IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

FREDERICK DOUGLAS

HUTTON LCJ

This is an appeal against sentence by Frederick Douglas. At Belfast Crown Court in the first 3 counts of the indictment the appellant and Peter Gilliland were jointly charged with 3 offences. The first count charged them with the attempted murder of Anthony Martin Brown in Belfast on 23 October 1993. The 2nd and 3rd counts related to the same crime. The 2nd count charged them with wounding Anthony Martin Brown with intent, and the third count charged them with possession of a revolver and a pistol and ammunition with intent.

The subsequent counts in the indictment were against Peter Gilliland alone and in Counts 4-22 he was charged with 3 attempted murders of different persons on different dates, with conspiracy to murder, and with linked offences such as possession of firearms with intent, false imprisonment, hijacking, conspiracy to falsely imprison, conspiracy to hijack and membership of the Ulster Freedom Fighters.

Both accused pleaded guilty before MacDermott LJ to Counts 1 and 3, and the Crown did not proceed on Count 2. Both accused were sentenced to 17 years' imprisonment on Count 1 and to 17 years' imprisonment on Count 3, the sentences to be concurrent. In respect of the numerous other counts against Gilliland he was sentenced to terms of 16 years' and 15 years' imprisonment in respect of the attempted murders and to lesser periods of imprisonment in respect of the other offences charged on the other counts, all of which sentences were made concurrent to the sentences of 17 years imposed upon him in respect of Counts 1 and 3. Therefore both the appellant and Gilliland were sentenced to a total period of imprisonment of 17 years.

The appellant now appeals against the total sentence of 17 years imposed upon him on the ground that there was an unjust disparity between that sentence imposed upon him and the similar total sentence imposed upon Gilliland, having regard to the consideration that Gilliland had pleaded guilty to 14 other terrorist offences

including 3 additional and separate attempted murders, conspiracy to murder and also membership of the Ulster Freedom Fighters.

Having sentenced the appellant and Gilliland to a total period of 17 years' imprisonment in respect of Counts 1 and 3 relating to the attempted murder of Anthony Martin Brown, the learned trial judge set out his reasons for imposing the same total sentence on Gilliland as on the appellant, notwithstanding the many other terrorist offences to which Gilliland had pleaded guilty, as follows:

"Now, with regard to the other offences to which you, Gilliland, have pleaded guilty, I have had to ask myself whether or not it's proper or necessary to increase the already lengthy sentence which I have imposed. You admit that you were involved in five other serious terrorist incidents. That said, there was no evidence to connect you with them apart from your own admissions. Those admissions are themselves significant in that they occurred in a somewhat unusual but not unique way. You had been charged in respect of the first incident and when on remand a month later in November you sent for the police and proceeded to make admissions in respect of these other offences. To use the colloquial phrase, you were clearly seeking to clear your slate. Now, such action involves not only a display of good sense but of no little moral courage. Such action, and your earlier frankness with the police when they were investigating the Brown shooting, satisfies me that you are genuinely remorseful and bitterly regret what you did. Accordingly, in the very special circumstances of this case, which I have outlined, I do not propose to increase your sentence by reason of your admission to these other offences."

The total sentence of 17 years imposed on the appellant for the attempted murder of Anthony Martin Brown and for possession of firearms with intent was a sentence which, looked at in isolation from the many additional counts against Gilliland, was not a sentence which was in any way excessive and, indeed, can be regarded as lenient, having regard to the normal level of sentencing for attempted murder. But the issue before this court is whether there is an unjust disparity between the total sentence imposed on the appellant and the total sentence imposed upon Gilliland.

The learned trial judge clearly explained, for reasons which this court fully understands, the reason why he did not increase the total sentence on Gilliland. Nevertheless we consider that the number of terrorist crimes in which Gilliland was involved was so much greater than the small number of terrorist crimes in which the appellant was involved, that the similarity of total sentence did create an injustice in relation to the appellant.

In certain cases the Court of Appeal will reduce a sentence, entirely proper in itself, where the trial judge has failed to differentiate properly between 2 co-accused. The principle is stated as follows in paragraph D 21.52 of Blackstone's Criminal Practice (1995):

"**Failure to Differentiate between Offenders** This is the mirror image of disparity. Where co-offenders have received the same or almost the same sentence but there were mitigating factors in one case not present in the other, the Court of Appeal may sometimes reduce the sentence on the offender with the mitigation so as to produce a proper differential in treatment (see, for example, cases in which one offender has pleaded guilty and the other not, and the former's appeal has succeeded because he was not given enough credit for his guilty plea, having regard to the almost identical sentence passed on the offender convicted by the jury). In such cases, the court has been relatively willing to intervene even though the appellant's sentence was not too severe in itself (see Fraser [1982] 4 Cr.App.R.(S) 254, and compare the markedly different approach in cases of ordinary disparity)."

When an accused is charged with committing a number of offences, it is often the proper course for the trial judge, rather than passing a number of consecutive sentences, to pass a number of concurrent sentences, the total length of sentence being determined by the gravity of, and to some extent by, the number of the offences. It is often the case that one co-accused could be guilty of, say, 5 burglaries, and another co-accused to be guilty of, say, 10 burglaries. In such a case the normal course is to impose concurrent sentences in respect of each offence, and there will be little, or no, validity in an argument that there is an injustice if each accused received the same sentence for each burglary, the sentences to be concurrent. This was made clear by the decision of this court in R v Paul Delaney (1994 unreported) where Carswell LJ, delivering the judgment of the court, stated at page 5:

"In so arguing counsel was invoking the well known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see R v Brown [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: R v Bell [1987] 7 BNIL 94, following R v Towle and Wintle (1986, The Times, 23 January).

It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain&helip;

It is only if a fair-minded and right-thinking person would feel that the disparity involved some unfairness to the appellant, as distinct from a possibly rueful feeling that his associate has been more fortunate in his treatment, that a court should intervene: cf R v Ellis [1986] 10 NIJB 117, per Lord Lowry LCJ.

When we apply this test to the present case, we have no hesitation in concluding that there has been no unfairness to the applicant. The sentence of three years' imprisonment was in our view a perfectly proper sentence for the court to impose in the circumstances of the case. Where criminals indulge in the habitual business of burglaries for gain, with substantial consequent loss to householders, disruption of their lives and damage to their property, they must expect commensurately condign punishment. We see no fault in the learned judge's approach to the sentence in this case and do not consider it at all excessive, let alone manifestly excessive.

It has been argued that his associate McFadden can count himself as somewhat fortunate in not receiving a heavier sentence, when he had committed more offences. Each man, however, received the same sentence on each count, namely three years, the sentences being made concurrent, which was the appropriate course for the judge to adopt. The only ground for contending that there was any disparity related to the fact that McFadden had committed more offences. If this could be said to constitute disparity then, as I have stated, it was not such as to lead us to reduce the entirely proper total sentence passed on Delaney. We are quite satisfied that if it was a disparity it was not gross nor was it such as to give the applicant a justified grievance."

However we consider that this is an exceptional case where Gilliland was guilty of many more very grave terrorist crimes than the appellant, and that justice requires that there should be a difference in respect of the sentences imposed upon them.

As we have stated, there can be no criticism whatever of the sentence of 17 years imposed on the appellant, when viewed in isolation from the sentence imposed on Gilliland. But we consider that the appellant should have received a lesser total sentence than the total sentence imposed on Gilliland. As Gilliland was sentenced to a total of 17 years we consider that we must reduce the total sentence imposed on the appellant to 14 years. Therefore we allow the appeal to the extent that we reduce each sentence imposed upon the appellant to a sentence of 14 years, those 2 sentences to be concurrent.