IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

COLIN McKEOWN

JASON LOYAL

ROBERT GLASGOW

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MacDERMOTT LJ

At Belfast Crown Court on 19 September 1997 the 3 appellants (Colin McKeown, Jason Loyal and Robert Glasgow) together with a fourth man (Victor Robert Reynolds) pleaded guilty to a charge of conspiracy to rob and to 2 counts of false imprisonment. On 25 September 1997 the Recorder of Belfast, His Honour Judge Hart QC, sentenced each man to a term of 12 years' imprisonment on the first count and to concurrent terms of 8 and 5 years' imprisonment on the false imprisonment charges. The appellants have appealed to this court claiming that the sentences were wrong in principle or manifestly excessive. McKeown was represented by Mr McDonald QC and Mr Campbell; Glasgow by Mr McDonald and Mr Lavery and Loyal by Mr Gallagher QC and Mr Dennis Boyd. Mrs Kitson appeared on behalf of the Director of Public Prosecutions.

Background facts

These charges arose out of an incident which occurred on 2 December 1996. At that time the Thompson family lived in the Lisburn area. Mrs Thompson was the sub postmistress of the Pond Park Post Office which is at a filling station at the junction of Pond Park and Ballymacash Roads in Lisburn.

Shortly before 8.00 am on 2 December 1996 4 men burst into the family home. They were wearing balaclavas and plastic gloves: one was waving a gun which in fact turned out to be an imitation weapon: another had an iron bar. Mrs Thompson and her daughter Jan were seized and had their mouths taped. The men indicated they were from the IRA. They wanted Mrs Thompson to go to the post office and get £100,000 and all the stamps. Fortunately in the mêlee the police had been contacted

by Mr Thompson who was in the house and they soon arrived. The 3 appellants and Reynolds were arrested in the house. They were caught "in the act" and this daring plan to rob the post office was nipped in the bud.

Beyond question it must have been a most traumatic experience for all in the house and Dr Curran's psychiatric report bears this out.

A portion of the statement of Mrs Thompson paints a graphic picture of what occurred:

"The man who had come into the room last said to me, `You had better get up them stairs and tell your husband to get out of the bedroom.' At this point I would like to add that when I first seen the 2 men coming up the stairs initially one had a gun the other one had an iron bar. I then took the tape off my mouth and went back up the stairs, one of the men was behind me, I knocked on the bedroom door and said, `It's alright Jackie it's not you they want it's the IRA and it's the Post Office money they are after. They have got Jan.' At this I was pushed into Jan's bedroom, I sat on the bed. One of the men then pointed the gun at my head and said, `This is no fake, do as I say we have your daughter.' I said, `Calm down and tell me what you want me to do', he replied, `I want one hundred thousand pounds in cash and all the stamps you have.' I told him no way would I have that money, he replied `Come off it', he then asked me how much would I have, to which I replied about eighty thousand pounds, he replied, `You bring me every fucking penny you have got.'"

The judicial approach to robberies of small post offices and similar premises where large sums of money are present is clear.

Thus Lord Lane CJ in Attorney General's Reference No. 9 of 1989 (Lacey) [1990] 12 Cr.App.R.(S) 7 said at page 9:

"Businesses such as small post offices coupled with sweetie-shops - that is exactly what these premises were -are particularly susceptible to attack. They are easy targets for people who wish to enrich themselves at other people's expense. That means that in so far as is possible the courts must provide such protection as they can for those who carry out the public service of operating those post offices and sweetie-shops, which fulfil a very important public function in the suburbs of our large cities. The only way in which the Court can do that is to make it clear that if people do commit this sort of offence, then, if they are discovered and brought to justice, inevitably a severe sentence containing a deterrent element will be imposed upon them in order so far as possible to persuade other like-minded robbers, greedy persons, that it is not worth the candle."

And more recently by Lord Bingham in Attorney General's Reference Nos 23 and 24 of 1996 [1997] 1 Cr.App.R.(S) 174 at 176-77:

"At the outset it has to be acknowledged - and counsel representing both offenders have realistically acknowledged - that these are very serious offences. It is common knowledge that branch post offices, betting offices, off-licences, garages and very many other premises are served by single, often female, assistants, in possession of cash, who are vulnerable to an extreme degree to the depredations of those who choose to behave in the lawless manner demonstrated by the 2 offenders. It has been said that in this field the public interest to protect such people is paramount and must override any personal considerations which might otherwise weigh in favour of a defendant. This Court would wish to give its emphatic endorsement to that principle. It is fundamental that the courts must be seen to protect the public."

In this jurisdiction there have been an alarming number of cases of this nature in the recent past and we wholeheartedly endorse those observations. We would also add that if the present level of sentencing is not deterring those minded to commit this type of offence sentencing levels will have to continue to rise. The public deserves no lesser response.

These principles also apply when the offenders are frustrated by being captured before the offence is committed. So the fact that the charge is one of conspiracy to rob is not an ameliorating factor. Indeed there are aggravating features about this case. For example, firstly, the case involves the invasion of the privacy of the home. Secondly members of the family including a young girl of 14 were threatened and terrified by this gang of 4 masked men who seized the girl and led the family to believe that the father might be killed. Thirdly it was not a chance, spur of the moment, operation but one which had been pre-planned. The mother was, obviously, identified as the post-mistress and the accused believed that she would be so concerned for the safety of her family that she could be relied on to go quickly to the post office and return with the money.

In our experience the practice of holding members of a household hostage while a parent or other member is sent to collect money for the raiders or otherwise assist in the execution of their criminal plan has become extremely common. We wish to make it as clear as we can that such offences will attract immediate and lengthy custodial sentences so that the offenders may be duly punished and others may be deterred from doing likewise.

The judicial attitude towards hostage taking or kidnapping is also quite clear. Lord Lane put it in this way in R v Spence and Thomas [1983] 5 Cr.App.R.(S) 413 at 416:

"It seems to this Court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than 8 years' imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer

than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arise as a sequel to family tiffs or lovers' disputes, and they seldom require anything more than 18 months' imprisonment, and sometimes a great deal less."

In this jurisdiction there have, unfortunately, been numerous cases of this nature in recent years. Many are related to terrorist offending but the practice of hostage taking is now appearing in a substantial number of non-terrorist cases and the courts must make it clear that such conduct is totally unacceptable and will attract lengthy prison sentences. The circumstances of this case place it towards the top of the scale and such offending must be met with at least 10 years' imprisonment. Needless to say cases may occur which merit a substantially longer sentence and it will be the duty of the courts to impose such sentences when appropriate. Against these general observations we turn to consider the submissions of counsel.

Firstly there is the claim that insufficient discount was given for the guilty plea made at the arraignment stage and secondly that the total effective sentence of 12 years' imprisonment was manifestly excessive.

DISCOUNT FOR A GUILTY PLEA

This has long been recognised and allowance made for it. In R -v- Connolly 1994 NIJB 226 this court said:

"It has long been established that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate to reflect the fact that the plea is an indication of remorse, has led to a saving of time and has convenienced witnesses who would otherwise have had to attend court. This approach is often called `giving a discount'. What is an appropriate discount depends on a variety of factors such as how early the plea was made and all the general circumstances of the case of which the sentencer will be aware."

Statutory recognition has now been accorded to that principle. Article 33 of the Criminal Justice (NI) Order 1996 is in the following terms:

"**Reduction in sentences for guilty pleas**

33.-(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account -

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) If, as a result of taking into account any matter referred to in paragraph (1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

That article is in the same terms as section 48 of the Criminal Justice and Public Order Act 1994.

Both Mr McDonald and Mr Gallagher submitted that the statutory formulation should lead to a more generous discount than previously and, especially, that the fact that the offenders were `caught in the act' should not reduce the amount of the discount which should be allowed. We do not accept those propositions. In our judgment the amount of the discount which is appropriate remains within the discretion of the sentencer and depends upon the particular circumstances of each individual case with the statute emphasising that the earlier the guilty plea is entered the greater will be the amount of discount. In this context the notes to section 48 in Halsburys Statutes (Volume 12, 1997 Re-issue) page 1425 provide an interesting background commentary and bear repetition:

"Although it is already customary for courts to recognise, in the form of discounts on sentences, the benefits to the judicial system of early guilty pleas, the Royal Commission on Criminal Justice in its Report published in July 1993 (Cm 2263) recommended that `the present system of sentence discounts should be more clearly articulated, with earlier pleas attracting higher discounts' (see the 156th Recommendation of the Commission and paras 7.46, 7.47 of its Report); hence this section, which requires *all* courts to take account of the timing and circumstances of a guilty plea when passing sentence. If a court decides that, in all the circumstances of the case, it is appropriate to impose a lesser sentence, it must state in open court that it has done so.

The sorts of factors that the court may take into account on arriving at its decision are already illustrated by case law and include, for example, the protection of the public (no discount will be given in the case of an especially dangerous defendant), the weight of the evidence against the defendant (a defendant who pleads guilty in the face of overwhelming evidence will be treated less favourably than one who made a crucial confession), and the extent to which the guilty plea appears to be indicative of real and genuine remorse (HC Official Report, SC B (Criminal Justice and Public Order Bill) col 1069, 1 March 1994).

Stage in the proceedings … at which the offender indicated his intention to plead guilty.

The Royal Commission on Criminal Justice in their Report of July 1993 (Cm 2263) suggested a system of graduated discounts on sentence operating in the following manner: `(1) The most generous discount should be available to the defendant who indicates a guilty plea in response to the service of the case disclosed by the prosecution. (2) The next most generous discount should be available to the defendant who indicates a guilty plea in sufficient time to avoid full preparation for

trial. The discount might be less if the plea were entered only after a preparatory hearing. (3) At the bottom of the scale should come the discount for a guilty plea entered on the day of the trial itself. Since resources would be saved by avoiding a contested trial even at this late stage, … some discount should continue to be available. But it should be appreciably smaller than for a guilty plea offered at one of the earlier stages.' see para 7.47 of the Commission's Report)."

Mr McDonald and Mr Gallagher both drew attention to the fact that the Recorder had not mentioned Article 33 in his sentencing observations and so had failed to give full weight to its significance. We do not accept that such a conclusion follows from such an omission. The statutory provision does not alter the practice previously applied in this jurisdiction and it is clear from his observations that the Recorder was very much concerned with the amount of discount which he could properly allow as he sought to balance 2 primary factors - the early time at which the plea was entered (on arraignment) and the reality of the situation (namely that the accused were `caught in the act').

The Recorder expressed his views in this way:

"It was only due to the prompt response of the police that this enterprise was foiled and all 4 were caught re-handed in the house.

Their pleas of guilty are therefore of little significance given that they were all caught in the circumstances in which no conceivable defence could be advanced. Nevertheless they have pleaded guilty to these offences at the first opportunity, that is upon arraignment, and that has to be taken into consideration, for what it is worth."

Counsel drew especial attention to the concluding phrase suggesting that the Recorder was only paying lip service to the discount principle. We do not agree. Towards the end of his observations the Recorder says:

"Had this robbery been successful then, even allowing the absence of the real firearm, I consider that the minimum sentence would have been in the region of 15 years imprisonment in view of the large amount of money potentially involved. It was, however, nipped in the bud at an early stage and no firearm was actually used."

In our judgment it could be said that a successful robbery in the circumstances of this case would have attracted a sentence closer to 20 than 15 years but reading his observations in their totality we are satisfied that the Recorder did in deciding upon an effective sentence of 12 years have regard to the early guilty plea and to the personal circumstances of the accused. Counsel however argued that those 2 factors in combination called for a greater discount. Again we cannot accept that argument and would point out that it has long been recognised that in cases which require condign punishment little weight can be attached to individual circumstances especially as a major element in such sentences is the deterrence of others minded to do likewise.

Accordingly we are satisfied that the Recorder did have due regard to the discount principle. We would draw attention to R v Fearon [1996] 2 Cr.App.R.(S) 25 where the Court of Appeal stressed the importance of the sentencing judge saying that he had taken a plea of guilty into account when he had done so and to the observation of Blofeld J at pages 27-28:

"The question then arises as to the proper discount. In our view a discount needs to be given, despite the fact that 2 years was a proper sentence. Nevertheless, the discount need only be a small one, because this appellant was caught red-handed: he was seen jumping out of the window, he was caught nearby and he had the stolen property upon him. This was an open and shut case. However, the law properly requires sentencing judges to give a discount for guilty pleas, however strong the case may be. We need to give credit here. In our view the proper discount in the circumstances here in to lower the sentence by 3 months. Consequently, we quash the sentence of 2 years' imprisonment and we impose a new sentence of 21 months' imprisonment. To that extent this appeal is allowed."

WERE THE SENTENCE MANIFESTLY EXCESSIVE?

As we have already sought to make clear this case had 2 particularly serious aspects. Firstly the conspiracy to rob a post office of a substantial sum of money in a planned operation and secondly the holding hostage of a family in its own home. Individually each offence would warrant a sentence in excess of 10 years and in combination that figure must rise to 15 years or thereabouts. After reviewing all aspects of the case the Recorder arrived at an effective sentence of 12 years' imprisonment. That is certainly a stiff sentence for young men with virtually clear records but in our judgment was appropriate in the circumstances and was not excessive - let alone manifestly excessive. Accordingly the appeals are dismissed.