10/80

COURT OF APPEAL (UK)

RICHARD MARTIN TOLLEY

Lord Justice Bridge, Michael Davies and Stocker JJ — 26th October 1978

SENTENCE – PREVENTIVE SENTENCE – MENTALLY DISTURBED OFFENDER – POSSESSION OF SMALL AMOUNT OF CANNABIS – WHETHER DISPROPORTIONATE SENTENCE OF IMPRISONMENT PERMISSIBLE.

On 7 November 1977, at Evesham Magistrates' Court the appellant pleaded guilty to assault and was remanded in custody for medical reports. On 12 January 1978, at the same court he was fined £10. At that time he was in breach of a probation order imposed for a period of 2 years at Worcester Crown Court on 28 September 1977 for possession of a controlled drug. The appellant was remanded in custody to Worcester Crown Court to be dealt with for breach for the aforesaid probation order. On 9 March 1978 he was sentenced by the recorder to 2 years' imprisonment. The following cases were cited in argument: *Coleman* (1977) 64 Cr App R 124; *Eaton* (1976) Crim LR 390; *Jones (WL)* (1977) Crim LR and *McFarlane* (1977) Crim LR 49. Upon appeal against the severity of the sentence—

HELD: Appeal allowed.
1. A fixed term sentence of imprisonment should not exceed a length which is commensurate with the offence for which it is imposed – i.e. the punishment should fit the crime. The fact that an offender's mental condition makes it likely that he may, if at liberty, be a danger to himself and others does not justify the use of the penal system as supplementing the shortcomings of the social services and mental health system.

***Clarke* (1975) 61 Cr App R 320, applied.**
***Arrowsmith* (1976) Crim LR 636, disapproved.**

2. A sentence of two years' imprisonment on a 24 year old man with a disturbed mental background for possessing a small quantity of cannabis, even following an offence committed in breach of the original probation order imposed for the cannabis offence is wholly inappropriate and out of proportion to the offence committed.

3. The 2 year sentence was quashed and substituted with an order for the appellant's immediate release. Six and a half months spent in a prison hospital.
(For sentencing, see *Archbold* (39th ed.), para. 645 *et seq*)

BRIDGE LJ: This appellant was sentenced on March 9, 1978 at the Worcester Crown Court, to a term of two years' imprisonment for an offence of possessing a small quantity of the drug cannabis. He appeals against the sentence by leave of the single judge.

Taking a leaf out of counsel's book, it would be convenient in the judgment of the Court, to start at the beginning of the story. On June 8, 1977 police officers were called to the house of the appellant's parents. He is a young man now aged 24 and in June of last year he was living at home in Worcester. When the police officers arrived, he was found to be in a very disturbed state. It was alleged he had tried to attack his younger brother with an axe. That was the subject of a charge against him of unlawful wounding for which he was in due course tried and of which he was acquitted. It is quite apparent that at that time, he was a young man suffering from delusions. He had a history of mental disturbance associated with the abuse of drugs and alcohol. The outcome of the incident on June 8 was that the appellant was arrested and remained in custody until he came up for trial on September 28, 1977. On that occasion, he pleaded guilty to the possession of a few grammes of cannabis resin and for that offence he was made the subject of a probation order. He was then at liberty from September 28 until October 17 when he was again arrested following a domestic disturbance with his parents and in due course he was charged with and pleaded guilty to an offence of common assault upon his mother. When he was before the Magistrates' Court on November 2, 1977 he was remanded in custody for medical retorts to be prepared.

On January 12, at the same Magistrates' Court, he was fined £10 for the offence of common assault but since he was found to be in breach of the probation order made by the Crown Court

in the previous September, he was remanded in custody to the Court to be dealt with for breach of that order. He came before the Worcester Crown Court on March 3, 1978. There were a number of medical reports before the Court, the consensus of which was to the effect that this young man was a psychotic and was suffering from schizophrenia, or a condition akin to it and that an order under section 60 of the *Mental Health Act* 1959 committing him to hospital would be appropriate.

The difficulty, however, was that no vacancy in a secure hospital was available at that time and an open hospital would not have been appropriate. A prison doctor persuaded the Court that there might be expectations that he might be accepted by a special hospital and the case was adjourned to March 9. Between these two dates, the appellant was examined by a doctor from Broadmoor hospital. That doctor disagreed with the opinion commonly held by the several other doctors who had examined him and who were aware of his history of mental health. The Broadmoor doctor took the view that the appellant was not deluded and was not in need of treatment in a special hospital. Whether he was in need of that treatment or not, Broadmoor hospital was not prepared to make a place available to him. That was how the matter stood when it came before the Court and the Court had to decide what to do. The Court, at the hearing on March 9 when the two year prison sentence was imposed, besides all the evidence in the shape of the reports which had been before it at the previous hearing on March 3, heard more evidence from the prison doctor, Dr Bickmore. He said that all his efforts to find some alternative disposal for this young man instead of imprisonment had failed. He indicated that the young man had improved while he had been in custody but if he were to be set at liberty, there was a danger of relapse, particularly if he again resorted to drugs or alcohol and he might resort to anti-social behaviour. It was in those circumstances that the court came to the conclusion that it would be appropriate to impose upon the appellant a sentence of two years' imprisonment.

To bring the story up to date, it is right to say that there are two reports (one from the medical officer and one from the deputy governor of Her Majesty's prison in Gloucester, where the appellant has been serving his sentence) which state that the appellant has been in the prison hospital throughout the period he has been in custody and that he has made very good progress. The doctor says he is no longer introverted and is becoming reliable and does not appear to be harbouring any delusional ideas and his improvement and progress are most gratifying. He is now much more mature in his attitude. The governor says the appellant has been in a position of some trust which he willingly accepted, and thrives on responsibility. His behaviour has been good and his overall response has been most encouraging.

Therefore, it is right to say, viewing the problem pragmatically, that the sentence of imprisonment in this case has, to date, been nothing but beneficial. From the history already recited, it is apparent, with the exception of the period of three weeks between September 28 and. October 17 of last year, that this young man has been continuously in custody since June 8, 1977. In fact the period of three and a half months from June 8 to September 28, 1977 does not count towards his prison sentence albeit that the subsequent period from October 17 onwards to the date when he was sentenced on March 9 does. The consequence of that, as counsel tells us and we accept, is that as matters stand, his earliest date of release, assuming no loss of remission, would be February 17, 1979.

The question which we have to decide is whether the imposition of a sentence of two years' imprisonment in this case was wrong in principle, as is submitted on the appellant's behalf. This subject-matter is not without authority. The starting point is the decision of this Court in the case of *Clarke* (1975) 61 Cr App R 320. This was a case of a young woman with a history of mental disturbance and antisocial behaviour who came before the Court charged with criminal damage having broken a number of flower pots. She was sentenced to a term of 18 months' imprisonment at the Crown Court and against that sentence an appeal was brought to this Court. The principles are clearly set out in the judgment of the court given by Lawton LJ at p323:

> "This court readily understands why the Crown Court at Exeter found it impossible to deal with this appellant by way of a probation order. The picture which presented itself was one of a violent woman in her mid 20's who could not be controlled in an open hospital, one who clearly at that time was not fit to go out into the community without the prospect of further trouble. The judge and the justices were of the opinion that it was their duty to protect both the public and the appellant from herself by passing a sentence of 18 months imprisonment. We have no doubt at all that they conscientiously felt that this was the best thing to be done. They fell into grave error in so thinking. There is some

> evidence that the attitude of the social services was, 'We cannot cope with this woman, let the Courts cope with her.' The first thing to be said, and said very firmly indeed, is that Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts become disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's judges stand on that road barring the way. The Courts exist to punish according to the law those convicted of offences. Sentences should fit crimes."

Those principles seem to be clearly enunciated but there is another decision of this Court, which appears to be in conflict with *Clarke* (*supra*). It is *Arrowsmith* (1976) Crim LR 636. This was again a case of a young woman with a history of mental disturbance and anti-social behaviour who was initially put on probation for an offence of criminal damage of a relatively trivial kind – she had damaged property to a value of £18. She was then brought before the Court as being in breach of her probation order, not by reason of the commission of a further criminal offence, but by reason of her failure to fulfil other conditions of the probation order. She was then sentenced to three years' imprisonment. That sentence was upheld by this Court. The special considerations to which the short report in the Criminal Law Review draws attention and which the Court evidently felt justified the course the Crown Court had taken, were these:

> "She had a long history of disturbed and impulsive and aggressive behaviour, she constantly demanded the attention of hospitals and social agencies where she was abusive and disruptive, causing injury to herself and her surroundings, she made threats of suicide and took overdoses of drugs. The medical and social agencies were reluctant to deal with her any longer. It was suggested she should go to a special hospital but the Department of Health was not willing to make a place available. The decision was that the Court accepted that three years was too long for the offence. However, the need to protect her and the public must also be considered. She had improved in prison and, as no better solution could be found, and the case was very exceptional. The sentence would be upheld."

That seems to us to be a decision in conflict with the principle on which the Court acted in the case of *Clarke* (*supra*) and we have to decide which of these conflicting decisions to follow. The principle enunciated in *Clarke* (*supra*) is clear, that the punishment should fit the crime and the fact that an offender's mental condition makes it likely that he may, if at liberty, be a danger to himself and others does not justify the use of the penal system as a kind of long stop to make good the shortcomings of the social services and mental health system. In this case, it is obvious on the face of it that for the relatively trivial offence of possessing a small quantity of' cannabis on the part of a young man with no previous convictions, a sentence of two years' imprisonment, even following an offence committed in breach of the original probation order imposed for the cannabis offence is wholly inappropriate and totally out of proportion to the offence committed. On the other hand, as the Court said in *Clarke* (*supra*), it is perfectly easy to understand the motivation of the Crown Court – and attention has already been drawn to the beneficial effects upon this young man – in thinking that prison was the only alternative.

It has been drawn to the Court's attention by Stocker J in the course of the argument, that in two very recent unreported decisions, this Court has chosen to follow the case of *Clarke* (*supra*) rather than the case of *Arrowsmith* (*supra*). On principle, that seems to us to be right and, following the case of *Clarke* (*supra*), we have no hesitation in saying it was quite wrong in this case to impose a sentence of two years' imprisonment. The term which the appellant has already served is far in excess of any term that could possibly have been justified and we therefore quash the sentence of two years' imprisonment and substitute such sentence as will permit his immediate release. Appeal allowed. Sentence varied.
