



THE COURT OF APPEAL

Court of Appeal Record No. 38/2020

**Edwards J
McCarthy J
Kennedy J**

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

MARTIN FEEHAN

APPELLANT

JUDGMENT of the Court delivered on the 29th day of March 2022 by Mr Justice McCarthy

1. This is an appeal against conviction and sentence. The appellant was convicted on one count of dangerous driving causing serious harm to a passenger in his own vehicle, one Bríd Hallihan, contrary to section 53 of the Road Traffic Act 1961 as inserted by section 4 of the Road Traffic (No. 2) Act 2011. She was very seriously injured. This judgment pertains to conviction.
2. Because of the issues which have been raised on appeal we think it appropriate to set out the somewhat unusual sequence of events prior to the trial. We have not been given the date upon which the prosecution was initiated but in any event the appellant was first prosecuted in the District Court on the basis that the offence was a summary one. It is not and may be dealt with only on indictment. No objection was raised on behalf of the appellant, however, to submitting to what was in fact a nullity and after summary trial on the 21st of March 2016, the appellant was convicted. An appeal was then taken to the Circuit Court and was apparently adjourned on a number of occasions. Subsequent to the conviction and apparently in 2017, it was sought to quash it and apparently judgement was given in those proceedings in May 2018. We are given little detail about them, but the moving party was the respondent. It seems that the parties were labouring under a common mistake as to the jurisdiction of the District Court and that this misconception persisted for some considerable time after conviction.

3. On the 16th of February 2015 the appellant was driving his blue Citroen Berlingo van on the main road between Mallow and Cork at Glencaum, Grenagh, County Cork. In particular, he was travelling on the south bound, overtaking, lane ("the overtaking lane") where it merged with what we might term the slow, ordinary, or single lane ("the single lane"), the traffic on which had priority. The prosecution's case was that as the overtaking lane came to an end the appellant was travelling too fast to slow down sufficiently to yield to an articulated lorry travelling in the single lane and when there had, over some distance, been no room for him to rejoin the latter lane. It was contended that the appellant lost control of his vehicle and spun across the road onto the Cork to Mallow carriageway where traffic was travelling in the opposite direction in consequence of which collisions occurred between a number of vehicles.
4. The appellant's case at bottom was that since there was traffic behind him on the overtaking lane he couldn't slow down or stop, that there was simply no room for him to rejoin or enter the single lane, and that as he drew abreast of the articulated lorry that vehicle swerved out slightly whereby the left hand side of his vehicle and the right rear of the lorry struck each other (it is to be inferred lightly, since he used the word "*nudged*" to describe the impact) as a result of which he lost control of his own vehicle. The driver of the lorry, a Mr O'Toole, was adamant that no such collision had occurred, that he had not swerved out and had driven straight ahead at the point of the merger of the lanes. It was contended on the appellant's behalf that the configuration of the roadway where the merger took place was, to put it no further, confusing or out of the ordinary in that there was a sense in which the slow lane merged into the overtaking lane – by that was meant that if one was travelling on the slow lane it would be necessary for one to veer to the right to join the single carriageway after merger rather than the more usual arrangement whereby vehicles being driven in the fast lane veer into the single lane.
5. The evidence of one Mr Shiel was that he was travelling in the fast lane too, some "*few hundred*" metres, as he described it, behind the appellant. Again, this witness's evidence is of importance on this appeal not just because of what he said he did and saw but also because of an issue on the charge as to whether or not the judge accurately reprised what he had said. He said he was in what he described as a line of traffic with a number of vehicles. There were a number of heavy goods vehicles on his left and he overtook two vehicles. He described himself as "*maybe a couple of hundred metres... I don't know what distance behind the chemical truck [Mr O'Toole's vehicle] and a blue van [the appellant's vehicle]*". He went on to state that the appellant's vehicle, as he put it, "*lost control and went spinning across the road into oncoming traffic*". He described himself as being "*a distance back*" and as trying to "*keep to the left and out of the way as much as I could. I was conscious that there were more trucks behind me, so I didn't want to stop suddenly and cause another accident on my side... so I pulled into stop on the left-hand side...*". He did not see the lorry and the van collide. He explained in answer to a question about the latter that he was "*a distance back*". Pressed by counsel on whether or not he would accept that he was perhaps too far back to see a collision between the two, he responded by saying "*probably not*" and added that he did not think it had occurred.

6. There was no evidence other than that of the appellant that a collision (however slight) occurred with the lorry before the multivehicular collision; the lorry driver, Mr O'Toole, was adamant on this point. His evidence was to the effect that as the *"two lanes were coming to an end"* the appellant's car *"kept going basically"*. He said he saw the car approaching, and, thereafter *"halfway up the [length of the] truck"* – the latter vehicle was 15 metres in length. From the point of merger there was a double white continuous line on the road; he described the event as occurring in *"milliseconds"* and the sequence of events as he described it was that after he saw the van travelling by his side he saw it facing *"totally the wrong way"* and that it was *"sideways basically"* on what might be described as the *"wrong side"* of the road. The witness, on more than one occasion in cross-examination, said that he *"followed the course of the road"* – this was in answer to propositions by defence counsel that the *"inside lane merges into the outside lane"* but accepted, however, that whosoever was coming from the inside lane had to *"tack"* to the right when the lanes merged. It appears that he first saw the appellant's vehicle when he (Mr O'Toole) passed a sign indicating that the overtaking lane came to an end some 400 metres ahead, driving *"very fast"* and at a sign indicating a merger some 200 metres ahead, the appellant's vehicle was still in the outside lane. He rejected the proposition that he ought to have slowed down, in effect to permit the appellant's vehicle to overtake him. We might add that it was suggested a certain mark on the van was left by a collision between his vehicle and that of the appellant, a proposition put for the purpose of seeking to show that such a collision had occurred, a matter to which we return below.
7. Mr O'Toole's vehicle had a *"dashcam"*, a fact of some importance on this appeal; he stated that he gave the *"chip"* from it to a Garda Marie Gibbons. He had looked at the footage on it himself but there was, as he so put it, *"nothing there"* save *"open road"*. Garda Gibbons said she *"viewed"* the footage but said that: -

"the file wouldn't open. It wasn't working. So, there was nothing of evidential value to be gleaned from this because the file must have been corrupted or something. It wouldn't open. So, I actually didn't view the file."

It is not clear what occurred to the so-called chip, but she said it was downloaded onto a *"file"* which she did not have. She sought assistance from those she described as local [garda] camera experts and they were not able to open it. She said that Mr O'Toole had viewed [the footage] on the dashcam itself but not later on a computer.

Grounds of Appeal

8. The grounds of appeal in respect of conviction are as follows: -
- (a) *The learned trial judge erred in law in his explanation of the difference between dangerous driving and careless driving in answer to the jury's question about [the] same.*
- (b) *The learned trial judge erred in fact and in law in failing to summarise the factual matters on relevant issues.*

- (c) *The learned trial judge erred in law in refusing the appellant's application for a direction in the case.*

Ground (a)

The learned trial judge erred in law in his explanation of the difference between dangerous driving and careless driving in answer to the jury's question about the same.

9. The trial judge had dealt with the issue of what did or did not constitute dangerous driving in his charge proper (the relevant passages from which we set out below) and was also asked a question by the jury after retirement in relation thereto. Again, we set out his answer thereto below.
10. The appellant submits that the judge failed to distinguish dangerous driving from driving which might amount only to careless driving or "*making a mistake whilst driving*". It was submitted that when providing his explanation to the jury in his charge (by which we understand to be a reference to the charge proper, rather than the answer to the question – a somewhat wider point than that which might be evident from the ground of appeal) his reference to a scale in the nature of a "*pyramid*" of fault "*incorrectly compared dangerous driving to negligence*". As to his answer to the question criticism is also made of the manner in which he sought to explain the types of conduct which might or might not constitute dangerous driving.

11. *In his charge proper the judge dealt with the matter extensively and in the following terms: -*

"Now, he is charged with an offence of dangerous driving. Now, what does that mean? Obviously, if you start off from the point of view of, if you look at driving and you get a competent driver, that's one standard, and then you get a driver who makes a mistake. There is an inadvertence, you may strike the curb as you are turning, momentary inadvertence. You'd hardly say that it was dangerous because it's a momentary passing thing. Then you will go on, let's say, up a step to carelessness, doing something that was careless driving without due care and attention. Maybe taking out the old phone, you are just doing something that you shouldn't do and that you know was careless but this is a step up again. And you look at the quality of the driving. Was his driving on the occasion of such a bad quality that it fell below the standard that you would require of a reasonably competent driver in all of the circumstances? And you look at it from your knowledge looking at the evidence using your own experience, assessing the road conditions, the traffic conditions and everything else, the speed involved. Was this driving from the point of view of a reasonably prudent driver looking on, was it such as that person, if they were there, would say that driving caused a real danger either to the public or risk to the public or risk of damage. In other words, we don't have a dash cam as we found out from the questions but if there was a dash cam mounted facing back towards Grenagh or Mallow and you saw this incident happening, would you say with your hand on your heart that (it?) is dangerous? That's the standard, the person looks, if you could, look on with all the evidence you have heard on that incident and as it developed, would

you say that the driver was driving dangerously? The quality of his driving is it of that standard.

Now, you've heard that there is an alternative [the alternative count of careless driving had been left to the jury]. Supposing you felt that... if you were to go down the line... if you felt that, well, look, the driving is careless given all the circumstances, that's a lesser charge [. If] you felt his driving wasn't dangerous or if you look at it and you say, well, I don't think he did anything wrong. He ran out of road and there was an accident. I don't think his driving in the circumstances of the road and the circumstances of the speed, I don't think there's anything wrong with his driving and I'll acquit him. If you believe that's where the evidence leads you, you can do that, and no one can say a word to you if that is your view of the evidence."

[Punctuation and capitalisation in square brackets after the word "charge", although not in the original transcript, has been inserted by the Court of Appeal to convey what we believe was the true sense of what was being said.]

He later returned to the topic in these terms: -

"If you believe that his driving was of a quality such as a prudent driver, in the circumstances, would consider it dangerous and that is made out beyond a reasonable doubt, convict him of that. If you think, in the circumstances, his driving was careless to the extent that he was driving without due care and attention for other road users, then you could consider a lesser charge of that, of careless driving."

12. Questions were raised by the jury about the difference between dangerous driving and careless driving and the consequences of anything the jury might do. The judge dealt with the matter in the following way: -

"First of all, you must regard it a sort of a starting line. What is the starting line? And if you take the starting line as being competent driving then you have, let's say, on a step above that, you have something, let's say as I said to you, like inadvertence or passing incompetence. That's one level. It's not quite careless but it's not competence. So another level up is careless. That is something that would – its without due care and attention. Look at it from an objective point of view, it should be done better with due care and attention. That driving is not done with due care and attention to the road, the traffic, the speed everything else because you must consider everything. And then above that is doing something that you know is dangerous, you anticipated, let's say, a bad result but you continued, really dangerous. Do you understand? So, it's an ascending pyramid or there are... in other words, there are gradations of behaviour from competent inadvertence, carelessness, negligence. So, you are entitled to put on the facts this driving into whatever category you like. You could say there was fantastic driving, Formula 1 you could say it was inadvertence, you made a mistake but in the road conditions I can understand it. You can say, look, I got it wrong, but he was careless, or you could say [gasp] did you

hear the way I almost drew breath? What he did was dangerous. What interpretation you make of the facts is down to you, the jury..."

13. Counsel requisitioned the judge on that answer submitting that *"the explanation insofar as it went was fine but there was a moment, judge, when you said that negligence meant dangerous driving and I don't think that's correct"*. This, be it noted was the extent of the criticism. The judge did not accept that requisition. The answer to the question must not only be read as a whole but also in the context of the charge proper.
14. There was no requisition on the manner in which the judge had addressed the issue of what might or might not constitute dangerous driving in the charge proper – the objection was confined to the form of the answer given with particular reference to the use of the term *"negligence"* presumably in the sentence *"so, it's an ascending pyramid or there are – in other words, they are gradations of behaviour from competent, inadvertence, carelessness, negligence"*.
15. Reliance is placed by the appellant on *The People (AG) v Dunleavy* [1948] IR 95 and *DPP v O'Shea* [2017] IESC 41. *Dunleavy* was a case involving manslaughter in and about the driving of a vehicle ("motor manslaughter"). The former Court of Criminal Appeal (per Davitt J.) explained that (at page 102): -
 - (c) *...There are different degrees of negligence, fraught with different legal consequences; that ordinary carelessness, while sufficient to justify a verdict for a plaintiff in an action for damages for personal injuries, or a conviction on prosecution for careless or inconsiderate driving, falls far short of what is required in a case of manslaughter; and that a higher degree of negligence which would justify a conviction on prosecution for dangerous driving is not necessarily sufficient.*
 - (d) *...Manslaughter is a felony and a very serious crime, and that before convicting of manslaughter the jury must be satisfied that the fatal negligence was of a very high degree, and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others."*
16. The *Dunleavy* decision, as quoted from above, is not of an immediate nor direct applicability to a charge of dangerous driving (whether causing serious injury or otherwise) but it serves to highlight the levels of negligence (and in a sense the term pyramid is an appropriate one) necessary in respect of various offences pertaining to driving.
17. *O'Shea* deals with the issue of *mens rea* in careless driving cases (and by extension prosecutions for dangerous driving) and is not of any direct assistance in this case. The respondent relies upon the case of *People (Attorney General) v Quinlan* (1962) ILT & SJ 123 and (1963) 219 (cited in *O'Shea*), where Judge Barra O Briain of the Circuit Court, in his charge, described dangerous driving as: -

"Driving in a manner which a reasonably prudent man, having regard to all the circumstances, would recognise as involving a direct, immediate and serious risk to the public."

A form of words was used by the judge in substantial conformity with that decision.

18. Criticism has also been made of the judge because of his somewhat colloquial or homely answer to the jury's questions. A charge of that kind is by no means to be deprecated since it is an exercise in communication. It is suggested that the manner in which he so answered the questions including an apparent gesture, facial and otherwise, and the use of the term "gasp", presumably associated with a facial gesture, intruded into the fact finding role of the jury, to the point that, to put the matter no higher, he departed from the duty of the judge to charge a jury impartially. We think from the context there is no basis for that submission (and we need say no more upon the topic) – the judge was plainly attempting to further explain the level of fault required to prove the charge and indeed we think that taken with the charge proper it is clear that what he said and how he acted served to highlight the high level of fault necessary to do so, as required by law. The approach he adopted fortifies our view that he made the levels of fault clear. We might add that we are surprised that at this point is advanced not only because it is entirely without merit but also since nothing was said about it at the trial and, indeed, it was expressly stated that the form of words used by the judge was unobjectionable (*"as far as it goes"*); neither is there any ground of appeal which would give rise to a basis for the complaint made that what the judge said was an illegitimate entry into the jury's domain. Apart altogether from any issue which might arise under *People (DPP) v Cronin* [2006] IESC 9 (reliance has not been placed thereon by the prosecutor), the fact that it was not raised at the trial speaks volumes as to its insignificance.
19. It has been repeatedly said that a charge (and by this we mean not only the charge proper but also what the judge may have said in answer to questions by the jury or any re-charge in response to requisition or otherwise) must be taken as a whole and is not a mere shopping list of desiderata from the point of view of one side or the other. We think that taking the matter on that basis the level of fault to prove the charge must have been clear to the jury. Hence, we reject this ground.

Ground (b)

That the learned trial judge erred in fact and in law in failing to summarise the factual matrix on all relevant issues

20. We have already referred to the evidence of Mr Shiel. The judge dealt with his evidence in the following terms: -

"Mr. Shiel, who was driving, he was driving a red van. He was in a line, there were heavy goods vehicles. The blue van was in front of him, he was overtaken, he pulled in. Then Mr. Shiel at some stage is behind the blue van overtaken but Mr. Shiel gets in."

21. A requisition was made of the judge on the footing that he was in error as to his summary of Mr Shiel's evidence. Some debate took place between counsel and the judge, but he reiterated that he considered what he had said was correct. Criticism is made of the judge because he decided not to revisit the topic and remained of the view that he was correct without reference to his notes or listening to the DAR. The latter point is utterly without merit – a judge can check or not as he sees fit as to what was said. We now have the benefit of the transcript. We see that the trial went into a second day to the extent that the appellant and an expert witness were called and thereafter speeches and charge took place. The evidence, by definition, must accordingly have been fresh in the jury's mind and it will occur from time to time that there will be a misstatement of fact or an issue as to the terms in which evidence has been understood by the judge when addressing the jury. We think that the judge's understanding was an understanding legitimately open on the evidence as we have referred to it in some detail above. What the judge gave was his understanding of the evidence in summary form and a summary is at most required. The judge is not required to accept counsel's version of the evidence. We accordingly reject this ground.

Ground (c)

That the learned trial judge erred in law in refusing the appellant's application for a direction in the case.

22. Counsel, at the conclusion of the prosecution case, sought an acquittal by direction in the first instance on the merits but this was rightly rejected by the judge and again rightly is not the subject of the present appeal. We are concerned here with the refusal of a direction to acquit in virtue of the jurisdiction of the court elaborated in *D.P.P. v PO'C* [2006] 3 I.R. 238 to direct an acquittal in the event that an accused person cannot obtain a fair trial. We have referred above to the fact that the conviction in the District Court was quashed. It appears from the transcript that the appellant sought to obtain a stay (by which we infer a permanent stay) on the prosecution but that he was unsuccessful in so doing. There is no reference to this in the submissions of either party. We cannot speculate as to the nature of the application or the reasons for its refusal.
23. Reliance was placed in the course of the application at trial on the proposition that the recall of witnesses for the event had deteriorated, that the locus of the accident was changed between the incident and the trial, that the Gardaí had failed to examine the lorry for the purpose of establishing whether or not there was a mark thereon from contact with the van and some failure to examine the appellant's van in its severely damaged state having regard to the appellant's subsequent assertions in a statement to the Gardaí about the event on the 24th of February 2015. The latter point cannot be a serious one and indeed it was not pursued here. The appellant was taken to hospital from the scene. The vehicles at the scene were, in fact, examined by a Garda White, a motor assessor, on the 16th of February; he could not have known of the appellant's version of events since this was given to the Gardaí when he made statements to Garda Gibbons on the 24th of February. He considered that the mark on the van referred to in cross – examination of Mr O'Toole and sought to be identified as one caused by contact with one of the wheels of the lorry was attributable to a repair. What more could legitimately have been called for as far as the examination of the vehicles is concerned is hard to see.

24. As to the recollection of witnesses there is nothing in the nature of the type of delay which could remotely trigger the exercise of the trial court's jurisdiction to stop the trial – cases are prosecuted where the offences have occurred many decades ago. In the present case there had been a trial in any event in April 2016 when all the relevant evidence was given. Here, emphasis is placed on supposedly blameworthy prosecutorial delay. The circumstances must be rare in which a prosecution would be stopped solely by reason thereof when the delay does not, as it does not here, give rise to any risk of an unfair trial. This is certainly not such a case. The appellant submitted himself to a purported trial in the District Court which was a nullity and appealed that nullity. We cannot accept that an accused can simply ignore his own participation and acquiescence in the sequence of events which in large part was responsible for the delay. He ought to have taken the minimal step at least of objecting to the purported invocation of the District Court's jurisdiction. Some minimal degree of engagement on the part of an accused is called for in circumstances such as the present – the position might be different if, say, after investigation for a summary offence, and before prosecution, a suspect did nothing and awaited events.
25. We cannot believe the assertion that the locus was changed gives rise to difficulty or any legitimate complaint; the appellant must have known well before the 16th of March 2016 that he was to be prosecuted – there is no suggestion that there was a delay in initiating the summary prosecution and from that moment onwards he was on notice of the importance of engaging with the evidence. A Forensic Collision Investigator, a Garda Carroll, attended at the Scene on the 16th of February and conducted an extensive survey preparing appropriate maps and taking photographs. This was surely enough.
26. As to the dashcam footage, there is no reference to it in the transcript of the District Court trial on the 21st of March 2016. It is plain from that transcript that Mr O'Toole's statement was in the hands of the appellant or his advisers prior to that trial and there is express reference therein to it. After the appellant's purported conviction on that day an appeal was taken to the Circuit Court and correspondence was had between the appellant's solicitors and the respondent. By letter of the 2nd of December 2016 the appellant's solicitors effectively asked the respondent not to proceed with the prosecution. They referred to the dashcam (for the first time) and said that: -

*"...it would appear that no such footage [by which we infer is meant footage from the dash cam] was obtained by the Garda Síochána in their investigation into the cause of this accident. Indeed Mr. O'Toole **[it appears that this is a reference to what was said by Mr. O'Toole in his statement rather than his evidence in either Court]** also refers to the fact that he spotted something ahead of him in the hard shoulder, being trapped what decision to make and then the incident occurred. He does not say that he went into the hard shoulder and does not say that he struck whatever was in the hard shoulder so he must have followed the tapered inside lane into the outside lane."* [Our emphasis.]

By letter of the 16th of April 2019, the respondent's solicitor was asked *inter alia* for: -

"all videos referred to in the book of evidence to include but not limited to the dash cam of vehicle driven by Frank O'Toole".

This was only after proceedings on indictment had been commenced.

27. Garda Gibbons fulfilled her duty to seek out and take possession of any potentially relevant evidence by taking the chip from the dashcam. There is no reason to doubt the reliability of her evidence to the effect that footage could not be viewed nor her evidence to the effect that she sought the assistance of experts locally. There is no explanation as to the whereabouts, now, of the so-called chip or file nor was Garda Gibbons asked about such whereabouts – she simply did not have it in her possession. It seems to us that the only deficiency accordingly which could be alleged in the context of the investigation is the loss of the item at some point between the date of the accident and the 20th of November 2019. We need not here reprise the principles, now well-established, as to the duty of Gardaí in investigation of offences; the appellant refers to the leading authority *viz. – Braddish v DPP* [2001] 3 IR 127, to *Scully v DPP* [2005] 1 IR 242 and *Hegarty v DPP* [2005] IEHC 134.
28. There is no doubt but that the chip ought to have been retained and made available whether anything was capable of being seen on it or downloaded or not. The fact that the Gardaí have not retained material of potential evidential value has, in general, no immediate bearing on whether or not the trial court ought to have directed an acquittal – one must address the issue of whether or not there is a real risk of an unfair trial because the relevant material is not available and this issue will arise regardless of whether some act or omission of the investigating authorities is blameworthy in law; we make no finding one way or another on that issue. The only issue is whether or not because it was not available to the appellant or his advisers for inspection, he was prejudiced to the extent that he was at a real risk of an unfair trial or, at this stage, did not receive a fair trial.
29. From time to time, evidence which might be valuable will not, for various reasons, be available and one can only decide on a case-by-case basis whether or not the fact that such evidence is not available gives rise to a real risk of, or resulted in, an unfair trial.
30. Any footage which might have been recoverable from the dashcam was *prima facie* relevant and hence admissible. We know that it was relevant evidence not only because Mr O'Toole gave evidence of its contents having viewed it on his dashcam but also by its nature. Further, it was objective evidence not dependant on the recollection of a party if available. In the light of the Garda evidence one can only speculate as to whether or not anything could have been extracted therefrom and further speculate as to whether or not if anything was so extracted it would have tended to undermine the prosecution case or assist that of the defence; it certainly does not follow rationally from its absence that this is so.
31. We know that the relevant footage was no longer available, even before the "chip" was mislaid, *prima facie* because it was corrupted or otherwise rendered incapable of being downloaded with the technology available to the Gardaí. After the chip was mislaid the height of the appellant's complaint must be that he was deprived of the opportunity to have it examined or seek afresh to recover or download its contents presumably with expert

help. We must decide accordingly whether that deprivation alone gives rise to the type of risk in question. We cannot speculate.

32. Most significantly to us, no real weight was ever attached by the defence to this item until the trial in the Circuit Court – in itself a key indicator of its importance or otherwise. This case is wholly exceptional in that the appellant had a full trial before the District Court when every aspect considered relevant could have been teased out and no doubt was; the dashcam was referred to in Mr O’Toole’s witness statement and was not sought until much later as aforesaid. Even if usable footage was recovered, what it might or might not show (if examined by a suitable expert) is entirely speculative. We therefore reject this ground.
33. We accordingly therefore reject all grounds of appeal and dismiss the appeal against conviction.