

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 1 of 2008) DAMIEN
GIBBONS, STEPHEN GIBBONS, DECLAN STILGES and DAVID
MARTIN CRONE

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] On 15 March 2007 a robbery took place at Upper Lisburn Road, Finaghy in Belfast. All four prisoners, Damien Gibbons, his brother, Stephen, Declan Stilges and David Crone were involved. They were arraigned on 7 November 2007 on a charge of armed robbery and they all pleaded not guilty. A fresh bill of indictment was subsequently served on the prisoners in which the armed robbery charge was substituted by a charge of robbery. All pleaded guilty to this charge.

[2] Damien Gibbons was also charged with attempting to cause grievous bodily harm with intent. He pleaded guilty to that charge. Stephen Gibbons was charged with dangerous driving, driving whilst disqualified and driving with no insurance and he pleaded guilty to all those charges. David Crone also pleaded guilty to taking and driving away a motor vehicle, careless driving, driving whilst disqualified and driving with no insurance. A charge of joint possession of a knife, preferred against all defendants, was not proceeded with and was ordered to remain on the books.

[3] On 12 February 2008, His Honour Judge Finnegan QC sentenced Damien Gibbons to a custody probation order comprising four and a half years' custody, to be followed by eighteen months' probation on the charge of robbery. He was sentenced to eighteen months' imprisonment on the charge of attempting to cause grievous bodily harm. This sentence was ordered to be

consecutive to that passed on the robbery charge. At the same court Stephen Gibbons received the same sentence as his brother, Damien, on the charge of robbery. He was sentenced to 6 months' imprisonment on each of the driving offences. These were ordered to run concurrently with each other but consecutively to the sentence for robbery. On the charge of driving without insurance he was fined £100 with an immediate warrant and he was disqualified from driving for two years.

[4] On 29 April 2008, at the same court before the same judge, Declan Stilges was sentenced to a custody/probation order on the charge of robbery, consisting of three years' imprisonment followed by two years' probation. On the same charge David Crone was sentenced to a custody/probation order consisting of five years' imprisonment followed by twelve months' probation. On the charge of taking and driving away a sentence of imprisonment of three months was passed and ordered to run concurrently with the sentence on the robbery charge. On the careless driving charge he was fined £100 with an immediate warrant and disqualified from driving for one year. On the charge of driving whilst disqualified he was sentenced to six months' imprisonment and this was ordered to be consecutive to the first sentence. and disqualified for one year; on the no insurance charge he was conditionally discharged for twelve months.

[5] The Attorney General has applied to refer these sentences to this court under section 36 of the Criminal Justice Act 1988 and seeks to have them quashed on the grounds that they are unduly lenient. On 20 June 2008 we granted leave to refer the sentences and the application duly proceeded.

Background facts

[6] The Attorney General's reference summarised the background to the case in this way: -

"8. The offences were committed on 15th March 2007, in circumstances where police undertook an operation stimulated by the receipt of intelligence. As a result, a team of specialist police surveillance officers and specialist uniform support officers was deployed. These officers took control of a Securicor delivery vehicle, driven by a Securicor delivery guard. This was a "cash in transit" Securicor vehicle, with a delivery destination of the Northern Bank, Upper Lisburn Road, Finaghy, Belfast. Damien and Stephen Gibbons are brothers. Damien Gibbons was travelling in a van driven by Stephen Gibbons. This was one of two vehicles, driving in convoy, under police observation

during a period of approximately one-and-a-half hours. The second vehicle contained Stilges and Crone.

9. The delivery of one cash box to the bank was duly effected and a second delivery then commenced. At this point, one of the plain clothes police officers was approached by the offender Damien Gibbons who was brandishing a large steel kitchen knife, approximately 10 - 12 inches long, and demanding that the cashbox be handed over. The offender made a grab for the box and when the officer refused to relinquish it the offender made an aggressive slashing motion across the officer's neck, forcing him to jump backwards. The knife narrowly missed his neck. At this stage, the officer relinquished the cash box and the offender Damien Gibbons ran off with it, crossing the Lisburn Road and entering Grangeville Drive, pursued by police officers. During pursuit, he threw the cashbox onto the pavement and got into the passenger seat of the van being driven by Stephen Gibbons. An unmarked police vehicle then blocked the progress of the getaway vehicle, which accelerated into the former, colliding with it bumper to bumper. Stephen Gibbons then attempted to accelerate past the police car, mounting the footpath and his vehicle collided with a concrete pillar. Damien Gibbons was arrested after a violent struggle with police officers and he continued to struggle following arrest. Stephen Gibbons also resisted arrest. It was observed that he was wearing black gloves. In the aftermath, two pairs of gloves were recovered from the offenders.

10. The Crown case was that all four offenders were involved in the planning and execution of the robbery. The conduct of Damien and Stephen Gibbons at the scene and in the immediate vicinity of the robbery is detailed in paragraph 7 above. [This should be paragraph 9]. During this phase of the execution of the offence, the role of Stilges and Crone was that of lookouts. The car being driven by Crone was to act as a second getaway car into which the Gibbons brothers were to transfer after

discarding their car. On being searched, the car contained four mobile phones, an iron bar and a hammer. The Crown case was that this was a prepared robbery in which all four offenders had essentially the same degrees of culpability. Crone was driving a car he had taken from his brother without his brother's consent. He was disqualified from driving and had no insurance.

11. The offenders made no admissions and maintained their denial of guilt until a late stage. Upon arraignment on 7th November 2007, they pleaded not guilty. On 30th November 2007, following submission of an amended indictment, they pleaded guilty. The amendments merely consisted of the indictment stating "robbery" as opposed to "armed robbery" and the insertion of a new second count on the indictment charging the offence of having an offensive weapon in a public place. In the event, the Crown did not proceed with this count against any of the offenders, on the basis that all of them knew that a knife was to be deployed in the robbery, and the case for the Crown was presented accordingly. The offence of having an offensive weapon was left on file in these circumstances."

[7] It is to be noted that the case is unequivocally made that all offenders knew that Damien Gibbons was armed with a knife. On behalf of the offender, Stephen Gibbons, Mr Hopley QC accepted that his client was aware that his brother had a knife but claimed that he did not know that it was to be used in the robbery. When this somewhat improbable claim was made, the court asked Mr Hopley whether he was inviting us to conclude that his client did not believe that the knife was to be used, although he was aware of his brother's possession of it. He replied that such a claim would be stretching the bounds of credibility unduly. We readily agree with that assessment.

[8] Mr Mallon for the offender, Crone, and Mr O'Donoghue QC for Stilges trenchantly asserted that neither of their clients was aware that a knife was to be used in the robbery. This claim was made despite the presentation of the prosecution case to the trial judge that all defendants were aware of the knife. On 23 April 2008 when Ms Mehaffey on behalf of the Crown first opened the case against these two offenders she said, "the Crown case [is] that Declan (*sic*) Gibbons had the knife for the robbery and the accused, or the co-accused knew about that fact, namely Stilges and Crone knew about that fact". At a

later stage the transcript records the following exchange between Ms Mehaffey and the judge: -

“His Honour Judge Finnegan QC: Ms Mehaffey you tell me the knife, the presence of the knife was known [on] your case?”

Ms Mehaffey BL: Yes, by all co-accused.”

[9] On the same date, 23 April 2008, Ms McDermott QC, who then appeared for Crone, is recorded as having said, “... [Crone] denies, as Your Honour knows, that he was aware of the existence of a knife and [it] doesn’t seem to me to be suggested by count one ... that a knife was involved so far as he was concerned, and particularly in the circumstances where the Crown have not proceeded on the second count”. At a later stage, Ms Mehaffey returned to this theme and said, “I was instructed to leave the weapon count on the books, on the basis that Damien Gibbons had the knife and the other co-accused knew that, and *that was shared with the defence*” (emphasis added). Ms McDermott’s riposte to this was: -

“... my learned friend is quite right, it’s just that she’s said that. But it always seems to me, Your Honour and I must say and I may not be right about it, that count one’s count of robbery, [to] which the accused has pleaded guilty ... not on the basis that he knew that there was a knife. It seems to me that the original indictment which I will hand up to Your Honour now, is the same offence robbery contrary to Section (8)(1), *Theft Act (Northern Ireland) 1969*. The difference being that in the particulars of the offence after Your Honour is looking at the second indictment, robbed Simon Gerald Callaghan of a cash delivery box and a weapon of offence, namely a knife, was used to commit the said offence. One might call it the usual way of expressing armed robbery and then my friend has said, what is now count three, was then count two. So the charges having being divided up ... or the first count having being divided up the way that it has between the first count and the second count, appears to reduce the situation where the robbery simpliciter is count one, and the possession of the knife at the time which is not being proceeded with, is count two. And I did have discussions at the time with my friend about this and ...”

[10] At the end of these exchanges, the position about knowledge on the part of Crone that Damien Gibbons had a knife was clearly in dispute. In so far as this question might influence his decision as to the proper sentence, it was undoubtedly incumbent on the judge to resolve this dispute. It appears, that at this stage, he may not have been particularly exercised by the matter for he is recorded as having said this: -

“All I’m interested in is what changed between the first indictment and the second indictment, it’s always ... an unhealthy area, due to frailties of recollection and what specifically was said and what was specifically agreed to, I merely want to establish what the court can see in front of it ... on the re-arraignment or the ... second arraignment ... and that’s all I require.”

[11] One may also observe that the sentences passed on the robbery charge might also indicate that the judge did not believe that the question whether the other offenders knew that Damien Gibbons intended to use the knife during the robbery was a matter of great moment. The sentences imposed for this offence were almost identical in the case of the Gibbons brothers and Crone. Stilges received a lesser sentence but this seems largely to have been due to the judge’s assessment that he suffered from mental difficulties. But, despite these indications, it became clear from the sentencing remarks of the judge on 29 April that he had indeed concluded that knowledge of the knife on the part of the offenders other than Damien Gibbons had not been established and that this made a difference to his choice of sentence, for he said on that occasion: -

“I think I must sentence on the terms of the new indictment which make no mention of the knife in the robbery and also that there is no joint charge, the second count has not been proceeded with.”

[12] It appears to us that the question whether the other defendants knew that Damien Gibbons intended to use a knife was of obvious importance to the sentencing exercise. It is equally clear that this was a matter that was in palpable dispute. The judge appears to have proceeded on the basis that the defendants other than Damien Gibbons did not know of the knife or, at least, of an intention to use it. In light of the case made by the Crown, it is difficult to understand why he should have reached that view, although, in fairness to him, the reasons that the Crown changed the indictment were never satisfactorily explained. We consider, however, that this matter should have been resolved before sentence was passed, if necessary by the holding of a *Newton* hearing. As matters stand, however, we are left with no alternative

but to proceed on what we consider to be an essentially contrived and artificial assumption that the offenders other than Damien Gibbons did not know that a knife was to be used in this robbery.

Previous convictions

[13] Damien Gibbons has a lengthy criminal record with a total of 165 convictions including 26 for burglary, 18 for theft, 56 for road traffic offences, two serious assault convictions, two assaults on police and two convictions for robbery. His convictions date back to 1986. In October 1999 he was convicted of wounding with intent at Londonderry Crown Court and was sentenced to a custody probation order of six years' imprisonment and eighteen months' probation. On 13 December 2002 he was convicted at the same court of robbery and was sentenced to four years' imprisonment. Again at the same court on 11 March 2003 he was also convicted of robbery and sentenced to two years' imprisonment consecutive to his then present sentence. On 9 March 2007 he was convicted at Downpatrick Crown Court of burglary and theft receiving an eighteen months' sentence suspended for two years and a three months suspended prison sentence for resisting police on that occasion.

[14] Stephens Gibbons also has a lengthy criminal record with a total of 295 convictions dating back to Belfast Juvenile Court in 1986. He has a total of thirty-three convictions for assault on police, six convictions for serious assault and one for possession of an offensive weapon. He has forty convictions for burglary, twenty for theft and ninety-eight convictions for road traffic offences. He also has four convictions for robbery. The first of these was at Carndonagh District Court on 19 June 1990 when he received a sentence of 9 months' imprisonment. In October 1995 he was sentenced by Belfast Crown Court to eighteen months' imprisonment for robbery and in December 2002 was convicted at Londonderry Crown Court of robbery receiving a custody probation order of thirty months' imprisonment and twelve months' probation. On 9 March 2007, one week prior to the index offences, he had been convicted on several counts at Downpatrick Crown Court of assault on police, driving while disqualified, dangerous driving and burglary and theft for which he had received a total sentence of eighteen months' imprisonment suspended for two years. He was also in breach of other suspended sentences in existence at the time of the offence and according to the probation report had only been released from Maghaberry one week prior to the offence.

[15] David Crone has a total of forty seven previous convictions, the majority of which are road traffic offences. However he had also been convicted on 21 January 2003 of an offence of robbery committed on 13 February 2002 for which he had received a custody probation order of four years' detention and

thirty months' probation. He had also been sentenced to five months imprisonment suspended for two years for driving whilst disqualified on 3 May 2005 – this period of suspension was still unexpired at the date of the present offences.

[16] Crone's convictions began when he was a juvenile of some 15 to 17 years old. There are several convictions before the juvenile/youth court in the period 1998 to 2000 for offences such as common assault, going equipped for theft, shoplifting, allowing himself to be carried, assault on police and obstruction of police, no driving licence/no insurance, taking a vehicle without consent, failure to stop and dangerous driving. In February 2002 he was convicted of having no insurance, no driving licence and no vehicle test certificate. In January 2003 he was convicted of a scheduled offence of robbery for which he received a custody probation order of 3 years 364 days' custody and 30 months' probation. Later in January 2003 he was also convicted of three offences of assault on police and criminal damage for which he received a custodial sentence of four months' imprisonment on each charge to run concurrently. Also in January 2003 he was convicted of several driving offences including dangerous driving and received two months concurrent sentences of imprisonment. In February 2003 he received a further period of imprisonment of four months for driving offences. In May 2005 he was sentenced to five months' imprisonment suspended for two years for driving offences.

[17] Declan Stilges has thirty-three previous convictions, thirteen of which are for road traffic offences. On 20 November 2002 he was convicted of four counts of robbery and was sentenced by Belfast Crown Court to a custody probation order of six years' imprisonment and two years' probation. He was convicted of attempted robbery on 1 June 2004 at Downpatrick Crown Court and received a custody probation order of forty-two months' imprisonment to be followed by a thirty months' probation order. At Belfast Crown Court on 27 January 2006 he was convicted of being unlawfully at large and was sentenced to six months' imprisonment suspended for three years.

Pre sentence reports

[18] The probation report on Damien Gibbons recorded that he was the third eldest in a family of seven and had been raised by his mother and her partner until he was placed in care at a children's home in Londonderry. He was transferred to various children's homes throughout Northern Ireland and did not complete his primary or secondary education. He has had problems with substance misuse including heroin and admitted that alcohol and drugs have played a part in his offending. The probation officer observed that none of the penalties imposed by various courts appears to have had a positive impact on this offender in terms of reducing his offending behaviour. During previous periods of engagement with probation services he lacked motivation

to make positive changes to his lifestyle. It was noted that when nearing the end of a previous sentence of imprisonment imposed in October 1999, he was granted two days' home leave during which he committed further burglary and theft offences and during the probation element of the order re-offended within a number of weeks, committing a robbery and serious driving offences. Despite all this, and somewhat remarkably, he has been assessed as suitable to undertake the Probation Board cognitive self-change programme.

[19] In relation to the index offences, Gibbons claimed that he had been pressurised into carrying out the robbery by a person to whom he owed a debt of £2,000 for drugs. He said that this person had planned the offence but has not been apprehended. During his interview with the probation officer Gibbons accepted that he had had a knife during the robbery and was prepared to demand the money from the person with the cashbox but denied any deliberate attempt to cause injury. He said that he was using Temazepam and Diazepam when he committed the offences.

[20] The probation officer assessed Damien Gibbons as a high risk of re-offending due to his previous history, involvement with negative associates, lack of victim awareness, use of alcohol/drugs, lifestyle issues and lack of employment.

[21] Stephen Gibbons is the second eldest in the family. He was admitted to care when he was three years of age and spent his childhood in children's homes until the age of thirteen when he was sent to St Patrick's Training School. He has a long history of alcohol and drug misuse and had been a daily user of cannabis and a binge drinker. He has no formal educational qualifications nor has he ever been employed. He has been in a relationship for just over nine years and has three children aged nine, four and two. He also has a fifteen year old son from a previous relationship who lives with his mother in Derry and with whom he has no contact. His current partner is supportive of him and he has a positive relationship with her.

[22] The probation officer noted that Gibbons has been dealt with by the courts in various ways, none of which had deterred him from re-offending. He is in breach of a number of suspended sentences. He has had several periods of probation which in the past had not proved successful. However he did in 2005 complete a seven month period of voluntary contact with probation which he viewed as helpful in addressing his alcohol and drug misuse and helping him to avoid re-offending for a period.

[23] In relation to the offences to which he pleaded guilty on this occasion, Gibbons stated that he had been visited by a friend of his brother's and asked to drive a motor vehicle. He agreed to do it as he had been released from prison just one week prior to these offences and had no money. He claimed that he had become caught up in the enterprise solely for financial gain but

had not been involved in the planning of the robbery. The probation officer felt that, while he expressed regret and remorse, Gibbons tended to minimise his responsibility and had limited victim awareness.

[24] Stephen Gibbons was considered not to have an established history of violent offences and it was therefore believed that he did not pose a high risk of harm to the public but since he was a persistent offender, there was a high likelihood of re-offending especially in view of his ongoing alcohol/drug misuse, impulsiveness/risk taking, lack of consequential thinking, disregard for current court orders, lack of structure or routine and association with pro criminal peers.

[25] A psychometric intelligence test administered by Dr M T Davies, a consultant psychiatrist, showed that Stephen Gibbons had a full scale IQ of 66, which placed him in the bottom 1% of the general population. The psychologist stated, however, that this result may underestimate his true level of ability but he would nevertheless be considered as falling on the borderline of mental handicap. His receptive vocabulary was that of an average 9 year old. The offender claimed to have suffered significant depression and anxiety throughout his life but had never had an assessment by mental health services.

[26] The probation report on David Crone recorded that he was a 24 year old single man who lived with his mother in the Lower Falls area of West Belfast. He had close relationships with other family members although since his remand in custody his father had ceased all contact with him. He had been subject to probation and subject of a sentence imposed on 21 January 2003 for offences of robbery and dangerous driving. The probation order began on 24 February 2004 and expired on 24 August 2006. He had engaged in the early part of the order and successfully completed an anger management programme and alcohol awareness programme but had been resistant to offers of pursuing vocational or employment opportunities and had committed further road traffic offences in October 2004 during the probation order.

[27] Crone is the youngest of five children and had grown up subject to negative community influences and had become involved in car crime. He had enjoyed a stable home life. During his secondary level education he left school in fourth year when he was expelled for assaulting a teacher. He had no formal educational qualifications. He did not bother to register with any training programme and has no qualifications, works experience or skills. Alcohol abuse had been a prevailing factor from an early age although since completion of the alcohol awareness programme in 2006 he stated that he had managed to avoid alcohol.

[28] During his interview with the probation officer Crone minimised his role in the offence and stated that he had been unaware of the fact an offence was taking place. He said that he had been asked to “sit in a car at a particular place” to clear a debt that he owed to an unnamed person. The probation officer noted he had a repetitive pattern of motoring offences including dangerous driving and it was considered therefore that he posed a potential risk of harm to the public. Previous community supervision by probation had not had a deterrent effect. The likelihood of reoffending was in the medium category. He was judged to have a continuing pro-criminal attitude and limited victim awareness.

[29] Crone was found to have a verbal IQ of 75 putting him the bottom 5% of the population but representing a fairly reasonable level of intelligence, according to a report from Colin McClelland, an educational psychologist. Mr McClelland did not detect anything “psychologically unusual” in Crone and did not feel he required any type of psychological counselling. He was literate at a level which places him in the bottom 9% of the population. With such cognitive abilities Crone would be able to differentiate between right and wrong, well able to engage in employment or train for employment although he seemed to have a very low level of motivation for seeking employment.

[30] The probation report on Declan Stilges, a 33 year old man living with his mother and his two sons aged 11 and 10 years in Norglen, West Belfast recorded that he too had a negative early upbringing mostly due to his father’s criminality and periods of imprisonment. His father had also been subjected to paramilitary attacks – having been shot on several occasions. The family had therefore moved around considerably. Stilges left secondary education with no qualifications but did find employment and remained in employment from 1993 to 2000 before becoming the manager of a car wash. In 2000 his relationship with his partner ended and he began to abuse drugs and alcohol. He also then became engaged in criminal activity including robbery. He had been subject to two previous probation orders: the probation element of the last order came into effect in August and he had completed sessions of the rapid assessment and treatment service for drug and alcohol misusers (RATSDAM).

[31] The probation officer considered that, notwithstanding Stilges’ involvement with RATSDAM, he represented a high risk of reoffending due to his inability to avoid negative influences in the community, associating with criminal peers, continued misuse of alcohol, increased depression and self harm, impulsive and risk taking behaviour. On the other hand the probation officer also noted that Stilges has been able to maintain employment, has cooperated with probation and had an understanding of victim issues; he had also begun a new relationship.

[32] There was concern about Stilges' mental health. He had been detained under the Mental Health Order in December 2007 in the Mater Psychiatric Unit having attempted to commit suicide. At the time of the probation report he was being prescribed antidepressants and attending a psychiatrist as an out-patient.

[33] Stilges' first account to the probation officer about his involvement in the offence was that Crone had asked him to come with him to Finaghy where he believed that they were going to abandon a vehicle. He denied any involvement in the robbery or knowledge that a robbery was going to take place. He also stated that he had no knowledge that a knife was to be used. An addendum report by the probation officer cast a rather different light on his involvement. On this occasion Stilges stated that he had been contacted by a fifth person, not known to the court, and had been told to keep watch while the robbery took place and he was to be paid £500. He stated that he never agreed to take part in the actual robbery. He was willing to take part in the offence for a financial gain. The probation officer considered that it would be essential that Stilges be supervised within the local community on his release from custody.

[34] A report of Dr Davies, a consultant clinical psychologist, was provided based on assessments carried out on 28 January 2008 and in December 2005. Dr Davies did not detect any signs of significant psychiatric illness and no evidence of undue anxiety but Stilges did appear to be depressed. At the assessment in 2005 an IQ test had revealed that Stilges had a full scale IQ of 85 i.e. in the bottom 16% of the population. There was a discrepancy between the verbal and non-verbal IQ. His non-verbal IQ was within the average range but verbal IQ fell within borderline learning disability range.

[35] Dr Davies noted that Stilges had lived a rather chaotic existence and the history which he gave was somewhat confused. He reported that his father had died at the age of 32 in 1988 and had been shot several times during his life and died of a heart attack whilst serving a prison sentence. He said that he had a close relationship with his mother whom he described as 'brilliant'. The family had moved around a lot and he said that he had stopped going to school when he was 13 years old. He had lived with his maternal grandfather for a time and had obtained employment at a car wash where he remained for 6 or 7 years and was promoted to the role of manager.

[36] When his relationship broke down his drink and drug use increased and he was also sacked from his job. He began to get into trouble with the police and was arrested for an armed robbery of a chemist shop at Andersonstown and remanded to prison where he spent 10 months awaiting trial. He was subsequently sentenced to 6 years' imprisonment followed by 2 years' probation and he felt he had been treated unfairly in relation to his co-accused.

[37] On 15 December he had been referred to the Mater Hospital having threatened to kill himself. He had also, apparently, bitten his sister. He said he could not remember any details of what had happened or his treatment although he admitted that he been taking cannabis and cocaine. He is now reviewed as a psychiatric out patient and was attending a suicide awareness counsellor. He is currently prescribed an anti depressant, a sleeping tablet and another medication. Dr Davies concluded that Stilges just finds it difficult to accept any responsibility for his present situation.

The judge's sentencing remarks

[38] The judge began his sentencing remarks on Damien and Stephen Gibbons by saying that he gave the defendants considerable credit for their pleas of guilty and he considered that the pleas had been made "as close to their first appearance in the Crown Court as makes no difference". With this statement, we find ourselves quite unable to agree. Damien Gibbons was charged with armed robbery. In effect he admitted armed robbery. Indeed, he admitted having used the knife which he used to carry out the robbery in an attempt to cause grievous bodily harm to a police officer. We cannot accept that Damien Gibbons can be said to have entered a plea at a time so proximate to his first appearance in the Crown Court as to make "no difference".

[39] To obtain maximum credit for the plea of guilty, it is necessary that an admission be made at the outset. No such admission was made in this case. Moreover, both Gibbons brothers had been caught red-handed and, as this court made clear in *R v Pollock* [2005] NICA 43, the discount for pleas of guilty in cases where the offender has been caught red-handed should not generally be as great as in those cases where a workable defence is possible. In the case of Stephen Gibbons, the plea of guilty to robbery was one that he could have made at the outset, whether or not it was acceptable to the prosecution. If a defendant chooses not to enter a plea at the earliest opportunity, he must bear the consequence (*which should inevitably follow*) that there will be a reduction in the discount that would otherwise accrue. We consider that the credit to be accorded the Gibbons brothers for their pleas of guilty should have been minimal.

[40] The judge referred to the deprived backgrounds of the defendants and the fact that they had spent most of their childhood in care but stated that in light of their atrocious criminal records immediate custodial sentences were "the only way forward". He observed that whilst they had not succeeded in the past on probation he considered that there were now some signs that they were attempting to "straighten themselves out" and to have some sort of background to return to. Again we have difficulty in understanding how the judge could have come to that conclusion. We have set out at some length in

paragraphs [18] to [25] above the available evidence on which an assessment on how likely it was that these offenders would commit further crimes could be made. Quite apart from the probation officer's view that both were at high risk of re-offending, their records point unmistakably to that conclusion.

[41] Very unfortunately, on the occasion that he was sentencing the Gibbons brothers, the judge was not referred to relevant guideline cases from this court on sentencing for robbery. In *Attorney General's reference (No 6 of 2006) [2007] NICA 16*, we said: -

“[18] This court has provided guidance on the proper sentencing range in a number of robbery cases in the recent past. Despite the existence of those guideline cases, no authority was referred to by either counsel who appeared before the Recorder nor did she advert to any of the recently decided appeals in her sentencing remarks. ... We deprecate this failure. In a case such as the present, counsel for the prosecution and for the defence should have had ready copies of the well known guideline cases and should have drawn these to the attention of the judge.”

[42] Observations such as these have been made on several occasions both before and since that case. It is a matter for considerable regret that they must be repeated. We are at a loss to understand why counsel in important cases such as the present neglect what we consider to be their elementary duty of bringing to the attention of the judge relevant guideline cases. Moreover, when, commendably, Ms McDermott QC on behalf of Crone, referred the judge to some of the relevant cases during the sentencing of Crone and Stilges, prosecuting counsel appeared to be unfamiliar with the decisions.

[43] Instead of being referred to relevant guideline cases from this jurisdiction, Judge Finnegan was asked to look at *Blackstone* 2008 Edition B4.50. This passage refers to guidance on sentencing for three categories of robbery (i) street robbery/mugging (ii) robberies of small businesses and (iii) less sophisticated commercial robberies. The sentencing range listed in those guidelines for a less sophisticated commercial robbery where a weapon is produced and used to threaten is a range of 2 to 7 years custody with a starting point of 4 years custody.

[44] As we have repeatedly made clear, the guidance provided by the Sentencing Guidelines Council must always be regarded as secondary to the guidelines provided by the Court of Appeal in this jurisdiction. There will be occasions where the guidelines accord with local experience in which case they may be followed but there will also be occasions where they should not

be applied. In any event, it is perhaps unsurprising that the judge remarked that the robbery in this case came closest to what is described by the Sentencing Guidelines Council “a less sophisticated commercial robbery” and sentenced the offenders accordingly. The judge did not activate the suspended sentences to which the offenders were subject and did not advert to these in his sentencing remarks.

[45] In the course of sentencing Stilges and Crone the learned trial judge referred to the suggestion that an *agent provocateur* had been involved in entrapping the accused into committing the offence. His sentencing remarks contain the following passage: -

“In the court papers there was a defence statement served on behalf of the first named accused which as part of his defence he alleged that there had been [an] *agent provocateur* and that he had been entrapped into committing this offence. While the court took the view that that did not give rise to a working defence in the particulars of this case there is authority to say that such a situation can affect the sentence. Such a Newtown type enquiry or anything of that nature would of course have led to the possibility at least of the source of the very, very extensive information that the prosecution agents, namely the police had as to the activities of the accused that morning. The court had also noted in the course of the papers that at least one of the accused claimed he had been brought in at short notice and that some other participant had withdrawn from the enterprise. If the court had decided to conduct an enquiry at that early stage or indeed even on the first day when the Gibbons were sentenced it would have precluded if there was any such intention that the (inaudible) of the accused would lead to a plea of guilty on the terms specified on the new indictment. Such an entitlement to discount would not have only flowed to the first named accused if a successful enquiry on a Newton type hearing had been launched and the court was satisfied that some participant not before the court had in fact set this up and encouraged the participation of all the four accused. For that reason the court stayed silent, perhaps unwisely and trusted in the wisdom of the new drafting of the indictment. I think the court should sentence

on the basis of what presented to it. Whatever the understanding, and I don't doubt the bona fides of Miss Mehaffey and the various other people involved. It is again of some significance that in spite of two enquires as to the police view about this suggestion of another participant not before the court and whether he had cried off and one of the accused had come in at short notice. Certainly the benefit to the State and a proper one is that no trace can be made to where all this information came from or whether it exists, this offence had been actively encouraged by somebody not before the court. It is on that basis that I sentenced the Gibbons."

[46] It is not clear from this passage whether the learned trial judge actually allowed some discount on the sentences passed on the Gibbons brothers on account of the possibility that an *agent provocateur* had played a part in instigating this robbery but we have to make clear that, on the evidence available to this court, we do not consider that the judge would have been justified in following that course. The suggestion that there might have been some such person was, on the basis of the material that we have seen, at best speculative. The judge had been informed on two separate occasions that the prosecution had no instructions in relation to such a figure and, without rigorous inquiry into the suggestion, a reduction based on the possibility that such an individual existed and that he had played the role that had diffidently been attributed to him, could not be justified.

[47] Counsel for Crone referred the judge to the authorities of *Attorney General's reference (No 6 of 2006)* and *R -v- Devine* [2006] NICA 11. The judge considered that these authorities established that the normal starting point for robbery where the defendant has not played a central role should be 5-7 years on a guilty plea and that this guideline 'married into' the Sentencing Guidelines Council advice on less sophisticated commercial robbery. He expressed himself as undecided about who was the driving force behind the robbery and who the main perpetrator. He said that this "was a serious crime ... but to describe it as sophisticated or professional would be stretching the imagination in terms of how it was gone about , the vehicles used and the weapon of choice was a kitchen knife, albeit of significant proportions". Again we have some difficulty with that assessment. The robbery was quite clearly planned. The Securicor van had been targeted in advance. Lookouts were given their stations. A getaway car had been arranged. Mobile telephones were available to allow the members of the gang to keep in touch. A second car was to convey the perpetrators from the scene once the initial escape had been effected. If the robbery had been successful, as one must deduce that it would have been if the police had not been alerted to the plan,

one would hesitate surely to describe it as other than sophisticated. There is, we believe, a danger in assuming that because a planned robbery is foiled, it cannot have been sophisticated or professional.

Sentencing for robbery in Northern Ireland

[48] In *Attorney General's reference (No 1 of 2004)* [2004] NICA 6 this court gave guidance as to the starting point for robbery where a plea of guilty has been entered. We said: -

“The normal starting point for robbery where the defendant has not played a central role should be in the range of 5 to 7 years on a plea of guilty. Obviously, the range of sentences for those who (like the offender's accomplice) play a central role should be much higher.”

[49] In *Attorney General's reference (No 1 of 2005)* NICA 44 we said: -

“We wish, therefore, to make absolutely clear that for a commercial robbery carried out as a well planned venture, where firearms or imitation firearms are used and where the perpetrators use or are prepared to use violence, the starting point for sentence after a contest should be fifteen years. On a plea of guilty at the earliest opportunity the appropriate starting point is ten years' imprisonment. Where a plea is made later than the first opportunity the reduction should be adjusted to take account of the lateness of the plea and the reasons that it was not entered earlier.”

[50] In that case we concluded that the robbery was indeed a well planned venture and there was clear evidence that imitation firearms had been used. But it is interesting to compare the circumstances of that robbery with those involved in the present case. They were described in the following passages from the judgment of this court: -

“[5] The robbery offence to which all the offenders pleaded guilty took place at approximately 12.15 pm on 7 January 2003 outside the Ulster Bank, Market Square, Antrim. Police had been informed that an armed gang intended to rob Securicor staff while they carried out a transaction at the bank. A police surveillance team was put in place and police officers took on the role of the Securicor

staff who would normally have been involved in the delivery to the bank. While walking from the Securicor vehicle to the bank, one of these officers (who was carrying a cash box containing £25000) was approached from behind and struck on the head with a gun by the offender Doran who then snatched the cash box. Immediately after that other police officers came to the scene; they apprehended Doran and recovered the weapon and the cash box. It was found that the firearm was imitation. A second person (who was arrested at the scene but later absconded) was arrested a short distance away. He was driving a stolen vehicle in which a bin filled with water was discovered. The driver was found to have two mobile telephones in his possession and a set of keys for a Volvo motor car.

[6] Rooney, Cunningham, Irvine and Dorrian were arrested in a van at High Street, Antrim, some 300 metres from the scene of the robbery. While making these arrests police recovered two mobile telephones. One of these was found to have been broken open, and the 'Sim' card had been thrown away. It was deduced that this had been done in an attempt to prevent analysis of calls that had been made earlier. Police had, however, observed earlier interaction between the occupants of this van and two other vehicles, one of which was the Volvo. The van had been seen parked beside these vehicles at other locations in Antrim before the robbery. Rooney's fingerprints were found inside the Volvo and on a can that had been discarded in that vehicle. The word "Roon" was also found written on the inside of the car's sunroof. Forensic evidence found a link between Rooney's telephone and the driver of the vehicle who was arrested near the scene. Other links were established between Rooney and Irvine. Based on these findings the prosecution case was that Rooney had a major role in the planning and execution of the robbery."

[51] It is arguable that the level of sophistication in that case was somewhat greater than in the present. It is also clear that imitation firearms were used whereas here a knife was the weapon chosen, although we do not regard that

as a matter of substantial distinction. Violence was actually used in the *Rooney* case whereas in this instance Damien Gibbons attempted to commit violence. Given that he pleaded guilty to an attempt to cause grievous bodily harm, again we do not see that as a major differentiating factor. Taken as a whole, there is little to distinguish the two robberies.

[52] Robbery remains one of the most prevalent types of serious crime in our community. The courts must react to this regrettable phenomenon with sufficiently severe penalties to ensure that a clear signal is sent to those who may contemplate involvement in such activity that lengthy periods of imprisonment will be imposed where involvement in such crime is established.

Discussion

[53] It appears to us that *Attorney General's reference (No 1 of 2005)* provides the most relevant guidance for sentencing in the present case. While there is scope for the argument that a somewhat less sophisticated robbery was involved in the present case, we do not consider that the circumstances are so markedly different as to warrant a significantly dissimilar disposal than that recommended in that reference.

[54] It is to be remembered that the starting point recommended where a plea was made at the earliest opportunity, for a defendant who was centrally involved in the robbery, should be ten years. Two comments about that require to be made. Firstly, the plea here was not made at the first opportunity. Secondly, ten years is the *starting point*. Where a defendant has significant previous convictions for similar offences, that starting point will be varied upwards, in appropriate cases substantially upwards.

[55] In the present case the judge appears to have accepted the prosecution case that all the defendants were more or less equally involved – or, at least, he was unable to identify a more central role for any of them above the rest. This seems to us to accord with the evidence that was presented to him. On that basis, he can have only concluded that all were centrally involved and that none had a role that could properly be described as peripheral.

[56] In the case of Damien Gibbons, who played the key role in the actual robbery, who was armed with a knife and evinced an intention to use it, the starting point, given that his plea of guilty was not entered at the earliest opportunity, should have been at least ten years. This makes some allowance for the argument that this was perhaps not the most sophisticated of commercial robberies. We consider that this starting point must be varied upwards substantially because of the appalling record that Gibbons has, most notably his convictions for robbery. We have concluded that the penalty for this robbery should have been of the order of twelve years. If the trial judge

had activated the suspended sentence of eighteen months and had made this consecutive on the penalty for robbery, we do not consider that any appeal against such a disposal would have been viable. The sentence of eighteen months' imprisonment on the charge of attempting to commit grievous bodily harm we do not consider is unduly lenient.

[57] In the case of Stephen Gibbons, we must proceed, as we have already observed, on the basis that he did not know that a knife was to be used in the robbery. He must have known, however, that the Securicor employee would not necessarily calmly yield up the cash box when it was demanded of him. Nevertheless, to reflect this - what we have described as - essentially artificial assumption, we consider that the penalty in his case, again taking into account his appalling record and the late plea of guilty, should have been in the order of ten years. Again a decision to activate the suspended sentence and to make this consecutive on the sentence for robbery could not have been challenged.

[58] Crone might reasonably claim that his role was not as central as that of the Gibbons brothers, although the judge does not appear to have accepted that. Otherwise there is nothing to distinguish his situation from that of Stephen Gibbons, apart from the suspended sentence that applied in the latter's case. Again, a substantial variation on whatever starting point was chosen was warranted because of his dreadful criminal record. We consider that a sentence of nine to ten years' imprisonment was the appropriate disposal in his case.

[59] In the case of Stilges there was reason to accept that he was less culpable than the others because of his propensity to be led and his mental difficulties. Again, despite the judge's finding, we believe that he could reasonably claim to have played a less central role than the Gibbons brothers. But, again he has a substantial criminal record which must operate as a significant aggravating factor. We believe that the appropriate range of penalty in his case is seven to eight years' imprisonment.

Conclusions

[60] We have concluded that each of the sentences imposed on the robbery charges was unduly lenient. They must therefore be quashed. It is necessary to take account of the effect of double jeopardy, although in the case of hardened criminals such as these offenders, this is perhaps not as significant as it would be in the case of a first offender. Having given careful consideration to all that has been advanced on behalf of the offenders we have decided that the following sentences should be substituted in each instance: -

1. In the case of Damien Stilges, a commensurate sentence on the charge of robbery of ten years. This will comprise a period of

custody of eight and a half years and eighteen months' probation. We were not invited by the Attorney General to activate the suspended sentence and, not without misgivings, we make no order in relation to that. The consecutive sentence on the charge of attempting to commit grievous bodily harm will remain unaltered.

2. In the case of Stephen Gibbons, a commensurate sentence of eight years. This will comprise a period of custody of six and a half years and eighteen months' probation. For the same reason, we shall not activate the suspended sentence in his case. The consecutive sentences on the driving charges will not be altered.
3. In the case of David Crone, a commensurate sentence of seven years. This will comprise a period of custody of six years and twelve months' probation.
4. In the case of Declan Stilges, a commensurate sentence of six years, comprising four years' custody and two years' probation.