IN HER MAJESTY'S COURT OF APPEAL IN

NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (NO.1 OF 1993)

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 a sentence which he considers to be unduly lenient.

At Craigavon Crown Court on 18 May 1992 the offender, Stephen Victor McNeill, pleaded guilty on the first count in the indictment to wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. The second count in the indictment charging the less serious offence of unlawful wounding contrary to section 20 of the Offences Against the Person Act 1861 was not proceeded with.

The offender, aged 25, was sentenced to a term of imprisonment for 6 months. He has served this sentence, having received the appropriate remission, and was released from prison on 6 August 1992. In addition to the sentence of 6 months' imprisonment the offender was ordered to pay, within 3 months, a sum of £500 by way of compensation to the injured party, and in default of payment the offender was to serve a sentence of 60 days imprisonment consecutive to the sentence of 6 months' imprisonment. This sum of £500 compensation has been paid by the offender.

The facts giving rise to the case were these. The victim, a young man in his early or middle twenties named Peter Tinney, lived with his parents in a terrace house No. 82 Glenfield Road, Lurgan. The offender lived 2 doors away in the same terrace at No. 86 Glenfield Road.

Prior to 28 September 1991 the offender had parked his motor cycle on occasions at the kerb outside No. 82. This had prevented the victim or his father from parking their cars in front of the house and had given rise to a degree of ill-feeling between the victim's family and the offender.

On the night of 28 September the victim had gone out for the evening with a friend, Mr Ian Devlin, and with Mr Devlin's 2 sisters. In the course of the evening the victim drank some bottles of beer. About 2 am one of Mr Devlin's sisters drove the

victim and her brother back to the victim's house and the victim and Mr Devlin got out of the car and Miss Devlin drove away. On getting out of the car the victim saw the offender's motor cycle parked in front of his house and he made some remark about this, probably in quite a loud voice, to Mr Devlin. Mr Devlin then drove away in his car which was parked nearby.

The offender who was in bed in the front bedroom of No. 86 heard the victim's remark to Mr Devlin about the motor cycle and got out of bed and opened the bedroom window, and some shouts were exchanged between him and the victim. The victim then walked up the path from his garden gate to the front door of his house. The offender ran downstairs, seized a bread knife from the kitchen, and ran out of his front door. The explanation which he gave to the police when he was interviewed was that he went outside with a knife because he thought that the victim and the people with him were going to beat him up and wreck his motor cycle.

Having run out of his front door the offender jumped over the fences which divided the gardens between the 2 houses and ran at the victim with the knife raised in his left hand. The offender and the victim engaged in a brief struggle in the course of which the victim struck the offender with his fist and the offender then stabbed the victim in the right upper chest and ran back to his house, left the knife there, and then ran off.

The victim made his way into the hallway of his own house where his parents came to his assistance. It was apparent that he had suffered a very severe wound, and in his statement to the police the victim's father said that blood was spurting from the wound. He was taken to hospital by ambulance and in her statement to the police the casualty officer who treated him stated that his clothes were soaked in blood and that he was attended to immediately by the surgical registrar and anaesthetist as his condition was critical. He received a transfusion of fluids and of 6 units of blood. In addition to the wound to his chest the casualty officer noted that he had a laceration 4 cms long on his left upper arm.

As we have stated, the offender pleaded guilty to the charge of wounding with intent to do grievous bodily harm. It appears that in his plea on behalf of the offender at the Crown Court, and notwithstanding the offender's plea of guilty, his counsel sought to suggest that there was an element of self-defence in the offender's conduct. It is clear that there was no validity whatever in that suggestion, because whatever insults or threats or challenges may have been shouted by the victim at the offender who was safely inside his own house at an upstairs window, there was no excuse whatever for the offender deciding to leave his house and to come out to assault the victim as he stood on his own garden path. Moreover even if, and there was no evidence of this whatever, the victim had presented some sort of threat to the offender, there was no shadow of excuse for the offender arming himself with a knife and stabbing the victim in the chest.

In sentencing the appellant the learned trial judge, His Honour Judge Russell QC, stated:

"I have to take account, as I do, of your plea of Guilty and to take account of what your Counsel has said on your behalf with such force, though with the reservation which Mr Hamill has expressed. I also take into account the fact that you have had a clear record now for effectively six years and I also have to have regard to the nature of the offence in which a dangerous knife was taken to the scene by you and used by you.

Now, there is, and I make this quite clear, a tariff for this type of offence and but for the fact that you have pleaded guilty you would have had expected to get a substantial sentence for this offence - I make that quite clear.

In the context of this case and having regard to your background I have come to the conclusion that the mere clang of the prison gates will be a punishment in itself and I am going to follow it by what might be said to be a short sentence, but nevertheless you are going to go to prison and in this case for 6 months. You are also going to have to pay compensation to the man that you injured of £500 and that must be paid within three months, and in default you will serve a further 60 days in prison consecutive to the sentence".

Counsel for the Attorney General, Mr Foote QC, referred us to a number of decisions of the Court of Appeal in England which make it clear that where a man arms himself with a knife and then takes part in a fight or scuffle with another man, in the course of which he wounds the other with the knife with intent to cause grievous bodily harm, the usual range of sentences is between 3 to 4 years. These cases are R v Land and Young [1981] 3 Cr.App.R(S) 130, R v Kang [1982] 4 Cr.App.R(S) 152, R v Lilly [1982] 4 Cr.App.R(S) 293 and R v Gurmail Singh [1991] 12 Cr.App.R(S) 667. It is unnecessary to set out the facts and judgments in all of these cases, in some of which the appellant had pleaded guilty and in some of which the charge had been contested. The approach of the English Court of Appeal is clearly shown in the judgment of Lord Lane LCJ in R v Kang where the facts were that the appellant, a man of previous good character, was convicted of wounding with intent. He had attacked another man with a knife following a series of arguments, stabbing him in the abdomen and causing an extensive wound. He was sentenced to 3 years' imprisonment. At 153 Lord Lane stated:

"Mr Hallchurch on his behalf submits to us that in the light of the following matters, the sentence was too severe; first of all, he has no previous convictions, which is perfectly correct; he has a comparatively good work record, which is also perfectly correct; he has a good prison report, again which is perfectly correct; finally he suggests that the provocation given by Sarwan Singh's use of the broom handle justifies some discount to the sentence.

In the judgment of this Court adequate discount was given for this very serious offence by the sentence of 3 years. It must be plainly understood by the appellant that whatever may be the situation in the country from which he comes, the use of knives in this sort of circumstances will not be tolerated in this country. The sentence of 3 years in the view of this Court was wholly appropriate both to the offence and to the offender and the appeal is accordingly dismissed".

As this court stated in Attorney General's Reference [No. 1 of 1990], which was a "glassing" case, the same approach to cases of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 should be taken by the courts in this jurisdiction as are taken by the courts in England.

In Attorney General's Reference [No. 1 of 1990] this court stated at p.5:

"In Attorney General's Reference [No. 1 of 1989] this court respectfully agreed with the approach stated by Lord Lane CJ in Attorney General's Reference [No. 4 of 1989] in England.

'A sentence was unduly lenient, their Lordships would hold, where it fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard had of course to be had to reported cases and in particular to the guidance given by the Court of Appeal from time to time in the so-called "guideline" cases.

However, it is always to be remembered that sentencing was an art rather than a science; that the trial judge was particularly well placed to assess the weight to be given to various competing considerations; and that leniency was not in itself a vice. That mercy should season justice was a proposition as soundly based in law as it was in literature'."

Unless there was some special feature or special features in this case, it is clear in the light of the judgment of this court in Attorney General's Reference [No. 1 of 1990] and in the light of the English authorities that the sentence of 6 months' imprisonment following the plea of guilty fell outside the range of sentences which could reasonably be considered appropriate and was unduly lenient.

The question therefore arises whether there was a special feature or features which would justify a sentence much lower than the normal range. This question is particularly apposite in this case where it is clear from his remarks in sentencing that the very experienced trial judge fully appreciated that there was a tariff for this sort of offence.

It is clear that the fact that the offender was also ordered to pay compensation to the victim of £500 cannot be a valid reason for imposing a sentence very substantially below the normal range (see R v Dorton [1987] 9 Cr.App.R(S) 514). As we have

stated, it is clear that there was no substance whatever in the suggestion made in the Crown Court by counsel in his plea on behalf of the offender that there was an element of self-defence in his conduct. But it is possible that the learned trial judge who, as we have stated, is a very experienced judge with a close knowledge of the area in which he sits, may have imposed the low sentence of 6 months' imprisonment because he may have felt that if the offender had pleaded not guilty and had relied on the defence that he had used the knife in self defence after the victim had struck him with his fist, then, quite invalid and unmeritorious though that defence would have been, there was a possibility that the jury would not have convicted him. It is also possible that the judge may have felt that a sentence of 3 or more years, imposed on the offender in respect of an offence committed against the background of a dispute between neighbours, would have increased the tension in the area and between the family and friends of the victim and the family and friends of the offender.

However we consider that neither of these considerations, if they were taken into account by the judge, was a valid reason for imposing a sentence of 6 months' imprisonment. If a jury were to disagree or to acquit perversely on a charge on which the evidence clearly pointed to a conviction, that would be deplorable, but the possibility that this might occur if a charge is contested is not a reason for imposing a sentence below the appropriate range on a plea of guilty. In addition, the possible reaction of the victim's family or friends should not be a reason for imposing a sentence far below the appropriate range.

Accordingly we are satisfied that the sentence of 6 months' imprisonment in this case was unduly lenient.

We then turn to consider the question whether the court, in the exercise of their discretion, should increase the sentence. This is not a case where the offender is still serving the sentence imposed on him at the Crown Court. The offender was released from prison in August 1992 and if this court increases his sentence it will mean that he will have to suffer the additional stress of returning to prison.

His counsel submitted that this was a reason why the court in the exercise of their discretion should not increase the sentence, even if they concluded that the original sentence was unduly lenient. In support of this submission counsel relied on the decision in Canada of the Prince Edward Island Supreme Court in R v Downe, Smith and Dow [1978] 44 CCC (2d) 468. In that case there was an application by the Crown for leave to appeal against sentences on the ground that they were inadequate. The offenders had been sentenced to 15 days imprisonment for drug offences, and were also ordered to pay a fine of $400, which sentence they had served. The court were of opinion that the sentences were inadequate, but refused leave to the Crown to appeal because the appellants had already served their sentences. At 470 McQuaid J. stated:

"We are of the opinion that the sentence of 15 days intermittent, together with a $400 fine was an improper and inadequate sentence in this case, and that a more appropriate term of imprisonment would be 3 months in the County Jail, without fine in addition. Were it not for the fact that all respondents have already completed serving the time originally imposed, and having paid their fines, we would substitute that sentence in place of that imposed by the trial Judge. However, we are in accord with the judgment of the Nova Scotia Supreme Court, Appeal Division, in R v Bartkow (1978), 1 CR (3d) S-36 at p.S-42, 24 NSR (2d) 518, MacKeigan , CJNS, which held that where, as here, the Court might otherwise be disposed to vary sentence, but where the sentence of the trial Court had already been served at the time the appeal was heard:

'We must always be disinclined to send a man back to jail to serve the remainder of a longer term substituted on appeal unless that disinclination is overridden by the need to deter others by a much greater sentence'.

We are not of the opinion that such an overriding need exists in this case. We would, therefore, refuse leave to appeal".

However, whilst the fact that an offender is at liberty when the Court of Appeal holds that the sentence imposed upon him was unduly lenient, either because he has already served the sentence or because he was given a non-custodial sentence, is a factor to be taken into account, it is clear that it is not decisive.

In Attorney General's Reference [No. 1 of 1990] this court sent the offender to prison for 3 years notwithstanding that the Crown Court Judge had suspended the sentence. In England, also, the Court of Appeal have increased sentences which are unduly lenient notwithstanding that the offender was at liberty when that court gave their decision. But the court takes account of the additional stress which will be suffered by the offender in the circumstances by reducing the sentence which they would otherwise impose.

In Attorney General's Reference [No.2 of 1991] [1992] 13 CAR(S) 337 at 341 Stuart-Smith LJ stated:

"We think that the proper sentence in this case initially would have been one of 15 months' imprisonment. However, having regard to what has been said in the case of Ashley and bearing in mind that this young man has been out of prison and is now having to return, the sentence can be reduced somewhat to take account of that fact".

In Attorney General's Reference [No. 8 of 1992] [1993] 14 CAR(S) 130 at 135 Lord Taylor LCJ stated:

"We also bear in mind that when this Court is increasing a sentence of this kind, it has to recognise the added stress which must have fallen upon the offender due to his coming up to be sentenced on a second occasion, and recognise that the period during which this hearing has been pending must have been one of considerable stress. Particularly that is so where the sentence of the Court at first instance was non-custodial, and the Attorney-General's application proposes that it be substituted by a sentence of custody.

Bearing all those matters in mind, we still feel that this is a case where the sentence was so unduly lenient that it would affect the public perception of the administration of criminal justice were we to let it stand. We take all the matters that Mr Purnell has urged into account, and as a result we can impose a much shorter sentence than would otherwise have been the case".

We think that the proper sentence in this case initially should have been one of 3 years' imprisonment. However having regard to the additional stress suffered by the offender by reason of these proceedings and by reason of the fact that he will be returning to prison having been at liberty we propose to impose a shorter sentence. We consider that the offender should serve a sentence of 2 years' imprisonment in total. Therefore we substitute a sentence of 2 years' imprisonment of which he has already served 6 months.

The sentence of this court constitutes a warning that those who use a knife to attack another or in a fight will receive a substantial sentence of imprisonment.