

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

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THE QUEEN

-v-

WAYNE JOHNSTON

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**MORGAN J**

[1] On the evening of 19th December 2003 Michael David Shaw was returning from the shops on the Falls Road with his children Darren Michael Shaw born on 27 October 1990, Christopher David Shaw born on 22 December 1991 and Clare Shaw. They were accompanied by Clare's friend Emma Lynch born on 24<sup>th</sup> February 1995. At that time the defendant was driving his car in the same direction along the Springfield Road. As he did so his vehicle swerved across the road onto its wrong side, mounted the footpath, struck Mr Shaw and three of the children, struck a set of traffic lights beyond the children pulling the lights from the ground and swerved across the Springfield Road again colliding with a parked vehicle. As a result of this collision Christopher David Shaw and Emma Lynch received injuries as a result of which they died. Darren Michael Shaw received severe personal injuries as a result of which he was detained in hospital until 21 January 2004. Having heard the witnesses in this case I am satisfied that all those who came upon the scene witnessed a scale of devastation and destruction which they will for ever retain in their memories. The extent of loss suffered by the families is incalculable and there are no words or indeed actions of mine which can ever repair the hurt suffered by them.

[2] The jury have convicted the defendant on two counts of causing death by dangerous driving and one count of causing grievous bodily injury by dangerous driving. The defendant admitted both at interview and in the course of his evidence that on 2 occasions prior to this accident he had suffered loss of consciousness as a result of choking fits brought on by smoking cigarettes. I am satisfied beyond reasonable doubt that I should approach the sentencing of the defendant on the basis that he suffered a

choking fit just prior to the collision which impaired his level of consciousness and caused the vehicle to go out of control.

[3] On the evening in question he lit up a cigarette at the junction of the Falls Road and Springfield Road. He described how he suffered a choking fit sometime thereafter as a result of which he lost control of the vehicle. I am satisfied beyond reasonable doubt on the evidence which was before the jury that there were at least two movements of the steering mechanism of the vehicle in the course of the collision. The first of these caused the motor vehicle to swerve to its right as a result of which it mounted the footpath and the second caused the vehicle to swerve to its left as a result of which it collided with the parked vehicle. In respect of each movement it is not possible to be satisfied about the level of consciousness of the defendant as a result of his choking fit.

[4] The approach to sentencing in cases of this type was recently considered by the Northern Ireland Court of Appeal in *R v David Anthony McElhone* [2004] NICA 46.

*“Sentencing guidelines*

[17] In *Re Attorney General for Northern Ireland's Reference* (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 28 this court gave guidance as to the level of sentencing in cases of dangerous driving causing death or grievous bodily harm. The court recognised the tension between, on the one hand, the devastating consequences of such offences and, on the other, the relatively low level of culpability in many of such cases. This tension gives rise to particular difficulty in selecting the appropriate sentence. The synthesis adopted by the court was that the outcome of the offence, including the number of people killed, was relevant to the sentence, but that the primary consideration had always to be the culpability of the offender. Another factor of critical importance acknowledged by the court was that the incidence of death and injury caused by road traffic accidents had been the subject of increasing public and Parliamentary concern over a number of years. This had been reflected in the increase in maximum penalties for these offences. The courts were bound to respond appropriately to these developments.

[18] This court in *Attorney General for Northern Ireland's Reference* considered the decision of the Court

of Appeal in England and Wales in *R v Cooksley, R v Stride, R v Cook; A-Gs Reference (No 152 of 2002)* [2003] EWCA Crim 996, which followed advice given by the sentencing advisory panel. After rehearsing the various arguments considered by the panel the court concluded that it should follow the guidance provided in *Cooksley*. The following paragraphs taken from the court's judgment set out its conclusions:-

"[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 of 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 para (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 *R v Cooksley* [2003] 3 All ER 40 at [32] 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, [1984] 1 WLR 1047. 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.""

[5] In this case I am satisfied that there were 2 aggravating factors namely:

(a) The defendant drove his motor vehicle when he knowingly suffered from a medical condition which gave rise to a significant risk that his driving would be impaired if he had a cigarette. I am satisfied beyond reasonable doubt on the evidence led by the prosecution that because of his two previous episodes of unconsciousness in the months leading up to this accident the defendant was aware that the consumption of a cigarette would give rise to the risk of unconsciousness and loss of control. Both of those incidents occurred when he was smoking at home. Each of them raised a risk of repetition if he smoked when driving a car. His culpability lies in failing to take any steps to deal with that risk.

(b) In this case he was convicted of causing the death of two children and serious injury to a third.

(c) I do not consider that his admission in respect of a driving offence some 25 years ago and about which there are apparently no records could properly be considered an aggravating factor and Mr McCollum QC for the Crown did not press me to so find.

[6] In mitigation the defendant can undoubtedly point to the fact that he has expressed his remorse on various locations. The value of that expression of remorse must be tempered, however, by the fact that he persisted in his denial of his guilt until the bitter end. He is entitled, however, to credit for disclosing his previous episodes of black-out as well as his previous conviction. I have also taken into account the fact that he suffered a major depressive episode subsequent to this incident but that does not appear to have persisted. Apart from the episode of bad driving some 25 years ago he has a clear record. I also recognise that he has been the subject of threats as a result of this matter. But in my view the greatest mitigating factor in cases of this type is an early plea of guilty and that is not present in this case.

[7] I have taken into account the submissions of Mr Dermot Fee QC on the defendant's behalf. In particular I have had regard to a number of Court of Appeal decisions in England and Wales that he has drawn to my attention. A number of those decisions pre-date the decision in Cooksley and I have found those decisions of limited assistance. The decision in Faulkner [2004] EWCA Crim 866 is related to its specific facts and of no assistance in this case. The decisions in Emery [2003] EWCA Crim 3771 and Teesdale [2004] EWCA Crim 1530 emphasise the discount that is available for an early plea and are to be contrasted with this case.

[8] The maximum sentence for this offence at the time that it was committed was 10 years. There is one aggravating factor relating to his

driving being his knowledge of the risk of black-out if he had a cigarette. That would suggest that this is a case of intermediate culpability having regard to the approach approved by the Court of Appeal. It is of importance, however, to note that the circumstances giving rise to intermediate culpability are wide and need not even include any factor relating to a highly culpable standard of driving at the time. In this case there is both a matter relating to culpable driving and the need to give proper consideration to the death of 2 children and the injury to a third.

[9] Taking into account the aggravating and mitigating factors I consider that a sentence of 5 years imprisonment is appropriate concurrent on each count. In light of the comments in the pre-sentence report I do not consider that he would benefit from probation and accordingly do not make a custody/probation order. He will be disqualified from driving on each count for a period of 10 years concurrent and I would request the prosecution to provide a copy of this judgment to the driving licence authorities so that his medical fitness should be investigated in the event that he should ever again apply for a licence.

[10] Finally this case should be a salutary lesson to all of those who might be tempted to drive while suffering from some impairment that might imperil their control. In cases of doubt members of the public should consult their general practitioners. Those who take a chance may well end up facing lengthy spells of imprisonment. Even worse they may forever have to live with the consequences of their actions.