R v Delaney
COURT OF APPEAL (CRIMINAL DIVISION)

CARSWELL LJ20 MAY 1994

20 May 1994CARSWELL LJ
(giving the judgment of the Court): This is an application for leave to appeal against sentences imposed by His Honour Judge Hart QC, sitting at Ballymena Crown Court on 10 April 1993. Leave to appeal was refused by the single judge.

The applicant pleaded guilty to five counts of burglary, committed between 4 March and 31 August 1992 in the South Antrim area. He also asked for three additional similar offences to be taken into consideration. The common feature of these burglaries was that the applicant broke into houses during the day when the occupants were not at home, and stole substantial quantities of goods and cash from the houses. The burglaries were described by the learned trial judge as follows:

". . . this was burglary on a major scale and systematic burglary. There have been a large number of cases before this court in recent years where young men drive around the Southern part of Country Antrim and take advantage of the absence from their homes of people who live in the most rural areas and who are away all day at work, and as a result when they come home in the evening they find that their houses have been broken into and virtually every portable item of value removed."

The value of the unrecovered items amounts to a total of approximately £15,700. The learned judge sentenced the applicant to three years' imprisonment on each count, the sentences to run concurrently, and in addition put into effect a suspended sentence of six months' detention in a Young Offenders' Centre for driving whilst disqualified, imposed at Antrim Magistrates' Court on 29 April 1992, to run consecutively to the other sentences.

The applicant was born on 23 October 1971, and was aged 21 years at the time when he was sentenced. He was unemployed at the time, and has never been in work for any sustained length of time. He has a bad criminal record, going back to June 1987 in Belfast Juvenile Court. Many of the offences involve theft, going equipped for theft and taking motor vehicles without consent and he has convictions for burglary in 1989. The learned judge's description of the applicant as a "habitual criminal" is fully justified. A number of sentencing expedients has been tried by the courts over the past six years, including three terms of detention in a Young Offenders' Centre, but none has deterred him from repetition of his criminal behaviour.

In the psychological report furnished to the court the applicant was assessed as of being dull average intelligence. Dr Burton, the consultant psychologist, expressed the opinion that he is shy, somewhat reticent, has indulged in alcohol and solvent abuse and is impulsive and heedless of the consequences of his acts. The applicant

claims that he now wants to settle down, having been hitherto unsettled and drifting.

In his grounds of appeal the applicant set out a number of respects in which he claimed that the learned judge did not give sufficient consideration to the matters urged upon him. Counsel appearing before us for the applicant laid more stress on some of these than upon others, although, as I shall discuss in a moment, the main thrust of his case was the comparison between the sentences imposed upon the applicant and those imposed upon another offender Paul Patrick McFadden.

The first ground relied upon by the applicant was that the learned trial judge did not give sufficient credit for his pleas of guilty and for his co-operation with the police. In his remarks on sentencing the learned judge did refer to both factors, and he was aware of the relevance of each. Whether he gave sufficient credit for these is a matter which goes to determining whether the sentences were manifestly excessive when considered as a whole.

This is linked with the second point, that the police had no evidence in many of the cases, and that the applicant himself confessed to a number of burglaries which they could not otherwise have proved. Again the learned judge adverted to this in his remarks on sentencing. We find it difficult to see much force in the point, when the applicant was already caught for at least one burglary and had every incentive to clear the sheet by admitting other offences. It may, however, be borne in mind when looking at the length of sentence overall.

The third point made is that the learned trial judge did not have regard to the age of the applicant or the fact that he was imposing the first sentence of imprisonment upon him, when he had served his previous sentences of detention in the Young Offenders' Centre. The learned judge did refer to the gamut of sanctions that had been imposed upon the applicant without deterrent effect, so the point was present to his mind.

It was claimed, fourthly, that the judge did not have regard to the totality of the sentences which he imposed upon the applicant. This is a matter again to be considered in relation to the overall length of the sentences.

The fifth point made was that the learned trial judge did not give sufficient weight to the personal circumstances of the applicant and paid insufficient attention to the contents of the psychologist's report. On the contrary, the judge did consider both of these, as appears from his remarks. He was in our view quite entitled to express scepticism about the applicant's professions of a desire to settle down, in view of the fact that he recommenced offending soon after his release from prison, at a time when he was under a suspended sentence. He also failed to surrender to his bail, which does not indicate a settled and responsible attitude.

The ground upon which counsel relied most strongly at the hearing of the application was that of disparity between the treatment of the applicant and that of

his associate Paul Patrick McFadden. McFadden appeared before the same judge some months earlier, on 11 January 1993, when he pleaded guilty to ten counts of burglary and asked for a further twelve offences, almost all of burglary, to be taken into consideration. The amount involved was estimated at a total of £41,770 and the value of the unrecovered property at £38,605. Some of the offences with which Delaney was charged were committed along with McFadden and formed part of the cata1ogue of crimes to which the latter pleaded guilty. McFadden also had a bad record, which the judge described as "formidable". The learned judge imposed concurrent sentences of three years on McFadden for the burglaries and put into effect two suspended sentences, totalling nine months, which he made to run consecutively to the term of three years. When sentencing Delaney, the judge's attention was drawn to the length of sentence which he had given McFadden, but he went on to impose the same sentence of three years on Delaney.

It was submitted on Delaney's behalf that there was a material disparity of treatment between the two persons, in that although McFadden had stolen more property and had admitted more offences, nevertheless Delaney received the same sentence. It was argued on Delaney's behalf that there should have been a clear difference in sentence, to reflect the disparity in the offences, and that therefore Delaney had a justified sense of grievance.

In so arguing counsel was invoking the well known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see R v Brown [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: R v Bell [1987] 7 BNIL 94, following R v Towle and Wintle (1986, The Times, 23 January).

It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain. For example, in R v O'Neill [1984] 13 NIJB two defendants were properly sentenced by one judge on pleading guilty. A third contested the charge, and the case came on before another judge. He then changed his plea to

guilty, and was sentenced to a substantially lesser term, which the Court of Appeal regarded as "clearly inadequate". Gibson LJ went on to say, however, at page 6:

"The fact that a judge in sentencing a co-defendant has passed a sentence below the range which this Court has laid down or would consider justified is not a valid ground for reducing a sentence which is in no way excessive imposed on another accused. It is probably true that the appellant feels aggrieved having regard to the sentence passed on McCrory. But the fact that an appellant feels aggrieved that a co-defendant has received a substantially smaller sentence is not a proper ground for interfering with his sentence if that is the only ground. We consider, as did the English Court of Appeal in R v Weekes 74 CAR 161, that it is only if the grievance is justified that this Court should interfere. Where, as here, the sentence of 7 years obviously made every allowance for mitigating circumstances and was in itself a lenient one and where the sentence on McCrory is clearly inadequate and must have been known by the appellant to be well below the minimum for the offence of armed robbery, there can be no room for any justified sense of grievance by him."

It is only if a fair-minded and right-thinking person would feel that the disparity involved some unfairness to the appellant, as distinct from a possibly rueful feeling that his associate has been more fortunate in his treatment, that a court should intervene: cf R v Ellis [1986] 10 NIJB 117, per Lord Lowry LCJ.

When we apply this test to the present case, we have no hesitation in concluding that there has been no unfairness to the applicant. The sentence of three years' imprisonment was in our view a perfectly proper sentence for the court to impose in the circumstances of the case. Where criminals indulge in the habitual business of burglaries for gain, with substantial consequent loss to householders, disruption of their lives and damage to their property, they must expect commensurately condign punishment. We see no fault in the learned judge's approach to the sentence in this case and do not consider it at all excessive, let alone manifestly excessive.

It has been argued that his associate McFadden can count himself as somewhat fortunate in not receiving a heavier sentence, when he had committed more offences. Each man, however, received the same sentence on each count, namely three years, the sentences being made concurrent, which was the appropriate course for the judge to adopt. The only ground for contending that there was any disparity related to the fact that McFadden had committed more offences. If this could be said to constitute disparity then, as I have stated, it was not such as to lead us to reduce the entirely proper total sentence passed on Delaney. We are quite satisfied that if it was a disparity it was not gross nor was it such as to give the applicant a justified grievance.

The applicant has not made out any of the grounds put forward by him, and we accordingly dismiss the application for leave to appeal.

Application dismissed