

Neutral Citation No [2013] NICA 9

Ref: MOR8780

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 27/2/2013

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL BERRY

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE
(NUMBER 5 of 2012)

Before: Morgan LCJ, Higgins LJ and McCloskey J

MORGAN LCJ

[1] This is a reference from a sentence of 18 months imprisonment suspended for 3 years, a fine of £50,000 and disqualification from driving for 5 years imposed by Judge Loughran on 21 November 2012 after the offender had been convicted of causing grievous bodily injury by dangerous driving. He had earlier entered a plea to causing the said injury by careless driving but this had not been accepted by the prosecution.

Background

[2] On the afternoon of 22 May 2010 the injured party, a 68-year-old lady, was the front seat passenger in a Ford Focus car being driven by her husband along the Moorfields Road in the direction of Ballymena. It was a fine sunny day and the road was dry and in good repair. As they travelled along a straight section of road at about 45 mph the injured party observed the car driven by the offender in the opposite direction pull directly into their path as they approached the junction with Collin Road on their left-hand side. Her husband had no time to avoid the ensuing collision. Both cars were badly damaged.

[3] The injured party sustained serious internal and orthopaedic injuries including a fracture of the right humerus and bilateral femoral fractures. She also required a laparotomy and small bowel resection and has had a colostomy bag fitted. She was in a comatose condition for some two weeks after the collision and was in hospital for four months in total. She has been rendered permanently disabled and requires crutches to walk. Her husband suffered a fractured sternum, cracked ribs and bruising to his stomach, groin and left hand. He was detained in hospital for 4 days.

[4] In his police interviews and evidence the offender said that he was returning from a shopping trip to Ballymena and was on the Moorfields Road intending to turn right into the Collin Road. He had initially been travelling at 50 to 55 mph but had slowed down to 5 mph as he commenced a right turn. He stated that there were no cars in front of him and that there was nothing capable of obstructing his forward view. He accepted that he had a clear view ahead of up to 800 metres. He maintained that he only observed the Ford Focus car driven by the injured party's husband after the impact had occurred. He was unable to explain how he had failed to observe it at any stage prior to the collision occurring.

[5] Engineering evidence established that the Moorfields Road at its junction with Collin Road is a long straight stretch of road. When the injured party's vehicle came onto the straight stretch of road it had to travel a distance of 483 m before it reached the junction. This would have taken something in excess of 20 seconds. The offender's vehicle came onto the straight stretch of road 293 m short of the junction. At 55 mph it would have taken the offender 9.7 seconds to reach the junction. If, as he says, he slowed down before turning it must follow that the injured party's vehicle must have been in his view for more than 10 seconds. The assertion by the offender that he did not see the injured party's vehicle is inexplicable. In order to complete the right turn manoeuvre which he intended to execute into Collin Road it would have been critical for him to assess the state of the traffic coming in the opposite direction against him. His failure to do so over a prolonged period represents a highly culpable piece of driving given the manoeuvre that he was intending to execute. The only other possible explanation was that he attempted to cut across the injured party's vehicle taking a chance that the collision might not occur or that he was distracted over a period of time and not paying attention to the road ahead. That was expressly disavowed by his counsel and in the absence of evidence we do not consider it further or take it into account.

[6] A trial commenced before Her Honour Judge Philpott QC and a jury at Antrim Crown Court on 18 April 2012. On the afternoon of the following date the offender was nearing the conclusion of his evidence in chief when he stated, "If I'm convicted of dangerous driving I am going to prison" or words to that effect. As a result of this remark the learned trial judge concluded correctly that the offender had tried to unfairly influence the jury by encouraging them to consider the consequences of their verdict rather than the evidence. Accordingly the jury were

discharged and the trial aborted. A further trial commenced before Her Honour Judge Loughran and a jury at Antrim Crown Court on 8 October 2012. At the outset of the trial the offender was re-arraigned and entered his plea of guilty to careless driving causing grievous bodily injury. He was convicted of the more serious offence on 10 October 2012. We wish to make it clear that the reason for the determination of the earlier trial is not an aggravating factor in this case but clearly the offender is not entitled to credit for his plea in light of the conviction for the more serious offence.

[7] A pre-sentence report stated that the Defendant had difficulty accepting that his manner of driving was dangerous as he was adamant that it was not his intention to pull out into the path of an oncoming vehicle. He did not dispute that his actions caused the accident and serious personal injury to the passenger in the other car and was motivated to avoid further offending. He had a limited but relevant criminal record consisting of road traffic offences all arising from one court appearance in 1986 but this was properly not treated as an aggravating factor by the sentencing judge. He was assessed as low risk of reoffending. He had passed the advanced driving test prior to the sentencing hearing and the possibility of a suspended sentence was raised on the pre-sentence report as was the willingness of the offender to pay a financial penalty.

[8] In the course of the plea the judge heard evidence from the managing director of the financial services company of which the offender is a director. The managing director explained that the offender was the financial director of the company and that he had a particular expertise in pensions. The company had not been able to secure further lending from the bank and the loss of any fee income as a result of the offender's imprisonment may put the company and the 17 people working in it at risk. If the company failed the directors were at risk of repossession of their homes. This was supported by a letter from the firm's accountants who noted that the loss of the offender for any length of time would result in a loss of income for the business which would put it in a loss making position. There was, however, no material by way of books of account provided to verify the information or enable it to be evaluated.

The conclusions of the learned trial judge

[9] The learned trial judge noted the offender's previous good background, the many references submitted on his behalf which spoke highly of him, his wife's medical condition and the evidence in respect of his contribution to his business. Perhaps because the case had gone to trial there was no analysis of the culpability of the offender by the prosecution in opening the plea and no analysis set out in the judge's sentencing remarks. The prosecution also opened the case as one in which there were no aggravating factors. In fact that was incorrect as the husband of the injured party had also been injured.

[10] The judge concluded that she should impose a sentence of 18 months imprisonment but suspended it for a period of three years as a wholly exceptional step because of the evidence about employment issues. She then continued:

“Because I have taken account of the business as an exceptional circumstance I am going to impose a very significant fine. If the business has been saved as a result of my not sending you to prison then the business is going to have to pay in the form of you as one of the directors. I am going to impose a fine of £50,000 with a maximum time to pay of six months.”

She also disqualified the offender from driving for five years.

Consideration

[11] The guidelines laid down by this court in Attorney General’s Reference (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 40 for the offence of causing death by dangerous driving and subsequently varied in R v McCartney [2007] NICA 41 to acknowledge the increase in the statutory maximum are broadly applicable to this offence also. This case was open to the learned trial judge as one in which there were no aggravating circumstances and the guidelines suggest a range of sentencing between 12 months and two years imprisonment in such circumstances. We have already noted that this was a case in which two people were injured and we are satisfied that this is a case which would have justified an increased starting point of two years or more.

[12] Although the learned trial judge did not embark on an analysis of the culpability of the offender’s driving such as we have set out at paragraph 5 above, it is clear that she considered this a highly culpable piece of driving both because of her selection of the starting point of 18 months in the circumstances opened to her and because of the extremely heavy fine which she imposed in addition. In our view, however, the imposition of the fine was wrong in principle. Indeed that was accepted by both parties in this reference and Mr McGrory QC submitted that whatever the outcome of this reference the fine should be remitted. The only basis for the imposition of such a heavy fine was to contribute to the exceptional circumstances upon which the learned trial judge relied in suspending the sentence. We cannot think of any circumstances in which the imposition of a fine could be justified as a basis for suspending a sentence of imprisonment.

[13] We have considered carefully the evidence about employment issues. In circumstances where an offender is facing a sentence of imprisonment it is often the case that harm will be caused not just to himself but to members of his family and those who depend upon him in the working environment. We do not consider that those who run businesses can avoid the consequences of their actions where highly

culpable driving causes death or serious injury to others. In our view there were no circumstances justifying the exceptional course of suspending the sentence of imprisonment in this case and accordingly we consider that the sentence was unduly lenient.

[14] We have discretion as to whether we should interfere with the sentence and if we decide to interfere it is necessary to take into account the double jeopardy principle. We are satisfied that we should interfere and in all the circumstances we impose a sentence of 12 months imprisonment in substitution for the suspended sentence of imprisonment and the fine. The period of disqualification will remain unaltered. The offender should present himself at Maghaberry prison by 10 AM on 28 February 2013 to commence serving his sentence.