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ATTORNEY-GENERAL'S REFERENCE NO. 10 OF 1992 (ALAN JOHN COOPER)

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Pill and Mr. Justice Sedley): April 1, 1993

Wounding with intent to cause grievous bodily harm—adequacy of sentence.

A compensation order held to be an unduly lenient sentence for wounding with intent to cause grievous bodily harm; 15 months' imprisonment substituted.

The offender pleaded guilty to wounding with intent to cause grievous bodily harm. The offender attacked a man who was unknown to him while the victim was waiting at a bus stop. He punched the victim to the ground and kicked him in the head and stomach, and jumped on his head with both feet. The victim suffered bruising and cuts to the face and a hairline fracture of the cheek. Sentenced to a compensation order in the amount of £1,000 compensation and ordered to pay £500 costs. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

Held: the sentencer had indicated that he was influenced by the fact that the offender had spent four months in custody on remand, and that he could pay compensation. Those remarks showed an approach which was wrong in principle. They might suggest that providing someone has money which enables him to pay compensation, he can buy his way out of having a sentence imposed on him in a grave case of this kind. This was wholly wrong, as was made clear in a number of decisions of the Court, including *Inwood* (1974) 60 Cr.App.R. 70, *Stapleton and Lawrie* [1977] Crim.L.R. 366 and *Barney* (1989) 11 Cr.App.R.(S.) 448. It was made clear in *Darton* (1987) 9 Cr.App.R.(S.) 514 that a compensation order was merely a means which was available to the court to give effect to a victim's legitimate civil claim and did not amount to a sentence; it was certainly not a sufficient way in which to deal with a grave offence such as this. Kicking a victim on the ground, and stamping on his head, was the kind of conduct which must be visited, save in the most exceptional circumstances, by a custodial sentence. The Court had been referred to *Att.-Gen.'s Reference No. 7 of 1991* (1991) 13 Cr.App.R.(S.) 285, where it was said that the sentence would normally be measured in years rather than months, and *Ivey* (1981) 3 Cr.App.R.(S.) 185, where a sentence of four years was imposed for kicking a victim's head. The Court considered that the course taken by the sentencer was not only unduly lenient, it amounted to no penalty at all; only £60 had been paid, and nothing for nearly 12 months. Bearing in mind that the appellant had been at large for some time, and that he would have to return to custody, and the element of double jeopardy involved in a reference by the Attorney-General, the least sentence that could be imposed was 15 months (the time spent in custody on remand would count as part of that.)

Cases cited: *Inwood* (1974) 60 Cr.App.R. 70; *Stapleton and Lawrie* [1977] Crim.L.R. 366; *Barney* (1989) 11 Cr.App.R.(S.) 448; *Darton* (1987) 9 Cr.App.R.(S.) 514; *Att.-Gen.'s Reference No. 7 of 1991* (1991) 13 Cr.App.R.(S.) 285; *Ivey* (1981) 3 Cr.App.R.(S.) 185.

References: Wounding with intent to cause grievous bodily harm, *Current Sentencing Practice* B2–2.

Commentary: [1993] Crim.L.R. 631.

John Bevan for the Attorney-General; *K. J. Hegarty* for the offender.

LORD TAYLOR C.J.: This is an application by Her Majesty's Attorney-General pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer to this Court for review a sentence he regards as unduly lenient. The application has been listed on two previous occasions but was adjourned becuase the offender was not present and it was not clear as to whether in one instance he was aware of the hearing date and in the other it did not seem he had had the opportunity of giving instructions. However, we granted leave to the Attorney-General on November 19, 1992.

We now have clear evidence of service upon the offender of notice of today's hearing. He was warned that if he wished to be present this was his last chance to be so and that he should take the opportunity if he wished to instruct counsel to make any submissions on his behalf; but he has not appeared. We are extremely grateful to Mr. Hegarty who has appeared on his behalf without having the benefit of specific instructions and who has made submissions to us on the basis of the papers he has before him.

The offender's name is Alan John Cooper. On March 5, 1992, he pleaded guilty on rearraignment to an indictment containing a single count of wounding with intent to cause grievous bodily harm. He had on a previous occasion offered to plead guilty to an offence under section 20 of the Offences Against the Person Act 1861. That was not acceptable to the Crown.

On March 5, 1992, the order of the court was that the offender pay £1,000 compensation to the victim and £500 costs at the rate of £40 per week; no other penalty was imposed.

The circumstances which gave rise to the offence are as follows. The victim, Bernard Siekierski, aged 38 years had spent a quiet social evening on Saturday, October 5, 1991, in a public house in Birmingham. He left there at about 8.30 p.m. in a cheerful though inebriated state to catch a bus to his home. His next memory was of being in Birmingham General Hospital.

At the bus stop he was seen by witnesses to be singing to himself. The offender was seen to approach him, having come up from a subway. Immediately and for no apparent reason the offender pushed the victim and punched him to the ground. He then repeatedly kicked the victim in the head and the stomach. A passer-by tried to intervene, indicating that what had been done was certainly enough, but that was ignored. The offender continued to kick the victim.

Two witnesses then gave evidence that he jumped on the victim's head with both feet. He told those who had tried to intervene that two of his brothers had been killed by the IRA and that he himself had been in the Army. He then walked away and was arrested nearby.

On arrest he stated that the victim had been singing IRA songs. "He's IRA. I hate them. Two of my mates were killed by them. I'm proud of it. I meant to kill him. I kicked his head in. If them people hadn't stopped me I would have killed him." When interviewed he admitted head-butting the victim and stamping all over him. He repeatedly stated that he was not ashamed of what he had done and he concluded: "The only thing I want to clear up is that if that guy is IRA he deserved every single kick he got and I mean that for a judge as well. If not, I'll apologise to him and I'll pay any compensation due to him."

The injuries inflicted on the victim were as follows. There was swelling and bruising around the right eye; there was a swollen and bleeding nose; there was a deep two-centimetre cut to the inner aspect of the upper lip which required stitching;

and there was, perhaps most seriously, an undisplaced hairline crack fracture of the right cheek.

In the submission of the Attorney-General there were two aggravating features to this offence: first, it was an unprovoked and prolonged attack on a defenceless victim; secondly, the offender, so far from showing any remorse, seems to have been proud of what he had done to the victim.

There were mitigating features which were acknowledged on behalf of the Attorney-General: first, this defendant pleaded guilty; and secondly, so far as sentence was concerned the learned judge clearly had to take into account that the offender had spent four months in custody awaiting trial. The only excuse he put forward ultimately was that he had been drinking; no doubt that was true.

The offender is an unemployed single man aged 26. He has a number of previous convictions including assault occasioning actual bodily harm, although that was as long ago as 1981. He had received custodial sentences, of which the last was 21 months in custody in 1986 for offences of dishonesty and criminal damage.

The submission on behalf of the Attorney-General is that the learned recorder gave insufficient weight to the gravity and aggravating features of this case; that it was wrong to make a compensation order and impose no other punishment for an offence of this gravity. Finally, it is submitted that the fact the offender had spent some four months awaiting trial was not sufficient justification for the learned recorder's decision to pass no sentence upon him.

It is to be noted that the recorder said this:

> "I do not intend to pass a separate penalty because it seemed to be the equivalent of six months' imprisonment. I want to see that he realises that he cannot go about hurting people in this way and he has got to pay for it. I hope that I have taken the right course. There are those who may say that it was extremely lenient. I cannot see why the public should keep you in prison for a further period. You are a man who can pay money and you are going to have to pay your victim and in the circumstances I think that justice is done."

It is submitted that those remarks show a wholly erroneous approach and one which is wrong in principle. We agree. 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. It is not necessary to cite from them. The cases are *Inwood* (1974) 60 Cr.App.R. 70 at page 73; *Stapleton and Lawrie* (1977) Crim.L.R. 366; and *Barney* (1989) 11 Cr.App.R. (S.) 448. It was made clear in the case of *Darton* (1987) 9 Cr.App.R.(S.) 514 that a compensation order was merely a means which was available to the criminal court of giving effect to a victim's legitimate civil claim and did not amount to a sentence; it was certainly not a sufficient way in which to deal with a grave offence of this kind.

Kicking a victim on the ground and even worse stamping on his head is the kind of conduct which must be visited, save in the most exceptional and unusual circumstances, by a custodial sentence. We have been referred to certain authorities which show the length of sentence which would normally be imposed for this kind of unprovoked assault. As was said in the *Att.-Gen.'s Reference No. 7 of 1991* (1991) 13 Cr.App.R.(S.) 285 the sentence would normally be measured in years rather than in months. In the case of *Ivey* (1981) 3 Cr.App.R.(S.) 185 a sentence of four years was imposed for kicking a victim to the head which caused a serious injury. In the Attorney-General's Reference, to which we have already referred, the sentence of three months imposed by the trial judge was increased to 15 months in circumstances

not wholly different from those in the present case. It is true that in that case there was a plea of not guilty, whereas here there was a plea of guilty; but there was exceptional mitigation in the case which gave rise to the *Attorney-General's Reference No. 7* which is not specially relied upon here.

What Mr. Hegarty has said on behalf of the offender is that this Court should take into account not only the fact that he had served four months, but also that having served that period he was released at large and has been at large now for some considerable period. Accordingly, if this Court now imposes a sentence upon him, it is not merely, as with some Attorney-General's references, that a lengthier sentence is being substituted for one already being served. In this case it would involve a return to custody after a period of freedom. Mr. Hegarty also reminds us that in all Attorney-General's references there is an element of double jeopardy to be borne in mind; the offender is sentenced before a court at the trial; he is then warned at a later stage that the matter is to be reviewed before this Court and he has the additional suspense of not knowing what the outcome will be, as well as having a different sentence imposed when the matter does come before this Court. We bear all those matters in mind.

This Court has a discretion whether to impose a different sentence even if the sentence of the trial judge was unduly lenient. We are in no doubt that the course taken by the learned recorder in the present case was not only unduly lenient, it amounted in effect to imposing no penalty at all. We therefore consider that it is a case in which it would be right for us to impose a sentence. We bear in mind all the factors to which reference has been made, but in our judgment the least sentence that can be imposed at this time is one of 15 months' imprisonment to run from the date when this offender is rearrested. In measuring that sentence there will have to be taken into account the four months which he served before the matter came before the trial judge.

So far as the compensation order is concerned, we are informed that the only payments which were made pursuant to it were three, the last of which was in April 1992; they were payments of £40, £15 and again £15. There remain, therefore, in respect of the learned recorder's order, some £1,430 outstanding. It seems quite clear to this Court that the chances of the victim obtaining payments from this offender are remote and since we have now imposed a sentence, that would be an additional reason for not continuing the compensation order. The victim is not of course entirely deprived of compensation; he has the opportunity of presenting a claim to the Criminal Injuries Compensation Board for assessment. But in the circumstances of this case we quash the compensation order, save in so far as payments have already been made.

I should like to clarify, in saying what I did about the four months, that we consider the four months should count towards the 15 months which will run from rearrest. Therefore, the 15 months will be diminished by having served the four months.

WAYNE JOHN JOEL

COURT OF APPEAL (Lord Justice Glidewell and Mr. Justice Garland): April 2, 1993

Costs—order to pay the costs of the prosecution—whether appropriate to order defendant who has pleaded guilty in the Crown Court to an offence which could have been dealt with in the magistrates' court to pay costs of proceedings in the Crown Court.

Editor's note: where a defendant pleads guilty in the Crown Court to an offence which could properly have been dealt with in the magistrates' court, and to which he would have been willing to plead guilty in the magistrates' court, he should not be ordered to pay costs at the level appropriate to the Crown Court; any order for the payment of costs should be at the level appropriate to the magistrates' court.

The appellant pleaded guilty to being carried in a motor vehicle, knowing it to have been unlawfully taken. The appellant and a co-defendant were indicted on various counts of burglary and taking a vehicle without authority. Eventually the prosecution elected not to proceed on the charges against the appellant, and he pleaded guilty to being carried in a motor vehicle, knowing it to have been unlawfully taken. He was fined £200 and ordered to pay £245 costs.

Held: the appellant ought to have been charged in the magistrates' court with the offence to which he was willing to plead guilty. That being so, it was wrong to order him to pay costs in the Crown Court. The proper order was an order to pay costs at the rate which would have been incurred in the magistrates' court. The order for payment of costs would be reduced to £75.

References: costs of the prosecution, *Current Sentencing Practice* J6–2J.

C. J. Briefel for the appellant.

GLIDEWELL L.J.: On March 27, 1992, this appellant, Wayne John Joel, and another young man called Lee Charles Westwood, were arraigned in the Crown Court at Swindon on an indictment which then contained four counts. On count 1 they were both charged with burglary, having burgled a car showroom and stolen, amongst other things, a Volkswagen Corrado car on August 13/14, 1991. On count 2 they were both charged with burglary at different premises and charged with stealing a variety of electronic equipment. On count 3 Westwood was charged with reckless driving, and on count 4 they were both charged with taking another car without the owner's authority on the same night, August 13/14, 1991, this car being a Volkswagen GTI. They pleaded not guilty to counts 1 and 2. Westwood pleaded not guilty to the reckless driving but guilty to the taking without authority (count 4) but Joel also pleaded not guilty to that. Those pleas were not acceptable to the prosecution and the matter was therefore put back for trial.

The case came before the court again on June 15, 1992, before an assistant recorder. On this occasion Westwood was willing to change his plea on counts 2 and 3. Thus, by now he was pleading guilty to one burglary, to the reckless driving and to the taking without authority. The prosecution merely had one not guilty plea as far as he was concerned, which they were willing to accept.

As far as the appellant was concerned, the prosecution applied to amend the indictment to add a count of being carried in a conveyance which had been taken without authority. That was allowing himself to be carried in the Volkswagen GTI. To that this appellant then pleaded guilty and made the point through his counsel