[COURT OF APPEAL]

REGINA v. KELLY (EDWARD)

REGINA v. SANDFORD

1998 Dec. 3; 15

Lord Bingham of Cornhill C.J., Forbes and Harrison JJ.

Crime—Sentence—Life imprisonment—Defendant convicted of second "serious offence"—Judge required to impose life sentence in absence of "exceptional circumstances"—Whether circumstances exceptional—Crime (Sentences) Act 1997 (c. 43), s. 2

In each case the defendant was convicted of wounding with intent contrary to section 18 of the Offences against the Person Act 1861, which was an offence designated as "serious" by section 2(5) of the Crime (Sentences) Act 1997[1] for the purposes of section 2(2) of that Act. Each defendant had previously been convicted of another "serious offence" in the circumstances specified by section 2(1) so that, in the absence of exceptional circumstances relating to either of the offences or to the offender, the judge was required to pass a life sentence. In the first case the judge found no exceptional circumstances and accordingly imposed that obligatory sentence, specifying four years as the period to be served under section 28 of the Act of 1997. In the second case the judge identified the 12-month sentence of detention imposed in respect of the earlier serious offence as constituting an exceptional circumstance which relieved him of the obligation of passing a life sentence. He accordingly imposed a custodial term of eight years.

On appeal against sentence by the defendant in the first case, and on applications in the second case by the Attorney-General for leave to refer the defendant's sentence to the court under section 36 of the Criminal Justice Act 1988 and by the defendant for leave to appeal against sentence:—

Held, allowing in part the appeal in the first case, granting the Attorney-General leave to refer the defendant's sentence in the second case and refusing the defendant's application for leave to appeal, (1) that "exceptional" within the meaning of section 2(2) of the Crime (Sentences) Act 1997 was not a term of art but a familiar adjective describing a circumstance which was unusual or uncommon, not regularly or routinely encountered, but which need not be unique or unprecedented; that in the first case the defendant's youth at the time of the first serious offence, the dissimilarity between the two serious offences, the long interval between their commission and his abstention from crime during the intervening period were not out of the ordinary so as to amount to exceptional circumstances relating to him or to either of the offences, and that, therefore, the judge had correctly imposed a life sentence under section 2(2); and that in the second case the judge had wrongly identified the circumstance of the defendant's earlier sentence as exceptional; that since there were no exceptional circumstances he had been obliged to pass a life sentence, and that, therefore, such a sentence would be substituted (post, pp. 208A–C, H–209C, G, 214C–F).

[1] Crime (Sentences) Act 1997, s. 2: see post, pp. 205D–206A.

(2) That the period to be specified under section 28 of the Act of 1997 on imposition of a discretionary life sentence should ordinarily approximate to one-half of the determinate sentence which would otherwise have been passed and time spent in custody before sentence should generally be taken into account in fixing the specified period; that in the first case a determinate sentence of six years and in the second case of seven years would have been appropriate and, taking account of time spent in custody by each defendant before sentence, a period of $2\frac{1}{2}$ years would accordingly be specified in the first case and of $3\frac{1}{4}$ years in the second case (post, pp. 210D–211B, C–D, 214G–H).

Reg. v. M. (Discretionary Life Sentence) [1999] 1 W.L.R. 485, C.A. applied.

Per curiam. Judges should, when specifying the period to be served under section 28, not only state what the determinate period would have been but also state publicly whether the specified period under section 28 is being reduced to take account of time spent in custody before sentence and, if not, the reasons for following that course (post, p. 211B–C).

The following cases are referred to in the judgment of the court:

Attorney-General's Reference (No. 34 of 1992) (1993) 15 Cr.App.R.(S.) 167, C.A.

Attorney-General's Reference (No. 47 of 1994) (1995) 16 Cr.App.R.(S.) 865, C.A.

Attorney-General's Reference (No. 35 of 1995) [1996] 1 Cr.App.R.(S.) 413, C.A.

Attorney-General's Reference (No. 32 of 1996) [1997] 1 Cr.App.R.(S.) 261, C.A.

Reg. v. Avis [1998] 2 Cr.App.R.(S.) 178, C.A.

Reg. v. Coles (Barrie) [1997] 2 Cr.App.R.(S.) 95, C.A.

Reg. v. De Havilland (1983) 5 Cr.App.R.(S.) 109, C.A.

Reg. v. Hodgson (1967) 52 Cr.App.R. 113, C.C.A.

Reg. v. M. (Discretionary Life Sentence) [1999] 1 W.L.R. 485; [1998] 2 All E.R. 939, C.A.

Reg. v. O'Dwyer (1986) 86 Cr.App.R. 313, C.A.

Reg. v. Richards [1998] 1 Cr.App.R.(S.) 87, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

The following additional cases were cited in argument:

Hogben v. United Kingdom (1986) 46 D. & R. 231

Hussain v. United Kingdom (1996) 22 E.H.R.R. 1

Ireland v. United Kingdom (1978) 2 E.H.R.R. 25

Reg. v. Khan (Sultan) [1997] A.C. 558; [1996] 3 W.L.R. 162; [1996] 3 All E.R. 289, H.L.(E.)

Reg. v. Parole Board, Ex parte Watson [1996] 1 W.L.R. 906; [1996] 2 All E.R. 641, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Furber [1998] 1 All E.R. 23, D.C.

Tyrer v. United Kingdom (1978) 2 E.H.R.R. 1

Van Droogenbroeck v. Belgium (1982) 4 E.H.R.R. 443

Weeks v. United Kingdom (1987) 10 E.H.R.R. 293

Winterwerp v. The Netherlands (1979) 2 E.H.R.R. 387

Wynne v. United Kingdom (1994) 19 E.H.R.R. 333

X v. United Kingdom (1981) 4 E.H.R.R. 188

The following additional cases, although not cited, were referred to in the skeleton arguments:

Pepper v. Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42, H.L.(E.)

Practice Direction (Crime: Life Sentences) [1993] 1 W.L.R. 223; [1993] 1 All E.R. 747, C.A.

Reg. v. Crow (1994) 16 Cr.App.R.(S.) 409, C.A.

Reg. v. D. (1994) 16 Cr.App.R.(S.) 564, C.A.

Reg. v. Gabbidon [1997] 2 Cr.App.R.(S.) 19, C.A.

Reg. v. Lowery (1992) 14 Cr.App.R.(S.) 485, C.A.

Reg. v. Mansell (1994) 15 Cr.App.R.(S.) 771, C.A.

Reg. v. Meek (1995) 16 Cr.App.R.(S.) 1003, C.A.

Reg. v. Okinikan [1993] 1 W.L.R. 173; [1993] 2 All E.R. 5, C.A.

Reg. v. Robinson [1997] 2 Cr.App.R.(S.) 35, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Norney (1995) 7 Admin.L.R. 861

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

APPEAL against sentence.

REGINA v. KELLY

On 19 March 1998 in the Crown Court at Middlesex Guildhall the defendant, Edward Kelly, was convicted of wounding with intent contrary to section 18 of the Offences against the Person Act 1861 (24 & 25 Vict. c. 100). By reason of a previous conviction in 1980 of robbery with a firearm he qualified under section 2 of the Crime (Sentences) Act 1997 for an automatic life sentence. On 1 May 1998 Judge Fabyan Evans sentenced him to life imprisonment pursuant to section 2 of the Act of 1997, specifying for the purposes of section 28 of the Act four years as the appropriate period to be served. The defendant appealed against sentence on the grounds that (1) there were exceptional circumstances relevant both to the offences and the offender which should have caused the judge not to have imposed an indeterminate sentence, namely, (a) his youth at the time of the first qualifying offence, (b) an interval of 18 years between the two offences, (c) the dissimilar nature of the offences, (d) the characterisation of the defendant as not dangerous, (e) that the offence as committed was not particularly grave, (f) the sentence was disproportionate as a punishment and contrary to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and imposed in effect a retrospective penalty contrary to article 7 of the Convention; (2) the power conferred by the Act of 1997 to impose a life sentence in circumstances such as the present was in breach of articles 3 and 7 of the Convention and, alternatively, if a life sentence was correctly imposed the tariff element fixed by the judge was excessive.

The facts are stated in the judgment of the court.

APPLICATIONS

REGINA v. SANDFORD

On 18 June 1998 in the Crown Court at Southwark Terence Sandford was convicted of offences of wounding with intent contrary to section 18

A of the Offences against the Person Act 1861 and actual bodily harm contrary to section 47 of the Act of 1861. By reason of a previous conviction in 1990 of an offence contrary to section 18 of the Firearms Act 1968 he qualified under section 2 of the Act of 1997 for an automatic life sentence. On 10 July 1998 Mr. Recorder Tudor Owen imposed sentences of eight years' for the first offence and of $2\frac{1}{2}$ years' concurrent for the second offence.

B By a reference dated 5 August 1998 the Attorney-General sought leave to refer the eight-year sentence to the Court of Appeal under section 36 of the Criminal Justice Act 1988 on the grounds that (1) it was wrong in principle and the judge erred in finding exceptional circumstances relating to the offences and the offender which justified a determinate custodial sentence; (2) by reason of his previous conviction of a serious offence C within the meaning of section 2(5) of the Act of 1997 together with his instant conviction the defendant qualified for an automatic life sentence; (3) the offence was aggravated, inter alia, by the brutal and unprovoked nature of the attack, the use of a glass as a weapon, the breaking of the glass before its use, and the extent and seriousness of the injuries inflicted, and (4) there were no mitigating features.

The defendant applied for leave to appeal against sentence on the D grounds that (1) the sentence of eight years' was manifestly excessive given that the offence was not in the most serious category of such offences and (2) the judge failed to take account of the defendant's age and personal circumstances.

The facts are stated in the judgment of the court.

E *William Clegg Q.C.* and *James Sturman*, assigned by the Registrar of Criminal Appeals, for the defendant in the first case. The issue is: what circumstances are capable of being "exceptional" within the meaning of section 2 of the Crime (Sentences) Act 1997 so as to displace the court's otherwise mandatory duty under that Act to impose a life sentence where the conditions in section 2(1) are satisfied?

F The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), although incorporated by the Human Rights Act 1998, will not become part of English law until that Act is brought into force. The courts, however, have been anxious to avoid inconsistency between the Convention and domestic law: see *Reg. v. Khan (Sultan)* [1997] A.C. 558. The Convention when incorporated will expressly require the courts to read and give effect to primary legislation in a way G which, in so far as possible, is compatible with the Convention. Until then the courts must interpret section 2 of the Act of 1997 in accordance with the presumption that Parliament does not legislate in breach of the Crown's international treaty obligations. Any ambiguity in legislation should be resolved conformably with the Convention, in particular, where the provision in question was enacted after the treaty obligation arose: see *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] H 1 A.C. 696.

It is to be presumed that a defendant who satisfies the statutory conditions will receive a sentence of life imprisonment under section 2 of the Act of 1997 for the second qualifying offence, but the presumption

may be rebutted by exceptional circumstances relating to either the offences or the defendant. In enacting that provision Parliament has assumed that the second offence demonstrates that the offender is likely to reoffend and, therefore, to represent a continuing danger to the public. In the case of such an offender an indeterminate life sentence is justified and not contrary to European law. It is unlikely that Parliament intended to imprison indefinitely an offender who does not represent such a danger. To do so will place the offender in the unfair position that once the tariff period has expired and the Parole Board has recommended his release, he will be released on licence and be subject to recall under section 39 of the Criminal Justice Act 1991: see *Reg. v. Parole Board, Ex parte Watson* [1996] 1 W.L.R. 906. Where the defendant can show, on a balance of probabilities, that he poses no continuing danger or risk to the public, that amounts to an exceptional circumstance for not passing a life sentence. [Reference was made to *Weeks v. United Kingdom* (1987) 10 E.H.R.R. 293; *Hussain v. United Kingdom* (1996) 22 E.H.R.R. 1; *Winterwerp v. The Netherlands* (1979) 2 E.H.R.R. 387; *X v. United Kingdom* (1981) 4 E.H.R.R. 188 and *Van Droogenbroeck v. Belgium* (1982) 4 E.H.R.R. 443.]

In construing section 2 "exceptional" should be given its ordinary meaning, namely, "of the nature of or forming an exception, unusual:" see *The Shorter Oxford English Dictionary.* By contrast, "exceptional circumstances" have been interpreted in a restrictive sense in other legislation: see, e.g., section 22 of the Powers of Criminal Courts Act 1973. However, that interpretation should not influence that given to later legislation concerning different subject matter.

Dorian Lovell-Pank Q.C. for the defendant in the second case, adopting the argument of the defendant in the first case. On its face section 2 of the Act of 1997 invites anomaly and injustice. Those evils can be reduced if "exceptional" is given a broad interpretation. Section 2 should be given a construction analogous to the plain wording of sections 3 and 4 so as to enable the court to dispense with an indeterminate sentence where the circumstances would make it unjust to impose it.

David Perry as amicus curiae in the first case and for the Attorney-General in the second case. A custodial sentence should, generally, be commensurate with the seriousness of the offence. As an exception to the general rule, Parliament provided that the court may impose a longer than commensurate sentence where special risk to the public is established and a proportionate sentence will not provide adequate public protection: section 2(2) of the Criminal Justice Act 1991. Parliament intended to create in section 2 of the Crime (Sentences) Act 1997 a further exception to ensure that (1) offenders convicted for a second time of a violent or sexual offence are not released from prison if they continue to pose a real danger to the public and that (2) those who are released will remain under supervision and subject to recall for the rest of their lives: see "Protecting the Public" (March 1996, Cmnd. 3190).

Parliament intended that an offender sentenced under section 2(4) should receive an automatic, but not a mandatory, life sentence with the consequence that he becomes a discretionary life sentence prisoner. As such he will be informed by the court at the time of sentence what period should expire before he can be considered for early release: see

A section 28(2) and (3) of the Act of 1997. The specified period should be set between one-half and two-thirds of the notional determinate sentence appropriate for the offence in question, allowance being made for any mitigating factor, such as a plea of guilty, and deduction being made for any remand time spent in custody: see *Reg. v. Secretary of State for the Home Department, Ex parte Furber* [1998] 1 All E.R. 23 and *Reg. v. M. (Discretionary Life Sentence)* [1999] 1 W.L.R. 485. After expiry of the B tariff period a discretionary life sentence prisoner's case for early release is considered by the Parole Board under a regime which is not contrary to European law.

The thrust of the European jurisprudence is limited, its aim being to achieve cross-border harmonisation of procedural safeguards against arbitrariness, but not of substantive sentencing policy: see *Ireland v. United* C *Kingdom* (1978) 2 E.H.R.R. 25; *Tyrer v. United Kingdom* (1978) 2 E.H.R.R. 1; *Wynne v. United Kingdom* (1994) 19 E.H.R.R. 333; *X v. United Kingdom* (1981) 4 E.H.R.R. 188 and *Hogben v. United Kingdom* (1986) 46 D. & R. 231. An automatic life sentence under section 2 does not appear to offend article 3 of the Convention since the sentence is imposed by a competent court following conviction for an offence which carries life imprisonment, the sentencing court's specification of the tariff D will be of a period proportionate to the seriousness of the offence, and on its expiry the offender's release is reviewed and directed by a statutory body. [Reference was made to *Ireland v. United Kingdom*, 2 E.H.R.R. 25; *Tyrer v. United Kingdom*, 2 E.H.R.R. 1; *Van Droogenbroeck v. Belgium* (1982) 4 E.H.R.R. 443; *Weeks v. United Kingdom* (1987) 10 E.H.R.R. 293, 311; *Hussain v. United Kingdom* (1996) 22 E.H.R.R. 1, 25.] In any event, E the Convention is not yet part of English law. When the Human Rights Act 1998 comes into force the courts will be required to read primary legislation in a manner which is compatible with the Convention. A declaration of incompatibility made by the Court of Appeal does not, however, affect the validity or enforceability of the statute but confers on the executive a power to amend it.

The phrase "exceptional circumstances" in section 2 should be F interpreted narrowly and consistently with the same expression in section 22(2)(*b*) of the Powers of Criminal Courts Act 1973. By contrast, the wording "unjust in all the circumstances," in sections 3 and 4 of the Act of 1997 indicates the conferral on the court of a wider discretion than that under section 2. A sentence which would be "unjust in all the circumstances" would not of itself amount to "exceptional circumstances." G What are clearly not "exceptional circumstances," because they are common to many offences and offenders, are (i) the offender's youth at the time of the first qualifying offence and (ii) a long interval between the two offences. Given the variety of offences qualifying as "serious" in section 2 the dissimilar nature of the two qualifying offences in any particular case cannot be exceptional. The fact that pre-sentence and psychiatric reports state that the offender is not dangerous cannot be an exceptional H circumstance. If the requirement to impose an automatic life sentence under section 2 of the Act of 1997 could be avoided in all cases where the offender could not be termed a danger to the public there would be little difference between the principles governing discretionary and automatic

life sentences. Since the Act of 1997 marks a departure from the principle of proportionality in sentencing the fact that the second qualifying offence was not of the most serious of its kind cannot be an exceptional circumstance.

Clegg Q.C. replied.

Cur. adv. vult.

15 December. LORD BINGHAM OF CORNHILL C.J. handed down the following judgment of the court.

REGINA v. KELLY

The defendant, who is now aged 38, appeals against the sentence of life imprisonment imposed upon him in the Crown Court at Middlesex Guildhall on 1 May 1998. The sentence was passed under section 2 of the Crime (Sentences) Act 1997 following the defendant's conviction by a jury on 19 March 1998 of one count of wounding with intent to cause grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861. The judge specified four years as the term to be served under section 28(2)(*b*) of the Act. In imposing this life sentence the trial judge concluded that there were no exceptional circumstances which would justify him in not passing such a sentence.

The defendant submits on appeal that the judge was wrong so to conclude. Alternatively, he submits that the relevant provisions of the Act of 1997 should be construed in a manner compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms and that, so construed, a discretionary life sentence should not have been imposed. In the further alternative he submits that the term of four years specified by the judge was too long.

The section 18 offence of which the defendant was convicted on 19 March 1998 was committed on 14 October 1997. The victim, Mr. Alex Humphrey was a commuter who regularly used the Caledonian Road railway station. On 14 October Mr. Humphrey was returning home from work via the railway station when he saw a group of about six boys in their very early teens bullying a girl. He intervened to stop them. The girl ran away, but the boys diverted their attention to Mr. Humphrey, whom they began to taunt and at whom they began to throw stones. After an unsuccessful attempt to chase them off, Mr. Humphrey picked up a large stone and threw it at the group of boys, striking one of them. This aggravated the situation and the boys then confronted Mr. Humphrey on the platform. Some of them continued to throw missiles at him, while others abused him verbally.

The defendant had been in a shelter on the opposite platform sharing a can of cider with his brother and a woman. One of the missiles struck the shelter and the defendant came out. He asked one of the boys what was going on, and was told that Mr. Humphrey had thrown a stone and injured someone. The defendant crossed the tracks to where Mr. Humphrey was being confronted by at least two of the group. At this stage the defendant was not acting aggressively, and appeared to be assuming the role of a peacemaker. But he then grabbed Mr. Humphrey around the

neck, and the two of them fell to the ground. The defendant managed to sit astride Mr. Humphrey, and threw a number of punches into his face. The group of boys joined in kicking Mr. Humphrey to the head and body and threw stones at his face. The defendant threw a few more punches, then got up, took some steps backwards, and kicked Mr. Humphrey (who was still on the ground) in the face about four times. The boys joined in the kicking until the group dispersed.

Mr. Humphrey suffered a fractured right cheek bone, and for some time after the attack complained of blurred vision and headaches. He lost two teeth and suffers a watery eye.

The defendant was arrested very shortly after this attack and in interview denied the assault, claiming that he had gone to intercede in the argument and had himself been a victim of violence. At the trial he denied the offence but was convicted.

This was a serious offence of violence. Applying the sentencing principles established by sections 1 and 2 of the Criminal Justice Act 1991, any sentencing court would have been bound to impose a custodial sentence of significant length, having regard to the criminality of the defendant, the need to protect the public and all relevant facts concerning the offence and the offender. Abundant guidance on the appropriate length of sentence for such an offence is to be found in the decided cases.

The sentencing regime established by the Act of 1991 was, however, modified by the Crime (Sentences) Act 1997. Section 2 of that Act, brought into force on 1 October 1997, provides:

> "(1) This section applies where—(*a*) a person is convicted of a serious offence committed after the commencement of this section; and (*b*) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence. (2) The court shall impose a life sentence, that is to say—(*a*) where the person is 21 or over, a sentence of imprisonment for life; (*b*) where he is under 21, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982 ('the 1982 Act'), unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so. (3) Where the court does not impose a life sentence, it shall state in open court that it is of that opinion and what the exceptional circumstances are. (4) An offence the sentence for which is imposed under subsection (2) above shall not be regarded as an offence the sentence for which is fixed by law. (5) An offence committed in England and Wales is a serious offence for the purposes of this section if it is any of the following, namely—(*a*) an attempt to commit murder, a conspiracy to commit murder or an incitement to murder; (*b*) an offence under section 4 of the Offences against the Person Act 1861 (soliciting murder); (*c*) manslaughter; (*d*) an offence under section 18 of the Offences against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent); (*e*) rape or an attempt to commit rape; (*f*) an offence under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13); (*g*) an offence under section 16 (possession of a firearm with intent to injure), section 17 (use of a firearm to resist arrest) or section 18 (carrying a

firearm with criminal intent) of the Firearms Act 1968; and (*h*) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Act."

Sections 3 and 4 of the Act of 1997 impose mandatory penalties, of seven and three years respectively, on third conviction of class A drug trafficking offences and domestic burglaries. In each case the third offence, to attract the operation of the respective section, must have been committed after the commencement of the relevant section, at a time when the offender was aged 18 or over, and when he had previously been convicted of two other offences of the same kind; one of those other offences must have been committed after conviction of another; and in the case of domestic burglaries, both the earlier offences must have been committed after the commencement of the relevant section. Both sections oblige the court to impose a custodial sentence of the specified length where the statutory conditions are fulfilled

"except where the court is of the opinion that there are specific circumstances which—(*a*) relate to any of the offences or to the offender; and (*b*) would make the prescribed custodial sentence unjust in all the circumstances."

The court is obliged, where it does not impose the mandatory minimum sentence, to state in open court that it is of the opinion specified and what the specific circumstances are.

The offence of which the appellant was convicted on 19 March 1998 fell within section 2(5)(*d*) of the Act of 1997. That offence was committed on 14 October 1997, after the commencement of the section. Therefore the condition in section 2(1)(*a*) was satisfied. When that offence was committed the defendant was aged 37. He had previously been convicted in England of another "serious offence" within the meaning of section 2(5), namely an offence falling within section 2(5)(*h*). On 26 March 1980, at the Central Criminal Court, the defendant, then aged 19, had pleaded guilty to three counts of robbery and one of attempted robbery and had been sentenced to a total of 14 years' detention. Those offences had been committed in 1979, jointly with co-defendants aged 38 and 28. During the robberies firearms had been carried, and on one occasion a firearm had been discharged by the defendant which had injured two members of the public. Those injuries had not been particularly serious, but had required hospital treatment. It follows that the conditions in section 2(1)(*b*) of the Act of 1997 were also satisfied.

Upon the defendant's conviction of the section 18 offence on 19 March 1998, the court was accordingly obliged to impose a life sentence unless it was of the opinion that there were exceptional circumstances relating to either of the offences or to the defendant which justified its not doing so. It was urged upon the trial judge, Judge Fabyan Evans, that there were such exceptional circumstances which justified him in not imposing a life sentence. He rejected that submission. He said:

"I have listened to what [counsel] has had to say about exceptional circumstances. Those are, in my view, not simply mitigating circumstances, but I do take the view that a combination of circumstances

A may, in certain cases, amount to an exception to the consequence that otherwise inevitably follows in the sort of situation [in which] you find yourself. I do not see that the facts of the offence, or the original offence, and a comparison between the two, is of any assistance to you. I have considered, obviously, over the weeks that have elapsed whether your youth on the previous occasion in comparison to your present age is something I should take into account. I do not think it B is. No weapon was used in this later offence, but it is fair to say that the youths had stones and one, indeed, had a stick. I do not see that the *Hodgson* criteria (see *Reg. v. Hodgson* (1967) 52 Cr.App.R. 113) are relevant in the consideration that I have to have in passing the sentence that I do today. I take the view that in the circumstances the law requires me to pass a life sentence in accordance with the Crime C (Sentences) Act 1997."

The construction of section 2

Mr. Clegg for the defendant submitted that where the conditions in section 2(1) were satisfied there was a statutory presumption that a life sentence should be imposed. But that was, he argued, a presumption which D could be rebutted where there were exceptional circumstances relating to either of the relevant "serious offences" or to the offender which justified it in not doing so. Mr. Clegg relied on a number of matters as amounting, cumulatively, to exceptional circumstances: the youth of the offender when he committed his first "serious offence" in 1979; the 18-year gap between the defendant's "serious offences;" the dissimilarity between the relevant "serious offences," the defendant's good record following release from his E 14-year sentence in 1988; and the fact that, within the genus of section 18 offences, the defendant's was not the most serious of its kind, lacking premeditation, the use of any weapon other than shod feet and the absence of injuries to the victim of the most serious kind. But most of all Mr. Clegg urged that this was a case in which, on the evidence, the defendant presented no continuing threat or danger to the public. The F purpose of section 2, Mr. Clegg submitted, was to permit the indefinite incarceration of those who presented a continuing threat or danger to the public; where no such threat or danger appeared, that was an exceptional circumstance which fully justified the court in declining to impose a life sentence or, as Mr. Clegg put it, which rebutted the presumption that such a sentence should follow.

The operation of section 2 is triggered by the commission of two G offences falling within section 2(5), a disparate collection of serious offences, all punishable by a maximum of life imprisonment. It is plain from the language of section 2(1) that the section applies irrespective of the age of the offender when committing the first "serious offence," the interval of time between the two "serious offences" and the nature of the "serious offences" in question. Provided the offender (when aged 18 or more) has committed a "serious offence" after 1 October 1997, having H previously been convicted anywhere in the United Kingdom of another "serious offence," the court becomes subject to a mandatory duty to impose a life sentence. This duty is not correctly described as a presumption, since presumptions relate to evidence.

Under section 2 the court is not relieved of the duty to impose a life sentence, as it is of the duty to impose the minimum mandatory penalties prescribed under sections 3 and 4, where it is of the opinion that there are special circumstances which would make the prescribed penalty unjust in all the circumstances. Parliament has not chosen to give the court the opportunity to exercise that judgment under section 2. But even under section 2 the mandatory duty imposed on the court is not absolute. It is relieved of the duty to impose a life sentence where two conditions are met: first, that the court is of the opinion that there are exceptional circumstances relating to either of the relevant offences or to the offender; and secondly, that the court is of the opinion that those exceptional circumstances justify the court in not imposing a life sentence. We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered. To relieve the court of its duty to impose a life sentence under section 2(2), however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section as derived from the Act itself and the White Paper on Protecting the Public (1996) (Cm. 3190) which preceded it.

Before the enactment of section 2, the courts had and exercised the power to impose sentences of life imprisonment on offenders who had committed serious offences punishable with life imprisonment in cases where the offenders were judged to present a serious threat to the safety of the public, whether because of their mental instability or for other reasons, for a period which could not be predicted or foreseen at the time of sentence: see, for example, *Reg. v. Hodgson* (1967) 52 Cr.App.R. 113; *Reg. v. De Havilland* (1983) 5 Cr.App.R.(S.) 109; *Reg. v O'Dwyer* (1986) 86 Cr.App.R. 313; *Attorney-General's Reference (No. 34 of 1992)* (1993) 15 Cr.App.R.(S.) 167; *Attorney-General's Reference (No. 32 of 1996)* [1997] 1 Cr.App.R.(S.) 261. If a sentencing court failed to impose a life sentence in a case where such a sentence was called for, it was open to the Attorney-General to seek leave to refer such a case to the court under section 36 of the Criminal Justice Act 1988, as the foregoing references show. It must, however, be inferred that Parliament intended life sentences to be imposed in cases in which, under the existing law, they were not being imposed, whether because of the conditions which the courts had laid down to govern the exercise of the power to impose such sentences or because the courts were reluctant to exercise it. Otherwise there would have been no need to enact section 2. When, in any ordinary case, the conditions in section 2(1) were satisfied, Parliament plainly intended a life sentence to be imposed.

We have considered, singly and cumulatively, the matters relied on by Mr. Clegg as exceptional circumstances justifying non-imposition of a life sentence. We cannot regard the youth of the defendant when committing his first "serious offence" as unusual: he was already by 1980 a very

A experienced offender, and the unhappy fact is that many very serious crimes are committed by very youthful defendants. It is true that there was an 18-year interval between the commission of the defendant's two "serious offences." For eight of those years the defendant was in prison, but it does appear that on release he settled down and abstained from a life of crime. That is, of course, very much to his credit and a strong mitigating factor; but it can scarcely be called exceptional, and Parliament has not seen fit B to provide that the two qualifying offences should be committed within a specified period. It is true that the defendant's "serious offences" were of different kinds, but the section lumps all these offences together and there is nothing to suggest that the imposition of a life sentence should depend on whether the offender has repeated the same "serious offence" or committed another. It is scarcely unusual for a defendant convicted of C robbery involving the use of firearms on one occasion to be convicted of causing grievous bodily harm with intent on another.

We readily accept that, but for the enactment of section 2, a court would not on the present facts have given serious consideration to imposition of a life sentence, and we would have expected such a sentence, if imposed, to have been varied on appeal. We must, however, accept, for reasons already given, that the object of section 2 was to alter the existing D law by extending the power and imposing a duty to impose a life sentence. Despite Mr. Clegg's attractive submission, we cannot regard the defendant as a man who, on the evidence available when he was sentenced, presented no continuing threat or danger to the public. It is true that the probation report prepared for the sentencing judge was generally favourable to the defendant. His personal history is, however, in many (but not unusual) E respects an unhappy one, with recurrent bouts of alcoholism, and the probation officer acknowledged that "there must be concern about future such incidents in which the public may be at risk of physical harm," although he considered that the defendant's capacity to take stock of his situation and seek and respond to external help, coupled with his increased age and knowledge of the dire consequences of future violence, were likely to decrease further the risk of similar offences on the defendant's eventual F release. In a psychiatric report prepared for the sentencing judge, Dr. Kennedy advised: "From a psychiatric point of view, Mr. Kelly could not be regarded as having a propensity for dangerous behaviour which is not amenable to treatment." He did not consider from a psychiatric point of view that there was sufficient evidence of an enduring tendency towards violence to others, nor did he regard the defendant's problems as G untreatable. It would seem, however, that he regarded the defendant as a man whose problems, if untreated, might lead to further violence.

We cannot fault the judge's approach to the application of section 2. In our judgment there were no "exceptional circumstances" relating to either of the defendant's offences or to him which justified the court in not exercising its mandatory duty to impose a life sentence.

H *The European Convention of Human Rights*

Mr. Clegg of course accepted that the European Convention forms no part of our domestic law, since the main provisions of the Human Rights Act 1998 have not as yet been brought into force. But he submitted, in

reliance particularly on the observations of Lord Bridge of Harwich in *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, 747, that where domestic legislation is ambiguous in the sense of bearing alternative meanings one of which does and the other of which does not conform with the European Convention, Parliament will be presumed to have intended to legislate conformably with our international obligations. In reliance on articles 3 and 5 of the European Convention, Mr. Clegg argued that the court should construe section 2 as precluding imposition of a life sentence on a defendant who was shown not to represent a continuing danger to the public.

We hope that we shall not be thought discourteous if we decline to address this argument in detail. Recourse to the Convention as an aid to construction of domestic legislation is still permissible only in cases of ambiguity; we find no ambiguity at all in section 2. In any event, as already pointed out, we do not find it possible to regard the defendant as a man who is shown not to represent a continuing danger to the public. In these circumstances, we think it preferable that consideration of the conformity of section 2 with the Convention should be deferred until that issue comes before the court for authoritative decision.

The term specified under section 28 of the Act of 1997

The procedure to be adopted when specifying a term under section 28 of the Act of 1997 on imposition of a discretionary life sentence was explained by this court in detail in *Reg. v. M. (Discretionary Life Sentence)* [1999] 1 W.L.R. 485. It is unnecessary for us to repeat that explanation. From it two points of relevance to this appeal emerge. First, the period to be specified under section 28(3) should ordinarily, although not invariably, approximate to one-half of the determinate sentence which the court would have imposed had it not imposed a discretionary life sentence. The element of public protection which influences the length of many determinate sentences is, in the case of a discretionary life sentence, provided by the Parole Board's scrutiny of a defendant's release. Secondly, because a defendant will not otherwise receive credit for any time which he may have spent in custody for the offence in question before sentence, the court should take that time into account in fixing the specified period under section 28(3).

We must accordingly begin by considering what determinate sentence would have been appropriate for this offence had a determinate sentence been imposed. Our attention has been drawn to certain recent authorities, in particular *Attorney-General's Reference (No. 35 of 1995)* [1996] 1 Cr.App.R.(S.) 413; *Attorney-General's Reference (No. 47 of 1994)* (1995) 16 Cr.App.R.(S.) 865; *Reg. v. Coles (Barrie)* [1997] 2 Cr.App.R.(S) 95 and *Reg. v. Richards* [1998] 1 Cr.App.R.(S.) 87. We bear in mind the mitigating factors on which the defendant can rely. We also bear in mind that the defendant did not earn the discount which a plea of guilty would have brought. In our judgment the appropriate determinate sentence in this case would have been one of six years' imprisonment. Although the sentencing judge did not indicate the length of the determinate sentence which he would have imposed had he not held section 2 to apply, we infer that he was probably envisaging a determinate sentence of approximately this

A length. If half of the appropriate determinate term is taken for section 28 purposes, we reach a figure of three years.

The judge did not in his sentencing remarks allude to the period, of between six and seven months, which the defendant had spent in custody before trial, and it does not appear that he took account of this (or decided not to take account of it) when specifying four years as the minimum term to be served.

B We can see no good reason why the defendant should not receive credit for the time which he spent in custody before sentence, and we accordingly reduce the specified term from three years to $2\frac{1}{2}$ years. It is in our judgment very important that judges should, when specifying the period to be served under section 28, not only state what the determinate period would have been if a determinate term had been imposed (as indicated in *Reg. v. M. (Discretionary Life Sentence)* [1999] 1 W.L.R. 485, 491, 492), but also state C publicly whether the period specified under section 28(3) is being reduced to take account of time spent by the defendant in custody before sentence and, if not, the reasons for not following that course.

For reasons given in this section of the judgment, we allow the appeal and quash the judge's specification of four years as the term to be served under section 28 and substitute the period of $2\frac{1}{2}$ years. To that extent the D appeal succeeds.

Regina v. Sandford

On 18 June 1998 in the Crown Court at Southwark the defendant, Terence James Sandford, was convicted before Mr. Recorder Tudor Owen E and a jury of one offence of wounding with intent to do grievous bodily harm and one offence of assault occasioning actual bodily harm. On 10 July 1998 he was sentenced to eight years' imprisonment on the first count and to 30 months' imprisonment concurrent on the second, making a total of eight years' imprisonment.

The eight year sentence has prompted two applications. The first is by the Attorney-General who seeks the leave of the court under section 36 of F the Criminal Justice Act 1988 to refer the sentence to the court as unduly lenient. By section 36(2) the Attorney-General is permitted to make such an application if it appears to him that the judge erred in law as to his powers of sentencing or failed to impose the sentence required by section 2(2) of the Crime (Sentences) Act 1997. The Attorney-General contends that the judge should have imposed an automatic life sentence G under section 2(2) of the Act of 1997. The second application is by the defendant, who seeks leave to appeal against the sentence of eight years' imprisonment under sections 9 and 11 of the Criminal Appeal Act 1968. This application has been referred directly to the full court.

These applications have been heard in conjunction with the appeal in *Reg. v. Kelly*, since a common point on the construction and application of section 2 of the Act of 1997 arises. Mr. Lovell-Pank, who represented this H defendant, adopted the argument advanced by Mr. Clegg in *Reg. v. Kelly*, and presented argument of his own. We shall not in this judgment repeat materials we have cited in that one, nor the construction we put upon them.

The offences for which the defendant was sentenced on 10 July 1998 were committed on 2 December 1997. At about 9 p.m. on that date a group of four friends, two men and two women, went to a restaurant in Pimlico in London. This group included the victim of this offence, Wessam Barakat. Later that same evening the defendant arrived at the restaurant with two other men who have not been identified or apprehended. Following their arrival at the premises one of the defendant's companions spoke to Barakat and became ill-tempered. The defendant and his friends then became abusive towards Barakat's group which had, until then, been sitting quietly at a table near the bar. The defendant threatened Barakat with violence, and then the three men attacked both Barakat and his male friend. Both the defendant and his two companions threw punches at Barakat and the other man. In the course of the attack the defendant smashed a glass on the table and pushed it into Barakat's face. He then struck Barakat twice with the broken glass, once on the head and once on his right arm. The other victim received blows from one of the defendant's companions while being held by the other, and was probably knocked unconscious. A customer at the restaurant described the defendant's behaviour as "berserk" and stated that he (the defendant) was clearly the main instigator of the violence. The defendant and his two companions left the premises. Barakat was taken to hospital and was found on examination to have suffered a large cut over the left side of his face, a smaller curved cut over the top of the left side of his head, three small areas of abrasion above his left eyebrow and a cut to his right upper arm. The wounds were cleaned and closed with one deep stitch and 18 skin stitches. The other victim was also taken to hospital and on examination was found to have suffered a mild swelling below his left eye, mild bruising over the left side of his jaw and an area of abrasion and bruising on the left side of his back. He also suffered a cracked tooth and numerous bruises and scratches.

The defendant was arrested on 11 February 1998 and was identified at an identity parade. He declined to be interviewed about the offences. At his trial he denied guilt.

The defendant has a long record of offending which includes 31 previous convictions (involving 20 court appearances between 1986 and 1998 inclusive) for a variety of offences, some of them offences of violence. Notable for present purposes are convictions for having an imitation firearm with intent to commit an indictable offence contrary to section 18 of the Firearms Act 1968 and aggravated burglary contrary to section 10 of the Theft Act 1968. For these offences the defendant was sentenced in the Crown Court at St. Albans on 10 December 1990 to 12 months' and 30 months' detention in a young offender institution concurrently. The offence against section 18 of the Firearms Act falls within section 2(5)(*g*) of the Act of 1997. The burglary was aggravated because the defendant, when committing it, had with him an imitation firearm. These offences were committed on 14 August 1990 when the defendant, with another man, went to the address of the other man's uncle who had a roofing business in Luton. They entered the premises and there stole wage packets and their contents to the value of £4,000, having with them an imitation hand gun. It was the other man who had the imitation firearm, but this

A was shown to the victim at the burgled premises who was put in fear and as a result handed over the money. No violence was used. Both of the intruders were dressed in balaclavas.

In February 1996 in the Crown Court at Southwark the defendant was sentenced to 30 months' imprisonment for an offence of robbery at an off-licence in Chelsea shortly before 10 p.m., when the defendant and another entered the shop both armed with knives. Two days later, on 25 February B 1996, for two offences of assaulting a police officer, the defendant was sentenced to a total of three months' imprisonment.

The offence of wounding with intent of which the defendant was convicted at Southwark on 18 June 1998 was aggravated, the Attorney-General submits, by the brutal and unprovoked nature of the attack, the use of a glass as a weapon, the breaking of the glass before its use, the use C of violence in a public restaurant upon victims minding their own business and the extent and seriousness of the injuries suffered by Barakat. The defendant did not plead guilty, and the Attorney-General submits that the case has no mitigating features. Pointing to the defendant's previous conviction of an offence within section 2(5)(*g*) of the Act of 1997, the Attorney-General submits that the court was obliged to impose a life sentence and that there were no exceptional circumstances relating to either D of the offences or to the defendant which justified it in not doing so.

It is in our judgment plain that the conditions in section 2(1)(*a*) and (*b*) of the Act of 1997 were fulfilled. The court was therefore bound to impose a life sentence unless the case fell within the exception. The recorder concluded that it did. In the course of his sentencing remarks he said:

E "I have to ask myself, in the circumstances, whether there are exceptional circumstances here, relating either to you or to the offences, which would enable me not to pass a sentence of life imprisonment. I say this to you, your counsel has persuaded me, but I stress this, only just. You have escaped a life sentence by the narrowest possible margin. But, at the end of the day, I am persuaded, but only just, not to do so in this case. The exceptional circumstance F upon which I am persuaded is that the offence in 1990, although a qualifying offence and, at first sight, a very serious matter, was actually dealt with by the court by a sentence of 12 months' detention in a young offender institution. I accept the submissions put forward, this legislation is designed to deal with the most serious criminals in our society. You are fast becoming so. But I am persuaded to look at the G circumstances of that earlier offence. It was open to the learned judge on that occasion to pass a sentence far greater than one of 12 months' imprisonment . . . in my judgment, there is an exceptional circumstance here relating to the earlier offence, and I accept the argument which was advanced by [counsel] that, although at first sight a serious matter, and although technically within the meaning of the Act a serious offence, the fact remains that you were dealt with by way of a sentence H of 12 months' detention in a young offender institution. And even taking both counts together, it was a total of 30 months in circumstances where the judge would have been able to pass a much longer sentence had he considered it appropriate to do so."

The probation officer in this case advised:

> "However, regrettably, it appears that when he is under the influence of alcohol, he loses control and then represents a significant risk, both to the community and to himself. I am of the opinion that until he gains insight into his role in these offences and the underlying issues that led to his behaviour, he remains at risk of reoffending in the future."

The medical report read:

> "Three threads emerge from Mr. Sandford's background: his emerging alcohol dependence, his violence and his increasing 'institutionalisation.' He is now alcohol dependent and he uses violence as a way of securing the (relative) security of prison."

The sole question on the Attorney-General's application is whether the recorder was entitled to form the opinion that there were exceptional circumstances relating to either of the defendant's offences or to him which justified the recorder in not imposing a life sentence. We conclude that he was not so entitled. When sentence was passed at St. Albans in December 1990 the defendant was only 18, and the term imposed was very much longer than any sentence he had served before. Although the sentence imposed for the firearms offence was 12 months, the possession of the imitation firearm was an essential ingredient of the aggravated burglary for which he was sentenced to 30 months. The authorities show that sentences imposed for firearms offences are often low, and often too low, particularly when a defendant is sentenced for other more substantial offences: see *Reg. v. Avis* [1998] 2 Cr.App.R.(S.) 178. On any showing, the offences for which the defendant was sentenced in December 1990 were far from trivial, and nothing in the court's sentence imposed then suggests that the court took any other view.

We grant the Attorney-General leave to refer this sentence to the court. We accept his submission that the sentence was unduly lenient, inasmuch as the recorder failed to impose the sentence required by section 2(2) of the Act of 1997. We accordingly quash the sentence of eight years imposed on the defendant and in place of it pass a sentence of life imprisonment.

That obliges us to consider the term which we should specify for the purposes of section 28 of the Act of 1997.

This was, as the Attorney-General rightly submitted, a brutal and unprovoked attack, aggravated by use of a glass deliberately broken to cause injury to a peaceable bystander by a defendant with a propensity to violence. We consider that the appropriate determinate sentence, following conviction, would have been seven years. For purposes of section 28 we would specify $3\frac{1}{2}$ years as the term to be served. But we are told that the defendant was in custody for three months and 12 days for these offences (excluding a period of confinement for other offences) before sentence. We think it fair to reduce the specified period to take account of that time in custody, and accordingly specify a period of $3\frac{1}{4}$ years under section 28.

In the light of this outcome the defendant's application for leave to appeal will be refused. We do, however, accept Mr. Lovell-Pank's submission that the eight-year term imposed by the recorder was somewhat too long, as our foregoing judgment makes plain.

A The sentence imposed by the recorder for the section 47 offence is the subject of neither application and will stand as a concurrent sentence.

Orders accordingly.

Certificate under section 33(2) of the Criminal Appeal Act 1968 in each case that a point of law of general public importance was involved in the decisions, namely: "Has the Court of Appeal, Criminal Division, on the facts of these cases erred in law in the construction or application of section 2 of the Crime (Sentences) Act 1997."

Leave to appeal refused.

Leave to refer to House of Lords refused.

Solicitors: Treasury Solicitor; Crown Prosecution Service, Headquarters; O'Keefe & Flanagan.

D. E. C. P.