

**APPROVED JUDGMENT FOR ELECTRONIC DELIVERY
NO REDACTION NEEDED**



THE COURT OF APPEAL

Record No: 137/2023

**Edwards J.
McCarthy J.
Kennedy J.**

Between/

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

Respondent

V

JOHN O'DOWD

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 15th of June 2023.

Introduction

1. Before this Court is an appeal brought by Mr. O'Dowd (i.e. "the appellant") against the severity of the sentence imposed on him by the South Eastern Circuit Criminal Court sitting in Wexford town on the 1st of April 2022. The appellant had been charged with the following counts (Bill No. WXDP0127/2020):

- One count (count no. 1) of careless driving causing death, contrary to s. 52(1) and (2)(a) of the Road Traffic Act 1961 (i.e. “the Act of 1961”), as substituted by s. 4 of the Road Traffic (No. 2) Act 2011;
- One count (count no. 2) of driving of dangerously defective vehicle, contrary to s. 54(1) and (4) of the Act of 1961, as substituted by s. 4 of the Road Traffic (No. 2) Act 2011 and by s. 46 of the Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012, and;
- One count (count no. 3) of use of a vehicle without excise duty, contrary to s 71(1) of the Finance Act 1976, as amended by s. 63 of the Finance Act 1993.

2. The appellant entered a guilty plea in respect of count no. 1, and the sentencing court took count nos. 2 and 3 into consideration when imposing sentence. The court below ordered (i) that the appellant be disqualified from holding a driving license for a period of 4 years from the date of sentencing, and further ordered (ii) that the appellant be imprisoned for the period of 1 year, which custodial sentence was suspended in its entirety for a period of 1 year.
3. The appeal against sentence is confined to the length of the disqualification period.

Factual Background

4. The following summary of the factual background to the appellant’s offending is compiled with reference to the transcript of the 1st of April 2022 on which date a Detective Garda Jamie Jordan (otherwise “D/Garda Jordan”) gave evidence to the sentencing court.

The Collision

5. On the 17th of September 2019, the appellant was driving an Iveco Daily van along the R741 Gorey to Wexford Road, at Knockskimolin, Oulart, County Wexford, when it collided with the rear of a Volkswagen Polo driven by a Ms. Katie Grimes, as the latter was making her way with her mother, seated in the front passenger seat, and boyfriend, seated in

the back of the vehicle, to Wexford Town. The sentencing court was provided with a report compiled by a forensic collision investigator which illustrated the layout of the road where the collision took place. It was described as a carriageway governed by an unbroken line, except for a portion of the road where there is a right-hand turn (changing direction from an otherwise northbound course towards Gorey to an eastbound course towards Kilmuckridge). It was Ms. Grimes' intention to execute that right-hand turn, and for this purpose she had slowed her speed and turned on the Volkswagen's right indicator. She was stationary, on account of her inability to execute the turn while traffic was oncoming. While stationary, Ms. Grimes had an opportunity to check her mirror and she could see the appellant's van coming behind her, which she anticipated would pass her by. Not realising the danger that this van posed, Ms. Grimes had her Volkswagen in first gear and her foot on the brake, indicating and preparing to manoeuvre onto the Kilmuckridge Road. It is then she heard the screeching of tyres and the sound of skidding from behind, all followed by a "*bang*" caused when the van/trailer combination, driven by the appellant, struck the Volkswagen from behind.

6. Following this collision, Ms. Grimes observed that there was silence in the Volkswagen, that the deceased was unconscious and was leaning on her chest, and that her boyfriend was unresponsive also. Considerable damage was caused to her Volkswagen. Distraught, Ms. Grimes got out of the vehicle and called for help, particularly conscious of her mother's need for medical attention. A passing vehicle stopped and provided assistance, and subsequently an ambulance was called. Ms. Grimes' boyfriend eventually came to and, with the assistance of the parties in attendance, managed to make his way out of the damaged vehicle complaining of a sore back. While waiting on the emergency services, those in attendance attempted to administer CPR to the deceased.

Medical Evidence

7. Upon arrival at Wexford General Hospital, Mrs. Alison Grimes was pronounced dead. An autopsy report was made available to the sentencing report. It noted that the deceased was 50 years of age. Blood was observed coming from her nose, and it was observed that there was a right periorbital haematoma, minor bruising over the left eye and chin, superficial bruising to the anterior aspect of the thighs and chest area, and further that there was no evidence of any seatbelt injury. The cause of death was determined, and was stated to have been a very surreal craniocerebral trauma, accompanied by multiple rib fractures.

8. The rear seat passenger in the Volkswagon, a mr Cullen, was also initially non-responsive, although he came around and with the assistance of persons who came on the scene managed to exit the car. He is believed to have sustained a back injury.

Forensic Collision Investigation

9. A forensic collision investigation was conducted by a Garda Tom Bolger (otherwise “Garda Bolger”) who subsequently prepared a report which was provided to the sentencing court. It described the slowing down and stopping of the Volkswagen in preparation to execute a right-hand turn and that it was rear-ended by the appellant’s Iveco. It further described the layout of the road, and noted that the surface of the road was in good repair, with no evidence of any contaminants. Skid tests conducted by Garda Bolger yielded results that indication that the road condition did not in any way contribute to the collision. A Trimble (laser scanner) was employed by Garda Bolger to construct a 1:500 scale map of the vicinity. It was noted that the point of impact was marked by two tyre scuff marks that could be attributed to the rear right-hand side wheel of the Volkswagen. Additionally, further tyre marks were to be seen going back some distance before the point of impact. Garda Bolger reported that these marks were indicative of a brake that was fully locked, and the freshness of the marks were consistent with the track of the Iveco’s front tyres. The length of these

marks were measured at 33 metres. After 23.2 metres, there was a substantial deviation in these tyre skid marks was manifest, which Garda Bolger attributed to some force acting against the vehicle as it was skidding. He was satisfied that this deviation occurred when the Iveco collided with the Volkswagen. It was further observed that from the point of impact the Volkswagen was shunted some 19 metres until it came to a stop, both vehicles travelling together and coming to a stop near the hard shoulder.

10. Garda Bolger provided an analysis based on his examination of physical evidence discovered at the scene, and his examination of the mechanical condition of the vehicles involved. He concluded:

“Approaching the collision site from the direction of travel of both the Volkswagen and the Iveco van, there was an unobstructed view to where the collision occurred, the area of impact, from a distance of 148 metres. This is more than adequate distance to observe, react and bring a roadworthy vehicle to a complete stop, while driving at or within the posted speed limit.”

11. Skid tests conducted by Garda Bolger indicated that a car or van in a roadworthy condition would take 41.3 metres to skid to a stop from a speed of 80 kilometres per hour, the speed limit of the road. It would take 23.2 metres from a speed of 60 kilometres per hour. Garda Bolger, however, was not definitive with regard to the speeds at which the Iveco was travelling at the time it collided with the Volkswagen. However, it was said that the Iveco was travelling in excess of the speed that would have allowed it to have come to a safe stop and not collide into the rear of the Volkswagen.

12. Photographs of the damaged vehicles were exhibited. It could be seen that there was a crease mark on the bonnet of the Iveco, and the back of the Volkswagen was rendered “almost hollow”. The damage to the Volkswagen, and its roadworthiness, was further described:

“[...] the rear of the Volkswagen Polo was badly damaged. Both rear quarter panels boot lid, boot front, rear bumper, rear light clusters were badly damaged. The damage included damage to the rear driver's side wheel, which was wedged against the bodywork and the tyre now deflated. This was the tyre or wheel associated with the tyre scuff mark which commenced at the area of impact. The car was in first gear when [Garda Bolger] examined it. Both the driver and the front seat passenger seat belts had been worn, no airbags were deployed. The car was examined by the PSV inspector or public service vehicle inspector, Garda Dean Ó Cualáin, and his report concluded that the vehicle, the Volkswagen Polo was in a good roadworthy condition prior to the collision [...].”

- 13.** The damage to the Iveco, and its roadworthiness, was also described:

“[...] we can see there that the van had significant frontal damage, the front bumper grill bonnet and radiator were damaged, the interior of the van was extremely untidy with a number of items discarded in the driver's footwell. The forward view from the driver's seat was clear, the van was in fourth gear and the driver's seat belt had not been worn at the time of the impact. The Iveco van and trailer was examined by the PSV inspector, again Garda Ó Cualáin, and his report outlines the defects associated with the rear brakes on the van, and his report concludes that the van was a dangerously defective vehicle [...].”

- 14.** The condition of the trailer attached to the van was also described:

“The attached trailer was a double axel plant trailer, Garda Ó Cualáin concluded that the overrun brake on the trailer was effective when tested, and the overrun brake – the Court will well know that's a mechanism which allows the trailer to break, and that was in working order.”

15. The influence of this overrun brake on the attached trailer was regarded as uncertain, and it was suspected that it might have cause a bit more of a velocity to the travelling Iveco. No tyre marks on the road were present to indicate that the trailer tyres were braking or had locked.

16. Having regard to what was known about the vehicles involved, the conditions of the road, and what was known about the positioning of the vehicles and the tyre marks, Garda Jordan concluded

“that the driver would have had an adequate view on the approach to the collision site to observe the presence of the Volkswagen Polo on the approach to the junction for Kilmuckridge, the driver of the Iveco van reacted to the presence of the Volkswagen Polo by braking hard”.

17. The cause of the accident was linked to a failure on the part of the appellant to react in timely fashion to the presence of the Volkswagen Polo which had slowed on the road ahead. While dangerous defects were identified with respect to the brakes of the appellant’s vehicle, namely that the offside rear brake had only a single brake pad present and the brake calliper was seized, it was accepted that any defect in the brakes was unlikely to have had any effect on the potential for collision avoidance in the present case. There was no evidence that the appellant was distracted by a mobile phone.

Victim Impact Statement

18. A poignant victim impact statement prepared by the deceased’s husband and children was tendered to the sentencing court by the deceased’s sister, who read the statement into the record. This greatly assisted the sentencing judge in appreciating the full extent of the harm done and he took account of it in assessing the gravity of the appellant’s offending conduct in sentencing him.

Personal Circumstances of the Appellant

19. In this context the sentencing court heard that the appellant had two previous convictions: The first was a District Court conviction dated the 25th of July 2005 for drunk driving for which he had received a disqualification order of two years, an endorsement of his licence for 2 years, and a fine of €150, and; the second was a Circuit Court conviction dated the 27th of November 2009 for drunk driving for which he had received a consequential disqualification order of 2 years, an endorsement of his licence for 3 years, and a fine of €500.

20. The appellant's personal circumstances were described to the Court by his counsel:

“63, Judge. Separated. Father of two children. His daughter, Fiona, is in court with him, Judge. And other relatives. There's a -- there had been a somewhat difficult period in the lead up to this in that he'd become estranged from some parts of his family. Grew up on a family farm in Wexford, Judge. Both of his parents are deceased. His brother took over the family farm, and the Court will see from the report that there was some tension in the family about that, going back very many years. But Mr O'Dowd ploughed his own furrow, so to speak and ended up, Judge, going -- he went to college in Carlow. He ended up then working in Dublin, predominantly as a landscaper, before setting up his own business. And has been in business for approximately 30 years, landscaping. And there are some letters of testimonials from clients of his that he has worked at through the years. The difficulty in the last number of years has been that not only with this incident, but particularly and acutely because of this, Judge, he has found working very difficult. He has been unable, really, to manage the business. And unfortunately, Judge, has really fallen on quite dire circumstances, in that at the present point in time, he's actually living in a mobile home on the family farm, with the consent of his brother. And that's obviously quite a stressful and upsetting situation for him, in that he had previously been in

gainful employment with a business. He previously had employed a number of people, but hasn't been able to do that. And I think going forward, Judge, at the age of 63, irrespective of what other penalty the Court might impose, the disqualification of him driving is going to effectively be terminal towards his actual landscaping business because he's not in a position to employ somebody to come in and work in that context. But the Court will see, he's very well sought after and very well regarded and thought of.”

Director’s Submissions to the Court below concerning disqualification.

21. Counsel on behalf of the Director submitted to the sentencing court that the offence of careless driving causing death carried a minimum consequential disqualification period of 4 years. The suggestion that there was a requirement to impose a minimum consequential disqualification period of 4 years was in fact incorrect. It was clarified in *The People (DPP) v McCann* [2022] IECA 302 that, as regards s.26(3)(a) of the Road Traffic Act 1961, unless a person has two previous convictions for careless driving a sentencing judge is not required to treat a first conviction for careless driving as being a conviction requiring a “consequential disqualification order” involving a mandatory minimum of 4 years disqualification from holding a driving licence.

Sentencing Judge’s Remarks

22. The sentencing judge began his ruling by setting out his approach towards sentencing: *“Now, every penalty must be proportionate. It must reflect the gravity of the offending conduct, number one, and it must have regard to your personal circumstances, viewed from your perspective, and also viewed from that which would best serve society, the interests of society at large. In assessing the gravity of your crime, I must not only consider the harm done to your victim by your offending, but I*

also have to assess your level of moral culpability. So I have to consider your personal circumstances, as I've said, and I have to consider any mitigating or aggravating factors that arise."

23. He identified the following as the aggravating factors: that the appellant had two previous drink driving convictions, albeit that they occurred a considerable time ago and in the time since the appellant had not come to adverse Garda attention. The sentencing judge noted the absence of factors such as driving under the influence of alcohol or drugs. However, he did note that he had to take into account the effect on the victim's family and that a tragic accident occurred as a result of the appellant's carelessness.

24. As for mitigation, the following factors were identified: the appellant's guilty plea which was offered at the earliest opportunity; his conduct immediately after the collision by staying at the scene; his cooperation with the Garda investigation; his acknowledgement of wrongdoing and genuine remorse; the positive testimonials; that he was not aware of any defect in his vehicle (which in any event had no bearing on the potential for collision avoidance), that the Iveco's NCT was in date, and that he had recently spent money on repairs to it, and; his personal circumstances.

25. In circumstances where the appellant was fully cognisant of the nature and extent of the effect the collision had on the family of the deceased, the sentencing judge remarked:

"So I have to strike, I have to be proportionate, and I have to strike a balance between the objective of retribution, deterrence and rehabilitation. There has to be an element of deterrence, but I'm not so sure that you require to be rehabilitated in respect of anything, only to redouble your efforts, should you ever drive again, to ensure that you pay full attention to that task, knowing, as you do from bitter experience, that even a momentary lapse can result in such a tragic outcome as befell Alison in this instance."

26. The sentencing judge ultimately regarded himself as being statutorily bound to imposed a consequential disqualification order of 4 years. This sanction he described as “*significant*” inasmuch as it would prevent the appellant from working and generating an income. Having regard to the statutory maximum custodial penalty of 2 years, and to the circumstances of the present case, the sentencing judge further imposed a custodial sentence of 12 months which was suspended in its entirety for 1 year on account of the fact that the appellant was a man of otherwise good character, that the event was not premeditated, and that the defects in the vehicle did not play a role in causing the collision.

Notice of Appeal

27. The appellant essentially appeals against the sentence imposed on him by the Circuit Criminal Court on the basis that the sentencing judge erred in law in regarding a four-year period of disqualification as being mandatory in his case. The appellant relies upon the decision of this Court in *The People (DPP) v. McCann* [2022] IECA 302 wherein this Court held that such a period of “*consequential disqualification*” is only mandatory where an accused has been convicted (whether summarily or on indictment) of careless driving contrary to s. 52 of the Act of 1961 (whether involving death or serious injury, or not) on at least two occasions within an immediately previous three year period prior to the offence being sentenced.

Submissions

28. The court has received helpful written submissions from both the appellant and the respondent for which it is grateful.

29. Counsel for the appellant has submitted that the sentencing court ought to have assessed the appropriate disqualification on the basis that it had an “*ancillary disqualification*” power under s. 27(1) of the Act of 1961 as distinct from being obliged to

impose a “*consequential disqualification*” under s. 26(3)(a) of the same Act. The appellant emphasises that “*ancillary disqualification*” orders are discretionary in nature, and that the test for determining whether such an order should be made requires consideration by the court of whether the convicted person is unfit to exercise the right to drive a motor vehicle having regard to the relevant evidence. In this regard, the appellant relies upon the dicta of Walsh J. in *Conroy v. Attorney General* [1965] I.R. 411, at p. 442 of the report, wherein the learned Supreme Court judge remarked:

“The right [to hold a driving licence] may therefore be lost if a Court, on a consideration of the relevant facts and materials, determines that the person concerned, by reason of his general recklessness or thoughtlessness or of 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 finding of unfitness might be both socially and economically serious for the person concerned.”

30. It was also observed that this approach, of exercising disqualification power upon a finding of unfitness, has been followed in more recent jurisprudence, and the appellant refers this Court to the following authorities in this regard: *The People (DPP) v. Sweeney* [2014] IECA 5; *The People (DPP) v. Cunningham* [2015] IECCA 2; *Collins v. DPP* [2017] IEHC 779; *The People (DPP) v. Walsh* [2017] IECA 240, and; *The People (DPP) v. Coen* [2022] IECA 308.

31. It was also noted that in *R. v. Ireland* (1988) 10 Cr. App. R. (S.) 474, the English and Welsh Court of Appeal (Auld J.) held that a discretionary disqualification order should not be imposed “*without warning*” and that counsel should be invited to address the sentencing court on the matter.

32. In the light of the foregoing, counsel for the appellant has submitted that a person should not be “*automatically*” disqualified by virtue of a conviction for an offence contrary to s. 52 of the Act of 1961 without proper judicial consideration of his fitness to drive. It is submitted by the appellant that no such exercise was conducted in circumstances where, in the light of this Court’s decision in *McCann*, a consequential disqualification order was not mandatory in the present case.

33. The submissions received on behalf of the respondent, i.e. the Director Of Public Prosecutions, accept the implications of the ruling of this Court in *McCann*. Accordingly, the Director does not seek to stand over the disqualification order made by the Circuit Criminal Court sitting in Wexford on the 1st of April 2022.

34. As such, the Director submits that it therefore arises as a matter for this Court’s discretion, in respect of re-sentencing the appellant, whether to impose an “*ancillary disqualification*” order under s. 27(1) of the Act of 1961. She further accepts the appellant’s characterisation of such an order and notes his analysis of the jurisprudence in this area, particularly the requirement to determine an offender’s unfitness to drive.

35. The Director stresses that the consequences of the incident resulted in the death of Mrs. Grimes and that it was a matter for this Court as to whether a judicial determination of unfitness to drive is warranted and whether a period of ancillary disqualification is appropriate, and on what terms. The Director notes that the imposition of such a disqualification (and the determination of such a disqualification’s duration) requires a judicial determination of the appellant’s unfitness to drive, and that this relies upon a consideration of the evidence and in particular the level of the culpability of the appellant’s driving.

The Court’s Analysis and Decision

36. It is in effect conceded by the Director of Public Prosecutions that the sentencing at first instance proceeded on the basis of an incorrect understanding of the law by the sentencing judge. The sentencing judge believed that he was constrained to impose a consequential disqualification of at least four years. That was not so. In the circumstances we are satisfied that a clear error of principle has been demonstrated and that so much of the sentence at first instance as relates to the disqualification must be quashed.

37. In the circumstances it falls to us to consider whether an ancillary disqualification order ought now to be imposed in the appellant's case. We have no hesitation in concluding that this is necessary. The circumstances of the accident were egregious and in our view raise a serious issue as to whether, having regard to the relevant evidence, the appellant should be deemed unfit for a period to exercise the right to drive a motor vehicle. We are satisfied that that is the case. While anybody can suffer a momentary lapse of attention, and we accept that that was the major cause of the accident here, we cannot lose sight of the fact that this occurred against the background of long-standing and scant regard by the appellant for the need to exercise appropriate care in driving and to respect the road traffic laws. It is highly relevant that on two previous occasions he has received ancillary disqualifications. While these were for drink-driving and not for careless driving, the fact that he drove while under the influence on previous occasions is indicative of a failure on his part to internalise the need to drive with care and in accordance with the road traffic laws. It is also highly relevant that in this instance both his Iveco van, and the trailer it was towing, had defective brakes. Again, we note the evidence that any defect in the brakes was unlikely to have had any effect on the potential for collision avoidance in the particular circumstances of this case, but the mere fact that he was on the road driving a vehicle combination in that condition again speaks to a failure on his part to internalise the need to take care when on the road.

38. We think that what is required in this case is a significant period of disqualification from holding a driving licence, in the hope that the appellant may reflect on the manner of his driving heretofore, and his failure to take appropriate care and to respect the road traffic laws in diverse respects, and that it might engender a resolve on his part to do better on that account in the future. Until he has reached that point, and is personally prepared to truly embrace road safety culture, we adjudge that he is not fit to be on the road and it is appropriate that he be temporarily disqualified.

39. While the sentencing judge at first instance was in error to disqualify him for four years on a consequential basis, we in fact see nothing erroneous about the period for which he was disqualified. The error was solely with respect to imposing the disqualification on a consequential basis. In our assessment it is appropriate to now impose an ancillary disqualification of four years to date from the date of the original disqualification. In our assessment a period of four years is required to impress upon this accused how necessary it is for him to mend his ways with respect to driving. In imposing an ancillary disqualification of four years we have taken into account his personal circumstances as eloquently outlined by his counsel. We appreciate the adversities that he has experienced in his life and that his circumstances are somewhat difficult. However, it is relevant that he has been given chances before, and clearly shorter periods of disqualification have not been adequate to bring about a sufficient change of attitude on his part involving an appropriate appreciation of what is required in terms of road safety and respecting other road users. The appalling consequences of his want of care in the present case are also something that we are entitled to take into account in this context.

40. Accordingly, the appeal is allowed and the appellant is resentenced to the same sentence as was imposed by the court below, subject to the variation that an ancillary disqualification from holding a driving licence for four years is substituted for the

consequential disqualification from holding a driving licence of four years imposed by the court below. The ancillary disqualification is to date from the same date as the consequential disqualification imposed at first instance.