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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **09/03/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (Number 6 of 2006)
NIALL DAVID McGONIGLE

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Before Kerr LCJ, Higgins LJ and Stephens J

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KERR LCJ

Introduction

[1] The offender, Niall David McGonigle, was charged with two offences of armed robbery contrary to section 8 (1) of the Theft Act (Northern Ireland) 1969. The offences were committed on successive days in February of last year, 19th and 20th. On arraignment at Londonderry Crown Court on 4 September 2006, he pleaded guilty to both charges. He was sentenced by the Recorder of Londonderry on 6 October 2006. She imposed a custody probation order in respect of each charge comprising thirty months custody and eighteen months probation. Both sentences were ordered to run concurrently.

[2] The Attorney General sought leave to refer the sentences to this court under section 36 of the Criminal Justice Act 1988, on the ground that they were unduly lenient. We gave leave on 23 February 2007 and the application proceeded on that date.

The facts

[3] The first offence took place at a takeaway restaurant in Springtown Industrial Estate, Londonderry. At approximately 7.30pm on 19 February two masked men, one of them the offender, entered the premises and demanded money from the staff. McGonigle was armed with a rifle which was brandished in the course of the robbery and pointed directly towards at least one member of staff. The other robber had a knife which he was observed to be holding just above shoulder height. McGonigle went to the cash register and after struggling with it for some time managed to wrench it

from its fittings and take it from the premises. He was seen carrying it towards a car with the electric lead trailing and money spilling from it. Some £200 was stolen. Neither the stolen money nor the cash register (which was worth £200) was recovered.

[4] Several members of staff and the public, some of whom were in the restaurant while it was taking place, were put in fear during this outrageous robbery. Happily, a quick-witted passer-by realised that the offender and his accomplices were embarked on a criminal enterprise and had the presence of mind to note the registration number of the car that they used and this information led to the offender being apprehended by the police on 22 February 2006.

[5] At about 7.40pm on 20 February 2006 a sales assistant in an off licence in Springtown, Londonderry heard a buzzer at the door of the premises and saw that a male person was standing there. The sales assistant activated the button that unlocked the front door whereupon two other persons ran into the premises. They ran towards the counter, threatening both the sales assistant and a customer whom he had been serving. One of these men was carrying a knife which was some thirty centimetres long with a serrated edge. It was later established that this was the offender. He jumped over the counter to stand beside the sales assistant and pointed the knife at him, holding it so that the point of the blade was a few inches from the sales assistant's stomach. He demanded that he open the till and threatened to stick the knife in him if he touched any buttons.

[6] The sales assistant opened the till and the two till drawers were removed by the offender. Cash amounting to £363 was stolen together with both till drawers. Nothing has been recovered from this robbery. Again the sales assistant and the customer must have experienced considerable fear during this incident.

The offender's interviews

[7] After his arrest the offender was interviewed about the robbery that had taken place on 19 February. He admitted that he was the owner of the vehicle which had been used in the robbery, having bought it a few days previously; that he had carried out the robbery with accomplices (whom he refused to name); that he had used an imitation firearm; and that he had used the stolen money to buy drugs. He claimed to have disposed of the imitation firearm in the Republic of Ireland. It transpired that the offender's girlfriend worked in the restaurant and he had visited her there on a number of occasions and was therefore familiar with its layout.

[8] During interview the offender also admitted that he had carried out the second robbery. He accepted that he had entered the off licence carrying a

large knife. He was accompanied by a second male person, while a third male held the door open. He conceded that one member of staff had been threatened and another had been coerced into opening the two cash registers at knifepoint. The offender stated that he was a cocaine addict and needed the money to buy drugs. He admitted that he and his accomplice had worn an outer layer of clothing which they had burned after the robbery in order to destroy any forensic connection with the off licence premises. Again he refused to name his accomplices.

Personal background

[9] The offender comes from the Ballymagroarty area of Londonderry. His date of birth is 5 April 1985 and he is now almost twenty two years old. At the time of these offences he was not quite twenty-one. He has an older brother and a twin sister. His is a tragic family background. In 2002 he found his mother dead in bed and in 2003 his father died in front of him from of a brain haemorrhage. These events are said to have affected him deeply.

[10] The offender left St. Joseph's secondary school without any formal qualifications. He obtained employment with a firm that manufactured fireplaces when he left school and remained there until the death of his mother. At about that time he started to take drugs. Subsequently, his father found him a job with a tyre firm in an attempt to help him escape from the negative influences in his life but he was unable to maintain this job after the death of his father. His drug taking continued and it is suggested that this was due to his inability to deal with his grief in a conventional way. His personal problems included psychological difficulties. He has received treatment for panic attacks.

[11] Mr McGonigle has previous convictions. In Londonderry Youth Court in June 1999 he was convicted of causing grievous bodily harm, discharging a firearm in a public place and, acquiring a firearm when younger than 18 years. A three year probation order was imposed in respect of those offences and we were told that they related to his possession of a pellet gun which he discharged, causing a pellet to ricochet and strike a friend in the eye. The only other convictions were for two road traffic offences and a driving licence regulation offence.

[12] The probation officer who prepared the pre-sentence report on the offender believed that he was genuinely ashamed of his behaviour and of the fear that he had caused to the victims of the robberies. It was considered that there was a medium risk of his re-offending with the potential to cause harm to other people. It was felt that he would benefit from a period of probation supervision requiring him to address his drug misuse and other risk factors in his life setting once released from prison. At the time of the report his partner

was pregnant and it was suggested that this provided him with an increased incentive to change.

Aggravating and mitigating factors

[13] The following aggravating factors were postulated in the reference:-

> "(a) The use of a weapon or imitation weapon on each occasion.
>
> (b) Their close temporal proximity to each other.
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> (c) The elements of threats and fear.
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> (d) The negative impact on the general community occasioned by armed robbery of small businesses.
>
> (e) Planning and premeditation.
>
> (f) The offender's criminal record."

[14] We accept that each of these constitutes an aggravating feature although we would not be disposed to regard the criminal record as a substantial factor. Apart from the road traffic offences (which we consider to be of no account in the present context) the only convictions arose from the incident in relation to the discharge and possession of the pellet gun. These offences were committed when the offender was thirteen years old and are more likely to have been associated with youthful indiscretion rather than betokening a propensity to serious criminality.

[15] On behalf of the offender it was disputed that planning and premeditation should be aggravating factors. It was suggested that there was no significant element of planning on his part. We do not accept that suggestion. It is true that the robberies could not be described as particularly sophisticated or professional but neither could they be portrayed as opportunistic. In particular, the wearing of an outer layer of clothes for the second robbery indicates a degree of planning on the part of the offender and his accomplices that goes well beyond cursory.

[16] Apart from his admissions of the offences and his early pleas of guilty (which are, by common consent, significant extenuating factors) Mr Brian McCartney QC on behalf of the offender submitted that the following mitigating features were present: -

> "(a) the age of accused when the offence was committed (20 years);

> (b) he had no relevant record involving offences of dishonesty;
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> (c) the single incident of violent offending was recorded against the offender when he was 13 years old. Since then he has remained clear of trouble for approximately 8 years;
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> (d) period in which avoided offending supports view he was not a career criminal or recidivist; and
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> (e) his involvement in criminality had its genesis in the untimely death of both parents when had understandable grief reaction and reliance on drugs."

[17] The absence of a criminal record is not, in any strict sense, a mitigating factor. It denotes the absence of an aggravating factor. Likewise, the youth of the offender and his tragic personal background do not alleviate his culpability, although they are to be taken into account in the selection of sentence. As to the latter of these, however, it is well settled that personal circumstances will not weigh heavily in reduction of penalty where the offences are, as in this case, extremely serious. There is ample – and recent - judicial pronouncement on this aspect of sentencing but, since there appears to be less familiarity with the principle than perhaps there should be we take the opportunity to remind practitioners of the latest statements of this court on the topic. In *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* [2004] NICA 42 this court said: -

> "[15] The personal circumstances of the offender, while of some importance in this particular instance, could not have removed the case from the category of normal disposal … Such factors will always be of limited effect in the choice of appropriate sentence".

And in *Attorney General's Reference (No 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 we said: -

> "[37]…as this court has frequently observed, the personal circumstances of an offender will not normally rank high in terms of mitigation, particularly where the offence is as serious as that in the present case".

Sentencing for robbery

[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. In fairness to her, the learned judge asked counsel for the offender to make submissions on the guidelines for sentencing in this type of offence but, apart from a rather desultory and vague exchange in which a range of years was touched upon, counsel provided no assistance whatever to the sentencing judge. 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.

[19] In *R v Dunbar* [2002] NICA 44 the appellant was convicted of a single count of armed robbery and sentenced to 14 years' custody and 12 months' probation. 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 appeal against sentence was dismissed.

[20] More recently, in *Attorney General's reference No 1 of 2004* [2004] NICA 6 this court said: -

> "The normal starting point for robbery where the defendant has not played a central role should be in the range of five to seven 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."

[21] In *Attorney General's reference (Walsh)* (September 2005) the offender pleaded guilty to robbery of an off-licence in Newcastle, County Down and to a number of other offences. He was sentenced to 2 ½ years' imprisonment on the robbery count with lesser concurrent sentences for the other offences. The offender performed the combined roles of look-out and driver of the getaway vehicle. His co-accused entered the premises, armed with a flick knife and demanded cash from the female employee, escaping in a vehicle driven by the offender with £266. The sentence was increased to 5 years' imprisonment.

[22] Although of a more serious character than in this case, the robbery involved in *Attorney General's reference No 1 of 2005 (Rooney and others)* [NICA] should have, in the opinion of this court, attracted a sentence of at least ten years' imprisonment. At paragraph [19] 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."

[23] In the present case we consider that the appropriate sentence range for each offence, taking account of the aggravating features and the offender's early plea was five to eight years' imprisonment. The question whether this was an appropriate case in which to impose concurrent sentences must then be considered.

Concurrent or consecutive sentences

[24] On the question whether to impose consecutive sentences, the Recorder said: -

> "… these were separate crimes carried out on two separate occasions. A consecutive sentence would be quite justified but I have to look at your age, the totality of the sentence and credit for a plea of guilty and I am giving you substantive credit for a plea of guilty so I am therefore making it concurrent."

[25] The totality of the sentence to be passed is certainly relevant to the question whether consecutive or concurrent sentences should be passed but the youth of the offender and his plea of guilty were not, except in so far as those factors influenced the choice of the total sentence. These were entirely separate robberies and called for separate punishment consistent with the requirements of the totality principle. Such separate punishment can, of course, be achieved by the imposition of concurrent sentences but these must be of sufficient length as to ensure that the offender does not escape punishment entirely by subsuming the sentence for one offence into the penalty imposed for the other.

[26] In *R -v- Kastercum* [1972] 56 CAR 298, 299 Lord Widgery CJ dealt with the circumstances in which concurrent sentences would be appropriate in the following passage: -

> "… where several offences are tried together and arise out of the same transaction, it is a good working rule that the sentences imposed for those offences should be made concurrent. The reason for this is if a man is charged with several serious offences arising out of the same situation and consecutive sentences are imposed, the total very often proves to be much too great for the incident in question. That is only an ordinary working rule; it is perfectly open to a trial judge in a case such as the present to approach this in one of two ways."

[27] This passage was approved by the Court of Appeal in this jurisdiction in *Attorney General's Reference No. 1 of 1991* [1991] NI 218 where Hutton LCJ said [at p. 224G/H]: -

> "… we do not consider that there is a principle that a trial judge necessarily errs if he imposes concurrent and not consecutive sentences. Moreover, we consider that in Northern Ireland concurrent sentences are imposed more frequently than in England. We are of opinion that it would be undesirable in this jurisdiction to limit the discretion of the trial judge as to whether he should impose concurrent or consecutive sentence. The over-riding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, must be appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences. In other cases he may achieve it more satisfactorily by imposing concurrent sentences … We stress that, whether the sentences are concurrent or consecutive, the over-riding and important consideration is that the total global sentence should be just and appropriate."

[28] We consider that the sentence chosen by the Recorder was not a total global sentence which was 'just and appropriate'. We consider that such a sentence, taking account of the aggravating features and the offender's early plea, would have been in the range of eight to ten years' imprisonment.

Disposal

[29] The sentences passed in this case were unduly lenient. They must be quashed. Allowance must be made for double jeopardy. The offender has

had to face the ordeal of a second sentencing exercise and the worry and uncertainty that this inevitably entails. Taking this factor particularly into account we substitute for the sentences passed concurrent sentences of seven years' imprisonment. We consider that a substantial period of probation is called for in this case in view of the offender's obvious need for supervision and assistance when he is released from prison. If he continues to agree to custody/probation disposal we shall order that the sentence of seven years will comprise five years' custody and two years' probation. We certify that, if he does not so consent, the sentence will be one of seven years' imprisonment on each count, to run concurrently.