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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 1 of 2009)
GARETH McCAUGHAN

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] The offender, Gareth McCaughan is aged 21. His date of birth is 30 November 1987. On 26 June 2008, at Craigavon Crown Court (sitting at Lisburn), having pleaded guilty to the offence of causing death by dangerous driving, he was sentenced by His Honour Judge Markey QC to a custody probation order, comprising eighteen months' detention in the Young Offenders' Centre and twelve months' probation.

[2] The Attorney General has sought leave to refer the sentence to this court under section 36 of the Criminal Justice Act 1988, on the ground that it was unduly lenient. We gave leave and the application has proceeded on 9 January 2009.

Factual background

[3] On the evening of 12 June 2006, Mr McCaughan and three friends were travelling together in Mr McCaughan's Toyota Corolla car in the Temple area. The friends were Raymond John Waddell, who had spent the earlier part of the day in Mr McCaughan's home, John Wilson and Mark Grant. John Wilson, who lives in Knockany Road, had been collected by the others at about 9 pm and all four had left in Mr McCaughan's car a

short time after 9. At first they had intended to drive to Carryduff but decided to go instead to Lisburn and Mr McCaughan drove his car onto the Saintfield Road.

[4] John Wilson was the front seat passenger. Before turning on to the Saintfield Road, Mr Wilson became concerned for his own safety as Gareth McCaughan drove along Knockany Road. He was aware that Mr McCaughan had passed his driving test only some five weeks before and he was conscious that the car was being driven far too fast for the road conditions. Knockany Road is winding with several blind bends. Mr McCaughan approached these at speed, slowing down, in the words of Mr Wilson, "at the last second". Mr Wilson considered his driving to be "aggressive".

[5] According to Mr Waddell, that was not the first episode of dangerous driving in which McCaughan had engaged that evening. Before they had arrived at Mr Wilson's house, the other three young men had spent a little time at a petrol filling station at Temple. When they left the garage they were overtaken by another car. When this happened, Mr Waddell has said that McCaughan accelerated so that he came into alignment with that car on the wrong side of the road. That was obviously a highly dangerous manoeuvre because both Raymond Waddell and Mark Grant cried out, shouting at McCaughan to pull back because they were travelling towards a blind bend. Fortunately, on this occasion, he did so for a car travelling in the opposite direction to theirs rounded the bend shortly afterwards.

[6] We were told by Mr Murphy QC, who appeared on behalf of the offender, that counsel for the prosecution who had appeared on the trial, had agreed not to refer to this evidence in her presentation of the case against McCaughan. We cannot understand why such an undertaking had been given. It is difficult to think of a reason that such an account would have been concocted by Mr Waddell and, if true, it was clearly indicative of a highly dangerous pattern of driving before the accident which led to Mark Grant's death. It was therefore highly relevant to the penalty to be imposed.

[7] We were invited by Mr Murphy to disregard the evidence of Mr Waddell on this issue. Had it made a difference to the outcome of this reference, it would have been necessary to obtain an account from counsel for the prosecution (who did not appear on the reference) as to whether

indeed such an undertaking was given. In the event, however, we do not consider that the result of the Attorney's application is affected and we have therefore had regard to that evidence. We should observe, however, that if such an undertaking is given by counsel, it would in all but exceptional circumstances be necessary that the reasons for giving it should be explained to the court. In every case where such an undertaking is given, it is not less than essential that the *fact* that it has been given should be stated. No such statement was made to the court by counsel for the prosecution or the defence. It should have been.

[8] Tragically, McCaughan was not deterred from driving dangerously by the narrowly avoided accident near Temple because, later, after he had collected John Wilson, as they travelled along the Saintfield Road towards Lisburn, his speed was outrageously high. Anyone at all familiar with this road is aware of its dangers. It has a number of bends and hills. It requires to be negotiated with great care. This is particularly so for a driver of little experience. At the time McCaughan was a restricted driver who should not have been travelling at more than forty-five miles per hour. Analysis of the physical signs after the catastrophic crash has established that he was driving well in excess of that speed – probably at more than eighty miles an hour. This was a highly dangerous speed for this road. It is small wonder that, as described by Mr Waddell, on coming over the brow of a hill, the car became airborne and then crashed onto the carriageway with an inevitable loss of control.

[9] In a graphic description of what then happened that was eerily reminiscent of some of the road safety broadcasts that one sees on television, the Toyota was observed by occupants of a car travelling behind it spinning several times in the air before crashing heavily into a field. Just before McCaughan lost control of the car, Raymond Waddell was so frightened that he fastened his seat belt, which he had not engaged earlier. According to him, Mark Grant also tried to engage his seat belt and was in the process of doing so when the collision occurred. It is a bitter tragedy that, if Mr Grant had managed to secure his seat belt, he might still be alive today.

[10] The ghastly circumstances of this accident bear many of the classic features that road safety campaigners repeatedly identify as the cause of death and grievous injury on our roads. The failure to wear a seat belt; the outrageous speed; the inexperience of the driver; the belief of the driver that his expertise is far greater than it is in fact and the foolish, brazen

bravado of youth are sadly well-documented causes of dreadful road traffic deaths.

[11] Mark Grant was flung violently from the car and his death must have been instantaneous. A particularly disturbing feature of this dreadful case is that in the immediate aftermath of the accident, when a young man who, he has claimed, was his best friend, lay dead in the field, McCaughan sought to enlist the help of the other two passengers, John Wilson and Raymond Waddell, in a lying account that he had swerved to avoid an animal in the road. In making a judgment about this, one must keep in mind the offender's age at the time. He was eighteen and a half years old. It is right also to remember that he was in shock. But this was a wholly discreditable aspect of the offender's reaction to this offence, made worse by his persistence in this patently lying account when first interviewed by police.

Attorney General's submissions

[12] In the first reference submitted to this court the Attorney General identified a single aggravating factor as the excessive speed of the respondent's vehicle. In a revised reference two aggravating features were alleged. Apart from excessive speed, it was claimed that the offender had engaged in a pattern of dangerous driving before the incident that caused the death of Mr Grant. In the first reference the Attorney General identified the following as mitigating factors: (a) the offender's previous good character; (b) the remorse shown; and (c) the offender's age. On the second reference, the last of these was omitted and Mr Gerald Simpson QC, who appeared for the Attorney, submitted that the offender's age should not be taken into account since, travelling at the speed that the car was found to have reached when it left the road, a collision was inevitable, whatever the experience of the driver. We do not accept that submission. McCaughan's inexperience, although by no means an excuse for his utterly irresponsible behaviour, contributed to the accident in that he plainly failed, where a more experienced person would not have, to appreciate the extreme danger that travelling at such a speed involved. We therefore regard this as a mitigating factor, although in the overall view of the case, little weight can be attached to it.

[13] The Attorney General submits that the punishment of the offender fails adequately to reflect the gravity of this offence, his high degree of culpability, the aggravating features, the intention of Parliament to impose

more stringent punishments for this type of offending, the need to deter others and public concern about offences of this kind.

Personal background of the offender

[14] Mr McCaughan has no previous convictions. He comes from an impeccable family background. It is also an enormously tragic background. In 2007 Gareth McCaughan's father died of leukaemia at the cruelly young age of forty-eight. His mother has been devastated by this loss and the dreadful circumstances that have engulfed her family. It is made the more poignant by the fact that these families were friends before the shocking tragedy that occurred on that fateful night. The awful events that have befallen the McCaughan family are deserving of great sympathy but it is well settled that the personal circumstances of an offender or the impact on his close relatives will rarely mitigate to any significant extent the seriousness of the offence or the punishment to be imposed.

Impact on the bereaved

[15] Three hugely moving victim impact statements have been prepared by the mother, father and sister of Mark Grant. This was a much loved son and brother. He was on the threshold of life. He was a young man of sunny disposition, a joy to his parents, his sister and his friends. The tragedy of his death is utterly incalculable. But it is made doubly sad by the quite appalling circumstance that his beloved brother died at the age of five from cancer. We have seen a photograph of Mark with his sister, his brother and his mother when they were in the happiest of conditions. The contrast that it provides with their current situation serves as the clearest evidence that the tragedy that has befallen this family is immeasurable. It is inevitable that no penalty imposed by this court can ever effectively expiate Mark's death or the untold grief and misery which it has caused his family. There is not – and cannot be - a direct correlation between their suffering and the punishment that Gareth McCaughan must accept. That is not to say that the victim impact statements are to be disregarded. They have been borne very closely in mind by each of the members of this court. But it must be recognised that the purpose of punishment cannot be focussed solely on the assuaging of grief. Its principal concentration must be on the culpability of the offender.

The expressed remorse

[16] The offender was examined by Dr Browne, consultant psychiatrist, on two occasions. He has reported that Mr McCaughan has suffered from a condition consistent with a grief reaction at the loss of his friend in this dreadful accident. We have observed in other cases that true repentance is often difficult to distinguish from sorrow at the plight that one finds oneself in as a result of one's criminal behaviour. In trying to make some assessment of this in the present case, we have borne in mind the offender's attempt to have his friends collude in a lying account of how the accident occurred. We have taken into account that he challenged as untrue the statement made by Mr Waddell that he had been asked by McCaughan to support the story that something had run into the path of the vehicle. This was particularly discreditable conduct.

[17] We have also had regard to the statements of the Grant family that McCaughan has never proffered an apology to them. On this point, however, we are bound to recognise that, where someone has been responsible for such a shocking tragedy in the lives of others, there is an understandable reticence to approach those whose lives you have blighted, especially when proceedings are pending, lest it be considered that you are attempting on that account to reduce the penalty that might otherwise be imposed. Having carefully reviewed the available evidence on this question, we are disposed to accept that the offender does have genuine remorse for the devastation that he has caused to so many lives.

The sentencing guidelines

[18] These are by now well established. We set them out most recently in *R v McCartney* [2007] NICA 41 as follows: -

> "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;

(iv) Most serious culpability – seven to fourteen years' imprisonment."

[19] In this case it has been agreed that the offender's driving should be placed in the intermediate category. In *Attorney General's Reference 2, 6, 7 and 8 of 2003* [2003] NICA 28 this court adopted the categorisation of this type of offence chosen by the Court of Appeal in England and Wales in *R v Cooksley and others* [2003] EWCA Crim 996: -

> (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.
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> (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.

[20] In *R v McCartney* we accepted that, following the approach in *R v Richardson* [2006] EWCA 3186, the sentencing levels for the various categories should be increased in line with section 285 (6) of the Criminal Justice Act 2003 (which came into force on 27 February 2004 by virtue of the Criminal Justice Act 2003(Commencement No 2 and Saving Provisions)

Order 2004) and raised the maximum penalty in this jurisdiction for dangerous driving causing death or grievous bodily injury from ten years to fourteen years' imprisonment. We said that henceforth the sentencing guidelines should be as outlined in paragraph [18] above.

[21] These are merely guidelines. They are not to be regarded as never-to-be-departed-from prescriptive rules. But consistency of sentencing, particularly in this fraught area is a valuable commodity. It provides a reasonable measure of – if not certainty – at least expectation for offender and victim alike.

[22] The guideline given represents the likely range of penalty following a trial in which an offender has contested his guilt. In this case the offender pleaded guilty at a relatively early stage. On well settled principles, he is entitled to a reduction on the sentence that would otherwise be imposed to reflect his plea and the other mitigating factors. Moreover, his case is not the worst conceivable case within this category. Judge Markey suggested that it lay within the lowest range in that grouping. We would not necessarily agree with that assessment but we are quite prepared to accept that it certainly did not come within the most serious imaginable range in that particular category.

Discussion

[23] We consider that the commensurate sentence following a plea of not guilty in this case was probably in the range of three to three and a half years' imprisonment. This is not significantly different from the range suggested by the Attorney of three and a half years to four years. A reduction of approximately one quarter on the sentence was appropriate, having regard to the timing of the plea and the initial attempt to suggest that the accident was caused by an animal running on to the road. The sentence that we consider that the guidelines would have impelled, therefore, lay in the range of two years and three months to two years and seven months. At that point one would have to consider the selection of a custody probation disposal. The judge decided that this was appropriate and we see no reason to disagree with his conclusion on this point.

[24] It is important to emphasise that a decision to impose a custody probation order does not involve the imposition of a probation element on top of the period of detention that a sentencer considers would otherwise be the correct punishment. On the contrary, one must choose the

appropriate sentence, if that is one of custody, and then address the question whether this should be served partly as a period in custody and partly on probation. That is not to say that the composite period chosen need necessarily coincide with the entirety of the period that one has initially chosen. It is perfectly in order to indicate that the period to be served, if the defendant is not willing to submit to a probation order after release from custody, is different from the sum of the custody and probation elements.

[25] The learned trial judge did not indicate in his sentencing remarks what he considered should be the period of detention that the offender should serve, if he did not agree to a probation element to his sentence. This should always be done by sentencing judges where a custody probation disposal is chosen. In his sentencing remarks the judge indicated that he was reducing the detention period from two years to eighteen months. He then proceeded to 'add' a period of twelve months' probation. This is not the correct approach. The commensurate sentence should be chosen first. Then a decision should be taken as to whether part of that sentence should comprise a probation element. If this approach had been adopted, as we have said, we consider that the appropriate commensurate sentence range for the judge to have chosen was between two years and three months and two years and seven months. A custody/probation order of two and a half years' is consonant with that range, although this does not appear to be the manner in which the judge arrived at his choice of sentence.

Conclusions

[26] In light of our view about the proper range of commensurate sentence, we do not consider that the sentence in fact imposed in this case lay significantly outside the established guidelines. By the standard of those guidelines it was not unduly lenient. The application to have the sentence increased must therefore be dismissed.

[27] We would like to say this to the family of Mark Grant, however. Although, as Mrs Grant has said in the statement that she furnished to the court, no-one who has not experienced it, can begin to conceive of the pain that is involved in the loss of a child, much less of the pain of losing two children, we hope that what we have had to say today will convince the family that we are acutely conscious of and deeply sympathetic to their grief. We cannot hope to assuage that sorrow by whatever decision we

take. Although we bear their unhappiness closely in mind, the punishment to be imposed must relate most directly to the culpability of the offender and the established sentencing guidelines. These are the factors that have primarily determined the outcome of the application.