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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Numbers 10 and 11 of 2009)
WILLIAM VOKES AND GARY VOKES

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ

[1] This is the judgment of the court.

[2] The offenders are brothers and on 15 October 2008 they were arraigned on one count of aggravated burglary alleging the infliction of grievous bodily harm on Joseph Paul Hughes, three counts of criminal damage and in relation to William one further count of assault on Paula Stewart. They pleaded not guilty to all counts. On 6 May 2009 their trial came on for hearing. The count of aggravated burglary was amended to allege an attempt to inflict grievous bodily harm and each pleaded guilty to all counts. Each was sentenced to 12 months' imprisonment in respect of the aggravated burglary, one month's imprisonment consecutive in relation to the criminal damage and in the case of William six months' imprisonment consecutive in relation to the assault. In relation to William the learned judge activated partially a suspended sentence adding one month's imprisonment (out of a possible 2 months' imprisonment) to the total and in the case of Gary the learned judge activated partially a suspended sentence adding two months' imprisonment (out of a possible 4 months' imprisonment) to the total.

[3] In relation to the total sentence of 19 months' imprisonment in respect of William the learned judge decided on a custody/probation disposal and ordered that he should serve one month in custody and undergo 18 months probation supervision. In relation to Gary she decided that he should serve one month in custody and 12 months under probation supervision. The Attorney General applies for leave to refer these sentences under section 36 of the Criminal Justice Act 1998 on the basis that they are unduly lenient.

The Facts giving rise to the Offences

[4] Joseph Paul Hughes was the partner of Paula Stewart and they lived together with their daughter at an address in Belfast. Around 11 p.m. on 22 January 2008 the defendants, who knew Mr Hughes from previous business dealings with him, arrived at the house. The windows on either side of the front door were smashed in by them and the front door was opened. The offenders then entered the hallway. Each was armed with a hammer. Each of them attacked Mr Hughes with their hammers and kicked him when he was on the ground. Paula Stewart was threatened by William with a hammer and although she was not struck with it she was pushed to the ground. The offenders then withdrew from the house and damaged two vehicles belonging to Mr Hughes by smashing the windows and damaging the bodywork before leaving the scene. A number of neighbours witnessed various elements of this attack which was carried out with open force in the public street.

[5] As a result of the incident Mr Hughes sustained tenderness of the 8th, 9th and 10th ribs, bruising to the left lower quadrant of the abdomen, a 3 cm laceration on the left frontal scalp area, tenderness over the nasal bones, tenderness in the left jaw and bruising over the left thigh. His head wound was stapled and he was admitted to hospital for observation. Paula Stewart sustained a laceration to a finger on her left hand and a sore right elbow. Damage was caused to the house and two cars to a value in excess of £5,000.

[6] Each of the offenders was interviewed and denied any knowledge or involvement in the incident. When the case was listed for hearing on 5 May 2009 the offenders sought a Rooney indication. The learned trial judge declined to give an indication and the case was then listed to proceed on the following day. On that day the principal count was amended, each offender asked to be re-arraigned and each pleaded guilty to all counts.

The aggravating and mitigating factors

[7] For the Attorney General Mr Maguire QC submitted that the following were the principal aggravating factors.

1. Each offender acted with a measure of premeditation in that when each arrived at Mr Hughes' house each had armed himself with a hammer and appeared to be intent upon an assault on the house and those in it.
2. Each offender was guilty of a gross invasion of the peace and quiet and privacy of the home of both Mr Hughes and his partner.

3. The use of a hammer to effect entry was calculated to cause maximum fear in the occupants of the house.
4. The two men, by their plea, indicated that they intended to cause their victim grievous bodily harm and the use of a hammer against Mr Hughes must have been designed to damage him to a significant extent.
5. The damage to the two vehicles occasioned as the offenders were leaving the scene of their attack was directed to instilling a further sense of fear in Mr Hughes and his partner.
6. Both men have criminal records with William Vokes having previous convictions for offences of violence, dishonesty and criminal damage. Gary Vokes has previous convictions for criminal damage and dishonesty. At the time of the incident each offender was in fact subject to a suspended sentence of imprisonment for other offences.

[8] Mr McCrudden QC for William Vokes submitted that since the offence of aggravated burglary required entry as a trespasser with intent to commit the offence while armed with a weapon of offence the second aggravating factor was merely descriptive of the offence charged. We do not accept that submission. This was a case in which the offenders used open force in a manner which inevitably attracted the attention of other householders in the vicinity and it is this gross invasion by the use of open force which lies at the heart of this aggravating factor. The third aggravating factor refers to the fear instilled in the occupants of the house and the fourth aggravating factor is concerned with the extent of damage which the offenders intended.

[9] Each offender puts forward his plea of guilty as a mitigating factor. On the original indictment the count alleging aggravated burglary claimed that each offender had caused grievous bodily harm to Mr Hughes. The Crown applied to amend the indictment to allege an attempt to inflict grievous bodily harm on Mr Hughes and it was to that amended indictment that the offenders pleaded guilty. The learned judge gave full credit for those pleas. We consider that she was wrong to do so. The appropriate discount for a late plea of guilty was considered by this Court in Attorney General's Reference (No 1 of 2006) Maternaghan and others [2006] NICA 4. That was a case in which a count of affray was added just before a late plea and it was submitted that the offenders should be entitled to full discount in those circumstances. The court rejected that submission.

> "**[18]** None of the offenders pleaded guilty to any offence until 11 October 2005 by which time proceedings were well advanced. It is suggested that since the offence of affray was not preferred until that date the failure to plead guilty to the other offences is in some way mitigated on that account. We wish to

> firmly scotch that suggestion. If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea he should be in a position to demonstrate that he pleaded guilty *in respect of that offence* at the earliest opportunity. It will not excuse a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with.
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> **[19]** To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset. None of the offenders in this case did that. All either refused to answer or denied guilt during police interview. On no basis, therefore, could any of them expect to obtain the maximum reduction for their belated guilty pleas. We wish to draw particular attention to this point. In the present case solicitors acting on behalf of two of the offenders appear to have advised them not to answer questions in the course of police interviews. Legal representatives are, of course, perfectly entitled to give this advice if it is soundly based. Both they and their clients should clearly understand, however, that the effect of such advice may ultimately be to reduce the discount that might otherwise be available on a guilty plea had admissions been made at the outset."

In this case it would have been open to both of these offenders to have pleaded guilty to an attempt to cause grievous bodily harm to Mr Hughes on the original indictment. In our view this is a case in which the offenders have denied their involvement at interview and persisted with their denial of responsibility until the very last moment. They were entitled to very limited discount in respect of their pleas.

The circumstances of the offenders

[10] The offender William Vokes was shot in both legs by paramilitaries in November 2001 when he was 18 years old. Since then he has experienced significant problems in relation to drug use. He was made subject to a

Probation Order in September 2008 and in early 2009 breach proceedings were commenced because of his failure to attend appointments. Those proceedings were adjourned in April 2009. Since then his attendance has improved. He has now commenced work under the probation order which was imposed as a result of the sentence. A recent report shows that he continues to engage with probation. Because of his previous drug use, dishonesty and aggression towards police he has been assessed as being at a medium risk of re-offending. He is not currently assessed as posing a risk of serious harm to the public. D/C Snodden said in evidence that he considered this attack out of character as his previous violence had been reserved for police officers.

[11] Gary Vokes has had significant problems with misuse of drugs and alcohol since 2004. He alleges that he had consumed a relatively small amount of alcohol and taken drugs on the day of the offence. He is assessed as being at a high risk of re-offending but does not pose an imminent risk of serious harm to others. Since his release from prison on 31 July 2009 he has attended five sessions of counselling to address his substance misuse. He has been warned for missing one appointment. He is due to commence a car mechanics course in January 2010.

Consideration

[12] The learned judge herself described the sentences in this case as exceptionally lenient. The issue for us is whether the sentences were unduly lenient. On behalf of the offenders it is pointed out that this is not one of those cases where elderly people are preyed upon or where an attack has been carried out for financial gain. While that is so it is nonetheless a different genus of the offence of aggravated burglary which is serious in itself. In the case of attacks on the elderly sentences in excess of 10 years' imprisonment would be appropriate. Such a sentence may well be appropriate for the present type of aggravated burglary depending on the circumstances. In this case the degree of premeditation, the use of the weapon and the open manner in which force was used lead to the conclusion that the range that would have been appropriate in this case is between three and five years' imprisonment for each offender having regard to the late stage at which their pleas were entered. We accept, therefore, that the sentences were unduly lenient.

[13] It does not follow, however, that this Court must interfere with the sentence. The reference has exposed the offenders to a second sentencing exercise which inevitably gives rise to worry and uncertainty. The court is obliged to take into account the effect of double jeopardy. In this case each offender has completed the prison sentence which was imposed on him and has commenced a course of probation supervision. In Attorney General's Reference (Nos 11, 12 and 13 of 2004) (Martin and others) [2005] NICA 18 the court recognised as relevant in this connection the principle stated in R v

Duporte (1980) 11 Cr App R (S) 116 that a sentencer should not ordinarily intervene to upset the course of a probation order unless there is good reason to do so. In Martin's case the offender had served a period of 133 days in custody and there was evidence that he had benefited significantly from the probation course that he had subsequently undertaken. In these cases the probation courses are at an early stage and we consider that it is necessary in the public interest to interfere with the sentences imposed. In light of the effect of double jeopardy we consider that the appropriate commensurate sentence for each offender is one of two years' imprisonment on the aggravated burglary counts with the sentences in respect of the assault and criminal damage counts to run concurrently. The suspended sentences have already been implemented.

[14] That leads us to the consideration of the imposition of a custody/probation order in these cases. The power to impose such orders is contained in article 24 of the Criminal Justice (Northern Ireland) Order 1996.

> "24. - (1) Where, in the case of a person convicted of an offence punishable with a custodial sentence, other than an offence for which the sentence is fixed by law or falls to be imposed under Article 70(2) of the Firearms (Northern Ireland) Order 2004 or paragraph 2(4) or (5) of Schedule 2 to the Violent Crime Reduction Act 2006, a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both-
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> (a) to serve a custodial sentence; and
> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.
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> (2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences."

[15] The necessary condition that a custodial sentence of 12 months or more is justified is clearly satisfied in this case. The legislation contemplates a period of custody to satisfy the requirements of retribution and deterrence followed by a period of probation to address the issue of rehabilitation. The approach which sentencers should adopt in respect of such orders was set out by the Court of Appeal in R v McDonnell [2000] NI 168 at 172.

> "1. It is clear from the terms of art 24(2) that since the court can deduct such period as it thinks appropriate to 'take account of' the effect of the probation that is quite inconsistent with any requirement of mathematical equivalence. It may in many cases appear appropriate to the court to make the reduction the same length as the probation period, but it is not compelled to do so in every instance, and it may exercise its discretion in determining the amount of the reduction. We consider, however, that the reduction should bear some relation to the length of the probation period. There should also be some balance between the custodial and probation elements.
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> 2. There should ordinarily be a significant period of custody before the offender is released to commence the period of supervision. The supervision seems to us to be intended to operate as an additional element which is designed to help the offender to keep out of trouble after his release rather than constituting the main element in the arrangement. It should be borne in mind that a custody probation order cannot be made unless the court regards a gross sentence of twelve months or more to be justified, so that it is not appropriate where the court might think in terms of a short sentence on the 'clang of the prison gates' principle.
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> 3. We therefore do not think that it would ordinarily be in accordance with the legislature's intention to make an order by which the custody element is very much shorter than the probation period, for in such a case it is doubtful whether a sentence of twelve months would have been justified in the first place, and the court should be giving consideration to other forms of sanction.
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> 4. For the same reasons we doubt whether a reduction in the gross sentence which is materially

> greater than the length of the probation period would be a desirable disposition in most cases.
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> 5. On the other hand, if the reduction in the gross sentence is materially less than the length of the probation period, that would savour of a double penalty, consisting of most of the appropriate gross sentence plus a significant length of probation. We doubt whether that would accord with the statutory intention."

Thus where the sentencing judge has determined that a custody probation order is appropriate he should take the following steps. First he should determine the sentence of imprisonment commensurate with the offence or offences. Then he should determine the period for which the offender should be under the supervision of the Probation Service. Then he should decide by how much the commensurate sentence should be reduced to take account of the fact that the offender is to be under supervision for the period specified. This does not routinely involve reducing the commensurate sentence by the length of the probation supervision, though in some cases it may do so. The reduction may be modest or otherwise depending on the nature and length of the supervision always bearing in mind the nature of the offence or offences.

[16] We consider that the custodial elements of the orders made in these cases departed from this guidance in a number of respects. Firstly there was no significant period of custody before the offender was released to commence the period of supervision. Secondly the custodial element is very much shorter than the probation element. Thirdly the balance that is required between the custodial and probation elements has not been properly struck. When the commensurate sentence is close to the threshold at which such orders can be made it will often be the case that the combined period of custody and probation will have to exceed the commensurate period in order to properly reflect the objectives sought to be achieved by this disposal.

[17] We note that the offender in each case would benefit from a probation order and the evidence indicates that they have complied with probation supervision since release. In those circumstances we consider that a custody/probation order is appropriate. The offenders have indicated their willingness to undergo a period of probation and we consider, therefore, that each offender should serve a period of 12 months' imprisonment together with 18 months' probation supervision thereafter subject to the conditions of the original Order. Each has served the period of imprisonment imposed in respect of the partial activation of the suspended sentences. Although the trial judge did not give her reasons for not imposing the sentences in full we do not at this stage intend to intervene with her exercise of discretion. Each is entitled to credit for any period of custody spent on remand and for the period spent in custody in respect of these offences on foot of the original

Order. Each will present himself by 10 a.m. on 23 November 2009 to HMP Maghaberry to serve the remainder of this sentence.