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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

KIERAN SMITH

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Before: Morgan LCJ, Treacy LJ and Horner J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an application by the prosecution for leave to appeal a ruling made by His Honour Judge Fowler QC granting a direction that there was no case to answer on a count of aiding and abetting driving with excess alcohol and a further ruling nominated by the prosecution excluding the admission of the respondent's interviews. Mr MacCreanor QC and Mr McAleer appeared for the PPS and Mr O'Rourke QC and Mr Fahy QC appeared for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] At about 2.20 pm on 3 September 2016 the deceased was driving his car along the Cavan Road, Newtownbutler heading towards Clones. This portion of road lies within Northern Ireland. The respondent's car was coming in the opposite direction and pulled out in front of him resulting in the fatal collision. The car was being driven at the time by Caolan Maguire and the respondent was in the front passenger seat.

[3] Mr Maguire pleaded guilty to causing death by dangerous driving, driving a motor vehicle with excess alcohol, driving without a licence and driving without insurance. The respondent was tried on charges of aiding and abetting the offence of causing a death by dangerous driving, aiding and abetting the offence of driving with excess alcohol, aiding and abetting the offence of causing death by driving without insurance and aiding and abetting the offence of causing death without a licence.

[4] The evidence was that at 2pm on the day of the collision Mr Brennan, the manager of Monaghan Leisure Centre, saw the respondent and Maguire in the car park of the leisure centre which is approximately 13.7 miles away from the scene of the fatal collision. They both appeared to be intoxicated. He approached them and asked them to leave the centre. The respondent maintained that he was the manager of the centre and was going for a swim. Mr Brennan robustly pointed out the respondent's error and ordered them to leave. He watched as they got into the respondent's silver Audi a short distance away. Maguire drove off with the respondent in the front passenger seat. Mr Brennan was so concerned about the driving of a motor vehicle with that level of intoxication that he called the Garda to alert them to what happened.

[5] About 2.15pm that day Mr Clegg was driving his motor vehicle along the Cavan Road towards Cavan when he noted the respondent's vehicle coming up behind him at speed. The vehicle strayed into the nearside verge and then mounted the grass verge on the driver's side before colliding with the rear of his vehicle. It then overtook a line of five vehicles on a blind crest.

[6] Approximately five minutes later the Audi vehicle was involved in the fatal crash. An ambulance was called and the respondent was taken to Cavan General Hospital. Evidence was given that he was unconscious at the scene but spoke with a paramedic in the ambulance and at hospital. Garda James McCormick indicated that he attended the scene of the collision and then spoke to the respondent at hospital at 5:20pm that afternoon. The respondent told him that Maguire had been driving the car at the time and that he would make a statement to that effect when able. He described the respondent as being able to talk quite sensibly at the time.

The Interviews

[7] The respondent was interviewed by Constable Dinning for the first time on 7 September 2016. He was advised that he was being interviewed on suspicion of committing the offence of permitting no insurance following a road traffic collision at Cavan Road, Newtownbutler, on 3 September 2016. He was given the standard caution. In the course of that interview he stated that he had been drinking through the night with Maguire and other friends and that he fell asleep sometime after 9am that morning. He remembered nothing until he woke up in Cavan General at 7pm after the accident.

[8] He was interviewed further on 6 January 2017. He was again advised that he was being interviewed on suspicion of committing the offence of permitting no insurance following the road traffic collision. When asked if he had objected to Maguire's driving he said that he had no recollection of being there.

[9] The prosecution relied upon the answers at interview to indicate that in light of the other evidence the respondent had been untruthful in asserting that he had been asleep throughout the incident. The defence objected to the admission of the

interviews. It is common case that the respondent was not made aware of any investigation into an offence of aiding and abetting causing death by dangerous driving. The investigating police officer had not been alert to the possibility of pursuing such an offence. It was not until the file was considered by Mr Dale, a senior public prosecutor with the DPP, that this offence was directed.

[10] The defence submitted that the evidence of the interviews should be excluded under Article 76 PACE which provides that the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[11] Code C of PACE requires that a caution must be given where there are grounds to suspect a person of an offence. The learned trial judge concluded that by the time of the interviews there were reasonable grounds to suspect the respondent of aiding and abetting causing death by dangerous driving. The obligation to caution under Code C is to be determined objectively and is not determined by the subjective intent or view of the police officer. The respondent had not been cautioned in respect of the subject offence as required by Code C and the unfairness was such that the interviews should be excluded.

The no case direction

[12] The judge noted that the prosecution advanced the case on the basis that there was a time during the 13.7 mile journey between Monaghan and the scene of the fatal collision when the respondent must have known that Maguire was driving dangerously. That must have been at the very least after the hit-and-run incident some 8.8 miles into the journey and 4.9 miles before the fatal collision. The respondent should have intervened and attempted to make Maguire slow down or stop and the failure to do so was indicative of the respondent's participation in the dangerous driving by tacit assistance and encouragement. He had an opportunity to intervene and did not take it.

[13] The defence submitted that the prosecution conceded that they were not in a position to say what was said or not said in the car during its journey and there was no evidence to show what the respondent knew or what he did or did not do. The judge concluded that in order to infer from the fact that the car did not stop after the initial hit-and-run incident that the respondent failed to intervene requires some evidential base. On the evidence as it stood that was a matter of pure speculation. Any number of situations may have taken place from the respondent encouraging the dangerous driving to saying nothing or trying to do everything he could to stop the car. Accordingly he granted the direction of no case to answer.

Preliminary Point

[14] The prosecution application was made to the judge on 18 February 2019. The transcript records as follows:

> "MR MacCREANOR: In this case, your Honour, the prosecution intend to appeal.
>
> JUDGE: Yes
>
> MR MacCREANOR: In respect of count 1 only your Honour.
>
> JUDGE: Yes
>
> MR MacCREANOR: Which is aiding and abetting and causing death by dangerous driving.
>
> Also we nominate, your Honour, in accordance with, which is sub-section 7, we nominate your evidential ruling, excluding the interviews, as a matter for appeal as well. And we give the undertaking that is required, your Honour, forgive me your Honour, it is sometimes there's more difficulty using the computer. Yes, your Honour, if leave to appeal is not obtained or the appeal is abandoned, the court as determined by the Court of Appeal, we give the normal undertakings your Honour in respect of this case proceeding further thereafter."

[15] The Criminal Justice (NI) Order 2004 ("the 2004 Order") provides the prosecution with a right of appeal with the leave of the judge or the Court of Appeal where a judge makes a ruling in relation to a trial on indictment in respect of one or more offences included in the indictment. Article 17(4) provides that the prosecution may not appeal in respect of the ruling unless following the making of the ruling it informs the court that it intends to appeal or requests an adjournment to consider whether to appeal and thereafter similarly informs the court. Article 17(6) provides that where the ruling relates to two or more offences any one or more of those offences may be the subject of the appeal. In this instance the prosecution indicated that it only wished to appeal the aiding and abetting causing death by dangerous driving. Article 17(7) provides that where the ruling is a ruling that there is no case to answer the prosecution may at the same time that it informs the court that it intends to appeal nominate one or more rulings which have been made by the judge in relation to the trial and which relate to the offence which is the subject of the appeal. None of that is in issue in this case.

[16] The material subsections for the purposes of the preliminary point are Article 17 (8) and (9):

> "(8) The prosecution may not inform the court in accordance with paragraph (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in paragraph (9) is fulfilled.
>
> (9) Those conditions are:
>
> (a) that leave to appeal to the Court of Appeal is not obtained; and
>
> (b) that the appeal is abandoned before it is determined by the Court of Appeal."

[17] There are a number of cases at appellate level in England and Wales which have considered the identical legislation in that jurisdiction. R v NT [2010] EWCA Crim 711 was a case in which the judge had ruled that the trial should be stopped as an abuse of process on grounds of delay. Immediately following that ruling the prosecution informed the court that it intended to appeal. It was not until the next day that the prosecution informed the court that if leave to appeal to the Court of Appeal were not obtained or the prosecution abandoned the appeal before it was determined by the Court of Appeal the defendant should be acquitted in accordance with the judge's ruling.

[18] Adapting the ruling of the court to the legislation with which we are concerned it was held that Article 17(2) limits the entitlement of the prosecution to appeal a terminating ruling to the circumstances defined in the remainder of the section. Article 17(4) provides the first condition, that the prosecution must inform the court of its intention to appeal or request an adjournment. That condition had been fulfilled. Article 17(8) provides a further precondition. The prosecution was prohibited from informing the court of its intention to appeal unless when it gave the court the information required by Article 17(4) it indicated that it had agreed to the acquittal of the defendant if the subsection (9) conditions were fulfilled. Unless those mandatory preconditions were established the court was unable to invest itself with a jurisdiction which it did not have.

[19] The court endorsed a similar analysis in R v A [2009] 1 All ER 1103, a court martial case in which Hughes LJ had given the judgment. Of interest in this case were observations made at [27] about the manner in which the required undertaking may be given:

> "Prosecutors who wish to launch appeals against rulings must give the article 4(8)/section 58(8) undertaking in open court at the time of invoking the right of appeal. We are not asked to consider whether it must be given in any particular form, and have not done so; it may well be that it can be given in shorthand or by reference to the statute; given, however, it must be, and that must happen at or before the time of invoking the right of appeal."

[20] The manner in which the acquittal agreement might be given was also considered by the Court of Appeal in R v M [2012] EWCA Crim 792. That was a case in which there was also an unfortunate failure by the prosecution to give the acquittal agreement at the same time as indicating its intention to appeal. The case was brought back to the court the following day and the following exchange between counsel and Mr Dean for the prosecution took place:

> "Judge: I should ask you, Mr Dean, because you have not done so, I assume that you are giving the normal undertaking in relation to the Court of Appeal?
>
> Dean: Your Honour, does your Honour refer to the undertaking as to acquittal?
>
> Judge: Yes
>
> Dean: Yes, I thought I did say that the day before yesterday, but I do give that undertaking, yes."

[21] Commenting on this passage the court said at [33]:

> "A strict view would say that the acquittal agreement was not then given: for not only was the agreement not completed but it was reasonably clear that the judge was not at that time understanding what was being said and the discussion diverted to the question of an adjournment. In such circumstances it may be doubtful whether the Crown had achieved its obligation to "inform" the court of its agreement; but we do not make our decision on that basis. Even if a clear acquittal agreement had been announced to the court at that time we think that it was difficult to say that it had been given timeously."

[22] From these cases the following principles can be extracted:

(i) Where the prosecution intends to appeal a ruling it must inform the court of that intention following the making of the ruling or at a hearing following a requested adjournment to consider whether to appeal.

(ii) Where the prosecution informs the court that it intends to appeal it must either before or at the same time provide further information to the court.

(iii) That information must convey to the court that in the event that leave to appeal to the Court of Appeal is not obtained or the appeal is abandoned before it is determined by the Court of Appeal the defendant should be acquitted of that offence.

(iv) Where, after the prosecution informs the court of its intention to appeal, the court is adjourned and thereafter reconvenes to receive the further information the requirement as to time in Article 17(8) is unlikely to be satisfied.

[23] In this case there is no dispute about the fact that the prosecution indicated its intention to appeal having earlier applied for and been granted an adjournment. Mr MacCreanor also nominated the judge's evidential ruling on the admission of the interviews. The passage set out at [14] also indicates that an undertaking was given. The undertaking was expressly related to the consequence if leave was not obtained or the appeal was abandoned. The undertaking was given in relation to how the case would be progressed thereafter in those circumstances.

[24] The judge, having received this undertaking then looked at whether or not the appeal should be expedited. That supports the proposition that the judge accepted that he had been informed of the requisite acquittal agreement. We are satisfied that the giving of an undertaking, described as the "normal undertakings", relating to the circumstance where leave was not obtained or the appeal was abandoned was sufficient to inform the court that the prosecution agreed in respect of the only offence which was the subject of the appeal that where the circumstances in Article 17(9) arose the defendant should be acquitted.

Consideration

Admission of evidence

[25] Issues of fairness around the admission of evidence are matters in respect of which the trial judge will always have a better feel for the case than an appellate court. It is only where the judge misdirected himself, left out of account relevant matters or took into account irrelevant matters that the appellate court should intervene. In this case there is no dispute that there was a breach of Code C. The police could have re-interviewed the accused on the more serious charge and could have been directed to do so by the DPP.

[26] Although the circumstances in R v Kirk [2000] 1 Cr App R 400 and Charles v CPS [2009] EWHC 3521 (Admin) are different from the circumstances in this appeal we accept that they support the proposition that the absence of a caution in circumstances where it should be given will normally, though not invariably, amount to a significant and substantial breach of the PACE Codes of Practice. Each case must, however, be decided on its own facts. The function of the judge is to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all the relevant evidence which either side want to place before it (see Lord Lane CJ in R v Quinn [1990] Crim LR 581).

[27] The principal argument advanced by the prosecution was that the defendant with the benefit of legal advice had submitted a defence statement in which it was stated that the accused had no recollection of events from the evening before until he woke up in hospital at approximately 7pm on the day of the accident. By virtue of section 6E of the Criminal Procedure and Investigations Act 1996 that statement was deemed to have been given with the authority of the accused. The defence statement did not set out any basis for the exclusion of the interviews.

[28] Although the prosecution relied upon the fact that the accused had made that case in the defence statement in its submissions to the learned trial judge it does not appear that the potential admissibility of that statement had been considered by the learned trial judge. There is no reference to the defence statement in his written ruling. The issue is whether the absence of such reference was material to the decision on the fairness of the decision to exclude. That requires consideration of the direction application.

No case to answer ruling

[29] The first question is to determine what the prosecution must prove in order to establish the offence. The Court of Appeal in England and Wales gives some useful directions on the manner in which the jury should be charged in cases of aiding and abetting dangerous driving in R v Martin (Paul David) [2010] EWCA Crim 1450. Adapting those directions we consider that in order to establish the offence in this case it was necessary for the prosecution to prove that Maguire committed the offence of causing death by dangerous driving and:

(i) The respondent knew that Maguire was driving in a manner which the respondent knew fell far below the standard of a competent and careful driver;

(ii) The respondent, knowing that he had an opportunity to stop Maguire from driving in that manner, deliberately did not take that opportunity;

(iii) By not taking that opportunity the respondent intended to assist or encourage Maguire to drive in this manner and the respondent did in fact by his

presence and failure to intervene encourage Maguire to drive in this manner; and

(iv) The respondent foresaw that someone might be killed by Maguire driving in this matter.

[30] The question for the judge in this case was whether there was no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict. The prosecution was advanced on the basis set out at [12] above. In particular it was not advanced that aiding and abetting dangerous driving was established by reason of the fact that Maguire drove off from Monaghan Leisure Centre.

[31] The prosecution case was a mixture of direct and circumstantial evidence. There was direct evidence that Maguire committed the offence of causing death by dangerous driving. There was direct evidence that the respondent was fully conscious and in the front passenger seat. The evidence about the manner of the driving from just prior to the first collision was sufficient to establish an inference that a front seat passenger in the motor vehicle would have known that the driving fell far below the standard of a competent and careful driver.

[32] There was direct evidence that the respondent was the owner of the vehicle. That was sufficient to enable a properly directed jury to draw an inference that he had an opportunity to stop Maguire from driving in that manner prior to the fatal collision. Given the respondent's position in the car there was a strong inference that he foresaw that somebody might be killed by Maguire's driving.

[33] There was no direct evidence that the respondent deliberately did not take the opportunity to stop or attempt to stop Maguire from driving in this dangerous manner. If, however, the inference could properly be drawn that the respondent had deliberately not taken that opportunity it would have been open to the jury to conclude that he failed to do so because he intended to assist or encourage Maguire to drive as he did and did so encourage Maguire.

[34] There was relevant circumstantial evidence on this issue. One of the questions which the jury had to consider was the state of intoxication of the respondent and Maguire when they left Monaghan Leisure Centre. That was material to the state of mind of the respondent. If the jury concluded that both were very drunk that would have left open the inference that the respondent was content to take the chance that the vehicle would have been driven at a standard far below that of a competent and careful driver. We agree, however, with the judge that to infer that he encouraged further dangerous driving after the first accident on that basis alone is speculative.

[35] That, however, brings us back to the admissibility issue. The analysis of the direction application shows the importance of the disputed interview. The answer supports the inference that the respondent did not intervene. That is the inculpatory

portion of the statement. The exculpatory portion is that he could not remember anything from 9am until 7pm and therefore was not in a position to intervene. The question for the jury, if the statement was admitted, was whether they accepted the exculpatory aspect of the statement suggesting that he was asleep or could not remember. There was clear evidence from Mr Brennan suggesting that he was alert shortly before the accident.

Conclusion

[36] This analysis demonstrates, therefore, that the admissibility decision was critical to the direction application. As we have previously indicated at [28] above the learned trial judge left out of account the admission in the defence statement. In our view that was significant in the assessment of the fairness of the exclusion. The prosecution were entitled to rely on the defence statement to counter any suggestion of unfairness in the introduction of the evidence. The unfairness to the respondent was, therefore, minimal. The unfairness to the prosecution was extreme. That was not addressed by the judge. In this case, as the judge accepted, there was no suggestion of impropriety by the police or prosecution authorities. We consider, therefore, that we should interfere with the ruling on admissibility because of the absence of consideration of the defence statement. In light of the admission made in the defence statement we do not consider that fairness required the exclusion of the interviews. It follows in the circumstances set out above that the direction ruling is also undermined.

[37] For the reasons give we allow the appeal in respect of the nominated ruling and the direction application and reverse both rulings. A fresh trial may take place in the Crown Court in respect of the offence of aiding and abetting causing death by dangerous driving.