IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

HENRY ROWDEN AND BRIAN PATRICK TOAL

HUTTON LCJ

Henry Rowden and Brian Patrick Toal pleaded guilty on 9 October 1992 at Belfast Crown Court before His Honour Judge Hart QC to having entered as trespassers 31 Elaine Street, Belfast with intent to steal. Rowden also pleaded guilty to having entered as a trespasser a house at 3 Landseer Street, Belfast and stolen a half bottle of whisky, and Toal pleaded guilty on the second count to having entered 7 Landseer Street as a trespasser and stolen a red metal brush shaft.

On the morning of 19 February the residents of 3 Landseer Street discovered that during the night their house had been broken into while they had been asleep and a half bottle of whisky had been stolen.

At 1.30 am on the same morning a resident of 7 Landseer Street was lying in bed when she heard the sound of breaking glass followed by someone trying the living room door which was locked. On going downstairs she found that the kitchen window of her house had been broken and it was later discovered that a red metal brush shaft had been stolen.

At 2.30 am on the same morning a woman living at 31 Elaine Street was awakened by the sound of breaking glass. She looked down into the yard from her bedroom where she saw a man looking up at her window. She shouted "What do you want, go away" to which he replied "Don't move or I will shoot". The woman ran to the bedroom of another woman living in the house and she telephoned the police. They heard someone coming up the stairs and they stood against the bedroom door. A man came to the door and asked them if they had telephoned the police and they said that they had not. He said that if they did they would shoot them. The police arrived shortly afterwards and the 2 defendants were arrested.

Rowden is 37 years of age and is unmarried. In 1976 he was convicted of disorderly behaviour and in 1988 of possession of an offensive weapon in a public place and

assault on the police. In 1989 he was convicted of theft from a vehicle and criminal damage.

Toal is 28 and is divorced. He has 16 previous convictions and of these 14 are for burglary, theft or robbery. In September 1992 he was sentenced to 5 years' imprisonment for robbery and prior to that the longest term of imprisonment imposed had been 1 year. The offences of burglary to which Toal had pleaded guilty on 9 October 1992 had been committed while on bail on the charge of robbery.

The Learned Judge in passing sentence on 30 October 1992, said that he could not say which of the defendants had made the threats and that if he had been satisfied to the requisite standard of proof the defendant who had done so would have been sentenced to a longer period of imprisonment.

He imposed a sentence of 2 years on each of the defendants for the offences they had committed in Landseer Street and a sentence of 4 years for the offence they had both committed in Elaine Street. In the case of Toal this sentence was made consecutive to the sentence of 5 years that he was already serving imposed in September 1992 for the offence of robbery.

Mr Tannahill on behalf of Toal submitted that 9 years, which was the totality of the sentences imposed on his client, was excessive.

It is clear that where an offence is committed while on bail in respect of another offence a consecutive sentence should be imposed. In R v Young [1973] Lord Widgery CJ stated:

"… It ought in general to be regarded as a proper ground for making a sentence consecutive that one was the result of an offence committed whilst the applicant was on bail for another".

And in R v Hunnybun (November 23 1979) Donaldson LJ (as he then was) stated:

"We think that there might well be a strong logical case where you have 2 offences of a wholly different character committed on completely different occasions, particularly when the second offence is committed while a man is on bail for the first offence, for making them consecutive. This not only marks the difference between them, but also makes it absolutely clear to all those concerned that once you have committed offences and are on bail, you do not have a free run to commit other offences without your sentence being substantially increased."

However, when a judge decides to impose a term of imprisonment for a subsequent offence consecutive to a term which the accused is already serving, he should have regard to the totality of the sentences which the accused will have to serve, and

reduce the sentence which he is minded to impose if the total length of the sentences will be too great. In R v Millen [1980] 2 Cr.App.R.(S) 357 at 359 Dunn LJ stated:

"The sole ground of appeal against the total sentence of 10 years which has been put forward very realistically on behalf of Millen by Mr Thompson is that it offends against the principle of totality. Mr Thompson accepts that these were serious offences of robbery and burglary of a private house whose only occupant was an old lady of 75. But he has drawn the attention of the Court to one remark of the deputy judge on July 20, when he said:

'I am not concerned about what sentences have been passed by the Central Criminal Court. I am more concerned for the victims of your depredations.'

Mr Thompson submits, in effect, that the learned judge thereby disregarded the well known principle that in a situation of this kind the second judge passing sentence, having decided what is the appropriate sentence for the particular offence or offences before him, should then look at the sentences which the accused man is presently serving and should decide, having regard to the total criminality displayed by the accused, what is the appropriate sentence. Mr Thompson says that in failing to do that the learned judge on July 20 erred in principle, and that the sentence of 3 years for the burglary, although he does not suggest that it was inappropriate, in the circumstances of the burglary should have been made concurrent with the 7 years' imprisonment, so that the appellant would serve a total of 7 years instead of a total of 10 years.

In general terms this Court accepts that submission. We think that the learned judge failed to have regard to the principle of totality. He should have looked at the total period which this man was to serve for the various offences of which he had previously been convicted, as well as the matters with which the learned judge was currently dealing on July 20."

The English Court of Appeal then reduced the total sentence of 10 years to 7 years. See also R v Reeves [1980] 2 Cr.App.R.(S) 35 where the Editor's note reads:

"where an offender is sentenced for a large number of offences, some committed while on bail in respect of others, the sentencer or sentencers concerned should ensure that the aggregate of consecutive terms imposed is not disproportionate to the gravity of the offences for which it is imposed."

Viewed in isolation, and leaving aside the question of a discount for the plea of guilty, the sentence of 4 years imposed on Toal for the burglary in Elaine Street was entirely proper having regard to his record. But we consider that the total sentence of 9 years is excessive and should be reduced. The only way in which this reduction can be achieved is to reduce the sentence of 4 years. Therefore the sentence imposed on Toal of 4 years will be reduced to 2 years, making a total sentence of 7 years. In

reducing the sentence of 4 years to 2 years we also make allowance for Toal's plea of guilty - a point to which we refer later in relation to Rowden.

An additional ground of appeal advanced on behalf of Rowden is the disparity of sentence in respect of the offences of burglary taking into account the difference between his previous record and that of Toal. We consider that this ground of appeal is valid. Thomas on Principles of Sentencing, 2nd Ed., states at p.68:

"Differences in age between offenders .... or in the number and quality of their previous convictions will normally result in a difference in their sentences."

See also R v Walsh [1980] 2 Cr.App.R.(S) 224. It is not every difference in the records of 2 co-accused which will require the trial judge to impose different sentences on them for the same offence. But in the present case the difference in the records was substantial and Rowden's record was much less bad than Toal's, and we consider that this should have been reflected in the sentence imposed on him.

The sentence of 4 years imposed on Toal was a proper sentence (subject to a discount for the guilty plea) if it had not been for the totality principle which had to be applied to the aggregate of the 5 years for robbery and the 4 years for the burglary. Therefore on the basis that 4 years was a proper sentence for burglary in respect of Toal, we consider that having regard to Rowden's much less serious record, the term imposed on him should have been less than 4 years.

A further ground of appeal advanced argued on behalf of both Toal and Rowden by Mr Tannahill and Mr McDonald was that the learned judge ought to have given the defendants credit for their guilty pleas which they had entered on 9 October 1992. In his judgment the judge said:

"The fact remains that these ladies were dreadfully frightened by what happened and the accused have pleaded guilty to this charge. Given that they were found in the premises by the police they had no alternative and while it is true, as Mr Campbell has urged upon me, that a plea of guilty normally attracts a discount for that plea there are cases where the circumstances supporting the charge against the accused are so overwhelming that no reduction should be given for a plea of guilty. For example, I draw attention to the case of R v Sawyer and the comments of May LJ."

The comments of May LJ in R v Sawyer [1984] 6 Cr.App.R.(S) 459, referred to by the learned judge, do not, in fact, lay down a clear principle that there should be no discount for a plea of guilty when the accused is caught red-handed. What May LJ said was this:

"Mr Simmons also submits that in the circumstances of this case the learned Common Sergeant did not give any allowance of this kind for the fact that the man pleaded guilty to the 3 offences to which we have referred.

This Court has earlier today commented that generally speaking it is a principle of sentencing that for a plea of guilty some discount should be made. We gave as an example a case in which perhaps it was not appropriate, where a man is caught red-handed with his hand in the till. A plea of guilty is less indicative of remorse where a man tendering it has only 2 years or thereabouts before being convicted of precisely the same series of mean offences. On the other hand, as Mr Simmons very rightly points out, the pleas did obviate the necessity of Mrs Hallegua and Mr Aldrich having to give evidence in court, although it was apparent from the transcript of the sentencing remarks that Mr Aldrich was, in fact, at the back of the court at the time."

The principle which should be applied, and which was approved by this court in R v Payne and others [1989] 9 NIJB 28 at 41, was stated as follows by Lawton LJ in R v Davis [1980] 2 Cr.App.R.(S) 168 at 170:

"It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused have pleaded guilty. The extent to which it is a mitigating factor must depend on the facts of each case. In this case it cannot be a very powerful mitigating factor because, with the possible exception of George Davis, it is difficult to see how any of them could have run a defence, although it is easy to see that by commenting and giving evidence about the informer, who was alleged to have been with them, they might have wasted a great deal of court time and made some members of a jury think that they had been treated unfairly.

The problem, therefore, arises as to what sort of allowance, if any, should be made for the fact that they all pleaded guilty and the whole case was dealt with within one day. This was in marked contrast to what so frequently happens in this class of case. This factor, in our judgment, should be taken into account when deciding what were the right sentences. But for the reasons I have already stated, not very much should be taken off the sentences which were passed."

The 2 defendants were caught red-handed by the police, but they pleaded guilty on arraignment and thereby saved the women in the house in Elaine Street the worry and stress of coming to court to give evidence. Their pleas also saved the waste of court time and the expenditure of public money. Therefore we consider that they should have been given a small discount and, without laying down a guideline or measure, we think that the reduction should have been 6 months in the particular circumstances of this case.

Therefore our conclusion is this. The sentence of 4 years on Toal would have been entirely proper if he had been convicted after a plea of not guilty and if his total sentence had not been 9 years, taking into account the previous sentence of 5 years for robbery. But looking at the totality of the 2 sentences we consider that 9 years is excessive and taking account also of his plea of guilty, we reduce the 4 years to 2 years to give a total sentence of 7 years. But we emphasise that, if it had not been for the previous sentence of 5 years, the sentence of 4 years, reduced to 3 years and 6 months to give a discount for his plea of guilty, would have been a proper sentence.

In taking account of Rowden's much lesser record, his sentence must be assessed against and compared with the 4 years (less 6 months) which would have been the proper sentence for Toal if it had not been for the previous sentence of 5 years. Rowden is not entitled to take advantage of the fact that Toal's sentence has been reduced to 2 years by reason of a factor which is irrelevant and extraneous in relation to Rowden, viz. the fact that Toal had previously been sentenced to 5 years for robbery.

We consider that to take account of Rowden's markedly less serious record and to take account also of his plea of guilty, the sentence of 4 years imposed upon him on the third count should be reduced to 3 years.

Therefore the applications for leave to appeal are allowed, the applications are treated as the hearing of the appeals, and the sentence of 4 years imposed on Rowden on the third count is reduced to 3 years and the sentence of 4 years imposed on Toal on the third count is reduced to 2 years so that he will serve a total aggregate sentence of 7 years.