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"Plea" of guilty to lesser offence included within the greater offence charged—effect—plea of not guilty of greater offence—admission of facts of lesser

R. v. Lee

Court of Appeal (Criminal Division): Stephen Brown L.J., Bristow and Skinner JJ.: July 18, 1985.[10]

The appellant was, with three others, charged with wounding with intent contrary to section 18 of the Offences against the Person Act 1861, that being the only count in the indictment. When the four accused were arraigned, and before the jury was empanelled and sworn, they all pleaded not guilty to wounding with intent, but the appellant pleaded guilty to unlawful wounding contrary to section 20 of the Act. That plea was not, however, acceptable to the prosecution and the trial proceeded on the section 18 offence. During his summing up the judge told the jury that the appellant had already pleaded guilty to the section 20 offence, and that they must in any event find him guilty of that. The jury returned a verdict on the appellant of not guilty of the section 18 offence. The appellant's counsel pointed out that the plea to the section 20 offence had not been tendered in the presence of the jury, and counsel for the prosecution attempted but was not permitted to cite *R.* v. *Hazeltine* (1967) 51 Cr.App.R. 351. The jury returned a verdict of guilty on the section 20 offence. The appellant appealed against conviction.

Held, allowing the appeal, that it had been held in *R.* v. *Hazeltine* that a plea of guilty such as that tendered by the appellant, which was not accepted by the Crown, must be withdrawn and was a nullity. Therefore since the appellant had not admitted during the course of the trial that he was guilty of the section 20 offence, the judge had misdirected the jury. The final verdict was a nullity, and the court thus had no power to apply the proviso. It was most unfortunate that the judge had not allowed counsel to cite *R.* v. *Hazeltine*. It was to be hoped that that case would now be engraved on everyone's mind, and that judges would be more patient when counsel properly intervened.

[*Reported by Kate O'Hanlon, Barrister.*]

Commentary. It was stated in *Hazeltine* at p.354 that "it is clear that there can be only one plea to any one count in respect of which an accused person is put in charge of the jury. If an accused person says that he admits certain ingredients of the offence charged in the count but not others that is a plea of Not Guilty."

The purported plea of guilty to unlawful wounding, as a plea of guilty, was a nullity. It might, however have some effect as an admission. As was said in *Hazeltine* at p. 356,

> ". . . it is open to the prosecution to call evidence before the jury to the effect that the accused person has pleaded Guilty to unlawful wounding and to make the point that it is inherent in such a plea that he admits that what he did was unlawful and malicious. Such an admission is wholly inconsistent with a defence that what he did was done by accident or in self-defence. If the accused person gives evidence and sets up a defence which is wholly inconsistent with the admission which he has already made, then he should be cross-examined by the prosecution on that admission. He should be asked, for example: 'If the story you are now telling the jury is true, namely, that you were acting purely in self-defence, why did you an hour ago admit in this very court that you were Guilty of unlawful wounding?' a question which most accused persons might find very difficult to answer." The "plea" is not conclusive but it is evidence against the defendant, like any other admission, and its relevance will depend on the course that the trial takes. [*J. C. S.*]

[10] For the appellant: *Ian Glen* (assigned by the Registrar of Criminal Appeals). For the Crown: *Christopher Leigh* (instructed by Keary, Stokes & White, Corsham).

SENTENCE

Partly suspended sentence—offence committed following release from first part of sentence—restoration of balance of sentence—offender liable to serve greater portion of original sentence than he would have been liable to serve if released on licence from immediate sentence of same length—whether relevant consideration in deciding whether to restore balance of sentence.

R. v. HANNELL: Ackner L.J., Jupp and Anthony Lincoln JJ.: June 11, 1985. *Facts*: in October 1983 the appellant was sentenced to 18 months' imprisonment with six months to serve and the balance held in suspense, for conspiracy to steal. He served four months of the first part of the sentence and was then released with one third remission. In April 1984 he was concerned in an attempt to obtain by deception six bottles of spirits from an off-licence by the use of a stolen cheque book. He was sentenced to one months' imprisonment for that offence, with the balance of the partly suspended sentence restored in full consecutively, so that he was liable to serve 13 months' imprisonment. *Special considerations*: it was argued that the appellant was in a worse position by reason of having had his sentence suspended in part than he would have been if the court had ordered him to serve the sentence in full immediately. *Decision*: it was clear that an anomaly had arisen as a result of the Order reducing the minimum period to be served before release on licence becomes possible, but the fact of this anomaly did not make it wrong to restore the balance of the sentence in full.

Commentary. This case provides an illustration of the anomaly pointed out at [1984] Crim.L.R. 52, 121, and 695. In many cases an offender who receives a partly suspended sentence will be worse off than if he had received a full immediate sentence of the same length, in that he will be released no earlier than he would have been released on licence from the full immediate sentence of the same length, and will thereafter be at risk for a longer period, and with a longer term to serve if he commits a further offence. In the present case, the appellant had the benefit of being released some weeks earlier from the partly suspended sentence (as a result of remission of one third of the part ordered to be served in the first instance) than he would have been from the full immediate sentence (six months, assuming he was released on licence as a section 33 case), but thereafter he was at risk for a further period of over 13 months. Under a parole licence he would have been at risk (in the sense of being liable to recall) until the end of the 12th month of the sentence; the period he would have been liable to be recalled to serve would have been whatever remained of the licence period on the day of his conviction (or 30 days, whichever was the greater). Under the partly

suspended sentence he was liable to be ordered to serve the balance of the sentence (12 months), from which he would be eligible for remission and release on licence.

The implication of the decision of the Court is that these matters should be ignored by the sentencer, in accordance with the general principle that a court should not have regard to the possibility of release on licence. Unfortunately, the effect of following that generally sound principle can be that justice will be done haphasardly, in that courts will in many cases be imposing sentences which do not reflect their assessment of the relative culpability of different offenders, and make nonsense when the reality of the sentence is considered as opposed to the form. The points which would have to be borne in mind (if it were proper to consider these matters) are that a partly suspended sentence does not normally bring any real benefit to an offender who has been on bail until conviction and sentence, unless the nominal period which he is ordered to serve in the first instance is less than nine months or one half of the nominal whole term of the sentence, whichever is the greater; even when it does result in earlier release, the partly suspended sentence may involve a longer period of imprisonment in the event of subsequent conviction, as the present case illustrated.

Everything is different if the offender has been in custody on remand prior to sentence, as time in custody on remand counts (with full remission) towards the part of the sentence that he is ordered to serve under a partly suspended sentence, and towards the period for which he is at risk after release, but does not count towards the six months which he would have to serve before becoming eligible for release on licence under a full immediate sentence. In this case, the offender will be released earlier under the partly suspended sentence so long as the term which he is ordered to serve in the first instance, after the deduction of one third remission and the whole of the time spent in custody on remand, is less than six months.

Compensation order—duty of court to be satisfied of defendant's means before making compensation order in large sum.

R. v. HUISH: Croom-Johnson L.J., Hirst J. and Sir John Thompson: July 23, 1985. *Age*: 65. *Facts*: pleaded guilty to fraudulent evasion of VAT. The appellant had inherited the family business, (a company) and fell behind with the VAT returns, which were manipulated to maintain cash flow. *Sentence*: 12 months' imprisonment, suspended, and ordered to pay £22,900 compensation. *Special considerations*: at the Crown Court, counsel had indicated that the appellant had assets available which would enable him to pay a compensation order in the full amount lost to the Excise. No detailed investigation was made. In the event, nothing was paid within the time allowed for payment, and the appellant was committed to prison in default. On an appeal out of time against the compensation order, it was disclosed that the appellant's only asset was a house, in which he lived with his wife, which was thought to be worth about £14,000: his liabilities were debts of £7,000 to trade creditors, £22,900 under the compensation order, and between £15,000 and £17,000 to the Inland Revenue in respect of PAYE. The appellant claimed that he knew at the Crown Court that he would never be able to pay the compensation order, but was afraid to say so, in case he was sent to prison. *Decision*: the Court had no alternative but to quash the compensation order. There were regularly appeals to the Court against compensation orders which were quite impossible to fulfil: it seemed that insufficient care had been taken to determine what means were available to pay them. In this case the sentencer had accepted what counsel had told him, but the investigation of the appellant's means and general state of affairs by his counsel and solicitor was wholly inadequate, as a result of which the

sentencer was totally misled. When compensation orders may possibly be made, the most careful examination was required. Documents should be obtained and evidence should be given, orally or on affidavit. The proceedings should be adjourned if necessary to arrive at the true statement of the defendant's affairs. Very often a compensation order was made and a light sentence of imprisonment was imposed, because the court recognised that if the defendant was to have the opportunity to pay the compensation, he must be enabled to earn the money with which to do so. If the compensation order turned out to be worthless, the defendant had got off with a very light sentence as well as no order of compensation—in other words, he had got away with everything. While the Court did not suggest that in the present case, in view of the appellant's age, an immediate sentence should have been passed, the case did emphasise the need for a careful investigation of the defendants' financial means before a compensation order was made in a large sum. The information which was given to the judge in this case ought not to have been given.

Commentary. Compare *Coughlin* [1984] Crim.L.R. 432, which illustrates the same turn of events. The present case seems to confirm that it is the duty of counsel who intends to put forward the suggestion that his client should be ordered to pay compensation, to satisfy himself of the truth of the information which he is placing before the court as to the client's ability to pay the compensation likely to be ordered, and to be prepared to support it by calling evidence. The decision makes clear that the sentencer should not rely, in cases involving substantial amounts, on the figures and assurances put forward by counsel on instructions without supporting evidence.

Community service order—custodial sentence passed for offence committed during currency of community service order—substantial part of community service order performed—whether appropriate to impose consecutive term for original offence, on revocation of community service order.

R. v. COOK: Croom-Johnson L.J. and Sir John Thompson: July 11, 1985. *Age*: 23 *Facts*: pleaded guilty to handling stolen goods. The appellant, together with his younger brother, dared a third man to steal a tray of rings from a jeweller's shop. The third man did so, and brought the rings to the appellant and his younger brother, who disposed of them immediately to an unknown person. The rings, worth about £4,000, were not recovered. *Previous convictions*: two, including one for handling stolen jewellery for which he had been ordered to perform 80 hours community service. *Sentence*: two years' imprisonment for the latest offence, with three months' consecutive for the offence for which the community service order had been made. *Special considerations*: the appellant had already performed 61 of the 80 hours community service. *Decision*: (considering *Anderson* (1982) 4 Cr.App.R(S.) 252): in *Anderson* the appellant had completed 126 hours out of an order for 180 hours: a sentence of six months for the original offences was quashed. The Court thought that there was force in the submission that the facts of the present case were somewhat parallel to those of *Anderson*, although this must be a question of fact and degree in every case. The appellant had performed three quarters of the number of hours ordered: the sentence of three months might represent the unworked part of the order.

The sentence of three months would not be quashed, but would be ordered to run concurrently with the sentence of two years, with which the Court could see nothing wrong.

Commentary. This case appears to strengthen the principle that an offender who has completed a substantial part of a community service order should normally be given some credit if the order is later revoked following the commission of a further offence. Most of the cases where this principle appears to have been applied have involved the completion of at least 60 per cent. of the hours ordered, although in the present case the court indicates that this will be a question of fact and degree in every case. The fact that the community service order has been partly performed does not necessarily mean that no effective sentence should be imposed for the original offence, but rather that any such sentence should be appropriately reduced (see in particular *Baines* (1983) 5 Cr.App.R. (S.) 264.)

Misconduct of defendant in face of the court—whether a ground for increasing the sentence imposed for the offence of which he is convicted.

R. v. POWELL: Skinner and MacPherson JJ.: July 11, 1985. *Age*: 19. *Facts*: convicted of possessing an offensive weapon, a machete, which was found strapped to his thigh when he was stopped by police. *Sentence*: six months' youth custody. *Special considerations*: the sentence originally imposed by the trial judge was three months' detention. When the sentence was announced, there was swearing and shouting in the dock. The judge had the defendants brought back into the dock, and reviewed the sentence by substituting a term of six months' youth custody. *Decision*: the judge was plainly wrong. There was a perfectly clear procedure laid down for dealing with cases of contempt. It should be dealt with separately from the initial offence, not by way of a review of the sentence originally imposed. The defendant should be told what was the nature of the contempt alleged, asked whether he admitted it or not, and should be offered legal representation. A separate sentence should then be passed for the contempt. The sentence of youth custody would be quashed and the original sentence of detention for three months would be substituted.

Commentary. This case offers a useful reminder of a well established principle: see *Principles of Sentencing* p.51.

Manslaughter—death resulting from head striking pavement, following blows with fists—length of sentence.

R. v. PHILLIPS: Watkins L.J., Bristow and Ewbank JJ: July 2, 1985. *Age*: 29. *Facts*: pleaded guilty to manslaughter. The appellant fell into a dispute with a man with whom he had been drinking, and attacked him with his fists, striking a number of blows to the face. The deceased fell to the ground, striking his head on the pavement. He was taken to hospital unconscious, and subsequently died of a severe cerebral injury. There was also possibly a broken nose. *Previous convictions*: several, including assault occasioning actual bodily harm and threatening behaviour. *Sentence*: seven years' imprisonment. *Decision*: manslaughter was committed in a wide variety of circumstances, and the court had to pay careful regard to the circumstances

of the death, and especially to the way death was actually caused, in reaching a conclusion as to what punishment the defendant should receive for whatever he did towards bringing it about. In the experience of the Court, in cases of manslaughter where the cause of death was a punch which felled the victim so that he struck his head on the pavement and cracked his skull, a sentence in the region of 12 months was usually considered appropriate, and sometimes no imprisonment at all. The trial judge was right not to treat the present case as the least serious example of manslaughter, as there was no reason for the assault, which was carried out with some ferocity, but the case was not so serious as to take it into the category for which sentences of seven years were normally passed. It would not be right to leave out of account the propensity of the appellant to behave violently, even though on this occasion the death of the victim was largely a misfortune. In the view of the Court, a sentence of two years would be appropriate.

Commentary. The general view of the Court seems to be that in this type of manslaughter case, the sentence should be based substantially on what would have been passed if death had not fortuitously occurred, although the fact that it has may justify some inflation of the sentence (see in particular *Paget and Pemberton* (1982) 4 Cr.App.R.(S.) 399). One argument which has proved persuasive on facts similar to those of the present case is that as the verdict implies that the accused did not intend to inflict grievous bodily harm (on the basis that such an intention would have resulted in a verdict of guilty of murder), the accused should be sentenced as if for an assault occasioning actual bodily harm, and thus as if the maximum term were five years' imprisonment. (See *McNamara and McNamara* (1984) 6 Cr.App.R.(S.) 356.

Kidnapping—kidnapping arising out of family disputes.

R. v. RAPHAEL: Stephen Brown L.J. and Bristow J.: July 23, 1985. *Age*: 31. *Facts*: convicted of kidnapping and assault occasioning actual bodily harm. The appellant had lived with a woman, with whom he had a child. The woman left the appellant and went to live with friends. A few days after she had left him, the appellant went to the house where she was staying and demanded to see her. When he was refused entry, he forced his way into the room where she was, struck her on the thigh with a hammer, dragged her into his car and drove her to the flat where they had previously been living. No further violence was offered. The woman's friends alerted the police and the appellant was arrested. The woman was found to have swellings and a bruise on her leg. *Previous convictions*: none for 10 years. *Sentence*: 18 months' imprisonment. *Decision* (considering *Spence and Thomas* (1983) 5 Cr.App.R.(S.) 413): in giving guidance on sentencing in kidnapping cases, the Lord Chief Justice had referred to cases of kidnapping arising out of family tiffs or lovers' disputes, for which sentences of 18 months' imprisonment and sometimes less would usually be adequate. It appeared to the Court that the sentencer had had that scale of sentences in mind. There was violence in this case, and the sentence was not wrong in principle or excessive.

Commentary. *Spence and Thomas* lays down some general guidance on sentencing in kidnapping cases, pointing out in particular the wide range of circumstances which may occur.

Extended sentence—whether appropriate to impose an extended sentence on a defendant who has kept out of trouble for a significant period of time after his last release from custody.

R. v. PARKER: Mustill L.J. and Tucker J.: July 9, 1985. *Age*: 33. *Facts*: pleaded guilty to two counts of burglary, and asked for four other offences to be considered. The appellant broke into a number of houses and stole property worth about £600 and a small amount of cash. *Previous convictions*: nine, mainly for burglary; longest previous sentence, four years' imprisonment. *Sentence*: five years' imprisonment, certified as an extended sentence. *Special considerations*: the appellant had gone without conviction for a period of 13 months following his release from his last sentence, and it was submitted that an extended sentence was inappropriate for an offender who had kept out of trouble for a significant period of time. *Decision* (considering *Bourton* (1984) 6 Cr.App.R.(S.) 361, *Johnson (Current Sentencing Practice* G1.4 (g)), and *Wright (Current Sentencing Practice* G1.4 (c))): the authorities enunciated a principle which was quite clear, which was that an extended sentence was appropriate only where a man had made no effort to rehabilitate himself, but had commenced committing offences immediately, or almost immediately, after his last release from imprisonment. The Court accepted the submission that this was not a case for an extended sentence, in view of the fact that the appellant had kept himself out of trouble for a period of time. However, the normal sentence for the offences would necessarily be a substantial one, in view of the appellant's record and the nature of the offences themselves. The sentence would accordingly be reduced to a term of four years' ordinary imprisonment.

Commentary. The principle that an extended sentence should not be imposed on a man who has made an effort to conform with the law for a reasonable time is an old one, carried over from the days of preventive detention: see [1963] Crim.L.R. 248.

Arson of school buildings—whether custodial sentence appropriate—length of sentence.

R. v. DEWBERRY AND STONE: Robert Goff L.J., Beldam and Hutchinson JJ.: June 6, 1985. (The Court gave separate judgments in relation to each appellant). DEWBERRY *Age*: 17. *Facts*: pleaded guilty to one count of arson. Together with a number of other young men, including S, he had set fire to a parka which had been placed against the door of a temporary classroom. About £200 worth of damage was done. *Previous findings of guilt*: none. *Sentence*: 12 months' youth custody. *Special considerations*: the offence was probably committed under the influence of alcohol, and the appellant had admitted his participation in full. *Decision*: Criminal Justice Act 1982, s.1(4), required the Court to take account of the circumstances of the individual offender, and the circumstances of the individual case, his personal background and the part played by him in the offence. Taking all those factors into account, the Court could not take the view that this was a case in which the offence was so serious that a non-custodial sentence could not be justified.

Arson was a very serious offence, but the range of criminality was vast, and the offence to which the appellant pleaded guilty came in the lower range of cases or arson. The Court did not consider a custodial sentence correct for the appellant, having regard to the particular part which he played, and the sentence of youth custody would be quashed: a community service order for 50 hours (bearing in mind that the appellant had been in custody for five months) would be substituted.

STONE. *Age*: 15. *Facts*: convicted of two counts of arson. The appellant was concerned in the offence to which D pleaded guilty, and a second offence in which D was not involved, in which a fire was started inside a temporary classroom, which resulted in damage to the extent of £67,000. *Previous findings of guilt*: none. *Sentence*: three years' detention under Children and Young Persons Act 1933, s.53(2). *Special considerations*: both offences were committed after the appellant had consumed vodka. An older co-defendant, H., was sentenced to 18 months' youth custody. *Decision* (considering *Storey* (1984) 6 Cr.App.R.(S.) 104): *Storey* illustrated how different the facts of cases of arson could be. In *Storey*, the appellants had taken a quantity of petrol which they had sprinkled over the classroom before setting it alight. The important question, as the Court had emphasised in that case, was that attention should be focused on the intention with which the act was done, rather than the consequences which resulted. Undoubtedly the fact that the appellant had gone to the school on a second occasion and started a fire meant that the offence was so serious that a non-custodial sentence could not be justified, but there was no apparent justification for passing a sentence on the appellant which was longer than that passed on his co-defendant in respect of the second arson, who received 18 months' youth custody. There was no evidence to support the trial judge's view that the appellant was the ringleader. In the circumstances it seemed to the Court that the proper length of custody for the arson would have been 18 months' youth custody, but as the appellant was a juvenile, the court was prohibited from imposing a term of youth custody of more than 12 months. This led to the question whether the case was one in which an order for detention under Children and Young Persons Act 1933, s.53(2), would be justified. In the opinion of the Court, it would not. The difference between a period of 12 months and 18 months was not so great that it could be said that a youth custody sentence was not a suitable method of dealing with the appellant (s.53(2) could be used only where no other method of dealing with the offender was suitable). The Court should not exceed the limitation on the period of youth custody to be imposed on juveniles, unless the circumstances really justified a sentence of detention. The sentence of detention for three years would be quashed, and a sentence of 12 months' youth custody substituted.

Commentary. This pair of judgments contain a number of interesting points relating to the custodial sentencing of young adults and juveniles. *Dewberry* illustrates the application of the statutory criterion established by Criminal Justice Act 1982, s.1(4), that the offence should be so serious that a non-custodial sentence cannot be justified. The implication of the decision, consistently with *Bradbourn* [1985] Crim.L.R. 682, is that the criterion must be considered in relation to the facts of the particular case, rather than to the general legal category within which it falls, and in particular the role of the individual offender must be considered. It would therefore follow that a case

might occur where the criterion could be held to be satisfied in relation to one offender, but not to his co-defendant charged with the same offence, if the co-defendant's participation was less. The fact that the offender is guilty of arson does not necessarily mean that the statutory criterion is satisfied.

Stone provides a further twist to the question of when the court sentencing a juvenile may go beyond the maximum of 12 months' youth custody and use the power to order a detention under Children and Young Persons Act 1933, s.53(2). *Butler* (1984) 6 Cr.App.R.(S.) 236 dealt generally with this question, and indicated that the power to order detention was not necessarily limited to cases of exceptional gravity, but this case suggests that the power should not be used unless a term significantly longer than twelve months is judged to be necessary. In *Butler* the term of two years' detention was approved. The upshot seems to be that the minimum term of detention imposed under Children and Young Persons Act 1933, s.53(2), should normally be two years: anything less than that is not sufficiently different from the maximum term of youth custody to make the sentence of youth custody unsuitable.

The Mathematics of Corroboration: Errata

On page 646, lines 27 and 28 should read:

"$\Pr(A_S|\overline{S},H) = 0{\cdot}6 \times 0{\cdot}2$

"$\Pr(B_S|\overline{S},H) = 0{\cdot}7 \times 0{\cdot}2$."

On page 649, following the line reading "Dividing the last expression by $\Pr(B_S|A_S,S,H)$ we get:" the expression contained in the last bracket should read

"$\dfrac{\Pr(B_S|A_S,\overline{S},H)}{\Pr(B_S|A_S,S,H)}$."

In the fourth and fifth lines lower on this page, the expression should read:

"$= \dfrac{\Pr(B_S|\overline{S}.H)}{\Pr(B_S|S,H)} \cdot \dfrac{\Pr(\overline{S}|H)}{\Pr(S|H)} \cdot \dfrac{\Pr(S|H)}{\Pr(\overline{S}|H)}$."

Two lines lower down, the bottom line of the last fraction should read "$\Pr(\overline{S}|H)$" and the last expression but one should read

"$= \dfrac{1 - x_2}{x_2} \cdot \dfrac{\Pr(S,H)}{\Pr(\overline{S}|H)}$."

Last, in footnote 22, the page reference 122, should read 207.

Letter to the Editor

From David Poole, Q.C.

Abortion in Great Britain

Dear Sir,

Mr. Kenneth McK. Norrie at [1985] Crim. L.R. 477 presumes that the proviso to section 1(1) of the Infant Life (Preservation) Act 1929 is to be interpreted in accordance with the trial judge's charge to the jury in *Bourne* [1939] 1 K.B. 687. Those interested may wish to remind themselves of the precise terms both of the proviso and of MacNaghten J.'s directions on the meaning of "for the purpose of preserving the life of the mother."

Those directions, by ignoring the existence of the word "only" between "purpose" and "of preserving" dealt rather lightly with the clearly expressed intention of Parliament that the protection of the proviso was to be invoked, uniquely, when life itself was under threat. It was binding on no other Judge, and Mr. Norrie's speculation that other Judges would follow it may be presumptuous indeed.

Yours faithfully,

DAVID POOLE,

Deans Court Chambers, Manchester.