`Neutral Citation No: [2019] NICA 17	***Ref:*** **DEE10875**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered: 3/4/2019***

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

NATHAN FINN

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Before: Morgan LCJ, Stephens LJ and Deeny LJ

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DEENY LJ (delivering the judgment of the court)

[1] This judgment deals with an application for leave to appeal by Nathan Finn, currently in custody in Hydebank Young Offenders Centre, against a determinate custodial sentence of nine years imposed upon him following his plea of guilty to the charge of causing death by dangerous driving contrary to Article 9 of the Road Traffic (NI) Order 1995. The sentence was imposed by HHJ Kerr QC on 28 June 2018. Concurrent sentences were imposed of six months for driving without insurance; one month for driving without a licence and four months each for failing to stop following an accident in which someone was injured, failing to remain at the scene and failing to report the accident. A six year driving disqualification was also imposed. The sentences were divided 50% as to custody and 50% as to licence.

Facts

[2] The court was provided with a prosecution statement of facts which was agreed and amplified, to some extent, at the oral hearing. The applicant, who was born on 24 January 1999, purchased a white Saab 1993 motor vehicle from a Martin Dougan on 8 April 2016. Dougan stated that he had been led to believe by Finn that he was approximately 23 years old and connected with the motor trade whereas in fact he was only 17 and had neither driving licence nor insurance.

[3] The next day, 9 April 2016, Finn was driving on the Monaghan Road out of the city of Armagh. Damien McCann in a Volkswagen Golf chose to overtake him, although the evidence would suggest that Finn was already driving quite quickly. Finn accelerated to prevent the Golf overtaking but McCann managed to do so, only by driving at a very considerable speed. It then appears that when entering the

village of Milford the Saab tried to overtake the Golf of McCann on the inside by driving up the hard shoulder of the road.

[4] Tragically, a young student aged 19, Lesley-Ann McCarragher, was jogging on the same hard shoulder. Finn does not seem to have seen her until the last moment. He appears to have swerved to the left but his car spun round and struck the young lady causing her fatal injuries from which she died in the Royal Victoria Hospital on 10 April 2016.

[5] After the collision a number of cars stopped and people got out to lend assistance. Some of those people moved towards the window of the appellant's vehicle and shouted at him. He panicked as he knew he had no licence and started to drive off. He made his way to his aunt's yard a short distance from the scene and hid the car in a shed. He contacted a relative and told her to tell anybody that came that she had sold the car to foreigners as he said that he had hit another vehicle. That, of course, was an attempt to procure what would have been a serious criminal offence. At 6:20 pm on the day of the incident the appellant was contacted by phone by police as he had been reported as having purchased the car the day before. The appellant said he did not own a car and did not drive. As a result of advice from his family and relatives he attended with police at 9:10 PM that evening and underwent eight interviews in the course of which he claimed that he had sold the car on and that he had not been driving it when the car struck the deceased. Even when the text messages to his relative asking her to concoct a story about selling the car to two foreigners was put to him he continued to deny his responsibility. It was not until 21 April 2016 that he attended with police in the company of his solicitor and admitted that he had been the driver and that he was sorry for what he had done.

Applicant's case

[6] Mr Frank O'Donoghue QC appeared with Mr Aaron Thompson for the applicant. Neither they nor their solicitor had acted for Finn at the court below.

[7] Counsel accepted that the case fell within the most serious category of culpability envisaged by *R v Cooksley and Others* [2003] EWCA Crim 996. He submitted, however, that the judge had overlooked the cautionary remarks of Carswell LCJ in *Attorney Generals References for Northern Ireland (Nos 2, 6, 7 and 8 of 2003)* [2003] NICA 28. He argued that the judge had failed to take into account the offender's previous good character and his genuine shock and remorse. He submitted that the starting point of 11 years fixed by the learned trial judge was manifestly excessive and wrong in principle and ought to have been 9 years at most.

[8] He contended further that the reduction for the applicant's plea of guilty ought to have been 25% rather than the approximate 18% which the judge allowed.

[9] He informed the court that the co-accused, Damien McCann, an older married man, had been charged with dangerous driving (not causing death) and had been

given a suspended sentence. The bad driving had taken place over a distance of a mile i.e. about a minute's duration at the speed they were driving. He submitted that that was much less prolonged than in some of the other cases such as *R v Stewart – DPP Reference (No. of 2016)* [2017] NICA 1. Counsel submitted that this sentence was clearly inconsistent with the range of 9 to 10 years approved by this court in *Stewart* where the offender lacked the mitigating factor of Finn's youth and was subject to the aggravating factors of consumption of drink and drugs and a previous criminal record.

[10] Counsel also drew our attention to the decision of this court in *Attorney General's Reference (No. 2 of 2008) – Christopher McGinn* [2008] NICA 40. There the appellant was 2 months short of his 17th birthday at the time of offences i.e. a little younger than Finn. Kerr LCJ at [20] said the following:

> "His youth and his plea of guilty are significant mitigating factors, as is his remorse which the judge found to be genuine. Two observations should be made about the strength of the first two of these, however. Although the offender was young, he was no stranger to car crime. He had been driving while under age for some little time. In relation to the plea of guilty, the offender did not confront his guilt at the earliest opportunity."

[11] It can be seen therefore that on the one hand McGinn was slightly younger than Finn but on the other hand he had a record, had consumed drink before the driving and had caused the death of two other human beings as well as causing serious injury to two more, all important factors. Allowing for double jeopardy the court imposed a sentence of 7 years imprisonment saying that the sentence range probably lay between 8 and 9 years. Counsel submits that the sentence here of 9 years is inconsistent given that there were substantial aggravating factors in *McGinn's* case which are not to be found in his client's case.

[12] He also queried the sentencing remark of the learned trial judge that the starting point would have been "much higher" than 11 years were it not for his youth. In response to queries from the court he said, and Crown counsel subsequently agreed, that the decision not to plead guilty at the first arraignment was apparently due to the wish of the then junior counsel and then solicitor to bring in English senior counsel.

The prosecution case

[13] Mr Charles MacCreanor QC appeared with Ms Geraldine McCullough for the prosecution. Mr MacCreanor submitted that the judge had followed the directions of this court in *R v Stewart*, a submission to which we will return in a moment.

[14] With regard to the late plea he pointed out Finn's then counsel did not seek to adjourn the arraignment to obtain the advice of senior counsel.

[15] He acknowledged that the judge's reference to a much higher starting point for an adult offender must mean at least 12 years but submitted that that was within the discretion of the sentencing judge. He acknowledged that the increase in sentencing by Parliament had taken place before the decision of this court in *McGinn*.

[16] He urged the court not to tinker with the sentence of the judge but very properly conceded that an intervention by reduction of even a year was more acceptable in the case of a young person.

Consideration

[17] This area of sentencing has been the subject of very recent consideration in this court in *R v Doherty* [2018] NICA 52. The court followed and adopted the remarks of Carswell LCJ in *Attorney General's Reference for Northern Ireland* [2003] as Kerr LCJ had previously done in *R v McCartney* [2007] NICA 41. Two short passages from that judgment of Carswell LCJ may be quoted in relation to this appeal. At [13] he said the following:

> "The Court of Appeal [in England] added in paragraph [32] of its judgment in *R v Cooksley* a warning that in the higher starting points a sentencer must be careful, having invoked aggravating factors to place the sentence in a higher category, not to add to the sentence because of the same factors."

His Lordship continued, at [14] as follows:

> "We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind they will in our view be enabled to maintain a desirable level of consistency between cases, while doing justice in the infinite variety of circumstances with which they have to deal."

[18] In *R v Stewart* op. cit. this court laid down the approach to sentencing which should be adopted to allow transparency and we observe, to reduce the possibility of relevant aggravating and mitigating factors being overlooked by a sentencing judge. At [28] Morgan LCJ said the following:

> "The proper approach is to identify the impact of all of the aggravating and mitigating factors to determine the starting point before applying the reduction for any plea. In that way both the aggravating and mitigating factors are subject to the same treatment."

[19] Regrettably, this was not, contrary to the submission of Crown counsel here, the approach adopted by the learned trial judge. It was common case before this court that on the facts the appropriate category within the *R v Cooksley* guidelines was the highest category of culpability, allowing for a sentence of 7 to 14 years imprisonment. The judge must then determine the starting point within that range. The judge did so at pages 6 to 8 of his sentencing remarks and arrived at a figure of 11 years imprisonment. But the only mitigating factor which he takes into account is the youth of the applicant. This Court made clear in *McGinn* op. cit. that youth is a significant mitigating factor but that the weight to be given to it should take into account the circumstances of the offender and the nature and facts of the case. We agree that the learned trial judge was entitled to give weight to this factor given the emotional, psychological and educational immaturity of the applicant.

[20] The judge then went on to consider what he describes as a number of factors which can properly reduce the sentence. One of those was the plea of guilty, albeit at a late stage. The applicant had failed to remain at the scene, denied his involvement when first questioned by the police and failed to plead guilty at the first arraignment. The judge accepted Mr Mallon QC's point on behalf of the applicant that "on the evidence in this case perhaps different advice might have led to a different result, especially with someone who was a young man and showing a degree of immaturity". He went on to say that he was taking into account that the applicant had no previous convictions and that he had expressed considerable remorse and was not considered to be a high likelihood of re-offending. He then decided to allow a discount of two years imprisonment on a starting point of 11 years giving the effective sentence of 9 years imprisonment.

[21] Mr O'Donoghue pointed out that this was approximately 18% of a discount which he submitted was too low. If, pursuant to *R v Stewart* one takes the issue of the discount at this point as one relating to the plea of guilty and related circumstances alone we cannot accept that submission. The failure to remain at the scene, the failure to admit the matter to the police when first taxed with it and the failure to plead guilty at the first opportunity, albeit perhaps on erroneous advice, did leave it open to the judge to impose a discount of this nature. But what is clear is that in doing so he cannot have made allowance for either the applicant's clear record or his genuine remorse. To have done so would have required a greater discount. No doubt the learned trial judge did read the medical report provided by the applicant's advisors from Dr Mark Davies, consultant clinical psychologist. He found the applicant to have "severely depressive symptoms". He said he was of low

IQ, the lowest 7% in the population and he diagnosed severe post-traumatic stress disorder arising from his reaction to the accident and its consequences.

[22] It is not contended by the Crown that the previous clear record and the genuine remorse and impact can properly be ignored. It seems that the applicant was not given credit for these factors either when the starting point was fixed within the highest band of culpability, as ought to have been done, or when the judge was fixing the discount.

[23] The court has referred to counsel's submissions regarding its previous decisions in *R v Stewart* and *R v McGinn*. This sentence is at odds with those two decisions, particularly *McGinn*. The sentence is contrary to the "desirable level of consistency" previously endorsed by this court – see [16] above.

[24] There is also force in Mr O'Donoghue's submission that the judge erred in saying that the starting point would be "much higher" than 11 years if the applicant had been older. To have justified a "much higher" starting point we consider that some, although not all, of the other serious aggravating factors identified by the court in the decisions cited above would have had to be present: i.e. previous consumption of drugs or alcohol, previous bad record of driving, more than one death or serious injury to one or more victims in addition to a single death.

Conclusion

[25] The appalling driving of this young offender, Nathan Finn, caused the tragic death of Lesley Ann McCarragher in April 2016. No sentence imposed by the courts on the applicant can bring her back or lessen her absence for her grieving family and friends. It is the duty of the court to dispassionately consider the justice of the sentence for the offences committed in the light of all the circumstances and the previous decisions of this Court.

[26] We consider that the learned trial judge did not give credit for two significant mitigation factors in fixing the starting point for sentencing here, i.e. the absence of previous convictions and the genuine remorse of the applicant.

[27] We conclude that the sentence is out of kilter with previous decisions of this Court in *R v McGinn* and *R v Stewart*. In the former of those two cases this Court found the range to be 8 to 9 years, although there were five aggravating factors present not found in this case i.e. drink, previous record, a second death and two persons seriously injured. The actual sentence, allowing for double jeopardy, was 7 years. In *Stewart* the range was found to be 9 to 10 years but with two aggravating factors not found here. The net sentence was 9 years.

[28] The court concludes, pursuant to statute, that the starting point for sentence, ought to have been no more than **10** years' imprisonment.

[29] We consider that the discount of 2 years for the plea imposed by the judge can properly be applied to that revised starting point giving him an effective sentence of **8 years'** imprisonment of which half is to be served in custody, the maximum allowed by legislation, and half on licence. This reflects the circumstances of the case and the previous decisions of this court.