UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 199

Record Number: 117/20

The President

Edwards J

Ní Raifeartaigh J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

CHLOE BATES

APPELLANT

JUDGMENT of the Court delivered on the 24th day of July 2020 by Birmingham P

1. On 18th June 2020 in the Circuit Court in Wexford, having entered a guilty plea on 10th March 2020, the appellant was sentenced to a term of twelve months' imprisonment in respect of the offence of careless driving, causing serious bodily harm, and to a concurrent sentence of four months' imprisonment in respect of the offence of failing to stop a vehicle at the occurrence of an accident.

2. The case related to events that occurred on 28th May 2018. On that occasion, the injured party, Mrs. Pamela Levingston, was walking her two dogs at approximately 7.25am at Millands, Gorey, Co. Wexford, close to her home. Mrs. Levingston is a lady in her early 60s. She was walking, facing the oncoming traffic in the appropriate manner, on what was a dry, bright morning, when she was hit by an oncoming car driven by the appellant. The impact

resulted in Mrs. Levingston being knocked into a ditch. She suffered very significant injuries, including injuries to her heart, which required stenting, her legs, her arms, her ribs and her breastbone. She had to spend some five months in hospital. There were also long periods of non-weight bearing involving the use of a wheelchair; her home had to be adapted to accommodate same. Prior to the accident, the injured party had been a long-time employee in a launderette and she did not return to her workplace. The loss of engagement with work colleagues was a source of great regret to her. It should be explained that Mrs. Levingston was thrown into the ditch, and indeed, she spent almost an hour in the ditch until neighbours heard a noise coming from outside and went to investigate, and then, at approximately 8.20am, they came upon Mrs. Levingston lying injured in the ditch and an ambulance was summoned.

3. At for the appellant, she was making her way to her home, having overnighted in a friend's house, with a view to going on from home to work her shift in a nearby hotel where she held down a summer job. Her car sustained significant damage in the incident and she made her way to work by taxi. At her workplace, she spoke to a colleague and told her that she had been involved in a road traffic accident earlier that morning on what she described as the "Old Tesco Road" and that her vehicle had struck a wall or a post. She told her colleague that after the accident, she had reversed her vehicle, but could not see anyone or anything and proceeded to drive home. The work colleague later became aware that reports were circulating, including on local radio, of a hit and run accident at the location described by the appellant, and she told the appellant this. Both women went to see the manager who advised Ms. Bates to go home. The appellant was collected from her workplace by her mother. Later, mother and daughter made their way to Gorey Garda Station. Ms. Bates made her vehicle available to Gardaí for examination.

4. Analysis of the appellant's phone indicated that there was quite an amount of activity, in particular, there was what was described as a flurry of missed calls between herself and her mother on the morning of the accident, but it did not appear that there were any calls at the actual time of the accident. It might be noted that when arrested on 27th May 2018, the appellant was requested to provide a PIN number for her phone, but she declined to do so. This meant it was not possible to examine the phone in Wexford and it had to be sent to Dublin for specialist analysis. When interviewed, the appellant exercised her right to silence. It was indicated that a statement would be provided, but that did not, in fact, happen. She was re-arrested about a year after the incident when the results of forensic examination became available, and once more, the appellant exercised her right to silence. Again, it was indicated that a statement would be forthcoming, but none was. The effect of this was that while there was significant cooperation in terms of going to the Garda station and making the car available, cooperation was far from total.

5. In terms of the appellant's background and personal circumstances, she was born on 19th July 1988. At the time of the road traffic accident, she was a student in UCD, studying for a B. Comm International and she had a summer job in Seafield House Hotel, her local hotel. She had spent much of her early childhood abroad while her father worked in various locations in and around the Caribbean. She had experienced tragedy in her young life, in that her brother, aged two and a half at the time, died in a drowning accident at home. Crucially, she had no previous convictions and a large number of very positive testimonials were made available to the Court.

The Sentencing Hearing

6. In the course of the sentencing process, slightly unusually, a degree of controversy developed as to just what was the basis of the prosecution case and what was the basis on

which the plea was entered. This issue arose in the course of cross-examination of the investigating Garda by defence counsel. At one point, the judge intervened and asked, "is it the situation that the prosecution case is that the accused wasn't aware she had struck anybody?" After an amount of debate, the trial judge decided that the situation was such that he could not proceed directly to finalising sentence, and instead, required prosecution and defence to set out their respective positions in writing. Upon the resumed hearing, the prosecution confirmed that their position was as follows:

> "Our case is that the accused vehicle struck the injured party and the accused did not stop the vehicle. Our case is that she knew she hit something and did not stop her vehicle. She may have known that she hit a person, but we will not lead that in evidence and did not do so."

7. In the course of the sentence hearing, the defence pressed strongly for a non-custodial disposal, and indeed, went further by suggesting that this was an appropriate case to apply the Probation of Offenders Act 1907.

8. The judge's approach to sentencing was to take the view that the manner of driving on a bend put the degree of carelessness into the upper end of the scale. He felt that the degree of culpability was that of a very careless driver falling below the standard of the reasonably competent driver. He did not accept a submission that had been made by defence counsel that this was momentary inattention which would put the matter at the lowest end of the scale. He made his observations about how he assessed gravity, having referred to the decision of the Supreme Court in the case of *DPP v O'Shea* [2017] 3 IR 684, in particular, making references to the judgments of O'Malley J and Clarke J, as he then was.

9. So far as the careless driving count on the indictment was concerned, the judge said he was satisfied that it was at the upper-end of the range of seriousness and that the headline sentence would be a sentence of 18 months. In relation to the failing to stop count, he saw the

headline sentence as five and a half months. When the judge pronounced the respective sentences, defence counsel asked "you are not considering any suspension of the sentence, Judge?". The judge responded "no, I have weighed and measured the appropriate sentence".

Discussion

10. In the course of the appeal, the case has been made that the judge erred in how he assessed culpability and that he was in error in not accepting the defence submission *vís-a-vís* the suspension of a portion of the sentence. However, the appellant says that even if the judge was right in his assessment of culpability, that still, there was an error when it came to imposing sentence. It is said that the sentence was unduly severe, and even if gravity was properly assessed, there was inadequate attention paid to the very significant mitigating factors present. In relation to mitigation, emphasis was placed on the appellant's youth, the evidence of her previous good character and to the extent of cooperation that was forthcoming; going with her mother to the Garda station and making her car available for examination. Further, the appellant says that inadequate credit was given for the plea, which was a valuable one, and had to be seen against the background of what was, in effect, admissions, by going to the Garda station and making her vehicle available.

11. The judge had seen the gravity of the injuries as an aggravating factor and the appellant does not really take issue with this. The judge had seen the failure to stop as an aggravating factor and the appellant does not deny that the judge was entitled to take this view, but it is said that the initial failing to stop was, to some extent, mitigated by her actions in going to the Garda station and making her vehicle available.

12. In the Court's view, the judge was correct in taking the view that this was a case at the upper-end of the scale of carelessness. We agree with his assessment that the degree of culpability was that of a very careless driver falling below the standard of the reasonably

competent driver. It is very difficult to understand how the appellant could have failed to see Mrs. Levingston walking her two dogs on this country road on a bright May morning. It might be possible to draw the inference that she was distracted by the fact that she was returning to engage with her mother, having stayed out the previous night without having given advance notice of an intention to do so, causing her mother to fear the worst. Whatever the explanation, the consequences of the inattention were very grave indeed. We are in no doubt that the judge was correct in taking the view that this was a case where a custodial sentence was warranted and appropriate. While it was understandable that the defence would canvass a non-custodial disposal, we feel that the reference to the Probation of Offenders Act was quite unrealistic. Overall, we believe the judge's identification of a headline or pre-mitigation sentence of 18 months was an appropriate one.

13. The difficulty on this case is on the mitigation side. The appellant says that the plea of guilty would itself have merited a reduction of the order of 25% to 33% from the headline figure which would have resulted in a sentence at or close to the sentence ultimately imposed. However, it is said forcibly that this was not a case where it can be said that the only thing that the appellant had going for her was the entry of a plea of guilty, that there was significant other mitigation present which should have been reflected in a further significant reduction. We see some merit and force in that argument.

14. There is a further point that arises. This was a case where the Court felt compelled to incarcerate a young woman of impeccable character.

15. The case of *DPP v. Aoife Maguire* [2015] IECA 350dealt with an appeal against severity of sentence. The appellant was an assistant manager with Anglo Irish Bank, who had been convicted of certain offences following a trial. We made the following observations:

> "19. If the judge felt that custody was inevitable and could not in fact have been avoided, it was appropriate then that the judge would remind himself that he was

being called on to sentence someone without previous convictions and not just someone without previous convictions, but someone of positively good character, who had made a real contribution to society by her role as a volunteer and as a carer, stepping away from her career to take on the role of caring for her mother. In those circumstances, the focus should have been on identifying the minimum period that could be specified which would meet the situation.

20. In the case of *DPP v. Doherty*, the Court of Criminal Appeal, the predecessor of this Court was dealing with a Garda who had been convicted of an offence of corruption. In passing a sentence, following a successful undue leniency application, the Court, (*per* Hardiman J.) the judgment commented as follows:

> 'We also bear in mind the factors which were recited on several occasions yesterday and acknowledge in the case of *DPP v. Egan* that is to say that in dealing with a person without previous convictions, and indeed, of positive previous good character, if the Court considers, as we do, that a custodial sentence is required in the public interest, such a sentence need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principal effect'.

21. In the earlier *Egan* case there referred to, Court of Criminal Appeal had quoted with approval remarks by Lawton L.J. in the English case of *R v. Sergeant* [1975] 60 Crim. App. where he had commented:

> 'For men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time'."

16. We see these remarks as of some application to the present case. It is true that, unlike Ms. Maguire who was a mature lady, Ms. Bates cannot point to a long life, lived responsibly

and honourably. However, the appellant does have many positive testimonials from a wide variety of sources, from teachers in the school she had attended, from the programme manager in UCD, from work colleagues, from friends, from family members, and friends of the family. These testimonials have left us in no doubt that the Court was indeed dealing with somebody of impeccably good character who had made a positive contribution to society. Nor is it possible to overlook the fact that she was only 19 years of age at the time of the incident.

17. While we are very conscious of the care with which the judge in the Circuit Court approached the question of sentence, adjourning the matter overnight for consideration, and delivering a careful and reasoned analysis, we have been persuaded that the multiple factors by way of mitigation needed to be reflected in a greater reduction from the headline or pre-mitigation sentence that was provided. We have been persuaded that the failure to further reduce the sentence below twelve months was, in the circumstances of the case, in error, which justifies and, indeed, requires intervention from this Court.

18. In the ordinary way, we are required to resentence as of today's date. We take into account that the appellant has been in custody since 18th June 2020. On entering custody, she was required to enter quarantine, which cannot have been easy, though we understand that she has coped relatively well with that. We are aware that the appellant has blood pressure issues and have been provided with the up to date position in respect of same by way of a GP's discharge letter dated 22nd July 2020. Recognising the seriousness of the offence, but having regard to the very many significant mitigating factors present, we believe that a more appropriate sentence would have been one of eight months' imprisonment.

19. Accordingly, we will quash the sentence imposed in the Circuit Court and resentence the appellant to a term of eight months' imprisonment which will date from the same day as the sentence imposed in the Circuit Court.