Attorney General's Reference (No 2 of 1993)
COURT OF APPEAL (CRIMINAL DIVISION)

HUTTON LCJ28 JUNE 1993

28 June 1993HUTTON LCJ
This is a Reference by the Solicitor General, acting as deputy for the Attorney General, to the Court of Appeal, under section 36 of the Criminal Justice Act 1988, of sentences which he considers to be unduly lenient.
The background to the Reference is as follows. At Belfast Crown Court on 16 December 1992 the offender was found guilty by a jury on one count of burglary, contrary to section 9(1)(a) of the Theft Act (Northern Ireland) 1989 and on a second count of causing grievous bodily harm with intent to do grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861.
The learned trial judge, His Honour Judge Pringle QC, the Recorder of Belfast, then adjourned the case so that he could be furnished with a Probation Report and the report of a psychologist on the offender.

The learned trial judge sat again on 15 March 1993 after he had received those reports. He heard Crown Counsel and a plea on behalf of the offender by his counsel, Mr Boyd. The judge then sentenced the offender to 2 years imprisonment, suspended for 3 years, on the first count of burglary and to 3 years imprisonment, suspended for 3 years, on the second count of causing grievous bodily harm with intent.

The facts relating to the two offences were as follows. The victim was an elderly man of 69 years, Mr Patrick Fisher, who lived alone in his flat. About 5 am on 27 December 1991 he was awakened from his sleep in bed by being grabbed by the neck. The light was on in the flat and Mr Fisher recognised the intruder as the offender, Pearse White. The intruder asked him where his money was and Mr Fisher tried to get up and fend him off but the intruder started to hit him. Mr Fisher had a Gurka knife on display on the fireplace and the offender hit him with this on the head and on the arm. It appears that the offender may have picked up this knife at the stage when Mr Fisher tried to fend him off. Mr Fisher shouted for help and the offender said "If you tell anybody I'll come back and kill you." The offender then left the flat. The offender had not ransacked or disturbed the flat and it appears that he took nothing with him, although it is not clear whether or not he carried the knife out of the flat.

Neighbours of Mr Fisher then came to help him and he was taken to hospital. Mr Fisher suffered serious injuries in the attack. These were lacerations of the scalp, a fracture of the right wrist, a fracture of the ninth rib and a possible fracture of the skull. Fortunately Mr Fisher made a full recovery and the learned trial judge was informed of this by counsel.

At the time of the offence the offender was aged 20 and was aged 21 on the date on which he was convicted. He had a completely clear criminal record and had never come under any adverse police notice. He and his parents and brothers and sisters comprised a family of eleven members and none of them had any previous convictions or had been in any trouble with the police, except for one sister who had a conviction for a minor public order offence 11 years ago.

In this Reference the Solicitor General states that the following aggravating features were present in the case:

"(i) The victim is, and was known to the offender as, an elderly man living alone.

(ii) The offender attacked the victim in the latter's own home in the early hours of the morning in the course of a burglary.

(iii) The offender could have carried out the burglary without waking the victim, but chose instead to wake, attack, injure and threaten him.

(iv) The offender deliberately armed himself with, and used, a weapon which was capable of causing serious injuries.

(v) The offender caused the victim serious injuries."

At the hearing before us, Mr Foote QC, for the Solicitor General, accepted that paragraph (iv) may not be entirely accurate, as it appears that the offender may not have armed himself with the knife until the victim began to struggle with him.

In the Reference the grounds upon which the Solicitor General submitted that the sentences were unduly lenient were stated as follows:

"It is submitted that the sentences of two years' imprisonment suspended for three years and three years' imprisonment suspended for three years imposed on the respective charges, when coupled with the aggravating features present in this case, were unduly lenient in that they failed to reflect fully the gravity of the offence, the need to deter others, and the public concern about offences of this kind."

Mr Foote cited a number of authorities to the Court which show that where a serious attack is made upon a person with a knife, the normal sentence is a sentence of immediate imprisonment for 3 or more years. This court in a number of cases in recent years has emphasised that those who break into the homes of elderly people to steal and who attack the occupants must be severely punished, in order to protect elderly persons, especially those who live alone, and to deter such offences, and this court has upheld and expressly approved very heavy sentences in such cases. Therefore it is clear that if there had not been special mitigating circumstances in this case, the offender should have been given an immediate sentence of imprisonment for a number of years and that it would have been unduly lenient not to have imposed such a sentence.

However whilst it is a very important element in the general approach to sentencing that those who attack elderly people in their homes to steal money should receive a severe and immediate sentence of imprisonment, there can be an exception to the general approach where the special circumstances of a case warrant it. As Lord Lane LCJ stated in the Attorney General's Reference (No 4 of 1989) 11 Cr App R(S) 517 at 521 in England:

"That mercy should season justice is a proposition as soundly based in law as it is in literature."

It is also important to observe that as recently as 1989 Parliament expressly recognised that even in a serious case calling for a sentence of up to 7 years imprisonment, it may be appropriate for the trial judge to suspend the sentence, and Article 9(1)(A) of the Treatment of Offenders (Northern Ireland) Order 1989 provides:

"1(A)A Court which –

(a) passes a sentence of imprisonment for a term of not more than seven years for a serious offence within the meaning of subsection (1B); or

(b) makes an order for detention in a young offenders centre for such an offence.

may order that the sentence or order for detention shall not take effect unless, during the period specified in the order, being not less than one year or more than five years from the date of the order, the offender commits in Northern Ireland another offence punishable with imprisonment in the case of a person aged twenty-one years or over, and thereafter a court having power to do so orders under section 19 that the original sentence shall take effect."

It is also important to emphasise that the decision to suspend a sentence should only be taken after the judge has decided that a sentence of imprisonment should be imposed and after he has decided what the length of that sentence should be. It is only after he has taken those two decisions that he comes to the third and final decision whether he should suspend the sentence. In R v O'Keefe [1969] 2 QB 29, [1969] 1 All ER 426, at 32G of the former report, Lord Parker CJ stated:
"Therefore, it seems to this court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment and the final question, it being a case for imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given?"

And in R v Mah-Wing 5 Cr App R(S) 347 at 348 Griffiths LJ (as he then was) stated:

"When the court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to

consider whether there are grounds for suspending it. What the court must not do is pass a longer custodial sentence than it would otherwise do, because it is suspended."

It is clear that in this case the learned trial judge followed this course in a way which was entirely correct because he stated:

"The offences are very serious and what is to be done? Quite clearly I think that Count No 1, that is the burglary, merits 2 years imprisonment because it was going to be a burglary with some violence. The second count, causing grievous bodily harm with intent, I think merits 3 years imprisonment. The question is can these sentences be suspended and after quite a considerable amount of consideration I am prepared to suspend both of these sentences . . ."

Therefore when a judge follows the correct procedure in suspending a sentence of imprisonment, he does not decide at the outset that he will not impose a sentence of imprisonment. Rather he decides that the offence merits a sentence of imprisonment for a specific period, and he then turns to decide whether there are circumstances which justify him in suspending that sentence.

In deciding whether a sentence was unduly lenient on a Reference by the Attorney General this court has previously approved and applied the test stated by Lord Lane in the Attorney General's Reference (No 4 of 1989) at 521 which is as follows:

"The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this Court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature."

Therefore in the light of the principles applying to the suspension of a sentence of imprisonment to which we have referred above, we turn to consider whether looking at all the relevant factors in this case, it could not be said that it was reasonably appropriate for the judge to suspend the sentences of imprisonment. In the particular circumstances of this case that question means whether there were special mitigating circumstances which justified the judge in deciding to suspend the sentences.

In the Reference the Solicitor General states that there was only one mitigating factor in the case, which was the offender's previous good character.

We do not, with respect, accept that there was only one mitigating factor in the case. We consider that there were a number of mitigating-factors in the case which the judge was entitled to take into account, and did take into account, and which, if not strictly mitigating factors, were nevertheless factors which pointed to the conclusion that a suspended sentence and not an immediate sentence was appropriate.

We enumerate these factors as follows:

1. In his report the psychologist, Dr RJ Davidson, the area clinical psychologist to the Northern Health and Social Services Board and a lecturer at Queen's University, Belfast, stated:

"A Verbal IQ of 76 places Mr White within the bottom 5% of the normal population and his Performance IQ places him in the bottom 1% of the population. Overall intellectually he is functioning at the 3rd percentile rank which means he is in the lowest 3% in comparison with others of his age and places him in the borderline subnormal classification.

. . .

Because of his low intelligence I think that he may be rather vulnerable in a normal prison environment. As he is fairly limited intellectually and also quite naive he may be suggestible and open to exploitation."

Mr Foote told us very frankly that although the psychologist's report was before the learned trial judge and the judge referred to it in the course of the submissions by counsel, the psychologist's report was not before the Solicitor General when he was deciding whether or not to refer this case to this court, and we think that this may be of some significance. It is clearly desirable that all the papers which were before the trial judge should be placed before the Attorney General or the Solicitor General when he is considering whether there should be a Reference on the ground of undue leniency of sentence.

2. The offender is epileptic. In his report the psychologist stated:

"He suffered some slight brain damage as a baby when he fell out of a window and has been epileptic as a result of this."

A medical report dated 17 June 1993 submitted to this court with reference to the offender's epilepsy states:

"He is at present awaiting urgent assessment by a consultant neurosurgeon following X-rays taken on 16 May 1993, following a road traffic accident."

3. An important feature is that it is clear that the victim bears no animosity towards the offender and has told the police that he wishes him well. This was a point which was specifically brought to the attention of the learned judge and to which he made specific reference in his remarks in sentencing. On 15 March 1993 Crown counsel informed the judge:

"I should also say that there has been no animosity or difficulty as regards the injured party in the case."

With the permission of Crown counsel, counsel for the offender, Mr Boyd, had spoken to the police officer in charge of the case who had told him of the attitude of the victim and in his plea Mr Boyd stated:

"My learned friend has pointed out very fairly and I think that it is not without significance, that certainly as far as the injured party is concerned there is no quest for vengeance. He has spoken to the police on this and he wishes the defendant well. He has made a full recovery and as I understand it is fully back to normal.

Fortunately there are no after effects."

It is clear that this forgiving attitude by the victim can be regarded as a mitigating factor. In R v Darvil 9 Cr App R(S) 225 at 227 Lord Lane CJ stated:

"There is no doubt that forgiveness can in many cases have an effect, albeit an indirect effect, upon the task of the sentencing judge. It may reduce the possibility of reoffending, it may reduce the danger of public outrage which sometimes arises where a defendant has been released into the community unexpectedly early."

In the present case the learned trial judge quite properly took this factor into account and said:

"You were living in the same vicinity as the injured party and apparently there is no animosity."

4. The offender's clear record.

5. The offender's good family background and the virtually clear record of his large family living in a troubled area of Belfast.

6. The age of the offender, he was 20 at the time of the commission of the offence.

The learned trial judge is a very experienced judge. In the passage of his judgment which we have already cited Lord Lane refers to the importance of the consideration that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations when passing sentence. This was particularly the position in this case where the judge had tried the case and seen the offender give

evidence, and was thus in an excellent position to assess what sort of a young man the offender was.

We fully recognise the gravity of the offence committed in this case. But having regard to the authorities relating to the suspension of sentence which we have cited, and to the considerable number of extenuating features in this case, we are of the opinion that, in the special circumstances of the case, whilst the course taken by the learned trial judge in suspending the sentences was lenient and merciful, that course was not unduly lenient. Accordingly we have decided not to substitute immediate sentences of imprisonment for the suspended sentences passed on the offender.

So that there is no misunderstanding of this judgment the court wishes to emphasise the following. This judgment does not mean that this court has in any way altered or qualified the general principle which it expressed in the case of R v Ferguson (as yet unreported) that

"It must be brought home to offenders who violate the privacy and security of old people in their homes and expose them to violence that immediate and heavy sentences of imprisonment will follow their detection and conviction."

We again endorse this as the usual approach which should be taken in sentencing. But every just system of sentencing offenders must permit a judge to show leniency in an exceptional case. The exception in no way alters the general rule. We are of the opinion that because of the considerable number of mitigating factors here the learned trial judge was entitled to regard this as an exceptional case.

Judgment accordingly