IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ANDREW WILLIAM COYLE

MacDERMOTT LJ

PRINGLE J

This is an application by Andrew William Coyle for leave to appeal against a sentence of 2½ years' imprisonment imposed by His Honour Judge Burgess at Londonderry Crown Court on 30 January 1997. The charge against the applicant was one of causing grievous bodily harm with intent contrary to Section 18 of the Offences Against the Person Act 1861. On re-arraignment on 25 September 1996 the applicant pleaded guilty.

As it appeared that the factual basis for the plea was in dispute the Judge directed that a "Newton" hearing take place. This occurred on 15 December 1996. The relevant incident occurred during the evening of 24 November 1995 in Londonderry in the vicinity of Waterloo Street and involved the applicant and another young man, Edward Love.

The Judge summarised the rival contentions as to what occurred in this way:

"The dispute which has arisen in this case surrounds the background and circumstances by which the Injured Party came to lose part of his ear. The Injured Party claims it was an unprovoked attack, an attack from behind by someone he had not previously seen, and therefore totally unexpected. He alleged that his assailant grabbed him by the neck, and dragged him downwards. His sweatshirt was partially pulled over his head and his ear was bitten, with the result that part of the ear was bitten off. He stated the only action on his part in response to this attack was to swing some punches from a crouched position, the blows possibly striking his assailant on the chest or face. He sustained an injury to his thumb, he says by reason of these punches.

The defendant disputes this version. He states there was a confrontation between himself and the Injured Party; that the Injured Party charged at him; and that there was a struggle during which the Injured Party grabbed the Defendant by his testicles, causing him excruciating pain. As a defensive mechanism, the only one he considered at the time, he bit the Injured Party on the ear. He claims that by mutual agreement they each agreed to release their respective holds on each other. At that point the struggle or fight ended."

The injured party's injury was a serious one. The superior third of the left ear's pinna structure was completely bitten off. In addition the proximal phalanx of his right thumb was tender and bruised. Though recovered the detached portion of ear was not suitable for restorative surgery. The Judge heard the evidence of the 2 participants in the struggle together with that of a number of bystanders. He carefully analysed that evidence in his ruling and was clearly not greatly impressed by the evidence of either the applicant or Injured Party. He stated his conclusions in these terms:

"Having considered all of the evidence and reminding myself of where the burden of proof lies and the standard of proof, I have determined as follows:

1. that the defendant's actions throughout were those of the aggressor, notwithstanding that the Injured Party was also in an aggressive mood. It was the defendant who precipitated this struggle, who struck the first blow, and was subsequently prepared to follow through with the intention, explicit in his plea to this charge, to inflict serious injury on the Injured Party;

2. that the defendant bit the ear of the Injured Party, that he pulled and dragged at it over a period of time, that considerable force would have been required to sever the upper ear, and that the defendant knew perfectly well what he had done before he left the scene.

3. that the defendant was not grabbed by the testicles in the manner he has described, and that his actions in biting and continuing to bite the Injured Party's ear was not related to any sense of self-protection against such behaviour on the part of the Injured Party. Rather, as I have stated, that behaviour was related to his overall aggression."

In his remarks when passing sentence the Judge said:

"I have concluded that in the circumstances of this case, the violence involved and the injury involved, and the way that injury was involved and for the other reasons I have stated, that it would not be appropriate to suspend the sentence in this case. It was a violent and terrible act causing pain, suffering and disfigurement. There is no excuse for it. The court must make it clear that violence of this type on the streets of this city is not going to be tolerated."

We agree that attack by biting is a serious form of violence. It is also one which, regrettably, is becoming somewhat common and a sentencing Judge is fully entitled to have regard to the prevalence of a particular form of offending in his area, as the Judge did, when determining the appropriate sentence. In the papers in this case 2 other cases of ear biting are mentioned - indeed the applicant was questioned about them but denied involvement - so the case was very much one which called for a stiff deterrent sentence.

In the course of his remarks the Judge referred to the case of the Attorney-General's Reference No.7 of 1994 [1995] 16 Cr.App.R(S) 300. In that case Lord Taylor observed at page 302:

"Both counsel who have appeared have accepted that there are no relevant previous decisions which give assistance as to the appropriate level of sentencing. The reason for that is obvious. For somebody to bite another person's face persistently, as occurred in this case, is a very rare event. It is inhuman conduct.

However, in passing sentence, the learned trial judge, whilst he accepted that this was a very serious offence, said, `It is right to say no weapon was used'. We cannot agree. For somebody to use his teeth as a pair of pincers to inflict disfiguring injury on somebody at point-blank range is, in our judgment, tantamount to using those teeth as a weapon."

Sadly, it would appear that ear biting is not as rare an occurrence as Lord Taylor suggested: otherwise we readily endorse that observation pointing out that to chew or bite an ear so that a portion is detached requires not only persistence but a ruthless determination to cause a serious and disfiguring personal injury. In such circumstances it is not surprising that the applicant's advisers recognised that the intent to cause grievous bodily harm was apparent and so the applicant pleaded guilty.

Mr Brian G McCartney appeared on behalf of the applicant as he had in the Crown Court. He recognised that ear biting can often attract a sentence of 30 months' imprisonment but submitted that because of the background circumstances such a sentence was not appropriate in this case. In support of this argument he claimed that the Judge had overstated the case against Coyle in his findings on the Newton hearing. He questioned the finding that Coyle was the aggressor and the related conclusion that the defendant had not been grabbed by the testicles in the manner he had described. This was very much the type of issue which a Judge has to resolve on a Newton hearing. No objection is, or could be, taken to the manner in which he approached his task: the complaint is that his factual conclusion is flawed.

We do not agree. Since the hearing we have re-read the transcript in the light of Mr McCartney's submission. He relied especially on a portion of his cross-examination of a young woman called May Brown. It reads:

"Q. Sorry, isn't it possible that if both men grappled and moved their arms in order to secure the advantages that we agreed they were attempting to secure, isn't it possible that during one of those grappling sessions Mr Love grabbed this man's testicles?

A. Its possible, yes.

Q. And isn't it equally possible that as a result of that this man grabbed Eddie's ear in his mouth?

A. Aye, I seen it, aye.

Q. You saw it, and isn't it equally possible that in the throws of this struggle one response attracted another? Did you hear at any time either of these men shouting `You let go of me and I'll let go of you.'?

A. Aye, but I can't remember who said it."

Witnesses often agree that something is possible on the basis that all things are possible even though they may be frivolous or fanciful possibilities. Thus this answer must be viewed in context and we note an answer which occurred on the previous page:

"The ferocity with which he ran at him was such that he was determined that this one was not going to avoid a fight through an apology. Is that right? Well, that would have been your understanding of what you say, isn't that correct? And couldn't it have been that in that situation Eddie Love could have had this man by the testicles?

A. No, because he had him by the neck and Eddie's arms was on his shoulders."

Despite the multi-faceted nature of this question - which Mr McCartney readily accepts leaves much to be desired - the answer is clear. Mr McCartney also suggested that the existence of a pact "You let go of me and I'll let go of you" confirmed that Love had grabbed Coyle by the testicles. In our view that would involve reading far too much into a vague and ambiguous remark especially as the witness was uncertain who made it and when it was made.

As we have already stated we have reviewed all the evidence in the light of Mr McCartney's submission and we are entirely satisfied that the Judge was entitled to reach the factual conclusions which he recorded.

We turn back now to consider the sentence of 30 months' imprisonment. We do not consider it to be excessive let alone manifestly excessive. The biting off of Love's ear was a vicious and determined infliction of serious injury. Even if Love had grabbed the applicant by the testicles such a response could not be condoned. With his hands free a person in such a situation has plenty of reasonable options open to him by pushing or punching, kicking or kneeing his opponent to cause him to release his grip.

In recent years the Courts have had cause to note that gratuitous violence is on the increase. In this Court we have sought to make it clear that those who injure others by "glassing", "kicking" or other forms of vicious violence which includes biting of any part of another's anatomy will suffer condign punishment. The only way that society can show that it will not tolerate this kind of conduct is by the Courts passing severe sentences. The fact that offenders are young is not a reason why they should not be punished severely when they behave in this vicious manner.

In this type of case the sentencer will have regard to all that is known about the offender for instance his previous record and his behaviour since the offence. But it will only be in an extremely exceptional case that such circumstances can justify a short or non-custodial sentence. In this type of offence it is necessary in the public interest to mark the gravity of the offence and to deter other people as well as this individual applicant. In this context we would also draw attention to the remarks of Lord Bingham in The Attorney-General's Reference (No.60 of 1996) (The Times 27 January 1997). In that case the offender bit the right ear of one of his victims. Towards the end of his judgment the Chief Justice said:

"We feel bound to conclude that the trial judge was overimpressed by the personal factors relating to the offender. It is of course right that trial judges should have regard to, and seek to reflect, personal considerations in the sentences which they pass, but it is important also to bear in mind prominently another dimension: the growing menace of serious and wholly unjustified violence in public places. That is a source of acute public concern. While the courts should not be unduly swayed by such concern, nor, in our judgment, should they be indifferent to it. It is necessary that the courts should, and should be seen and understood to, punish such conduct severely."

Finally we would draw attention to the observation of the court in R v Beswick [1996] 1 Cr.App.R(S) 343 at 347.

"We conclude this judgment by saying that when, following a plea of guilty, there is a Newton trial of an issue if that issue goes against the defendant this may

result in him forfeiting some or even the whole of any discount to which he might otherwise have been entitled by reason of his plea of guilty."

We consider that in this jurisdiction Judges should bear that observation in mind.

To conclude: this sentence was not excessive. We would add that the Judge clearly dealt with the case in a very careful and humane manner and the sentence cannot be faulted.

Accordingly, the application for leave to appeal against sentence is refused.