Neutral Citation No. [2013] NICA 73

Ref: **COG9073**

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

Delivered: **10/12/13**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GARETH EDWARD MARCUS

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE
(NUMBER 1 of 2013)

Reference under Section 36 of the Criminal Justice Act 1988 (as amended by Section 41 of the Justice (NI) Act 2002)

Before: Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is a reference by the Director of the Public Prosecution Service (the "DPP") under Section 36 of the Criminal Justice Act 1988 (as amended by Section 41 of the Justice (NI) Act 2002) grounded upon the submission that the sentence of four years suspended for three years passed upon Gareth Edward Marcus ("the appellant") on 8 February 2013 was unduly lenient. The DPP was represented by Ms Walsh while Mr John McCrudden QC and Mr Taylor Campbell appeared on behalf of the appellant. We are grateful to counsel for their carefully considered and succinctly delivered written and oral submissions.

The factual background

[2] The factual background has been set out in considerable detail in the course of the judgment of this court delivered on 24 October 2013 dismissing the appellant's appeal against conviction. In summary, at about 1.50 am on 13 July 2010 a householder, who was in his house in the Donegall Road area of Belfast, heard a smashing of glass and a number of bangs. He realised that a device had

been thrown through a broken pane in the front door into the hallway. The device was fizzing and subsequently exploded while the householder was taking shelter in the kitchen. The device was found to have contained a firework rocket body in a glass jar with 32 nails taped around the jar. The appellant was stopped by the police shortly after the incident and DNA testing showed that it was his blood that had been found on the broken glass panel in the front door. The appellant was interviewed and, after an initial period denying involvement, he admitted that he had been at a Twelfth night bonfire, that he had been very drunk and that he had agreed to assist a person, whom he did not name, to put a "firework" in a "taig's house". He told the police that, when they arrived at the house, he had refused to light the firework but had broken the window to allow the firework to be thrown into the house. He claimed to have no specific knowledge of the exact nature of the device, that this was a one-off incident out of character for him and that he was not and never had been in any way sectarian.

[3] On 18 December 2012 the respondent was convicted of:

(*a*) Count 1 (possession of explosives with intent to endanger life or cause serious injury to property, contrary to Section 3(1)(*b*) of the Explosive Substances Act 1883).

(*b*) Count 2 (causing an explosion likely to endanger life or to cause injury to property, contrary to Section 2 of the Explosive Substances Act 1883).

The sentencing

[4] Each of the offences of which the respondent was convicted carries a maximum sentence of life imprisonment. In sentencing the respondent on 8 February 2013 the learned trial judge, His Honour Judge Kerr QC, imposed sentences of 4 years imprisonment suspended for 3 years in respect of each count, the sentences to run concurrently. In imposing such sentences the learned trial judge noted that it was common sense that the presence of nails was intended to cause the maximum personal injury and damage inside the property and that, despite the compelling DNA evidence, the respondent had denied involvement and had only changed his account after a second application that there was no case to answer in respect of Count 2 had been refused. He considered that the effect on the victim and the sectarian nature of the attack were significant aggravating factors and concluded that the starting point for the appropriate commensurate sentence was one of 7 years imprisonment.

[5] In terms of personal mitigation the learned trial judge identified the following factors:

- The respondent's clear criminal record.

- The respondent's youth (20 at the time of the offence).

- The pre-sentence report that recorded the respondent had expressed shame and regret, that he had demonstrated victim empathy and that he had recognised the impact of his actions. Accordingly, he had been assessed as constituting a low risk of re-offending and did not represent a significant risk of causing serious harm.

- Evidence that the respondent had a history of non-sectarianism both before and after the offence continuing up to the date of trial and that the offences were out of character. The learned trial judge noted that the respondent had not been involved in any further trouble during the 2½ years since the offence, that he had led what appeared to be a useful and productive life performing work that appeared to be of benefit to the community as a whole and that 11 good character references had been produced on his behalf. He also recorded the fact that the respondent came from a loving and supportive family environment and was in a stable relationship with a Catholic girlfriend. The learned trial judge considered those factors to warrant a reduction of the custodial sentence to one of 4 years imprisonment.

[6] It is clear that the learned trial judge took into account the decision in Attorney General's Reference (Nos 3 and 4 of 1992) [1992] NI 187, a case involving the throwing of petrol bombs, and the remarks of Hutton LCJ who said, at page 196:

> "Second, in a case of this nature, the court must pass sentences intended to deter others from throwing petrol bombs at vehicles or houses carrying or occupied by other people. It must be brought home to young men and others that in using petrol bombs they are playing with fire in more senses than one, and that anyone who is convicted of throwing a petrol bomb at a house or a vehicle giving rise to the risk of injury will go to prison or into detention. The need to punish and deter petrol bomb offenders must override the good record and personal circumstances of the offenders."

In the context of that authority the learned trial judge recorded that his task was to balance the public interest in deterrent sentencing with the personal circumstances of the offender. It is quite clear that he gave very careful and anxious consideration to his task and, having done so, he decided to suspend the sentence of 4 years imprisonment for a period of 3 years in accordance with the provisions of Section 18(1A) of the Treatment of Offenders (NI) Act 1968.

The grounds for the reference

[7] Ms Walsh helpfully commenced her submissions by confirming that the reference was focused solely upon the suspension of the sentence of imprisonment. While she accepted that the learned trial judge had the power to suspend the sentence, she submitted that, in a case of this nature, such a power should only have been exercised in the context of "exceptional circumstances" which were not present in this case.

The respondent's submissions

[8] On behalf of the respondent Mr McCrudden QC reminded the court that in this jurisdiction, unlike that of England and Wales, there has never been a statutory requirement that the suspension of sentences of imprisonment could only be justified by exceptional circumstances. However, he also accepted that, as a matter of practice in this jurisdiction, the offences of which the respondent had been convicted and the circumstances which had given rise to such offences would generally attract an immediate custodial sentence in the absence of exceptional circumstances. He also drew our attention to the fact that Section 18(1A) of the 1968 Act contained a power to suspend a sentence of imprisonment of up to 7 years. In that context we note the decision in Attorney General's Reference (No. 2 of 1993) [1993] 5 NIJB 71 in which this court refused to substitute immediate custodial sentences for sentences of 2 and 3 years imprisonment suspended for 3 years in respect of offences of burglary and causing grievous bodily harm with intent. In reaching that conclusion Hutton LCJ quoted with approval the well-known observations of Lord Lane in Attorney General's Reference (No. 4 of 1989) at 521 when he said:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this Court from time to time in so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition that is soundly based in law as it is in literature."

Discussion

[9] There can be no doubt whatever but that the circumstances of these offences warranted deterrent sentences and that the sectarian element enhanced the requirement for such sentences. On the respondent's own case he was clearly aware of the sectarian nature of this attack. Sectarianism has fuelled community hatred and violence in this jurisdiction for many years and, sadly, appears to continue to do so. It seems that there have been 44 attacks upon the victim's family home over a period of 25 years and a perusal of the victim impact report in this case reveals the stark reality of the extent of the devastating personal and social damage suffered as a consequence of this particular attack. As the consultant clinical psychologist confirmed in his report of 18 January 2013, the victim meets the diagnostic criteria for Post Traumatic Stress Disorder which is a debilitating psychiatric condition that affects many aspects of psychological and social functioning. As recently as November of this year Morgan LCJ, in delivering the judgment of this court in a DPP reference of sentences arising out of convictions for riotous assembly (DPP Ref (Nos 13, 14, and 15 of 2013) [2013] NICA 13), observed, at paragraph [11]:

> "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."

Accordingly, despite the personal mitigation eloquently advanced by Mr McCrudden QC on behalf of the respondent, we are satisfied that the suspension of this custodial sentence was unduly lenient in this case.

[10] However, that is not necessarily the end of the matter. Section 36 of the 1988 Act provides this court with a discretion as to whether or not to interfere with the sentence passed at first instance even if it comes to the conclusion that such a sentence was "unduly lenient" (A-G Reference (No 1 of 1993) [1993] NI 38), A-G Reference (No 3 of 2004) [2004] NICA 20). In this particular case the question arises as to whether, in the exercise of that discretion, this court is entitled to consider circumstances, exceptional or otherwise, that have arisen since sentence was passed.

[11] The conduct of the respondent since conviction featured prominently in a number of the documents that have been submitted upon his behalf as illustrated by the following examples:

- "I know that he has completed a level two in youth work and he currently volunteers with South City in working with young people in a mentoring role pointing out the bad decision he made in relation to this incident. I am aware that he is also working in a job placement with Greater Village Regeneration Trust through the Belfast Sports Community Development Network in delivering sports coaching to young people from a disadvantaged background." – Councillor Bob Stoker, Balmoral Electoral Area.

- "Gareth has been involved in my project the REACH project in Youth Action NI for around 10 months. He has completed accredited training in youth work, personal development, goal setting and self-awareness. He has been a joy to work with and participated fully in every class we ran. He was honest, supportive and willing to share his experiences to help other members of the group. He has repeatedly spoken to other members of the group about his experiences and worked well with all members of the group regardless of backgrounds, religion etc. He was willing to provide a listening ear for those young people who felt comfortable speaking to him and point them in the right direction to seek support and guidance … He has been a positive role model in all the programmes he has been involved in." - Youth Action Northern Ireland.

- "In the last two years Gareth has provided a great example of how volunteering in local community work can contribute to the development of young men, youths, and adults alike within the Village and South West Belfast Area …. On Saturday evenings Gareth has been assisting on a crime prevention programme called "Midnight Street Soccer", he manages and mentors a football team of 10 local youths aged 14 to 17. These youths would normally be engaged in anti-social behavior but with Gareth volunteering on the programme it enables GVRT to take another group of youths off the street and engage them in activities within their local community … Through delivery of these volunteer classes and sessions Gareth has completely shone. The feedback from the local participants engaged in Gareth's classes/sessions has been fantastic. Each group or individual had nothing but admiration for Gareth and how well he instructs them through their class/session. … The community work that Gareth has undertaken to date has shown that he is worth the investment of the above courses, throughout his time volunteering as a support worker he has always had a keen eagerness to engage his local community and make a positive change to the youths and young men of the area." – Greater Village Regeneration Trust.

We consider particularly impressive the confirmation by the various character witnesses that the respondent has used his own criminal behavior and subsequent

conviction as a means of positively discouraging other susceptible youths from similar conduct.

[12] According to the author of "Valentine on Criminal Procedure in Northern Ireland" (2nd edition) the general rule when considering appeals against sentence in this jurisdiction is that the court should not hear evidence of facts occurring after the trial judge's sentence was imposed. The author refers to the decision in R v Winchester [1978] 3 NIJB. However, in that case Lord Lowry LCJ was relying on a passage contained in the 39th edition of Archbold and, as the author went on to add, "…such evidence has often been heard" – see now Archbold 2014 at 7-139 and the authorities therein cited.

[13] We note with interest the England and Wales Court of Appeal decision in Attorney General's Reference (No. 123 of 2002) [2003] EWCA Crim. 949. In that case the offender, who was 17 at the time of the offences, had been sentenced to an 18 month Community Rehabilitation Order with 100 hours community service for numerous robberies and burglaries. The Attorney General referred the case to the Court of Appeal on the grounds of the sentence being unduly lenient. In the course of delivering the judgment of the court Rose LJ observed at paragraph [17]:

> "There is no doubt that the sentence he (the Recorder) passed was a lenient one. Even on the assumption that it was an unduly lenient one, which it may not have been, the question which arises, on a Reference of this kind, is whether or not the court should now interfere with the sentence which the Recorder passed. In that regard, it is of great significance what progress has been made by the offender since the learned Recorder passed sentence. This can be gleaned from two reports which are before this court. The first is dated 10 March 2003, and was prepared by a probation officer for the benefit of this Court. It is apparent from that report that the offender has successfully completed the community punishment element of the order made by the Recorder. He has, indeed, worked very well on each occasion that he has undertaken sessions supervised by the Community Service Unit. Furthermore, he is continuing to attend a college where his studies are going well. He was referred to that college by a mediation service to whose report, in a moment, we shall come."

After referring to the report from the mediation service in positive terms Rose LJ went on to conclude at paragraph [20]:

> "In the light of these observations, and the progress made by the offender since the learned Recorder passed sentence upon him, even if we were to take the view that the sentence passed by the learned Recorder was an unduly lenient one, it is not a sentence with which, in all the wholly exceptional circumstances of this case, we would think it appropriate, in the exercise of our discretion, to interfere, either in the interests of the public, or of the offender. Accordingly, we do not do so."

A similar approach was adopted in this jurisdiction by Kerr LCJ in A-G Reference (No 3 of 2004).

[14] Accordingly, in the exceptional circumstances of this particular case, despite our firm conclusion that it was unduly lenient, we are prepared to exercise our discretion in favour of letting this sentence stand.

[15] We simply conclude this judgment by re-emphasising once again what should by now be self-evident, namely, that in this jurisdiction acts of violence influenced by any form of sectarianism must, in the absence of exceptional circumstances, attract significant deterrent custodial sentences.