

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

Delivered: 16/09/11

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

-v-

STEPHEN GORDON WARNOCK

PUBLIC PROSECUTION SERVICE'S REFERENCE  
(NUMBER 1 of 2011)

Before: Morgan LCJ, Higgins LJ and Girvan LJ

**MORGAN LCJ**

[1] This appeal arises from the death of John Cully, a 20 year old man with his life ahead of him, for which the respondent was responsible. John Cully's family are devastated and nothing can repair the hurt that the respondent has caused. The respondent did not intend to cause the death but because of his dangerous driving he is responsible not just for this untimely death of an innocent boy but also for the injury caused to his own passenger.

[2] The respondent was sentenced to a total of 16 months' imprisonment consisting of 8 months imprisonment and 8 months on licence and disqualified from driving for 5 years on 2 June 2011 at Downpatrick Crown Court for causing the death of John Cully by dangerous driving and causing grievous bodily injury to Gareth Keenan by dangerous driving. The Director of Public Prosecutions ('DPP') has referred the sentence under section 36 of the Criminal Justice Act 1988. The DPP submits that the sentence is unduly lenient.

[3] The offences occurred in the early hours of Saturday 11 April, 2009 on the Bog Road, Portavogie, which is a minor country road. The respondent, who was 23 at the time, was driving his Honda Civic car out of Portavogie

carrying Gareth Keenan as a front seat passenger while the deceased, Mr Cully, was driving his Volkswagen Golf in the opposite direction. The circumstances were that the respondent was approaching the de-restriction sign indicating the end of the 30mph zone at a speed in excess of that limit calculated by Mr. Coll, forensic scientist, at the point of collision to be 53mph.

[4] It appears that the respondent and Gareth Keenan had gathered with others in the early hours of 11 April 2009 at The Quays, Portavogie. Keenan had expressed an interest in buying a Honda Civic R motor vehicle of the type owned by the respondent. The respondent had fitted a customised exhaust to his vehicle to amplify the sound. After a discussion about the attributes and costs of the vehicle the respondent offered to take Keenan for a drive. They drove up New Harbour Road. Various witnesses commented on the sound of the vehicle and Keenan said in his statement that the vehicle reached speeds of between 40 and 50 MPH in this 30 MPH built up area before stopping to negotiate the road junction leading onto Bog Road.

[5] The distance from the junction with Bog Road to the scene of the accident is approximately 300 yards. Witnesses living along Bog Road commented on the sound of the vehicle going through the gears as it built up speed heading out of Portavogie. Keenan said that it reached a speed of 60 MPH which is broadly consistent with the conclusion of Mr Coll. Just before leaving the restricted zone there is a slight left hand bend followed by an undulation. There were tyre marks on the road caused by the respondent's vehicle just after it had passed the top of the undulation which placed it on the wrong side of the road at that point.

[6] The engineer retained by the respondent was of the opinion that the speed of his vehicle as it negotiated the undulation caused the vehicle to move onto the other side of the road indicating either a loss of control by the respondent or that he was travelling by design on the wrong side of the road. The collision with the deceased's vehicle which was on its own side of the road was almost directly head on. The prosecution submit that the speed at which the respondent was driving was unsafe for such an undulating minor road and that the culpability was aggravated by the fact that he was doing so within a 30 MPH limit. The prosecution also contended that the explanation for driving at such a speed was that the respondent was showing off to his passenger.

[7] The respondent had a previous conviction for speeding arising out of an incident in 2003 when he was seventeen. He was fined £60 and had his licence endorsed with 3 penalty points. The prosecution relied on this as an aggravating feature. We also take into account the very moving statement by the deceased's mother setting out the devastating effect his death has had on her and the rest of the family.

[8] The pre-sentence report indicates that the respondent was successful at school, becoming head boy, and in his sporting activities. He then obtained employment in the public service where he was clearly highly thought of as is shown by a number of references and the fact that his job is still open for him. We recognise that any increase in his sentence may lead to the loss of that job. He has a three year old child with type 1 diabetes whom he looks after from time to time.

[9] He sustained significant injuries as a result of the collision which required prolonged hospital treatment. He had extensive soft tissue injury to the abdomen and intra-abdominal injury which leaves him at risk of adhesions. He had a fracture of the right heel which will leave him vulnerable to accelerated degenerative change. He also had a fracture of his left distal femur and a tear of the quadriceps of the right knee. He developed anxiety and depression as a result of these events.

[10] He did not plead guilty at the first opportunity in February 2011. He suffered brain contusion in the accident as a result of which he had no recollection of the circumstances. His passenger wrongly suggested that the deceased's vehicle was in the centre of the road prior to the crash. The respondent's legal advisers indicated to the learned trial judge at arraignment that they considered it prudent to obtain an engineer's report before entering a plea. As soon as the report was received the respondent asked to be re-arraigned in April 2011 and entered a plea of guilty. The learned trial judge and the prosecution at the plea and sentence hearing accepted this as a timely plea. During his police interview and in the pre-sentence report he expressed his remorse for what occurred and that was reiterated during the plea on his behalf and at the hearing before us.

## **Discussion**

[11] There has been recent guidance from this court on the appropriate level of sentencing for this offence. In *Attorney General's References 2, 6, 7, and 8 of 2003*, [2003] NICA 28 Carswell LCJ adopted the approach propounded by the Sentencing Advisory Panel and adopted in England & Wales by the Court of Appeal in *Cooksley*. A number of aggravating and mitigating factors which help to identify the nature of the culpability were identified and of relevance to this case are the following aggravating factors:

(b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off

(k) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving

(m) serious injury to one or more victims, in addition to the death

A number of mitigating factors were identified which are relevant to this case.

(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);

(f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving.

[12] The Court of Appeal in England & Wales reassessed the relevant starting points for sentencing identified in *Cooksley* in *R v. Richardson* [2006] EWCA Crim 3186 to take into account the increased maximum sentence of 14 years for causing death by dangerous driving and the Court of Appeal in this jurisdiction in *R v. McCartney* [2007] NICA 41 adopted the revised starting points which are now as follows:

- (a) Cases with no aggravating circumstances, where the starting point should be a short custodial sentence of perhaps 12 months to 2 years 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 years progressing up to four and a half 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 and a half years to 7 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 seven years to 14 years was propounded for this category.

[13] The aggravating and mitigating factors are designed to assist in identifying the culpability of the offender and thereby the appropriate sentencing range. With guidance of this sort it is necessary to remember that sentencing is not a mechanical exercise where the sentence can be determined by numerical assessment of the factors involved. At paragraph 11 of *Attorney General's References 2, 6, 7, and 8 of 2003* [2003] NICA 28 Carswell LCJ stated

that there can be cases of three or more aggravating factors which are not as serious as a case providing a bad example of one factor. That, of course, is expressly recognised in the preceding paragraph at 12(d).

[14] In this case the learned trial judge concluded that the only aggravating factor which assisted with culpability was the injury to the passenger. On that basis he assessed this as being a case at the lower end of the intermediate category. We do not agree. The speed at which this vehicle was being driven on a road of this sort was grossly excessive. The respondent was well aware of the road conditions and the 30 MPH limit. These factors were, of course, elements of the dangerous driving alleged but that should not prevent the court assessing their relevance to the issue of culpability. There was an element of showing off the speed of the vehicle to the passenger. No other explanation for the respondent's conduct on this night was advanced. His conviction was also a factor that had to be taken into account although not particularly weighty in light of its vintage and the lack of information about its circumstances.

[15] In our view the culpability of the offender was at the top of the intermediate category or the bottom of the next category. The injuries sustained by him in the collision were significant and he is entitled to have that taken into account in mitigation. We consider that on a contest a sentence of in or about 4 years imprisonment would have been appropriate. He pleaded guilty in the circumstances set out at paragraph 10 above. In light of the explanations for the delay in taking that course he is entitled to considerable discount for his plea. We consider that a sentence of 3 years imprisonment or thereabouts would have been appropriate in the circumstances.

[16] It follows that we consider that the sentence imposed by the learned trial judge was unduly lenient. We give leave to appeal and in accordance with the usual practice treat the hearing as the hearing of the appeal. Before deciding whether to interfere with the sentence we must take into account the fact that the respondent has been exposed to this appeal against his sentence, sometimes referred to as the double jeopardy principle. In all the circumstances we consider that we should interfere and impose a sentence of 2 years and 3 months imprisonment of which half will be spent in custody and half on licence. His disqualification for 5 years will remain and the period already spent in custody should be counted as part of his custodial term.

[17] As in all cases of causing death or serious injury by dangerous driving the task of the sentencing court is the difficult one of establishing the culpability of the respondent as a driver and establishing the proper sentence in accordance with the guidance which applies in these cases. In this case, as in all such cases, we are very mindful of the fact that, sadly, no sentence imposed by the court can assuage or make good the terrible sense of hurt and

loss suffered by a grieving family which has lost a loved one as a result of the avoidable and culpably irresponsible actions of some one who, albeit unintentionally, caused the death of an entirely innocent young man.