



THE COURT OF APPEAL

Record Number: 152CJA/2022

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

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MICHAEL WELBY

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 13th day of February 2023 by Ms. Justice Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of a sentence of three years with the final eighteen months suspended imposed for one count of dangerous driving causing death, contrary to s. 53(1) of the Road Traffic Act, 1961, as substituted by s. 4 of the Road Traffic (No.2) Act, 2011.

Background

2. At approximately 4pm on the 29th February 2020, the respondent collected Róisín Hession, the deceased, and a friend from their homes to drive them into Oughterard for a night out. The group socialised in two pubs in the town and returned to the friend's house where the respondent had left his vehicle at approximately 10/11pm.

- 3.** At approximately 1am, Ms Hession left the house with two of her friends in order to go home but subsequently asked if she could be dropped off at a Centra in order to avail of a lift home with the respondent instead.
- 4.** At 1:06am, the respondent's vehicle was captured on CCTV footage exiting the Centra car park. Shortly thereafter, the vehicle was observed by Garda Naughton driving at speed heading in the direction of Oughterard. The Garda made an attempt to stop the vehicle, activating the blue lights and siren but the vehicle failed to stop and turned off the N59 onto a minor road. The Garda noted that upon making this turn, the vehicle hit a bump with such force that he could hear the undercarriage of the car scraping off of the road. A friend of the deceased stated that around this time, Ms. Hession had sent a Snapchat message to her which read "we took chase."
- 5.** The Garda lost sight of the vehicle but continued down minor roads in an attempt to locate it. He located the vehicle crashed at Porridgetown West, Oughterard. The respondent sustained serious injuries and when attending to him, the Garda realised there was a second person in the vehicle. Ms. Hession was a front seat passenger and received fatal injuries; whilst the Garda made attempts to resuscitate her at the scene which continued until the paramedics arrived, sadly, she was pronounced dead at the scene.
- 6.** The respondent was taken to University Hospital Galway. A blood sample was taken from him pursuant s. 14 of the Road Traffic Act, 2010 and he later gave his consent for same to be examined by the Medical Bureau of Road Safety of Ireland pursuant to s. 17 of the 2010 Act. This sample was obtained over two hours after the time of the collision. The results indicated a blood alcohol level of 125 milligrams of alcohol per 100 millilitres of blood.
- 7.** The scene of the collision was preserved and examined by a forensic collision investigator. The road was described as a country road with a small carriageway. There were no road markings either at the centre or at the road's edge, no hard shoulder or footpath and no street lighting at the location of the collision. The forensic collision investigator found that the respondent lost control of the vehicle as it went around a slight bend in the road and collided with a small clump of trees. The vehicle then continued with both nearside wheels in the hedgerow for nine metres before flipping over onto its roof and colliding with a wall. After impact, the car spun clockwise 220 degrees. The distance from the initial point of collision with the tree to impact with the wall was 40 metres. The weather conditions at the time of the collision were poor. There had been a status red warning the day before due to Storm Jorge.
- 8.** In terms of the condition of the vehicle, the PSB inspector indicated that the vehicle was in a dangerously defective condition prior to the collision. The rear offside tyre had a tread depth of 1.5 millimetres and was therefore defective and the rear nearside tyre was bald. The rear offside shock absorber was worn and had been leaking fluid prior to the collision. Further, the front windscreen was fitted with an inessential tinted sticker with a light transmission level transparency of 18%. According to the Road Traffic (National Car Test) Regulations 2017, glass in front windscreens require a light transmission level transparency of 65%.
- 9.** On the 18th May 2020, the respondent was arrested by arrangement for the offence of dangerous driving causing death. He made admissions during his detention. He admitted to driving the vehicle involved in the collision, he admitted to having consumed alcohol and he accepted that his vehicle was in a dangerously defective condition. He was, however, reserved in his admissions

around the quantity of alcohol consumed, the speed at which he drove and whether he knew the blue lights driving behind him were that of a garda vehicle. The respondent showed remorse and was upset during interview.

Sentencing Remarks

10. The sentencing judge noted the aggravating factors in the case as the respondent's blood alcohol level, his decision to drive under the influence of alcohol, knowing that there were defects in his vehicle, his failure to comply with his legal duty to stop his vehicle when being called upon to do so by the Garda and the impact of the offending.

11. In terms of mitigation, the judge considered the respondent's young age, that he was a first-time offender, that he entered a mid-early plea, that he was otherwise of good character and had a good work ethic, that he suffered serious injuries in the accident, his reaction post the accident, his expression of remorse and that he visited the scene of the accident with the father of the deceased girl.

12. The judge nominated a headline sentence of five years' imprisonment. Taking into account the mitigating factors, he reduced this sentence to three years' imprisonment, then, after remarking that the respondent did not require specific deterrence, but that general deterrence was required in the case, the judge suspended the final eighteen months thereof, leading to an effective carceral sentence of eighteen months' imprisonment.

Grounds of Review

13. The Director relies on the following grounds:-

"The learned sentencing Judge:-

- 1) Failed to fully appreciate the gravity of the offences as committed by the offender;*
- 2) Departed in a significant way from the norm that would reasonably be expected in a case of this nature;*
- 3) Failed to have sufficient regard to the deterrence aspect of the sentence;*
- 4) Failed to have sufficient regard to the aggravating factors; and*
- 5) Attached too much weight to the mitigating factors."*

Submissions of the Applicant

Aggravating Factors

14. It is submitted that the sentencing judge failed to reflect the culpability of the respondent, the harm done by him, and the numerous aggravating factors present in his nomination of a headline sentence of five years. While acknowledging that each case must be decided on its own individual facts and noting this Court's clear position on the role of comparators, the applicant puts forward a number of comparator cases.

15. In *People (DPP) v Moran* [2019] IECA 5 this Court noted a recalibration in how courts assess the gravity of dangerous driving causing death as an offence and emphasised that aggravating factors are to be considered in the assessment of gravity.

16. It is acknowledged that Ms Hession was not originally intended to travel with the respondent, however, it is said there remained pre-meditation in the sense that he made a conscious decision to leave the public house, walk to his car and drive for some time before the resulting collision.

17. Reliance is placed on *People (DPP) v Flynn* [2020] IECA 294 in which this Court considered an undue leniency application in relation to a sentence imposed for dangerous driving causing serious

injury. It was noted that the respondent exceeded the lawful alcohol limit by four times and that on that account alone he was "very substantially morally culpable." It is submitted that the same consideration applies herein.

18. In terms of speed, the applicant refers to *People (DPP) v Whelan* [2020] IECA 350 and says that the primary cause of the collision in the present case was excessive speed, as underlined by the evidence that the undercarriage of the respondent's vehicle was damaged when travelling over a bump at excessive speed. It is submitted that the fact that the respondent was observed travelling at speed by the Garda shortly after exiting the Centra carpark indicated that his dangerous driving continued over a period of time rather than for a moment in time and that this sequence of event demonstrates his culpability.

19. In contrast with *People (DPP) v Cody* [2021] IECA 354, it is said that the respondent herein made a series of decisions which lead to the fatal accident. This Court in *Cody* placed the culpability of the respondent in the mid-range and accordingly it is contended that the culpability of the respondent in the present case was far greater.

20. In the *Flynn* case this Court set out the spectrum for dangerous driving causing death with a low range of zero custody to three years and four months, a mid-range up to six years and eight months and a high range up to a maximum of ten years. In that case, the respondent seriously injured two cyclists while driving under the influence of alcohol. This Court was of the view that a headline sentence of six years' imprisonment, as opposed to the headline of four years nominated by the sentencing judge, would represent the norm for offending of that gravity. It is said that the respondent's speed, failure to stop when legally required to do so and the defective condition of the vehicle, warranted a headline sentence over five years.

21. It is submitted that the sentencing judge failed to afford sufficient weight to the principle of general deterrence.

Mitigation

22. The Director acknowledges the mitigating factors; that the respondent indicated his remorse and his lack of previous convictions. However, it is noted that the reduction in the headline of two years represented a 40% reduction for mitigation and the further suspension of 18 months meant that the respondent's custodial sentence was reduced by 70% in total. It is maintained that this level of reduction was excessive.

23. It is accepted, in line with *People (DPP) v DW* [2020] IECA 145 that the sentencing judge had a discretion to suspend a portion of the sentence, however, it is submitted that the proportion of the sentence suspended in conjunction with the 40% reduction for mitigation attached too much weight to the mitigating factors.

Submissions of the Respondent

24. The respondent draws particular attention to the following factors:-

- a) The finding by the sentencing judge that the respondent was wholly and completely remorseful.
- b) The finding by the sentencing judge that a mid-early plea had been entered in the case.
- c) The finding by the sentencing judge that the respondent was a first- and only-time offender.

- d) The finding that the respondent was otherwise of good character and had a good work ethic.
- e) The respondent's cooperation with the Gardaí.
- f) The respondent's cooperation at interview.
- g) The respondent's admission to the consumption of alcohol.
- h) The fact that the respondent suffered serious injuries in the accident.
- i) The respondent's expression of remorse and his subsequent attendance at the incident with the father of the deceased.
- j) The Probation Report and the finding of the Probation Officer.

The People (Director of Public Prosecutions) v Alexiou [2003] 3 IR 513; the People (Director of Public Prosecutions) v Jervis and Doyle [2014] IECA 14; and the People (Director of Public Prosecutions) v Flanagan [2015] IECA 94.

25. It is said that the judge carefully considered the evidence and nominated the appropriate headline sentence. In relation to short sentences imposed for road traffic offences reference is made to Prof. O'Malley on *Sentencing Law and Practice* at p. 516:-

"Shorter prison sentences have been imposed where there were few aggravating factors or where there was strong personal mitigations. In the People (DPP) .v. Stronge the defendant, an 18-year-old man caused the death of a close friend who was a passenger in the car which went out of control while being driven by the defendant, was sentenced to two years' imprisonment with the last year suspended, on pleading guilty to dangerous driving causing death. There were several mitigating factors, including youth, remorse, acceptance of responsibility and the impact of the collision on the defendant himself... In People (DPP) .v. O'Leary the defendant pleaded guilty to dangerous driving causing the death of one person and bodily injury to others (both children). His car had gone out of control after he engaged in impromptu speed racing on a stretch of rural road with the driver of another, similar, car he had encountered. The driver of the other car was killed. He was given an effective sentence of two years' imprisonment but, following a prosecution appeal, this was increased to three and a half years. The Court of Criminal Appeal was cognisant of the many mitigating factors present, including the injuries suffered by the defendant himself but it felt that the heavier sentence was merited because of what it described as the appalling speeds involved, the context when the crash happened, the presence of two young children in the defendant's car at the time and the fatal injuries caused."

26. And in relation to suspended sentences:-

"This occurred most notably in People (DPP) .v. O'Reilly where the defendant pleaded to dangerous driving causing death, drink driving and driving without insurance. He was given a total sentence of 5 years' imprisonment suspended in its entirety. The Court of Criminal Appeal accepted that a suspended sentence might often be appropriate for such an offence but in this case quashed the suspended sentence and replaced it with 240 hours' community service saying that "this form of sentence will also have an important added feature that it will constitute a plainly visible form of general deterrence for other road users in the locality where this offence occurred and where all the affected parties reside".

27. The respondent cites the case of *People (DPP) v Nestor* [2018] IECA 255. That case concerned an offence of dangerous driving causing death. The accused's driving caused the death of an elderly man and serious injuries to two members of An Garda Síochána. His blood alcohol level was 272mg per 100ml of blood. A headline sentence of 6 years was imposed. This was reduced to four years and suspended in its entirety. On appeal, this Court opined that the headline sentence was not unreasonable however, substituted a sentence of four years' imprisonment with the final two years suspended.

28. The respondent also relies on the *Cody* case as a comparator. The case concerned a defective car, the accused had a blood alcohol level of 188mg per 100ml of blood, the incident resulted in the death of a friend of the accused, the accused was a first-time offender and had shown remorse. A post-mitigation sentence of two and a half years' imprisonment was imposed and then suspended in full.

The following portion of the judgment of this Court is cited:-

"We are satisfied that the offence of dangerous driving causing death where intoxicants are a feature or where are multiple aggravating factors requires, in most instances, a custodial sanction. However, that cannot simple be a state of policy and should not be taken as such as each case is fact-dependent, and it is necessary for the judge to drill down into the factual matrix to determine the proportionate sentence."

This Court nominated a headline sentence of four and a half years' imprisonment, reducing this to two years post-mitigation and then suspending it in its entirety.

29. This Court in *Cody* also noted that:-

"Whilst the aggravating features appear at first blush to be very serious indeed, and would in most instances result in a high level of moral culpability of an offender, when we examine the details of the circumstances leading to the tragic events of the date in question a somewhat different picture emerges."

30. It is submitted that the sentencing judge in the present case found himself in an analogous position and that after "*drilling down into the factual matrix*" imposed a sentence he was fully entitled to so impose.

Discussion and Analysis

31. This is yet another case of dangerous driving causing death where a young person drives in such a manner so as to cause the death of a friend. The tragedy of the loss of any life and particularly that of a young person is readily apparent. The pain for the family of the deceased is never ending and, in this case, Ms Hession's father, a widower, having lost his wife when his daughter was 8 years old, is understandably devastated.

32. A court must look to the factors which aggravate the moral culpability of the offender and serve to extenuate the moral culpability of the offender to determine the notional sentence and then examine the mitigating factors in order to arrive at a proportionate sentence.

33. In the present case, the judge carefully and correctly identified the aggravating factors as set out in the factual background in this judgment. In so doing, he identified a headline sentence of five years' imprisonment. The Director takes issue with the notional sentence and contends that the headline sentence is simply too low when one takes account of the many aggravating factors

and says that five years is a substantial departure from the norm, thus rendering the sentence unduly lenient.

34. The principles concerning undue leniency appeals are well settled at this stage, in essence, this Court will only intervene if the Director demonstrates that the sentence imposed by the court below is a substantial departure from the norm. The Director must establish that there is a divergence between the sentence which ought to have been imposed and that which was imposed which amounts to an error in principle, thus justifying an intervention by this Court. The principles distilled by McKechnie J. in *People (DPP) v Stronge* bear repetition:-

- “(i) the onus of proving undue leniency is on the D.P.P.:*
- (ii) to establish undue leniency, it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former:*
- (iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate:*
- (iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal:*
- (v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise:*
- (vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally*
- (vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.”*

35. Ms. Silke on behalf of the Director argues that the sentence imposed is a substantial departure from the norm. She points to the aggravating factors and seeks to rely on the jurisprudence from this Court in cases of this nature, whilst accepting that comparators are of limited assistance given the divergence of facts in such appeals.

36. The respondent had consumed alcohol prior to driving, the analysis two hours after the accident reading as 125 milligrams of alcohol per 100 millilitres of blood; placing him as twice the legal limit. There were defects in his vehicle of which he knew and he drove nonetheless. Moreover,

he had purchased a tinted windscreen film which covered the entire windscreen and which he knew to be illegal.

37. This Court considers the fact that he not only failed to stop when the Garda required him to do so, but increased his speed, clearly for the purpose of evading the Gardaí. We consider this to be a significantly aggravating factor. Every case of dangerous driving causing death calls for general deterrence to be marked. Driving under the influence of alcohol, in a known defective vehicle and increasing speed in order to evade the Gardaí, is, undoubtedly, seriously reckless conduct and had in the present case devastating consequences. The impact on the deceased's family cannot be overstated and was poignantly and eloquently expressed by her father.

38. The applicant refers to the decision of this Court in *Cody*, where the facts, although having some similarities were, in other respects quite different, which of course serves to underline the limited assistance of comparator cases. The respondent in that case drove his vehicle for a short distance, having consumed intoxicants, but the accident occurred due to an over correction and underinflated tyres. There was no issue of increasing speed in an effort to avoid the Gardaí in the *Cody* case, as in the present case. Moreover, the present case did not involve an impulsive decision to drive having consumed alcohol.

39. The range of penalties available for offences of this nature range from that of a wholly suspended sentence to one of 10 years' imprisonment. Having considered the aggravating factors in this case, this Court considers that a greater headline sentence was necessitated, not only given the aggravating factors but also to mark the requirement for general deterrence. As stated in *Stronge*, the function of this Court is one of review and :-

"it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified:"

40. Whilst we give considerable weight to the discretion of a sentencing judge in cases of review of sentence brought by the Director, in the present case, the judge nominated a sentence of five years' imprisonment, and we are persuaded that the nominated sentence was not within the norm for offending of this gravity. This case had the kind of aggravating factors, in particular, that of increasing the speed to evade apprehension, which brings it into the upper end of the mid-range and therefore the sentence nominated constitutes a divergence from the norm which justifies intervention by this Court. The attempt to evade the Gardaí also demonstrates that the respondent was fully aware that he was over the legal limit and perhaps also that he was driving a vehicle which he knew to be defective; all serve to increase the moral culpability. Accordingly, we will quash the sentence and proceed to resentence the respondent as of today's date.

Re-Sentence

41. As we find the sentence unduly lenient, we will proceed to re-sentence *de novo* as of today's date. We take account of the aggravating factors, including driving whilst twice the legal limit, the distance from the point of impact with a tree to the collision with the stone wall was that of 40 metres, which was indicative of speed, increasing speed clearly to evade the Gardaí, once the Gardaí activated the siren and the lights, which this Court (as did the court below), considers a significantly aggravating factor, driving whilst over the limit and at speed in poor weather conditions, driving a

dangerously defective vehicle which had been modified to the degree of the tinted film which limited visibility, and the impact on the victim's family. In our view, the appropriate headline sentence is one of six years' imprisonment.

42. We take account of the mitigating factors set out earlier in this judgment, including the plea of guilty, the absence of previous convictions, his undoubted remorse and apology and his personal circumstances. We do not find any error in the sentencing judge's approach to reduce the sentence by two years, and so we will reduce the headline sentence to one of four years' imprisonment. Nor do we disagree with the judge's approach in suspending 18 months of the sentence in the respondent's circumstances to incentivise his rehabilitation. We suspend the 18 months for a period of two years. The disqualification remains at four years.