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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

TRISTAN BINGHAM

Before: Carswell LCJ and Coghlin J

COGHLIN J

[1] This is an application for leave to appeal against a sentence imposed by His Honour Judge Foote QC at Enniskillen Crown Court on 30 October 2002. Following a trial by jury, the applicant was convicted by a majority verdict of 10 to 2 of two counts of causing death by dangerous driving contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995. The judge imposed the same sentence upon each count to run concurrently, namely, a custody probation order, the components of which were five years in custody to be followed by two years on probation. The applicant was also disqualified from driving for a period of seven years on both counts. On 16 January 2003 leave to appeal against his sentence was refused by the single judge, Gillen J.

[2] On the evening of Saturday 20 May 2000, when he was approximately 17 years and 4 months old, the applicant was driving his Vauxhall Vectra motor car in the vicinity of Augher, Clogher and Fivemiletown, accompanied by his friends William McFarland (then aged 15), Elisa Brunt (then aged 14) and Samantha Clarke (then aged 16). At that time the applicant was a Restricted driver, having only held a full driving licence for a matter of weeks. At approximately 10.30 pm the applicant collected Felicity Clarke (aged approximately 15), the sister of Samantha Clarke, and drove her to meet her boyfriend Neill Loughlin (aged 20). The meeting took place at a local car park where Felicity transferred to Neill Loughlin's car, a Vauxhall Corsa. Both vehicles then left the car park and appear to have driven about the local area

for some time until approximately 12.20 am on 21 May 2000 when the applicant's vehicle, which was travelling from Ballygawley in the direction of Fivemiletown, met Mr Loughlin's car driving in the opposite direction.

[3] Mr Loughlin flashed his lights at the applicant's vehicle and it seems that, shortly afterwards, Mr Loughlin turned and set off in pursuit of the applicant's car. At approximately 12.30 am, Mr Loughlin was seen to overtake the applicant's vehicle, whereupon the applicant increased his speed in an attempt to keep up with Mr Loughlin with the result that both cars proceeded in the same direction towards Fivemiletown at high speed a short distance apart. It appears that Mr Loughlin attempted to perform a "handbrake turn" possibly at a moment when the applicant was trying to overtake, and, as a result, a severe collision took place as a consequence of which Mr Loughlin and his passenger were both killed.

[4] In a carefully prepared and well marshalled submission Mr Philip Mooney QC, with whom Mr Michael Campbell appeared on behalf of the applicant, advanced a number of arguments in support of the application. These were:

(*i*) The applicant had no previous criminal record, he came from a respectable family and had clearly impressed the Governor of the Young Offenders Centre who provided a positive report of the applicant's progress to date for the assistance of the court.

(*ii*) There was no question of the applicant having consumed any alcohol on the evening of the accident.

(*iii*) The applicant's driving was not the only nor even the main cause of the collision.

(*iv*) In the circumstances, the sentence was manifestly excessive and wrong in principle in that it was substantially outside the bracket normally applicable for such a case.

[5] In the course of his submissions Mr Mooney QC emphasised the danger of relying upon estimations of speed put forward by Samantha Clarke, the only witness from the vehicles to give evidence apart from the applicant, or inferred from the circumstances. There is no doubt that the trial judge was alive to such a risk and he quite properly directed the jury to proceed with care in relation to this aspect of the case. It is also clear, both from his charge to the jury and his sentencing remarks, that the trial judge considered that the deceased Loughlin was more to blame for the ultimate collision than was the applicant. On the other hand, the expert from the forensic science laboratory, George Alexander Johnston, who was called on behalf of the Crown, took the view that the extent of the damage to the

vehicles and the distance travelled by each vehicle after the collision was not consistent with a speed of 45 mph, which was the applicant's estimate, but indicated an impact speed "considerably in excess of this figure". In addition, it is also clear from the terms of the judge's charge to the jury that the jury were satisfied beyond reasonable doubt that, at the material time, the applicant had been racing the deceased Loughlin.

[6] In the course of his submission Mr Mooney QC drew the attention of the court to a number of relevant cases set out in part B1 of Current Sentence Practice and Volume 2 Section 7 of the "Sentencing Guidelines Cases" published by the Judicial Studies Board for Northern Ireland, for the purpose of locating this case within the appropriate range of sentences. Perhaps the most recent relevant decision in this field is that of the Court of Appeal of England and Wales in R v Cooksley, Stride and Cooke – Attorney General's Reference (No. 152 of 2002) [2003] All England Reports (D) 58. In this case, following the advice of the Sentencing Advisory Panel, the Court of Appeal issued up to date guidelines in respect of the offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs. Lord Woolf CJ, who gave the judgment of the court, made a number of general points about sentencing in relation to the offence of causing death by dangerous driving, one of which was:

> "A fact that the courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence."

[7] The Lord Chief Justice then went on to adopt the aggravating and mitigating factors set out by the Sentencing Advisory Panel in their advice but, in so doing, he was careful to point out that the significance of these factors can differ and that there can be cases with three or more aggravating factors which are not as serious as a case which contains a bad example of one such factor. After considering the detailed advice of the Advisory Panel in

relation to sentence the court went on to set out four starting points which were:

(*a*) No aggravating circumstances – 12 to 18 months.

(*b*) Intermediate culpability – 2 to 3 years.

(*c*) Higher culpability – 4 or 5 years.

(*d*) Most serious culpability – 6 years and over.

In relation to "intermediate culpability" Lord Woolf qualified the Panel's advice to the extent that he said that the court could foresee circumstances, particularly where there was more than one of the aggravating factors present, that five years could be appropriate and, as an example, he referred to cases where there was more than one victim.

[8] In some respects, one of the cases that was the subject of the Attorney General's reference in R v Cooksley & Others displayed features not unlike the applicant's case in that in R v Cooke Lord Woolf noted that:

> "Two young people were killed and others suffered severe injuries as a result of this appellant's deliberate decision to drive at a dangerous speed in order to impress his fellow passengers."

[9] It must be said at once that R v Cooke also had two significant features which were not present in the applicant's case: the appellant had entered a plea of guilty but had a bad driving record and was actually disqualified at the time of the offences. In that case the Court of Appeal reduced a sentence of 7 years detention in a Young Offenders Institution to one of 6 years.

[10] There is no doubt that the views of the Sentencing Advisory Panel together with guideline decisions published by the Court of Appeal provide valuable assistance in the search for consistency of sentencing in relation to this and many other types of offence. However, when faced with the practical application of such guidance we believe that it does no harm to bear in mind the words of Lord Lane CJ in R v Nicholas (The Times 23 April 1986) who said:

> "I say again – we have said it frequently in the past – guidelines are guidelines and they are not meant to be measuring rods to be applied rigidly to every case. They are there for assistance only and not to be used as rulers never to be departed from."

In this jurisdiction we find it hard to improve upon the words of MacDermott LJ in R v Sloan [1998] NI 58, a case of dangerous driving causing grievous bodily harm, when he said, at page 65:

> "It is not possible (it need hardly be said) to say in advance what the proper sentence should be in any particular case as the appropriate sentence will depend upon the particular features of each individual case and due regard must be paid not only to the circumstances of the offence but to the circumstances of the offender. Thus it is unadvisable, indeed impossible, to seek to formulate guidelines expressed in terms of years. What must be sought is a fair and appropriate sentence, a consistent judicial approach to sentencing in this field and the proper discharge and the duty of the courts to reflect the concern of Parliament and also, which is sometimes forgotten the concern of the public about these matters."

[11] The mitigating features of this case, so clearly articulated in Mr Mooney QC's submissions, confirm that there is much that is positive to be said about this applicant and his background. On the other hand his case includes significant aggravating factors, namely, two deaths and racing with another vehicle at a time when other young people were present in both vehicles in circumstances in which there was always a high risk that multiple deaths and/or injuries might be the result of any accident. Death and injury on the roads continue to be a very serious problem in Northern Ireland and, in both jurisdictions, the Court of Appeal has emphasised the need for sentences to reflect deterrence and retribution. Furthermore the Home Office has recently announced plans to increase the maximum sentence for this offence to 14 years and a similar proposal is currently being considered by the Northern Ireland Office. We accept that this was a stiff sentence but we do not consider it to have been either manifestly excessive or wrong in principle. We regard an equivalent sentence of seven years as justified. The judge decided to impose a custody probation order, under the provisions of Article 24 of the Criminal Justice (NI) Order 1996. We should ourselves have had considerable hesitation about making such an order, for there was very little in the pre-sentence report which pointed to the need for support in order to keep the applicant out of trouble after his release and prevent his re-offending, the prime object of such orders. We are not prepared, however, to upset the exercise of the judge's discretion.

[12] Accordingly, the appeal will be dismissed.