

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ROBERT McKEOWN, EDWARD LYNN AND STEPHEN FERRIS

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCES
(NUMBERS 13, 14 and 15 of 2013)

Before: Morgan LCJ, Coghlin LJ and Horner J

MORGAN LCJ (delivering the judgment of the court)

[1] These are three references by the Director of Public Prosecutions under section 36 of the Criminal Justice Act 1988 in which it is submitted that unduly lenient sentences were imposed on the respondents following convictions for riotous assembly contrary to common law. The three convictions arose out of disturbances that took place following the decision by Belfast City Council to limit the number of days on which the Union flag is flown outside Belfast City Hall. In these applications the PPS contend that the learned sentencing judge erred in (i) failing to identify the correct starting point or setting a period of imprisonment too low by comparison to the starting point; and (ii) suspending the sentence of imprisonment.

[2] It is important at the outset, however, to make it plain that none of these sentences are the result of the exercise by anyone of the right to lawful protest. We think it proper to note at the beginning of this judgment the important place that the right to protest has in our society. It is quite inappropriate in a democratic society for the criminal law to be used to inhibit peaceful lawful protest. Citizens are entitled to be heard and the right to freedom of expression must be protected by the law and secured by the courts. It is only those who lend themselves to the

encouragement of, or engagement in, violent disorder who offend the criminal law on riotous assembly.

Background

[3] There is no guideline case on sentencing for riotous assembly issued by this court but assistance is to be derived from the decision of the English Court of Appeal in R v Najeeb and others [2003] EWCA Crim 194. The background to that case was a riot in the streets of Bradford which had been preceded in earlier weeks by public disturbances in neighbouring towns. There was a racist confrontation in the city centre. Four hundred police attended and three hundred of them were injured. Police were attacked with stones and petrol bombs. Two garages were completely gutted and stolen cars were set alight and driven at police. Businesses were ruined and £27m of damage was caused. There was clear evidence of organisation and the riot proceeded for 12 hours. This was a riot of the utmost gravity.

[4] The court concluded that a sentence of 5 years was appropriate after a trial for those present for a significant period and repeatedly throwing missiles like bricks and stones. Those engaging in more serious acts of violence would receive heavier sentences and those who were ringleaders could expect a sentence near the statutory maximum in England of 10 years.

[5] In this jurisdiction Judge Burgess gave guidance at first instance in R v Heagney and others [2012] NICC 35. That case concerned various defendants who were involved in disturbances in a number of areas of Belfast and beyond during June and July 2011. These included rioting in Ardoyne during 12 and 13 July 2011 when police were attacked with petrol bombs and other missiles and a number of vehicles were hijacked and pushed towards police lines. The rioting in that case lasted for 8 hours and 19 police officers were injured. Water cannon and 62 AEP rounds were discharged.

[6] A further group faced charges arising out of events on 20 June 2011 on the Lower Newtownards Road, Belfast. During the course of that day serious disorder occurred at the bottom of the Lower Newtownards Road and at the junction of Castlereagh Street/Mountpottinger Road. A large crowd was reported to have run into Strand Walk in the Short Strand area and attacked people and property. From approximately 9:15 pm police resources that had been deployed came under attack with rubble, petrol bombs and fireworks being thrown. Many within the crowd had their faces covered and additional police resources were deployed to try and separate the two factions. Over the ensuing hours the disorder escalated and from 10:00 pm blast bombs were thrown. Live rounds were directed at police from Strand Walk onto the Newtownards Road and from Pitt Park onto the Newtownards Road. During the course of the disorder police deployed AEP rounds in order to assist in quelling the riot. The crowd, which at its peak was in excess of 500 people, began to reduce from about 2:30 am on 21 June 2011. The remaining persons were

concentrated in the Pitt Park area but continued to throw bricks and rubble sporadically before dispersing at about 4:30 am. A large number of police vehicles were damaged in the disorder.

[7] On 1 July 2011 the annual Somme Commemoration Parade took place in East Belfast. As there had been disorder in East Belfast on 20 and 21 June 2011, there was a large police presence to deal with the Parade and the potential for any subsequent disorder. At approximately 10:45 pm there was an altercation on the Albertbridge Road between males. Two opposing crowds of approximately 150 gathered. While the crowd on the Mountpottinger Road dispersed that on Castlereagh Street grew larger and attacked police with masonry, stones and petrol bombs. Many of the crowd concealed their identity. The disorder escalated over a number of hours and water cannon and AEP rounds were deployed. The crowd dispersed at approximately 1:30 am having reached at its peak about 250 persons. During the course of the disorder a large number of police vehicles were damaged and water cannon and 22 AEP rounds were deployed.

[8] On 8 July 2011 there had been disorder in Ballyclare after PSNI had removed a number of paramilitary flags from the town. On the afternoon of 9 July a large crowd numbering up to 100 had gathered in the town and re-erected the flags. Police anticipated further disorder that evening and resources were deployed in advance to meet the perceived threat to police and members of the Catholic community. Shortly before midnight an Ulsterbus was hi-jacked and used to ram a police landrover and a large crowd of about 80 attacked police with petrol bombs, masonry and fireworks. The crowd appeared to be attempting to reach the local Catholic Chapel. Some of the crowd were masked and attempts were made to set the bus alight and push it towards police lines. During the course of the attack on police the numbers involved grew to over 100 and in an effort to quell the violence further police were deployed as were water cannon and AEP rounds. The crowd violence continued and a number of vehicles were set alight and pushed towards police lines. The violence was concerted, organised and spread to Carrickfergus, Doagh, Greenisland and Newtownabbey. The disorder ended at about 2:20 am in Ballyclare but continued elsewhere until 5:00 am.

[9] On 11 July 2011 serious public disorder took place in the area of Donegall Road/Broadway/Falls Road. This was part of wider disorder in North and West Belfast on the nights of 11 and 12 July 2011. Police evidence gathering teams were deployed and as a result of the material gathered and other footage a number of defendants were identified. During the course of the riot a Translink Bus was hi-jacked and crashed. The vehicle was extensively damaged during the incident at a cost of some £6,000.

[10] We have spent some time setting out the circumstances of the offending dealt with by Judge Burgess because it demonstrates that there remain a significant number of people, usually male, who persist in lending themselves to this violent

mob activity. The gravamen of this offence is the decision to participate in the assembly thereby causing fear and alarm to those members of the public affected. Each participant adds to the weight of numbers in the mob and fuels the level of aggression that has been evidenced to us in these cases. Even for those who participate by presence and encouragement only, their culpability must be judged by the total picture of the disorder and violence caused.

[11] Such persistent criminal conduct spread as it is across our community inevitably requires a deterrent sentencing framework. Those who chose to participate by presence and encouragement had the option of walking away. Those who actually used violence did so as part of the violent disorder. Their conduct cannot be viewed in isolation. Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight. Secondly, although in this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment, where a deterrent sentence is imposed it should only be suspended in highly exceptional circumstances as a matter of good sentencing policy. Thirdly, where there is compelling evidence such as video material, an offender is unlikely to get full credit for admissions and a plea where there realistically was no alternative. It was submitted to us that such a sentencing approach was only appropriate for those involved in petrol bombing or similar offences. Although we accept that R v Blaney and others [1989] NI 286 is authority for the proposition that deterrent sentences are required in such cases, we do not accept that this inhibits in any way the need for deterrent sentences in these cases.

[12] In Heagney Judge Burgess adopted the sentencing framework suggested in Najeeb as follows:

- Any ringleader who had been caught and convicted following trial, could expect to receive a sentence at or near the statutory maximum of ten years.
- Immediately below that highest level of culpability the court would have expected an active and persistent participant who threw petrol bombs or used a crossbow or drove a car at the police to be sentenced following a trial to between eight and nine years.
- Below that level, for those who participated over a number of hours and threw missiles less dangerous than petrol bombs, but potentially more damaging than stones, the court would have expected following a trial sentences of six to seven years.
- Below that level, for those present for a significant period and repeatedly throwing missiles such as bricks or stones, the court would have expected sentences of five years following a trial.

- Lesser degrees of participation would attract sentences at a lower level.

[13] We have found Heagney and Najeeb very helpful in approaching these cases. In selecting the appropriate starting point there are a number of matters which may have to be taken into consideration:

- (i) the size of the group of offenders;
- (ii) the nature of the violence used;
- (iii) the duration of the riot;
- (iv) whether the riot is associated with any other disorder occurring before or after the incident in question;
- (v) the harm caused;
- (vi) the nature and extent of interference with the public;
- (vii) any likely effect on community relations; and
- (viii) the likely cost to the public purse.

[14] It has been argued that the Bradford riots were of a larger scale than some of those that we are dealing with here. That is balanced, however, by the recurrence of this offending behaviour in this jurisdiction across the community. Where there is any participation, including participation by way of presence and encouragement, in large scale riots involving the use of serious violence and extensive public disruption a deterrent sentence of immediate custody is required other than in highly exceptional circumstances. In the case of those present for a significant period and repeatedly throwing missiles such as bricks or stones, a sentence of five years following a trial is appropriate. Ringleaders should expect sentences of 10 years following a trial and those who instigate or organise those present or use more serious violence should expect sentences between 5 and 10 years after a trial. We do not consider that we need to be any more prescriptive.

The individual cases

McKeown

[15] On the evening of 3 December 2013 there was serious ongoing rioting in the Castlereagh Street, Albertbridge Road and Templemore Avenue areas of Belfast. This offender was seen on four separate occasions attacking police between 21:10 and 22:23. At 21:10 he attacked police with a stick at Castlereagh Street, at 21:50 he attacked police at the Albertbridge Road, at 22:08 he threw bricks at police at the

same location having come out from behind a bus shelter and at 22:23 he threw a bottle at police lines in Templemore Avenue, which he obtained from a man with a bag who was handing them out.

[16] An image of him was published in the local press as a result of which he handed himself in at Castlereagh Police Station on 21 March 2013. He stated that he had gone to the City Hall to show his support for the flag protest and was angry at the decision. He made his way back with the group who had been outside the City Hall to East Belfast. People in the crowd started lifting stones and throwing them towards houses in the Short Strand area. Rather than walking away he decided to throw bricks and stones at Castlereagh Street and he went with the crowd towards the Albertbridge Road area where he joined in throwing stones at the police and police vehicles. He admitted throwing a wooden pole or brush shaft at a police vehicle at the junction of Templemore Avenue and Albertbridge Road. He was seen standing in the Albertbridge Road with two parts of a brick in his hands while cars were trying to get past.

[17] The learned trial judge considered that the appropriate starting point was four years imprisonment. Although Mr McGroary QC submitted that the appropriate starting point was five years imprisonment he accepted that a starting point of four years was not unduly lenient. We agree. This offender accepted his culpability during interview and pleaded guilty at the first opportunity. The credit for his plea is reduced by the fact that he was caught on camera. He has no previous criminal record. The learned trial judge concluded that those factors led to an appropriate sentence of 18 months imprisonment. It is notable that in this case as in the other cases which are the subject of this reference the judge made no mention of the fact that a deterrent sentence was required. He could only have reached the conclusion that 18 months imprisonment was the appropriate sentence by giving very substantial weight to the personal circumstances of the offender. Making every due allowance for the plea and the way in which the offender met the charge we consider that the minimum appropriate sentence was a determinate custodial sentence of 2 ½ years.

[18] The learned trial judge then decided that he should suspend the sentence that he had reached because he felt that little would be gained by the offender going to prison immediately. As we have indicated a deterrent sentence should only be suspended where there are highly exceptional circumstances. No such circumstances were identified by the learned trial judge. We have been provided with detailed medical information in respect of the offender's son and note his plans to marry. We do not consider, however, that these constitute circumstances which would entitle us to suspend the sentence.

[19] We are satisfied, therefore, that the sentence was unduly lenient. We must take into account the impact of double jeopardy. This offender will now have to serve a prison sentence whereas previously he had been allowed to remain in the

community. We consider that the appropriate sentence is a determinate custodial sentence of 18 months comprising nine months in custody and nine months on licence which should commence from today. He should present himself to Maghaberry Prison today at 2 pm to begin serving his sentence and should get the benefit of any period served on remand.

Lynn

[20] On 5 January 2013 there was serious ongoing rioting in the Albertbridge Road area of Belfast. A crowd of approximately 100 persons attacked police lines by throwing heavy masonry, petrol bombs, glass bottles and industrial fireworks. The attacks continued over a period of several hours and included attacks on public property and vehicles which were set on fire. Just after 11 pm a section of the crowd numbering 20 people attacked water cannon and police vehicles from the Roundhill Street junction with the Albertbridge Road with heavy masonry, bottles and fireworks. The offender was part of this crowd and was wearing a blue and white scarf around his face. He threw a missile directly at police lines in a violent and forceful manner from a distance of 10 metres and had another piece of masonry in his hand. He was identified by a police officer as part of the crowd between 11:10 pm and 11:22 pm. He was arrested at the scene when police moved in to disperse the attackers.

[21] At interview he said that he had travelled from Coleraine because his girlfriend's mother had called her. She lived in Mersey Street. Despite the CCTV evidence showing him throwing a piece of masonry at police lines he continued to deny his involvement. He did, however, plead guilty at the first opportunity. The CCTV evidence means that credit for the plea is reduced. He is a 22-year-old man with no previous convictions. He joined the Territorial Army in 2008. He had one tour of duty in Afghanistan for six months between 2010 and 2011. His Army service was exemplary. He was exposed to horrific injuries suffered by colleagues and civilians. As a result of his experiences in Afghanistan he has required counselling and the medical evidence indicates that he suffers from an adjustment disorder with post-traumatic symptoms. Dr Loughrey's opinion is that his symptoms would have made him more susceptible to submission to the collective experiences of the mob than might otherwise have been the case had he full control of his senses. That is consistent with his account of getting angry and frustrated during the events in question.

[22] The learned trial judge took a starting point of three years imprisonment. Mr McGrory contended that this was unduly lenient. We accept that a higher starting point could have been selected but do not consider that it can be said that three years was unduly lenient. The learned trial judge imposed a suspended sentence of 15 months imprisonment. He could only have done so by concluding that there were highly exceptional circumstances in this case. He did not make any such finding in his sentencing remarks. We must take into account, however, that

this young man as a teenager was exposed to horrendous violence during the period of his army service which has affected his ability to control his actions which has in turn required continuing counselling that. It does not follow that every such case should lead to a suspended sentence but in light of the particular circumstances of this offender we do not consider that we should interfere with the decision to suspend the sentence. This application is dismissed.

Ferris

[23] On 12 January 2013 serious public disorder occurred on East Bridge Street Belfast. This was part of a pattern of rioting which had developed at that period. A crowd of about 100 making their way from the City Hall forced their way through police lines outside Central Railway Station. Despite the fact that the offender came from South Belfast he made his way with this crowd to East Belfast where previous disturbances had occurred. Police were concerned about a sectarian confrontation at the Short Strand. During this early part of the disturbance the offender threw a golf ball at a female police officer at short distance. This particular form of attack was a feature of the ongoing disturbances.

[24] The offender was later seen to throw a number of missiles into the Short Strand area. He was in the company of six or eight persons who were also engaged in similar activity. He was observed on footage gathered by police to be holding a piece of masonry and to run towards police lines. He was arrested on 16 January 2013 and at interview accepted that he was present at the protest. He agreed that he had breached police lines. CCTV was not available at the time of his interview but he accepted that still photographs were likely to be photographs of his activity. He stated that he was present from approximately 2:20 pm until sometime between 3:30 pm and 4:00 pm. He continued to deny throwing the golf ball despite his plea when interviewed for his pre-sentence report.

[25] The learned trial judge again failed to refer to deterrence or the guidance decision in Heagney. She noted that it was an aggravating feature that the offender had made his way to East Belfast with others to cause trouble and that he had engaged in a sectarian confrontation. She noted that he had honoured the stringent bail conditions on which he had been released. The offender had no material criminal record and the learned trial judge concluded that there was no immediate need or benefit in a direct custodial sentence.

[26] In this court Mr Duffy QC has argued that there were exceptional circumstances. He noted the offender's plea at the first opportunity and the broad tenor of his admissions at interview. The appellant was 18 years old at the time of the incident, had a limited criminal record, had lost his employment and had suffered six weeks in detention on remand which he had found very stressful.

[27] We do not accept that such features either individually or cumulatively amount to exceptional circumstances. We consider that this was an unduly lenient sentence. We see little distinction between this offender and McKeown and taking into account double jeopardy we impose a determinate custodial sentence of 18 months comprising 9 months detention and 9 months on licence which should commence from today. The offender should present himself to the Young Offenders Centre at 2 pm today to begin the sentence. Any period spent on remand should count against the custodial period.