THE COURT OF APPEAL

Edwards J.
McCarthy J.
Donnelly J.

Record No: 259/2019

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

GARY O'CONNELL

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 22nd day of July 2020 by Mr Justice Edwards

Introduction

1. On the 31st of May 2019, the appellant was arraigned in relation to count 1 on the indictment, namely one count of endangerment contrary to section 13 of the Non-Fatal Offences Against the Person Act, 1997, in respect of an incident which occurred on the 14th of December 2018. On the 29th of July 2019, further pleas of guilt were entered in relation to certain summary counts added to the indictment, being counts 4, 6, 7 and 14, which consisted of a count of driving without insurance, a count refusing to provide a specimen, a count of dangerous driving and a count of obstruction, respectively. These pleas were offered and accepted on the understanding that a number of further summary counts would be taken into consideration, involving possession of a controlled drug contrary to s.3 of the Misuse of Drugs Act 1977, failure to stop his vehicle at the direction of a member of An Garda Siochana, and multiple further counts of dangerous driving. These were counts 2, 3, 5, 8, 9, 10, 11, 12 and13. The court heard evidence on the 29th of July, 2019.

2. On the 21st of October, 2019, the appellant received a sentence of six years' imprisonment with the final 18 months conditionally suspended in respect of the count of endangerment. In respect of counts 4 and 7, the appellant was sentenced to imprisonment for six months and was disqualified from holding a driving license for a period of 16 years. In respect of count 6 he was also sentenced to imprisonment for six months and was disqualified from holding a driving license for a period of 6 months. Count no 14 was also taken into consideration.

3. The appellant now appeals against the severity of the sentence imposed in respect of the count of endangerment.

Background Facts

4. The court heard evidence from Garda Andrew O'Donnell that on the 14th of December, 2018, at approximately 12.05 a.m. whilst travelling on the N11 in Cherrywood, County Dublin inbound, he and his colleague Garda Darragh Hughes observed a blue Volvo 40 series saloon vehicle travelling at high speed on the dual carriageway and passing

motorists in the overtaking lane. Garda O'Donnell noted that the car was breaching the speed limit of 80 kilometres per hour at which he was travelling, and it continued out of sight. Garda O'Donnell estimated the car to have been travelling at anywhere between 120 and 140 km/h due to the speed he had to reach to catch up. He activated the blue lights and sirens, prompting the vehicle in question to come to a stop on the N11 at Cabinteely. Garda O'Donnell and Garda Hughes approached the vehicle and observed three occupants, of which the appellant was the driver. As the gardaí came near to the driver's window, the vehicle took off at speed, skidding as it did so, and drove through a red light at the junction of the N11 and Johnstown Road in Dun Laoghaire. This was the subject of the dangerous driving charge at count 8 on the indictment. The two gardaí returned to their patrol vehicle and engaged the appellant in pursuit.

5. The vehicle driven by the appellant was at this stage travelling at speeds in excess of 160 km/h and was weaving between other vehicles as it approached the junction of the N11 and Clonkeen Road in Dun Laoghaire. This was the subject of the dangerous driving charge at count 9 on the indictment. At this point Garda Hughes informed the Garda Command Control of the situation. The appellant's vehicle then travelled through a red light at the junction, necessitating other motorists taking evasive action to avoid collision. This formed the basis of the dangerous driving charge at count number 7 on the indictment.

6. The vehicle further sped past a red light at the junction of the N11 and Kill Lane. Once again, motorists in the vicinity had to take evasive action to avoid a collision. This was the subject of the dangerous driving charge at count number 10 on the indictment. A similar action was repeated at the junction of the N11 and Leopardstown, Foxrock, where the car continued travelling at speed and weaved between other cars. It proceeded onto the Kilmacud Road Lower, in Goatstown, where it yet again breached a red light and again forced motorists at that junction to take evasive action to avoid collision. This formed the basis of the dangerous driving charge at count 11 on the indictment.

7. The vehicle travelled along the old Dublin Road towards Donnybrook. Another garda patrol car joined in pursuing the appellant at this stage. The vehicle passed the junction of Fosters Avenue and Stillorgan Road, before turning left at Beaver Road onto Clonskeagh Road. Garda. The crew of the second garda car updated Command and Control to state that the vehicle was now heading towards Bird Avenue, Clonskeagh, and as Garda O'Donnell caught up in his patrol vehicle, he observed the second patrol vehicle pursuing the Volvo into Gledswood Park, a housing estate in Clonskeagh.

8. Garda O'Donnell drove onto the Dundrum Road and waited there, anticipating that the appellant's vehicle would return along Mulvey Park. Whilst stationary at this junction, facing the direction of Milltown in Clonskeagh on the Dundrum Road, another unmarked patrol vehicle pulled up and then Garda O'Donnell observed the Volvo travelling towards them at high speed from Bird Avenue. It was travelling at high speed in the middle of the road in contravention of a continuous white line, with its headlights off. This portion of the

incident is reflected in the dangerous driving charge at count number 13 on the indictment.

9. Garda O'Donnell observed this vehicle travelling towards his vehicle without slowing and as the vehicle approached him its wheels were locked to the right; however, the vehicle continued to drive at the patrol vehicle, skidding in its direction. The vehicle came to a stop, inches from and parallel to the patrol car, without any impact. This constituted the endangerment charge at count number 1 on the indictment.

10. The vehicle then took off at speed again travelling for approximately 800 meters at approximately 140 km/h on the wrong side of the road, breaking a red light at the junction of Dundrum Road/ Miltown Road, necessitating other motorists taking evasive action to avoid collision. The Volvo also at this point had to take evasive action to avoid collision, and as a result, came to a stop and struggled to take off again. Garda O'Donnell positioned his car parallel to the Volvo, and again noted the appellant in the driver's seat and the other occupants. The occupants of the front seats fled from the vehicle; the passenger ran towards the River Dodder at Milltown road, whilst the appellant jumped over a wall into Alexandra College. They were pursued by two gardaí from the second garda car whilst Garda O'Donnell detained the back-seat passenger. The appellant was apprehended by Garda Daniel Redmond in the grounds of Alexandra College. Prior to that apprehension, as Garda Redmond was pursuing the appellant, he was told to "*fuck off*" by the fleeing man. As Garda Redmond reached the appellant, a struggle ensued as the appellant became aggressive, kicking and lashing out and attempting to reach his hands into his pockets. This was the subject matter of count number 14 on the indictment. Garda Redmond struck the appellant in the legs with his baton. The appellant continued to kick and conceal his hands in his pockets. Garda Redmond then took out his incapacitation spray and warned the appellant that he would be sprayed if he did not stop resisting arrest. He did not comply and was subsequently sprayed in the eyes. After this, the appellant was subdued and became compliant. He was found to have a small quantity of cannabis on his person. Garda Redmond then arrested the appellant. Gardaí subsequently carried out a search on the Volvo vehicle and recovered a further four individual bags of cannabis amounting to 5.5 grams under the driver's seat and an iron bar in the back seat.

Circumstances of the appellant

11. The appellant had 98 previous convictions, which fall into the following categories:

    i. 14 convictions for s.3 drugs offences;

    ii. 4 convictions for s. 15 drugs offences;

    iii. 1 conviction for theft;

    iv. 3 convictions for failure to answer bail contrary to s. 13 of the Criminal Justice Act 1984;

    v. 13 convictions for driving without a licence;

vi. 14 convictions for driving without insurance;

vii. 2 convictions for driving while disqualified;

viii. 1 count of unauthorised taking of an MPV;

ix. 7 convictions for failure to produce insurance;

x. 3 convictions for no display of insurance disk;

xi. 2 convictions for no display of tax;

xii. 10 convictions for failure to produce a driving licence;

xiii. 1 conviction for possession of stolen property;

xiv. 1 conviction for possession of certain articles;

xv. 2 convictions for offences contrary to s.4 of the Road Traffic Act 1961;

xvi. 2 convictions for speeding;

xvii. 3 convictions for use of a mechanically propelled vehicle without an NCT;

xviii. 2 convictions for no valid NCT;

xix. 1 conviction for driving without L-plates;

xx. 2 convictions for driving while unaccompanied as a learner driver;

xxi. 1 conviction for failure to stop for gardaí;

xxii. 1 conviction for having no crash helmet while driving a motor cycle;

xxiii. 1 conviction for criminal damage;

xxiv. 1 conviction for possession of knives.

12. The majority of these convictions were dealt with in the District Court and resulted in a variety of penalties including several short custodial sentences for the appellant. Many of the offences (85 out of the total of 98) were committed whilst the appellant was on bail. However, there was no evidence that the present offending had been committed whilst on bail. Moreover, the appellant had acquired numerous disqualifications from driving, and was the subject of a 10 year disqualification at the time of the incident the subject matter of these proceedings.

13. It was stated that the appellant had a history of drug problems but had since remedied these issues and was free from drug use at the time of the sentencing hearing. He was registered with the Mountjoy Education Centre and was pursuing courses, in English, and Crime Awareness and had sought to enrol in the Tower Project in Clondalkin shortly

before the offending had occurred. He was also an actively involved in a local equestrian centre. It was submitted by counsel for the appellant that he had voluntarily submitted for urine analysis within the prison, however the court was informed that the he had refused to give a sample; this was disputed as being inaccurate. The appellant had entered a guilty plea at the earliest possible opportunity, had engaged well with Probation and had, it was submitted, demonstrated a willingness to tackle his drug problem.

14. It was accepted by counsel for the appellant that although his driving had been highly dangerous and reckless, no collisions, damage or injury had been caused. It was accepted by the sentencing judge that the appellant had not set out to cause harm and had solely sought to avoid apprehension due to his possession of cannabis and his relevant disqualification from driving. Furthermore, counsel for the appellant submitted that at the time of offending, shortly after midnight, one could reasonably expect a reduced volume of traffic on the roads, resulting in a somewhat reduced level of danger to other road users from the appellants actions.

15. The court heard that the appellant came from a difficult background, and left school at an early stage and turned to drugs. More recently, it was noted the appellant had suffered a bereavement that had a significant impact on him. It was urged upon the court that the appellant the benefit of a supportive family, who will continue to support him after his release.

Remarks of Sentencing Judge

16. In sentencing the appellant, the sentencing judge made the following remarks:

> *"The Court heard evidence from Sergeant Seamus Ryan in respect of this matter and the most significant offence in the indictment is Count 1 being the count of endangerment and Sergeant Ryan described being on patrol on the 14th December 2018 at 12.05 am and he observed a car travelling at high speed passing vehicles. He was on patrol at the time and the car was travelling at speeds of 120 to 140 kilometres per hour. He activated the blue lights. This occurred along the N11 at Cabinteely. He described approaching the car and as he approached the car took off again at speed and drove through red lights. The entire incident went on for over 20 minutes and involved a 15-kilometre drive at speeds of up to 160 kilometres an hour being chased by the gardaí. It involved breaking red lights on a number of occasions and speeding through traffic lights.*
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> *The chase continued at high speed onto the Stillorgan road towards Donnybrook and yet another red light was broken at that stage the speeds went up to about 180 kilometres per hour. Eventually the accused was apprehended while driving at Bird Avenue he turned left onto the Dundrum road and the gardaí had backup at that point. There was a further chase. Motorists had to take evasive action and the Volvo had to come to a halt as a result. The description given by the garda in the course of his evidence was quite alarming. It was clearly highly, highly dangerous driving and I consider the offences to come within the upper end for offences of this nature. The offending conduct was also significantly aggravated by the accused's*

previous convictions, 98 in total. Five while on bail. Offences for possession of knives, driving while disqualified, failure to appear, five counts of previous for dangerous driving, numerous counts for section 3 drugs, 14 in total, four for section 15 drugs, 14 for no insurance. This is a man who clearly has no regard for the rules of the road, no regard for the public using the road, no regard for any of the road traffic laws. I consider that the offence comes within the upper range for offending and consider absent mitigation that a seven-year sentence, the maximum sentence would be the appropriate sentence. It was highly, highly dangerous.

By way of mitigation, I take into account the accused early plea and his guilty plea. I take into account his apology. I take into account his background which is a very troubled background and he was one of a large family and his father died when he was five years old. There has been a letter of apology and the accused did suffer a number of traumatic experiences very young and I take that into account. I do note that thankfully no one was harmed, and it wasn't his intention to harm anybody, but his conduct was highly reckless. In the premises I consider a six-year sentence to be the appropriate sentence and in order to give him an opportunity to reform and deal with his drugs issues which clearly underly much of his troubles I am going to impose a period of one year probation supervision and I'll back date the sentence to give him credit for time spent in custody.

MR SPENCER: I think it's the 14th of December 2018, Judge.

JUDGE: Yes. Now I just want to get the conditions in the probation report. Sorry, sorry I meant to say 18 months, I'll suspend the final 18 months, not one year. That will give him appropriate time to complete the various programs suggested by the probation services. So, six years with 18 months suspended on condition that he remains under the supervision of the probation services for a period of 18 months. That he completes the Choice and Challenge program and Offensive Behaviour Program; that he provide weekly urinalysis to the Matt Talbot agency or such other agency as nominated by the probation services; that he complete a road safety program; that he attend intense supervision programs as directed by the probation services; and he undertake counselling as directed by the probation services.

In respect of the no insurance count I am going to disqualify him for 16 years. He has had numerous no insurance convictions.

…

I'm going to ban him for 16 years. I'm going to, in terms of the refusal to give the blood sample, I'm going to impose a six-month driving ban. I think that's the maximum. In terms of the dangerous driving again I'm going to impose a 16-year ban in respect of that. In terms of the obstruction and resisting arrest I'm going to take that into consideration".

Grounds of Appeal

17. The appellant rests his appeal on the following grounds:

    i. The sentencing court failed to take into account the mitigating factors and placed too much emphasis on the aggravating factors in imposing sentence, in particular the fact that no damage was caused nor was any person was physically injured in the commission of the offence in question;

    ii. In all the circumstances the sentence imposed was too severe having regard to the aggravating and mitigating factors and the personal circumstances of the appellant.

    iii. The sentencing court erred in identifying a headline sentence of seven years for this offence and the resultant sentence imposed was excessive and disproportionate.

Discussion & Decision

18. Complaint is made that the sentencing judge selected the maximum potential sentence as her starting point. We accept that it is a principle of sentencing that maximum sentences should only be passed for the worst manifestation of the offence, although, as Thomas O'Malley, has put in "Sentencing Law and Practice" 3rd ed (2016) at para 5.04, lawyers and judges should be discouraged from "*straining to conjure up more egregious instances of the offence than that presented by the case before them.*" Indeed, that highly respected author adds that there is some Irish authority suggesting that the maximum sentence may be imposed when the offence is at the highest end of the scale of gravity though not necessarily the worst imaginable variant of the offence. The case of *The People (DPP) v Power* [2009] IECCA 149 is cited by O'Malley in support of that proposition.

19. Be that as it may, the reasonable point is made by counsel for the appellant that the endangerment count was preferred on the basis of recklessness rather than intent. Moreover, although the potential for injury was very significant no actual injury was caused to Garda O'Donnell or anybody else. We have been referred to a number of comparators by the appellant including *The People (At the Suit of the D.P.P.) v Joseph McInerney* [2016] IECA 378, *The People (At the Suit of the D.P.P.) v Maxwell* [2020] IECA 62, *The People (At the Suit of the D.P.P.) v. O'Driscoll* [2017] IECA 91 and *The People (At the Suit of the D.P.P.) v. Cash* [2015] IECA 198 and *The People (At the Suit of the D.P.P.) v. McGillian* [2018] IECA 62. We have considered these in detail, particularly with respect to the headline sentences imposed. We have further noted the submissions of counsel for the DPP seeking to distinguish these cases from the present case, on one basis or another. We have said many times that direct comparison of individual cases is unlikely to be helpful in a situation where every case is different, and the individual circumstances of each accused is different. The true value of comparators lies in their indication of a trend, if such is discernible, concerning how particular issues have been approached in the past, or with respect to an evidencing an apparent range within which gravity has tended to be assessed in past cases involving the same type of offending. Having considered the comparators submitted to us we are satisfied that for the sentencing judge in this case to have selected the maximum sentence of seven years as her starting point or headline

sentence was an error. A headline sentence of seven years imprisonment was out of kilter with the sentencing trend with respect to assessments of gravity evident from the comparator cases to which we were referred, and which suggested that a headline sentence of between four and five years would have been the appropriate one for the endangerment offence considered in isolation.

20. That having been said, it cannot be gainsaid that this was a very serious case. More over, the sentencing judge had been asked to take several other offences into consideration. Where sentences are taken into consideration, the sentence imposed is intended to reflect a defendant's overall criminality. In some cases, where the offence to be taken into consideration amounts to offending of the same type, and has been committed within the same overall incident as the primary offence for which the defendant is to be sentenced, such that little is added in terms of the offender's overall culpability, the offences to be taken into consideration may end up adding little or nothing to the sentence which the court would otherwise impose. However, in other cases, particularly where the offending to be taken into consideration involves significant additional culpability, and/or is qualitatively different from the offence for which the defendant is to be sentenced, as we are satisfied is the case here, the offences taken into consideration may lead to a substantial increase in the sentence which the court would otherwise impose.

21. In this case the offences to be taken into consideration, the majority and most egregious of which were a series of dangerous driving offences committed by the appellant in the course of the hot pursuit of the appellant's vehicle by Gardai, but which also included the offence of obstruction committed when the appellant violently resisted arrest and had to be subdued, involved significant additional culpability and undoubtedly would have justified a substantial increase in the headline sentence which the court would otherwise have determined upon for the incident of reckless endangerment involving the near collision of the appellant's vehicle with the stationary Garda vehicle and which had placed Garda O'Donnell in very specific danger.

22. Having considered all the circumstances relevant to the gravity of the appellant's offending conduct, including relevant aggravating circumstances such as the appellant's appalling previous record which included numerous convictions for relevant offences, and the fact that he was disqualified from driving, and also factoring in an increase for the offences to be taken into consideration, we believe that an appropriate starting point to select as a headline sentence was 5 ½ years' imprisonment rather than the seven years selected by the sentencing judge.

23. A further complaint was made concerning the degree to which the sentencing judge discounted for mitigation from the headline sentence, although this was not pressed with particular vigour. We are completely satisfied that there was no error of principle on that account and that if the headline sentence nominated in the first instance had been correct the appellant would not have had any legitimate complaint with respect to the level of discount afforded to him, particularly in circumstances where he was the beneficiary of a significant part suspension in the interests of incentivising his continued rehabilitation.

24. However, in circumstances where we have found an error of principle and it is necessary for us to quash the sentence imposed by the court below, and proceed to a re-sentencing of the appellant, we propose to reflect the mitigation to which the appellant is entitled, to further reward progress by him towards rehabilitation to date, and further to incentivise his continued rehabilitation, by means of a single measure i.e., the part suspension of a portion of the nominated headline sentence. Accordingly, we impose a sentence of 5 ½ years' imprisonment on count no 1 but will suspend the final two years of that sentence to make allowance for those factors. For the avoidance of doubt this sentence takes into consideration the offending conduct charged in counts 2, 3, 5, 8, 9, 10, 11, 12, 13 and 14. The net custodial sentence to be served by the appellant, providing that he keeps to the conditions on foot of which his sentence is to be part suspended, is therefore one of 3 ½ years' imprisonment. We propose attaching the same conditions to the partial suspension as were imposed by the sentencing judge in the court below. The sentence will further date from the same commencement date as was nominated by the court below. The appellant can enter into his new bond before the governor of the prison in which he is serving his sentence. We grant liberty to apply in the unlikely event of difficulty in that regard.