Neutral Citation No. [2006] NICA 38 | *Ref:* **COGC5659**

Judgment: approved by the Court for handing down | *Delivered:* **19/10/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

RICHARD RONAN O'DONNELL

Attorney General's Reference (No 5 OF 2006)
Before Nicholson LJ, Campbell LJ and Coghlin J

COGHLIN J

[1] This is a reference by Her Majesty's Attorney General to the Court of Appeal under Section 36 of the Criminal Justice Act 1988 of a sentence that he considers to be unduly lenient.

[2] The reference arises out of the following circumstances;

(a) On 29 March 2006 the offender was arraigned before Her Honour Judge Kennedy sitting at Belfast Crown Court on an indictment containing a single charge of blackmail, contrary to Section 20 of the Theft Act (Northern Ireland) 1969. The offender pleaded not guilty.

(b) On 19 May 2006 the offender was re-arraigned before His Honour Judge Finnegan and pleaded guilty. His Honour Judge Finnegan adjourned the case for sentencing.

(c) On 28 June 2006 His Honour Judge Finnegan sitting at Belfast Crown Court (sitting in Downpatrick) sentenced the offender to a Custody Probation Order of 6 years, consisting of 4½ years' imprisonment followed by 18 months on probation.

[3] The facts of the case are as follows;

(a) On 16 September 2004, 3 men called at the premises of a local business man "A". A runs a transport business in Ardglass. The 3 men accused A of stealing some cigarettes from a person in England. He was told that he had 5

days to sort the matter out and pay back the money and that if he failed to do so, he "would be put in a hole". He was given a mobile phone number to contact. The Crown did not make the case that the offender was one of these three men. A contacted the police who then set up surveillance and tape recorded all subsequent telephone calls.

(b) A number of telephone calls and text messages followed and, in particular, on 20 September 2004 A received a call at work. As a result he rang the mobile telephone number that he had been given and a male answered to whom he had spoken before and whose voice he recognised as that of one of the men who had earlier visited his premises. This man demanded £300,000 in recompense for the load of cigarettes stolen in England and A was told that if this was not sorted out he would be back to see him.

(c) Over the next few days A received a large number of text messages of a threatening nature seeking to persuade him to pay. During the course of these messages the sum demanded was reduced to £100,000.

(d) On 4 October 2004 A received a message telling him to be at the "Oak Grill Castlewellan at 5. Make sure the boys in blue aren't there. If they are on your head be it. Bring an Irish News with you under your arm. I am not listening to no more shit after 5."

(e) Later that day the offender who was personally known to A called at A's work. He said that he had been sent there to take A to Castlewellan. A asked who had sent him and what it was all about but the offender declined to say. A refused to go with the offender and the offender left. The conversation was overheard by two other witnesses and the offender's arrival and departure were captured on video.

(f) Between 4 October and 9 October A received further threatening text messages from a person or persons other than the offender.

(g) On 11 October A received a call from the offender. The call was recorded. A was busy and asked the offender to ring him back. The offender did so the following day. That call was also recorded. In it, the offender arranged to meet A. The meeting took place and was covertly recorded. The offender told A that he was acting as a messenger from the Provisional IRA. He told A that the message was that if A did not hand over the money the next day, A and his family would have to leave the country.

(h) On 13 October the police provided A with a quantity of marked, fake banknotes. A called the offender to arrange a meeting. The call was recorded. In the call A asked for some guarantee of safety if he paid. The offender replied that he would sort that out.

(i) The meeting took place and was covertly recorded. During the meeting the offender told A that a donation had to be made to the IRA if the matter was to be sorted out. The money was handed over to the offender who drove off with it. He was stopped by the police, the fake bank notes were recovered and he was arrested.

(j) During interview the offender, advised by his solicitors, refused to answer any questions on the ground that no adequate pre-interview disclosure had been made. His defence statement gave no factual indication of any defence.

(k) A pre-sentence report on the offender concluded:

> "The defendant is confident he can resettle back into his community with the assistance of his family. However the defendant states that he would welcome support from the PBNI (Probation Board Northern Ireland) to assist in his resettlement. He is aware of the implications of non-compliance should the court consider a Custody Probation Order in this case."

Earlier in the report the reporting probation officer had indicated that it had not been possible to carry out an analysis of the offence, the risk of harm to the public or the likelihood of re-offending. No doubt this was due to the terrorist nature of the offence.

[4] Mr McCloskey QC on behalf of Her Majesty's Attorney General submitted that the following constituted aggravating features:

(1) The offender had a criminal record that included a conviction in 1983 for serious terrorist related offences in respect of which he received a sentence of 12 years' imprisonment.

(2) The offence of blackmail was carried out, upon the offender's own admission, on behalf of a terrorist organisation, namely the Provisional IRA.

(3) The sum demanded was large – initially £300,000, later reduced to £100,000, and subsequently said to involve a "donation" to the terrorist organisation.

(4) The menaces involved were to the personal safety of the victim and his family.

(5) Mr McCloskey QC drew the following to the attention of the court as potential mitigating factors;

(i) The offender had not been convicted of any offence since 1989. The only offence committed by the offender since his release from the 12 year sentence in 1987 was one of shoplifting that took place on 5 November 1988.

(ii) The plea of guilty entered on behalf of the offender, although Mr McCloskey QC submitted that this was qualified by being entered only on arraignment, after refusing to respond in interview and in the face of a strong Crown case.

[5] Mr McCloskey QC based the reference upon two propositions, namely;

(i) That 6 years' imprisonment was, in itself, unduly lenient and that the appropriate starting point should have been one of 8 to 10 years. He supported this submission by relying upon the authority of Attorney General's Reference No 5 of 2004 (Potts) NICA 27.

(ii) That the trial judge should not have made a Custody Probation Order and he advanced this submission upon the authority of Attorney General's Reference No 3 of 2004 (Hazlett) NICA 20 and Attorney General's Reference No 1 of 1998 (McIlwee) [1998] NI 232.

[6] In the circumstances, after hearing the submissions advanced by Mr McCluskey QC, we granted leave for the reference to proceed.

[7] On behalf of the offender Mr Barry McDonald QC, who appeared with Mr Fox, advanced a number of factors by way of mitigation:

(i) At all material times the offender had been only a "minor player" fulfilling the role of a mere messenger. In the course of the recorded telephone conversations the offender had referred to himself as being only "the messenger boy" and A himself had accepted that he was "only the middleman".

(ii) There was no evidence that the offender had ever personally issued any threat to A and the Crown had accepted that he was not among the three men who has originally called at his premises.

(iii) The offender did not stand to make any personal gain out of the transaction. However, the Court notes that the offender left A in no doubt that he was acting on behalf of a terrorist organisation.

(iv) The offender had entered a guilty plea. In this context the court notes that, despite a strong Crown case and the fact that it was accepted that the offender was known to witness A, the guilty plea was not entered until

arraignment. In Attorney General's Reference (No 1 of 2006) McDonald and Others [2006] NICA 4 Kerr LCJ observed, at paragraph [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."

This court endorses these remarks by the learned Lord Chief Justice. In this case the offender's solicitor initially advised the offender not to respond to police questioning because of the absence of disclosure. However, by the second interview the offender and his solicitor were fully aware of the allegations made by witness A and that witness A and at least one other witness had made written statements. In addition, during the course of the second interview video and audio tapes were played to the offender and his solicitor. Despite such disclosure, the offender's solicitor continued to advise the offender to make no comment.

(v) The age of the offender on the basis that he is now some 57 years of age and a mature married man who is unlikely to commit further offences.

(vi) The offender's contribution to the community. In relation to this factor a number of impressive references were submitted describing the courageous and unstinting efforts of the offender in the course of the search for a young man tragically drowned off the coast of Killough as well as his support for the family of a young woman who died in Sydney Harbour, Australia.

[6] In delivering the judgment of the Court of Appeal in Attorney General's Reference (No 5 of 2006) (Potts) Kerr LCJ noted that the maximum penalty for blackmail contrary to Section 20 of the Theft Act (Northern Ireland) 1969 was 14 years and that, in a paramilitary context, the court considered that the normal range for such an offence, after a contest, should be between 10 and 14 years, depending upon the seriousness of the offence. In that case, the court considered that the appropriate penalty, after a contest, would have been 10 to 12 years. In the case of Potts the offender did not plead guilty until the second day of the trial and, in such circumstances, the learned LCJ did not consider that any reduction should be substantial. He felt that the minimum penalty on a plea of guilty should have been one of 8 years, given the lateness of the plea and the virtual inevitability of conviction.

[7] It seems to us that there are several features that distinguish the case of Potts from the instant case. These include the fact that Potts had a much longer and more serious criminal record comprising some 20 offences spread over 12 separate court appearances. A number of these offences involve terrorist violence including convictions for grievous bodily harm with intent and conspiracy to murder together with possession of firearms in respect of which he received a sentence of 16 years' imprisonment at Belfast Crown Court. He was released from this sentence under the provisions of the Northern Ireland (Sentences) Act 1998 but, at the time of the commission of the blackmail offences, he was on bail charged with the offence of grievous bodily harm with intent. In addition, the facts established that Potts had carried out an active part in a well organised protection racket preying upon legitimate businessmen, despite being employed as a community worker. The court noted that Potts received a number of character references attesting to his industry and helpfulness in the community but did not consider the weight of this to be substantial in view of the extremely serious nature of the offences and his significant previous criminal record.

[8] In the course of his submissions, as he had done before the learned trial judge, Mr McDonald QC laid considerable emphasis upon allegations that Mr A, far from being a legitimate businessman, was involved in illegitimate enterprises including the smuggling of cigarettes. This court believes that it is important to record that no evidence has been placed before it to substantiate these allegations. No such evidence was available to the police and, despite being asked, no such evidence has been produced by the offender. In any event, the court notes that the victims of blackmail demands may often be the subject of such demands and menaces precisely because they are vulnerable to the disclosure of certain information. While the character of the victim may not be a mitigating factor, the court is prepared to accept, as did the learned trial judge, that the fact the victim/victims are legitimate businessmen simply seeking to serve the interests of the community, as in Potts, would be an aggravating factor.

[9] The correct approach to Section 36 of the Criminal Justice Act 1988 has been helpfully set out in the well known passage from the judgment of Lord Lane CJ in Attorney General's Reference (No 4 of 1989) (1989) 11 Cr App Reports (S) 517 when he said, at page 521:

> "The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentence increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, when it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular, to the guidance given by this Court from time to time in the so-called guidelines cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature."

[10] Standing back, and viewing all the circumstances of this case in the context of Lord Lane CJ's remarks and bearing in mind the fact that the learned trial judge is one of the most experienced in the criminal law in this jurisdiction, we have reached the conclusion that, while in our view this was a lenient sentence, particularly in the context of its connection with a terrorist organisation, it was not unduly lenient within the meaning of Section 36 of the Criminal Justice Act 1988.

[11] In Attorney General's Reference (No 1 of 1998) [1998] NI 232 Carswell LCJ said, when delivering the judgment of the court, at page 238/9;

> "It hardly needs to be said that the court should not regard it as correct as a matter of routine to make a Custody Probation Order where a custodial sentence of 12 months or more would be

> prima facia justified. Still less should it be tempted to resort to it as an easy option or compromise.
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> In our view the court should look for some material which indicates that there will be a need to protect the public from harm from the offender or to prevent the commission by him of further offences. The relevant time at which the existence of that need falls to be determined is the time of his release. If, for example, the court takes the view that after his release the offender is likely to relapse into excessive drinking and to drive under the influence of alcohol, it may consider that a period of probation, with a condition attached that he undergo an appropriate course of treatment would help to prevent the commission of further drink driving offences. If so, it would be justified in making a Custody Probation Order. If it took the view, on the other hand, that by the time the offender is released probation would not be likely to help in such a way, it would not in our opinion be right to make a custody probation order."

These observations were endorsed by Kerr LCJ in Attorney General's Reference (No 3 of 2004) (Haslett) [2004] NICA 20, in which he said, at paragraph [16]:

> "It appears to us that where a probation officer has not recommended a period of probation following time spent in prison, it will not normally be appropriate for a sentencer to choose this option. This is because the co-operation of the prisoner is critical to the success of the probation element of the sentence. The compiler of the pre-sentence report will usually be in the best position to make that assessment. …
>
> [19] This court has recently observed (in Attorney General's Reference (No 2 of 2004) [2004] NICA 15) that the exercise of the court's discretion in deciding a Custody/Probation Order should not be interfered with lightly."

In the course of his carefully reasoned sentencing remarks the learned trial judge, as we would have expected, confirmed that he was familiar with the relevant authorities and noted that there was no positive recommendation for

a period of probation in the pre-sentence report. He would have noted the support and regular visits that the offender has received from his family since his imprisonment and the fact that, upon release, he is likely to be able to resume employment in the family business which, in the meantime, is being managed by his three sons from his first marriage. After reading the pre-sentence report in the context of all the circumstances of the case the learned trial judge expressed the following opinion:

> "I think his optimism about the ease which he will reintegrate with his employment and his family will not be as easy as he thinks. I am reassured that he states that he would welcome support to assist in his resettlement and on balance I am satisfied that it is appropriate to involve an element of probation in the 6 years."

This was clearly a finely balanced decision reached by a very experienced judge with the benefit of a much more direct "feel" for the case than it is possible for us to enjoy. In the circumstances, we would not presume to interfere with the exercise of his discretion.

[12] Accordingly, we have reached the view that we should make no order on the reference.