IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BAKER AND ANOTHER

MacDERMOTT LJ (delivering the judgment of the court)

This is an appeal by each appellant against a sentence of 6 months' imprisonment in respect of a joint charge of burglary imposed by His Honour Judge McKee QC at Belfast Crown Court on 28 January 1998.

The background facts can be stated shortly.

On Saturday 28 September 1996 at about 4.45 am police were informed that 2 men were acting suspiciously in the vicinity of the Borough Arms Public House in Carrickfergus. On their arrival there were 2 men present who immediately walked or ran off. The police gave chase and the 2 appellants - James Alan Esdale Baker and Stephen James - were soon apprehended: the latter emerging from a wheelie bin in which he had been hiding. They were taken to Larne RUC Station. It would appear that both were considerably the worse for drink - indeed they were not interviewed until after midday.

Examination of the area revealed that entry had been gained to the Borough Arms by forcing a hole in a rear first floor roof. Nothing was taken from the premises but the repairs to the roof cost £690. Forensic examination of fibres around the roof opening showed that 10 fibres of 2 fibre types could have come from James' trousers.

At interview each described being at a party - Baker claimed he was 'blocked': James said he was not particularly drunk. Each denied being in the public house.

On rearraignment on 11 December 1997 each pleaded guilty to the burglary charge (count 1) and count 2 (criminal damage) has been left on the books. The matter was adjourned for pre-sentence reports and these are dated 26 January 1998. The appellants were much more forthcoming with the probation officer than they had been with the police. This is her account.

James

'He advises me that he had consumed a large quantity of alcohol over the period of the day. He states that having finished work at Kilwaughter House Hotel, he and his co-accused went to a party in Carrickfergus and later left to get cigarettes. He informs me that it was as they were making their way to the garage that they passed a shop selling paint, near the Borough Arms. He tells me that he then suggested to his co-accused that they steal paint, as he states his sister was redecorating at the time. He advises me that he then climbed onto the roof of the building from the back of the shops and tells me that he then realised that he had broken into the Borough Arms as opposed to the supposed paint shop and left the roof. He was apprehended by the police as he was leaving the scene'.

Baker

'He advises me that he and his co-accused had consumed a large quantity of alcohol over the period of a day. He tells me that he and his co-accused had been attending a party in the Carrick area, when they decided to leave to buy cigarettes in a local garage. He informs me that as they passed a shop selling paint his co-accused suggested that they steal paint as his sister was redecorating at the time. The defendant states that he subsequently kept watch as Stephen James attempted to break into the roof of the supposed paint shop. He states that they were in the process of leaving the scene, realising what they had done, when the police arrived. They were both apprehended after a police chase.

It seems that the plea proceeded on the basis that these reasonably similar versions were correct. Thus the significant facts are: (1) This was a drunken incident. (2) It was not pre-planned. (3) Entry into the public house was in fact a mistake. (4) We know that in fact nothing was taken from the Borough Arms though damage was caused to the roof. We also know that these 2 men aged 25, James, and 24, Baker, have no particularly relevant criminal record; though Baker has one conviction for theft for which he was fined £60.

On reading the papers we each felt rather surprised that this very experience judge considered that a 6 month custodial sentence was appropriate. Reading his sentencing remarks what emerges is that he considered that burglary is a serious offence. That is so: indeed there is far too much of it and the observation of Hutton LCJ in R v Lendrum[1993] 7 NIJB 78 at 86-87 bears repetition:

'We have carefully considered whether we should follow the approach taken in England and establish a lower level of sentencers for the burglary of commercial and business premises. We have decided that we should not reduce the level of sentences. We consider that the court should seek to protect the occupiers of shops and other commercial premises against burglaries by imposing sentences for such

offences which contain a deterrent element, particularly when the offender has previous convictions for burglary'.

Another factor in this case is that by the time the appellant was to be sentenced Article 19 of the Criminal Justice (Northern Ireland) Order 1996, SI 1996/3160 (the 1996 Order) was in operation. That article reads:

'(1) This Article applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.

(2) Subject to paragraph (3), the court shall not pass a custodial sentence on the offender unless it is of the opinion -

(a) that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence; or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.

(3)Nothing in paragraph (2) shall prevent the court from passing a custodial sentence on the offender if he refuses to give his consent to a community sentence which is proposed by the court and requires that consent.

(4)Where a court passes a custodial sentence, it shall -

(a) in a case not falling within paragraph (3), state in open court that it is of the opinion that either or both of sub-paragraphs (a) and (b) of paragraph (2) apply and why it is of that opinion; and

(b) in any case, explain to the offender in open court and in ordinary language why it is passing a custodial sentence on him.

(5)A magistrates' court shall cause a reason stated by it under paragraph (4) to be specified in the warrant of commitment and to be entered in the Order Book'.

It is questionable if that article in effect alters existing appropriate sentencing practice as custodial sentences in this jurisdiction have been imposed on the basis that the offence was so serious as to justify a custodial sentence. That said it would seem to be advisable that sentencers proposing to impose a custodial sentence will refer to the article and indicate that they consider that this offence is sufficiently serious to justify a custodial sentence - indeed Article 19(4) requires them to do so. In the course of counsels' submissions the question arose as to whether or not Article 19 applied as the guilty plea was before the operative date (1 January 1998) and the

sentence was after it. Schedule 6, para 1 of the 1996 Order, however, makes it quite clear that Article 19 does apply.

Mr Blackburn appeared for James and Mr Connor for Baker. Mr Blackburns' grounds of appeal were:

'That the Learned Trial Judge's sentences of 6 months' imprisonment on the appellant for one offence of attempted burglary contrary to section 9(1)(a) of the Theft Act (NI) 1969 was manifestly excessive in the particular circumstances of this case, in that: The Learned Trial Judge did not give sufficient weight to the following factors in mitigation on behalf of the appellant when imposing sentence in that: (1) The appellant had pleaded guilty to the offence. (2) The appellant had no previous convictions of any sort for any offence of dishonesty. (3) The appellant's only previous conviction was for a motoring matter. (4) It is clear from the facts of the case that premeditation for this offence was very limited in as much as both the appellant and his co-accused had consumed a great quantity of intoxicating liquor before forming a drunken intent. (5) That the offence had occurred in September 1996 and the appellant had not any further involvement with the police for a period of nearly 16 months prior to being sentenced by the Learned Trial Judge. (6) That this was an isolated incident which was out of character for the appellant who has served for 7 years in HM Armed Forces as well as holding down some other jobs. (7) That neither the justice elements of the case nor the deterrence element for the appellant or other offenders required the Learned Trial Judge to impose a sentence of immediate custody in this particular case'.

The grounds of appeal advanced by Mr Connor in respect of Baker were:

'1. The Appellant pleaded guilty to one count of burglary contrary to section 9(1)(a) of the Theft Act (NI) 1969 and received a sentence of 6 months' imprisonment.

2. It is respectfully submitted that having regard to the circumstances surrounding the offence and the character and background of the appellant the sentence was manifestly excessive and wrong in principle for the following reasons: (i) The Learned Trial Judge failed to attach sufficient weight to the plea of guilty. (ii) The Learned Trial Judge failed to attach sufficient weight to the character and antecedence of the appellant. (iii) The Learned Trial Judge failed to take account of the likelihood of re-offending and alternative methods of disposal. (iv) That neither the justice element of the case nor the deterrence element for the appellant or other offenders required the Learned Trial Judge to impose a sentence of immediate custody in this particular case'.

Counsel referred us to a number of cases in which the Court of Appeal in England has considered whether or not what is called the threshold of seriousness has been reached. Understandably that threshold cannot be defined - each case depends on its own facts and circumstances and the court, of course, has regard to the circumstances of the offender. We are satisfied that no useful purpose is served by an analysis of such cases though we pay tribute to the industry of counsel who prepared lists of authorities for our consideration. The judge referred to one

authority which he considered helpful. It was R v Bleasdale [1984] 6 Cr.App.R.(S) 177. In that case the accused had a previous conviction for larceny which was a most significant factor and we do not read that case as establishing any guideline principle.

For our part we are satisfied that this offence did not require a custodial sentence and as we suggested earlier we have reached that conclusion whether or not Article 19 was relevant. We take that view because we are satisfied that this was a drunken and unplanned piece of stupid, but wrongful, behaviour by 2 young men whose records do not suggest that they are likely to re-offend.

Accordingly we shall allow the appeal and quash the sentences of imprisonment. As the reports favour community service and as the appellants are willing to do such work we shall direct that each appellant does 100 hours of community service being satisfied that the instant offence was sufficiently serious to justify such a sentence.

Appeal allowed.