

Gary McCourt – appeal by Crown rejected

✘ *The appeal by the Crown against what they considered to be a lenient sentence imposed on a driver who caused the death of a cyclist on Portobello Road in August 2011 has been rejected by the Court of Criminal Appeal.*

On 8 April 2013, after a trial at Edinburgh Sheriff Court, a jury convicted driver Gary McCourt by a majority verdict of causing death by driving a motor car without due care and attention.

The sheriff imposed a sentence which comprised a Community Payback Order with a requirement that the respondent undertake 300 hours unpaid work (being the maximum available) within a period of 12 months, disqualified him from holding and obtaining a driving licence for five years and until he passes the extended test of competence to drive, and ordered endorsement of his driving licence. The Crown appealed against this sentence as being unduly lenient.

The Court of Criminal Appeal today issued its judgement which can be read [here](#) in full. The court decided that the sentencing has not been calculated wrongly, but did concede that the sheriff was wrong to mention the fact that Mrs Fyfe (who was a lifelong cyclist) was not wearing a helmet. Following the conviction earlier this year it was discovered that Mr McCourt had previously been found guilty of causing the death of 22 year-old George Dalgity in 1985 by reckless driving.

Lord Menzies delivered the appeal court's verdict which included this statement:-

It is perhaps easy to take a superficial view that by his bad driving the respondent has caused the death of two people in

two road accidents over 27 years, and that this required to be marked with a sentence of imprisonment. However, the sheriff has carried out the delicate and detailed sentencing exercise recommended by the Definitive Guideline with considerable care, and has given full reasons for the conclusion which he reached. This court must give weight to his views, particularly given that this is a case which has gone to trial and the sheriff has had the advantage of seeing and hearing all the evidence. Despite the sheriff's error in treating the fact that Mrs Fyfe was not wearing a cycle helmet as a mitigatory factor, we are unable to say that the sentence of a Community Payback Order with the maximum number of unpaid hours was unduly lenient. It did not fall outside the range of sentences which the sheriff, applying his mind to all the relevant factors, could reasonably have considered appropriate. In particular, we cannot say that, in all the circumstances of this case, the sheriff could only have reasonably considered a sentence of imprisonment to be appropriate.

The Edinburgh Reporter spoke to Robert Fairbairn the solicitor who represented Gary McCourt throughout this trial and appeal. Mr Fairbairn said:-“From the outset, and since the scene of the tragic accident Mr McCourt immediately showed signs of remorse. He stayed at the scene of the accident and tried to assist Mrs Fyfe in every way. When the police arrived he cooperated fully with them and requested police to keep him informed about her welfare when she was taken to hospital.

“He reiterated his genuine concern and remorse while making a statement to police after the event and after his conviction he again confirmed that he was dreadfully sorry for the consequences of this particular accident.

“On the matter of the appeal, Mr McCourt is grateful for the considered and careful judgement of the Court of Criminal Appeal by their Lordships and her Ladyship, and that judgement

is of course available for anyone to read on the Scottish Courts website. When looking at that judgement, save for one matter that Sheriff Scott took into consideration incorrectly, every other ground which the Crown put in their appeal was found to have no basis.

“Sheriff James Scott in his careful and considered judgement dealt with the variety of delicate and legal issues and ultimately his legal judgement was not found wanting.”

“Had the crown not been so pressurised by the cycling fraternity we suspect they would not have taken this to appeal. The reason we say this is based on the fact that one of the cases to which they referred during the appeal *HM Advocate v McKay* was one where the crown appealed against a sentence of Community Payback Order. In that case the driver was on the wrong side of the road and a cyclist died as a result, but the appeal court decided in that case that the sentence was not outwith the range of sentences. They have taken the same view here.

“Mr McCourt has been disqualified from driving for five years and he must sit an extended driving test. In one regard the cycling lobby have misdirected themselves regarding public safety. Parliament has decided that cyclists should be given greater protection and that the judiciary are not in step. But what the judiciary did was to apply themselves to the issues under appeal. They cannot be criticised in any way for that.

“The cycling lobby seem to be of the view that in the absence of a lifetime ban in this case that the public is in danger, but Mr McCourt was found guilty of careless driving which sadly resulted in the death of a cyclist, and not the greater charge of reckless driving.

“It was the sheriff’s view that the accident was the result of a momentary lack of concentration, and that the consequences were disproportionate to the event which took place.”

Mr McCourt has now completed 94 hours out of 300 hours community service.

CTC the national cycling charity has expressed its disappointment:- "CTC, the national cycling charity, is bitterly dismayed over today's decision of the Court of Appeal in Edinburgh to allow 49-year-old Gary McCourt, whose driving has killed two cyclists, back on the roads."

Donald Urquhart the Secretary of CTC Scotland commented outside court:

"A man who has now killed two cyclists will soon be allowed to resume driving, while the families and friends of those killed have been permanently affected by his criminal conduct.

"The authority to drive a motor vehicle is not a right; it is a privilege, that should be withdrawn when driving conduct kills, injures or seriously endangers others, particularly when more vulnerable road users are affected. Allowing McCourt to continue driving is neither right nor acceptable in a civilised society."

Audrey's daughter Aileen Brown said,

"I am lost for words. There was a unanimous vote in Parliament earlier this month to strengthen the enforcement of road traffic law, to ensure that driving offences – especially those resulting in death or injury – are treated sufficiently seriously by police, prosecutors and judges.

"The police here did an admirable job for us, but the Scottish justice system appears to have had complete disregard for Government policy. Scotland led the way in the smoking ban and minimum pricing on alcohol. The decision to allow Gary McCourt and drivers like him to drive again suggests that the judiciary are frightened to grasp the nettle and make decisions which would make our country a safer place to live."

Alison Johnstone, Lothians Green MSP said:-“Today’s deeply worrying judgement only reinforces the feeling that our justice system is not on the side of the most vulnerable on our roads. There is widespread agreement that a man who has killed two cyclists is being let off lightly, and at the very least should receive a lifetime driving ban.

“I welcome the court’s rebuke to the sheriff on his ill-judged comments on helmet use but this is not enough. If this light sentence is, as the court maintains, within the normal range available to the sheriff then I want to see what more can be done to review the sentencing guidelines for offences of this severity.”

[Pedal on Parliament](#) who campaign for cycling safety have expressed their wish that everyone writes to their MSP to call on the Justice Secretary to investigate the issue:-“PoP supports the view of Audrey Fyfe’s family that a life time driving ban would have been more appropriate sentence. There is no right to drive, it is a privilege granted under licence, when that privilege is abused it is right that it should be withdrawn.”