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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (NUMBER 3 OF 2004)
THOMAS JOHN HAZLETT
(AG REF 4 of 2002)

Before Kerr LCJ, Campbell LJ and Sheil J

KERR LCJ

Introduction

[1] In June 2002 the offender was tried with two other defendants, Darren Edward Clarke and an accused person referred to as D, by Nicholson LJ on the following charges arising out of an incident on 28 August 2000: -

(a) Attempted murder of the occupants of 48 Jefferson Park, Coleraine.

(b) Unlawful and malicious wounding of an 11 year old girl with intent to do her grievous bodily harm contrary to Section 18 of the Offences Against the Person Act 1861.

(c) Possession of a firearm and ammunition, namely a sub machine gun and 30 rounds of ammunition with intent by means thereof to endanger life or cause serious injury to property contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

[2] On 28 June 2002 Nicholson LJ delivered judgment, acquitting D of all charges. Hazlett, and Clarke were acquitted of attempted murder and of malicious wounding but convicted on the article 17 count. Clarke's convictions were subsequently quashed on appeal. On 16 September 2002 Hazlett was sentenced to a custody/probation order under article 24 of the

Criminal Justice (Northern Ireland) Order 1996 comprising 7 years custody and 2 years probation. The judge indicated that, had the offender not agreed to the making of a custody/probation order, he would have imposed a sentence of eight years' imprisonment. The Attorney General sought leave to refer the sentence to this court under section 36 of the Criminal Justice Act 1988, on the ground that it was unduly lenient. We gave leave and the application proceeded.

Background facts

[3] On the evening of 27 August 2000 shots were fired at the upstairs windows of the home of Philip McKergan, a member of the Progressive Unionist Party. It is believed that this incident occurred as part of a feud between two paramilitary groups, the Ulster Defence Association and the Ulster Volunteer Force. The trial judge found that Hazlett was contacted the following evening, 28 August 2000, by some unidentified person and ordered to arrange for an attack by way of retaliation on the home of Frank Daly, a former prisoner believed to be associated with the UDA. Hazlett was informed of the whereabouts of the gun and ammunition for the attack and told where the weapon was to be left after the attack. He selected the gunman, (alleged to be D), and the driver, Clarke, to carry out this enterprise.

[4] The offender, who did not give evidence on his trial, said during interviews by the police that his instructions to the gunman were to fire a number of shots at the upstairs windows of Daly's home. This mode of attack had been chosen, he said, in order to minimise the risk of injury. Clarke drove the gunman to and from the scene of the attack on the Daly home. The judge found that Clarke carried out a dummy run approximately 30 minutes before the attack took place and then drove the gunman to the house for the actual attack.

[5] The house is in a densely populated, residential area. The attack on it occurred at about 11 pm. Some thirty rounds were discharged at the house; approximately twenty being directed at the ground floor and a further ten towards the first floor. One of the shots struck Charlene Daly, the 11-year-old daughter of Frank Daly, as a result of which she was admitted to hospital with serious injuries. Charlene had been sitting in a downstairs room watching television when she was hit. After the attack the gunman was driven from the scene and he and the driver subsequently attempted to burn the car by pouring petrol over it. It appears that they did not have a lighter or other means of ignition, as a result of which the vehicle was found and various items of forensic evidence were recovered.

[6] Clarke was arrested at approximately 5.40 pm on 29 August 2000 and denied any involvement throughout his interviews. The offender was arrested at approximately 5 pm on 30 August 2000 and initially denied any

involvement in the incident. At approximately 1.15 pm on 1 September 2000, however, after speaking to his solicitor he made admissions to the effect that he had organised the attack after receiving instructions to do so.

Personal background of the offender

[7] The offender is a resident of Limavady, but is originally from Claudy. He left school without formal qualifications and has mostly been unemployed since then. His lifestyle while in the community involved him in a pattern of heavy binge drinking. A report dated 16 May 2001 from Colin McClelland, an educational psychologist, suggested that the offender is in the bottom 7% of the population intellectually and that "he is a suggestible person, vulnerable to firm social pressure to accept the views of others even when such views differ from his own." His literacy skills are poor and are considered well below basic adult competency: he is functionally illiterate.

[8] The offender has two children from relationships that have failed. He keeps in relatively regular contact with his daughter, now aged eight years. He has several siblings but is not particularly close to any of these apart from his eldest sister. She submitted a letter about him to the sentencing judge; we have read and considered that.

[9] The Reverend John Morrow, prison chaplain, stated in a letter dated 23 May 2002 that he believed that the offender genuinely regretted his involvement in the crime and had never tried to minimise its seriousness. He stated that the offender's was 'co-operative' while in prison. Mrs Gamble, his sister, also said in her letter to the court that Hazlett regretted his involvement in the offence. These expressions of regret must be viewed in the light of his denial of involvement in the offence to the probation officer who compiled the pre-sentence report in his case, however. This denial prompted the probation officer to say that, although the offender had claimed that he would avail of probation assistance, this could prove difficult because of his failure to accept that he was guilty of the offence of which he had been convicted by the learned trial judge.

[10] The offender has a lengthy record, consisting of 12 different appearances in the criminal courts between 1987 and 2000. All his earlier convictions have been dealt with in the magistrates' courts and are of a relatively minor nature. His only previous convictions for violence to the person are two assaults upon fisheries officials for which he was sentenced to 1-month imprisonment suspended for 2 years by Limavady Magistrates' Court in March 1988.

Aggravating features

[11] The following aggravating features are present: -

(a) The offender was deeply involved in the planning of the gun attack on the Daly home.
(b) The attack was planned as retaliation for an earlier attack and was likely to prolong an ongoing feud between the UDA and UVF. Further incidents of a similar nature could have been prompted by the attack.
(c) The offender chose the gunman and gave him directions as to the manner in which the attack should take place.
(d) He arranged for the gun to be removed from the vicinity and returned to a place where it would be available for further use by paramilitaries.
(e) The offender ordered that shots be discharged at the house which he knew was in a residential area.
(f) A young girl was shot and seriously injured. She required in-patient hospital treatment.
(g) The weapon involved was a machine gun capable of discharging a large number of rounds quickly and was more likely to cause serious or fatal injuries.

[12] The only mitigating features are these: -

(a) The offender made admissions as to his role in interview although he sought to resile from those admissions in his comments to the Probation Officer.
(b) The offender expressed regret for his involvement in the incident and remorse for the injuries suffered by the girl.
(c) According to the report from Mr McClelland he is a person of low intellectual abilities and he may have been vulnerable to influence from more sinister individuals.

Judge's sentencing remarks

[13] The judge said that he considered that the shooting was retaliatory for the earlier attack on Mr McKergan's house. He then continued: -

> "You, Hazlett, told the gunman to fire at a darkened upstairs bedroom about 11pm. You must have known a person or persons might well be sleeping in that room and that firing into that room was bound to endanger life. Although the weapon was fired from street level bullets can ricochet, can fragment. In fact a bunk bed was struck. By chance the children of the house were downstairs at the time of the firing but in the ordinary course of events one at least would have been sleeping there at that time."

As to the offender's role, he said: -

> "You knew whose house was to be fired at, namely Frank Daly, who was a member of a group supportive of the UDA. You were a member of a group supportive of the UVF and there had been an ongoing feud between the UDA and UVF, of which this incident formed a part…..You decided that Daly would be hit because you thought he had hit McKergan's house the previous night. So it would appear that you chose the target…..…you also selected the gunman and I have no doubt that this incident was planned in advance. You say that you had one hour's notice but a car was provided, it was intended to burn the car after the shooting and a method of doing so was made available and you were aware of the plan. I have accepted as a reasonable possibility that you did not know that a machine-gun was going to be used or that it was loaded with a full magazine of 30 bullets. But as you knew where the weapon was to be found and were, therefore, able to tell the gunman where to collect it and where to put it back you could, if you had chosen, have found out that it was a machine-gun, fully loaded. Although 30 bullets were fired through the living room and the bedroom there is no evidence that you ever reprimanded or censured the gunman for firing as he did. You appear to have been genuinely upset that a child was shot and seriously injured. Your intention was to endanger Daly and if he had been seriously injured or killed I have no reason to suppose that you would have been upset. At least you admitted a part in the shooting, expressed regret to the police, to your sister and to the Prison Chaplain though you have maintained your innocence to the Probation Officer…I do not accept that no one was to be hurt. The attack on the house went wrong because a child was shot. You made no attempt to assist the police to recover the weapon or to assist in their investigation of the crime. However, as I have said, I treat you only as intending to endanger life."

Article 24

[14] In so far as is material article 24 of the 1996 Order provides: -

> "**Custody probation orders**
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> **24. —**(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence other than one fixed by law, a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both—
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> (a) to serve a custodial sentence; and
>
> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.
>
> (2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences."

[15] In *Attorney General's Reference (no 1 of 1998)* [1998] NI 232 this court provided guidance as to the circumstances in which a custody probation order should be made. At page 238/9 Carswell LCJ said: -

> " A court which has formed the opinion that a custodial sentence of 12 months or more would be justified for the offence is bound by the terms of art 24(1) to consider whether it would be appropriate to make a custody probation order. Under the terms of art 24(2) the sentencer is to take account of—
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> '…the effect of the offender's supervision by the probation officer on his release from

> custody in protecting the public from harm from him or for preventing the commission by him of further offences.'
>
> It hardly needs to be said that the court should not regard it as correct as a matter of routine to make a custody probation order where a custodial sentence of 12 months or more would be prima facie justified. Still less should it be tempted to resort to it as an easy option or compromise.
>
> In our view the court should look for some material which indicates that there will be a need to protect the public from harm from the offender or to prevent the commission by him of further offences. The relevant time at which the existence of that need falls to be determined is the time of his release. If, for example, the court takes the view that *after his release* the offender is likely to relapse into excessive drinking and to drive under the influence of alcohol, it may consider that a period of probation, with a condition attached that he undergo an appropriate course of treatment, would help to prevent the commission of further drink-driving offences. If so, it would be justified in making a custody probation order. If it took the view, on the other hand, that by the time the offender is released probation would not be likely to help in such a way, it would not in our opinion be right to make a custody probation order."

[16] It appears to us that where a probation officer has not recommended a period of probation following time spent in prison, it will not normally be appropriate for a sentencer to choose this option. This is because the co-operation of the prisoner is critical to the success of the probation element of the sentence. The compiler of the pre-sentence report will usually be in the best position to make that assessment. In the present case the probation officer dealt with this topic in the following passage: -

> "The defendant demonstrates a resolve to adopt a more stable lifestyle upon his release to the community. While he says that he would avail of probation assistance if available to help him address issues regarding alcohol misuse, housing and employment, his denial of the current offence and circumstances surrounding it could pose

> difficulties with community supervision. These difficulties would relate mainly to an absence of clear focus for supervision given the defendant's denial of the offence and also potential concerns surrounding personal safety in relation to the defendant, supervising probation staff and others, given the wider circumstances of this offence."

[17] As we understand this passage, the probation officer was of the view that unless the offender was willing to openly acknowledge his guilt (and therefore his association with paramilitary elements) there would be considerable difficulty in conducting an effective supervision of his activities so as to make a probation order worthwhile. This is unsurprising. It seems to us that it will normally be necessary that an offender should not only admit his involvement with such elements but also agree to sever them before any hope for success in the programme could be entertained.

[18] As it happens, however, the offender has completed his time in custody and is now living in the community. We were told (and have no reason to disbelieve) that he is attending the Probation Service scrupulously and that he has already begun to benefit from the programme that they have devised for him. Moreover, the denial to the probation officer of involvement in the crime of which he was convicted ran completely counter to his reaction to the accusation during interview and on trial. In those circumstances the store to be placed on the denial was infinitesimal. The offender had admitted his guilt of the offence to the police and had not challenged it during his trial. It should be possible, therefore, to use those admissions as a basis for the programme that his particular circumstances require.

[19] This court has recently observed (in *Attorney General's reference (No 2 of 2004)* [2004] NICA 15) that the exercise of the court's discretion in deciding that a custody/probation order should not be interfered with lightly. We have concluded, therefore, that the judge's decision to make this order was not wrong in principle and that it should not be disturbed.

Sentencing in article 17 cases

[20] Mr McCloskey QC for the Attorney General submitted that the sentence imposed in this case fell "well below" the range of sentences established for this type of offence in recent authorities. We accept this submission. Broadly speaking, the range of sentences for this type of offence imposed by the Crown Court or this court for article 17 offences has been between 12 and 20 years. Those sentences were passed, however, when there was an active terrorist campaign in progress in this country. The need for substantial deterrent sentences in that context was obvious and compelling. Sadly, paramilitary violence continues. This case is an example of it. This led Mr

McCloskey to suggest that sentences of similar length should still be passed where paramilitary crime occurs.

[21] An offence under article 17 is, by definition, a serious offence. On that account, those convicted of such an offence must expect to and should receive substantial sentences and those sentences should contain a significant deterrent element. The deterrent component of the sentence should be enhanced when the crime has, as here, a paramilitary setting. So long as paramilitary violence continues in our society, therefore, those convicted of offences associated with that type of violence should receive more severe sentences, as a general rule, than those whose crimes are committed in a non-terrorist context. We consider, however, that the range of sentences for this type of offence, in order to reflect contemporary conditions, should normally be between 12 and 15 years.

Double jeopardy

[22] For the offender Mr Orr QC drew our attention to a number of decisions in Attorney General reference cases in which the Court of Appeal reduced the sentence that they would otherwise have imposed by as much as one third to take account of the principle of double jeopardy. While, of course, this factor must be evaluated according to the particular facts of each case, it will generally be appropriate to make some reduction to reflect the fact that an offender must in references under section 36 confront the prospect of being sentenced twice for the same offence. In *Attorney General's reference (No 2 of 1999)* [2000] NICA Carswell LCJ, dealing with the effect that having to face sentencing twice should have, said:

> "We have to bear in mind the issue of the effect of double jeopardy. It has been the consistent practice of the court to make allowance for the fact that an offender who has been duly sentenced is put at risk all over again when a reference is brought under the 1988 Act, and to reduce to some extent the sentence eventually imposed to recognise that factor."

[23] In the present case the reference has been delayed by an unfortunate combination of circumstances. The offender's co-accused, Clarke, successfully appealed his conviction. The appeal was heard in October 2003 and judgment was delivered on 31 October 2003. Hazlett had been in custody on remand before his trial and having served one half of the sentence of imprisonment imposed was released on 5 March of this year. While the prospect of requiring an offender to return to prison will not deter this court, in appropriate cases, from substituting a heavier penalty, it is a matter that requires to be carefully considered in the context of double jeopardy.

Disposal

[24] We have concluded that the sentence imposed in this case was unduly lenient. As we have said, a sentence in the range of 12 to 15 years is appropriate for this type of offence. It does not inevitably follow from that conclusion, however, that the offender's sentence must be increased – see, for instance, *Attorney General's Reference (No.1 of 1993) (R v Stephen Victor McNeill)* [1993] NI 38.

[25] We have concluded that, because of the exceptional (and, possibly, unique) circumstances of the offender's case, we should not interfere with the sentence imposed by the judge. We wish to take the opportunity to emphasise that this does not represent an endorsement of the sentence imposed. A sentence of at least 12 years imprisonment would have been more appropriate in his case. Two principal factors have influenced our decision to take this unusual course. Firstly, the offender is now at liberty and apparently benefiting from the programme that the Probation Service has devised for him. Secondly, through no fault of his, the hearing of this reference has been delayed well beyond the time that it would normally be heard. We would not expect these circumstances to recur and sentencers for this type of offence in future will wish to keep in mind the views expressed by this court as to the appropriate disposal for defendants such as the offender in this case.