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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

WILLIAM MOORE

Applicant.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

Higgins LJ (giving the judgment of the Court)

APPLICATION FOR LEAVE TO APPEAL

AGAINST CONVICTION

[1] On 2 June 2011 following a trial before his Honour Judge Smyth QC and a jury the applicant was convicted of dangerous driving causing the death of Darren Brown. His application for leave to appeal that conviction was refused by the single judge and he renewed that application before this court.

[2] It is not disputed that the vehicle in which Darren Brown was a rear seat passenger and in which he died was driven dangerously on the road from Carryduff to Saintfield at about 10.30pm on Saturday 25 April 2009. The vehicle was a blue Rover 620 motor car which was not owned by any of the occupants, Darren Brown, David Reed or the applicant. As it was driven at speed from Carryduff towards Saintfield it clipped the rear offside of a Renault Clio which it was overtaking. The Renault was driven by a young woman. The Rover continued past the Renault rotating in an anti-clockwise direction off the road, smashing through a fence on the left hand side, striking a young tree and then rotating in a clockwise direction down a bank and striking another tree ending up on its driver's side with the underside of the car resting against the tree. Exit from the vehicle was thus not possible on the driver's side. The forces involved in these rotation and counter-rotation movements would have been considerable in the extreme. They were a clear indication that prior to the contact with the

Renault Clio the vehicle was travelling at very great speed. Most of the damage was to the off-side.

[3] The only issue at the trial was whether David Reed or the applicant was the driver of the vehicle as it proceeded from Carryduff in the direction of Saintfield. The jury decided it was the applicant. It was submitted that looking at the totality of the evidence this court should be left with a sense of unease or a lurking doubt about the jury's conclusion that the applicant was the driver and thereby the safety of the conviction. At the conclusion of the hearing we announced that the application for leave to appeal was refused and that we would give our reasons at a later time which we now do.

[4] It was submitted by Mr Grant QC who with Mr McAlinden appeared on behalf of the applicant, as they did at the trial, that four matters should lead to the conclusion that the verdict of the jury was unsafe. First that it was a reasonable possibility, based on the evidence of the emergency service personnel who attended the scene, that the applicant was not the driver. This submission centred on the evidence relating to the position of David Reed when the rescue personnel arrived at the Rover car, which was on its driver's side wedged against a tree. This evidence from a number of personnel, which differed in its exact detail, was that David Reed was in the area of the driver's seat with his head trapped or wedged against the headrest and the damaged roof and his feet in the driver's foot-well. The emergency services had to remove the roof of the vehicle in order to extricate David Reed from the vehicle. It was stressed by Mr Grant QC that if the applicant was driving he would have to manoeuvre himself either over or under David Reed in order to exit the vehicle which he was observed doing from the front passenger's window. Secondly that David Reed admitted he was the driver of the vehicle on a number of occasions and signed a statement to that effect and that he only retracted this admission just under two weeks later. Thirdly the manner in which he retracted his admission was far from convincing and raised serious questions about his credibility. Fourthly that the scientific and medical evidence on which the prosecution relied, in particular the blood distribution in the vehicle and the injuries to the applicant, was not conclusive that the applicant was the driver.

[5] Both the applicant and David Reed were taken to the Royal Victoria Hospital in Belfast and were detained in the same ward. Reed made his first admission to a Constable Magill at the hospital. When asked who was driving he replied 'me'. He was released from hospital on 28 April and interviewed at Grosvenor Road Police Station. He made a written statement to a solicitor in Grosvenor Road Police Station admitting that he was the driver and then was interviewed by the police in the presence of that solicitor that same day and made similar verbal admissions. Following his interviews he spoke to the interviewing officer at the custody desk and said he was not driving the car and that he had been told to say that he was. He refused a further interview at that

time but indicated that he would at Downpatrick Police Station where he was being taken with a view to getting home. At that Station he said he wished to go home and that he would return the following day to make a statement. He did not re-attend for interview until 8 May 2009.

[6] David Reed was not called as a witness at the trial by either the prosecution or the defence. The prosecution did not regard him as a witness of truth. The full extent of the admissions made by David Reed that he was the driver of the vehicle and his retractions were placed before the jury. The prosecution case that the applicant was the driver of the Rover was a circumstantial one comprising various observations, findings and forensic evidence, the more important aspects of which were as follows –

i. the evidence of the State Pathologist that the injuries sustained by the applicant which included rib fractures were typical of a driver not wearing a seat belt and who struck the steering wheel;

ii. the injuries to David Reed were typical of a front seat passenger not wearing a seat belt who struck the windscreen;

iii. the applicant was more seriously injured than David Reed which was consistent with him being on the driver's side which suffered most of the impacts and the damage. In addition to the rib fractures the applicant suffered a de-gloving type injury to his right elbow and upper arm, consistent with contact with a hard object to this right hand side.

iv. the applicant suffered a penetrating wound to his right upper chest close to the right armpit probably caused by a piece of wood entering the vehicle through the bottom right hand side of the windscreen when it crashed through fencing, trees and shrubbery. The photographs disclose the presence of wood in the vehicle after the crash, mainly on the driver's side. The applicant was observed shortly after the accident with a piece of wood sticking out of his right chest. He denied that this was so despite the existence of a penetrating wound in the same location;

v. blood from the applicant was found in a crack in the windscreen in a position in front of the driver's seat;

vi. the applicant bled from his injuries particularly from the penetrating wound to his right chest whereas Reed bled little and a quantity of blood, which was not typed, was found on the face of the airbag which deployed during the crash.

vii. an area of projected blood was found in the six o'clock position on the air bag which on analysis matched the applicant;

viii. blood which matched the applicant was found on the driver's sun visor and on the driver's door close to the door handle;

ix. the applicant's trainers with the laces undone were found under the foot controls in the driver's foot-well and when the applicant exited the vehicle he was not wearing footwear. When asked his foot size during interviews with police he stated 'I'm not telling you my shoe size'. He said he took his shoes off when he entered the vehicle and sat on the front passenger seat;

x. the applicant gave evidence during which it was demonstrated that he had lied to the police during interviews and in parts of his evidence. Furthermore he admitted that it was he who had driven the car to Carryduff.

[7] It was submitted by Mr McDowell who with Mr Hunter QC appeared on behalf of prosecution that this evidence when taken together provided a compelling case against the applicant and that it greatly outweighed the admissions made by Reed (which were retracted) and which admissions were inconsistent with the objective scientific evidence and findings. Furthermore and most importantly there was no piece of circumstantial evidence which was inconsistent with the prosecution case that the applicant was the driver of the Rover.

[8] The learned trial judge accurately summed up all the evidence and issues for the jury. The applicant makes no complaint about the conduct of the trial or the learned judge's summing up to the jury. He maintains that the Court should, nevertheless harbour a sense of unease or a 'lurking doubt' about the safety of the conviction. In R v Pollock [2004] NICA 34, this court considered the proper approach to a case in which it is submitted that the court should have such a lurking doubt or sense of unease. At para [32] Kerr LCJ, having analysed a number of cases , stated:

The following principles may be distilled from these materials: -

1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.

2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

3. The court should eschew speculation as to what may have influenced the jury to its verdict.

4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.

Later at para [45] he added:–

> "the circumstances in which a jury verdict should be set aside where there has been no challenge to the manner in which the trial was conducted must be wholly exceptional."

Thus the principal issue in this case is whether this case is one of those very exceptional cases in which, despite the lack of criticism of the conduct of the trial or the trial judge's directions to the jury, this court retains a sense of unease about the safety of the conviction.

[9] We carefully considered all the evidence in the trial and the submissions of counsel on behalf of the applicant but having done so entertained no lurking doubt or sense of unease about the safety of the conviction. In the absence of criticism of the conduct of the trial or the judge's summing up we did not consider that this was the type of exceptional case to which Kerr LCJ was referring.

APPLICATION FOR LEAVE TO APPEAL SENTENCE

[10] The applicant was sentenced to a term of imprisonment of ten years and six months. Prior to sentencing the learned trial judge had before him a Pre-Sentence Report in respect of the applicant, a Victim Impact Report in respect of the family of the deceased and a medical report related to the injuries suffered by the applicant. He referred to the applicant's attempt to put the blame on someone else and commented that the evidence that the applicant was driving was overwhelming. He noted the effect of the death of the deceased on his mother. He then referred to the applicant's condition at the time of the incident. By means of a back- calculation the evidence was that the applicant's alcohol level was approximately 182 mgs per ml of blood and would have been grossly impaired through alcohol at the time of the incident. This conclusion was disputed. The judge considered this was relevant to the manner in which the vehicle was driven and stated –

> "I regard this case as coming into the most serious category in that your driving and its manner, no

> doubt affected by your condition was such that you deliberately presented a danger to anyone driving on the Saintfield to Belfast Road. Miss Massey (the driver of the Renault Clio) was very lucky. Your car came up on her very suddenly, there was minimal contact, your car veered across the road, you over-corrected and went to the nearside of the embankment and went off it causing Mr Brown's death."

[11] The judge noted the applicant's extensive criminal record which included several motoring offences. The latter included four convictions for driving without a driving licence, five convictions for using a motor vehicle on a road without insurance and one offence of driving whilst disqualified. In addition the present offence was committed whilst he was on bail in respect of other matters and he was convicted of driving while unfit through alcohol or drugs eleven months after the present offence.

[12] It was submitted by Mr Grant QC that the learned trial judge erred in placing this case in the 'most serious category' that is in Level 1 in the Guidelines issued by the Sentencing Guidelines Council in England and Wales in respect of causing death by dangerous driving. It was further submitted that the conclusion of the trial judge that the applicant deliberately presented a danger to other road users was not consistent with the finding of the Forensic Investigator that there was only light contact between the Rover and the Clio. In addition it was submitted that the evidence of alcohol consumption derived from the back calculation was insufficient to permit a finding of gross impairment. None of the aggravating factors either singly or in combination with the other circumstances justified a conclusion that this offence fell within the most serious category.

[13] It was submitted by Mr D Hunter QC that the learned trial judge was correct in placing this case in the most serious category. He identified the following aggravating factors which justified this categorisation –

i. the consumption of alcohol;

ii. greatly excessive speed;

iii. a prolonged, persistent and deliberate course of very bad driving;

iv. aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking);

v. 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;

vi. previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving;

vii. 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;

viii. offence committed while the offender was on bail.

[14] This court has laid down guidelines for the imposition of sentences for the offence of causing death by dangerous driving in Attorney General's Reference Nos 2, 6, 7 and 8 of 2003 [2003] NICA 28. Subsequently the maximum sentence for the offence was increased from 10 to 14 years and in R v McCartney [2007] NICA 41 the guidelines were amended to reflect that increase. These guidelines largely mirrored the guidance issued in England and Wales in R v Cooksley [2004] Cr App R(S) 1 and R v Richardson and Others [2006] EWCA 3168 respectively, which had adopted the approach commended by the Sentencing Advisory Panel in England and Wales. In Attorney General's Reference Nos 2, 6, 7 and 8 of 2003 Carswell LCJ stated –

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

[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."

[15] These guidelines informed the basis for sentencing decisions in Northern Ireland until R v McCartney when this Court decided that the revision to the starting points identified in R v Cooksley and introduced by R v Richardson, should be applied in this jurisdiction. The revision undertaken in R v Richardson was set out in paragraph 19 of that judgment –

> "The relevant starting points identified in *Cooksley* should be reassessed as follows: -
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> (i) No aggravating circumstances – twelve months to two years' imprisonment;
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> (ii) Intermediate culpability - two to four and a half years' imprisonment;
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> (iii) Higher culpability – four and a half to seven years' imprisonment;
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> (iv) Most serious culpability – seven to fourteen years' imprisonment."

[16] In 2008 the Sentencing Guidelines Council issued its Guidelines on the offences of causing death by driving which was dangerous, careless, inconsiderate or while the driver was unlicensed, disqualified or uninsured. In R v Doole [2010] NICA 11 this court dealt with an appeal against a sentence of twelve months imprisonment imposed for the offence of causing death by careless driving. In the course of that judgment the court re-emphasised the usefulness of guidelines and their limitations.

> "[6] A recurring theme in the caselaw of this Court is that guideline decisions are only what they purport to be, that is to say guidance to sentencers. They are not prescriptive. They are intended to provide a proper focus for sentencers but not a straight jacket. Every case must be decided justly in its own factual context taking account of the relevant considerations

> and evidence. Guidance and guidelines provide useful assistance to sentencers in the proper identification of those considerations. Excessively prescriptive guidelines, whether imposed by the Court or by any statutory body, would frustrate the sentencer's duty to decide the case before him or her justly on the merits. The duty of the court under art 6 of the ECHR is to ensure a fair trial by an independent and impartial duty. Excessive prescription has the potential to undermine judicial independence and thus infringe art 6.
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> [7] In determining proper guidelines or guidance this Court takes account of but is not bound by the recommendations of the Sentencing Guidelines Council of England and Wales. Their Guidelines usefully identify relevant considerations in determining the seriousness of offences, aggravating and mitigating circumstances and factors relevant to personal mitigation. They usually put forward the starting point for sentences in carrying out the sentencing exercise. On occasion this Court recommends the adoption of a similar approach though in other cases it may recommend a different approach because of special factors in this jurisdiction.
>
> [8] The English Council has produced Guidelines in relation to offences relating to causing death by driving. They usefully identify the issues relating to determining the seriousness of the relevant offence, the aggravating and mitigating circumstances and relevant factors that relate to personal mitigation. In particular in the present context it contains a section which deals with causing death by careless driving. We consider that the English Guidelines represent a fair and accurate assessment of the relevant factors which a sentencer in this jurisdiction should take into account in reaching his or her decision."

[17] The introduction to the Guidelines makes clear that the starting point will be the culpability of the offender. Therefore the first task involves an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created. Where intoxication is a factor the degree of such will be a relevant consideration. The Guideline draws a distinction between the factors which

inform the quality of the driving which are referred to as the 'determinants of seriousness' and those which aggravate the offence. The Guidelines identify five determinants of seriousness. These are –

i. the offender's awareness of risk;
ii. the effect of the consumption of alcohol or drugs;
iii. whether the offender was driving at an inappropriate speed;
iv. whether the offender behaved in a seriously culpable manner and
v. the identity of the victim.

[18] The Guidelines identify three Levels of Seriousness. Level One is driving that involves a deliberate decision to ignore or a flagrant disregard for the rules of the road and an apparent disregard for the great danger being caused to others. Determinants of seriousness that will place a case at this level would include i and ii above and/or a group of determinants which would place a case at Level Two. The presence of i and ii above, particularly if accompanied by aggravating factors, will move the offence towards the top of the sentencing range which for Level One is a starting point of eight years and a range of seven to fourteen years. Key aggravating factors are identified. The relevant ones for the purposes of this appeal are previous convictions for motoring offences, injuries to other persons and falsely claiming that one of others present in the car was responsible. Relevant mitigating factors in this case might be the injuries sustained by the applicant and if the deceased was a close friend though these factors should have less effect where the culpability of the offender is high.

[19] The approach to the scene of the incident travelling from Carryduff is relatively straight for a distance. The driver of the Clio said that the Rover approached and overtook her extremely fast. The applicant had more than the width of the other carriageway to overtake the Clio yet he was unable to do so without making contact with the rear offside of the Clio which was on its proper side of the road. It is a reasonable inference that the applicant was unable to control the Rover due to his level of intoxication and probably the speed at which he was travelling as well. He has a criminal record which shows complete disregard for the basic rules of driving – no licence, no insurance and driving whilst disqualified. In addition to the death of one passenger another was injured and the applicant sought to blame the injured passenger. The injuries to the applicant and the fact the deceased was a passenger in the vehicle are of little weight in the circumstances of this case. The violent movements of the Rover after impact with the Clio and the damage it caused in its path after it left the road confirm the very great speed at which it was travelling. Combined with the degree of intoxication it is clear that other road users were placed in great peril. All these factors point clearly to this being an offence that fell within Level One and within the upper half of the appropriate range for that Level. Having given careful consideration to all these factors and while the sentence imposed by the learned trial judge was at the upper end of the appropriate range, it cannot be

said to be manifestly excessive for this offence. The appeal against sentence is therefore dismissed.