



THE COURT OF APPEAL

Record Number: 100/2021

McCarthy J.

Kennedy J.

Donnelly J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PAUL COEN

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 15th day of December 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against severity of sentence. On the 18th of May 2021, the appellant was sentenced to 4 years' imprisonment with the final year suspended for an offence of dangerous driving causing serious bodily harm contrary to s. 53 of the Road Traffic Act, 1961, as amended, and a summary offence of failing or refusing to comply with a requirement to provide a sample contrary to s.12 of the Road Traffic Act, 2010. The sentencing judge disqualified the appellant from holding a driving licence for a period of 10 years on the first count. In truth, this appeal focuses on the length of the disqualification period.

Background

2. On the 1st December 2019, An Garda Síochána received a call reporting a serious road traffic accident on the N20 road between Mallow and Cork City. On arrival at the scene, Gardaí observed a Ford Focus in the middle of the left-hand lane and a Toyota Corolla in the grass verge on the left-hand side. Paramedics were at the scene and the driver of the Toyota vehicle, the injured

party herein, was removed from the scene by air ambulance to Cork University Hospital. The driver of the Ford vehicle, the appellant herein, was also removed by ambulance as were the passengers of the Toyota vehicle.

3. Subsequent to this, a request was made by Gardaí to obtain a sample of blood or urine from both drivers involved in the accident. The injured party provided a sample but the appellant refused.

4. An investigation was launched, and a number of witnesses came forward. One witness who was travelling on the N20 from Cork towards Mallow at approximately 1:30pm recalled being behind a silver Ford Focus vehicle before Rathduff. She described that the vehicle was driving erratically over and back the white line and in and out of the hard shoulder. As she was concerned, this witness pulled in behind the Ford vehicle in Rathduff and observed the driver exit his vehicle and enter a public house there.

5. At approximately 3:30pm, three further witnesses observed the same Ford vehicle driving in a similar erratic fashion. These witnesses were concerned that an accident was about to occur. Shortly after this, the Ford vehicle crossed the white line into oncoming traffic and collided with the Toyota vehicle.

6. Serious collision investigators who carried out a report on the scene found that the accident occurred in the southbound lane of the N20 going from Mallow towards Cork. The Ford vehicle was traveling northbound at the time. Weather conditions were dry on the day in question. There was no defect found in either vehicle nor was there evidence of mobile phone usage or excessive speed on the part of either driver.

7. In a prepared statement of the 14th May 2020, the appellant acknowledged that he lost control of the vehicle, traversed the white line and crashed into oncoming traffic. As a result of the collision, the appellant suffered a broken left arm and bruising to the chest area. He also had to have stitches to his head.

8. The injured party underwent a CT scan of her brain and cervical spine. She sustained a stable fracture to the transverse process of the seventh cervical vertebrae and multiple right sided rib fractures and contusions as well as fractures to the breastbone and pneumothorax. She had to undergo surgery and was seen by the cardio-thoracic and neurosurgical teams. The injured party's husband and daughter who were passengers in the vehicle at the time also sustained injuries however, there is no charge arising out of those.

9. In her victim impact statement, the injured party described the impact of the collision like a bomb going off. Her injuries required her to be air lifted from the site of the collision and she described that her husband and daughter thought her to be dead. She was in critical condition in the CUH and now has ongoing physical and mental health issues including post-traumatic stress disorder. The injured party further outlined the long-term impact of the collision on her life. She stated that, *"I haven't woken up in the last 17 months without feeling sad or being in pain. I have great difficulty being in cars."*

Personal Circumstances of the Appellant

10. The appellant was 45 years of age at the time of sentencing. He is married with one child and has four previous convictions, none of which are for road traffic offences.

- 11.** The appellant was in full-time employment at the time of the offending herein and positive testimonials were put before the sentencing court from a previous workplace of his.
- 12.** The appellant has a history of mental health issues and has availed of mental health services in an inpatient capacity four times prior to the offending herein. He has issues with alcohol.

Sentencing Remarks

13. The sentencing judge identified a headline sentence of five years' imprisonment on the dangerous driving offence and reduced this to one of four years in light of the appellant's guilty plea and personal circumstances. The judge disqualified the appellant from driving for a period of ten years. He further suspended one year of the four-year sentence of imprisonment on the condition that the appellant does not drive for the period of the disqualification or until his licence is restored to him. In relation to the offence of refusing to provide a sample, the judge imposed a sentence of six months' imprisonment and a four year disqualification. All sentences to run concurrently.

14. The judge outlined the aggravating factors to include the nature of the appellant's driving prior to the accident, the fact that the appellant had consumed alcohol immediately prior to the accident and his refusal to provide a sample pursuant to s. 12 of the Road Traffic Act, 2010. Insofar as the latter is concerned, a sentence was imposed for this offence and it does not in the circumstances in strictness constitute an aggravating factor. Whilst the refusal to provide a sample may point towards the consumption of an intoxicant, which consumption aggravates the offence, the fact of refusing to provide a sample post accident is not an aggravating factor in and of itself. In any event the appellant acknowledged that he had alcohol taken prior to the accident.

15. In terms of mitigation, the judge acknowledged the appellant's early guilty plea, his young age and his absence of previous convictions for road traffic infringements. The appellant's psychiatric history and good employment record were also acknowledged.

Grounds of Appeal

16. The appellant appeals his sentence on the following four grounds:

- i. That the sentence was excessive and disproportionate in all the circumstances.*
- ii. The lengthy disqualification of ten years was wrong in principle in that it hampered the Appellant's ability to rehabilitate post release, severely curtailing his prospects of getting and/or keeping employment. In doing so, the learned judge failed to afford sufficient weight to the public interest in the Appellant's rehabilitation.*
- iii. The disqualification from driving, or alternatively its length, was wrong in principle, in that it was disproportionate given all the circumstances of the case and given the penalty imposed by way of custodial sentence.*
- iv. The learned sentencing Judge did not give sufficient weight and balance to the evidence adduced in mitigation of sentence such as the Appellant's early plea of guilty, co-*

operation tendered during the course of the investigation, his psychological and/or depression difficulties and expression of remorse.”

Submissions of the Parties

The Headline Sentence

17. The appellant relies on the case of *The People (DPP) v Shovelin* [2009] IECCA 44. In that case, the predecessor to this Court reduced a sentence of seven and a half years imposed for a dangerous driving offence in circumstances where there were aggravating factors present, a notable absence of mitigating factors and the appellant had 27 previous convictions including for previous road traffic offences. It is submitted that the lesser aggravating factors herein coupled with the appellant’s plea of guilty and absence of previous road traffic convictions warranted a greater divergence.

18. The appellant also relies on *The People (DPP) v Whelan* [2020] IECA 350 in which this Court increased the suspended portion of a six-year sentence imposed for dangerous driving in recognition of the mitigating factors present in the case despite there being a number of serious aggravating factors. Again, it is submitted that although the sentence affirmed by this Court exceeds the sentence imposed in the present case, the lesser aggravating factors herein as well as the appellant’s plea of guilty and absence of previous road traffic convictions warranted a greater divergence.

19. Further reliance is placed on *The People (DPP) v Byrne* [2019] IECA 261 in which this Court substituted a sentence of five years’ imprisonment for dangerous driving for one of four years with the final year suspended in circumstances where the appellant had been advised not to drive twenty years previously due to a defect in his peripheral vision. It is accepted that the quality of driving at issue herein is worse than that in *Byrne*, however, it is submitted that as the driving at issue in that case led to a fatality and that that appellant had contested his trial, the equivalence between the sentence imposed in *Byrne* and the sentence imposed in the present case constitutes an error in principle.

20. The respondent relies on *The People (DPP) v Flynn* [2020] IECA 294 in which this Court set out the relevant sentencing guidelines relating to dangerous driving causing death and serious bodily harm as follows:

“Although the range of available penalties open to the sentencing judge for the principal offence in this case theoretically ranged from non-custodial disposal up to imprisonment for ten years, we consider that such was the gravity of the respondent’s offending conduct that in no circumstances could a non-custodial headline sentence ever have been realistically contemplated. In our view, an appropriate assessment of the gravity of this case based upon a synthesis of the twin ingredients of culpability and harm done would mandate that the headline sentence should be a substantial custodial one, and that it should be located towards the high end of the mid-range on the spectrum, in a situation where that spectrum extends from zero custody to imprisonment for up to ten years (or one hundred and twenty months) and assuming a division of that spectrum into three equal parts to provide for a low range, a mid-range and a high range. Accordingly, the low range would extend from zero to three years and four months (i.e. forty months); the mid-

range would extend beyond that to six years and eight months (i.e. eighty months); and the high range beyond that again up to the maximum of ten years (i.e., one hundred and twenty months).”(emphasis added)

As such, it is submitted that a headline sentence of five years' imprisonment is representative of the median point on the spectrum for the within offending and is therefore entirely appropriate and not an error in principle.

21. The respondent submits that the gravity of the within offending was particularly egregious both in terms of harm done and moral culpability. In relation to harm done, it is submitted that the nature of the injured party's injuries has resulted in a long-term impact on her life. In terms of culpability, the respondent outlines that the appellant engaged in patently dangerous driving over a significant period of time on the day in question and that he was witnessed by a number of persons who feared for their safety on encountering him. Further, that the appellant was under the influence of drugs and alcohol at the time of the collision. In this way, it is contended that the culpability of the appellant was entirely meritorious of the headline sentence imposed by the sentencing judge.

22. The respondent says that the appellant's reliance on *Shovelin* is misconceived as it does not take into account the more recent jurisprudence of this Court, particularly *Flynn* supra. It is submitted that *Whelan* is equally of limited assistance to the appellant as it demonstrates that by identifying a headline sentence of five years and discounting same to a sentence of four years and suspending a further year was not an error in principle. Further, the respondent says that *Byrne* is another questionable comparator case as while the appellant is correct in that Mr Byrne did contest his trial, this was in circumstances where he accepted that he was guilty of careless driving causing death. The respondent also notes that Mr Byrne had no previous convictions whereas the appellant herein is not of an entirely unblemished character.

Discussion and Decision on Headline Sentence.

23. Gravity is assessed with reference to culpability and harm done. In the present case, the appellant's culpability is significant as is the harm done to the unfortunate victim and the two passengers in the car. The lives of this family have been radically altered. The victim impact report is testament to this. The judge was quite right to identify the nature of the driving as aggravating the offence; the appellant was observed driving erratically on two separate occasions, he consumed alcohol in the period between those two observations, the consumption of which is an aggravating factor. He crossed over and back the white line, onto the hard shoulder and collided head on with the victim's vehicle. The point is made by the appellant that the driving was not prolonged, however, he was observed driving in this erratic manner two hours before the accident. We do not believe this is a point of substance. The harm caused to the injured party is clear; she was required to be airlifted to hospital and her injuries are life altering. Two passengers were also injured in the accident. In the circumstances, we are not persuaded that the judge erred in his identification of the notional or pre mitigation sentence. No issue is taken with the discount for mitigation.

The Disqualification Order

24. In terms of the appellant's disqualification from driving, the following quotation from Prof. O'Malley on *Sentencing Law and Practice* (3rd ed) is relied upon:

"Disqualification from driving is often the more severe, and certainly the most feared, consequence of a road traffic offence."

It is submitted that this observation is apposite in the appellant's case, wherein he is 45 years of age, a father to a child who was only aged 7 at the time of the offending and employed at an electrical company. The effects of the disqualification of the imposed duration are described as catastrophic and as potentially rendering his continued employment untenable.

25. Further points are made related to the heightened impact of a driving disqualification for those living in rural areas and those living in rural areas but working in urban areas.

26. It is the respondent's position that the imposition of a disqualification order is not a punishment but rather a judicial determination of unfitness to drive. The following passage of *The People (DPP) v Conroy* [1965] IR 411 is quoted:

"In so far as it may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character. One must not lose sight, however, of the real nature of the disqualification order which is that it is essentially a finding of unfitness of the person to hold a driving licence....It is obvious that the protection of the common good requires that the right to drive a motor car cannot be unrestricted. The right may therefore be lost if a court, on a consideration of the relevant material facts, determines that the person concerned, by reason of his general recklessness or thoughtlessness or his propensity to drink or by reason of disease or other disability or his abuse of the right by exercising it in the furtherance of criminal activities is unfit to exercise the right to drive a motor car. Such disqualification is not a punishment notwithstanding that the consequence of such a finding of unfitness might be both socially and economically serious for the person concerned.... Undoubtedly disqualification may have a deterrent quality but that does not make it a punishment. It is a regulation of the exercise of a statutory right in the interest of public order and safety."

27. Similarly, the respondent quotes from *The People (DPP) v Sweeney* [2014] IECA 5 as follows:

"If the power to disqualify could be exercised in any wider fashion, then it would cease to retain the essential quality of a determination of fitness to drive. Such a broader interpretation would alter the general character of the disqualification power so that it would thereby evolve from a regulation of the fitness to drive into a form of primary punishment. This would have significant implications throughout the wider criminal justice system and would once again call into question the constitutionality of legislation providing for the summary disposition of drunk driving offences. As we have just pointed out, the constitutionality of s. 49 of the 1961 Act was upheld in Conroy on the basis that provisions of this nature were not in their nature primary punishments, even if they had unwelcome and inconvenient consequences for those affected by the making of such disqualification orders. It seems necessarily implicit in the reasoning of Walsh J. in Conroy that if such a disqualification order could be regarded as a primary punishment this would have led to a finding of unconstitutionality in that case inasmuch as s. 49 of the 1961 Act would thereby have sanctioned the summary trial of a non-minor offence."

As well as, *The People (DPP) v Cunningham* [2015] IECCA 2 in which judgment Clarke J cites *Conroy* and states:

"It follows that a disqualification under s. 27 of the 1961 Act cannot, likewise, be regarded as primarily a punishment, but rather requires a judicial determination of unfitness to drive which would warrant the disqualification in question."

28. In this regard, it is submitted that it is clear from the transcript that the sentencing judge based the disqualification order upon a determination of the applicant's unfitness to drive as per *Conroy*, *Sweeney* and *Cunningham* as well as the nature of the offence which it is said reveals a propensity on the part of the appellant towards grossly negligent and dangerous driving which was properly identified by the sentencing judge.

29. Reliance is placed on *The People (DPP) v Kazinski* [2016] IECA 305. In this case, the appellant with a blood alcohol reading of over three times the legal limit, collided with a truck while driving with his daughter in the car. The daughter suffered what were described as "horrendous injuries" which left her with spastic quadriplegia. This Court found that a lengthy period of disqualification from driving would have been the expected outcome, however, in circumstances where this this would impact the ability of the appellant to care for his daughter, the period of disqualification was reduced to one of three years. It is pointed out that it was the Court's view that absent the exceptional circumstances, the expected outcome would be a lengthy period of disqualification and the appellant's personal circumstances do not meet this required threshold of exceptionality.

30. It is further submitted that the length of the disqualification period was a proportionate response to the appellant's culpability and the devastating harm that he has caused.

Discussion and Decision on the Disqualification Order

31. A disqualification order follows a finding of unfitness of the person to hold a driving licence. It is not a primary punishment of itself but is designed, in reality, to protect the public. There is no doubt but that the court considered the relevant facts and came to a separate determination on the sentence and on the duration of the disqualification period.

32. The judge found it necessary to disqualify the appellant on the basis of his outrageous driving and was concerned that the appellant have the time to manage his issues; obviously, the consumption of alcohol is itself relevant to the period of disqualification. However, it is also the position, that the disqualification period is a lengthy one with significant consequences for the appellant and his family in terms of employment. There is no doubt that the judge was fully entitled to impose a period of disqualification in excess of the mandatory 4 years, but we are persuaded that the period of 10 years is somewhat disproportionate. In the circumstances we will reduce the disqualification period to that of 7 years.

33. Accordingly, we find the judge erred in this regard only and we will therefore intervene only to the extent of reducing the period of disqualification to 7 years.