Neutral Citation No. [2014] NICA 8 | *Ref:* **MOR9149**

Judgment: approved by the Court for handing down | *Delivered:* **31/01/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICIA McGRADE

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the Court)

[1] This is an application for leave to appeal against a determinate custodial sentence of three years comprising 18 months custody and 18 months licence imposed for the offence of causing death by driving a car without due care and attention having consumed alcohol, contrary to Article 14(1)(b) of the Road Traffic (Northern Ireland) Order 1995. Mr Mulholland QC and Mr Turkington appeared on behalf of the applicant and Mr Reid for the PPS. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] On 21 June 2012 the applicant was committed for trial on two counts, causing death by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 and causing death by driving a vehicle after consuming alcohol in excess of the prescribed limit, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995. At her arraignment the applicant pleaded not guilty. On the date of the trial, 4 December 2012, an alternative count of causing the death of Kevan Hughes by driving a motor vehicle on the Dooish Road, Dromore without due care and attention when she had consumed so much alcohol that the proportion on her breath exceeded the prescribed limit, contrary to Article 14(1)(b) of the Road Traffic (Northern Ireland) Order 1995 was added. The applicant pleaded guilty to this charge. This was accepted on behalf of the PPS and the remaining counts on the indictment were not proceeded with. The applicant had from an early stage accepted

that she was the driver of the vehicle and the learned trial judge considered that she had pleaded guilty at the first opportunity.

[3] The plea was entered on the basis of an agreed statement of facts. On the afternoon of 17 October 2011 the applicant was driving her Vauxhall Vectra car in the general direction of Drumquin. The deceased's Toyota Yaris car was travelling in the opposite direction. As the applicant negotiated a right-hand bend in the carriageway the nearside of the car moved off the Drumquin bound lane and onto the grass covered verge. The applicant steered her car to the right so that the car moved back onto the Drumquin bound lane and across the lane so that the front offside of her car moved on to the opposite lane and into the path of the Toyota Yaris car as a result of which the impact occurred. There was no defect in either vehicle prior to the collision and neither car was travelling at a fast speed on impact.

[4] The applicant was noted at the scene to have consumed alcohol and a breath test showed 89 mg of alcohol in 100 ml of breath. The legal limit is 35 mg of alcohol. The deceased was taken to hospital and died the following morning as result of multiple injuries. In the course of her interviews the applicant stated that she had been in a pub in Dromore and drunk two bottles of beer. She was with another lady whom she said was drunk. She decided to give this woman a lift. She said she would not normally drink and drive. Her passenger was being a nuisance and she said that she drove slowly due to this and the wet weather. She said that the passenger made a grab for the wheel and she managed to get her off but on a second occasion she did this again as she arrived at the bend and there was a collision. The Crown could not contradict this account to the required standard if it was advanced but noted that the disruptive passenger had acted in this way once before and the defendant had not broken her journey. Both prosecution and defence submitted that in those circumstances this appeared to be a lower culpability case.

[5] The applicant has no material criminal record. She is a 39-year-old married mother of four girls whose ages range between 21 years and 14 years. She left school without any qualifications but returned to full-time education in her 30s as result of which she obtained employment as a classroom assistant. A number of references in relation to employment and her positive standing in the community were submitted. She expressed remorse for her actions leading to the death of the deceased. She subsequently obtained medical assistance in relation to anxiety and depression and has been attending for individual counselling.

[6] The deceased, Kevan Hughes, was a 33-year-old single man. Statements from his parents and siblings convey their sense of loss as a result of this unnecessary death. The deceased's sister came across the scene of the accident and witnessed the efforts of the emergency services to release her brother from his vehicle. The consequences of this accident will continue to adversely impact upon all of their lives.

The trial judge's decision

[7] The learned trial judge set out the agreed factual basis of the plea. He recorded that in her first interview the applicant stated that she had been drinking earlier that day and had consumed both beer and vodka. She apparently related this to the fact that it was the anniversary of her mother's death. He noted the applicant's account that her passenger was highly intoxicated and behaving in a grossly erratic manner. She tried to grab the wheel of the car on two occasions, the latter of which led to the vehicle mounting the nearside grass verge before the collision. He concluded that the applicant's account in a written statement that she had consumed two bottles of beer was wholly implausible having regard to her reading which was 2½ times the legal limit.

[8] He noted the victim impact statements and acknowledged that any sentence passed on the offender could not cure their anguish. He correctly concluded that the offender was not dangerous for the purposes of the Criminal Justice (Northern Ireland) Order 2008. He noted that the maximum sentence for this offence was 14 years which was the same as that for causing death by dangerous driving. He considered the Northern Ireland cases in relation to causing death by dangerous driving and the decision of this court in R v Doole [2010] NICA 11 dealing with the offence of causing death by careless driving. He noted in particular the assistance that could be given by the Sentencing Guidelines Council of England and Wales which was discussed in the latter case. He concluded that the very high alcohol reading required a sentence commensurate with the level of culpability that such a reading connoted.

Consideration

[9] It is contended on behalf of the applicant that the determinate custodial sentence of three years was manifestly excessive and wrong in principle. The argument that the sentence was wrong in principle was based, *inter alia*, on the proposition that the learned trial judge departed from the agreed factual basis for the plea by concluding that the applicant's account as to her alcohol consumption on the day of the accident was wholly inadequate and entirely self-serving.

[10] The Court of Appeal in England and Wales recently examined the approach that the court should take in relation to a written basis of plea in R v Cairns and others [2013] EWCA Crim 467. The proper approach of the prosecution when considering the agreement of the basis of a plea was discussed in R v Tolera [1999] 1 Cr App R 29. That guidance has been published as a guideline by the Attorney General in England and Wales. A Newton hearing is normally required where there is a dispute between the prosecution and defence but the court in Cairns identified three exceptions: –

> "(a) if the difference between the two versions of fact is immaterial to sentence (in which event the defendant's version must be adopted: R v Hall (1984) 6 Cr App R (S) 321 ;
>
> (b) where the defence version can be described as 'manifestly false' or 'wholly implausible': R v Hawkins (1985) Cr App R (S) 351 ; or
>
> (c) where the matters put forward by the defendant do not contradict the prosecution case but constitute extraneous mitigation where the court is not bound to accept the truth of the matters put forward whether or not they are challenged by the prosecution: R v Broderick (1994) 15 Cr App R (S) 476."

[11] The judge is, of course, entitled to reject the version of the facts agreed by the parties. If he does so the principles upon which a Newton hearing will be required are the same. In this case the alcohol reading recorded after the accident was 2½ times the legal limit. We consider that the judge was perfectly entitled to regard as manifestly false or wholly implausible the suggestion that this reading was the consequence of the consumption of two bottles of beer. This was not a case which required a Newton hearing.

[12] The submission in the prosecution opening that this was a lower culpability case reflected the distinction between careless and dangerous driving. The submission was not, however, concerned with the factual basis of the plea and it was clearly open to the learned trial judge to form his view on the basis of the facts as to the culpability of the applicant. We do not consider, therefore, that the approach of the learned trial judge was wrong in principle insofar as he rejected the submission of both parties that this was a lower culpability case.

[13] The next issue concerned the weight which the learned trial judge placed upon the extent to which the applicant was over the legal limit for driving. This court considered the material sentencing factors in respect of this offence in R v Mullan [1998] NIJB 93. That was a case in which the offender knocked down a pedestrian late at night on a country road and left the scene. He was detected shortly afterwards in a distressed state at the home of a friend and was found to have a reading approximately twice the legal limit. In considering the statutory purpose behind the increase in the maximum sentence MacDermott LJ adopted the words of Lord Taylor CJ in A-G's Ref (Nos 14 and 24 of 1993) (1993) 15 Cr App R (S) 640.

> "These reforms show an intention by Parliament to strengthen the criminal law, to reduce death on the

> roads by increasing the punishment available to the court, and by specifically targeting those who cause death whilst driving with excess alcohol. The five-year maximum sentence for causing death by dangerous driving has been doubled. In tandem with that, causing death by the less serious form of culpable driving, characterised as careless, carries the same maximum sentence if coupled with driving whilst unfit through drink or over the limit. The latter offences do not require proof of a causal connection between the drink and the death. Thus, under section 3A who ever drives with excess alcohol does so at his or her peril, and even if the driving is merely careless but death results, the courts' powers to punish are the same as for causing death by dangerous driving."

[14] He also adopted the approach taken by Lord Taylor to the relevant sentencing factors.

> "The offence under section 3A, although requiring proof of only careless driving rather than dangerous driving, also has built into it the aggravating feature which was the first on the list in Boswell, namely consumption of alcohol or drugs. Thus, where a driver is over the limit and kills someone as a result of his careless driving, a prison sentence will ordinarily be appropriate. The length of the sentence will of course depend upon the aggravating and mitigating circumstances in the particular case, but especially on the extent of the carelessness and the amount the defendant is over the limit. In an exceptional case, if the alcohol level at the time of the offence is just over the border line, the carelessness is momentary, and there is strong mitigation, a non-custodial sentence may be possible. But in other cases a prison sentence is required to punish the offender, to deter others from drinking and driving, and to reflect the public's abhorrence of deaths being caused by drivers with excess alcohol."

[15] He concluded that in respect of this offence the sentencer will have regard to the extent of the carelessness and the amount the defendant was over the limit together with all aggravating or mitigating circumstances. In our view that was the approach adopted by the learned trial judge and we consider that there is no criticism as a matter of principle which can be made of it.

[16] In A-G's Reference (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 28 this court adopted the categorisation of circumstances in relation to culpability set out in R v Cooksley [2003] EWCA Crim 996. The range of sentences was then amended in R v McCartney [2007] NICA 41 to take account of the increase in the statutory maximum. It was submitted on behalf of the applicant that by reason of the consumption of alcohol she could not fall into the lowest category which described no aggravating circumstances but that the sentencing range lay somewhere within the intermediate category. In light of the fact that this was careless rather than dangerous driving she ought not to lie towards the top of that category.

[17] We do not accept that the categories can be applied in such a mechanistic way. In R v Richardson [2006] EWCA Crim 3186 the court had to deal with the approach that should be taken in respect of the equivalent offence in England and Wales. It was noted that as the consumption of alcohol rose so did the relative culpability. By the time that consumption was at about double the legal limit the case would fall within the intermediate category. At higher levels than this there was usually a correlation between the amount of alcohol consumed and significantly reduced standards of driving. At those sorts of levels the result would be dangerous driving of a kind which would take the case into the categories of higher culpability or beyond. That is an approach which we consider is appropriate in this jurisdiction also and consequently in a case of this kind the judge will be entitled on the basis of the level of consumption to use a starting point beyond the intermediate category, even in cases where there is no clear evidence of higher culpability in relation to driving. Of course if there is such evidence and a lower alcohol reading, the case may for that reason attract a sentence beyond the intermediate range.

[18] In July 2008 the Sentencing Guidelines Council published guidance in relation to causing death by driving. That guidance reflected the fact that the larger the consumption the higher the starting point. It also reflected the fact that the starting point should be influenced by the culpability of the driving. That is consistent with the approach taken in this jurisdiction. Depending on the culpability of the driving the suggested starting point lies between 6 and 8 years. In this jurisdiction we have taken the view that there should be a reasonable measure of discretion available to the judge to find a sentence appropriate to the particular case. We do not consider, therefore, that sentencers should inevitably apply these guidelines. We accept, however, that judges can take them into account and there is no criticism to be made of the learned trial judge for doing so in this case.

[19] The maximum sentence for causing death by careless driving is five years. The maximum sentence for causing death by careless driving having consumed alcohol is 14 years. The very considerable difference in those maximum sentences reflects the legislative policy of severely punishing those whose bad driving has caused death and who have chosen to drive a motor vehicle having consumed excessive amounts of alcohol. The extent to which this applicant was over the limit

required a stiff sentence. In any event to drive on with a disruptive drunken passenger who had already attempted to grab the steering wheel was to invite disaster. This was a bad piece of driving.

[20] Secondly, the legislature did not require any direct connection between the consumption of alcohol and the bad driving. It is clear that the statutory purpose was to deter those who might drive with excess alcohol. Where a sentence has a clear deterrent purpose personal circumstances will not weigh as heavily as they might in other circumstances. The applicant was entitled to credit for her plea, her remorse and previous good character. We do not consider, however, that in the circumstances a determinate custodial sentence of three years was other than appropriate. It was suggested that we might extend the licence period and reduce the custodial period. As we indicated in DPP's Reference No 2 of 2013 [2013] NICA 28 such a course by way of mitigation would not be in accordance with the statutory requirements of the Criminal Justice (Northern Ireland) Order 2008.

Conclusion

[21] At the conclusion of the hearing we refused leave to appeal for the reasons set out above.