SENTENCING REPORT

HM Advocate v Noche

HIGH COURT OF JUSTICIARY

LORD MACKAY OF DRUMADOON, LADY SMITH AND LORD WHEATLEY

28 OCTOBER 2011

[2011] HCJAC 108

Justiciary — Sentence — Appeal — Unduly lenient sentence — Accused pleading guilty to causing death by dangerous driving — Sentencing judge holding that exceptional circumstances existing justifying non-custodial disposal — Community service order of 300 hours imposed — Whether unduly lenient.

An accused person pleaded guilty to causing death by dangerous driving whereby he had driven on the wrong side of the road and collided with a car in which the deceased was a passenger. The sentencing judge heard evidence that the accused was a Spanish national who had moved to Scotland three weeks before the accident, it was agreed that excessive speed had not played any part in the incident, and the Crown accepted that the extent of the accused's culpability was his driving on the wrong wide of the road. A social inquiry report and psychiatric report demonstrated that the accused had no history of criminal behaviour and that the accident had had a considerable impact on the accused. The sentencing judge held that there were exceptional circumstances that justified a non-custodial disposal, and imposed a community service order of 300 hours on the basis that the sole factor implying culpability was the accused mistakenly driving on the wrong side of the road, there were no other aggravating factors, any sentence would have a greater impact on the accused as he would be separated from family and friends, and he had pleaded guilty at an early stage. The Crown appealed the sentence as unduly lenient.

Held, (1) that the sentence imposed was unduly lenient and fell outwith the range of sentences that the sentencing judge, applying her mind to all the relevant factors, could reasonably have imposed; the case required the consideration of the imposition of a custodial sentence and that was the only appropriate sentence (paras 25 and 28); (2) that the sentencing judge had erred in considering that there were no aggravating factors where those existed in the injuries suffered by passengers other than the deceased, and in accepting that the dangerous driving was momentary as it was not limited to the point of collision (paras 26 and 27); (3) that having regard to the English sentencing council's definitive guidelines on causing death by driving, the respondent's culpability fell within the overlapping margins of less serious cases of causing death by dangerous driving and more serious cases of causing death by careless driving; the Crown's concession that the reason for the dangerous driving was the respondent's being accustomed to driving in Spain reduced the degree of culpability but did not do

so to the extent that the imposition of a non-custodial sentence was appropriate (para.31); (4) that an appropriate starting point was 18 months' imprisonment, which would be reduced to 12 months to take account of the respondent's guilty plea and the number of community service hours he had already served (para.32); and appeal *allowed*, community service order *quashed*, and sentence of 12 months' imprisonment *substituted*.

Indictment
Pedro Pena Noche was charged at the instance of the rt hon Elish Angiolini, QC, on an indictment libelling that: "On 3 May 2010 on a road or other public place, namely the A714 at High Alticane Farm, Pinwherry, South Ayrshire, you PEDRO PENA NOCHE did cause the death of Margaret McIlroy, born 24 December 1929, aged 80 years, formerly residing at 10 Glenhuntly Terrace, Port Glasgow, by driving a mechanically propelled vehicle, namely motor car registered number DV10 CFX dangerously and did cross into the opposite carriageway and drive in said carriageway into the face of oncoming traffic and collide with motor vehicle, registered number YX56 OYA, then being driven by James Dempster Coyle (Senior), c/o Strathclyde Police, Ayr, whereby said Margaret McIlroy, a passenger within said vehicle, was fatally injured and the other occupants in said vehicle, namely James Coyle (Junior), Sandra Coyle, said James Dempster Coyle (Senior) and Glen Hopkins aged 9 years, all c/o Strathclyde Police, Ayr were injured; CONTRARY to the Road Traffic Act 1988, Section 1."

The accused pleaded guilty and was sentenced to 300 hours of community service.

The Crown appealed against sentence.

Cases referred to
Advocate (HM) v Bell, 1995 S.L.T. 350; 1995 S.C.C.R. 244.
Attorney General's Reference (No.1 of 1994) (1995) 16 Cr. App. R. (S.) 193; (*sub nom R v Day*) [1995] R.T.R. 183; [1994] Crim. L.R. 764.
R v Le Mouel [1996] 1 Cr. App. R. (S.) 42.
R v Obermeier [1997] 2 Cr. App. R. (S.) 346.
R v Pulido-Sanchez [2010] EWCA Crim 2375; [2011] 1 Cr. App. R. (S.) 108.
Wright v HM Advocate [2007] HCJAC 16; 2007 J.C. 119; 2007 S.C.C.R. 139.

Appeal
The appeal was heard before the High Court.

On 28 October 2011 the court *allowed* the appeal, *quashed* the community service order, and *substituted* a sentence of 12 months' imprisonment.

The following opinion of the court was delivered by Lord Mackay of Drumadoon:

OPINION OF THE COURT.— [1] The respondent was born on 14 January 1973. He is a Spanish national. On 28 February 2011, at a first preliminary hearing in the High Court at Glasgow, the respondent pled guilty to a contravention of s.1 of the Road

Traffic Act 1998. That charge was in the following terms: [his Lordship quoted the terms of the charge set out supra and continued:]

The respondent appeared before the court as a first offender. Sentencing was adjourned until 29 March 2011. On that date, having considered the terms of a social inquiry report and a medical report, which were available, and having heard a plea in mitigation by senior counsel for the respondent, the sentencing judge, Judge Rita Rae, QC, imposed a community service order on the respondent for the maximum period of 300 hours, disqualified the respondent from holding or obtaining a driving licence for a period of four years and ordered endorsement of the respondent's licence.

[2] On 26 April 2011 the appellant lodged a note of appeal in terms of ss.108 and 110 of the Criminal Procedure (Scotland) Act 1995 against the sentence of community service on the ground that the sentence was unduly lenient.

[3] On 3 May 2011 the appellant lodged a petition under s.121A of the 1995 Act to suspend *ad interim* the community service order, which had been imposed on the respondent. By the date the petition was granted the respondent had satisfactorily completed 134.5 hours of the 300 hours of community service ordered.

[4] The facts and circumstances giving rise to the charge were presented to the sentencing judge in an agreed narrative. For the purposes of this appeal they can be summarised in the following terms:

"Parties involved in collision

"The deceased Margaret McIlroy was born on 24 December 1929 and was 80 years of age at the time of the fatal collision. Her husband had passed away in 2009. In January 2010 she moved to reside with her daughter, Sandra Coyle, her son-in-law, James Coyle, Senior, and their son, James Coyle, Junior, at 20 Bouverie Street, Port Glasgow. With the support of her family, she had made good progress in coping with her bereavement and her family's view was that she had more or less returned to being her usual cheerful self.

"At the time of the collision the deceased was the rear offside passenger in a Citroen motor vehicle, which was being driven by James Coyle, Senior. Her daughter was the rear nearside passenger, her grandson, James, Junior (age 34) was the front seat passenger, and her great-grandson, Glen Hopkins, was the centre rear passenger. All of the witnesses within the Citroen motor car were returning home, having spent the weekend at Barrmill Caravan Site where Mr and Mrs Coyle own a static caravan. Mr Coyle was familiar with the road in question as he had travelled backwards and forwards on this road to the caravan site for approximately 12 years. He was also aware of the dangers of using this road, namely tight bends, lorries and agricultural vehicles. Mr Coyle, Senior, had held a driving licence since 1973 and was an experienced driver. At the time of the collision, he was driving north on the A714.

"The respondent was driving south in a Mitsubishi Pick-up, registered number DV10 CFX, which was owned by the wind farm company in Girvan, which the respondent works for.

"(ii) Locus of the collision

"The collision occurred at a bend on the A714 Newton Stewart to Girvan road approximately 200 metres south of High Alticane Farm, which lies between Barrmill and Pinwherry, South Ayrshire. The A714 consists of a single carriageway road with one lane for traffic in each direction, the national speed limit on that section being 60 mph for motor cars. The A714 extends generally north to south. The lanes are separated by hazard warning lines, which warn drivers of an unspecified hazard. The hazard at the locus was a tight right hand bend for southbound drivers (respondent) and tight left hand bend for northbound drivers (Mr Coyle). The carriageway is partly bordered to the west by a raised kerb, which ceases almost at the apex of the bend and is thereafter bordered with a soft verge, which inclines steeply from the carriageway towards a hedgerow boundary beyond which is a field. The east carriageway is bordered by a soft verge which falls steeply from the carriageway towards a water-filled ditch and a field. There is a crown camber at the locus, which means the slope of the road falls from the centre of the road towards the outer edges.

"(iii) Road, Weather and Traffic Conditions

"The collision occurred at approximately 14.30 hours on Monday, 3 May 2010. At the time of the incident it was daylight and visibility was good. The road surface was dry and in a reasonable state of repair.

"(iv) Driver's view Southbound (respondent)

"The respondent was driving southbound in the company Mitsubishi Pick-up motor vehicle. On his approach to the locus, he negotiated a series of bends followed by a straight section of the road on a slight uphill gradient. Due to the steep verge and hedge line to the offside, southbound drivers would have a very restricted view across the right hand bend, even more so if driving on the wrong side of the road.

"(v) Driver's view Northbound (Mr Coyle)

"Northbound drivers approaching the locus also negotiate a series of moderate bends before travelling on a slight downhill gradient towards the locus. The carriageway straightens out before extending towards the locus and thereafter into a tight left hand bend. Due to the steep verge and hedge line northbound drivers would have a very restricted view across the left hand bend. The view of oncoming vehicles on the wrong side of the road would have been even more restricted.

"(vi) Description of Events

"Road users who were travelling behind the respondent observed him driving on the wrong side of the road for a distance of between a quarter and a half mile prior to the collision. They had no concerns about the standard of the respondent's driving, (he was not, for example, swerving, or travelling at excessive speed), other than the fact that the vehicle he was driving was completely on the wrong side of the road. The

respondent was seen to approach and negotiate the right hand bend, where the collision occurred, whilst still on the wrong side of the road.

"When Mr Coyle first saw the Mitsubishi, it was about 20 to 25 feet away and straddling the hazard warning lines. The Mitsubishi then moved completely onto Mr Coyle's side of the road. Mr Coyle braked and drove as far over to the left as he could but the hedgerow prevented him from steering out of the path of the respondent's oncoming vehicle. The vehicles collided head on. Mr Coyle's car was almost at a halt at the moment of the collision. Mr Coyle estimated that the respondent was travelling at about 40 mph.

"Other road users stopped to render assistance. One of them spoke to the respondent. In broken English, the respondent told her that he was sorry and that he was accustomed to driving on the other side of the road.

"(vii) Consequences of the collision

"All five of the occupants of the Citroen were injured and trapped within the vehicle. The emergency services were contacted. A short time later Police, Fire Service, Ambulance personnel and two helicopters attended at the scene. All of the occupants of the Citroen required to be cut free. All were then conveyed to hospital. The deceased was conscious but in pain. The deceased was given oxygen and pain relief intravenously and then airlifted to Crosshouse Hospital. During the journey, the deceased's blood pressure fell and she lapsed into unconsciousness. She suffered a cardiac arrest during the flight. Attempts were made to resuscitate her in the helicopter and on arrival at Crosshouse Hospital. These attempts proved futile and the deceased's life was pronounced extinct.

"Mr Coyle sustained injuries to his chest and right foot. He was detained in hospital overnight for observation. Mrs Coyle was treated for a fractured collarbone and detained overnight in hospital for observation. James Coyle, Junior, had a fractured right elbow, a laceration to his left hand and an abrasion caused by his seatbelt. He was detained in hospital overnight for observation. Glen Hopkins, aged 9, suffered a fractured right femur and transferred to Alexandra Hospital, Paisley for treatment.

"The respondent was examined by paramedics at the scene but made no complaint of any injury and received no treatment at the time. However, whilst at Ayr police office he complained of a sore back. A police casualty surgeon was summoned who examined the respondent and prescribed painkillers.

"(viii) Police Involvement

"The respondent's employer was made aware of the incident and a colleague of the respondent, David San Martin, who speaks both English and Spanish, attended the scene of the collision. Mr San Martin assisted the police by acting as interpreter. The respondent said to the police, through Mr San Martin, 'I was wrong. I was on the wrong side of the road.' The respondent later attended Ayr police office on a voluntary basis, where he was interviewed with the assistance of an interpreter. He confirmed that he

was the driver of the Mitsubishi at the time of the collision. He confirmed that he had been driving on the wrong side of the road. He was asked whether he felt confident driving in Scotland to which he replied: 'It's a bit complicated.' He was then asked whether he had noticed anything wrong with the car, to which he replied: 'The problem was mine, getting orientated on the roads. I was driving like I was in Spain.' He was cautioned and charged but made no reply."

[5] In her report to this court the sentencing judge indicates that she was informed by the advocate depute that it was a matter of agreement that Mr Coyle and the respondent were driving at appropriate speeds at the time of this collision and that there was no evidence that excessive speed played a part. The sentencing judge was also informed that it was accepted by the appellant that the extent of the respondent's culpability was that he had been driving on the wrong side of the road and that the reason for this was that he was accustomed to driving on that side of the road in Spain. It was accepted by the respondent that, viewed objectively, driving on the wrong side of the road is dangerous.

[6] During the course of the hearings before her, the sentencing judge was provided with information about the respondent. On 15 April 2010, approximately three weeks prior to the collision, which gave rise to his prosecution, the respondent had moved from Spain to Scotland to start work as an assembly team leader for a wind farm company based in Girvan. The company was erecting a wind farm which was reached via the A714 road. The respondent had a steady work record and had worked in a number of countries throughout the world. The respondent had no previous convictions or road traffic contraventions, either in the United Kingdom or in Spain. He was the holder of a Spanish driving licence which he had held for approximately 20 years. He remained an employee of the company.

[7] The sentencing judge was also provided with a social inquiry report and psychiatric report instructed by the respondent's solicitors. These reports revealed that the respondent was a man of impeccable character with no history of any criminal behaviour whatsoever. It appeared from those reports that the collision had had a considerable impact on the respondent and that his mental health had suffered. His personality had changed. The respondent had not driven since the collision and there had been a period when he had been off work. The psychiatrist had recommended treatment. The respondent had been prescribed antidepressants and at the point of the plea he was on a form of sick leave.

[8] The sentencing judge reports that in his plea in mitigation, senior counsel for the respondent had amplified on the circumstances of the collision and emphasised the respondent's good character. No issue was taken with the agreed narrative, but senior counsel had provided some additional information about the lead up to the collision. The respondent had been working on the day of the collision, at the wind farm site which lay to the south west of the locus of the collision. On that date, the respondent was still getting used to driving on the left hand side of the road. An issue had arisen as to a spare part which was required and he was instructed to obtain a

replacement. That involved the respondent driving from the wind farm site to Girvan. On his way back to Girvan, whilst heading north on the A714, the respondent realised that he had forgotten the faulty part, which had a code number on it. He had pulled into a lay by and turned round in order to drive back to the wind farm site. Senior counsel indicated that was when the respondent's fatal error had occurred. The dangerous manoeuvre had been momentary. When the respondent left the lay by he had joined the right hand side of the A714 carriageway. He had continued southwards on that side of the road. At the time the respondent had thought that he was driving on the correct side of the road. Otherwise the appellant's recollection of what had happened prior to the collision was dim, but he did recall that as he came round the bend he was confronted by Mr Coyle's car and could not stop in time. Immediately the respondent had acknowledged that he was on the wrong side of the road and had repeated that admission to the police, when they arrived.

[9] In her report to this court the sentencing judge has explained her reasons for imposing the sentence of community service which she did. She indicated that when selecting a non-custodial disposal she was very well aware that this was an unusual and exceptional sentence. She continued:

"I was very familiar with recent decisions from your Lordships' court in relation to these cases and I am also familiar with the English guideline cases. These cases make clear the range of sentences that might be appropriate, dependant upon the number of aggravating factors as well as the circumstances of each individual accused. What those cases do not direct however, as far as I can see, is that every case of this type must result in a custodial sentence, albeit I accept, and senior counsel accepted, that in such cases a custodial sentence is almost inevitable and the length of that sentence will depend upon the number of aggravating factors present.

"In the present case, the only factor implying culpability was the fact that this respondent was on the wrong side of the road at the point at which the collision occurred. This was very serious but there was an explanation for his being on the wrong side of the road, albeit it was not an excuse. There were no other aggravating factors. The respondent has never offended. As disclosed in the agreed narrative the appellant conceded that the respondent's driving, albeit on the wrong side of the road, was perfectly normal and within an appropriate speed for that type of road. It was clear, and the appellant has conceded this, that at the point at which the respondent was driving on the wrong side of the road, he believed that he was on the correct side of the road. This, of course, was wrong and, as I have acknowledged, very serious. This was not, however, a driver who had made a deliberate decision to execute a dangerous manoeuvre, such as to exceed the speed limit or to cut a corner or to overtake on a bend or such like. This was a driver who, in my view, made a very serious error but it was not a deliberate decision to drive in a dangerous manner. I have dealt with a number of these cases in the past and I am also aware of other such cases which have been dealt with in the High Court, some of which have been the subject of appeal. In my view this case came at the lowest end of the scale of such cases."

[10] In her report, the sentencing judge went on to stress that she had not ignored the consequences of this tragic collision on the family of the deceased. However she indicated that in imposing sentence she required to look at the element of culpability as well as the consequences. She took the view that justice would not be served in this particular case by imposing a custodial sentence and that exceptional circumstances existed for refraining from imposing that sentence, having regard to the fact that the only culpable factor was that the respondent had been on the wrong side of the road and that he had not deliberately set out to drive on the wrong side of the road. The sentencing judge also explained that she had regard to two other factors in selecting a non-custodial disposal. Firstly the respondent was a Spanish national, with very limited English, and that any sentence was bound to have a greater impact on him as he would be separated from family and friends. Secondly the appellant had pled guilty to the charge at an early stage in the proceedings against him.

Submissions on behalf of the appellant

[11] The advocate depute submitted that the sentencing judge had erred in taking the view she did that the circumstances giving rise to the fatal collision had been exceptional. There was nothing exceptional about a foreign driver, who was driving in the United Kingdom, making an error and driving onto the wrong side of the road. Where the sentencing judge had erred was in proceeding on the basis, which she did, that the sole culpable factor was that the respondent had been driving on the wrong side of the road at the point of collision. The advocate depute explained that the Crown was not alleging that the respondent had deliberately driven onto the wrong side of the road as he left the lay by. What the Crown did found on, however, was that throughout the period of time it had taken him to travel between the lay by and the collision, the respondent had failed to apply his mind to the fact that he was driving his vehicle with the driving seat adjacent to the verge and the hazard warning lines in the middle of the road and that he had failed to appreciate that he was driving on the wrong side of the road. The dangerous driving of which the appellant was guilty had not therefore been momentary. On the contrary, he had persisted in his dangerous driving as he drove between a quarter mile and a half mile from the lay by from which he had set off to retrace his steps back to the wind farm site and the scene of the collision. In these circumstances it was clear that the sentencing judge had failed to address the question of the duration of the period when the respondent was driving dangerously on the wrong side of the road.

[12] The advocate depute explained that the Crown was not arguing that there must always be a custodial sentence in cases giving rise to a contravention of s.1 of the Road Traffic Act of 1988. However, what previous authorities made clear was that in the absence of exceptional circumstances the imposition of a custodial sentence was appropriate.

[13] The advocate depute also criticised the sentencing judge for having failed to treat the injuries sustained by the other occupants of Mr Coyle, senior's car as having been an aggravating feature.

[14] In conclusion, the advocate depute argued that the sentencing judge had erred in departing from the guidance to be found in the definitive guidelines issued by the Sentencing Guidelines Council in England in relation to offences of causing death by driving. It was well established that Scottish courts should take cognisance of those guidelines (see e.g. *Wright v HM Advocate*). Reference to that guidance indicated that the imposition of a custodial sentence was appropriate. It was submitted that the circumstances of this case fell within level 3 of the guidance for contraventions of s.1 of the Road Traffic Act 1988, which recommended a sentencing range of two–five years' custody with a starting point of three years' custody.

[15] In support of his submissions the advocate depute referred to *R v Pulido-Sanchez*, which had also involved a Spanish driver causing death by driving dangerously on the wrong side of the road. At [2011] 1 Cr. App. R. (S.), p.644, para.12, of the judgment delivered by Owen J, the court stressed that the gravamen of the offence lay in the appellant's failure to appreciate his error and to respond to the efforts of other drivers to alert him to his error, and by continuing to drive on the wrong side of the road for one and a half miles. Those failures followed upon his original error of driving on to the wrong side of the road — an error which was described at p.644, para.13, as: "one made at one time or another by many, if not most, of those who are used to driving on one side of the road, but have to switch to the other." In that case the Appeal Court in England had reduced a sentence of four years' imprisonment to one of two and a half years' imprisonment.

[16] The advocate depute accepted that the respondent's good character was a mitigating factor. Notwithstanding the absence of any previous convictions and that good character, it was submitted that the sentencing judge's departure from the guidance to be found in the definitive guidance had been in error and had led to imposition of an unduly lenient sentence. The circumstances were such that the imposition of a sentence of imprisonment was appropriate. In calculating that sentence this court should determine a starting point, make a reduction from that starting point to take account of the respondent's plea of guilty, and then make further deduction to take account of the fact that the respondent had carried out 150 hours of community service, before the community service order was suspended.

Submissions for the respondent

[17] In responding to the submissions on behalf of the appellant, senior counsel for the respondent stressed that this was a very anxious case. In considering the appeal, the court should not seek to balance the tragedy suffered by the family of the deceased, including the injuries to the other occupants of the car, with the consequences for the respondent. He submitted the circumstances of the accident were not such that there "jumped out" from them that a clear contravention of s.1 of the Road Traffic Act of 1988 had been committed for which the imposition of a prison sentence was appropriate.

[18] Senior counsel explained that on the day of the accident, the respondent had driven from his residence in Girvan to the wind farm site. Some hours later it had been

necessary to return to Girvan. On his way back to Girvan, he had realised that it was necessary to retrace his steps to the wind farm site because he had forgotten a spare part. He had driven into in a lay by in order to turn round. The error he made had occurred when he came out of the lay by. The respondent's error had been momentary. He had been under stress at work that day and that had contributed to his failure to appreciate that having left the lay by he was driving along the wrong side of the road.

[19] Senior counsel for the respondent accepted that the sentencing judge had fallen into error when she had failed to regard the injuries suffered by the other passengers in the car as a feature aggravating the charge of causing death by dangerous driving to which the respondent had pled guilty. However he submitted some aggravating features were of greater significance than others. His submission was that in the circumstances of the present case the aggravating feature relating to the injuries suffered by the other passengers was not such as to render the sentence imposed an unduly lenient one.

[20] Senior counsel for the respondent sought to distinguish the case of *R v Pulido-Sanchez* relied on by the advocate depute. He submitted that the dangerous driving in that case was more serious than that of the respondent in the present. Senior counsel also cited three authorities of earlier date: *Attorney General's Reference (No.1 of 1994) (sub nom R v Day)*; *R v Le Mouel*; and *R v Obermeier*. He relied on those authorities in support of his submission that the non-custodial sentence imposed in the present case should not be held to have been unduly lenient, but in doing so recognised that the maximum penalties for contraventions of s.1 of the Road Traffic Act 1988 had been increased since those other cases were decided.

[21] Senior counsel argued that even if the members of the court would themselves have imposed a custodial sentence, had they been dealing with this case at first instance, the court need not interfere with the sentence the sentencing judge had imposed. Furthermore, as with the sentencing judge, this court should only impose a prison sentence if it reached the conclusion that no sentence other than a custodial sentence was appropriate. Senior counsel submitted that even though the sentencing judge had been entitled to consider that the custodial threshold had been reached and the imposition of a custodial sentence should be considered, she had been perfectly entitled to reach the conclusion that a custodial sentence did not require to be imposed; and to take into account the respondent's plea of guilty as one factor supporting such a conclusion.

[22] Senior counsel for the respondent also argued that in considering the appeal the court should take account of the fact that the respondent had carried out, in a satisfactory manner, one half of the 300 hours of community service imposed. The respondent had not worked since December 2010. Since that date he had been on sick leave and was being paid by his employers. He had received treatment from a psychologist.

[23] Under reference to *HM Advocate v Bell*, senior counsel submitted that even if

the court was of a view that the sentence imposed was, or might be considered to have been, unduly lenient, the court had a discretion as to whether to quash that sentence and impose a more severe sentence. The court was not obliged to impose a more severe sentence, if in all the circumstances, it does not consider it appropriate to do so.

[24] Senior counsel for the respondent agreed with the advocate depute that in the event of the appeal being allowed and a custodial sentence being imposed, the approach to the calculation of that sentence outlined by the advocate depute was the correct one.

Discussion

[25] We are satisfied that the sentence imposed by the sentencing judge was unduly lenient. In our opinion, the sentence of community service imposed fell outwith the range of sentences that the sentencing judge, applying her mind to all the relevant factors, could reasonably have imposed.

[26] In reaching the decision to impose a non-custodial sentence, the sentencing judge took the view that the only factor implying culpability was the fact that the respondent was on the wrong side of the road at the point at which the collision occurred. In her report to this court, the sentencing judge states in terms that there were no aggravating factors. In our opinion, the sentencing judge erred in failing to take account of the injuries suffered by the other passengers as a factor aggravating the charge of causing death by dangerous driving to which the respondent had pled guilty. Indeed it was a matter of concession on behalf of the respondent that the sentencing judge had erred in that respect.

[27] It also appears from the terms in which the sentencing judge describes the culpability of the respondent, that she may have accepted the submission made on behalf of the respondent that the dangerous driving on his part had been "momentary". The dangerous driving of which the respondent was guilty was not limited to the point of collision. It occurred throughout the time the respondent drove from the lay-by onto and along the wrong side of the A714 road, without appreciating the significant error he had made when he left the lay by.

[28] This is a case in which the sentencing judge required to consider the imposition of a custodial sentence. In our view, it is also a case in which the only appropriate sentence was the imposition of a custodial sentence. A community service order was, in our opinion, outwith the range that was properly open to the sentencing judge, and was unduly lenient.

[29] As has been recognised in a number of appeals before this court, it is appropriate in cases involving charges of causing death by dangerous driving or careless driving for sentencers in Scotland to have regard to the Definitive Guideline entitled "Causing of Death by Driving" issued in July 2008 by the Sentencing Guidelines Council in England. The advocate depute submitted that the circumstances of the present case

placed it within level 3 of the guidelines relating to contraventions of s.1 of the Road Traffic Act 1988 (causing death by dangerous driving), for which the maximum sentence is 14 years' imprisonment. Those guidelines provide:

Nature of offence	Starting point	Sentencing range
Level 1 The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others	**8 years custody**	**7-14 years custody**
Level 2 Driving that created a *substantial* risk of danger	**5 years custody**	**4-7 years custody**
Level 3 Driving that created a *significant* risk of danger	**3 years custody**	**2-5 years custody**
[Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving]		

Having regard to the qualification to the nature of the offence in level 3, it is appropriate to have regard to the sentencing guidelines for contraventions of s.2B of the Road Traffic Act 1988, causing death by careless driving, which provide:

Nature of offence	Starting Point	Sentencing range
Careless or inconsiderate driving falling not far short of dangerous driving	**15 months custody**	**36 weeks-3 years custody**
Other cases of careless or inconsiderate driving	**36 weeks custody**	**Community order (HIGH)-2 years custody**
Careless or inconsiderate driving arising from momentary inattention with no aggravating factors	**Community order (MEDIUM)**	**Community order (LOW)-Community order (HIGH)**

The sentencing guidelines for charges of causing death by dangerous driving and causing death by careless driving also provide that the causing of serious injury to one or more victims, in addition to the death of the deceased, is a factor which aggravates

the charge an offender faces.

[30] Having regard to the fact that the respondent pled guilty to a charge of causing death by dangerous driving and the terms of the guidelines to which we have referred, we understand why the advocate depute argued that the case falls within level 3 of the guidelines dealing with charges of causing death by dangerous driving in contravention of s.1 of the Road Traffic Act 1988. That would suggest that the minimum sentence which would be appropriate for conviction after trial would be one of two years' imprisonment.

[31] In our opinion, however, the culpability of the driving of which the respondent was guilty falls within the overlapping margins of culpability of less serious cases of causing death by dangerous driving and more serious cases of causing death by careless driving. When the respondent drove away from the lay by he made a serious error, by driving onto and setting off along the wrong side of the road. As the opinion of Owen J in *R v Pulido-Sanchez* indicates that type of error is made by many drivers who are used to driving on one side of the road and have occasion to switch to driving on another. However, it is difficult to understand how the respondent failed to appreciate his initial error, whilst he continued to drive along a length of road with which he had some familiarity. For a distance of between a quarter mile and a half mile he drove along a single carriageway, which had the lanes for opposing traffic separated by hazard warning lines, and with the driver's seat of his vehicle adjacent to the kerb. On the other hand, before the sentencing judge it was expressly accepted by the Crown in the agreed narrative that the reason for the respondent's dangerous driving was that he was accustomed to driving on the right side of the road in Spain. That concession reduced the degree of culpability attributed to the respondent. However, we are not persuaded that it did so to the extent that the imposition of a non-custodial sentence was appropriate. Nor are we persuaded that this is a case in which we should exercise our discretion and refrain from quashing a sentence that we have held to be unduly lenient. That is because the case involves the death of an innocent victim in a road traffic accident, which is admitted to have been caused by dangerous driving.

[32] Our decision in this appeal is to quash the community service order and to impose a sentence of 12 months' imprisonment. That sentence will run from 26 August 2011. We reached the figure of 12 months' imprisonment by taking as a starting point a sentence of 18 months' imprisonment. That starting point has regard to the full circumstances giving rise to the collision which caused the death of Mrs McIlroy, the serious injuries incurred by the other occupants of the car driven by Mr Coyle, the fact the respondent appeared before the sentencing judge as a first offender and his personal circumstances as disclosed in the reports available to this court and the submissions advanced on his behalf by senior counsel. In reaching our decision as to the appropriate level for the starting point, we also take into account the fact that the proceedings against the respondent have taken longer than would ordinarily have been the case, by virtue of the decision of the Crown to appeal against the original sentence as being unduly lenient. We reduce the starting point of 18 months by 25 per cent to take account of the fact that the respondent tendered a plea of guilty at the first

preliminary hearing; and reach the figure of 12 months by making a further reduction to take account of the hours of community service that had been satisfactorily carried out prior to the lodging of this appeal.

Solicitor Advocate for Appellant, Prentice, QC; Solicitor, C Dyer, Crown Agent — Counsel for Respondent, McConnachie, QC; Solicitors, A C White & Co, Ayr.