IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (NO 1 OF 1991)

HUTTON LCJ

This is a reference by 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 the 3 offenders Thomas John Gallagher, Gerald Joseph McAllister and John Francis McWilliams were indicted on a Bill of Indictment containing 3 counts which were as follows:

"FIRST COUNT

STATEMENT OF OFFENCE

Burglary, contrary to section 9(1)(B) of the Theft Act (Northern Ireland) 1969.

PARTICULARS OF OFFENCE

Thomas John Gallagher, Gerald Joseph McAllister and John Francis McWilliams, on a date unknown between the 5th day of November 1990 and the 8th day of November 1990, in the County Court Division of Belfast, having entered as trespassers a building, namely premises known as Stewarts Supermarket, situated at 405 Antrim Road, stole therein a quantity of cases of beer of value belonging to Stewarts Supermarkets Ltd.

SECOND COUNT

STATEMENT OF OFFENCE

Wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

Thomas John Gallagher, Gerald Joseph McAllister and John Francis McWilliams, on the 7th day of November 1990, in the County Court Division of Belfast, unlawfully wounded Brian Thompson, with intent to do him grievous bodily harm or with intent to resist or prevent the lawful apprehension or detainer of themselves.

THIRD COUNT

STATEMENT OF OFFENCE

Wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

Thomas John Gallagher, Gerald Joseph McAllister and John Francis McWilliams, on the 7th day of November 1990, in the County Court Division of Belfast, unlawfully wounded Philip Pointon, with intent to do him grievous bodily harm, or with intent to resist or prevent the unlawful apprehension or detainer of themselves".

On 24 May 1991 the 3 offenders pleaded guilty to the first count charging burglary. The hearing was then adjourned and on 10 June 1991 the 3 offenders pleaded guilty to the second and third counts charging wounding with intent. On 12 June 1991 His Honour Judge Gibson QC sentenced each offender to 15 months imprisonment on each count, the sentences to run concurrently.

The facts relating the 3 offences can be summarised as follows. A short time after midnight on 7 November 1990 the 3 offenders entered the rear of Stewarts Supermarket on the Antrim Road, Belfast, for the purpose of stealing drink from a store in the supermarket. The police were alerted that a burglary was in progress and a number of police officers arrived at the supermarket. When police officers entered the store inside the supermarket the 3 offenders retreated into the roofspace. Constable Thompson seized the leg of McAllister and McAllister started to kick the constable about the head and shoulders. At the same time a large number of beer cans were thrown by one or some of the offenders at Constable Thompson through a hole which led into the roofspace and some of the beer cans struck Constable Thompson in the face with a brick and this blow caused a fracture of his frontal sinus. He was immediately treated at Belfast City Hospital and subsequently, on

27 November 1990, Constable Thompson was operated on under general anaesthetic and the frontal sinus was opened, debrided and the various comminuted pieces aligned and wired into position. He was discharged hospital on 4 December 1990 and on review on 8 January 1991 the hearing appeared satisfactory. In addition Constable Thompson received a fracture of an upper incisor tooth at gum level and also sustained a lacerated gum.

Sergeant Pointon came to the assistance of Constable Thompson when he was holding onto McAllister's leg, and a number of bricks were thrown at him by one or some of the offenders through the hole leading into the roofspace and one of these bricks struck him on the forehead, caused bleeding, knocked him off the trestle on which he was standing and caused him to lose consciousness for a short time and to be badly dazed. Sergeant Pointon was taken to the Belfast City Hospital where he arrived at 12.55 am. On examination at the hospital Sergeant Pointon was found to have a laceration on his forehead, but he was alert and orientated with no neurological deficit. He was noted to have a low blood pressure and intravenous fluids were administered resulting in a rapid return to normal pressure. The laceration to his forehead was closed with multiple skin sutures.

A short time after the injuries were sustained by Constable Thompson and Sergeant Pointon the 3 offenders were arrested by other police officers in the roofspace.

Prior to committing the burglary at the supermarket the 3 offenders had been drinking from about 6.00 pm to midnight in a public park close to the supermarket and they had also been inhaling Damp Start.

At the time of the offences Gallagher was aged 21 years, McAllister was aged 22 years and McWilliams was aged 22 years. Gallagher had a bad record. His record commenced in March 1985 when he was convicted of robbery. Thereafter there were convictions for burglary, attempted burglary and disorderly behaviour. In June 1986 he was convicted of wounding with intent and was sentenced to be detained in the Young Offenders Centre for 2 years. Thereafter he had a number of convictions for burglary, for assault occasioning actual bodily harm and for assaults on the police.

The psychiatric report on Gallagher stated that his father was an alcoholic, with a lengthy criminal record, and that he had a poor relationship with his mother. He began to drink at the age of 15 and would take 6 or 7 bottles of cider over 5 to 6 hours. He also drinks spirits and wine, and sniffs glue and Damp Start. At the end of the report the consultant psychiatrist states:

"When I interviewed the defendant today he showed a remarkable degree of insight into his difficulties, and a desire to make a fresh start in life".

A psychologist's report in respect of Gallagher stated:

"Mr Gallagher's full scale IQ was 64, placing him in the mentally handicapped range. Only 1% of the general population would be expected to score at or below this level".

McAllister also had a lengthy criminal record, but his offences were principally for theft and burglary, and although he had a number of convictions for disorderly behaviour he had no previous convictions for assault or wounding.

McWilliams also had a lengthy criminal record. His convictions were mostly for burglary and theft although he had a number of convictions for assault on the police.

The Attorney General considered that the total sentence of 15 months imposed on each offender for the offence of burglary and the 2 offences of wounding with intent was unduly lenient on 3 separate but interrelated grounds.

These grounds were stated as follows in the reference:

"10. The Court of Appeal in Northern Ireland in The Attorney General's Reference (No.1 1990) indicated that the normal range of sentence for certain types of offence contrary to Section 18 of the Offences Against the Person Act 1861 is between 3 and 5 years' imprisonment.

11. The Court of Appeal in England and Wales has stated that in cases where an offender assaults the police in an effort to escape, the sentence for the initial offence should be fixed independently of the assault on the police and that the assault on the police should be dealt with by a separate and consecutive sentence.

12. It is submitted that the sentence of 15 months' imprisonment for burglary was appropriate. However, it is submitted that by sentencing the offenders to a term of only 15 months' imprisonment for the offences of wounding with intent and by making those sentences concurrent with the sentence for burglary, the learned trial judge dealt with the offenders as if they had surrendered immediately and caused no injury to the police".

We consider that the submissions advanced by counsel on behalf of the Attorney General in support of the first 2 grounds do not support the contention that the total sentence of 15 months' imprisonment was unduly lenient. In the Attorney General's Reference (No.1 of 1990), where a young woman received appalling facial scarring which would leave permanent traces on her face, this court was considering the appropriate range of sentence where a man or woman was struck in the face with a bottle or glass, which is commonly termed "glassing". The court said at page 10, after referring to a number of English decisions:

"It is clear from these decisions that, in England, the offence of wounding with intent by striking or slashing the victim in the face with a glass or bottle is regarded as a very serious offence which requires an immediate sentence of imprisonment to make it clear that the courts will not tolerate such vicious conduct, and the normal range of sentence is between 3 to 5 years' immediate imprisonment.

Taking account of the offender's previous good record and character, to his plea of guilty to the charge of wounding with intent and to the matters relied on by Mr Cinnamond QC on his behalf, we consider that the proper sentence to impose upon him is 3 years' imprisonment with no suspension. Therefore we quash the order of

the Crown Court Judge and substitute the sentence of 3 years' imprisonment without suspension.

This sentence is intended to warn young men that if they wound another person in a public house or elsewhere with a glass or bottle they will be severely punished, especially if the victim is a woman, and whether or not the violence is committed under the influence of drink and whether or not they have a clear record".

This passage makes it clear that the court was concerned to emphasise that severe punishment must be imposed in "glassing" cases. The judgment does not lay down sentencing guidelines for other types of wounding, such as striking someone with a brick where, as in this case, the scarring may be much less severe than the permanent scarring caused by the wound inflicted by a glass or bottle. A head injury caused by a brick may result in serious brain damage which could call for a severe sentence, but fortunately there was no brain damage to either police officer in this case.

There is a further significant distinction between the "glassing" case which this court considered in the Attorney General's Reference (No.1 of 1990) and the present case. Section 18 of the Offences Against the Person Act 1861 provides:

"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, … with intent, … to do some … grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable … to be kept in penal survitude for life …".

Therefore section 18 refers to 2 separate intents: the intent to do some grievous bodily harm to a person and intent to resist or prevent the lawful apprehension or detainer of a person. In the "glassing" case it was clear that the intent of the accused was to do grievous bodily harm. But in the present case it was clear that the Crown accepted that the intent was not to do grievous bodily harm to the police officers but to resist lawful apprehension. Thus in stating the facts to the trial judge Crown counsel, Mr McCrudden stated:

"It is also fair to say, if Your Honour pleases, that the causation of the grievous bodily harm seems clear on any showing (to have been) as a result of their, as it turned out, futile attempts to resist apprehension by the police …"

And in his plea on behalf of Gallagher his counsel, Mr Cushinan, said:

"As Mr McCrudden has very fairly pointed out the actual assaults in fact were not with the intent of causing grievous bodily harm but with the intent to escape which was a rather forlorn ambition because they were caught by the police".

Therefore we consider that the total sentence of 15 months cannot be said to be unduly lenient in the light of, and having regard to the judgment of this court in Attorney General's Reference (No.1 of 1990),and we think that the judgment in that case is not directly relevant to the present case.

As regards the second ground stated in the reference, we consider that whilst it may well be appropriate on occasions to impose consecutive sentences, rather than concurrent sentences, when an accused commits an offence, such as burglary or theft, and subsequently assaults a police officer who comes on the scene to arrest him, there is no principle that this course must be followed. Accordingly we consider that it does not follow that a judge who fails to impose consecutive sentences in a case such as the instant one errs in principle.

In R v Kastercum [1972] 56 Cr.App.R.298, where consecutive sentences were imposed for robbery and assault on a constable who pursued the robber, Lord Widgery LCJ stated at 299:

"The first point taken on his behalf which was inspired, if I may use that term without disrespect to Mr Wilkinson, by the observation of the single judge, is that these 2 sentences should have been concurrent and not consecutive. Mr Wilkinson cites the well-known working principle of this Court that where several offences are tried together and arise out of the same transaction it is a good working rule that the sentences imposed for those offences should be made concurrent. The reasons for that is because if a man is charged with several serious offences arising out the same situation and consecutive sentences are imposed the total very often proves to be much too great for the incident in question. That is only an ordinary working rule, it is perfectly open to a trial judge in a case such as the present to approach this in one of two ways. If he thinks that the assault on the police officer is really part and parcel of the original offence and is to be treated as an aggravation of the original offence, he can reflect it in the sentence for the original offence. If he does that it is logical and right that any separate sentence for the assault should be made concurrent. On the other hand, and, as this Court thinks, a better course, in cases where an offender assaults the police in an effort to escape, the sentence for the principal offence can be fixed independently of the assault on the constable and the assault on the constable can be dealt with by a separate and consecutive sentence. It is quite evidence that that is what the learned judge did in this case and, far from saying he was wrong, this Court says as I have already observed, that in this kind of case it is generally preferable to emphasise the gravity of assaulting the police as a means of escape, to make the sentence for that assault separate and consecutive".

But in that case Lord Widgery did not say that the trial judge must make the sentences consecutive, he said "It is generally preferable" to do so. A similar approach has been stated in a number of other cases in England in which R v Kastercum has been followed. It appears to be clear that it is the practice in England to impose consecutive sentences where an accused commits an offence and then

assaults a police officer who attempts to arrest him or to pursue him. But we do not consider that there is a principle trial a trial judge necessarily errs if he imposes concurrent and not consecutive sentences. Moreover we consider that in Northern Ireland concurrent sentences are imposed more frequently than in England. We are of the opinion that it would be undesirable in this jurisdiction to limit the discretion of the trial judge as to whether he should impose concurrent or consecutive sentences. The overriding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, must be appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences. In other cases he may achieve it more satisfactorily by imposing concurrent sentences. As Lord Widgery remarked in R v Kastercum if a judge imposes consecutive sentences in respect of several offences arising out of the same situation the disadvantage of adopting this course is that "the total very often proves to be much too great for the incident in question". But we consider that the same disadvantage may arise even if there are 2 incidents occurring close to each other in time. On the other hand the disadvantage of concurrent sentences may be that the total sentence is too small. That is why we stress that, whether the sentences are concurrent or consecutive, the overriding and important consideration is that the total global sentence should be just and appropriate.

This brings us to the final question which is whether the total sentence of 15 months for the burglary and the 2 woundings was unduly lenient. We approach this question by recognising at the outset that the trial judge gave the question of sentence very careful consideration and set out carefully and at length his reasons for imposing sentences of 15 months to run concurrently. The judge commenced his remarks on sentencing by stating:

"The defendants have pleaded guilty to one offence of burglary and 2 offences of wounding with intent. The offences are interwoven as they form part of the same series of events. I therefore intend to treat the defendants on what I would term a global basis; that is on a basis where no further term of imprisonment is added by reasons of counts 2 and 3. It is a case which deserves a sentence of imprisonment in respect of each and that to me is something which is beyond preadventure not (only) because of the facts giving rise to the offences but also because all 3 defendants have previous records of some considerable length".

The judge then continued at page 20:

"That leaves the question of the appropriate length of the sentences. To answer that question these elements of the case which are personal to each defendant must be analysed, and they would appear to be as follows:

(1) Each defendant has pleaded guilty thus saving public time and money. They are therefore entitled to a discount on the appropriate sentence. (2) All of the defendants are reasonably young. Gallagher is aged 21, McAllister is 22 years of age and

McWilliams is also 22 years of age. There is therefore some home for them to mend their ways and accordingly any sentence on them should not be subject to causing them to lose heart. (3) In the case of the defendant Gallagher I have carefully read and taken into account the psychological report and the psychiatric report upon him and I have paid attention particularly to the assessment of his intellectual ability. He is mentally handicapped. This is not an excuse but it does help to explain. I also note his wish to keep in contact with the probation service and the medical experts who have treated him. That is essentially a matter for Gallagher himself. It he does it on a voluntary basis it will go a long way towards helping him ultimately to rehabilitate himself. (4) The assaults to which the defendants have pleaded guilty were not deliberate or premeditated. They were in essence part of the defendants' attempts to escape and were not examples of gratuitous violence towards the police. (5) I am informed that each defendant wants to make a fresh start. That may well be so and I certainly hope that they are genuine in these expressions. Put simply they face a simple choice – stop offending or risk increasingly long periods of imprisonment. The ages of the defendants as I have already indicated range from 21 years to 22 years. They will either continue to spend long periods of incarceration in Crumlin Road or stop offending. The choice is entirely theirs. (6) The fact that they come from unsettled backgrounds and have indulged among other things insolvent and alcoholic abuse. Before these offences, for example, it would appear that the defendants had been sniffing what is termed Damp Start. (7) In the case of McAllister and McWilliams that their participation in count 2 and count 3 was indirect; indirect in the sense that it arose through a joint enterprise. I accept that point. Finally, that in the case of McAllister and McWilliams that their records although significant do not contain offences of violence. I accept that in the case of McAllister. I do not entirely accept it in the case of McWilliams who has already been convicted of a number of previous assaults on the police. Balancing those facts which fall within the public domain as against those which are personal to the defendants when I read the papers at first in this case I considered that a sentence of 2 years in respect of each defendant would be fully justified. However, having carried out the balancing exercising to which I have already referred I am driven to the conclusion that a shorter sentence should be imposed. One more thing occurs to me. Although it is clear that the defendant McAllister played a slightly less culpable role I am of the view that the other matters personal to Gallagher and McWilliams tend to balance things out. I therefore intend to treat all of the defendants on a very similar footing. In relation to each count I impose a sentence of 15 months' imprisonment. All of these sentences will run concurrently in relation to each defendant".

It appears to be clear, having regard to considerations (2) and (5) that, by not imposing as long a sentence as he might have done, the judge was, in effect, trying to give the offenders one last chance to make a fresh start and he said:

"Put simply they face a simple choice – stop offending or risk increasingly long periods of imprisonment. The ages of the defendants, as I have already indicated

range from 21 years to 22 years. They will either continue to spend long periods of incarceration in Crumlin Road or stop offending. The choice is entirely theirs".

The decision by a court to give a last chance to an offender, and particularly to a relatively young offender, who has built up a substantial record, need not necessarily be wrong, although it is an approach which should be adopted with considerable circumspection and in many cases a trial judge would be fully entitled to reject such an approach. The approach is one described as follows in Thomas on Principles of Sentencing 2nd Edition p.20:

"The term 'intermediate recidivist' is used to describe an offender in his twenties or early thirties who has acquired a substantial history of convictions and findings of guilt as a juvenile, has undergone various individualised measures such as probation and borstal training, and is now steadily adding terms of imprisonment to his record. Faced with the prospect of his developing into an institutionalised habitual offender, the Court will frequently seek to interrupt the sequence by the use of probation or whatever other measure may offer some reasonable chance of success. Many examples can be given. In White a man of 26 was sentenced to 5 years' imprisonment for a series of burglaries. The appellant had made many Court appearances and had experienced 2 probation orders in the past, in addition to a variety of other sentences. The Court, stating that it 'could not possibly disagree' with the sentence of 5 years' imprisonment, nevertheless decided that the availability of a place in an adult probation hostel justified the Court in giving him 'one final chance to rehabilitate himself'. The sentence was varied to probation.
In Brooks a man with 22 previous convictions was sentenced to a total of 12 months' imprisonment for various offences of dishonesty. Impressed by evidence that the appellant had established a stable home and obtained a job with good prospects, the Court decided that although that sentence was neither wrong in principle nor excessive, it could give the appellant 'his last opportunity … impelled to a merciful conclusion by the very blackness of his record'. The sentence was varied so as to allow his immediate release".

The fact that Thomas refers to cases where the offender was not sent to prison does not validate the approach of a judge who gives an offender a shorter sentence than would normally be imposed for offences committed.

It is also relevant to refer to a passage, with which this court respectfully agrees, in the judgment of Lord Lane CJ in Attorney General's Reference (No.4 of 1989) 90 Cr.App.R.366 at 371 in England:

"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 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".

We also refer to the judgment of Lord Lane in Attorney General's Reference (Nos.19 and 20 of 1990) 12 Cr.App.R.(S) 490 at 493:

"But the fact remains that if members of this Court had been trying this case and had been charged with the job initially of sentencing them in the Crown Court, we should almost certainly have passed a longer sentence.

That does not mean that the sentences were unduly lenient. After a considerable amount of hesitation and doubt, we have come to the conclusion that in the particular and somewhat extraordinary circumstances which surround this case, this case does not fall outside the range of sentences which the Judge, applying his mind to the relevant factors, could reasonably have considered appropriate. Consequently, although we gave leave for this application to be made, and it was an application properly made, we do not allow the appeal and consequently the sentences will remain as the learned judge imposed them".

In this case, also, each member of this court would have passed a considerably longer total sentence, whether as concurrent sentences or as consecutive sentences, than were passed by the trial judge. It is important that those who attack the police and cause them serious injury should normally receive substantial punishment. It is also important that the police should know the Courts will seek to protect them in their difficult and often dangerous work on behalf of the public.

It should also be the normal approach of the judge passing sentence that when the accused commits an offence, such as burglary or theft, and then assaults or wounds a police officer who arrives on the scene to arrest him, the total sentence imposed, whether as concurrent or consecutive sentences, should contain an appropriate additional element to punish the accused for the attack on the police officer.

It is for these reasons that the members of this court would have passed sentences longer than those imposed by the trial judge. Moreover, having regard to the lengthy records of the accused, we would have been slow to regard this case as one where it was appropriate to give the accused a last chance.

However, although the sentences were significantly less than we would have passed, we do not consider, for the reasons which we have earlier stated, that it is appropriate to hold that the sentences were unduly lenient and to increase them.

It sill be clear from what the court has stated that our decision constitutes no authority whatever for the proposition that when an accused commits an offence,

and then assaults or wounds a police officer who arrives at the scene to arrest him, it is appropriate to impose no additional period of imprisonment for the assault or wounding. On the contrary, we consider that an additional period of imprisonment should be imposed, whether by increasing the concurrent sentences or by imposing a consecutive sentence. As we have stated, if the members of this court had been sentencing the accused, we would have imposed a total sentence considerably in excess of 15 months.