IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

FRAZER AND OTHERS

HUTTON LCJ (giving the judgment of the court).

These are appeals against sentence by Michael Frazer who is aged 26, by David Stitt who is aged 24, by William James Stitt who is aged 30, and by Andrew Philip Larmour who is aged 23.

On 12 December of last year they were arraigned before His Honour Judge Petrie QC and pleaded guilty to the 1 count of robbery which was contained in the indictment against them. Each of the appellants was sentenced to 7 years' imprisonment. Another co-accused Samuel John Scott who was a younger man aged 20 also pleaded guilty and was sentenced to imprisonment for 4 years and 11 months. There were 2 other co-accused on the indictment. One was a man named James Baxter who had a bad criminal record and another man called Alan Alfred Price and both of those men were in their thirties. These 4 appellants and Scott were charged with the robbery itself but Baxter and Price were charged with aiding and abetting, counselling and procuring these 4 appellants and a Samuel John Scott to commit the robbery. Baxter and Price maintained a plea of not guilty before His Honour Judge Petrie so they were put back into custody. They were later tried by His Honour Judge McKee QC in May of 1995 and after they had fought the case against them for 3 days both Baxter and Price pleaded guilty to the charge of aiding and abetting, counselling and procuring the robbery. Baxter was sentenced to 3 years' imprisonment which he was to serve after he had served out the remainder of a previous sentence in respect of which he had been released on licence and Price was sentenced to 3 years' imprisonment suspended for 3 years. It is largely in relation to the sentences passed on Baxter and Price that these appeals have been presented before this court today. The principal ground of the appeal is set out as ground 4 in the notice of appeal as follows:

'The appellant was sentenced to 7 years' imprisonment with a plea of guilty before His Honour Judge Petrie at Belfast Crown Court on 15 December 1994 for armed robbery. On 3 May the defendants Alan Price and James Baxter were rearraigned and pleaded guilty to aiding and abetting, counselling and procuring the said

appellant in respect of the above said events before His Honour Judge McKee at Belfast Crown Court. Alan Price received 3 years' imprisonment suspended for 3 years in respect of the offence and James Baxter received 3 years' imprisonment for a substantial offence with his prison licence activated also. The appellant submits that there is a disparity in the sentence imposed upon him by His Honour Judge Petrie and the sentences imposed on Alan Price and James Baxter by His Honour Judge McKee'.

There is a further ground of appeal, ground 3, which counsel have told us should be linked to ground 4 which is that Judge Petrie failed to give due or adequate weight to the fact that the appellants were neither the instigators nor the planners of the offence.

We turn first to look at the circumstances of the robbery to which these 4 appellants pleaded guilty. It was a very serious robbery. A number of robbers came into the cash and carry warehouse. They were armed with hand guns which in fact on later examination turned out to be imitation firearms. Some of them were weapons that could fire blanks, but we have no doubt that certainly some of the staff in that warehouse thought they were menaced with real weapons and that is the reason why the robbers carried them. It was an armed robbery in which the staff, people carrying out an honest day's work in that warehouse, were menaced with what appeared to be real firearms. Some of the staff were also manhandled and were pushed into a room at the back of the warehouse, and it is quite clear that they were put in fear. This was also a robbery where the robbers were equipped with walkie-talkie radios. Amongst the things which the manageress said in her statement were the following:

'I had just entered the office door and Alastair Patterson, the cashier, came in behind me. He asked me for Mars Bars and I had indicated to him a box of Mars Bars. He had just lifted the box and was opening it when suddenly I was pushed violently from behind. I turned to see what had happened and saw Alastair had been pushed into me and against me by a person with a dark coloured hood with eyeholes in it, and his mouth and nose showing I think the mask was dark greenish, grey coloured. I seen a gun in his right hand. I cannot recall if he had gloves on or not. I seen he was wearing a khaki coloured jacket. I remember seeing this dark coloured gun and [in] my honest opinion it didn't look real. I was trying to see if there was anything I could see would identify him. He shouted at me to give him the … money. I told him there was none. He shouted back at me, "If I find any it will be too bad for you". I told him again there was none. He said I was a liar. He then demanded the keys for the place where the cigarettes are kept. I told him the time lock is on and you can't get in. By this time he had put me and Alastair down on the office floor and threw a green cloth over our heads. I am a bit claustrophobic and pulled it up a bit. He pushed me down and covered my head and told me not to get up or look up … He told me again to get up, and I still with my head covered was pushed along out of the office turned left towards the counter door out this door turned left along a bit and left into the corridor to the storeroom. I was then pushed

into the small store on the right and the door slammed shut. When I looked I was the last one to be put in the store as all the rest of the staff were already inside. There were 8 of us in there. I heard noises and every now and again I could hear a walkie talkie radio being used although I couldn't hear what was said. I heard a voice asking for a piece of wood which I believe was to jam the store door shut. The next thing I heard was one of the trolleys being pulled against the store door. I heard gas cylinders being loaded on top of the trolley. Everyone in the room was very frightened … As a result of me being pushed to the floor I have injured my left knee and bruised my lower left thigh on the outside. I am still very shocked as this is not the first time I have been robbed'.

As well as that very serious element of fear and ill-treatment in respect of the staff the robbery was also serious because the robbers succeeded in getting away from the store with a considerable amount of property. They took a sum in excess of £2,500 in money and they loaded the van with cigarettes in excess of £28,000 so this was a large robbery carried out with menace and with violence and it would have succeeded if it had not been for the alertness of the police.

This Court has said on numerous occasions that it is the duty of the court to protect decent people working in places like this cash and carry warehouse against robbery and also to ensure that property is not taken by force, and for that purpose this Court has emphasised that severe sentences must be passed on robbers and that those sentences should contain a substantial deterrent element. Not only those who commit the robbery but others who may be tempted to commit robbery will know that if they are caught and convicted they will go to prison for a lengthy period.

In delivery judgment in this Court in R v O'Neill [1984] 13 NIJB at 3 Gibson LJ stated:

'It is now some 9 years since this Court declared in a reserved judgment its view as to the proper range of terms of imprisonment for armed robbery. This was done in 2 cases heard in the same day namely R v McKellar and R v Newell reported in [1975] 4 NIJB. I was a member of the Court although the judgment in each case was delivered by McGonigal LJ. We would wish to emphasise that the trend of criminality in the meantime has done nothing to diminish the opinion which was there expressed that armed robbery, especially of a bank, post office, security van or other premises where the staff and members of the public are put in fear and where considerable sums of money are likely to be stolen if the robbery is successful, is a very serious crime which must be visited with an immediate custodial sentence which in almost every case will be for a considerable number of years regardless of the circumstances or the personal background of the accused. Indeed, such robberies are now more common than they then were and the Courts must in sentencing those found guilty bear in mind that there ought to be a considerable element of deterrence in the term which should properly be imposed. This court, therefore, wishes it to be clearly understood that it affirms the statement made by it in McKellar's case that this is a type of offence which must in present circumstances

be met by sentences which in other times might be outside the norm for such offences. In circumstances such as obtain nowadays in Northern Ireland where firearms are frequently used to rob banks and post offices this Court would reaffirm that a sentence of 13 years or upwards should not now be considered outside the norm for a deterrent sentence for this type of offence. Indeed, it would be appropriate for a judge to regard a sentence within the range of 10 to 13 years as a starting point for consideration, which sentence may be increased if there is a high degree of planning and organisation, or if force is actually used, or if the accused has been involved in more than one such crime'.

In a later case in 1988 in R v Colhoun [1988] 12 NIJB 16 this court said at 29:

'Since the judgment of this court in R v O'Neill there has been no diminution in the number of armed robberies. They are very serious crimes which put innocent members of the public in fear and this court desires to emphasise again that armed robbery is an offence which must be met by severe sentences which contain an element of deterrence. Accordingly the sentence of 10 years' imprisonment passed on the appellant in this case was an entirely proper sentence and the court dismisses the appeal against sentence'.

Therefore there can be no criticism of the sentence of 7 years passed on each of these appellants. It was an entirely proper sentence. It took account of their pleas of guilty when the case came on for hearing and if a higher sentence had been imposed it could not have been criticised. Indeed the sentence of 7 years can be regarded as being on the lenient side for a robbery of this gravity. We would further add that there is no substance in the point made that the co-accused Scott received a lesser sentence of 4 years and 11 months. He was some years younger than these appellants and therefore the judge was quite entitled to take that into account and to give him a lesser sentence.

But, as we have already indicated, the argument addressed to this court today relates to the sentences imposed upon Baxter and Price. It is submitted on behalf of these appellants that they have been left with a sense of grievance when they look at the sentences imposed upon those 2 men. Mr Finnegan QC has referred to the judgment of the Court of Appeal in England in R v Pilson 56 Cr.App.R.391 where Lawton LJ, referring to the ground of appeal, said at 396:

'It is not surprising in those circumstances that this appellant has come to this Court and has said "The way I have been treated is an affront to justice, and an affront which an ordinary citizen would regard as such"'.

The submission cogently advanced by counsel is that these appellants have been left with a sense of affront. That there has been an affront to justice and an affront which an ordinary citizen would regard as such when their sentences are compared with the sentences imposed upon Baxter and Price.

In considering this submission it is necessary to take account of the way in which the law is administered. Where a judge comes to sentence a person who pleads guilty he must sentence him on the basis of the facts which the Crown can establish against him and not on the grounds of suspicion unsupported by evidence. It is necessary for this Court to emphasise in this appeal that there was no evidence before His Honour Judge McKee that Price and Baxter were ringleaders or planners of this robbery. There may well have been suspicion of this. We are informed that the Crown stated that view on bail applications. But, of course, there are many cases where the Crown may have a suspicion where the case cannot be established by evidence. It seems to us that the only evidence against Baxter and Price before Judge McKee was that they were seen in the vicinity of this robbery driving about and being in and out of a number of public houses. Therefore on the material which was before him the judge was only entitled to regard them as people who had been acting as lookouts and not as ringleaders or planners. It is clear that is the way in which the judge approached sentencing them, because he said at the beginning of his sentencing remarks:

'Alan Price and James Baxter in the first instance I must take into account the facts that your involvement in the events of 21 July 1993 when this robbery took place of Anna Elizabeth McHugh, your involvement is less than the involvement of the others who actually committed the events of robbery. You are not charged with robbery you are charged with aiding and abetting, counselling and procuring that robbery'.

This is the first and most important circumstance. It is also important to bear in mind that when the robbery was committed firearms were used and in determining what was the proper penalty for robbery I am sure that that circumstance was taken into account by Judge Petrie. Therefore Judge McKee was stating that the involvement of Price and Baxter was less on the evidence before him than the involvement of these appellants, that Price and Baxter did not actually commit the robbery, they did not go into the warehouse and they were not involved in the use of firearms. For that reason Judge McKee passed a substantially lower sentence on Price and Baxter.

This court takes the view that the judge was entitled to approach the matter in the way in which he did. As Lord Justice MacDermott observed in the course of the submissions there are many cases unfortunately in Northern Ireland where a terrorist leader or some person deeply involved in a crime plans some terrorist offence or other criminal offence and sends young men out to do it and they are caught and convicted, but regrettably there is not sufficient evidence against the planner and organiser. This is an unfortunate fact, but that is no reason why a proper sentence should not be imposed on those who are caught and against whom there is evidence.

The view could be taken here that the sentence which Judge McKee passed was on the light side. It may be he would have been entitled to pass a somewhat higher

sentence, but as we had stated he was entitled to draw a clear distinction between these appellants and between Price and Baxter. Even if the view were to be taken that he should have passed or might have passed a higher sentence on Price and Baxter that does not mean that there is such a disparity as gives these appellants a justified sense of grievance.

There are a number of authorities which have considered the argument that where there is disparity, then even though the higher sentence passed on the appellants was a perfectly proper one, nonetheless it should be reduced because other persons involved in the crime were given a lesser sentence and the appellants contend that that leaves them with a sense of injustice. The matter was considered by the English Court of Appeal in R v Stroud 65 Cr.App.R.150. The Court in Stroud was a strong Court consisting of Roskill LJ, Scarman LJ and Griffiths J and Roskill LJ stated at 152:

'When the appellant Stroud appeared before Judge McKee, he appeared along with a number of people. It is not necessary to relate how the learned judge dealt with the others, because there is no disparity between Stroud's sentences and those passed on the others on that occasion. But because Neighbour had been put on probation and Stroud was sentenced, on a different occasion, to the term of imprisonment made up as I have already indicated, it is said that there is here such a glaring disparity that this Court ought to interfere in order to remove what is said to be a grievance on the part of the appellant Stroud. That argument pressed to its logical conclusion involves, as Scarman LJ pointed out during the course of the appeal, that because one inadequate sentence is wrong, the other prisoner must also get a glaringly inadequate sentence in order to produce what is said to be a proper adjustment between the 2 and to avoid disparity. In the view of this Court that is quite wrong. There is nothing new in this problem. It has arisen from time to time in the past and of course it is likely to arise now more than ever, having regard to the number of cases that have to be dealt with in different Crown Courts and the number of different judges before whom criminals appear. As Lawton LJ pointed out in one of the cases to which we have been referred, where a gang is involved - and those involved here can properly be called a gang - it is desirable, so far as administratively possible, that all of them should appear at the same court and at the same time. There was an attempt to put Neighbour's trial over until later, but that was not done. One readily understands why it was not possible to get all these people before the same court on the same day and at the same time. Thus we are faced with this disparity and we are invited to reduce Stroud's sentence in order to bring it into line with Neighbour's inadequate sentence. That, as I have already said, involves the proposition where you have one wrong sentence and one right sentence, this could should produce 2 wrong sentences. That is a submission which this court cannot accept'.

The same principle was stated in R v Weekes 74 Cr.App.R.161 where Boreham J delivering the judgment of the Court of appeal stated at 166:

'But the fact is that Styles has received this, in our judgment, ridiculously light sentence for a very serious offence and, in those circumstances, Mr Leigh, Mr Gabb and Mr Whitley all complained that the appellants have a sense of deep grievance because of the disparity between their sentences and the sentence passed upon Styles. It is not suggested by any of them in their, as I have said, careful and responsible submissions, that those sentences should be reduced to anything like that of Styles. But the matter is put thus: that we should effect what may be regarded as a compromise between the public sense of justice, which no doubt is reflected by the current sentences passed upon these appellants, and that sense of grievance which it is alleged the appellants themselves are now suffering. We have been referred to a number of examples, in recent years, of cases where the court has taken account of disparity. We consider that the guiding principle is to be found in one of the more recent decisions in this Court in Hair v Singh [1978] Crim L.R. 698. It is unnecessary to go into the detail of the matter, but there the argument of disparity was put before the Court. The Court held that their grievance might be real but it was not justifiable and that their sentences in that case were correct and, indeed, moderate. We take the view that the court should ask not only whether the appellants labour under a sense of grievance, but whether there is justification for that grievance. Upon that matter this must be said: it is accepted by all counsel, and indeed accepted by the appellants themselves, that the sentences imposed upon Styles were ridiculously low if the facts put before the sentencing Court then in any way resembled the facts which were before His Honour Judge McCreery and this Court. That being so, it seems to us impossible to say that Styles' sentence should be brought into the reckoning. Moreover, we have no doubt that even if the appellants here labour under a sense of grievance because of the disparity between the sentences, they know that there is no justification for that sense of grievance, and they know perfectly well, in our judgment, that the offences to which they either pleaded guilty, or of which they were found guilty, were offences which deservedly attracted very substantial periods of imprisonment. In our judgment there is no basis here for the argument based upon disparity'.

The same principle was stated by this Court in its judgment to which we have already referred in the case of R v O'Neill where Gibson LJ said at 5:

'As regards the sentence of 4 years imposed on McCrory, we have been furnished with the transcript of the hearing before Judge Curran and his remarks when imposing the sentence. Giving every due consideration to the arguments pressed upon him and to his observations we are unable to detect any matter which would have justified the sentence either on its own or when taken together with the sentences previously imposed by Judge Chambers and we consider that the sentence of 4 years was clearly inadequate. 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 the sentence if that is the only

ground. We consider, as did the English Court of Appeal in R v Weekes 74 C.A.R. 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 sense of justified grievance by him'.

As we have already said, we consider here that the sentences of 7 years were entirely proper and indeed can be regarded as being on the lenient side. As stated in the case of Weekes we have to take account not only of the feelings of these appellants but of the feelings of the general public, and we consider that the general public would have a sense of grievance and, in particular, the staff put in fear in the warehouse, if the quite proper sentence of 7 years passed upon these appellants were reduced. We repeat again and apply to these appellants what was said in the case of Weekes -

'… we have no doubt that even if the appellants here labour under a sense of grievance because of the disparity between the sentences, they know that there is no justification for that sense of grievance, and they know perfectly well, in our judgment, that the offences to which they either pleaded guilty, or of which they were found guilty, were offences which deservedly attracted very substantial periods of imprisonment. In our judgment, there is no basis here for the argument based upon disparity'.

Therefore we dismiss these appeals.

In conclusion we wished to emphasise that the practice should cease of different judges sentencing co-accused on the same indictment, save in special circumstances, because it clearly gives rise to the type of difficulties that have been discussed in this case.

We refer to the headnote of R v Payne 34 Cr.App.R. 43:

'Where several prisoners are jointed in an indictment and some plead Guilty and others Not Guilty, the proper course is to postpone sentence on any prisoner who has pleaded Guilty until those who have pleaded Not Guilty have been tried, so that the Court may be in possession of all the facts relating to all who are convicted and may be able to assess properly their degrees of guilt. The above rule will not apply where a prisoner who has pleaded Guilty is to be called as a witness. In such circumstances it is a proper practice that sentence should be passed forthwith, so that there should be no suspicion of the prisoner's evidence being coloured by the fact that he hopes to get a lighter sentence because of the evidence which he gives'.

Lord Goddard LCJ stated at 45:

'It may be a very convenient course to sentence prisoners who plead Guilty on the first day, but that ought not to apply where several persons are indicted together

and one pleads Guilty and the other or others Not Guilty. In such a case the proper course is to postpone sentence on the prisoner who has pleaded Guilty until the other or others have been tried and then to bring the prisoner who has pleaded Guilty up in the Court where the other or others have been tried and let all who have been convicted be dealt with together, because by that time the Court will be in possession of the facts relating to all of them and will be able to assess properly the degree of guilt among them. The reason why the appellant received a heavier sentence than his other 2 co-prisoners is because he was tried in a different Court on a different day. It is a most inconvenient practice and it is a practice which is wrong and which ought to cease. Quarter sessions should be informed that where more than one prisoner is joined in an indictment and one pleads Guilty and the other or others plead Not Guilty, the sentencing of the first one should be postponed until the others have been tried and all whose guilt has been established should be sentenced together. I hope that quarter sessions will take notice of the opinion of this Court and discontinue a practice which can only lead to disproportionate sentences being passed and will naturally leave a sense of grievance in the minds of prisoners. What I have said will not apply in the exceptional case where a prisoner who pleads Guilty is going to be called as a witness. In such circumstances, the general practice is that he should be sentenced there and then, so that there should be no suspicion of his evidence being coloured by the fact that he hopes to get a lighter sentence because of the evidence which he gives. If it is a case in which one prisoner is going to be called to give evidence against another, that may be a good reason for dealing with him separately. I do not throw doubt on that very proper practice; I am speaking only of cases in which those circumstances do not arise'.

The same principle was stated in the case of Weekes where Mr Justice Boreham said:

'Before embarking upon consideration of that contention, it is right to say now, as this court has said on numerous occasions in recent years, that here are made manifest the difficulties that arise, and the trouble that is caused, when persons involved with others are sentenced before the full facts have been heard, and particularly where a trial is to take place, as it was to take place here'.

This court has also said on numerous occasions that it should be left to the judge who may sentence those who have pleaded Not Guilty to sentence all. There is an exception to this rule as stated by Lord Goddard (and in rare cases there may be other exceptions), but generally it is better for both the public and all the accused concerned that all accused are sentenced at the same time by the same Court. We trust that these observations will be acted upon in the future.

Appeals dismissed.