IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

KYLE IVAN ORR

HUTTON LCJ

This is an application for leave to appeal against sentence by Kyle Ivan Orr. On 23 May 1990 he was convicted by a jury at Armagh Crown Court of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861, on a little baby, Lesley Burke. The offence was committed on 11 May 1989 when Lesley was aged 6 weeks.

The background to the offence was as follows. Lesley was the child of the applicant, who was born on 2 June 1970, and his girlfriend Tanya Burke. The applicant lived with his parents in their house in Portadown and Miss Burke lived with her parents in their house in the same street in Portadown. The parents of Lesley were not married and both took turns at looking after Lesley. On the morning of 11 May 1989 Lesley's mother brought Lesley round to the applicant's house so that he could look after her whilst she went out to work, the applicant being unemployed.

The applicant looked after Lesley during the morning and at about 12.45 pm his mother came into the house and stayed for about half an hour when she went back to work.

A short time after the applicant's mother had returned to work the applicant telephoned his father, and it is clear that he telephoned him to tell him that Lesley had sustained an injury or was not well. As a result of this telephone call the applicant's mother came back to the house and he and his mother took the baby to Craigavon Hospital where they arrived at 3.15 pm, having been delayed for some time by a bomb scare in the vicinity of the hospital.

In her witness statement to the police Dr Margaret Hutchinson, the consultant paediatrician at Craigavon Hospital, described the condition of the baby on arrival at the hospital as follows:

"The baby was screaming with a high-pitched cry and was very pale and had an obvious head injury. Following an X-ray of the skull, which showed a non-depressed fracture of the left parietal bone, the infant was transferred to the Children's Ward 3 North where she arrived at 4.15 pm. At approximately 4.30 pm,

Dr Barbara Bell and myself were asked by the Surgical Senior House Officer to help with the baby who was deteriorating and looked very shocked. As Dr Bell and I arrived, the baby started having fits. We rapidly assessed the infant and Dr Bell erected intravenous fluids and gave intravenous Epanutin to relieve the fits. Rapid assessment suggested that there might be a brain haemorrhage. We therefore arranged an immediate CT scan which was carried out under general anaesthetic. This scan did not confirm any definite collection of blood but showed contusion of the brain. Treatment of severe head injuries is to give oxygen by ventilator to try and reduce pressure on the brain, so we immediately put the baby on our ventilator and she was transferred to the Intensive Care Unit, Royal Belfast Hospital for Sick Children, for further treatment. She travelled accompanied by an Anaesthetist and Dr Bell followed the ambulance in her own car. During our assessment, we had noted some bruising on the left thigh and slight fading bruises on the chin. This would be unusual in a young baby who does not move about much. I did not interview the father personally as the condition of the baby was so serious as to be life-threatening and my energies were required by the baby".

In his witness statement to the police Dr Maurice Savage, consultant paediatrician at the Royal Belfast Hospital for Sick Children described Lesley's condition on arrival at that hospital as follows:

"On admission to the Intensive Care Unit the fracture of the skull was confirmed and it was further discovered that there was a fracture of her right clavicle when a skeletal survey was carried out. No other fractures were seen but examination of the child revealed some finger-print type bruising on the right buttock and a bruise over the left greater trochanter. The child remained seriously ill, had several seizures after admission requiring treatment with anti-convulsants and ventilation for forty-eight hours to reduce cerebral oedema and swelling. After coming off the ventilator she began breathing spontaneously but remained somewhat hypertonic, there was evidence of some residual neurological deficit".

Lesley has survived her head injury, but whilst there can be no certainty as to her future condition, it appears, sadly, that there is a distinct risk that she will suffer some moderate to severe brain damage in the future although at this stage it is impossible to assess the degree to which such damage may affect her physical and mental powers. When the applicant brought Lesley to Craigavon Hospital on 11 May he told the medical staff that Lesley had been dropped two feet from his knee onto a carpeted floor. However the position of the fracture on the side of the baby's head and the degree of injury to the skull and the brain were such that the doctors who examined Lesley considered that her injuries were not accidental.

The applicant was then interviewed by the police after caution and he gave a different account to the police in which he described that Lesley was crying on the couch in the living room and he picked her up and walked about with her trying to stop her crying and he then told the police.

"She was still crying so I came back in and went into the kitchen. I put her up against the back window to let her see the dog.

Q. What way were you holding Lesley?

A. My left hand on her back and my right hand on her bum.

Q. Go on.

A. She was still crying and I laid her in my arms with her head in my left arm. I rocked her back and forwards but she still cried. I was talking to her and looking out the window as well. She was swinging her arms about and as I looked out the window she slipped out of my arms and fell on the kitchen floor. As she was falling I tried to grab her but she hit the floor.

Q. Go on.

A. I managed to grab her arm and her frock, but her head hit the floor...."

In his written statement to the police the applicant said:

"Every time you stopped walking she started to cry again. I held her up to the kitchen window to let her see the dog. She stopped crying on and off. If you stopped moving she would cry again. I put her into my arms and rocked her to see if she would go to sleep. I was rocking her and talking to her, she was wriggling her arms about and still crying. I looked out the back window and then she fell out of my arms. I tried to grab her as she fell. I was standing up and I tried to grab her, but I didn't get a hold of her. She hit the kitchen floor with her head first. When she hit the ground her arms went out straight and went stiff. She was crying hard. I picked her up and tried to put her arms down and checked her head. She was roaring at that time and then she just stopped. I checked her eyes and put my ear down to her nose and she was breathing. She was sighing and then I brought her into the living room and put her on the couch. I rung my father and mother at her work and my mother came round. Me and my mother both took Lesley to Craigavon Hospital".

At the trial the medical evidence on behalf of the prosecution was that the fracture of the skull and brain damage and the fracture of the right collar bone could not have been sustained by an accidental drop or fall onto the kitchen floor. The applicant gave evidence that the injuries had been sustained by an accidental fall as he had described in his police statement.

It is clear that the jury did not accept the applicant's account that the injuries were sustained accidentally and were satisfied that he had inflicted grievous bodily harm on the baby.

The applicant had a previous criminal record which included a number of convictions for shop-lifting and burglary and he had 2 convictions for possessing an offensive weapon in public. In addition at Downpatrick Crown Court on 15 May 1989 he was convicted of three offences which had been committed on 3 July 1988 and which were two assaults occasioning actual bodily harm and one offence of possessing an offensive weapon in a public place and he was ordered to be detained in a Young Offenders Centre for 9 months suspended for 2 years on each count, the sentences to be concurrent. After his conviction at Armagh Crown Court of inflicting grievous bodily harm on baby Lesley His Honour Judge Russell QC ordered him to be detained in a Young Offenders Centre for four years, and the applicant now applies to this court for leave to appeal against that sentence, leave having been refused by the single judge.

On behalf of the applicant Miss Philpott persuasively advanced a number of points. She accepted that the baby had sustained a very serious injury but she submitted that the fracture of the skull and the fracture of the collar bone could fairly be regarded as having been inflicted because of a sudden loss of temper by the applicant who was just a few weeks short of his nineteenth birthday when the offence was committed. She made the point that apart from the injuries inflicted on 11 May and the evidence that there was some fingerprint bruising on the baby's buttock, the baby was well nourished and fed. She further made the point that the applicant did not seek to hide the fact that the baby had been injured but that he quickly rang his father to tell him of the baby's condition and that the applicant and his mother then took the child to hospital where the applicant, although he gave a false account to the doctors of how the injury had been sustained, nevertheless described to the doctors at Craigavon Hospital the condition of the baby after she had sustained the injuries.

Miss Philpott further submitted that the Crown had not charged the applicant under section 18 of the Offences Against the Person Act 1861 with the more serious offence of causing grievous bodily harm with intent, but with the lesser offence of inflicting grievous bodily harm contrary to section 20, and Miss Philpott made the point that the maximum sentence laid down by Parliament for the offence under section 20 was 5 years' imprisonment.

In addition Miss Philpott strongly relied on a number of decisions of the English Court of Appeal and she submitted that in the light of the sentences approved by the English Court of Appeal the sentence of 4 years in this case, particularly when considered in the light of the others points upon which she relied, was manifestly excessive. These cases were: R v Boswell [1982] 4 CAR(S) 317; R v Greenhill [1986] 8 CAR(S) 262: R v Mahieu [1988] 10 CAR(S) 265; R v Oke [1988] 10 CAR(S) 371; R v Broady [1988] 10 CAR(S) 495; R v Dawson [1989] 11 CAR(S) 338; R v Stewart [1988] 10 CAR(S) 197; R v Durkin [1989] 11 CAR(S) 315.

In this case we think it would be helpful to state our views as to the factors which a judge seeking to determine the appropriate sentence in a case of this kind should bear in mind.

1. Cases of serious injury to a young child giving rise to a conviction under section 20 must always be classified as serious cases and those under section 18 will be treated as even more serious as a conviction under the latter section presupposes an intention to injure. In nearly all cases an immediate custodial sentence will be inevitable.

2. One very important feature of cases of this nature is the need for the courts to protect little children and to deter those parents and others who might cause them serious physical injury. This Court agrees with the principle stated by the Court of Appeal in England in R v Boswell [1982] 4 CAR(S) 317 at 318:

"But where one has a helpless child, only a few weeks old, the only protection which can be given to such a helpless infant is that the law steps in and makes it quite plain that such cases like this have to be met with severe sentences".

3. A plea of guilty will always be a most significant factor because it will indicate remorse on the part of the accused. In this case the attitude of the applicant to the offence remains, we are told, that it was an accident. This attitude on the part of the applicant concerns us, as no doubt it did the trial judge.

4. Subject to one qualification we consider that the guideline observations of Lord Lane in R v Durkin [1989] 11 CAR(S) 313 at 315 are most helpful:

"It is perhaps worthwhile to pause for a moment to consider the basis upon which the Court must try to arrive at the proper sentence in cases such as these, which are amongst the most difficult which a judge has to deal with so far as sentencing is concerned.

First of all it is necessary of course to punish someone who has committed this sort of offence. Secondly, it is necessary to provide some sort of expiation of the offence for the defendant. Thirdly; it is necessary to satisfy the public conscience. Fourthly, there is the necessity to deter others from committing this sort of offence, by making it clear that this sort of behaviour will result in condign punishment.

So far as the last matter is concerned, a sudden loss of temper case like this, deterrence of others does not come into it. Certainly so far as this man is concerned, we are quite satisfied that he will never do anything like this again. So there is left the question of punishment and the question of the public conscience. What is the least sentence which in those circumstances is required?"

We have some difficulty, with respect, in understanding how the deterrent element in a sentence does not come into a sudden loss of temper case - in our opinion little children do require to be protected from ill-tempered adults and the public should be made aware of this and should realise that ill-temper will not be accepted as an exculpatory explanation.

5. Cases of repeated assault are much more serious than a single incident. We would adopt what Lord Lane said in R v Gayle [1989] 11 CAR(S) 435 at 436:

"As has been said on other occasions, these cases of assaults on little children present notoriously difficult problems for the sentencing court. One of the most important considerations so far as the extent of punishment is concerned is the degree of persistence with which the attacks were committed. A single act arising out of a momentary loss of control, precipitated no doubt by a child's aggravating behaviour, is one thing. A series of assaults committed on separate occasions is quite another. The former is to some degree forgivable: the latter can regrettably excite little sympathy".

6. The court should seek to reach as informed a view of the offender as is possible before passing sentence in order to understand, so far as is possible, why an unnatural, but not sadly unusual, act occurred. It is the duty of those representing the accused to have such information available.

In deciding the appropriate sentence the judge may find it helpful to consider reported decisions. We recognise, however, that when a case is contested an experienced trial judge will have a much better "feel" of the case than this Court can possibly get from the cold print of the papers before it. Reported decisions are not to be treated as binding legal precedents unless the case establishes a point of principle. As Lord Lane CJ stated in R v Nicholas (The Times 23 April 1986):

"I say again - we have said it frequently in the past - guidelines are guidelines and they are not meant to be measuring rods to be applied rigidly to every case. They are there for assistance only and not to be used as rulers never to be departed from".

However consideration of a range of cases may provide a pointer to the normal scale of sentences. Thus the English cases referred to by Miss Philpott appear to support the statement at p 922 of the Criminal Law Review for 1989.

"The cases suggest that the current bracket approved by the court (of appeal) for offences under Offences Against the Person Act 1861, section 20, is from a minimum of about 12 months to about 3 years, depending in particular on whether the violence was a single incident.... Longer sentences may be upheld where the offence is causing grievous bodily harm with intent".

When this court first considered the papers in this case, before the court had been referred to the English authorities, we considered that, although the sentence was a stiff one, it was not manifestly excessive. We also took into account the consideration that the very experienced trial judge had imposed the sentence after he had heard all the evidence at the trial and therefore had the complete "feel" of the case.

However notwithstanding that the applicant was entitled to no discount for a plea of guilty and that he has shown no remorse by pleading guilty, we are satisfied that the sentence of 4 years is outside the range of sentences which has been laid down in a considerable number of cases by the Court of Appeal in England for this type of offence.

This Court on occasions lays down a higher level of sentence than that which has been laid down in England, for example, this Court has stated that the starting point for sentences of rape should be higher than in England: see R v McDonald [1989]3 NIJB 28. However it is necessary to emphasise that cases of the type which is now before us are not cases of sexual abuse, they are cases of a quite different nature.

The principles on which, and the range within which, sentences should be imposed for this type of offence have been carefully considered by the Court of Appeal in England. As Lord Lane has stated, cases of this nature give rise to very difficult sentencing problems, and we consider that at present there is no reason why there should be a different range of sentences in Northern Ireland unless local circumstances should indicate that stiffer sentences are required in order to deter an increase in this type of offence.

Accordingly we shall give leave to appeal and will treat the hearing of this application as the hearing of the appeal and we reduce the sentence of 4 years' detention to a sentence of 3 years' detention in the young offenders centre.

We make this observation in conclusion. None of the English authorities cited to this Court were cited to the learned trial judge and he was given no assistance by counsel as to the appropriate range of sentence for an offence of this nature. We think that this was regrettable and we have no doubt that if these cases had been cited to the judge he would have imposed a sentence in the region of three years. It is usually inappropriate for counsel to make submissions to a judge as to the length of sentence which he should impose in respect of a common type of offence which comes before him frequently. But where the judge is going to pass sentence in a type of case which is unusual we consider that counsel should carry out research to see whether the Court of Appeal in this jurisdiction of the Court of Appeal in England has laid down guidelines, and if such guidelines have been laid down we think that counsel should refer the judge to those decisions before he passes sentence, although it would normally be inappropriate for counsel to do more than merely refer the judge to the decisions.