



THE COURT OF APPEAL

**Birmingham P.
Hedigan J.
McCarthy J.**

38/2018

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

- AND -

ADRIAN NESTOR

RESPONDENT

JUDGMENT of the Court delivered on the 31st day of July 2018 by Mr. Justice McCarthy

1. This is an appeal against a sentence of four years imprisonment suspended on the basis that the accused undertake 240 hours of community service, imposed by the Circuit Court on 18 January 2018 on a charge of dangerous driving causing death and serious injury on 1 February 2016 in the small hours of the morning and at a time when the accused had a blood alcohol level of 272 mg of alcohol per 100 ml of blood.
2. The accused had been drinking in two public houses and had attended a wake having left home at around 7 o'clock the previous evening. On the public highway near Gort, County Galway he drove onto the hard margin knocking down and killing Mr Liam McDonald and injuring two members of an Garda Síochána who were helping the former. The headlights of their car were dipped and the Garda flashing lights were lit.
3. At Garda Murtagh's request the accused summoned assistance by going to a neighbouring house. The accused admitted driving the vehicle to one of the Gardaí who arrived at the scene and that he had also been drinking. When initially arrested he expressed sorrow for what occurred and enquired as to the welfare of the injured Gardaí. Subsequently, by appointment, on 18 June next following he was arrested by appointment and furnished a prepared statement to investigating officers. He was also interviewed. He made full admissions.
4. The ill effects on the Gardaí were very significant – but more so in the case of Garda Casserly. In her case they might be described as devastating and it is hoped she will resume her Garda career. She lost consciousness, having been thrown a considerable distance by the collision and was treated at Galway University Hospital until 25 April 2016 when she was then transferred to the National Rehabilitation Centre, remaining there until 10 June of that year. She has since been engaged in rehabilitative activities and treatments and, in particular, for example, she was at the time of sentencing hearing enrolled in a brain surgery rehabilitation programme. Her injuries and the treatment for them have greatly hampered her progress within the Gardaí. We do not set out the injuries *in extenso* but for the purpose of this judgement we might summarise them as being head injuries, cervical spine injuries, lacerations and haematomae to the spleen and pulmonary contusions, a coccyx fracture, a left vocal injury, a vocal cord injury and several tibial and fibular fractures on both sides. She had amnesia for her first week in hospital. On 2 February 2016 she suffered a massive stroke as a result of which she lost all movement and power in the right side of her body and she is left with a broad range of difficulties and ailments which it seems will not improve as she gets older and she is obviously worried for her future health. She suffered nightmares and continues to do so. Because of the brain injury she has weakness in her right hand, shaking and a tremor and she finds writing and typing difficult. It also gives rise to mood swings and fatigue with difficulties of memory, focus, attention and a tendency to repeat herself. In May 2017 she was fortunate to have a daughter although she finds it difficult to play with her. The physical and psychological trauma of the event will undoubtedly remain with her for ever, as she put it herself it when giving evidence. One might also add that she it had been arranged that she should be married on 3 June 2016 and of course it was necessary to cancel that arrangement.
5. Garda Murtagh's injuries extended to a fracture of the right upper humerus, lacerations to the head, whiplash injuries to the neck and back and ligament damage to the knees and ankles all of which have resulted in ongoing pain. He remains nervous when walking on the road and feels that he failed in his duty to protect Mr Macdonald notwithstanding the fact that the accident was not his fault. It was necessary for him to receive counselling. His involvement with his child and sporting or physical activities were adversely affected.
6. Catherine Macdonald, widow of the deceased, sought clemency for the accused. Neither of his daughters Mary or Joanna who's victim impact reports were also before the court in any sense seek vengeance and show any special animus towards the deceased. Both of them, however, were abroad at the time of the accident and understandably were deeply upset when told of their father's death. The late Mr McDonnell was someone who'd had a rather troubled life and was an alcoholic and his daughter Joanna in particular makes reference to the fact that she had hoped that stability and comfort would be brought into his life when he entered the nursing home in which he was residing at the time of his death.
7. Turning to the accused, subsequent to the event he spent significant periods in St John of God's Hospital under the care of Drs

Hussey and McWilliams. He has also been cared for by his general practitioner, Dr O'Flaherty, and has attended (and attends) a day hospital for mental health issues. He does not, however, have a psychosis but rather (to quote Dr Hussey) "an adjustment disorder mixed with anxiety and depressive reaction and ongoing symptoms of post-traumatic stress disorder" of "a moderate level of severity". He has had suicidal ideation and has attempted suicide. He could not continue his work, which he enjoyed, at Schneider Electric after some 20 years. He takes several types of medication and has undertaken psychotherapy, occupational therapy, as well as having the assistance of the psychologist. In the course of his evidence he stressed that "it's not about my injury or mental health, don't get me wrong, it's about the injured people and the dead man this thing is about". He has received a favourable probation report. There is no suggestion of future offending.

8. We need hardly refer to the principles which must be applied by the court in dealing with this type of appeal – suffice it to say that the onus of proof is on the Director to show that the sentence was unduly lenient as that term has been elaborated.

9. A number of authorities have been referred to either in the written submissions or argument. We think that the observations of Mahon J. in *DPP v. O'Rourke* [2016] IECA 246 are of use as a starting point –

"clearly there has been a progressive increase in sentences imposed in dangerous driving causing death cases over the past 15 years or so. This probably reflects the increased abhorrence of drink-driving by the public generally"

We also endorse his observations to the effect that it is difficult to achieve consistency in sentencing for offences of this kind because of the wide differentials of fact. Insofar as comparators have been referred to we do not think that *DPP v. O'Reilly* [2008] 3 IR 632 is of particular assistance because of the different facts and the movement in the approach to sentencing to which Mahon J. has referred.

10. In *O'Rourke* itself the accused had killed a child and seriously injured his mother having been speeding and drink driving. He left the scene and was less than forthcoming with investigating Garda. Although he pleaded guilty the trial judge took the view that the appropriate starting point was one of nine years imprisonment and this Court reduced this to seven and a half years on the basis that that headline sentence was placed at an erroneously high level in the absence of what were characterised as significantly excessive speeding or prolonged dangerous driving. He was sentenced to eight years imprisonment in this court, the final two years being suspended. We think that the following four decisions quoted by Mahon J. are also of some assistance:

(i) In *DPP v. Casey* [2015] IECA 278, the accused had been remorseful, had cooperated, had an excellent work record and been of general good character (all of which factors are present here): this court reduced the sentence of seven years imposed in the trial court to one of five years imprisonment with suspension of the final year.

(ii) In *DPP v. Kelly* [2015] IECA 250 the accused who was driving whilst drunk at speed crashed and killed seven occupants in his car. This court ultimately imposed a sentence of eight years imprisonment but with suspension of the final four years.

(iii) In *DPP v. Maurice Power* [2016] IECA 326 accused, whilst drink-driving had badly injured a pedestrian, had previous relevant convictions, was driving whilst disqualified and uninsured though he had remained at the scene, provided such assistance as he could, expressed remorse and pleaded guilty in early course. A term of imprisonment of seven years was imposed by the trial judge (upheld in this court) with suspension of the final year's imprisonment to take account of mitigating factors.

(iv) In *DPP v. Vincent Cadden* [2017] IECA 58 the accused was driving a dangerously defective vehicle whilst drunk, crashed killing his passenger, pleaded guilty, cooperated with the Gardaí and was remorseful. In order to afford him an incentive to rehabilitate himself this court upheld a sentence of six years imposed on the accused in the trial court but suspended the final 18 months thereof.

11. In the course of his submissions, counsel for the Director of Public Prosecutions submitted that, in the first instance, the trial judge was wrong in considering that the appropriate starting point, objectively speaking, in terms of the accused's moral culpability, for a sentence in a case of this kind was in or about six years but that it was a case which should have attracted a so-called headline sentence of seven to nine years. We do not think that this is correct and agree with the trial judge on this point. He submitted also that in arriving at the figure of six years he had regard to the fact of the plea when that is a factor which ought to have been taken into account when passing to the second stage of sentencing, namely, the application of factors mitigating the accused moral culpability but again we think this is not a well-founded point when one looks at the judgement as a whole. We do not think it was wrong for the trial judge to reduce the initially chosen sentence to four years having regard to the mitigating factors.

12. Mr. Cole's real criticism was that he adopted an erroneous approach to the question of suspension and in particular did not follow that outlined by this court in *DPP v. Byrne* [2017] IECA 97 where Edwards J. said –

"Amongst the considerations that a sentencing judge must have regard to, deciding within this second stage of the sentencing process [i.e arriving at a sentence discounted from what is commonly called the headline sentence to take account of mitigating factors] and the subsidiary issue as to whether or not the suspension of the sentence in its entirety might be appropriate in a particular case are

(i) the nature of the offence committed

(ii) the objective seriousness of the criminality involved

(iii) the need for general or specific deterrence and

(iv) the subjective circumstances of the offender."

13. Mr Cole further submitted that on these principles, the flaws in the decision to suspend the sentence in its entirety were that that course failed to address the seriousness of the offence and the principle of general deterrence. The factors which he submitted were relevant in this respect were that the trial court failed to have regard to the full extent to which the accused had consumed alcohol, the fact that Mr Nestor was not engaged in what one might term a single unplanned drive or "ad hoc" (or, as he put it, an "ad hoc" drive) but was rather out for the evening together with the facts that he was driving whilst drunk for relatively lengthy period, alcohol must be regarded as a causative factor in the accident and the gravity of the case due to the fact that a number of persons (the deceased and the two Gardaí) were killed or injured. He further submitted that the trial judge placed excessive emphasis on Mrs McDonnell's desire that a custodial sentence not be imposed, something to which we have already referred.

14. Mr Flannery submitted, effectively, that the case was a straightforward one inasmuch as what occurred was that the accused

took the wrong option when confronted with the Garda car and been called upon to make what he characterised as a split-second decision. He said that the only aggravating factor in the case was that the accused blood alcohol level was very significantly over the legal limit and submitted that there was no evidence of dangerous driving before the incident – effectively, in a sense, that it was a once off or very brief event.

15. On this basis he submitted that the starting point of 6 years was not unreasonable with which we agree. He stressed also that there were what he described as “huge” mitigating factors and in particular stressed his remorse, his loss of employment and his ill health – he was himself, as counsel put it “serving a life sentence”. Mr. Flannery also emphasised the fact that the circuit judge was in a position to see and assess the evidence of the witnesses for himself. We infer that what he was effectively saying here was that the decision was within the margin of discretion of the trial judge.

16. We think however that by suspending the balance of the sentence of four years (with provision for community service), after the discount from 6 to 4, the trial judge fell into error. We think thereafter it would have been appropriate to have further regard to the mitigating factors such as the plea of guilty and associated remorse, the fact that the accused remained at the scene and sought to assist, his full admissions, that he was otherwise of good character, that he lost his employment, the serious personal consequences for him in terms of his mental health and the favourable probation report and that having taken these factors into account he should have afforded a shorter period of suspension of in or about 18 months only.

17. We will suspend the last two years of that sentence having regard to the fact that it is appropriate that what we might describe as an additional discount is given to the accused since he is now entering custody for the first time in circumstances where he might have hoped that he would not do so. The suspension will be for the period of two years and upon the terms that he keep the peace and be of good behaviour for that period and also abstain from alcohol.