IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCES

(NOS.1 AND 2 OF 1996)

MacDERMOTT LJ (giving the judgment of the court at the invitation of Hutton LCJ).

These are references by the Solicitor General, as deputy for the Attorney General, to the Court of Appeal under section 36 of the Criminal Justice Act 1988 (the 1988 Act) of sentences which he considers to be unduly lenient.

At Belfast Crown Court on 19 October 1995 the 2 respondents, Robert Kennedy and Charles Clarke, stood charged with 2 offences arising out of an incident which occurred during the early hours of 5 October 1994 at Havana Court, Belfast. Both applied to be re-arraigned and each pleaded guilty to both counts. On count 1 (causing grievous bodily harm with intent to Gabriel Duffy contrary to section 18 of the Offences against the Person Act 1861 (the 1861 Act)) Kennedy received a sentence of 18 months' imprisonment suspended for a period of 3 years and Clarke a sentence of 2½ years also suspended for 3 years. On count 2 (burglary by entering 25 Havana Court as a trespasser and inflicting grievous bodily harm on Gabriel Duffy) Kennedy and Clarke each received a concurrent sentence of 3 months similarly suspended. His Honour Judge Smyth QC also made a compensation order in the sum of £750 against Kennedy and £1,000 against Clarke.

The background facts can be stated shortly. During the evening of 4-5 October 1994 the respondents and Mr Duffy had been drinking in the Jamaica Inn. Mr Duffy left about 1.30 am and was being escorted to his home at 25 Havana Court by his 16-year old daughter Sylvia Duffy, the journey being about half a mile. Clarke approached and asked to walk Miss Duffy home but Mr Duffy told him to leave them alone. As they were approaching Havana Court Clarke appeared with 2 other men (one of whom was Kennedy). Clarke put Mr Duffy to the ground and all 3 proceeded to kick and punch Mr Duffy who lost consciousness for a short time. Miss Duffy managed to college other members of the family and they got Mr Duffy into his home. The respondents and the other man then returned, entered No.25 and continued their assault upon Mr Duffy. When seen at the accident and emergency unit of the Mater Hospital, Mr Duffy was complaining of a sore jaw and pain in the right side of his chest. X-ray examination revealed a bilateral fracture of the mandible which was reduced and fixed by bone plates under general anaesthetic. Mr Duffy also lost several teeth.

This was clearly a vicious and unprovoked assault and its seriousness is not diminished by the fact that Mr Duffy a man aged about 40 appears to have made a good recovery. It is a sad fact that this type of gratuitous violence is all too prevalent at the present time and courts in this jurisdiction have repeatedly sought to make it clear that such behaviour is totally unacceptable and will almost inevitably lead to an immediate custodial sentence so that the offenders may be properly punished and others may be deterred from such misconduct.

Mr Coghlin QC (who appeared with Mrs Kitson for the Attorney General) accepted that custodial sentences of 18 months and 2½ years could be appropriate but he submitted that when they were suspended the effective sentences were unduly lenient.

Mr Coghlin emphasised a number of aggravating features which were present in this case: (a) this was an unprovoked and planned attack on the victim at night and in a public place; (b) the attack on the victim was violent and savage and involved kicking and punching; (c) this was an attack by 3 men on the victim and Clarke initiated the attack; (d) the attack was continued by the offenders and their accomplice forcing their way into the victim's house.

In relation to Clarke, Mr Coghlin pointed out that Clarke was at the time of the offence still on licence for offences of violence.

On behalf of Kennedy, Mr Mooney QC (who appeared with Mr Gibson) argued that the sentence was not unduly lenient and that there were a number of mitigating features: (1) the respondent pleaded guilty to the offence; (2) the respondent had a clear record; (3) the respondent who suffered from an industrial accident disability had responsibility for the care and supervision of his young family, his wife working full-time as a care attendant; and (4) the injured party had made a full recovery.

On behalf of Clarke Mr McMahon QC (who appeared with Mr Magee) also claimed that the sentence was not unduly lenient and emphasised the following points. (1) The respondent pleaded guilty to the offence. (2) The respondent has responsibility for the care of his young child and he and his wife had left the area in which the offence occurred and had just got their first home which they were furnishing and decorating for themselves and were trying diligently to meet the payments. (3) The respondent had served a sentence at the young offenders' centre and had qualified as a hairdresser and had just secured his first full-time permanent employment and he and his partner who also worked were experiencing a modicum of financial security for the first time in their lives. (4) The learned trial judge was taking an exceptional course in order to afford the respondent the chance to keep his employment as both he and his partner grew up in an area of very high unemployment. (5) The incident was not premeditated but arose out of a situation where the respondent and the injured party had been drinking. (6) The injured party made a complete and immediate recovery and did not attend hospital to keep any of

the follow-up appointments which were made for him. (7) The trial judge, as appears from his judgment, inquired as to the extent of the injured party's injury from the doctor who was present in court, and also from the officer in charge. (8) The respondent had not come under any adverse police notice whatsoever since the incident.

The issue for this court can therefore be posed as a question: were suspended sentences in the circumstances unduly lenient sentences?

Counsel have referred us to a number of cases in which the appellant was sentenced under sections 18 or 20 of the 1861 Act for assaults involving kicking the victim on the ground and causing serious injuries, often to the head. Several clear principles emerge from the cases.

1. On conviction in respect of a section 18 offence an immediate prison sentence is almost inevitable. The words of Lord Lane CJ in Attorney-General's Reference (No.7 of 1991) [1991] 13 Cr.App.R.(S) 285 at 288 are particularly apt:

'Indeed anyone who knocks his victim to the ground and then kicks him in the face, faces the possibility at least of conviction under the terms of section 18 of the Offences Against the Person Act. It needs no pronouncement from this Court to emphasise the gravity of such a conviction. Generally speaking an immediate custodial sentence is inevitable'.

This proposition was affirmed by Carswell LJ in R v Wright and Hall [10 June 1994, unreported] where the conviction had been under section 20. He said:

'Even regarding the case, as the Judge properly did, as one under section 20 and assuming in favour of the applicants, as one must, a lack of intent on their part to do grievous bodily harm, the courts have said that they regard the deliberate kicking of a helpless victim as an offence requiring custodial penalties and one which requires a clear approach by the courts to deter other people. I refer to the judgment of Simon Brown J in R v Moore [1991] 13 Cr.App.R.(S) 130, 131 where he said: "A very serious view must inevitably be taken of a vicious attack of this nature sustained long after any conceivable explanation of its start. Kicks to the head of a man lying helplessly on the ground gravely aggravate any assault"'.

In Moore's case a sentence of 3 years' imprisonment was upheld and the sentences of 15 months imposed on Wright and Hall were also affirmed.

2. The fact that a respondent has been at liberty since being sentenced does not fetter the court's discretion to impose an immediate custodial sentence. We would repeat what this Court said in Attorney-General's Reference (No.1 of 1993) [1993] NI 38 at 44:

'In Attorney-General's Reference (No.1 of 1990) [December 1990, unreported] this court sent the offender to prison for 3 years notwithstanding that the Crown Court judge had suspended the sentence. In England, also, the Court of Appeal have increased sentences which are unduly lenient notwithstanding that the offender was at liberty when that court gave its decision. But the court takes account of the additional stress which will be suffered by the offender in the circumstances by reducing the sentence which they would otherwise impose'.

3. The fact that the respondents were also ordered to pay compensation to the victim cannot be a valid reason for imposing a sentence very substantially below the normal range (see R v Dorton [1987] 9 Cr.App.R.(S) 514). We emphasise this point because in the course of counsel's submissions the judge said: 'I am going to consider a suspended sentence and compensation order'. We would repeat the observation of French J in Dorton (at 516):

'In our judgment, it is not right, certainly not right in every case and certainly not right in this case, to regard the imposition of a compensation order as being by way of additional punishment. It is a speedy, summary and cheap method of ensuring that where funds are available to compensate a victim compensation shall be paid'.

In repeating this observation we have borne in mind that in Northern Ireland it may be easier to obtain satisfactory compensation under the criminal injury code than it is in England and Wales.

We would emphasise that compensation orders must be made with caution lest it be felt that an accused with means is buying his way out of a custodial sentence. Lord Taylor CJ, commenting on the remarks of a trial judge when making a compensation order, said in Attorney-General's Reference (No.10 of 1992) [1993] 15 Cr.App.R.(S) 1 at 3:

'The remarks might suggest that providing someone has some money which enables him to pay compensation, he can buy his way out of having a sentence imposed upon him in a grave case of this kind. That is wholly wrong as is evident from a number of previous decisions of this Court'.

4. The fact that an offender has behaved after the imposition of a lenient sentence need not deter the court from imposing a custodial sentence if it is satisfied that that is the proper sentence. Lord Taylor CJ put the matter this way in Attorney-General's References (Nos.21, 22 and 23 of 1993) [1994] 15 Cr.App.R.(S) 741 at 744:

'We want to make it quite clear that if a sentence is unduly lenient, and markedly so, the mere fact that the offender, counting his lucky stars, makes the best of a lenient sentence passed upon him, is not conclusive as to what this Court should do on an Attorney-General's reference. Submissions which were made to us

suggested that because there had been a favourable response by the offenders to the sentences passed by the learned recorder, that showed that the learned recorder had shown great perception and had got the right sentence. We do not so read the situation. We have to consider not only the response of the offenders and their rehabilitation, but also the gravity of what was done and how the public would regard that … if people get the idea that this kind of violence may take place without any form of retribution, then we will be liable to have a great deal more violence, and people will think they can commit violence with impunity'.

5. An attack upon a person in his home is a particularly aggravating factor. Lord Taylor CJ made this point in Attorney-General's References (Nos.21, 22 and 23 of 1993) (at 744):

'To attack anybody unprovoked is bad enough. When the attack takes place by 2 people on one who is sitting down in his home, it is worse. An attack in somebody's own home is itself an extremely aggravating feature …'.

In this case it must be remembered that Mr Duffy was attacked by 3 men in the street and instead of departing into the night they returned and continued their attack in his home.

Against these general observations we return to the issue in the present case - was it proper in the circumstances to suspend these sentences? At this stage we would venture to repeat the elementary, but sometimes forgotten, proposition that before suspending a sentence a judge has to apply his mind in turn to 2 separate questions: (1) does the offence require a custodial sentence; and (2) if it does do circumstances exist which would justify a suspension of the sentence? We would repeat what Hutton LCJ said in Attorney-General's Reference (No.2 of 1993) [1993] 5 NIJB 75 at 76:

'It is also important to emphasise that the decision to suspend a sentence should only be taken after the judge has decided that a sentence of imprisonment should be imposed and after he has decided what the length of that sentence should be. It is only after he has taken those 2 decisions that he comes to the third and final decision whether he should suspend the sentence'.

And (at 76-77):

'Therefore when a judge follows the correct procedure in suspending a sentence of imprisonment, he does not decide at the outset that he will not impose a sentence of imprisonment. Rather he decides that the offence merits a sentence of imprisonment for a specific period, and he then turns to decide whether there are circumstances which justify him in suspending that sentence'.

We emphasise this matter because in the course of the argument it was suggested that the judge's early reference to a suspended sentence and a compensation order might indicate that he had not followed the correct sequence of reasoning. This is a very experienced judge and, as it is quite unnecessary to rehearse every detail of one's thinking process when passing sentence, we are very willing to accept that the judge decided that a custodial sentence was necessary and then satisfied himself that it was proper to suspend that sentence.

Clarke's case

We turn back to the arguments of counsel. We have already outlined the substances of Mr McMahon's argument on behalf of Clarke. He emphasised, firstly, that this was an attack which did not 'come out of the blue' as there was evidence of some exchange in the Jamaica Inn and Clarke had been denied the opportunity to walk Miss Duffy home. All that may be so, but Clarke decided to remain in the vicinity, attacked Mr Duffy and continued the attack into his home. In that sense the attack was premeditated though the amount of planning may have been slight. Secondly this offence occurred at a particularly critical point in Clarke's comparatively young life - he is now 22. On 25 September 1992 he was sentenced to 4 years in the young offenders' centre for a series of serious offences of violence. He was released on 10 March 1994 and was on licence until 28 February 1996. He had made good use of the training facilities in the young offenders centre and emerged equipped to obtain employment as a hairdresser and has since been doing well in that career. He and his girlfriend have got their own house and she has just been promoted to the post of chef. All this, Mr McMahon argues, and with good reason, indicates that Clarke has turned the corner and is determined to forsake crime and lead a useful life. In such circumstances the judge was, he claims, fully entitled to impose a suspended sentence as an immediate custodial sentence would frustrate the chances of Clarke developing as he has done since leaving the young offenders' centre.

However, a sentencer must have regard not only to the circumstances of the offender but to the circumstances of the offence. Here Clarke when on licence saw fit to attack Mr Duffy in an unprovoked and seriously aggressive manner. That was the time when he should have paused and thought about his future and that of his girlfriend. We have considerable sympathy for both of them. We recognise that mercy should season justice but the very facts that made this offence one requiring a custodial sentence - gratuitous and repeated violence at night and in the house involving kicks to the face - are facts which militate against the suspension of the sentence. We would repeat and adopt the words of Lord Taylor CJ in Attorney-General's Reference (No.27 of 1993) [1994] 15 Cr.App.R.(S) 737 at 740 (a case where a footballer head-butted an opposing player and was made the subject of a probation order):

'We understand it may well be in his interests and indirectly in the interests of society that an offender should be rehabilitated and progress made towards his

being responsible and hard-working. But there is another aspect to the public perception of offences of this kind and that is that there are too many of them these days on football fields, on the terraces of football grounds and indeed in the streets. If the idea becomes current that that kind of conduct amounting to an intention to do really serious harm to somebody is to be dealt with by putting them on probation and hoping that they will respond satisfactorily, then that idea has to be scotched'.

Accordingly we are satisfied that the judge was in error in suspending the sentences in Clarke's case and that the suspended sentences were unduly lenient. Therefore the sentence of 2½ years and the concurrent sentence of 3 months must be brought into operation and Clarke must serve those sentences. Mr Coghlin directed our attention to para 10 of Schedule 3 to the 1988 Act which reads:

'The term of any sentence passed by the Court of Appeal or House of Lords under section 36 above shall, unless they otherwise direct, begin to run from the time when it would have begun to run if passed in the proceeding in relation to which the reference was made'.

The result, as we understand it, is that the period between the date on which the original sentence was imposed (19 October 1995) and today's date will be reckoned as served when calculating Clarke's release date. This would mean that Clarke will actually serve less than 2½ years (with remission 15 months). As 'double jeopardy' and continued anxiety on the part of the offender as to the outcome of these proceedings are matters to which the court pays regard we consider that this statutory result will not be unfair.

Kennedy's case

A point made by Mr Mooney was that Kennedy had pleaded guilty on the basis that his involvement in the attack on Mr Duffy occurred because he came across the attack and in seeking to separate Clarke and Duffy used excessive force. This does not accord with the evidence revealed in the depositions and no application was made for a 'Newton' hearing to resolve this issue (see R v Newton [1982] 77 Cr.App.R.13). That said the judge proceeded to sentence Kennedy on the basis that he got involved for some 'inexplicable reason' and, in any event, however Kennedy became involved initially he participated in the renewed attack in Mr Duffy's house. Mr Mooney further emphasised the extremely adverse effects on Kennedy's family which would flow from his being in custody - his wife, a care assistant, would have to give up her job to look after the family (a task which Kennedy presently performs being unfit for work). Sadly a prison sentence often has a serious, sometimes devastating, effect on family life but that is not normally a mitigating factor though in exceptional circumstances some weight may be given to it in determining the length of the sentence.

The judge drew a marked distinction between Clarke and Kennedy in that the latter received a sentence which was one year less than that of Clarke. We have no doubt that the facts justify such a distinction. However, in this case also we have no doubt that the facts relating to Kennedy's involvement and domestic circumstances do not warrant the suspension of his sentence.

Accordingly we declare that the suspended sentences imposed on Kennedy were unduly lenient and direct that the sentences imposed (effectively of 18 months) should be served as if imposed on 19 October 1995.

This judgment constitutes a clear warning that the courts are determined to deter, by means of custodial sentences, those who might otherwise commit the type of violent crime carried out by the offenders in this case. Citizens should be able to walk the streets of this city and this province free from the threat and fear of violent attack.

This court also makes it clear that if violent attacks, of the nature committed in this case, are carried out in the future, it may be necessary to impose custodial sentences considerably in excess of the level of sentences imposed on these offenders.

Order accordingly.