THE COURT OF APPEAL

[97/2018]

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

ADAM WHELAN

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 14th day of October 2019 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. The appellant pleaded guilty to dangerous driving causing serious harm, contrary to s.53 of the Road Traffic Act, 1961, as substituted by s.4 of the Road Traffic (No.2) Act, 2011, (Count no 1) and to drink driving contrary to s.4 of the Road Traffic Act, 2010 as amended.(Count no 2) On February 20th 2018, the appellant was sentenced in the Trim Circuit Criminal Court to six years imprisonment with the final two years suspended in relation to the s.53 offence, and to four months imprisonment for the offence of drink driving. Further, the appellant was disqualified from driving for ten years in respect of count number one, and for one year in respect of count two.

2. The incident took place in the early hours of Saturday September 17th 2016, at approximately 4 a.m., when the appellant was driving in Moyfeigher, Ballivor, Co. Meath. The appellant was under the influence of alcohol and drugs at the time. The injured party, Ms. Kettle, was in the passenger seat of the car, sitting on another girl's lap. She recalled being reluctant to get into the car, but did not want to be left behind in Trim. She described the appellant driving dangerously and performing 'doughnuts' on the Dublin road. There were four occupants in the vehicle when the appellant was driving though Ballivor. The injured party described the appellant as driving 'unbelievably fast' and that he was drinking from a can of beer while driving. Another occupant of the vehicle, Ms Delaney, also described the appellant as driving at excessive speed. She said that she could not recall the accident, but in the immediate aftermath, she and the others in the car realised that Ms Kettle was seriously injured and went to a nearby house seeking help. Another occupant of the vehicle, Mr Hogan, also recalled the appellant driving at speed, and that the appellant had been drinking that day. The speed limit on the road in question was 50 miles per hour. That dangerous driving gave rise to a crash.

The appellant provided a breath sample at 5:33 a.m. (the accident having taken around place around 4 a.m.) and the reading at the time was 38 micrograms of alcohol per 100 ml of breath when the relevant limit was nine micrograms.

3. Ms Kettle was brought by ambulance to James Connolly Memorial Hospital. Upon an initial examination, a laceration was noted to her left ear, a triangular laceration of approximately three centimetres to her neck. Ms Kettle had a femur fracture ; X-ray examinations showed a left displaced mid-shaft fracture and a left undisplaced superior pelvic rami fracture. Ms Kettle`s injuries have given rise to long term serious sequelae including the loss of all mobility in her left foot. Ms Kettle was 16 years old at the time of the accident. She provided a Victim Impact Statement to the court outlining her extensive injuries and the impact thereof including grave ill effects on her life and development.

4. The accused was arrested by arrangement on the 31st of January 2017 and interviewed by Detective Garda Kevin Ganly in Trim Garda station. The appellant confirmed that he had only purchased the car hours before the incident, around 9 p.m., and that he was disqualified from driving at the time. He admitted that he had been drinking and under the influence of drugs, and that the car was overloaded when driving to Ballivor.

5. The appellant was twenty-six years old at the time of sentencing. He had 26 previous convictions before the present offence, primarily for public order and misuse of drugs offences. He was disqualified from driving at the time of the offence arising from a conviction he received on September 24th 2015 due to driving without a licence. Indeed, there was no evidence of the appellant ever having obtained a driving licence.

6. At sentencing, the judge identified the gravity of the offence to be at the higher range, and determined a headline sentence of six years in respect of count number one, and the maximum sentence of six months in respect of count number two. The judge noted the serious of the offence the extremely high level of dangerous driving, and the profound impact to the injured party. The judge also noted the appellant's previous convictions and his disqualification from driving at the time of the offence. In mitigation, the sentencing judge accepted that the appellant entered an early plea of guilty, and his co-operation in the investigation; the appellant accepted responsibility for the offence and was remorseful. In respect of his addiction, the appellant attended the "Camino" in Enfield, Co. Meath which is a 15-week residential programme for young men with drug dependencies. He entered the programme on the 27th of September 2017. The sentencing judge proceeded to suspend the final two years of the six year sentence in respect of count one, and the final two months of the six month sentence in respect of count number two. Further, the judge disqualified the appellant from driving for a period of ten years and one year respectively.

Grounds of Appeal

7. The appellant submits that that the learned sentencing judge erred:-

i) In deciding that the offence was on the higher end of offences of this nature erred in principle;

and

ii) In having insufficient regard to the mitigating factors in the present case, the early guilty plea, his expressions of remorse, the appellants difficult family background and his efforts at rehabilitation.

Submissions

8. The appellant submits that the judge erred in principle in identifying this as an offence at the higher range for offences of this nature. Whilst it is accepted that there are significant aggravating factors in this case, the judge erred in not discounting from the headline sentence and having insufficient weight to the mitigating factors in this case, in particular the accused's early plea of guilty and co-operation with the Gardaí. The appellant referred to *DPP v Shovelin* [2009] IECCA 44, where the Court of Criminal Appeal allowed an appeal against severity of sentence and imposed a sentence of five years on ae count of dangerous driving causing death and four years on the charge of dangerous driving causing serious injury, whilst acknowledging that "*there was a singular absence of mitigating factors in this case. There was no guilty plea, nor did the appellant demonstrate either remorse or a helpful attitude in terms of how he had addressed the tragedy for which his driving was exclusively responsible.*"

9. The appellant also referred to *DPP v Moran* [2019] IECA 5, where the accused appealed a sentence of six years imprisonment with the final twelve months suspended for an offence of dangerous driving causing death with three other counts taken into consideration, including leaving the scene of an accident. The accused was found to be in excess of the alcohol limit some three hours after the incident, tested positive for cocaine, and had a relevant previous conviction for drunken driving. The Court of Appeal declined to interfere with the sentence noting that two other serious offences were taken into consideration in deciding sentence.

10. The respondent effectively drew an analogy between the present case and *DPP v O'Rourke [2016]* IECA 299, by quoting from the judgment of this Court (per Mahon J.) where he said of the facts in that case that:-

> *"This accident occurred as a result of the appellant's reckless behaviour in driving his car having consumed a large amount of alcohol. It is suggested on his behalf that the offence was not pre-meditated. But while the appellant may not have planned to drive with alcohol on board for any great length of time before doing so there was pre meditation in the sense that, having consumed a great deal of alcohol, he made the conscious decision to leave the public house, walk to his car and then drive for some time before the collision occurred. It was not something he did on the spur of the moment or without thinking. The act of driving with a lot of drink consumed was very much a calculated act on his part, and a risk he freely took."*

There, the sentence was one of seven years and six months.

11. In interview, the appellant admitted to travelling at approximately 70 miles per hour, (112 kilometres per hour). The respondent does not accept the appellant's contention that this represents a minor divergence from the speed limit. Reference is made to *DPP v Coleman* [2017] IECA 40, which reflect the courts increasing intolerance for excessive speed, as stated by Sheehan J. at para. 21:-

> *"…to this we might add that there is also an increased abhorrence of the speeding allied to an awareness of how this is frequently a principle cause of road traffic accidents."*

12. The respondent refers to the significant aggravating factors in the present case, including the numerous previous convictions of the appellant, including a conviction for speeding, the fact that he was disqualified from driving, the poor condition of the vehicle, the young age of the injured party, and the severe impact the incident has had on her life. In those circumstances, the respondent submits that the sentence imposed is clearly within the range of sentencing options open to the sentencing judge, and the appellant has failed to identify an error in principle.

Discussion and Decision

13. It is in the public interest to impose conditions upon the reintroduction of the appellant to the community so that the community will be protected and also that the appellant can be rehabilitated; which of course is the ultimate desideratum of, for example, suspended sentences, and we think that the headline sentence was rightly conceded to be appropriate given the offence of this gravity. Clearly, a certain discount was necessary for the purpose of recognising the mitigating factors. What has troubled this Court however, is the extent of the terms of the suspension, and we think that the appropriate course, having regard to the fact that we think that an error of principle occurred in that regard, is to increase somewhat the level of the suspended period, but to impose conditions to permit the appellant's safe re-introduction into the community in the context of encouraging his rehabilitation. We are fortified in this approach on consideration of the reports as to his conduct in prison. The Court will not interfere with the term of imprisonment of six years in the course of resentencing, but will confine itself to an extension so to speak of the suspensory period from two years to two and a half years but with the imposition of additional conditions of the kind which are prescribed in the Probation Report. These conditions are that: -

i) The appellant should undertake offence and victim focused intervention as directed by the supervising Probation Officer – of course to remain under the supervision of the Probation Service,

ii) to attend aftercare and addiction service as requested by the supervising Probation Officer,

iii) to attend training and employment services as directed by the supervising Probation Officer.

and;

iv) to observe all directions of the Probation Service for the period of suspension.

The period of suspension we propose to extend has reduced the period in custody but extends the supervisory period; the appellant will remain under the supervision of the probation authorities according to the conditions to which we have referred for a period of three years after his release.