

## THE QUEEN

-v-

DAVID JOHN O'NEILL AND BRIAN JACK ARCHIBALD

-----

The Right Honourable Lord Justice Kelly

The Honourable Mr Justice McCollum

-----

KELLY LJ

As the judge said, this offence was outrageous in its contemplation and brutal in the way it was carried out.

The 2 men decided to rob a man called Barber, whom they both knew, about midnight on 23 December 1991. For this purpose they armed themselves with a hammer and went to his flat. Because O'Neill was known to Mr Barber and unlikely to gain admission they devised a ruse by which Archibald went to the door first, gained admittance and then O'Neill followed him in with the hammer. Archibald found a shovel and beat Mr Barber with it while O'Neill hit him with the hammer. All the while they demanded money and threatened to kill him if he did not. He gave them £50. They demanded more. Their victim was clearly in a terrified state and he gave them then £300. Not content with this O'Neill smashed the victim's video with a hammer and demanded another £100. Again Mr Barber responded and gave them, not £100 but £200. So all in all, £550 was taken from their victim and his video and television were smashed as well. Then they left, threatening to kill him if he told the police, and on leaving, Archibald hit him again and cut him with the shovel. Fortunately their victim plucked up courage and told the police.

When he was examined by Dr Nutt the next day extensive bruising was found all over his body and 26 different areas of his body showed bruises or cuts.

The learned trial judge accurately assessed their respective responsibility when he held that there was very little to choose between them but because of the nature of O'Neill's record, which is one of violence, he imposed a sentence of 12 years on him and 10 years on Archibald.

It is said before us by Mr McNaughton for O'Neill that the learned trial judge failed to give weight to a number of extenuating factors, and therefore the sentence in the circumstances was manifestly excessive.

However as this Court has frequently pointed out, the crime of robbery calls for a severe deterrent sentence. Accordingly mitigating factors, touching the offence and the offender must give way to a significant extent, to the deterrent element of the sentence, which is, of course, to deter others from carrying out what has now become, in this jurisdiction a prevalent crime.

Mr McNaughton in mitigation, pointed out that the victim was not an elderly or infirm person. He sought to contrast this case with those others on which we have passed judgment in which the householder was of that state. We agree that the victim in this case was not elderly, but it is clear to us that he was chosen because he was a man of weak and vulnerable constitution, unlikely to offer much resistance to the demands of the appellants when accompanied by violence.

It was submitted also that his injuries while numerous and extensive, were not in fact serious. They were no more than cuts and bruises, and they left Mr Barber with no permanent disability, it was said. This does not, of course, have regard to the fear in which the victim was put. We were also reminded that about £250 of the stolen money was recovered.

Mr McCartney on behalf of Archibald points to the fact that his client is an alcoholic and that some discount should be given for that. It has been the practice of this court to recognise that a trial judge is justified when alcoholism is established as a disease or illness to give some discount in respect of it, but that discount must be a measured one in all the circumstances of the case. Mr McCartney also refers to Archibald's record which shows that he, unlike the co-accused O'Neill has not been convicted of any offence of violence. Undoubtedly that is true. His convictions in the past have been for motoring offences with one for dishonesty. This contrasts markedly with O'Neill's record, who has convictions for disorderly behaviour, assault occasioning actual bodily harm, resisting the police, common assault and assault on the police. And the aggravating factor is that one of the assaults committed by him in the past was on the same victim Mr Barber.

One factor however was strongly relied on by both counsel. It was that from the outset when confronted by the police both appellants at once admitted their guilt. This they followed with pleas of guilty before the learned trial judge. Accordingly their victim who had suffered a great deal, in the robbery, was spared the ordeal, and in particular the possible humiliation and embarrassment that a certain course of cross-examination which was considered material to the case, had been pursued.

We feel, in the circumstances, after some deliberation that this factor which we felt was of substance was not given full weight by the learned trial judge in his very

careful judgment in passing sentence. We think the justice of the case will be met if we reduce the sentence in the case of O'Neill from 12 years to 10 and in the case of Archibald from 10 years to 8.