



THE COURT OF APPEAL

Neutral Citation: [2024] IECA 239

Record Number: 245/2023

Kennedy J.

Ní Raifeartaigh J.

Burns J.

BETWEEN/

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

RESPONDENT

- AND -

BRIAN KELLY

APPELLANT

**JUDGMENT of the Court delivered on the 9th day of May, 2024
by Ms. Justice Tara Burns**

1. This is an application to extend the time for appealing against sentence in circumstances where the sentence was imposed over 14 years ago.
2. On 6 October 2009, the proposed appellant entered a plea of guilty to a single count of dangerous driving causing death, contrary to s. 53(2) of the Road Traffic Act 1961, as amended ('the 1961 Act').

3. On 15 December 2009, the proposed appellant was sentenced to a 2 year term of imprisonment, all of which was suspended for a period of two years, upon certain terms and conditions. He also was disqualified from holding a driving licence for life.

Background

4. On the night of 17 October 2008, the proposed appellant was at home. He already had been consuming alcohol, before a group of friends, to include the deceased, called to his house. The group continued drinking. After a period, the deceased indicated that she wanted to go to the shop to get cigarettes. The proposed appellant volunteered to drive her to a nearby 24 Hour Service Station.
5. On the return journey, the proposed appellant passed the entrance of the estate where he lived. Shortly afterwards, on a left bend in the road with a speed limit of 50km/h, the proposed appellant's vehicle crossed onto the incorrect side of the road and mounted the footpath. The vehicle proceeded onto a grass/clay mound and became airborne for a distance, before colliding with the outer block wall of an apartment building.
6. Emergency services were called to the scene. The deceased showed no vital signs at the scene and was later pronounced dead.
7. The proposed appellant was also seriously injured. He spoke to Gardaí present who detected a smell of alcohol from him and he verbally confirmed to them that he had consumed alcohol. A blood sample taken from the proposed appellant revealed a concentration of 172 milligrams of alcohol per 100 millilitres of blood.

8. Two residents from the area, described hearing a car approaching the area at speed with the engine roaring, after which they heard a loud bang.
9. A Garda Forensic Collision report noted that the weather was dry but the road surface was wet after a recent mist shower; that the proposed appellant's vehicle was assessed to be in good pre-accident condition but had suffered extensive damage in the collision; that the bend radius on which the proposed appellant lost control of his vehicle was 178.44 meters; and that the proposed appellant's vehicle had been travelling at a minimum speed of 71.22km/h before it became airborne off the grass/clay mound. The report noted that speed and alcohol intake were the sole reasons for the fatal incident.
10. The proposed appellant was arrested on 8 December 2008 and detained pursuant to s. 4 of the Criminal Justice Act 1984. He was interviewed on three occasions. He was unable to recall driving at, or immediately before, the collision but confirmed he had been drinking at home and that he drove the deceased to get cigarettes.
11. The proposed appellant did not form an intention to appeal against the sentence imposed on him until August 2020 when he approached a solicitor to enquire whether it was possible to have his driving licence restored. In December 2021, a licence restoration application was filed on the proposed appellant's behalf in accordance with s. 29(2) of the 1961 Act. A difficulty arose with respect to this application as it appears that s. 29(4)(b) of the 1961 Act only applies to determinate sentences.
12. Arising from this difficulty, the proposed appellant instructed his solicitor to appeal the sentence imposed asserting that the sentencing judge had erred in principle in imposing a lifetime disqualification upon him having regard to the circumstances of the case.

13. The proposed appellant has so far experienced 14 and a half years of the lifetime disqualification which was imposed.
14. The respondent's position with respect to the enlargement of time application is that it is a matter for the Court.

Principles applicable to an extension of time

15. The role of a Court dealing with an application to extend time to appeal in the criminal context was considered by the Supreme Court in the case of *The People (at the suit of the Director of Public Prosecutions) v. Kelly* [1982] IR 90, where O'Higgins CJ stated at p. 107:-

"In either case, since a question of delay and enlargement of time is involved, the court is bound to act 'as the justice of the case may require.' In other words, the court's approach must be flexible and its discretion guided not by any general test or criterion but by what appears to be just and equitable on the particular facts of the case in question.

...

In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of an appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require.'"

16. In *The People (at the suit of the Director of Public Prosecutions) v. Walsh* [2017] IECA 111, the Court of Appeal, considering *The People (at the suit of the Director of Public Prosecutions) v. Kelly* stated at paragraphs 56 and 77:-

"56. We consider that where a putative appellant is out of time, and is seeking an enlargement of time within which to appeal, it is incumbent on him to do more than simply demonstrate that he wishes to pursue intelligible grounds of appeal that appear to be arguable in principle. He must, it seems to us, engage with the actual evidence given, and rulings made, as disclosed in the transcript of the trial and, in relation to any intended grounds of appeal, show that the matter complained of is sufficiently grounded to justify at least some optimism that the appeal, if allowed, would succeed."

...

"77. However, it has always been recognised that non-compliance with the rules is not always malign and that benign non-compliance can sometimes occur for different reasons, be it genuine error, inadvertence, misinformation, oversight or for some other understandable reason. Accordingly, the rules themselves have always had built into them the facility for an appeal court to be flexible in its approach and to forgive non-compliance with the rules where it appears just and equitable that it should do so."

17. As the proposed appellant in the instant matter is well out of time to appeal and did not form the intention to appeal until recently, in accordance with *The People (at the suit of the Director of Public Prosecutions) v. Walsh*, he must engage with the facts of the case to establish that there are reasonable grounds of appeal.

The Identified Error

18. The error in principle which the proposed appellant identifies is the imposition of a lifetime disqualification upon him in the circumstances of the case.

19. In the hearing before us, Counsel on behalf of the proposed appellant submitted that whilst the imposition of a lifetime disqualification order was an option available to the sentencing judge, the jurisprudence relating to such orders established that such an option should only be availed of in exceptional circumstances. Reference was made to the decision of the Court of Appeal in *The People (at the suit of the Director of Public Prosecutions) v. Moran* [2019] IECA 5, where Birmingham P. stated:-

"In the Courts experience, disqualification for life from driving, even in the case of dangerous driving causing death are very unusual and if they are encountered at all, it is normally in the case of repeat offenders who have persisted in driving and further offending when already subject to a disqualification order".

20. In addition, reference was made to dicta from the appeal courts to the effect that disqualification orders are not to be imposed as a form of punishment but rather reflect '*a finding of unfitness of the person concerned to hold a driving licence*' per Walsh J. in *Conroy v. Attorney General* [1965] IR 411 and applied in *O'Brien v. Coughlan* [2015] IECA 245 and *The People (at the suit of the Director of Public Prosecutions) v. Walsh* [2017] IECA 240.

21. In the instant case, it is argued, that in light of the fact that the proposed appellant did not have any previous convictions in respect of road traffic matters, the imposition of a lifetime disqualification

order was inappropriate and amounted to a punishment rather than a reflection of his unfitness to drive.

Discussion and Determination

22. In light of the fact that lifetime disqualification orders are only validly imposed in exceptional cases usually involving repeat offending, and that disqualification from driving must not be utilised as a punishment, it appears to us that the proposed appellant has established that a reasonable ground of appeal exists with respect to the sentence imposed upon him in light of his previous driving history.
23. Accordingly, notwithstanding that the intention to appeal was manifestly not formed by the proposed appellant within the relevant time period, we are prepared to extend the time for appealing against the relevant sentence for a further 7 days, as we consider that it is just and equitable to do so having regard to *The People (at the suit of the Director of Public Prosecutions) v. Kelly*.
24. It is appropriate to state, however, that any appeal which is pursued by him relates to the entire sentence of the lower court and is not restricted to the lifetime disqualification order imposed by the sentencing judge.