R v McShane

COURT OF APPEAL

MACDERMOTT LJ AND KERR J20 FEBRUARY, 16 MARCH 1998
Road traffic – Dangerous driving – Driving while disqualified – Sentence – Principles of sentence – Maximum sentence – Plea of guilty – Appellant pleading guilty to charges of dangerous driving and driving while disqualified – Appellant receiving maximum sentence in respect of both offences – Whether appellant ought to have been given credit for pleading guilty – Occasions that maximum sentence might be imposed on a guilty plea – Criminal Justice (Northern Ireland) Order, SI 1996/3160, art 33.

J J Mallon (instructed by McCann & McCann) for the appellant.

R K Weir (instructed by the Office of the DPP) for the Crown.

Cur adv vult

16 March. The following judgment of the court was delivered.KERR J (giving the judgment of the court at the invitation of MacDermott LJ). The appellant, Gerard Martin McShane, appeals, with leave of the single judge, against a sentence of two years' imprisonment on a charge of dangerous driving and a consecutive sentence of one years' imprisonment for driving while disqualified. The sentences were imposed at Belfast Crown Court on 20 November 1997 by the Recorder of Belfast, His Honour Judge Hart QC.

Background
The appellant is 23 years old. He has appeared in court on eleven previous occasions beginning on 14 May 1993 when he was 19. Virtually all of his previous convictions are for motoring offences. He was first disqualified from driving on 7 October 1993. He was detected driving within two weeks of that disqualification, on 21 October 1993. The following day he again drove while disqualified. Tragically, on this occasion, his reckless driving caused the death of another. On 5 November 1994 at Belfast Crown Court the appellant pleaded guilty to offences of reckless driving causing death, driving while disqualified and other offences. He was sentenced to a total of 21 months' detention in a young offenders centre and was disqualified from driving for five years.

On 27 May 1996 at 2 am approximately the appellant was observed driving a vehicle with four passengers on board. When he discovered that he had been spotted by police he drove in an appallingly dangerous fashion evading or breaking through check points, travelling at enormous speeds and ignoring signals to stop. The car which he drove eventually collided with one of two police landrovers drawn up in formation to stop him. Some of his passengers and a number of police officers in the landrover were injured.

The appellant was arraigned on four counts; dangerous driving, driving while disqualified, driving without insurance and failing to provide a specimen. On arraignment he pleaded not guilty to all charges. His counsel

[1998] NIJB 64 at 65subsequently explained to the recorder that one reason for the appellant's plea of not guilty was that he had always intended to contest the last of these charges. The recorder accepted this explanation but concluded that the appellant's principal reason for pleading not guilty was that he wished to spend time with his girlfriend.

The appeal

The notice of appeal contained three main grounds: (i) that the recorder was wrong to impose consecutive sentences for offences which arose out of the same incident; (ii) that the recorder failed to take sufficiently into account a psychiatric report and a probation report on the appellant; and (iii) the appellant ought to have been given credit for having pleaded guilty. On the hearing of the appeal only the last of these was pursued. It was submitted that it was wrong in principle to fail to give the appellant any credit whatever for his plea of guilty. Counsel argued that the requirement to do so had been given statutory recognition and emphasis in art 33 of the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160 (the 1996 Order). He submitted that it was only in the most exceptional case that no discount whatever should be given for a guilty plea. This was not such a case.

Counsel accepted that there are occasions when a maximum sentence may be justified on a plea of guilty. Of necessity, such cases must be not only exceptional but devoid of any mitigating feature. In particular, it would not be appropriate to impose the maximum penalty when there was a possible defence available to the accused. In this case there was inconsistency in the accounts given by police officers as to whether the accused remained in the driving seat or tried to climb into the rear of the vehicle after the final collision. While this may not have provided a very fruitful line of defence, counsel suggested that it might nevertheless have been exploited by the appellant as a possible challenge to the Crown case that he was the driver.

Finally, counsel contrasted this case with the decision of the Court of Appeal in England in *R v Hastings* [1996] 1 Cr App R (S) 167. In that case the standard of driving of the accused was similar to that of the appellant in the present case but there were aggravating features which were not present here. The offender had consumed alcohol and indeed was convicted of driving with excess alcohol. While the maximum penalty was considered to be appropriate in that case, it could not be justified here because this was a less serious instance of dangerous driving. In this context, counsel drew attention to the recorder's acknowledgement that it was 'possible to conceive of worse cases' than the present. He argued that since the ultimate sanction of the maximum penalty should be reserved for the worst type of case, the appellant should not have received the maximum sentence.

Article 33

The effect of art 33 of the 1996 Order has been considered recently by this court in *R v McKeown, Loyal and Glasgow* (1997, unreported). MacDermott LJ, delivering the

judgment of the court, rejected the argument that the enactment of art 33 called for a greater discount for a guilty plea than would hitherto have been appropriate. At p 6 he said:

'In our judgment the amount of discount which is appropriate remains within the discretion of the sentencer and depends upon the particular

[1998] NIJB 64 at 66circumstances of each individual case with the statute emphasising that the earlier the guilty plea is entered the greater will be the amount of discount.'

In the present case it was not suggested that the recorder was wrong to conclude that the main reason for the appellant's failure to plead guilty was that he wished to spend time with his girlfriend. This delay in pleading guilty must diminish the mitigating effect of the plea. As the recorder observed, if the appellant had pleaded guilty on arraignment he would almost certainly have been remanded in custody and, in order to avoid that, he pleaded not guilty. The recorder's conclusion that this was a manipulation of the system is undoubtedly correct. Such deliberate manipulation must also reduce the possibility of a discount on sentence.

When may a maximum sentence be imposed on a guilty plea?

It is well settled that, in general, a plea of guilty will attract a lesser sentence than will be imposed on conviction after a contest. In *R v Connolly* [1994] NIJB 226 at 227 this court said:

'It has long been established that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate to reflect the fact that the plea is an indication of remorse, has led to a saving of time and has convenienced witnesses who would otherwise have had to attend court. This approach is often called "giving a discount". What is an appropriate discount depends on a variety of factors such as how early the plea was made and all the general circumstances of the case of which the sentencer will be aware.'

There are cases, however, where it will be appropriate to impose the maximum sentence even when the accused has pleaded guilty. If a late plea has been entered or if a plea has been delayed deliberately or where there is an open and shut case against the accused, the maximum penalty will be a possibility to be considered by the sentencer. That possibility will increase if the accused has a substantial and relevant criminal record and the offences to which the accused has pleaded guilty are particularly serious and of a type of which he has been frequently convicted in the past.

It is clear, however, that even if these features are present, a maximum penalty will not always be appropriate. The imposition of a maximum sentence on a plea of guilty will be an exceptional event suitable only for exceptional cases. In our opinion, it would not be helpful to attempt to define further the category of case in which a maximum sentence may be imposed where an accused has pleaded guilty.

Conclusions

The appellant deliberately delayed entering a plea of guilty in order to avoid his being taken into custody. He was arraigned on 16 May 1997. The case had to be listed for mention on 17 September 1997 to fix a date. It appeared again before the recorder on 14 October 1997 before being dealt with finally on 20 November 1997. Many of these appearances could have

[1998] NIJB 64 at 67been avoided if the appellant had pleaded guilty on arraignment. He can claim no credit for the timing of his plea of guilty, therefore.

It is equally clear, in our opinion, that the appellant cannot claim credit for not having presented what his counsel accepted was the unmeritorious defence that he had not been driving. Counsel suggested that, despite its lack of merit, this defence might have appealed to a jury. We consider that such a possibility should not give rise to any discount. A decision not to attempt to exploit an unworthy defence cannot earn credit for an accused. In this case, the evidence against the accused was overwhelming. We do not consider that the possibility of the appellant securing what would have been a perverse verdict warrants any discount in his case.

The appellant has an appalling record of convictions for offences similar to those to which he pleaded guilty. His driving on this occasion was also appalling. His counsel suggested that it was not the worst case of its type; this may be so but we do not consider that the option of the maximum sentence must be reserved for the worst conceivable case in each category.

Having said that, we have concluded that some discount on the maximum sentence is warranted. Although most, if not all, of the aggravating features which prompt consideration of the maximum penalty are present in this case, as we have said, where a plea of guilty has been entered, the imposition of the maximum sentence must remain an exceptional event. Despite its obvious seriousness, we do not consider that this case qualifies for such exceptional disposal. Clearly, however, the discount attracted by the plea of guilty must be modest. In our view the proper reduction is one of two months on the first count and of one month on the second count. We therefore quash the sentence of two years on the charge of dangerous driving and substitute one of twenty-two months and quash the sentence of one year on the charge of driving while disqualified and impose in its place a sentence of eleven months. These sentences will, of course, be consecutive as before.

Order accordingly.