



**THE COURT OF APPEAL**

**Sheehan J.  
Mahon J.  
Edwards J.**

**159/14**

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

**Respondent**

**V**

**John O'Driscoll**

**Appellant**

**JUDGMENT of the Court delivered on the 20th day of March 2017 by Mr. Justice Sheehan**

1. This case is concerned with an appeal against the severity of an overall sentence of twelve years imprisonment imposed on the appellant for offences committed during a protracted period of dangerous driving in Cork city on the morning of the 18th April, 2014, as he endeavoured to evade capture by the gardaí.

2. The appellant received five sentences of five years imprisonment for causing criminal damage to five different cars and five sentences of twelve months imprisonment in respect of five counts of dangerous driving. The Court directed all the sentences to run concurrently and the appellant was disqualified from driving for life in respect of the dangerous driving. Three further concurrent sentences of six months imprisonment were imposed for driving without a licence, driving without insurance, and driving with excess alcohol. In respect of a count of endangerment contrary to s. 13 of the Non Fatal Offences Against the Person Act 1997, the appellant was sentenced to seven years imprisonment and the Court directed that this sentence be served consecutive to the sentences imposed for criminal damage.

3. Originally the sentencing judge indicated that he would suspend the final two years of the sentence, but when the appellant was invited by the Registrar to enter a bond he used an expletive which the sentencing judge interpreted as a refusal to enter into the bond and immediately removed the suspended element of the sentence.

4. The appellant challenges the sentence imposed on him under eight different grounds of appeal. These are set out in written submissions filed on behalf of the appellant as follows:-

1. The learned sentencing judge erred in law and/or in fact in failing to have any or any adequate regard to the mitigating factors in the case i.e. the early guilty plea and the Appellant's remorse;
2. The learned sentencing judge erred in law and/or in fact in failing to have any or any adequate regard to the Appellant's personal circumstances i.e. his age, his history of having sustained a head injury, his low level of education and his history of alcoholism;
3. The learned sentencing judge erred in law and/or in fact in imposing the maximum penalty in relation to the endangerment charge relating to Garda Twomey at Count No. 7 i.e. seven years;
4. The learned sentencing judge erred in law and/or in fact in imposing a consecutive sentence comprising of the maximum available penalty in respect of the endangerment charge i.e. seven years;
5. The learned sentencing judge failed to have adequate regard to the principle of rehabilitation;
6. The learned sentencing judge failed to have adequate regard to the totality principle.
7. The learned sentencing judge erred in fact and/or in law in imposing a life-time driving ban on the Appellant.
8. The learned sentencing judge erred in fact and/or in law in placing the offence of criminal damage on the highest end of the scale.

5. In order to consider these grounds of appeal it is necessary to consider the background facts, the victim impact statement of Garda Twomey, the personal circumstances of the offender and the remarks of the sentencing judge.

**Background facts**

6. At about 6.30 a.m. on the 18th April, 2014, the appellant and his co-accused entered the Vienna Woods Hotel in Cork as trespassers and removed a quantity of alcohol. They were observed driving away from the hotel by the night porter who took down the registration number of the vehicle which had been taken from McCurtain Street in Cork the previous evening.

7. An off duty garda observed the appellant and his co-accused in the van and notified his colleagues. The Douglas patrol car was alerted and signalled to the appellant to stop, but he sped off and the pursuit then commenced.

8. The first occasion where danger to the public occurred was at Rochestown Road where the appellant was seen driving on the incorrect side in the direction of a garda patrol car. The appellant manoeuvred around the patrol car and drove towards the Fingerpost Roundabout in Douglas, where it travelled the incorrect way around the roundabout and proceeded up the Douglas Relief Road on the wrong side causing other road users to take avoidance action.

9. The next incident occurred at Douglas Road where a Ms. Kelly was driving towards Douglas when she noticed the vehicle coming in her direction. She stopped to facilitate the appellant who in attempting to pass between vehicles collided with Ms. Kelly's car.

Fortunately she was uninjured but was nevertheless very shaken by the accident and considerable damage was done to her car.

10. The next incident also occurred at Douglas Road when the appellant attempting to go around a garda patrol van hit and damaged a parked car. A short while later the appellant crashed into a vehicle owned by Mr. Ger Feeley who was stopped at traffic lights and this accident caused injury to Mr. Feeley. At this point the city centre garda patrol van had caught up with the appellant who, in an attempt to get away, drove inside a set of traffic cones adjacent to road works and without warning turned right into Parnell Place bus depot directly across the path of the patrol van which it crashed into. The appellant then drove off at speed through the bus station, where people were getting on and off buses and proceeded towards Leitrim Street where he collided with the vehicle belonging to a Ms. O'Dea.

11. The appellant then drove off at speed again towards the main Cork-Mallow Road and towards the roundabout. As he came out of the roundabout at speed he drove towards Garda Twomey and knocked him from his garda motor cycle. Garda Twomey was stationary at the time on his motor cycle and wearing high visibility clothing. He was unable to take evasive action before the appellant collided with him throwing him from his motor cycle. Garda Twomey suffered broken ribs, lacerations to his body and internal bruising. The appellant continued on at speed until he ultimately stopped at Lower Killeens where he and his co-accused left the vehicle. The appellant was arrested shortly after this and was subsequently found to have a blood alcohol level showing 244 mgms per 100 mls of blood.

#### **Impact on Garda Twomey**

12. In the course of his victim impact statement Garda Michael Twomey said that the incident had affected him enormously and that he had frequent flashbacks of the incident. He said that he still has difficulty in sleeping and for some time was on medication to help alleviate this. He said that if he thought about the incident he would get quite upset. He said he had a partner and two children and a third child due shortly and that it often crossed his mind what might have happened to his family if something more serious had happened to him. He said he still found it difficult to talk about what had happened with anybody apart from his partner.

13. He had been unable to return to work and at the sentence hearing in the Circuit Court was still unsure if he would ever be able to ride a motorcycle again, especially in work without constantly worrying about the consequences. He spoke about how he felt quite vulnerable on the road when travelling as a passenger in a car. He spoke about how he had missed out on motorcycle trips which had been a long time in the planning and wondered if there would be a place for him in the Garda Traffic Unit if he could not regain his confidence on a motorcycle.

14. By the time this appeal came on for hearing, the Court was told that Garda Twomey was back at work. The Circuit Court had also been told that his partner was a member of An Garda Síochána and she had been on duty in Cork at the time that Garda Twomey was knocked from his motor cycle.

#### **Personal circumstances of the appellant**

15. At the time of sentence the appellant was a 27 year old unemployed, single man living in a Simon Hostel. He has 168 previous convictions. These include convictions for theft, 8 convictions for burglary, 4 convictions for unauthorised taking as well as other convictions for possession of knives, assaults, criminal damage, entering buildings as a trespasser, handling stolen property, arson, public order offences, dangerous driving and a multitude of driving licence and insurance convictions. His last appearance on an indictable matter was in the Circuit Court was in 2003 when he was a juvenile.

16. At the time of these offences the appellant was on bail in relation to an offence of obstructing a police officer for which he received a five month sentence and he was also on bail in respect of theft and public order offences.

17. He left school at thirteen and when he was fifteen years old he sustained a serious head injury as a result of a fall from a roof. He underwent brain surgery following this fall. His own family believed that he has never been right since this time. His prison record showed that he had been in and out of prison since the age of sixteen. The appellant was described as a chronic alcoholic.

#### **Submissions**

18. In the course of the oral hearing before us an issue arose as to whether or not the appellant had intentionally driven at Garda Twomey or whether the collision with Garda Twomey arose out of recklessness on the part of the appellant. There was a conflict between the parties on this matter and much of the hearing was taken up with this conflict.

19. Counsel for the appellant also submitted that the sentencing judge had failed to give any credit to the appellant for his plea of guilty and that he had erred in placing the endangerment count at the highest point on the scale. When he made the sentence of seven years imprisonment consecutive to the other offences the learned trial judge stated, "I do think because of the continuity of the criminality here I do think consecutive sentences are merited".

20. Counsel for the appellant also submitted that the "continuity of the criminality" should have been the basis for a concurrent sentence and that this was an error of principle with very grave consequences for the appellant on the length of the sentence. Counsel relied on the *People (Director of Public Prosecutions) v. G.McC.* [2003] 3 I.R. 609 and the *People (Director of Public Prosecutions) v. Yussuf* [2008] 4 I.R. 204. Counsel also maintained that a submission on the application of the maximum sentence has greater significance when it is imposed as a consecutive sentence.

21. Counsel for the respondent while conceding that the learned trial judge ought to have given counsel for the appellant an opportunity to advise her client prior to treating the appellant's response to the Registrar as a refusal to enter into the bond, opposed all other grounds of appeal and concluded her submissions by saying that the sentences imposed were proportionate having regard to the gravity of the offences, the culpability of the appellant and the circumstances surrounding the offence.

22. Counsel further maintained that the learned trial judge did not err in principle in placing the offences other than that of burglary at the absolute highest end of the scale of offences and submitted that the trial judge was entitled to make the sentence for endangerment consecutive to the other sentences.

#### **Discussion**

23. The critical factor in this appeal is whether or not the appellant was sentenced on the basis of intentional endangerment as against reckless endangerment. It is noteworthy that the count which the appellant pleaded to incorporated both elements as alternatives. Counsel for the appellant maintained that it was open both from statements in the book of evidence and the appellant's evidence that he did not drive deliberately at Garda Twomey. In this regard the appellant gave unchallenged evidence that he did not drive intentionally at Garda Twomey.

24. There is in our view a significant difference between a situation where an offender drives deliberately at a member of An Garda Síochána who is on his motor bike and where he collides with such a person as he seeks to evade arrest.

25. In the course of the hearing before this Court, the issue as to whether there ought to have been a *Newton* type hearing was raised, but counsel for the appellant did not concede that there had been any failure in this regard on her part.

26. There is a helpful discussion on this question in Prof. O'Malley's *Sentencing Law and Practice*, (3rd Ed.) at paras. 31-31 to 31-33. It is important to quote what Prof. O'Malley says at the outset:-

"A defendant who has been convicted following a trial or a guilty plea may still contest some aspects of the prosecution case at sentencing. In such an eventuality which is most likely to occur following a guilty plea the version of events found or accepted by the court may have a significant impact on sentence. A guilty plea, after all, is merely an admission of the essential legal ingredients of the offence. Reliable fact finding procedures are therefore necessary to ensure that the sentence properly and adequately reflects the defendant's actual conduct and degree of culpability. Courts in these islands generally apply the *Newton* principles when dealing with such disputes."

27. Prof. O'Malley then goes on to set out the facts in *R v. Newton* [1983] Crim LR 198 and refers to the judgment of the Court of Appeal in that case which stated the following:-

"There are three ways in which a judge in these circumstances can approach his difficult task of sentencing. It is in certain circumstances possible to obtain the answer to the problem from a jury... The second method which could be adopted by the judge in these circumstances is himself to hear the evidence on one side and another and come to his own conclusion acting so to speak as his own jury on the issue which is the root of the problem. The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that then as the trial judge himself said in a passage to which reference will be made in a moment where there is a substantial conflict between the two sides he must come down on the side of the defendant. In other words where there has been a substantial conflict the version of the defendant must so far as possible be accepted."

28. Prof. O'Malley notes at a later stage that there is little Irish case law on *Newton* type hearings, but that the courts seem to accept that they may sometimes be appropriate.

29. As Prof. O'Malley concludes in para. 31-33:

"Constitutional justice requires that a person should be sentenced only on the basis of facts that have been reliably established."

30. In this case it was clear that the appellant's plea was based on recklessness rather than an admission to intentionality. He gave evidence to that effect. To a certain extent the matter was left up in the air. Defence counsel cannot be blamed for that. There is a lack of clarity on the part of the trial judge with regard to this issue but his pre sentence remarks bear the interpretation that he sentenced the appellant on the basis of the prosecution version of events.

31. Counsel for the appellant makes the case before us that there were witness statements in the book of evidence capable of supporting the appellant's evidence that he did not intentionally drive at Garda Twomey. While this may be the case, the matter ought to have been properly resolved by a *Newton* hearing. Given that this did not happen it appears to us that we are obliged to resolve this matter in favour of the appellant, given that he entered his plea on this basis and gave unchallenged evidence in support of his position.

32. The question of when a court should exercise its discretion to impose a consecutive sentence is not an easy one to answer. Perhaps this question is best looked at in the context of the totality principle. The important point being that it is the court's duty when imposing sentence to apply the principle of proportionality and where possible to incorporate the penal aim of rehabilitation in order to ensure a fair, balanced and constitutional sentence. It seems to us that the continuity of the offending behaviour in this particular case resulted in different citizens being collided with at different points of the appellant's attempts to avoid capture and that the single transaction rule does not apply to this case.

33. Recently in an *ex tempore* judgment of this Court in the *Director of Public Prosecutions v. Blake Tobin* [2017] IECA 7 delivered by Mahon J. on the 23rd January, 2017, the appellant had received four consecutive six month sentences for dangerous driving in which he had sought to evade the gardai. The appellant challenged the consecutive nature of the sentences on the single transaction basis, but the Court refused the appeal holding that the overall offending was so serious that the ultimate sentence of 24 months was not inappropriate. We held that in this case the offending behaviour was of such seriousness that this was a case where it was appropriate to allow some connectivity in order to arrive at a fair sentence. While the sentence could have been structured in a number of different ways to allow for the one transaction principle namely by making sentences consecutive to the burglary sentence it was not necessary to do it in this way.

34. The endangerment offence was clearly the most serious offence pleaded to. A member of An Garda Síochána was knocked from his motor cycle by the reckless and drunken driving of the appellant and received serious injuries. This particular offence required to be marked separately.

35. The critical sentence from the appellant's point of view is the seven years sentence. The maximum sentence for that offence was imposed. He was given no credit for his plea of guilty, no allowance was made for his personal circumstances and no allowance for the fact that there was no evidence before the Court of more than one dangerous driving conviction.

36. In this context the appellant's record deserves closer scrutiny given that a lengthy term of imprisonment was being imposed. It is noteworthy that all but two of the appellant's previous convictions had been dealt with in the District Court. According to the evidence the last matter dealt with on indictment occurred when the appellant was fifteen or sixteen years old. It therefore follows that all his remaining convictions were for summary offences or indictable crimes deemed to be minor offences. This was a factor which merited some consideration.

## Conclusion

37. We hold that the sentencing judge fell into error when he immediately removed the suspended element of the sentence following the appellant's outburst.

38. We also hold that the trial judge fell into error by failing to hold a *Newton* hearing in circumstances where there was a significant factual dispute between the parties. We should however point out that the learned trial judge got no assistance on this matter from either of the parties. In the absence of a *Newton* hearing and in circumstances where there was a dispute between two versions of a significant factual issue, the learned trial judge was obliged to resolve that issue in favour of Mr. O'Driscoll if there was a reasonable possibility that his account was true. Accordingly we allow the appeal against sentence and proceed to a fresh sentence hearing. In accordance with the normal practice we invited submissions from the parties on a contingency basis. The only additional information we received was to the effect that the appellant was doing very badly in prison. He had been transferred from Cork prison to another prison and at the time of the hearing of his appeal was subject to a 23 hour lock up.

39. In considering what is the appropriate sentence in this case, we are satisfied that the seriousness of the endangerment charge – knocking an on duty member of An Garda Síochána from his garda motorbike and the subsequent injuries suffered by him – is such that a consecutive sentence is justified. Counsel for the appellant submitted that in arriving at the appropriate headline sentence this Court ought to have regard to a number of sentencing judgments that it has delivered as well as some delivered by the Court of Criminal Appeal in dangerous driving causing death cases. A number of these cases were cited to us. While we note these cases we consider them to be of limited assistance. One previous judgment of this Court is of relevance and that is the judgment (*ex tempore*) delivered by Sheehan J. on the 9th July, 2015, in *The People at the Suit of the Director of Public Prosecutions v. James Cash* [2015] IECA 198. The facts of that case and the personal circumstances of that appellant bear an uncanny resemblance to the present case. In the first instance it should be noted that in *Cash* he was attempting to evade capture by the gardaí when he committed a number of offences. Paragraphs 12 and 13 of the judgment summarise the facts as follows:

"12. On the 19th February, 2013, at 7.35 p.m. in the evening, the gardaí were informed about an incident at Seaview Park, Dun Laoghaire involving a silver saloon vehicle which the gardaí subsequently observed parked down from the Rathmichael halting site. As the gardaí approached the vehicle, they turned on the strobe lighting as a result of which the appellant who was the driver of the white car drove off at speed towards Ballycorus Road, and turned off his lights. He drove at approximately 100km per hour at times along the Rathmichael Road, which has a 50km per hour speed limit, continuously crossing the white line overtaking other cars and causing other cars coming in the opposite direction to swerve and use their emergency breaking in order to avoid head on collisions. He drove through a red light at the end of Ballycorus Road causing opposing traffic to take heavy evasive action and continued in a similar dangerous manner along Enniskerry Road and Glenamuck Road.

13. The gardaí sought permission to use a stinger device and asked for aerial support. The appellant continued to drive towards the Ballyogan roundabout and then past the Carrickmines shopping centre and at the Carrickmines roundabout, he mounted a kerb at a flyover and struck the safety barrier causing sparks to fly off the barrier. He then drove the wrong way down a slip road and on to the M50 travelling the wrong way against oncoming traffic as he went down the hard shoulder where two drivers, one being a disabled driver were waiting for the gardaí following a minor incident. The appellant hit the silver Saab that belonged to the disabled driver and then spun out and hit a black Volkswagen Tourer being driven by a Mrs. Tiernan who had three of her children with her in the car. The appellant then hit a Toyota Corolla being driven by an Aideen Kenny at which stage his car flipped and broke in two and he was ejected as the vehicle was splitting."

40. Paragraph 17 and 18 of the *Cash* judgment deal with the appellant's personal circumstances and previous convictions as follows:-

"At the time of sentencing the appellant was a 25 year old man with 85 previous convictions, including 16 for dangerous driving, one for endangerment and 31 for burglary as well as one for the unlawful seizure of a vehicle.

Between the time of the accident in February and his arrest for burglary on the 28th April, 2013, he had committed eighteen other offences. The Court was told that the appellant was addicted to heroin."

41. The *Cash* case was an appeal against sentence and this Court stated when dismissing that appeal that it had considered increasing the sentence. It would have done so, but for the very restrained submissions of counsel for the appellant.

42. Prof. O'Malley in *Sentencing Law and Practice* discusses sentencing in endangerment cases at paras. 12-09 to 12-12. In para. 12-10 Prof. O'Malley refers to four cases of endangerment arising in the course of driving with the two highest sentences being one of four years imprisonment with the final two years suspended and the second highest sentence being one of three years imprisonment. Paragraph 12-12 is mainly taken up with a newspaper report of the present case. Relying on that report Prof. O'Malley states: "the most serious aspect of this case was that the defendant while drunk had deliberately driven a van at a stationary garda motor cyclist who was directing traffic". Interestingly the newspaper report suggests that the appellant's bad language was directed at the trial judge and not the court Registrar.

43. Bearing in mind the principle of proportionality and the need where appropriate to reconcile the application of that principle with the penal aim of rehabilitation, our first task in this case is to identify an appropriate overall headline sentence. We are also mindful of our obligation to bring about a measure of consistency in sentencing. Bearing in mind the principle of totality and the fact that we hold that the reckless endangerment in this case must be measured by a separate consecutive sentence, we identify an overall headline sentence of 9 years imprisonment as being appropriate. We will mitigate that sentence down to 6 years and 9 months, in other words by 25 per cent, in light of the appellant's guilty pleas and his co-operation with the Gardaí following his arrest. In order to incentivise the appellant's rehabilitation we will suspend the final 12 months of that sentence on condition that the appellant keep the peace and be of good behaviour for a period of 12 months following his release from prison and that he be subject to the supervision of the Probation Service for that period of 12 months. It is clear that the appellant's reintegration into society will need to be carefully planned. The purpose of involving the Probation Service is to ensure that he is assisted in the best possible way in reintegrating into society following what for him will have been an exceptionally lengthy prison sentence. In arriving at the effective overall sentence that we now impose, we propose to reduce all the 5 year sentences to 4 years imprisonment in each case and the 7 year sentence to 5 years imprisonment leaving an overall headline sentence of 9 years imprisonment. In order to achieve the above result we now structure the sentence in the following way. All original sentences of 5 years imprisonment are now reduced to sentences of 2 years and 9 months. All sentences apart from the one for reckless endangerment are concurrent. We impose a sentence of 5 years imprisonment on the count of reckless endangerment and make that sentence consecutive to the sentences of 2 years and 9 months. We then suspend the final twelve months of the sentence in order to incentivise the appellant's rehabilitation on his entering into a bond for a period of twelve months to keep the peace and be of good behaviour for that period and also to be subject to the probation service during that time. Finally, we direct that the appellant be disqualified from driving for a period of 35 years.

