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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WILLIAM DESMOND GALLAGHER

Before Kerr LCJ, Campbell LJ and Higgins J

KERR LCJ

Introduction

[1] This is an appeal by William Desmond Gallagher against a sentence of life imprisonment imposed by His Honour Judge Hart QC, the Recorder of Belfast, on 9 October 2003 on a charge of robbery. The single judge gave leave to appeal.

[2] The appellant had been arraigned on 11 June 2003 on two counts, robbery and possession of a Class B drug. He pleaded guilty to both offences and sentencing was adjourned so that pre-sentence reports could be obtained. He was sentenced to six months for the drugs offence and does not appeal against that sentence. The 'tariff' imposed by the Recorder on the life sentence was 8 years. This means that the appellant will not be considered for release until this minimum term has expired: article 5 of the Life Sentences (NI) Order 2001.

Factual background

[3] At approximately 9.35pm on Saturday 5 October 2002 the appellant entered the Kentucky Fried Chicken restaurant at Connswater Retail Park, East Belfast. He went behind the counter and into the kitchen area, where he approached two members of staff. Joyce Moffett, who was working in the

kitchen, asked him what he wanted to which he replied: "I own the place." Another member of staff went for the manager, Alison Withers. The appellant approached Ms Withers as she emerged from the staff room door, and said: "Open the fucking till, or you'll get a bullet in the head." He grabbed Ms Withers' shirt, pushed something hard against her back and forced her to open a till. She stated that she was "very frightened" that the appellant would harm her if she did not do as she was told. Joyce Moffett said in her statement: "I believed that this male might have had a gun and was going to hurt one of us." The applicant stole money from the open till and then walked out of the restaurant. Ms Withers then telephoned the police. She estimated that the amount stolen would have been approximately £230.

[4] Police were called to the scene and a description of the offender was circulated by radio. The appellant was stopped while walking citywards on the Albertbridge Road, but he ran off. After a brief chase he was detained and arrested. Solvent was removed from his person at the time of arrest. He was taken to Strandtown Police Station and was seen to drop a sum of money to the ground. £240 in cash (8 x £20 notes and 8 x £10 notes) was later recovered from the station yard. A cannabis cigarette was recovered during a search of the appellant's property. When charged with the robbery the appellant replied: "I can't remember doing it." He said: "I can't remember having it" when charged with the drugs offence.

[5] In police interview the next day the appellant stated that he could not recall the events of the previous night as he had been "on the glue." He denied having dropped the bundle of cash. He could not remember having possession of the cannabis cigarette.

Personal background

[6] In a pre-sentence probation report dated 27 June 2003, Mr Winnington stated that the appellant came from an "extremely unstable family background" and was "raised in a household characterised by parental violence and conflict, alcohol abuse and inadequate and inconsistent parenting." The family were known to social services on account of these problems. Despite these inauspicious circumstances, the appellant's siblings have moved on to stable and worthwhile lives but the appellant has frequently been involved in criminal activity. He attended schools for pupils with learning and behavioural difficulties and finished his education at Rathgael. He has no formal qualifications and only limited social, literacy and numeracy skills, although he did work as a porter in a restaurant kitchen for part of last year.

[7] The probation report recorded that the appellant's offending had taken place against a background of long standing alcohol, illegal drug (ecstasy,

cannabis) and solvent abuse. Mr Winnington stated that the appellant had not been prepared to address these issues seriously, and his motivation remained very limited. Work undertaken inside prison to tackle the appellant's offending patterns had not been continued in the community because of his lack of motivation. It was therefore considered that the appellant was unlikely to seek help or comply with treatment or counselling in the community.

[8] The Probation Board considered that the appellant posed a "significant danger to members of the public". This conclusion was based on his past convictions for violent and sexual offences, failure to adhere to supervision requirements, lack of motivation, unstable lifestyle and antisocial peer associations. Because of these factors the likelihood of his committing further offences was considered to be "very high". The appellant is listed as dangerous to members of the public under the Probation Board's risk assessment procedures.

[9] On the appellant's own attitude to his previous offences, Mr Winnington's report stated: -

> "[The appellant] seems to regard his offending as impulsive and something which 'just happens' when he is under the influence of solvents, alcohol or illegal drugs. Whilst this may be the case he has displayed in his offending behaviour (whether planned or opportunistic) a worrying willingness to threaten and to use violence to get his own way, especially when confronted."

In light of this it is unsurprising that Mr Winnington had concerns as to the appellant's victim awareness, stating that the appellant

> "… has great difficulty in accepting responsibility for his behaviour and in particular how it has affected other people. He sees himself as 'a victim' (in terms of his own childhood and addiction problems) and as a result struggles to recognise the effects of his own offending on the victims."

[10] Mr Winnington also had concerns about the appellant's failure to learn from his past offending. In relation to the present robbery offence, Mr Winnington commented that the appellant was not willing to take responsibility for his own actions and its consequences for the staff involved: "He acts solely in terms of his own needs."

[11] The appellant was assessed by the Probation Board's clinical psychologist in March 2000 and was found to have an antisocial personality disorder. It was considered unlikely that he would engage in or benefit from offending focused programmes due to lack of insight and motivation. He had engaged superficially in a subsequent custody probation order, but the order was eventually breached and action had to be taken in respect of his failure to comply with the terms of the order.

[12] Dr Bownes, consultant psychiatrist, examined the appellant and provided a lengthy report dated 27 August 2003. The report dealt with the appellant's disturbed home life. Both parents were alcoholics. There had been violent domestic arguments and the appellant had attended several counselling sessions with a psychiatrist at a child guidance clinic while at primary school. As an adult the appellant had contact with mental health professionals outside prison for the first time on 13 June 2002, when he complained of low mood and reported extensive drug and alcohol use. He absconded from treatment and was eventually discharged from the outpatient list due to failure to meet appointments. He received some treatment in prison. None of the health care professionals who had contact with the appellant expressed the view that he had an underlying mental illness process.

[13] On the question of drug and alcohol abuse Dr Bownes recorded the appellant as saying the following: -

> "Mr Gallagher denied that his pattern of psychoactive substance use had ever been associated with difficulty in controlling his alcohol intake once he started drinking or with a subjective sense of compulsion or craving for an particular substance, and he described that as having remained mostly a social and recreational activity rather than a central feature of his daily routine…Mr Gallagher admitted to smoking cannabis regularly 'to chill out' and he also explained that he had used cocaine occasionally 'to keep alert in the kitchen.' However Mr Gallagher denied that he had used any other illicit psychoactive substances during the ten months prior to his current committal to prison 'because I had the responsibility of a job and a family,' and he described his usual alcohol intake at the time of his arrest on the current charges as 'no more than the odd couple of pints at the weekend.'"

[14] The appellant said that he had resumed solvent abuse three months before the present offences because of the stress of work and family life. He

said that he was "stoned out of my head on glue" at the time of the robbery and his memory was patchy. He understood that his behaviour had been wrong and he talked about his feelings of remorse and shame: "I had got my life back, and I am totally disgusted with myself for throwing it away again and letting Donna [his partner] and the kids down." He indicated that he intended to engage with professional advice in the future.

[15] Dr Bownes detected a tendency for the appellant to present what he considered to be the most favourable picture of himself. His answers were frequently inconsistent and patently self-serving. It was clear that he understood and accepted that his behaviour had been wrong. There was no evidence of any underlying mental illness process. Dr Bownes considered that the mental health difficulties that the appellant described were consistent with the effects of persistent psychoactive substance abuse and long-standing attitudinal and personality-based deficits and problems. He considered that if the appellant resumed psychoactive substance abuse the risk of deterioration in his mental health and further episodes of antisocial behaviour would be significantly increased.

[16] The clinical picture presented by the appellant was, in Dr Bownes' opinion, consistent with "dissocial and borderline personality traits". He had the intellectual ability to engage in making changes to his lifestyle and should be supported to develop strategies for avoiding relapse into substance abuse but the success of therapeutic intervention depended on the appellant's motivation. Dr Bownes found it very difficult to engage him in identifying strategies for addressing his shortcomings and changing established habits. He considered that the appellant's previous record of failing to engage in a meaningful way with the treatment and support he had been offered meant that he was unlikely to benefit from them in the future.

Antecedents

[17] The appellant has three previous convictions for robbery and other convictions for rape and causing grievous bodily harm. The latest of the robbery convictions was in March 2000 and the appellant was given a custody probation order comprising three years custody and two years probation. He was therefore within the probation period when the offences that are the subject of this appeal were committed.

The appeal

[18] For the appellant Mr Allister QC accepted that this was "a mean and opportunistic" robbery but he submitted that it did not qualify as "a very serious offence" justifying the imposition of a life sentence. In particular, Mr Allister pointed out, there was nothing that indicated a significant amount of planning. On the contrary, it had all the appearance of a spontaneous crime;

the appellant made no attempt to conceal his identity; no weapon was in fact used; no physical injury was inflicted; there was no suggestion that any of the victims had suffered long-term consequences; there was no collateral damage and the amount stolen was modest.

[19] Mr Allister submitted alternatively that the tariff imposed was unwarrantably high. This equated to a determinate sentence of sixteen years which, in light of the circumstances of the offence, and even allowing for the appellant's record, was significantly greater than would have been imposed if a determinate sentence had been passed. In this context, Mr Allister drew attention to the Recorder's sentencing remarks where he said: -

> "Therefore, were it not for the aggravating factor of the accused's record, but taking into account his plea of guilty on arraignment, I consider that the proper sentence would have been one of five years' imprisonment."

These remarks, Mr Allister submitted, could not be regarded as consistent with the imposition of an eight-year tariff. While some increase in the five-year sentence that the Recorder thought might be appropriate but for the previous convictions could be defended, an increase to an effective sentence of sixteen years could not.

[20] For the Crown Mr Sefton accepted that the offence was not intrinsically serious enough to warrant the imposition of a life sentence but he argued that it could be transformed to a condition of sufficient seriousness by the operation of article 37 (1) of the Criminal Justice (Northern Ireland) Order 1996 which provides that in considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences. Mr Sefton did not dispute that the tariff of eight years was excessive.

Discretionary life sentences

[21] In *R v Hodgson* [1967] 52 Cr App R 113 the Court of Appeal, dealing with the circumstances in which a discretionary life sentence might be imposed said: -

> "When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit

> such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

[22] These conditions were refined somewhat by the judgment in *Attorney-General's Reference No. 32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261 where the court said: -

> "In our judgment the learned judge was taking an unnecessarily narrow view of the circumstances in which a discretionary life sentence can be imposed. It appears to this Court that the conditions may be put under two heads. The first is that the offender should have been convicted of a very serious offence. If he (or she) has not, then there can be no question of imposing a life sentence. But the second condition is that there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence."

[23] The continuing relevance of the first condition came under scrutiny in the case of *R v Chapman* (2000) 1 Cr App R 77. In that case the Crown had suggested that a number of recently decided cases had cast doubt on the continued applicability of the first condition. The Court of Appeal dealt with that suggestion in the following passage: -

> "In most of those cases there was no express departure from the criteria laid down in *Hodgson*, and certainly no doubt has to our knowledge ever been cast on the authority of that decision, which was very recently reaffirmed in *Attorney-General's Reference No. 32 of 1996 (Whittaker).* In *Attorney-General's Reference No. 34 of 1992 (Oxford), Hodgson* was indeed specifically relied on as laying down principles which were described as "not in dispute". It is in our judgment plain, as the Court has on occasion acknowledged, that there is an interrelationship between the gravity of the offence before the Court, the likelihood of further offending, and the gravity of further offending should such occur. The more likely it is that an offender will offend again, and the more grave such offending is likely to be if it does occur, the

> less emphasis the Court may lay on the gravity of the original offence. There is, however, in our judgment no ground for doubting the indispensability of the first condition laid down for imposition of an indeterminate life sentence in *Hodgson*, reaffirmed, as we say, in the more recent *Attorney-General's Reference No. 32 of 1996 (Whittaker).* It moreover seems to this Court to be wrong in principle to water down that condition since a sentence of life imprisonment is now the most severe sentence that the Court can impose, and it is not in our judgment one which should ever be imposed unless the circumstances are such as to call for a severe sentence based on the offence which the offender has committed."

[24] We agree with the reasoning of this passage. A discretionary life sentence should be reserved for those cases where an extremely grave offence has been committed. Of course it is true that the criminal record of the offender may affect the view to be taken of the seriousness of the offence since a repeat of earlier offending may indicate a more determined and settled criminal propensity and may cast doubt on any claim that the offence was spontaneous. But it would be wrong to impose a life sentence *solely* because it was considered that the offender is likely to re-offend on release from a determinate sentence for a less than serious offence. As Lord Bingham CJ pointed out in *Chapman,* a sentence of life imprisonment is the most condign punishment that a court may impose and it is therefore fitting that this should be reserved for the most serious type of offence and where it is likely that there will be further offending of a grave character.

Article 37 of the Criminal Justice (Northern Ireland) 1996

[25] In so far as is relevant article 37 provides: -

> **Effect of previous convictions and of offending while on bail**
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> **37.** —(1) In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences.
>
> (2) In considering the seriousness of any offence committed while the offender was on bail, the court shall treat the fact that it was committed in those circumstances as an aggravating factor."

[26] The effect of this provision has been considered by Allen & McAleenan in the third edition of *Sentencing Law and Practice in Northern Ireland*. At paragraph 6.198 they state: -

> "To date the English Court of Appeal has not provided guidance on whether this change [introduced by the equivalent provision in England] amounts to a change in substance such that the fact of previous convictions and/or the offender's response to previous sentences amount to aggravating factors of the instant offence in themselves. It is submitted that such an approach would run contrary to the provisions in articles such as 19 (2) (a) and 20 (2) (a) of the CJO 1996 as a previous conviction as a fact discloses nothing as to the seriousness of the instant offence. In *Spencer and Carby* (1995) 16 Cr App R (S) 482, the appellants were pickpockets with long records of similar offences. The Court of Appeal concluded that section 29 (1) of the CJA 1991 allowed the court to take into account the offender's previous convictions when determining the seriousness of the instant offence as the previous convictions meant the appellants that the appellants could properly be regarded as professional pickpockets. In *Townsend* (1995) 16 Cr App R (S) 553, the Court of Appeal did not demur from the proposition of counsel for the appellant that while 'section 29 does not in terms restrict consideration of previous convictions to those of the same kind, that is really the only logic of it, and where a person has previous convictions for offences of a totally different kind, then the court should not treat an offence as more serious because of those previous convictions.'"

[27] The Court of Appeal in this jurisdiction has, in the view of the authors, declined to accept the arguments adumbrated in this passage from Allen & McAleenan. In *R v Larmour* (2001) unreported, the court said: -

> "Mr Grant argued, on the authority of the discussion in Allen and McAleenan, *Sentencing Law and Practice in Northern Ireland,* 3rd ed, paras 6.196 et seq, that a bad record cannot operate to increase the seriousness of the offence or the

> length of the sentence. It might appear to be correct logic to say that the offender's record cannot affect the seriousness of the offence itself. The court is enjoined, however, by art 37(1) of the 1996 Order:
>
> > 'In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences.'
>
> That provision has to be set beside the obligation placed upon the court by art 33 to take into account certain matters in mitigation on a plea of guilty. The English equivalent of art 37(1) was passed in order to reverse the effect of s 29(1) of the Criminal Justice Act 1991, which provided that an offence was *not* to be regarded as more serious 'by reason of any convictions of the offender or any failure of his to respond to previous sentences.' The intention of Parliament appears to us to be quite clear, accordingly, that the effect of previous convictions may be to increase the seriousness of the offence and so cause the court to impose a heavier sentence."

[28] The statement in this passage from the court's judgment that Parliament intended that the effect of previous convictions may be to increase the seriousness of the offence was *obiter*. Indeed the court said expressly that the issue was "largely academic" because the applicant's convictions were of some vintage and were relatively minor. But in a supplement to the third edition of their book Allen & McAleenan suggested that this statement "contested" their view that previous convictions could serve to increase the seriousness of the offence only "where they disclose something about the current offence". We do not consider that the judgment in *Larmour* necessarily conflicts with this view. In that case the Court of Appeal was dealing with a claim that "a bad record cannot operate to increase the seriousness of the offence or the length of the sentence". The use of the word "may" in the final sentence of the passage quoted denotes, in our opinion, the court's acceptance that previous convictions will not invariably increase the seriousness of the offence.

[29] The wording of article 37 (1) itself reinforces this conclusion. It is clearly a permissive rather than an imperative provision. The existence of previous convictions *may* be taken into account when considering the seriousness of the offence. When should the court have regard to these? Plainly, it seems to us,

they should be taken into account when they are offences of a similar nature to the index offence and indicate a degree of professionalism in the commission of the offence. But should all other offences be ignored? We do not believe that this will be the only possible outcome. If offences of a different type are capable of shedding light on the disposition of the offender; if, for instance, they disclose that he is an habitual offender who is disposed to professional criminality, it appears to us that they may provide insight as to the level of seriousness of the index offence. We accept, however, that the mere existence of previous convictions without more will not normally be sufficient to trigger the application of article 37 (1).

Conclusions

[30] We consider that the previous convictions of the appellant for robbery and the offences of violence including rape should be taken into account in assessing the seriousness of the present offence. They indicate an indifference (at best) to the welfare of others that characterises the present offence. It is not merely the fact of those convictions that make the present offence more serious, however. It is because they show a propensity to callousness on the part of the appellant which was present on the occasion of this robbery also that a more serious view of the present offence is warranted.

[31] The circumstances of the present offence are not such as would alone justify the imposition of a life sentence. The question arises therefore whether the effect of the previous convictions is to enhance the level of seriousness of the offence to a condition that would warrant this course. We have some misgivings about the use of article 37 to bring about such a result. It seems to us to be unlikely that it was intended to operate in this way. We do not find it necessary to decide whether it may ever be used for this purpose, however, and we will therefore refrain from expressing any final opinion on the matter.

[32] Even if article 37 may be used to transform a case that would not, by virtue of its own essential facts, warrant a life sentence, we are satisfied that it cannot operate to have that effect in the present case. This was a nasty and (for the staff involved) very frightening robbery. The offence itself did not come near the level of seriousness that would justify a life sentence, however, and, although it must be regarded as more serious because of the appellant's previous convictions, we do not consider that it satisfies the first criterion set out in *Hodgson* and *Whittaker.*

[33] The sentence of life imprisonment cannot therefore stand. We consider, however, that a severe penalty must be imposed to reflect the seriousness of the offence which, although not the worst of its type, was, as we have said, extremely frightening for the victims of the robbery. We have recently had occasion to consider the range of sentences appropriate for robberies of premises such as were involved here in *Attorney General's reference (No 1 of*

2004) (Pearson) [2004] NICA 6. In that case the court referred with approval to the statement of Lord Taylor CJ in *Attorney-General's Reference No 7 of 1992* where he said that the type of offence 'which involves somebody committing robbery at a small shop or other premises would ... normally attract a sentence of at least seven years' imprisonment on a plea of guilty'. We consider that the proper sentence to reflect the seriousness of the offence in light of the appellant's previous convictions is one of nine years' imprisonment. We shall therefore quash the sentence of life imprisonment and substitute a determinate sentence of nine years imprisonment.

[34] We have given consideration to the question whether a custody/probation order should be made. Although it is virtually inevitable that, on his release, the appellant will present a high risk of re-offending, in light of his lack of motivation, we have concluded that a probation order would not be suitable in his case.