

Judgment: approved by the Court for handing down  
(subject to editorial corrections)\*

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**BILL NO: 05/060346**

**REGINA**

**-V-**

**DAVID ANDREW JOHNSTON  
STUART WHITE**

**BEFORE  
HIS HONOUR JUDGE BABINGTON**

**Application of Article 2 of the Criminal  
Justice (No 2) (Northern Ireland) Order 2004  
– offences aggravated by hostility.**

1 The defendants have pleaded guilty to Section 20, in that they  
2 inflicted grievous bodily harm on John Joseph Carey.

3

4 This incident occurred on Monday 3rd October 2005, not far from the  
5 centre of Enniskillen. On that day Mr Carey, a man of 23, was  
6 making his way home from work, he was carrying some groceries that  
7 he had purchased. As he was passing the children's play park in  
8 Derrychara he noticed three persons, two males and a female, sitting  
9 by the children's slide.

10

11 He recognised one of the males as Stuart White, the other male who  
12 was David Johnston approached him and asked for a cigarette, he said  
13 sorry that he didn't smoke. White then asked him his name, he said it  
14 was John Carey. He was asked was that the same as Kerry in the  
15 butter. Carey said no and spelt it out. He was then asked what he was  
16 doing coming through there and he said he was just going home.  
17 White then said "...but you're a taig, you can't come through  
18 here....". Carey said "get a grip" and White replied "don't tell me to  
19 get a grip" and started pushing him. Johnston then told him to walk  
20 around the other way, grabbed him, swung him round and threw him

1 to the ground. He kept saying “go round the other way”. White was  
2 trying to kick him when he was on the ground. The female tried to  
3 calm things down. Carey told them to calm down and said he would  
4 walk around.

5

6 He got up to walk away but Johnston told him to go back the other  
7 way. Carey said “fine” and started to walk away. White then said  
8 “it’s not about you, it’s just about the turf”. White said they had to go  
9 that way as well. He then grabbed Mr Carey and swung him to the  
10 ground. Both defendants then kicked and punched him all over his  
11 body, particularly his head on which they also stamped. He tried to  
12 protect himself as best he could. He said he thought this went on for  
13 some seven or eight minutes. He was later able to get up and stagger  
14 home. He was not able to remember what route he took to go home or  
15 how he managed to get there.

16

17 As Carey had approached before the attack the witness said that the  
18 defendant White said “...there’s a fenian he won’t walk through this  
19 park”. After that they confronted the injured party as I have already  
20 set out.

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On 29 November 2005 Carey picked out the defendant Johnston during an identity parade.

Carey attended the Accident & Emergency Department of the Erne Hospital and was detained overnight. He was found to have multiple bruising particularly around the head. It was said that the injuries to his head were consistent with multiple blunt trauma blows. He also had bruising to his left forearm, right shoulder and both knees. The forensic medical practitioner was able to note twenty different bruises, abrasions and swellings. The vast majority of which were to his head. The most serious was a fracture dislocation of his right elbow. It is understood that he has made a good recovery from these injuries.

Johnston was interviewed on 6 October and denied any knowledge of the assault. He was again interviewed on 29 November following being picked out at the identity parade but again denied assaulting anyone.

1 White was interviewed on 6 October and denied being in the area of  
2 the play park.

3

4 Johnston, is who is now 26, has a poor record included in which are  
5 three convictions for common assault, six for assaulting the police and  
6 two for serious assault. He was sentenced for grievous bodily harm,  
7 presumably Section 20, the same charge in this case, for which he  
8 received a Custody Probation Order of 33 months custody and 12  
9 months probation in November 2000; an assault occasioning actual  
10 bodily harm for which he received a 3 year sentence suspended for 3  
11 years on 27 October 2005. This was 24 days after this offence and for  
12 which at the time he was awaiting sentence having pleaded guilty on  
13 13 September 2005. Furthermore he has two convictions for  
14 possessing an offensive weapon, convictions for dishonesty, four for  
15 burglary, one for theft and one for handling as well as drugs and road  
16 traffic matters.

17

18 White who is now aged 22 has a record comprising road traffic  
19 matters as well as convictions for criminal damage, disorderly  
20 behaviour and resisting police. In December 2004 he was bound over

1 to keep the peace for 12 months, to refrain from anti-social behaviour,  
2 which he is technically in breach of as a result of this matter.

3

4 The pre-sentence report in respect of Johnston states that as a result of  
5 his alcohol and drug abuse he effectively left or was put out of home  
6 at 16. He himself says that he has adequate literacy and numeracy  
7 skills. He has been employed from time to time but his increasing  
8 dependency on drink and drugs together with his offending behaviour  
9 has impacted negatively on his employability. It is said that his  
10 offending history is almost exclusively alcohol or drug related. In  
11 relation to the present offence it is said that he accepts the facts as  
12 outlined in the prosecution case. It is also noted in the report that he  
13 had been abusing alcohol and drugs on a daily basis.

14

15 His risk of harm to the public is assessed as high until he effectively  
16 addresses his abuse of alcohol and drugs. It is also felt that until he  
17 addresses various factors that the likelihood of re-offending also  
18 remains high. Those factors are his misuse of drugs and alcohol  
19 leading to subsequent aggressive offending behaviour, his poor self  
20 control in confrontational situations, his past failure to accept full

1 responsibility for his abuse, adverse peer group association and his  
2 aimless unstructured lifestyle.

3

4 I have read a number of references handed into the court by Mr Fahy  
5 which speak well of him. I make this comment – they may well be  
6 correct but he behaved in a totally different manner on 3 October  
7 2005.

8

9 In relation to the defendant White, he too appears to have left the  
10 family home in November 2004 as a result of his alcohol and drug  
11 addiction. He had rather a disjointed upbringing but is obviously not  
12 without academic ability. He feels he has adequate literacy and  
13 numeracy skills. It is said that all his previous offending has been  
14 alcohol or drug related. It is said that he remembers little of the  
15 incident in question having taken drugs and a great deal of drink. He  
16 says he feels bad about the incident, regrets the injuries caused and the  
17 distress caused to the injured party's family.

18

19 Whilst not meeting the Probation Board definition of high risk of  
20 harm to others it is felt that the potential risk of harm to the public is

1 significantly increased when he is under the influence of alcohol or  
2 illicit substances and therefore his ability to abstain from drugs and  
3 alcohol will dictate this level of risk. The likelihood of re-offending is  
4 similarly predicated, he must refrain from drugs or excessive drinking.

5  
6 Both defendants have pleaded guilty although this was not until the  
7 day fixed for their trial. This was in spite of Section 20 being on the  
8 indictment as well as Section 18. It was said that there were  
9 discussions taking place between Counsel. However it was quite clear  
10 that the defendants were at one stage, perhaps up until the last minute,  
11 intending to contest this matter. Their credit is limited by their  
12 attitude but they are entitled to a lesser sentence than if they had not.

13  
14 It is quite clear to me that this matter falls within the provisions of  
15 Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004  
16 in that this offence was aggravated by hostility in that the defendants  
17 demonstrated hostility to the injured party as a result of his religion or  
18 perceived religion - see Article 2(3)(a)(iii). Furthermore I note that  
19 Article 2(3)(b) defines aggravation by hostility if the offence is



1 motivated (wholly or partly) by hostility based on membership or  
2 presumed membership of, in this case, a religious group.

3

4 This legislation is similar to that in England under Section 28 of the  
5 Crime and Disorder Act 1998 which deals with racially aggravated  
6 offences. The method for courts to deal with these aggravated  
7 offences was set out by the English Court of Appeal in Saunders  
8 [2002] 2 Cr. App.R(S) 71, developed by their Sentencing Advisory  
9 Panel in July 2000 and then given further guidance by the English  
10 Court of Appeal in R v Kelly and Donnelly [2001] 2 Cr. App.R.(S)  
11 73. It seems to me appropriate and proper that I follow this approach  
12 which is to arrive at the appropriate sentence without the element of  
13 aggravation, in this case, religious aggravation, but including other  
14 aggravating and mitigating factors. That sentence should then be  
15 enhanced to take account of the religious aggravation.

16

17 In this case the defendants both kicked and stamped on Mr Carey's  
18 head whilst he lay helpless on the ground. The assault went on for  
19 some minutes, seven or eight according to Mr Carey, although I take  
20 the view that this could have been a shorter period.

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2 In respect of Johnston this offence was committed whilst he was on  
3 bail and awaiting sentence for a charge of assault occasioning actual  
4 bodily harm for which he was sentenced some 24 days later.

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6 In respect of White the offences were committed whilst he was on  
7 probation.

8

9 The injured party was savagely attacked by you both for the simple  
10 reason that you both considered him to be a catholic and that he  
11 should not have been where he was, simply making his way home  
12 after work carrying the groceries. You showed him little mercy by  
13 kicking and stamping on his head in particular whilst he lay helpless  
14 on the ground. Although badly injured it was fortunate for you both  
15 that his injuries were not more serious and that he has made a  
16 reasonable recovery by all account.

17

18 In relation to Johnston you have a very poor record especially for  
19 violence and you committed this offence whilst on bail awaiting

1 sentence for another offence of violence. Your sentence at this stage  
2 is three and a half years.

3

4 White, your record is nothing like as bad but you committed this  
5 offence whilst on probation. Your sentence is two and a half years.

6

7 Turning to the aggravation I accept what Mr Fahy and Mr Turkington  
8 have said that this was not a premeditated attack in that it was planned  
9 in advance. I also accept both defendants were drunk and had  
10 probably also taken drugs. It is clear that this offence was committed  
11 as the injured party was on his way home by a normal route during the  
12 hours of daylight and as such would impact more heavily on him as it  
13 occurred whilst he was going about his normal daily life. It is also  
14 clear that the religious aspect of this case appears to be the only reason  
15 why this injured party was attacked. Here not only was sectarian  
16 language used but it was made clear that as he was a catholic he could  
17 not go a certain route.

18

19 In all the circumstances I consider an enhancement of fifteen months  
20 in each case is appropriate making a total sentence of 4 years and nine

1 months in the case of Johnston and three years and nine months in the  
2 case of White.

3

4 I have to consider in each case whether I will impose a custody  
5 probation order in accordance with the provisions of the Criminal  
6 Justice (Northern Ireland) Order 1996. In respect of Johnston I have  
7 come to the conclusion that I will not as he committed other offences  
8 namely three assaults on the police and a burglary within six weeks of  
9 starting the probation element of a previous custody probation order.

10

11 In addition the author of the pre-sentence report states that although he  
12 attended as instructed during the period of supervision there was little  
13 significant change in his alcohol and drug misuse and subsequent  
14 offending. It is also clear in my opinion that there was a doubt as to  
15 whether he is firmly committed to change his ways. Finally the  
16 serious assault for which he was sentenced on 27 October 2005 was  
17 committed whilst he was on probation for a period of 12 months in  
18 relation to yet another assault, as well as being on bail.

19

1           In respect of White I have also come to the conclusion that I will not  
2           as there is no suggestion within the pre-sentence report of what a  
3           period of supervision could possibility do for the defendant within the  
4           ambit of Article 24, and secondly and perhaps more importantly he  
5           committed this offence whilst on supervision, indeed while coming  
6           towards the end of a period of supervision. This is my mind is  
7           particularly significant as one would ordinarily conclude that at that  
8           stage the full benefit of an Order should have been readily apparent to  
9           the defendant.