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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE NUMBER 1 OF 2004
(ZOE LYNNE PEARSON)

(AG REF 17 of 2003)

Before: Kerr LCJ, Campbell LJ and Higgins J

KERR LCJ

Introduction

[1] The offender, a young woman now aged 23 years, pleaded guilty on 30 October 2003 to one count of armed robbery contrary to section 8 (1) of the Theft Act (Northern Ireland) 1969 and to one count of taking a motor vehicle without consent contrary to article 172 of the Road Traffic (Northern Ireland) Order 1981. His Honour Judge Gibson QC sentenced her to a custody probation order of twenty-seven months on the first count, comprising nine months imprisonment and eighteen months probation and to three months concurrent on the second count. The Attorney General sought leave to refer the sentence to this court under section 36 of the Criminal Justice Act 1988, on the ground that it was unduly lenient. We gave leave at the hearing before us on 16 January 2004 and the application proceeded on that date and on 13 February 2004.

Background facts

[2] Shortly after 9am on 19 March 2002 a man entered a post office at Drumaroad, a rural area north of Castlewellan, County Down. He had a white dust mask over his face and held a gun in his right hand. He shouted at the postmaster to open the safe. With great presence of mind the postmaster managed to reset the time lock for an extra fifteen minutes. At this the robber put the postmaster on the ground, placed his foot on his neck and threatened him repeatedly. The doorbell sounded and the postmaster was hauled to his

feet and forced to admit the robber's accomplice, the offender. She was also masked.

[3] The robber struck the postmaster on the head with the gun, slapped him about the head and threatened to shoot him if a police officer entered the premises. He put the gun to the postmaster's head while uttering these threats. The customers in the shop were herded behind the counter and forced to lie or crouch behind it. These included a woman with her two grandchildren, aged 7 and 2. Unsurprisingly, the children were hysterical while this episode took place.

[4] It is not clear when the offender left the premises but she was not present throughout. She had departed some time before the robber and may not have been present when some of the violence took place. She did not take an active part in the events that have been described above. The robber succeeded in obtaining a quantity of benefit books, postal orders, saving stamps and an amount in cash. He and the offender made their escape in a Vauxhall Astra van which the offender had driven to the scene of the robbery. The loss to the Post Office is £5160. Nothing was recovered.

Aggravating factors

[5] The following aggravating features are present: (i) the robbery took place at a rural post office; (ii) considerable violence was used, threats were made and several members of the public including young children were put in fear; (iii) the attack had a considerable impact on the postmaster who was unable to resume his business for something in excess of two months; (iv) the robbery required a significant element of pre-planning; (v) a gun or imitation weapon was used; and (vi) the offender has previous convictions and her involvement in these crimes were in breach of a conditional discharge order.

Mitigating features

[6] The following mitigating features can be identified: (i) the offender pleaded guilty, albeit not at the first opportunity; (ii) her accomplice was the driving force behind the offences and it appears likely that she acted under his influence; (iii) she does not appear to have played a central role in the robbery offence and may have been absent when most of the violence took place; (iv) she has a most unfortunate background and had a difficult upbringing; she has been involved in abusive relationships with men, and suffered a stillbirth; and (v) at the time of sentencing the offender was pregnant. She has since given birth to a baby boy.

Sentencing in cases of robbery of off-licences and similar commercial premises

[7] It has been well recognised that small commercial premises such as off-licences and post offices (which often provide a vital service for the community) are vulnerable to the type of robbery perpetrated by this offender and her accomplice. In *Attorney General's Reference Nos 23 and 24 of 1996* [1997] 1 Cr App R (S) 174 (a case involving a series of robberies of small shops) Lord Bingham of Cornhill said at 176-77:

> "At the outset it has to be acknowledged -- and counsel representing both offenders have realistically acknowledged -- that these are very serious offences. It is common knowledge that branch post offices, betting offices, off-licences, garages and very many other premises are served by single, often female, assistants, in possession of cash, who are vulnerable to an extreme in the lawless manner demonstrated by the 2 offenders. It has been said that in this field the public interest to protect such people is paramount and must override any personal considerations which might otherwise weigh in favour of a defendant. This Court would wish to give its emphatic endorsement to that principle. It is fundamental that the courts must be seen to protect the public."

[8] That approach was followed by this court in *R v McKeown* (18/12/97). Delivering the judgment of the court MacDermott LJ said:

> "In this jurisdiction there have been an alarming number of cases of this nature in the recent past and we wholeheartedly endorse [Lord Bingham's] observations. We would also add that if the present level of sentencing is not deterring those minded to commit this type of offence sentencing levels will have to continue to rise. The public deserves no lesser response."

[9] On 18 October 2002 the Court of Appeal gave judgment in two cases of post office robbery. In *R v Brown* the appellant had pleaded guilty and was sentenced to 5 years imprisonment. He had robbed a Comber post office by holding a knife to the throat of a female customer, stealing £3585. Dismissing the appeal the court stated:

> "The judge was quite correct to regard offences of this type as serious and requiring proper deterrent sentencing to protect persons who run such premises. Sentencers should in our opinion take

> quite a high figure as their starting point when considering sentence in these cases. In the present case the appellant is entitled to credit for his plea of guilty, even though he had little option in the circumstances. His working record is also reasonably favourable. The judge was entitled to regard the previous offence as relatively minor; strictly, this is not a mitigating factor, but the absence of an aggravating one. We could not place much weight on the motives for the crime. We agree that it was an amateurish crime, and to a degree done on impulse, but such crimes are easy to commit and can be very frightening for the victims and other persons caught up in them. Having considered all the factors, we cannot regard the effective sentence of five years as anything but markedly lenient, and we should ourselves have imposed a materially heavier one."

[10] In *R v Dunbar* the appellant was convicted of a single count of armed robbery and sentenced to 14 years' custody and 12 months' probation. The Court of Appeal dismissed the appeal. The appellant had entered a sub post office in rural Londonderry, pointed a gun at the 56 year old postmistress, pushed her face on the floor, tied her hands, took her keys and stole £822 from the till. The offence had a traumatic effect on the injured party. The appellant had a poor record which included robberies. The Court of Appeal gave the following guidance on sentencing in robbery:

> "[8] The level of sentencing for armed robbery has been the subject of consideration on several occasions in this court and we think it appropriate to review it yet again in this appeal. A suitable starting point for a review of such sentences is the English case of *R v Turner* (1975) 61 Cr App R 67, regularly referred to as a guideline case in later judgments both in England and Northern Ireland. At page 91 Lawton LJ said:
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> > 'We have come to the conclusion that the normal sentence for anyone taking part in a bank robbery or in the hold-up of a security or a Post Office van, should be 15 years if firearms were carried and no serious injury done. It follows therefore that the starting point for considering all these cases is a sentence

> of 15 years. As was pointed out in argument, the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the court is dealing with cases of this gravity. In this case, all those who took part in the bank robberies, in the sense of going into the banks carrying firearms or other weapons, had criminal records. Some had bad criminal records and others not so bad. We have decided that in dealing with those for whom a sentence of 15 years' imprisonment for one bank robbery is appropriate, the length and type of record is of little assistance'."

A similar guideline case in this jurisdiction was *R v O'Neill* [1984] NIJB 1, in which Gibson LJ said at page 3:

> "It is now some 9 years since this Court declared in a reserved judgment its view as to the proper range of terms of imprisonment for armed robbery. This was done in 2 cases heard on the same day, namely *R v McKellar* and *R v Newell* reported in [1975] 4 NIJB. I was a member of the court though the judgment in each case was delivered by McGonigal LJ. We would wish to emphasise that the trend of criminality in the meantime has done nothing to diminish the opinion which was there expressed that armed robbery, especially of a bank, post office, security van or other premises where the staff and members of the public are put in fear and where considerable sums of money are likely to be stolen if the robbery is successful, is a very serious crime which must be visited with an immediate custodial sentence which in almost every case will be for a considerable number of years regardless of the circumstances or the personal background of the accused. Indeed, such robberies are now more common than they then were and the courts

> must in sentencing those found guilty bear in mind that there ought to be a considerable element of deterrence in the term which should properly be imposed. This Court, therefore, wishes it to be clearly understood that it affirms the statement made by it in *McKellar's* case that this is a type of offence which must in present circumstances be met by sentences which in other times might be outside the norm for such offences. In circumstances such as obtain nowadays in Northern Ireland where firearms are frequently used to rob banks and post offices this Court would reaffirm that a sentence of 13 years or upwards should not now be considered outside the norm for a deterrent sentence for this type of offence. Indeed, it would be appropriate for a judge to regard a sentence within the range of 10 to 13 years as a starting point for consideration, which sentences may be increased if there is a high degree of planning and organisation, or if force is actually used, or if the accused has been involved in more than one such crime. Equally it would be appropriate to reduce the sentence if the degree of preparation or the efficiency of performance is low, or if the money and weapons have been recovered, or if the accused has shown contrition and pleaded guilty to the charge, or if there are other special features which ought to be treated as grounds for reduction of the penalty."

[11] The Sentencing Advisory Panel published a consultation paper on robbery in April 2003. The Panel summarised the present sentencing position for the type of robbery involved here as follows:

> "*Robberies of small businesses (7-9 years on a guilty plea, 9-12 years after a trial)*
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> 13. Coming below the level of professionally organized offences is a category of less sophisticated robberies involving business premises such as post offices or small shops.

> These offences are typically less well planned, so that they could not be described as 'professional', and they are often committed by a single offender using a real or imitation firearm, or other weapon, to threaten the victim(s). Robbers will target these premises in the hope of stealing significant amounts of cash, and because such shops lack the physical and electronic security devices available to banks or building societies. In *Attorney-General's Reference No 7 of 1992* Lord Taylor CJ said that the type of offence 'which involves somebody committing robbery at a small shop or other premises would ... normally attract a sentence of at least seven years' imprisonment on a plea of guilty'. The use, rather than threat, of violence against the shopkeeper will require a sentence at or above the top end of this range. A typical case is that of *Kevin Clarke*, where a total sentence of 9 years' imprisonment (7 years for robbery and two years consecutive for having an imitation firearm with intent) was reduced by the Court of Appeal to 7 years by making the two sentences concurrent instead of consecutive. The offender had pleaded guilty to an offence which involved pointing an imitation firearm at a cashier in a bank and demanding money; there was no violence, and he left after taking £2,000."

[12] These passages illustrate the courts' determination to ensure that the law's protection is afforded to those who provide the indispensable service to the public of staffing small shops, post offices and other commercial premises. The staffing levels and the location of these premises mean that those who provide these facilities must often do so in vulnerable circumstances. It is precisely because of their vulnerability to the type of robbery involved here that substantial sentences must be passed. Experience has shown that this type of offence will continue unless it is made clear to those who contemplate such robberies that they will, if apprehended, face lengthy terms of imprisonment.

The hearing in the lower court

[13] Mr O'Donoghue QC for the offender has informed the court that the hearing of the plea in mitigation took place before the judge, despite an application that it be adjourned so that a pre-sentence report and a report from a consultant psychiatrist be obtained. In his sentencing remarks the

judge said that Miss Pearson's condition was such that her case had to "be dealt with as a matter of urgency".

[14] It is claimed that the refusal to adjourn the hearing of the plea in mitigation until these reports had been obtained constituted a violation of the offender's rights under article 6 of the European Convention on Human Rights. That breach, Mr O'Donoghue claimed, could not be cured by the subsequent production of the reports for the purpose of the hearing before this court. The violation of the offender's Convention rights should be reflected, he suggested, in a reduction of any sentence that this court might otherwise be disposed to impose.

[15] For the Attorney General, Mr Morgan QC did not accept that there had been a breach of article 6 but submitted that, in any event, the offender had not suffered any disadvantage because the reports had now been produced and, in light of their contents, even if they had been available previously, they could not have led to any more benevolent disposal by the judge.

[16] One can understand why the judge was anxious that the matter proceed with dispatch but we consider that it was unfortunate that he did not accede to the request that a pre-sentence report and a psychiatric report be obtained. A probation officer had given evidence before sentence was passed but this was not on foot of any interview with the offender or extensive investigation of her background. We believe that this was unsatisfactory. We consider, however, that if there was a breach of the offender's article 6 rights that this has not led to any substantive disadvantage for we consider that the sentence in fact imposed was significantly less than that which should have been passed even if the proper procedures had been followed.

Double jeopardy

[17] In *Attorney General's reference (No 2 of 1999)* [2000] NICA Carswell LCJ, dealing with the effect that having to face sentencing twice should have, said:

> "We have to bear in mind the issue of the effect of double jeopardy. It has been the consistent practice of the court to make allowance for the fact that an offender who has been duly sentenced is put at risk all over again when a reference is brought under the 1988 Act, and to reduce to some extent the sentence eventually imposed to recognise that factor."

[18] It appears to us that this factor is of particular importance in the present case because the offender has had the added anxiety of awaiting her confinement and wondering whether she will be allowed to have her child

with her in prison. Happily, it appears that she may keep the child with her for so long as the medical officer thinks desirable. At nine months a report will be made to the governor on whether the child should remain with the offender or removed to the care of a relative or the local trust. Nevertheless, it is clear from the probation and psychiatric reports that the welfare of her child has been a source of worry and distress for the offender and we feel that this should be reflected in the sentence that this court passes.

Disposal

[19] The sentence imposed by the judge was in our view unduly lenient. 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. While some discount on the range appropriate to the offender was warranted to take account of the mitigating factors that we have mentioned above, we do not consider that a sentence such as was passed by the trial judge can be upheld.

[20] We shall substitute for the sentence of twenty-seven months one of three and a half years. This sentence is rather less than would be appropriate, even after making allowance for the double jeopardy effect, to meet the seriousness of the offence and the offender's participation in it but we have borne in mind that for her the period to be spent in custody will be the more onerous because she must spend the first months of her baby's life in prison. On that account we have reduced the sentence well beyond what would normally be suitable for this type of offence.

[21] We are satisfied that the offender would benefit from a period of probation after her release from custody. If she will agree, therefore, we will direct that the sentence shall take the form of a custody probation order comprising two years custody and eighteen months probation.