient. It is contended that undue weight was given to the acknowledged mitigating factors, and that insufficient weight was accorded to the aggravating factors. It is also contended that the learned sentencing judge failed to attach sufficient weight to the significant nature of the injuries sustained by Ms. Neylon. The aggravating factors included the following:-

- The fact that the respondent was driving having consumed alcohol.
- The fact that the respondent drove through a red light.
- The fact that the respondent left the scene immediately following the accident.
- The fact that the respondent drove while uninsured.
- The fact that the respondent was the holder of a provisional licence only.
- The fact that the respondent was driving at night time without lights and at excessive speed.

8. In the course of his sentencing judgment, the learned sentencing judge remarked as follows:-

"The court has to mark the seriousness of the offence, but also take into account the personal circumstances of Mr. Ryan and the court has taken as well into account the contents of the victim impact report and the injuries sustained and continued to be sustained by the injured party, but the court has to take into account the mitigating factors which include his young age, no previous convictions and he was with his father who he was trying to . . . leave a scene and foolishly drove a car in the manner he did. The court has to mark the seriousness of the offence, but also take into account the personal circumstances of Mr. Ryan and the court in so doing in count No. 1 on the indictment which is the dangerous driving charge will impose a prison sentence of three years imprisonment, but suspend it for three years on condition that he enter into a bond to keep the peace and be of good behaviour towards the people of Ireland and the sum of €150 for a period of three years and a consequent disqualification of four years from today's date. . . ."

9. It is well established that when considering an application by the Director to review a sentence on the grounds that it was unduly lenient, the court must be satisfied that the sentence imposed was more than simply lenient. In *DPP v. Stronge*, [2011] IECCA 79 the Court of Criminal Appeal indicated the following general principles in relation to sentence review applications as be:-

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

10. While sentences for the offence of dangerous driving causing death have been the subject of appeal to this court (and previously, to the Court of Criminal Appeal) fairly regularly over recent years, there are few examples of appeals relating to dangerous driving causing injury. Of course a number of the dangerous driving causing death cases have also involved serious injury to others. Sentences for dangerous driving causing death vary for the good reason that each have different background facts. Occasionally such offences result in a custodial sentence of up to six or seven years. Frequently in such cases, as is the case here, the driver of the car has no previous convictions and is, in general terms, a person of excellent character. Invariably also, in such cases, as indeed in this appeal, the offender pleads guilty and is genuinely remorseful. It is therefore understandably a difficult decision for a court to sentence such an offender to a custodial prison term in such circumstances.

11. On the other hand, justice must be done and be seen to be done. An individual who drives dangerously, particularly while under the influence of alcohol, and who in consequence severely injures another road user must expect to pay a very high price in terms of punishment. Society demands that such individuals ought to be dealt with severely by the courts. Equally it is necessary to consider the personal circumstances of the offender in order to arrive at the appropriate sentence. In the often quoted extract from the judgment of Barron J. in *DPP v. McCormack* [2000] I.R. 356 it is stated:-

"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered. As we have indicated, that is not the present case."

12. In this case there are strong mitigating factors. They were referred to by the learned sentencing judge and were quite clearly afforded significant weight by her. They include the fact that the respondent was not yet eighteen years old at the time of offence, the fact that he pleaded guilty and is remorseful for what occurred, and the fact that he has no previous convictions. The learned sentencing judge also had the benefit of a number of impressive testimonials concerning the respondent's character. All these point very much to the fact that this offence was, for the respondent, out of character and a most regrettable event for him and his family.

13. On the other side of the coin, as it were, are the equally significant aggravating factors. Driving at speed in a built up area,

without his lights switched on, driving having consumed alcohol and then leaving the scene of the accident make the offence particularly serious. The most significant factor however, is the devastating injury caused to the completely innocent, Ms. Neylon and the fact that these injuries will adversely affect her for the rest of her life, and are already responsible for adversely altering many aspects of her life. While undoubtedly the respondent was to a degree under the influence of his father in these events, the respondent is the person primarily responsible for the decision to drive, and to do so in such a dangerous fashion, and then, to compound matters, leave the scene.

14. The learned sentencing judge, while noting that the maximum sentence for the dangerous driving offence was imprisonment for ten years, did not identify on the gravity scale where she believed this offence lay. The only prison term identified by her was the three years, and such would suggest that she deemed the offence to be one of low to medium range in terms of its gravity.

15. The court does not consider a three year headline sentence to be inappropriate. The real issue however is the decision to suspend the entire of the sentence, and whether doing so was unduly lenient.

16. It is necessary for the court to satisfy itself that a sentence is not merely lenient, but unduly so, before interfering with it. The imposition of a lenient sentence does not constitute an error of principle. An error of principle is not established merely on the basis that members of this court might have imposed a different sentence.

17. In this case, and as already indicated, the court is satisfied that a fully suspended three year sentence was unduly lenient. Notwithstanding the strong mitigating factors and, not least, the respondent's young age at the time and the fact that his actions were heavily influenced by his father, the particular circumstances of the events of 6th January 2015, and especially the devastating injuries caused to Ms. Neylon, required a sentence which included a custodial element in the region of twelve months.

18. In the event, no custodial element was incorporated into the respondent's sentence. This court has therefore had to consider if, having regard to the fact that eight months have passed since the sentence date during which time the respondent has continued to enjoy his liberty, the imposition of a custodial element at this stage, albeit one of less than twelve months, would satisfy the requirement for justice and would not be unduly harsh. It is also necessary to weigh in the balance whether the public interest would best be served by directing the respondent to serve a custodial sentence, with all the risk attendant upon a young first time offender spending time in prison.

19. The court has concluded that in these particular circumstances the public interest would not be best served by sending the respondent to prison at this point in time. Instead this Court will re-impose a three year sentence, and will suspend the entire of same for a period of three years on the following conditions:-

(i) the respondent enters into a bond in the sum of €100 to keep the peace and be of good behaviour for a period of three years from this date, and

(ii) pay €50 per week from 18th January 2017 for seventy two weeks to National Rehabilitation Hospital, Dun Laoghaire, County Dublin. (This requirement is a significant penalty for a person on Social Welfare of €188 per week and little prospect of employment in the foreseeable future, and

(iii) undertakes to provide community service under the direction of Mr. Tiernan O'Neill, school principal, and

(iv) remain under the supervision of the Probation Service for eighteen months and to cooperate with the requests and requirements of the Probation Service.