Neutral Citation no. [2008] NICA 40 | *Ref:* **KER7225**

Judgment: approved by the Court for handing down | *Delivered:* **16/7/08**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 2 of 2008)
CHRISTOPHER McGINN

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] On 17April 2008, at Newry Crown Court (sitting at Belfast), the offender, Christopher McGinn, was arraigned on two counts of dangerous driving causing death, two counts of dangerous driving causing grievous bodily injury, one count of driving having consumed excess alcohol and one count of driving a motor vehicle without insurance. He pleaded guilty to all offences. Hart J sentenced Mr McGinn as set out in the table below: -

Count	Sentence
1. Causing death by dangerous driving of Stephen John Shields, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995	Four years' detention in the Young Offenders Centre
2. Causing death by dangerous driving of Gerard Patrick Fearon, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995	Four years' detention in the Young Offenders Centre concurrent
3. Dangerous driving causing grievous bodily injury to Gemma McKeown	Four years' detention in the Young Offenders Centre concurrent

4. Dangerous driving causing grievous bodily injury to Anthony Derby	Four years' detention in the Young Offenders Centre concurrent
5. Driving with excess alcohol	Three months' detention in Young Offenders Centre concurrent
6. No insurance, contrary to Article 90(4) of the Road Traffic (Northern Ireland) Order 1981	£250 fine

[2] The Attorney General has applied to refer these sentences to this court under section 36 of the Criminal Justice Act 1988 and seeks to have them quashed on the grounds that they are unduly lenient. On 27 June 2008 we granted leave to refer the sentences and the application duly proceeded.

Background facts

[3] The Attorney General's reference summarised the background to the case in this way: -

> "1. The offences were committed shortly before midnight on 27 October 2006. The location was the Dublin Road, Newry, County Down, in close proximity to Newry. The offender was driving a Toyota Carina vehicle, proceeding in the direction of Newry. The offender's vehicle overtook another vehicle at high speed and then braked very sharply, in order to negotiate a roundabout. The offender's vehicle then overtook a taxi at high speed, driving on to white chevrons in order to do so. The vehicle next entered that section of the Dublin Road which comprises one lane for vehicles travelling in the direction of Newry (the offender's direction of travel) and two lanes for vehicles proceeding in the opposite direction. On this section of the road, the offender's vehicle encountered two vehicles proceeding in their respective lanes in the opposite direction. In the inside lane was a blue Peugeot vehicle driven by Stephen Shields, a part-time taxi driver. In the outer lane was a Renault Clio vehicle driven by Gerard Patrick Fearon. The offender's vehicle was

travelling on the wrong side of the road, occupying portions of each of the oncoming country bound lanes.

2. The offender's vehicle then collided with the front nearside of the vehicle driven by Mr. Fearon (the Renault Clio), causing severe crush damage to both vehicles. Next, the offender's vehicle rotated anti-clockwise, striking the offside of Mr. Shields' vehicle, following which the offender's vehicle re-entered the north bound carriageway, mounted the adjacent footpath and came to rest against a telegraph pole.

3. The offender's vehicle was travelling at a grossly excessive speed at all material times. Further, the offender disregarded a warning from one of his passengers to moderate the speed at which he was travelling. The offender was driving under the influence of alcohol, having a blood alcohol level measured at between 139 and 196 mg of alcohol per 100 ml of blood. On the date of the accident, the offender was aged sixteen years. He had been driving vehicles for a period in excess of one year beforehand. He had no driving licence and no insurance.

4. Mr. Fearon and Mr. Shields, the drivers of the two vehicles with which the offender's vehicle collided, died as a result of the collisions. The survivors of the collisions, who were passengers in the vehicles involved, suffered injuries of considerable severity. Anthony Derby suffered serious head injuries, a fractured pelvis, a fractured left leg and other injuries, posing a serious threat to his life. Gemma McKeown suffered a fractured pelvis, a fractured skull, a fractured ankle, a fractured finger and, in consequence, has restricted mobility and extensive scarring. The offender also suffered injuries, from which he made a satisfactory recovery."

The Attorney's submissions

[4] The Attorney General suggested that the following aggravating features were present: -

(a) The multiplicity of victims, including two mortal victims.

(b) A prolonged and sustained course of aggressive, irresponsible and highly dangerous driving.

(c) Grossly excessive speed.

(d) The consumption of alcohol.

(e) Disregarding a passenger's warning.

(f) Driving without a licence or insurance.

(g) A flagrant disregard for the road traffic laws generally.

[5] It was acknowledged by Mr McCloskey QC (who appeared on behalf of the Attorney General) that the plea of guilty was a mitigating factor. He pointed out, however, that this plea had not been made until the offender was formally arraigned and was in any event inevitable in the face of overwhelming evidence as to the respondent's guilt. It was therefore submitted that the punishment of the offender failed to adequately reflect the gravity of the offences, the respondent's high degree of culpability, the aggravating features, the intention of Parliament to impose more stringent punishments for this type of offending, the need to deter others and public concern about offences of this kind.

The respondent's arguments

[6] On behalf of Mr McGinn, Mr O'Hara QC accepted that the case fell into the highest culpable category of case as that has been defined in such cases as *R v McCartney* (see below). He submitted, however, that the learned trial judge was correct in removing the case from that category to one of intermediate culpability in recognition of the mitigating factors which were present, most notably the respondent's age. (The respondent was some two months short of his seventeenth birthday when the offences were committed, his date of birth being 20 December 1989). It was, moreover, open to the judge to take into account that if a sentence in excess of that imposed were chosen, the respondent would have had to be imprisoned in an adult prison with all the malign influences that this would expose him to and it was legitimate to adjust the term to avoid that eventuality. Finally, Mr O'Hara submitted that, even if this court concluded that the sentence was unduly lenient, it ought to

exercise its discretion not to increase the sentence in light of the impact that the entire episode has had on his life.

The judge's sentencing remarks

[7] In a carefully constructed and comprehensive judgment, Hart J reviewed all the recent relevant authorities in this vexed and difficult area of sentencing. In paragraph [23] of his judgment he identified the following eight aggravating features: -

> "(1) The defendant had not passed a driving test and had no insurance. (2) This was not the first time he had been driving on the public roads underage. (3) He had been drinking and was over the legal limit for the consumption of alcohol. (4) He drove in a dangerous fashion over a significant distance prior to the collision, and the manner in which he was driving immediately prior to the collision was extremely dangerous. (5) He disregarded a warning from his one of his passengers to slow down. (6) He drove at a grossly excessive speed immediately before the collision. (7) His driving resulted in the deaths of two people, and (8) in grave injuries being sustained by two more."

[8] Mr O'Hara did not dispute the judge's findings on any of these features although he pointed out that the 'warning' which the judge found that the offender had ignored was couched in equivocal terms. On the aggravating factors issue generally, the burden of Mr O'Hara's submissions was that the judge had not neglected any feature of the offender's driving which could properly be regarded as amounting to an aggravating factor and that his final judgment should be viewed against that background.

[9] Having identified a multiplicity of aggravating factors, the judge then expressed the view that the presence of so many of these factors "[was] such that this is a case which falls into the highest level of culpability where a sentence of at least 8 years imprisonment would have been appropriate in the case of a defendant who was an adult at the time of the offence, where the charges were contested, and the defendant convicted". Mr O'Hara criticised this passage, pointing out that the starting point of the range for the highest culpability category was in fact seven years. We will return to this argument later.

[10] The judge then dealt with the mitigating factors in the case at paragraph [24] of his judgment as follows: -

> "There are a number of mitigating features that have to be taken into account. (1) He pleaded guilty upon arraignment and therefore is entitled to a considerable degree of credit for doing so. However, the maximum credit is reserved for those who admit their guilt in interview and the defendant did not do this. Indeed he denied that he could have been driving in the way that was alleged even when the overwhelming evidence to the contrary was put him in interview. Whilst I accept that he has suffered a genuine loss of memory, his reluctance to recognise the inevitable at that stage does not assist him. (2) I am satisfied he has displayed genuine remorse for the devastating consequences of his actions on that night. (3) He is a young man, he was not quite 17 at the time and he is now 18. (4) He has no previous convictions, although the credit to be allowed for this is somewhat diminished by his driving whilst underage on other occasions. Mr Berry QC pointed out that his client had suffered injuries. That is so, but fortunately he has been left with no lasting physical consequences and I do not regard his injuries as a mitigating feature."

[11] It is clear that the offender's youth weighed heavily with the judge in his ultimate choice of sentence. He dealt with this issue in the following passage from paragraph [25]: -

> "In view of his youth at the time of the offences I consider that, despite the number of aggravating features, I should treat him as having a lower degree of culpability and therefore impose a somewhat lower sentence than would be appropriate for an older defendant."

[12] Mr O'Hara suggested that this clearly signified the judge's intention to remove the offender into a lower culpability category and that this exercise was entirely consonant with the approach of this court in *Attorney General's Reference 2, 6, 7 and 8 of 2003* [2003] NICA 28 where, in one of the individual cases, that of Graeme Humphreys, the offender was deemed to fall into the intermediate category of culpability notwithstanding the presence of a number of aggravating factors. It was because of his youth that this adjustment was made, Mr O'Hara claimed.

[13] Having considered carefully the judgment in *Attorney General's Reference 2, 6, 7 and 8 of 2003*, we are unable to accept Mr O'Hara's argument on this point. It is true that the offender, Humphreys, was nineteen years of age when the offences were committed but the court did not relate that to its selection of the intermediate category of culpability. Indeed, it is far from clear why that category was chosen since the court appears to have accepted that no fewer than seven aggravating factors were present and it expressly found that these were not outweighed by the mitigating features and the otherwise good character of the offender.

[14] The judge was urged to consider a custody probation disposal but, in our view rightly, he concluded that neither of the objectives of article 24 (2) of the Criminal Justice (Northern Ireland) Order 1996 of protecting the public from harm or preventing the commission by the offender of further offences applied in this case. Indeed, custody probation was not recommended in the pre-sentence report and the judge was entirely right not to choose such a sentence.

[15] As we have already observed, the judge was clearly influenced by the consideration that, if the offender was sentenced to a longer period of detention than four years, he would have to serve that sentence in an adult prison and this is apparent from the remarks that he made in the final paragraph of his judgment, when he said, "I consider that I should also take into account that a sentence of imprisonment, as opposed to a period of detention in the Young Offenders Centre, would result in his being exposed to the influence of older criminals". For the Attorney General, Mr McCloskey QC accepted that this was a factor that the judge was entitled to take into account but he argued that he had accorded it disproportionate weight.

Discussion

[16] In *Attorney General's References 2, 6, 7, and 8 of 2003* this court followed the approach advocated by the Sentencing Advisory Panel and adopted in England & Wales by the Court of Appeal in *R v Cooksley and others* [2003] EWCA Crim 996. The Court of Appeal in this jurisdiction outlined the approach that was to be followed in sentencing in this type of case in the following paragraphs: -

> "[11] The Sentencing Advisory Panel propounded a series of possible aggravating factors, which were adopted by the Court of Appeal in *R v Cooksley*, with the caveat that they do not constitute an exhaustive list. The court also pointed out that they cannot be approached in a mechanical manner, since there can be cases with three or more aggravating factors which are not as

serious as a case providing a bad example of one factor. The list is as follows:

> *'Highly culpable standard of driving at time of offence*
>
> (a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl' (b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off (c) disregard of warnings from fellow passengers (d) a prolonged, persistent and deliberate course of very bad driving (e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking) (f) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held) (g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills. (h) driving when knowingly deprived of adequate sleep or rest (i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns
>
> *Driving habitually below acceptable standard*
>
> (j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle (k) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving
>
> *Outcome of offence*

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable) (m) serious injury to one or more victims, in addition to the death(s)

Irresponsible behaviour at time offence

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape (o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension (p) offence committed while the offender was on bail.'

We would add one specific offence to those set out in paragraph (j), that of taking and driving away a vehicle, commonly termed joy-riding, which is unfortunately prevalent and a definite aggravating factor.

[12] The list of aggravating factors was followed by one of mitigating factors, as follows:

'(a) a good driving record; (b) the absence of previous convictions; (c) a timely plea of guilty; (d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend); (e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and (f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving.

Again, although this list represents the mitigating factors most commonly to be taken into account, it is possible that there may be others in particular cases.

[13] The Court of Appeal went on in *R v Cooksley* to set out sentencing guidelines, stating firmly that

in these cases a custodial sentence will generally be necessary and emphasising that in order to avoid that there have to be exceptional circumstances. It ranked the cases in four categories:

(a) Cases with no aggravating circumstances, where the starting point should be a short custodial sentence of perhaps 12 to 18 months, with some reduction for a plea of guilty.

(b) Cases of intermediate culpability, which may involve an aggravating factor such as a habitually unacceptable standard of driving or the death of more than one victim. The starting point in a contested case in this category is two to three years, progressing up to five years as the level of culpability increases.

(c) Cases of higher culpability, where the standard of the offender's driving is more highly dangerous, as shown by such features as the presence of two or more of the aggravating factors. A starting point of four to five years will be appropriate in cases of this type.

(d) Cases of most serious culpability, which might be marked by the presence of three or more aggravating factors (though an exceptionally bad example of a single factor could be sufficient to place an offence in this category). A starting point of six years was propounded for this category.

The Court of Appeal added in paragraph 32 of its judgment in *R v Cooksley* a warning that in the higher starting points a sentencer must be careful, having invoked aggravating factors to place the sentence in a higher category, not to add to the sentence because of the same factors.

[14] We are conscious that we stated in this court in *R v Sloan* [1998] NI 58 at 65 that it is inadvisable, indeed impossible, to seek to formulate guidelines expressed in terms of years. When that view was expressed the court did not have the benefit of a carefully thought out scheme of sentencing in

> these difficult cases, such as that constructed by the Panel and the Court of Appeal in *R v Cooksley*. We consider that it should be adopted and followed in our courts, and that these guidelines should be regarded as having superseded those contained in *R v Boswell* [1984] 3 All ER 353. We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind, they will in our view be enabled to maintain a desirable level of consistency between cases, while doing justice in the infinite variety of circumstances with which they have to deal."

[17] As we stated in *R v McCartney* [2007] NICA 41, these guidelines have formed the basis for sentencing decisions in this jurisdiction for these types of offence since the judgment in *Attorney General's References 2, 6, 7, and 8 of 2003* was given. It follows that, since well in excess of three aggravating factors are present in the instant case, it fell squarely into the highest culpability category set out in paragraph 13 (d) of the court's judgment.

[18] Since the decision in *Attorney General's References 2, 6, 7, and 8 of 2003* the statutory maxima for offences of dangerous driving have been increased and we considered the effect of these increases in *R v McCartney.* Applying the approach adopted by the Court of Appeal in England and Wales in *R v Richardson and others* [2006] EWCA 3186 we said: -

> "[35] A revision of the starting points in *Cooksley* was undertaken by the Court of Appeal in *Richardson* and the outcome of its consideration was given in paragraph 19 of the judgment: -
>
> > "The relevant starting points identified in *Cooksley* should be reassessed as follows: -
> > (i) No aggravating circumstances – twelve months to two years' imprisonment;
> > (ii) Intermediate culpability - two to four and a half years' imprisonment;
> > (iii) Higher culpability – four and a half to seven years' imprisonment;
> > (iv) Most serious culpability – seven to fourteen years' imprisonment."

> [36] We have concluded that these guidelines should now be applied in this jurisdiction. The appropriate range of sentence in the appellant's case is therefore within the last of these categories. The learned trial judge was correct in his view that the fact that the maximum sentence has now been increased from 10 years to 14 years should augment the range of penalty for this type of offence. He was also entirely right in concluding that the proper sentence, taking account of the aggravating and mitigating features that we have already discussed, was one of ten years' imprisonment."

[19] Mr O'Hara was therefore correct in his argument that the starting point for the category to which the offender's case belonged was seven years. But we do not construe the judge's remarks on this issue as an indication that the starting point in all such cases should be eight years. We consider it more likely that he was observing that in the offender's *particular* case a minimum starting point was eight years. This debate is essentially peripheral to the issues that we have to decide, however.

[20] If the offender had been an adult and had contested these charges, we consider that the appropriate sentence would have been towards the upper end of the sentencing range that is now appropriate for this category of case, probably of the order of twelve years' imprisonment. His youth and his plea of guilty are significant mitigating factors, as is his remorse which the judge found to be genuine. Two observations should be made about the strength of the first two of these, however. Although the offender was young, he was no stranger to car crime. He had been driving while under age for some little time. In relation to the plea of guilty, the offender did not confront his guilt at the earliest opportunity. We agree entirely with the judge's analysis of this issue. The offender was not entitled to the full reduction that an early acceptance of guilt would have warranted.

[21] The judge's choice of sentence in effect removed the offender's case from the most serious category to the intermediate culpability category. We entertain doubts as to whether it is legitimate to move between categories in this fashion. The presence of mitigating factors will (at least in the vast majority of cases) affect the choice of sentence *within* a category rather than justify its removal from one category to another. We hesitate to prescribe that a move to a lesser category of culpability will never be appropriate because we are mindful of the enjoinder in *Cooksley* and other cases of the need to avoid an over mechanistic approach to the question of sentencing but we consider that this will be a wholly exceptional disposal.

[22] The judge was right to have regard to the effect that a sentence of imprisonment which required the incarceration of the offender in an adult prison would have. But we are constrained to agree with Mr McCloskey's submission that disproportionate weight was given to this consideration. Allowing for the mitigating features present in the case, we consider that the sentence range probably lay between eight and nine years. Making every allowance for the laudable aim of protecting the offender from the influence of older criminals, we do not believe that the adjustment required to achieve that objective could be justified on that account alone.

Conclusions

[23] For the reasons that we have given, we have concluded that the sentences passed on the first four counts were unduly lenient. We have considered whether, notwithstanding that conclusion, we should exercise our discretion not to increase the sentences but have concluded that there is no warrant for such a course. We must have regard, however, to the double jeopardy aspect of the case which we believe is of particular significance in the case of a young offender. We therefore quash the sentences imposed by the learned trial judge on the first four counts and substitute for those a sentence of seven years' imprisonment on each of those counts, all such sentences to run concurrently.