



**THE COURT OF APPEAL**

**[163/18]**

**The President  
Whelan J.  
Kennedy J.**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**DAVID BYRNE**

**APPELLANT**

**JUDGMENT of the Court delivered on the 15th day of October 2019 by Birmingham P.**

1. On 13th March 2018, following a seven-day trial, the appellant was convicted, by way of a majority verdict, of dangerous driving causing death, making a gain by deception contrary to s. 6 of the Criminal Justice Theft and Fraud Offences Act 2001, and making a statement that was false or misleading contrary to s. 64 of the Road Traffic Act 1961. Subsequently, on 11th May 2018, he was sentenced to a term of five years imprisonment in respect of the count of dangerous driving causing death and to lesser concurrent sentences on the other counts. He has appealed against both his conviction and the sentence imposed. This judgment deals only with the conviction aspect.
2. This case arose from a fatal road traffic accident that occurred on Friday 16th October 2015 on Collins Avenue East in Dublin, close to the junction of Collins Avenue and the Howth Road. On that occasion, a motor vehicle driven by the appellant struck a pedestrian who was crossing the road, killing her. CCTV footage from a nearby licenced premises showed the pedestrian, a seventy-year old lady, the late Mrs. Patricia Dunne, crossing the road from west to east pulling a shopping trolley behind her. An examination of that same footage showed the late Mrs. Dunne stopping on the centre line to allow the car in front of the appellant's car to pass. We have been told, and it appears to be the case, that the actual impact is not visible on the CCTV footage. On the evening of the accident, members of An Garda Síochána investigating the incident went to an address in Dublin 8: the home of the appellant's parents. Gardaí spoke with the appellant and informed him that Mrs. Dunne had passed away. While the victim had been conscious at the scene of the accident, she died shortly after being brought to the Mater Hospital.
3. Gardaí made a request of the appellant that he produce his Driver's Licence and insurance and an appointment was made for him to attend Clontarf Garda Station on Sunday 18th October 2015. The next day, following an appeal for information in relation to this fatal

accident, confidential information became available to the Gardaí to the effect that the appellant suffered from a particular medical condition known as Usher Syndrome Type II.

4. Usher Syndrome Type II is a degenerative condition concerning a combination of congenital hearing loss and a degenerative eye condition, effecting peripheral vision. Type II Usher Syndrome is distinguished from Type I by the fact that the latter is characterised by a much more severe and profound hearing loss.
5. The prosecution's case was that for the appellant to drive while suffering from such a condition was to drive in a manner which a reasonably prudent person, having regard to all the circumstances, would recognise as involving a direct immediate and serious risk to the public. This was said to have amounted to dangerous driving on the part of Mr. Byrne which, in turn, caused the death of Patricia Dunne. Evidence was adduced that Mr. Byrne had been advised by a consultant ophthalmologist in 1997 not to drive, and had informed an optometrist in 2012 that he was not driving at the time. There was also evidence before the trial court that the appellant had not disclosed the condition when applying for a Driving Licence and insurance. This was important as the other counts on the indictment related to alleged falsehoods or deceptions used in obtaining same.
6. On Sunday 18th October 2015, the appellant, as scheduled, attended at Clontarf Garda Station on a voluntary basis for the purpose of making a voluntary cautioned statement. He was advised about his right to legal advice, but did not elect to avail of it before participating in the interview. From that session, Gardaí learned that Mr. Byrne had been born in March 1996, and so was thirty-nine years of age at the time of the fatal accident. He worked as a postman and stated that on the day of the accident, he had been travelling to meet his father after completing his work shift.

#### **Interview with David Byrne**

7. In the course of the interview, Mr. Byrne was asked about the information that had come to light suggesting that he had been diagnosed with Usher Syndrome Type II and the appellant admitted that this was the case. At the conclusion of the interview, he was invited to, and did in fact, sign a voluntary cautioned statement. Having brought the interview to an end, the Gardaí then sought consent from the appellant for them to be allowed to access his medical records. The question about accessing medical records was not the subject of any particular or specific caution to Mr. Byrne about his entitlement to seek legal advice on that issue and this forms a significant aspect in the appeal.
8. A number of grounds of appeal have been formulated, but the central contention, as developed in the written and oral submissions, would appear to be that the trial judge erred in admitting evidence of medical and ophthalmological records in relation to Usher Syndrome. There were also a number of sub-grounds canvassed in relation to this issue.
9. It is said that the trial judge was in error in failing to grant a direction following the close of the prosecution case. An issue was raised as to the appropriateness of charging an offence contrary to s. 53 of the Road Traffic Act, an offence of dangerous driving causing death, rather than an offence contrary to s.48 of the Road Traffic Act 1961, the offence of

driving, when to one's knowledge, one is suffering from a disease or physical or mental disability which would be likely to cause the driving of the vehicle to be a source of danger to the public. It is said that the offence of making a gain or loss by deception was not made out, on the basis that no specific "gain" or "loss" had been identified.

10. Before turning to address the individual grounds of appeal, it is appropriate to say a little more about what was known about the circumstances of the collision. This is of particular importance to the contention that this was a case where there should have been a directed verdict of 'not guilty'. The trial court heard from Garda Patrick McElroy, who was described as a forensic collision investigator. He indicated that his analysis, including analysis of the CCTV footage, indicated that at the time of impact, the appellant had been travelling at 49kms an hour, the speed limit being 50kms per hour. When the scene was examined by Garda McElroy some hours after the impact, there was no sign of the driver having braked. Garda McElroy's evidence was that he would have expected to find skid marks if a driver had applied emergency braking. However, while that was what one might have expected to see, the absence of skid marks did not establish that the appellant had not applied the brakes, or even that he had not done so with force by way of emergency braking. Garda McElroy calculated that the appellant had 2.8 seconds to react to the presence of Mrs. Dunne when she was at the centre line of the road waiting for the car in front of the appellant to pass. A normal reaction time for a driver is put at between 1.5 to 2 seconds, however, that time could be up to 2.5 seconds in certain circumstances. Had there been a reaction to the presence of Mrs. Dunne within 1.5 seconds, the car would have stopped before reaching the deceased and there would have been no impact whatsoever. With a reaction time of 2.0 seconds, however, the vehicle would stop travelling three metres past the point of the deceased on the road, or, put differently, she would have been struck, albeit at a lower speed.
11. The case on behalf of the defence was that the standard being demanded of the driver was an extremely high one and the defence goes further in saying that it was unrealistic due to there being no margin for error factored into the equation. To that end, it was suggested that the prosecution had proposed an impossible standard and the failure to achieve same could not constitute dangerous driving. The prosecution case, however, was that there had not been any reaction at all from the driver of the vehicle and as such, this was not a case of a driver been held to an unreasonably high standard.
12. On behalf of the appellant, it was submitted that the fact that the accused suffered from Usher Syndrome was immaterial insofar as the offence charged was concerned. It was said that the existence of an eye deficiency per se could not be said to constitute dangerous driving. Further, the mere existence of an eyesight deficiency cannot ipso facto establish or demonstrate that the standard of driving on the particular occasion was dangerous. The appellant goes so far as to argue that the existence of a medical condition and the nature and quality of driving are two entirely discreet and mutually exclusive matters. In the absence of evidence explicitly demonstrating a causal connection between the two, proof of the mere presence of the medical condition should never have been permitted to go before the jury. In that regard, it is said the fact that

the deceased came to a stop in the middle of the road prior to the collision was of particular importance. The suggestion being that it was not established that any impairment to the appellant's peripheral vision was the cause of the accident. In the absence of any positive evidence of a causal link of that kind, the appellant submits that admitting evidence of the existence of his condition served to gravely and irreparably prejudice him in the eyes of the jury.

13. In the course of oral argument in the Circuit Court, prosecuting counsel raised, by way of analogy, the issue of intoxication, comparing the act of driving while intoxicated to that of driving with a condition such as Usher Syndrome. The appellant says that the analogy is inappropriate as driving while intoxicated is an act that has been specifically criminalised due to its recognised and established effect on driving. He said that the trial judge fell into error in accepting prosecution counsel's submissions in that regard. The prosecution contend that the analogy is a fair and appropriate one, in that both driving while intoxicated and driving while physically impaired have the effect of making the driving of the vehicle an inherently dangerous act. Counsel for the Director says that just as driving while intoxicated is a specific offence, so, too, is knowingly driving while suffering from a disease or physical or mental disability which would be likely to cause the driving of the vehicle to be a source of danger to the public.

#### **The Obtaining of Consent for the Release of Medical Files**

14. The defendant puts this issue in the context of a voluntary attendance for interview some forty-eight hours following the fatal accident. At the point at which he was interviewed, he was informed of his right to seek and obtain legal advice and chose not to do so. When the interview concluded, the appellant was asked to consent to Gardaí obtaining certain of his medical records. The appellant says this was not satisfactory as no separate or specific caution was given as to his right to obtain legal advice in respect of same.
15. He said there was an obligation upon the Gardaí to specifically warn him that this was a matter in respect of which he had the right to obtain legal advice and that material arising therefrom could be given in evidence at any future trial. It is said that the issue of consent to releasing medical records ought to have been dealt with as an entirely separate and independent matter from the fact that he was willing to participate voluntarily in an interview. The appellant argues that he ought to have been given the opportunity to consider taking professional advice and cautioned in respect of his entitlement to same. This was particularly so given that the interview had, in the formal sense, been concluded. It is said that there was a need for an additional and specific caution; the failure to provide which was unfair, and indeed, far below minimum standards of fairness.
16. The Director says that consent to release was properly sought and freely provided. It is her contention that the appellant had no absolute right to the confidentiality of his medical records. Instead, he had a qualified entitlement to confidentiality only, the nature of which was to expect no more than that his records could not be disclosed, save where that was required by the exigencies of the public good. It is said that even if there was no evidence that the appellant had been cautioned, or indeed, no evidence that he had

consented to the release, that Gardaí would still have been entitled to seek out access to records.

17. In the Court's view, the complaint that the procedures followed at Clontarf Garda station failed to accord with minimum standards of fairness is not made out. This was not a situation of someone arrested at their home in the early hours of the morning, or anything of that nature. It was a meeting that was taking place by appointment. At the start of the interview, the appellant was informed of his right to obtain legal advice and decided not to avail of the opportunity. Undoubtedly, the Gardaí could have returned to the question of an entitlement to obtain legal advice when asking him would he consent to them accessing his medical records, but we have not been persuaded that their failure to do so introduced such an element of unfairness to the proceedings as to require the exclusion of the medical records.
18. The appellant argues that even if the prosecution can stand over the procedures followed at Clontarf Garda Station, that there were still difficulties in admitting the evidence of Dr. Kenna, a consultant ophthalmologist, who saw Mr. Byrne on 9th December 1997. Objection was taken on the basis that the diagnosis of Usher Syndrome was, in part, based on tests carried out by a visual function technologist working with Dr. Kenna in the Eye & Ear Hospital Research Department. The appellant also took issue with the fact that Dr. Kenna was permitted to refer to a letter that he had sent on the day of the examination to the referring ophthalmologist. In the course of that letter, Dr. Kenna referred to the fact that Mr. Byrne had told him that he was currently driving both in daylight and at night and records that Dr. Kenna strongly advised him against driving either in daytime or night-time and expressed the hope that the advice would be taken. The letter also included an expression of interest in seeing Mr. Byrne approximately two years from that time and it was explained that this was because the condition was progressive in nature. However, Mr. Byrne did not come back for a further review.
19. The trial judge dealt with this aspect of the matter as follows:

“[t]he other matters of Mr. Kenna, the tests were carried out and he explained that the two persons carrying out the tests, that they were done in concert and he made his diagnosis. There is no reference to driving in his notes, but he refers to a letter that he sent a couple of days later to the referring consultant, Mr. Hugh Cassidy, and that letter – he was questioned about the driving and he said in the letter that he strongly advised him not to drive either at night-time or daytime and hoped that he would take that advice. That letter is admissible. It was given after a person made the diagnosis of Usher's Syndrome. The letter was written to a referring consultant a few days later. The notes referred to the diagnosis, but the letter refers to the consequence of same and in answer to cross-examination, when that lacuna was put to Mr. Kenna, he said ‘well, I strongly advised him not to drive’.”
20. In the Court's view, the ruling by the trial judge on this aspect of the challenge was an appropriate one. In effect, the letter, which was effectively a contemporaneous letter, was

being relied on by Dr. Kenna to refresh his memory in relation to a patient that he had seen some twenty years earlier.

21. More fundamentally, and transcending the procedural issues raised, the appellant says the fact that the accused suffered from Usher Syndrome was immaterial to the offence charged. The suggestion is that the presence of a medical condition and the nature, quality, and manner of driving were entirely separate and unconnected matters. In these circumstances, the fact of the condition should not have been permitted to go before the jury. It is said that the evidence in relation to the condition must inevitably have seriously prejudiced the appellant in the eyes of the jury. The Director, at trial and again on the appeal, says that the appellant fundamentally misunderstands the prosecution's case. Its case was that the very act of driving when suffering from such a condition was to engage in driving which a reasonably prudent man, having regard to all of the circumstances, would recognise as involving a direct, immediate and serious risk to the public i.e. dangerous driving. The prosecution says that while objection was raised to the analogy being drawn with intoxication, that intoxication is in fact a fair comparison as both it and the condition in issue affects the body so as to make the driving of the vehicle an inherently dangerous act.
22. In this case, the prosecution was contending that no efforts were made to avoid the collision. In those circumstances, the question of whether Mr. Byrne's vision, and in particular, his peripheral vision was impaired, was, in the Court's view, relevant and therefore admissible.

**The Charge of Dangerous Driving Causing Death was not the Appropriate Charge**

23. The appellant says that at the heart of the prosecution case was the fact that the appellant drove while suffering from a physical disability and that in those circumstances, the appropriate charge to lay was one contrary to s. 48 of the Road Traffic Act 1961 (as amended) which provides:

“[a] person shall not drive or attempt to drive a mechanically-propelled vehicle in a public place when he is, to his knowledge, suffering from any disease or physical or mental disability which would be likely to cause the driving of the vehicle by him in a public place to be a source of danger to the public.”

The appellant says that in the circumstances of the case, that the conduct of the prosecution amounted to an abuse of process, in that there was a clearly identifiable criminal offence, a summary only offence, but the prosecution elected to prosecute the appellant for an indictable offence which carried a substantially more serious in nature and character which carried far higher maximum penalties. The appellant has placed reliance on the case of *GE v. DPP* [2009] 1 IR 801 which this Court regards as somewhat surprising as the facts in that case could scarcely be more different. In that case, the applicant was charged with unlawful carnal knowledge, contrary to s. 2(2) of the Criminal Law Amendment Act 1935. The Director had signalled consent to summary disposal on a plea of guilty. However, due to the successful challenge to the unlawful carnal knowledge section in the case of *CC v. Ireland* [2006] 4 IR 1, a nolle prosequi was entered and the

applicant was then charged with rape. The contrast with the present case could scarcely be more stark. Implicit in the criticism of the prosecution is the suggestion that the Director would have wished to prosecute this matter as a s. 48 offence and resorted to a prosecution for dangerous driving causing death on indictment only because of running out of time. The appellant is not in a position to point to any factual evidence to support the theory he has come up with, and such evidence as there was in the case, as to when the file was submitted by Gardai to the Office of the DPP, goes the other way. In any event, the Court is quite satisfied that there is absolutely no basis whatsoever for suggesting that the fact that there was a summary offence available precluded charging the appellant with dangerous driving causing death and should have led the trial judge to refuse to allow the jury consider the matter. As such, we have no hesitation in rejecting this ground of appeal.

#### **An Application for a Direction in Relation to Dangerous Driving Causing Death**

24. At trial, the application for a direction focused heavily on reaction times. It was pointed out that a normal reaction time is between 1.5 and 2.0 seconds. However, in certain circumstances, the time could go out to 2.5 seconds. It was said that in this case, with a driver reacting within 1.5 seconds, the driver would have stopped the vehicle three metres short of the point on the road where the deceased was. With a reaction time of two seconds, the vehicle would stop travelling three metres past the point of the deceased on the road. It was suggested that these amounted to very fine margins and the prosecution was seeking to hold the appellant to very high standards indeed, and that a failure to meet these very high standards did not amount to dangerous driving. The prosecution, on the other hand, contended that all the focus on reaction times was somewhat misplaced because the evidence before the Court was that there was simply no reaction at all from Mr. Byrne. The prosecution referred to the fact that the deceased was on the road for ten seconds, some seven seconds crossing the road before she even got to the centre line of the road when she should have been clearly visible. In ruling on the matter, the Circuit Court Judge indicated that the question of withdrawing the case and ordering a directed verdict of not guilty would arise only where the state of the evidence would render it unfair to proceed. She felt that this threshold had not been reached and consequently, it was a properly a matter to be addressed by a jury. In this Court's view, the conclusion arrived at by the trial judge, that this was not a case for a directed verdict of not guilty, was one that was certainly open to her. Accordingly, this ground of appeal also fails.

#### **Making a Gain or Causing a Loss by Deception**

25. The second count on the indictment was in these terms:

“Statement of Offence.:

Making a gain or loss by deception, contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Particulars of Offence:

David Byrne, on 30th September 2014, within the State, dishonestly, with the intention of making a gain for himself or causing a loss to another, induced by deception the National Driver Licence Service to issue him with a Driving Licence.”

The appellant asks, where was the “gain” or “loss” exactly? It was pointed out that a definition is provided for the terms “gain” and “loss” by s. 2(3) of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides:

“‘Gain’ and ‘loss’ are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent.”

The appellant says that someone applying for a Driving Licence will do so with the intention and expectation of being granted a permission to drive and having a right to drive or the privilege to drive, but that one is not seeking to acquire property. The property acquired is the piece of paper on which the Driving Licence is printed. The prosecution points out that the evidence they relied on in relation to this charge was that when applying for a Driving Licence, the appellant had ticked a box, indicating that he did not have any condition affecting his peripheral vision. The prosecution, however, says that in ticking the box, what the appellant was seeking was that he would be issued with a physical Driving Licence. The Court agrees with the prosecution that this must have been the objective and was certainly the result. Accordingly, the Court is not prepared to uphold this ground of appeal.

### **Conclusion**

26. In summary, then, the Court has not been persuaded that it should uphold any ground of appeal raised in relation to conviction. Moreover, the Court has not been persuaded that the trial was unfair or that the verdict was unsafe. Accordingly, the appeal against conviction is dismissed.