Neutral Citation No. [2013] NICA 55 | *Ref:* **MOR9003**

Judgment: approved by the Court for handing down | *Delivered:* **04/10/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

MARY McLAUGHLIN

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBER 11 of 2013)

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Before: Morgan LCJ, Coghlin LJ and Maguire J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference by the Director of Public Prosecutions under section 36 of the Criminal Justice Act 1988 in which it is submitted that a sentence of 15 months imprisonment comprising 10 months on licence and 5 months in custody concurrent on each count imposed on the respondent following her conviction on 17 May 2013, after trial, of 1 count of causing death by dangerous driving and 4 counts of causing grievous bodily injury by dangerous driving contrary to contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 (the "**1995 Order**") was unduly lenient.

Background

[2] On 7 October 2010 the respondent was driving her Vauxhall Zafira car along the M5 motorway just before 1 pm. As her vehicle approached the Hazelbank roundabout it failed to stop, entered the roundabout and collided with a Ford Focus. There was a considerable impact to one side of the Ford Focus. Witnesses who observed the collision stated the Zafira did not stop nor was there any sign of brake lights.

[3] There were 5 occupants of the Ford Focus. Rebecca McManus who was in the rear at the side of the impact died of serious chest and abdominal injuries whilst still inside the vehicle. She was aged 27, had 2 young children, and was pursuing further education. The 4 other passengers sustained serious injury. Angelo Fusco was the front seat passenger and sustained 4 fractures to his pelvis, requiring surgery, and a torn spleen. Gillian Jackson sustained fractures to her pelvis, requiring surgery, and a broken rib. Michele Holmes sustained a fractured pelvis, cracked ribs, bruising to her spleen and concussion. Karen Banks sustained contusions to her lung, acute spraining over her left shoulder, requiring surgery, and bruising over most of her body. Some of the injuries were predicted to have permanent effects. These victims experienced significant trauma and suffered disruption to their education and employment.

[4] The respondent was observed before the impact by a Mr Finlay who described her eyes as closed and her head as being bowed over the steering wheel. Mr Finlay approached the vehicle after the accident. He said she appeared to open her eyes and lift her head but that almost immediately her head dropped down again. When she came to she seemed confused and asked what happened. At the scene she said she had felt signs of a possible black-out when driving along the road before the roundabout. She was about to pull over to the verge but passed out before she could do so and only woke up when the collision had occurred. She indicated to police at the scene that she had a history of black-outs and had taken her medication at midday. At the time of the collision she was driving on a medically restricted licence having reported the condition to the Driving Vehicle Licensing Authority ("**DVLA**").

[5] At trial it was not disputed the respondent had suffered loss of consciousness as she was driving. Her medical history indicated that she had for many years suffered from neurocardiogenic syncope with the result that she can and does suffer from loss of consciousness at times. She reported this condition to the DVLA when applying for her last two licences and her doctor was asked to report to the DVLA medical division. The medical reports from her doctor suggested these attacks were preceded by recognisable symptoms and that she therefore had warning if they were likely to occur. It was on that basis the DVLA granted a licence restricted to three years.

[6] The prosecution case was that the respondent knew that she suffered from no warning blackouts and despite that continued to drive. There were three evidential sources in relation to this issue. Jean Carson was a former co-worker of the respondent and described having to deal between 2006 and 2008 with a large number of occasions when the respondent had black-outs. She said the respondent would just black out without apparently having notice or with very short notice. It was common for co-workers to have to place her in the recovery position.

[7] The jury also heard evidence from Professor Adgey who considered that it was foreseeable the respondent would have these incidents when she was driving. The Professor criticised the DVLA and the medical advice that they were given and expressed the view that it was unsafe for the respondent to drive and that she should never have been given a licence.

[8] The principal evidence identified by the learned trial judge came from her last application for Disability Living Allowance made in 2010 (five months before this incident). The respondent claimed for assistance stating: "*Due to no warning black-outs I need help to avoid injury to myself*". This phrase was repeated in the form on a number of occasions. She described her condition as being so bad that she could only go out when necessary, for example, to doctors, dentists and hospital appointments. The learned trial judge said it was clear in hindsight that the respondent was unsafe; the culpable matter was the respondent knowing that she was unsafe, as evidenced by the applications for Disability Living Allowance.

[9] Although the respondent advanced explanations for the content of the forms it is clear that the jury were satisfied beyond reasonable doubt that she was driving when she knew that she could suffer from a no warning blackout.

Discussion

[10] This court has laid down guidelines for the offence of causing death by dangerous driving, also relevant to the offence of causing grievous bodily harm by dangerous driving, in Attorney General's Reference No. 6 of 2003 [2003] NICA 40, subsequently varied in R v McCartney [2007] NICA 41. We agree, however, with the Director of Public Prosecutions, Mr McGrory QC, who said that these cases are among the most difficult sentencing exercises that judges are called upon to perform because no sentence can begin to reflect the enormous consequences of the loss of a young mother who had everything that life could offer to look forward to and the disruption to the lives of those injured. The victim impact statements available in this case capture exactly those points.

[11] The establishment of sentencing ranges by determination of aggravating and mitigating factors must seem by comparison an arid exercise but it is to these that we must turn. We are satisfied that there are two aggravating factors in this case. First, there was serious injury to one or more victims in addition to death. Secondly, the respondent was driving while knowingly suffering from a medical condition which significantly impaired her driving skills. This is an indication of highly culpable driving which generally arises from cases like R v Sims [2009] EWCA Crim 1533 where the offender who had a history of epileptic fits had been warned by doctors on three occasions that he should not drive because of the risk of blackouts.

[12] The guideline cases suggest that the appropriate sentencing range where 2 such aggravating factors are present is 4 1/2 to 7 years imprisonment. The learned

trial judge distinguished this case on the basis that it was not a case of wilful disregard of repeated medical advice not to drive. This offender's licence application had been supported by her own GP who had also been involved in her DLA application. There was evidence that she had developed a false sense of security as is evidenced by the fact that she had earlier been driving her own children. The judge, considered, therefore, that the appropriate starting point to reflect the respondent's culpability was 3 years imprisonment.

[13] We agree that guidelines should not be prescriptive and that a judge should retain an area of discretionary judgment outside the guidelines in appropriate cases. We also accept that there were unusual features of this case relating to culpability. Although we recognise that a starting point of 3 years was generous to the offender we cannot say that the judge went wrong in adopting it.

[14] The pre-sentence report noted that the respondent was a 47 year old married woman with 3 children. Her father was terminally ill. She had suffered from black-outs since she was 11 years old following traumatic incidents. Despite this handicap she achieved well in school and had a good working record. Impressive character references were introduced on her behalf. She was described as having the victims forever in her thoughts. She was deemed to be a low risk of reoffending and was not a significant risk of harm to the community.

[15] The trial judge also considered a medical report from Professor Rose Anne Kenny dated 18 June 2013 confirming the nature of the treatment the respondent was receiving and reporting that the stress of prison would be likely to exacerbate her condition. Constant supervision in custody was recommended. She had been a lady of good character and had a good driving record. She had shown evidence of remorse.

[16] The learned trial judge concluded that these factors should reduce the starting point to 15 months and then determined that there should be a 10 month licence period because of the medical difficulties the offender would have in serving her sentence. We cannot accept that either of these dispositions was warranted by the facts of this case. Personal circumstances inevitably carry modest weight in cases of this kind. These sentences are intended to be deterrent. Making every possible allowance for the mitigating factors and taking account of the approach to the medical difficulties which a prisoner may have to endure, approved by this court in AG Ref No 4 of 2003 [2003] NICA 49, we consider that a determinate custodial sentence of at least 2 years 3 months was appropriate. We consider, therefore, that the sentence was unduly lenient.

[17] We are required to take into account the impact of double jeopardy. We consider, therefore, that we should substitute a determinate custodial sentence of 21 months. In DPP's Ref No 2 of 2013 [2013] NICA 28 we stated that the duration of the licence period is dependent upon the assessment by the judge of the effect of

probation supervision in protecting the public from harm from the offender and preventing his commission of further offences. It cannot simply be used to effect further mitigation. There is nothing in the pre-sentence report or medical reports to justify departure from the statutory minimum licence period. We substitute a sentence of 10½ months in custody and the same period on licence. Any period served on remand should be taken into account.