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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (Number 1 of 2006)
GARY McDONALD, JOHN KEITH McDONALD
and STEPHEN GARY MATERNAGHAN
(AG REF 11-13 of 2005)

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Before Kerr LCJ, Nicholson LJ and Girvan J

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KERR LCJ

Introduction

[1] The offenders were jointly indicted on a series of charges arising from events that took place on 12 July 2003 at Innisrush Village, County Londonderry. On their arraignment, on 20 April 2005, all three pleaded not guilty to all counts in the indictment. On 11 October 2005, an amended indictment, introducing the offence of affray contrary to common law as a fourth count, was presented. On that date, at Belfast Crown Court the offenders pleaded guilty to certain counts in the indictment and were dealt with as follows:

(a) Gary McDonald pleaded guilty to counts alleging possession of an imitation firearm (a deactivated Chinese Type 56 assault rifle – also described as an AK47) with intent to cause fear of violence; possession of ammunition in suspicious circumstances; and affray. In respect of the possession of the imitation firearm and affray he received sentences of three years' imprisonment for each. In respect of the possession of ammunition, he received a sentence of 12 months' imprisonment. All sentences were ordered to run concurrently and all were suspended for five years. He was further ordered to pay £250 compensation to each of two victims.

(b) John Keith McDonald and Stephen Gary Maternaghan both pleaded guilty to the counts of affray and possession of an imitation firearm (the deactivated rifle) with intent to cause fear of violence.

They were each sentenced of three years' imprisonment on each count. The sentences were again ordered to run concurrently and both were suspended for five years. They were each ordered to pay £250 compensation to each of the victims.

[2] A charge of attempted hijacking that had been preferred against all three offenders was allowed to remain on the books, not to be proceeded with without the leave of the Crown Court or the Court of Appeal.

[3] The Attorney General sought leave to refer the sentences for affray and possession of an imitation firearm to this court under section 36 of the Criminal Justice Act 1988, on the ground that they were unduly lenient. (The sentence for possessing ammunition cannot be reviewed as it may also be prosecuted summarily). We gave leave on 13 January 2006 and the application proceeded on that date. After hearing submissions it was decided that pre-sentence reports from the Probation Board for Northern Ireland were required and the reference was adjourned for that purpose. The hearing was resumed on 17 February 2006.

Factual background

[4] At approximately 1.45am on 12 July 2003 Thomas O'Hara drove into Innisrush Village. He saw four people standing at the roadside. Suddenly two of these stepped into the middle of the road, one coming from either side. The man to the left of Mr O'Hara brought both hands up and was seen to be brandishing a handgun which he pointed directly at the motorist. The barrel of the gun was but a matter of feet from Mr O'Hara. The gunman was wearing a balaclava. The man on the other side of the road also wore a balaclava and was carrying a stick of about two feet in length. Not surprisingly, Mr O'Hara was considerably alarmed by this and he accelerated his vehicle. Both men jumped out of the path of the car and he heard shouting and two loud bangs coming from the direction of the gunman. Mr O'Hara believed that he had been fired on. When he arrived at his friend's home a short time later he discovered two large dents on the nearside wing and front door of his vehicle. He was greatly frightened and upset by this experience and a friend telephoned his father to ask that Mr O'Hara senior come and collect Thomas who was so distressed that he was unable to speak to his father on the telephone.

[5] Mr O'Hara's father (also called Thomas), after receiving the telephone call, drove from his home in Cullybackey to Innisrush to collect his son. While passing through the village, he observed three persons walk into the middle of the road. The man in the centre of the group was holding a gun. He was wearing a balaclava and a military type jacket. He raised the gun and pointed it at Mr O'Hara who saw two flashes coming from it. By this stage Mr O'Hara had stopped his van and the gunman stepped forward to the vehicle. He

pointed the weapon through the driver's window so that it was only some six inches from Mr O'Hara's face and he then demanded from the motorist an explanation for his being in Innisrush. While this was going on, one of the other men tried to open the driver's door. Mr O'Hara accelerated away. As he did so he was aware of the side of the vehicle being struck and he later discovered several dents on the vehicle's offside.

[6] Following reports of these incidents, at approximately 2.45am on the same date a police vehicle drove into Innisrush Village. The police driver observed four persons standing on the roadway, two on either side. Two of them were armed with stick-like weapons which they waved above their heads. Another had a long arm weapon with a curved magazine attached. This was the deactivated AK 47 assault rifle. As the police driver stopped his vehicle, he observed that the gunman had adopted a kneeling position. Not unnaturally, he believed that the gunman was about to open fire on the police vehicle. The driver then reversed the vehicle, whereupon the four persons began to run in pursuit and the gunman aimed the weapon towards the police car.

[7] At this stage, a second constable, with great and commendable presence of mind, alighted from the vehicle and identified himself as a police officer. At that all four persons ran away. Following a chase and a struggle John Keith McDonald was apprehended. A rifle and baseball bat were found on the ground nearby. Stephen Maternaghan was apprehended by police at the rear of Innisrush Parish Hall, lying face down on the ground.

[8] Some hours later premises and a vehicle at 51 Innisrush Road were searched by the police. Weapons and ammunition were found in a blue plastic bag behind the driver's seat. The weapons were a revolver and a semi-automatic pistol. The revolver contained five blank rounds and one spent round. The owner of the vehicle was Gary McDonald. His bedroom was searched. Five live rounds of .303 ammunition, a live round of 9mm ammunition, an air pistol, a black wooden baton, seven solid shotgun cartridges, a box of 8 mm black cartridges and certain UDA publications were found. Mr McDonald had received authorisation from PSNI for the purchase of blank cartridges only. He was not authorised to purchase or possess any of the live ammunition. This offender was apprehended later on the same day and made no reply when cautioned.

[9] Neither John nor Gary McDonald gave any useful response to police questioning, generally answering with no comment. Maternaghan told police that he had been at the 11th night celebrations but had run away with the rest of the crowd when the police arrived. He said that he did not know at that stage that it was the police who had caused the crowd to disperse. At first he denied all involvement in the events that gave rise to the charges but he later admitted that his fingerprints might be on a baton found at the scene.

He claimed that the baton belonged to him but that he had lent it to someone. He refused to name the person to whom he had lent the baton.

Aggravating factors

[10] The Attorney General has submitted that the following are aggravating factors in the case: -

1. There were three incidents involving the use of weapons;

2. In both instances direct threats were made to the victims in a way that must have been extremely frightening;

[11] We accept that these must be regarded as significant aggravating features. In Northern Ireland, to be confronted by masked men who are apparently armed must be a terrifying experience. In all three incidents (*i.e.* the two involving the O'Hara's and one involving the police) a weapon was pointed directly at individuals. In the case of the younger Mr O'Hara it was pointed directly at him in the aim position; in the case of his father the handgun was held within inches of his face. A rifle was pointed towards the police vehicle. All who were the victims of these outrageous incidents must have feared for their lives. The police are to be congratulated for their restraint in light of the circumstances with which they were confronted. This might have led to their opening fire on a gunman who gave every appearance of intending to discharge lethal shots in their direction.

[12] Apart from the factors identified by the Attorney, we consider that the element of planning that clearly attended the commission of these offences makes them significantly graver. Mr McCloskey QC, who appeared with Mr Valentine for the Attorney General, suggested that this should not be regarded as an aggravating factor as such; he submitted that this feature of the offences made them more serious of their type. We are not sure that much turns on this but, however this aspect of the matter is to be regarded, we are clearly of the view that the element of pre-planning calls for more severe penalty than if the offences had been spontaneous.

[13] It was said on behalf of the offenders that this was a drunken escapade prompted by a misguided desire to protect an Orange arch that had been the subject of attack in previous years. As to the fact that the offenders were under the influence of drink we raise no query but we are loath to accept that this episode was played out simply in order to protect property. In response to a question from the learned trial judge as to the prosecution's view of what motivated the "activity" of the offenders, counsel stated that the defendants were mounting a guard on the arch. We find this difficult to accept. Both Mr O'Hara and his son were travelling alone in their vehicles. They cannot seriously have been regarded as presenting a risk to the Orange arch. A

guard on the arch could have been achieved much more simply by keeping it under observation rather than by the offenders stationing themselves with weapons on the roadway and stopping cars.

[14] Counsel also said that the offenders' plan was to stop vehicles driven by Catholics in order to divert them away from the town. This was not challenged by counsel for the offenders in their pleas in mitigation. We think that it may well be right that they intended to stop cars being driven by Catholics but we have strong reservations as to whether that was for the sole purpose of diverting them away from the arch. We consider that this was a planned operation and that the offenders had armed themselves not only with the means of intimidating those travelling on the road to stop but also with weapons that could have been used to inflict violence upon them or their vehicles. We believe that a much more sinister complexion to this episode should be recognised than the somewhat benevolent view the trial judge appears to have formed about it.

[15] A further aggravating factor, in our opinion, is the fact that these offenders had purported to take charge of the public road and to enforce their own brand of control on the passage of traffic. We consider that this attempted usurpation of the function of the authorities, in particular the police service, is an especially serious feature of these offences. Our society – perhaps more than most – requires a clear understanding amongst all its sections that law is enforced by the police service and the criminal justice agencies and that any attempt by individuals to take the law into their own hands will be dealt with severely.

Mitigating factors

[16] Mr McCloskey was disposed to accept – and counsel for the offenders strongly argued – that mitigating features in this case were the virtually clear records of the offenders and their pleas of guilty. We accept that the lack of significant criminal records of any of the offenders must stand to their credit. The position about the pleas of guilty is less clear cut, however.

[17] Article 33 (1) of the Criminal Justice (Northern Ireland) Order 1996 provides: -

> "**33.**—(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given."

[18] None of the offenders pleaded guilty to any offence until 11 October 2005 by which time proceedings were well advanced. It is suggested that since the offence of affray was not preferred until that date the failure to plead guilty to the other offences is in some way mitigated on that account. We wish to firmly scotch that suggestion. If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea he should be in a position to demonstrate that he pleaded guilty *in respect of that offence* at the earliest opportunity. It will not excuse a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with.

[19] To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset. None of the offenders in this case did that. All either refused to answer or denied guilt during police interview. On no basis, therefore, could any of them expect to obtain the maximum reduction for their belated guilty pleas. We wish to draw particular attention to this point. In the present case solicitors acting on behalf of two of the offenders appear to have advised them not to answer questions in the course of police interviews. Legal representatives are, of course, perfectly entitled to give this advice if it is soundly based. Both they and their clients should clearly understand, however, that the effect of such advice may ultimately be to reduce the discount that might otherwise be available on a guilty plea had admissions been made at the outset.

[20] Mr Greene on behalf of the offender, Gary McDonald, suggested that the case against his client on the charge of possession of the imitation firearm with intent to cause fear of violence would have had to be withdrawn if the Crown's application to read the evidence of a certain witness had not been successful. We do not accept that claim. The firearm was registered to Gary McDonald. Police officers had observed it being discarded by a person who managed to flee the scene. This constituted clear *prima facie* evidence against Gary McDonald. He refused to answer questions about the weapon in the course of police interviews. We consider that there was a patently viable case against this offender. In any event, on the material available to us, we have no reason to suppose that the application to read the witness's evidence would not be successful.

[21] We have concluded, therefore, that while the offenders were entitled to some discount for their guilty pleas this should not have been the maximum

reduction appropriate to a case where pleas at the earliest opportunity were made.

Sentencing for affray

[22] There are no local guideline cases on affray and the modern English authorities are of limited value as the statutory offence there is different and the maximum penalty is three years imprisonment whereas in this jurisdiction the maximum possible penalty is imprisonment for life. A guideline case predating the legislative change in Great Britain is *Keys and others* (1986) 8 CAR (S) 444 where the appellants were involved in a large scale disorder at the Broadwater Farm Estate, in which 200 police and fire crew were injured, vehicles were used as barricades and set on fire, and a variety of missiles, including petrol bombs, were thrown. One officer was killed. The appellants were sentenced to 5 and 7 years' imprisonment. In that case it was stated that for premeditated, organised affray ringleaders could expect to be sentenced to 7 years and upwards although it was acknowledged that since there is a very wide spectrum of types of affray, it was not easy to give firm sentencing guidelines. Lord Lane CJ stated: -

> "The facts constituting affray and the possible degrees of participation are so variable and cover such a wide area of behaviour that it is very difficult to formulate any helpful sentencing framework."

[23] In this jurisdiction there is no reported decision that could be described as a guideline case for the offence of affray. In *R v Fullen and Archibald* (2003 – unreported) this court was invited to consider the effect of the amendment of the law in England and Wales brought about by the enactment of the Public Order Act 1986 which abolished the common law offences of riot, rout, unlawful assembly and affray. The 1986 Act introduced a statutory definition of affray and imposed a maximum term of imprisonment of 3 years upon conviction on indictment. The Act has not been extended to Northern Ireland and in this jurisdiction affray remains an offence at common law punishable by life imprisonment. McLaughlin J, delivering the judgment of the court, rejected the argument that sentences here should be based on the 1986 Act, saying: -

> "…we do not consider that courts here should regard themselves as limited by the provisions of the 1986 Act. For the present there remain sufficient differences between the public order problems in Northern Ireland and Great Britain to reserve to these courts a greater degree of flexibility in sentencing than is available under the 1986 Act."

[24] The decision not to extend the 1986 Act to Northern Ireland must be regarded as deliberate. As a matter of principle, therefore, it would not be correct to adjust sentences for affray in this jurisdiction to reflect the change in the law that was brought about by that Act. We consider that the range of possible sentences for this offence in Northern Ireland extends well beyond the three year maximum that applies in England and Wales.

[25] Because of the infinitely varying circumstances in which affray may occur and the wide diversity of possible participation of those engaged in it, comprehensive rules as to the level of sentencing are impossible to devise. Certain general principles can be recognised, however. Active, central participation will normally attract more condign punishment than peripheral or passive support for the affray. The use of weapons will generally merit the imposition of greater penalties. The extent to which members of the public have been put in fear will also be a factor that will influence the level of sentence and a distinction should be drawn between an affray that has ignited spontaneously and one which has been planned – see *R v Anderson and others* (1985) 7 Cr App R (S) 210. Heavier sentences should in general be passed where, as in this case, the affray consists of a number of incidents rather than a single self contained episode.

Sentencing for use of an imitation weapon

[26] The offence relating to the use of the imitation firearm to which the offenders pleaded guilty is provided for by article 17A of the Firearms (Northern Ireland) Order 1981: -

> "A person who has in his possession any firearm or imitation firearm with intent –
>
> a) by means thereof to cause; or
> b) to enable another person by means thereof to cause,
>
> any person to believe that unlawful violence will be used against him or another person, shall be guilty of an offence."

[27] In *R v O'Keefe* (2000 – unreported) this court in the following passage reviewed some authorities that dealt with sentencing in cases involving the equivalent provision in England and Wales: -

> "In *R v Avis and Others* [1998] 2 Cr App R (S) 178 the Court of Appeal reviewed the level of sentencing for offences concerned with possession of firearms and ammunition, with a view to setting guidelines for

sentencers. Lord Bingham CJ said at page 181 that a sentencing court should ask itself the following questions:

> '(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.
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> (2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.
>
> (3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.
>
> (4) What is the defendant's record? The seriousness of any firearms offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.'

Having examined the range of offences, Lord Bingham commented at pages 185-6:

> 'Save for minor infringements which may be and are properly dealt with summarily, offences against these provisions will almost invariably merit terms of custody, even on a plea of guilty and in the case of an offender with no previous record. Where there are breaches of sections 4, 5, 16, 16A, 17(1) and (2), 18(1), 19 or 21, the custodial term is likely to be of considerable length, and where the four questions suggested above yield answers adverse to the offender, terms at or approaching the maximum may in a contested case be appropriate.'
>
> In the reported cases where there is a serious attempt to use a firearm to frighten people or compel to take some action demanded by the gunman, it may be seen that the general level of sentence on a plea of guilty is of the order of two years or more: see, *e.g.*, *R v Steven Thompson* [1997] 2 Cr App R (S) 188; *R v Barton* (one of the *Avis* group); *R v Roker* [1998] 2 Cr App R (S) 254."

[28] Although the court in *O'Keefe* varied the custody probation order that the trial judge had imposed to two years imprisonment which was then suspended, this reflected the highly unusual circumstances of that case and the fact that the appellant suffered from grave mental instability. The court made it clear that a custodial sentence would be the virtually invariable disposal for this offence. Indeed, even with the appellant's difficulties, it is clear that the court was influenced to its decision to suspend the sentence by the consideration that he had already spent some time in prison.

[29] A sentence of imprisonment should follow conviction, even on a plea of guilty, of an offence under article 17A save in the most exceptional circumstances. Recent decisions in England confirm this approach. In *R v Omari* [2004] 2 Cr App R (S) 96 the appellant pleaded guilty to possessing an imitation firearm with intent to cause fear of violence. He had been with a group of youths when a police patrol passed. He stretched out his right arm and made a pistol gesture. The police officers stopped the car and approached the group. The appellant ran off, chased by an officer. The appellant stopped and turned, pointed a gun at an officer and threatened him. He later threw the gun over a wall into a yard. He was subsequently arrested. The gun was found to be an imitation firearm, capable of firing ball bearings.

His appeal against a sentence of five years' imprisonment was dismissed. In *R. v Duffy* [2005] 1 Cr App R (S) 75 the appellant pleaded guilty to having a firearm or imitation firearm with intent to resist arrest, possessing an imitation firearm with intent to cause fear of violence, and making a threat to kill. Police officers had been called to an address in the early hours of the morning where the appellant was causing a disturbance. He emerged from an upstairs window, produced a hand gun and pointed it at a police officer saying, 'I am going to shoot you'. The appellant did not put the gun down when requested to do so and pointed the gun at three other officers threatening to shoot them. The police officers did not believe that the weapons that the defendant had brandished were real and so it proved because after his arrest they were found to be a toy hand gun and an ornamental musket. An appeal against a sentence of five years' imprisonment was unsuccessful. In many ways both cases were less serious than the present offences.

[30] We consider that the starting point for an offence under section 17A on a plea of guilty should be in the range of two to three years' imprisonment. Sentences substantially in excess of that range will be justified where the imitation weapon is used on more than one occasion or where members of the public have been put in significant fear. The factors outlined in *Avis* will also be relevant in fixing the appropriate sentence. The features of this case that we have reviewed in paragraphs [10] to [15] above call for a sentence well above the starting point range. A sentence in the range of five to seven years would not have been inappropriate. It follows that we consider that the sentences passed by the learned trial judge were unduly lenient.

Events since the sentence

[31] For some months before October 2005, the father of the offenders Gary and John McDonald had suffered from back pain and general malaise. He had a number of medical investigations including bone scans and was eventually diagnosed in October 2005 as suffering from multiple myeloma, an incurable malignancy of plasma cells. This diagnosis was made after histological examination of fragments of a biopsy that had been carried out on 24 October 2005. The prognosis for survival appears to be within three and five years. His mobility has been affected and he is need of regular care.

[32] Mrs McDonald has been examined by Dr Ian Bownes, a consultant psychiatrist, and he has reported that she suffers from a reactive depression and anxiety disorder as a consequence of a number of stressors including her apprehension about the fate of her sons. This is increased because they had provided practical and emotional support to her husband and herself. They were also involved in dealing with her husband's business.

[33] Pre-sentence reports on all three offenders have now been obtained. In the case of John McDonald, a probation officer, Mr Paul Wiseman, has expressed the opinion that the risk of committing further offences such as those involved in the present reference is low. He considered that a custody probation order "could serve to monitor the defendant's general alcohol consumption and associated behaviour". Mr Colin Dempsey, probation officer, assessed the risk of Gary McDonald re-offending as low also. He thought that a custody probation order "could monitor the [offender's] alcohol consumption and potential associated risks, carry out victim awareness work and examine further the issue of sectarianism." In the case of Stephen Maternaghan, the probation officer, Ms Dorothy Wilson, was unable to find any risk factors that would predispose him to further offending and she believed that he did not present a risk to the public. Again she considered that a custody probation order would "serve to monitor the [offender's] attitudes and behaviour."

[34] The question arises as to whether this court should take into account material that was not before the sentencing court. We are satisfied that we should. We have determined that the sentence imposed was unduly lenient. That sentence in our judgment should not have been passed. We must now address the question as to what the proper disposal should be. It would be illogical and contrary to justice to ignore material relevant to that sentencing exercise simply because it came into existence subsequent to the passing of sentence in the Crown Court. This subject is dealt with in the latest edition of *Archbold on Criminal Pleading, Evidence and Practice* at paragraph 7-140 as follows: -

> "The Court of Appeal is entitled to have regard to material which was not available at the time sentence was passed and also to have regard to what has happened since sentence was passed. Whereas the Criminal Appeal Act 1907 provided for the quashing of a sentence where it was thought that a different sentence should "have been" passed, section 11 of the 1968 Act (*ante*, §7-125) provides for a sentence to be quashed where the Court of Appeal considers that the appellant "should be" sentenced differently. … It is impossible to be precise about the circumstances in which the Court of Appeal will have regard to fresh material or to events occurring subsequent to the passing of sentence. However, cases occur in which the Court of Appeal says that, having regard to a certain report, usually a prison governor's report, the court now feels able to take a lenient course, *e.g. R v Plows,* 5 Cr App R (S) 20, and *R v Thomas* [1983] Crim L R 493, where the court said of a sentence of nine

> months' imprisonment that it was neither wrong in principle, nor excessive in length, but because of the impact of the sentence on the appellant and as an act of mercy it could be reduced so as to permit immediate release."

[35] Section 10 (3) of the Criminal Appeal Act 1980 is in similar terms to section 11 of the 1968 Act. It provides: -

> "On an appeal to the Court against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court."

The personal circumstances of the offenders

[36] It was strongly urged that, in exercising its discretion whether to impose a different sentence on the offenders, the court should give particular weight to the personal circumstances of the offenders as they now have been revealed. In the case of John and Gary McDonald the fact that their father is now terminally ill and that both parents rely heavily on them for support was prayed in aid as justifying a more lenient course. In the case of Maternaghan it was suggested that he had "turned over a new leaf" and had severed association with those who might have involved him in criminal activity in the past.

[37] It is well settled that, even where the Court of Appeal concludes that a sentence is unduly lenient, it retains a discretion whether to quash the sentence imposed and substitute a more severe penalty. In *Attorney General's reference (No 4 of 1989)* [1990] 1 WLR 41, 46, Lord Lane CJ said: -

> "… even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or

> detrimental to others for whose well-being the court ought to be concerned."

[38] Would it be unfair to the offenders to increase the sentence? Would it be unacceptably detrimental to others for whose well-being the court ought to be concerned? We cannot accept that it would be unfair to the offenders to increase the sentence. It is true that the charges have been hanging over them for a substantial period and that they have therefore had to endure the ordeal of waiting for the outcome both of the trial and this reference. We do not consider, however, that it could be regarded as unfair that they should not receive the sentence that was appropriate to their involvement in these offences on that account alone. The issue of whether the plight of the McDonalds' parents should influence the exercise of the discretion is less easy to resolve.

[39] It is permissible to have regard to any physical disability or illness which will subject the offender to an unusual degree of a hardship if he is imprisoned – see, for instance, *R v Leatherbarrow* (1992) 13 Cr App R (S) 632; *R v Green* (1992) 13 Cr App R (S) 613. It is less clear that the illness of a relative can be taken into account for the same purpose. The effect that personal circumstances may have on the selection of a sentence was discussed by this court in *R v Sloan* (Neutral Citation no. (2000) 2132). In that case Carswell LCJ said: -

> "There is a well settled line of authority that in certain cases the court can impose a lighter sentence than that which would normally be appropriate for the type of offence where the offender suffers from some physical or mental disability: see, *e.g.*, the discussion in *R v Bernard* [1997] 1 Cr App R (S) 135 and the principles deduced from the previous reported cases by Rose LJ at pages 138-9:
>
> > '(i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this Court to interfere with an otherwise appropriate sentence (*Archibald Moore*);

> (ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence (*Archibald Moore* and *Richard Moore*);
>
> (iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate (*Wynne*);
>
> (iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.'

We respectfully agree with the approach of the court in that case, but would emphasise that it is important to bear in mind the passage which Rose LJ earlier cited from *R v Wynne* (1994, unreported):

> 'It is always to be borne in mind that a person who has committed a criminal offence, especially one who has committed a serious criminal offence, cannot expect this or any other court automatically to show such sympathy so as to reduce, or to do away with altogether, a prison sentence purely on the basis of a medical reason. It is only in an exceptional case that an exceptional view can be taken of a sentence properly passed. In this case a proper sentence was passed for a serious offence.'"

[40] There are instances where the Court of Appeal in England and Wales has opted for a more lenient penalty because of circumstances affecting an offender's family rather than him personally. In *R v Crompton* July 22, 1974 the appellant was sentenced to nine months' imprisonment for theft and a suspended sentence of two years was activated concurrently. A fortnight after he had been sentenced his wife and child received very serious injuries

in a road traffic accident. The child was released from hospital but the mother remained there and was likely to be detained for a substantial period. It was therefore necessary to put the child in care. The Court of Appeal, taking into account that the appellant had already served the sentence of nine months and was detained on foot of the suspended sentence part of the order, "as an act of mercy" decided to make such an order as would enable him to be released immediately. In *R v Renker* June 29, 1976 the appellant pleaded guilty to burglary and theft, and was sentenced to a total of 18 months' imprisonment. He was been given leave to appeal because his little son was dying of leukaemia. The appellant had already served some time in prison. It was accepted that his relationship with his son was close, and that it would make a great difference to the boy's remaining months (he was not likely to live more than 12 months) if his father could be with him. The court ordered that there be substituted for the sentence of 18 months such a sentence as enabled him to be released at once. In *R v Haleth* (1982) 4 Cr App R (S) 178 the appellant was sentenced to 12 months' imprisonment for affray. Not very long after he committed the offence, the appellant's wife, who had been suffering from a kidney disease for some time, died from that complaint. Their son suffered from the same condition. He required constant care and was being looked after by the appellant's brother. The appellant's immediate release was ordered partly because the boy had only just been told that his father was in prison and this had had an adverse effect on his health.

[41] In line with these decisions we consider that it is open to us to take account of the condition of the McDonalds' parents in deciding whether we should exercise our discretion to increase the sentence passed on them and if so, to what extent. In each of the cases referred to in the preceding paragraph there was, in our judgment, a more pressing reason that the offender should be given his liberty than in the present instance. We are not unsympathetic to the plight of the parents but we do not consider that it has been shown that their circumstances are such as to warrant the offenders escaping a prison sentence entirely.

Conclusions

[42] Taking into account these matters and the effect of double jeopardy we have concluded that the proper disposal in these cases is a concurrent sentence of three years' imprisonment on each of the charges of affray and possession of an imitation firearm. Although the factors relating to Mr and Mrs McDonald do not apply to Maternaghan we consider that it would be invidious to make a distinction in his case and, in any event, we bear in mind the efforts that he has made to rehabilitate since the sentence of the Crown Court was passed. We accept that each of the offenders would benefit from a period of probation after their release from prison and, therefore, if they are prepared to agree to it, we shall make a custody order in each case, comprising two years custody and one year probation.

[43] Paragraph 10 of Schedule 3 to the Criminal Justice 1988 Act provides: -

> "The term of any sentence passed by the Court of Appeal or House of Lords under section 36 above shall, unless they otherwise direct, begin to run from the time when it would have begun to run if passed in the proceeding in relation to which the reference was made."

[44] We have concluded that it would not be appropriate to give such a direction. It was suggested by Mr Valentine for the Attorney General that if the court decides not to direct that the sentence should run from a point other than the date of the original sentence, this should affect the discounting effect of double jeopardy. We would wish to hear rather fuller argument on this question before reaching a concluded view on it. Whatever may be the merits of that argument, we do not consider that it should have that effect in the present case.

[45] We shall quash the sentences imposed on the offenders and substitute those which we have set out. We direct that they surrender to custody within 48 hours.