

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980**

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**THE QUEEN**

**v.**

**MARTIN SMYTH**

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**Before: Girvan LJ and Coghlin LJ**

**GIRVAN LJ (delivering the judgment of the court)**

**Introduction**

[1] This is an application for leave to appeal against sentence brought by the applicant Martin Smyth, leave having been refused by Deeny J. The applicant pleaded guilty on 19 February 2009 to a count of burglary in May 2008. Her Honour Judge McReynolds ("the sentencing judge") sentenced him to 30 months imprisonment in respect of that offence. She activated a suspended sentence imposed at Newtownards Magistrates' Court on 31 January 2008 in respect of offences committed on 4 September 2005 comprising one count of burglary of a dwelling house, one of theft, one of taking and driving away and one of aggravated vehicle taking. He was given sentences of 9, 4, 6 and 1 month respectively in respect of those counts all imposed concurrently and suspended for 3 years. In addition the applicant was subject to a custody probation order for possession of an offensive weapon, comprising an element of custody for 12 months and an element of probation imposed for 12 months imposed by the sentencing judge herself on 18 January 2008. When sentencing the applicant on 19 February 2009 the sentencing judge imposed an additional 12 months imprisonment in respect of the breach of the terms of the probation order imposed on him on foot of the custody probation order to run consecutively with the two other periods of imprisonment. In the result the applicant was subject to a total sentence of 51 months imprisonment.

### **The circumstances of the offence**

[2] The burglary giving rise to the sentence of 30 months imprisonment occurred on 14 May 2008. The applicant and another man entered a dwelling house at Glenavy, County Antrim and stole a number of items including a flat screen television, a jewellery box, jewellery and a mobile phone. At the time of the burglary the residents of the house were not in occupation. The two burglars were pursued by a neighbour. They dropped the television, jewellery box and jewellery and made off in a black Ford car which had no rear registration number. The applicant was identified by fingerprints found on the television. When arrested the applicant admitted the burglary.

### **The applicant's record**

[3] The applicant's record was an extensive one. He had 79 convictions including a number of dishonesty offences comprising 4 convictions for theft, 6 for burglary, 1 for aggravated burglary and 1 for handling. In addition he had convictions for hijacking, threats to kill and possession of an offensive weapon.

### **Pre sentence reports**

[4] There were before the sentencing judge pre sentence reports furnished by members of the Probation Service. One dated 21 October 2008 by Ms Grant related to the applicant's breach of the custody probation order. Reports were also furnished by Ms Carville. There was in addition an earlier report dated 14 January 2008 relating to the offence of possession of an offensive weapon in respect of which the custody probation order was imposed. The sentencing judge had in addition a report from Dr Weir, consultant psychologist, which outlined the tragic history of the applicant whose mother died at the hands of his father following a row at a nightclub fuelled by drink and drugs. Dr Weir identified a history of substance abuse involving glue sniffing by the applicant when he was a juvenile, alcohol, benzodiazepines, cannabis and cocaine. The applicant appears to have ADHD tendencies. Dr Weir concluded that when released from prison he will require a multi-disciplinary approach if any change is to be made in relation to his lifestyle. He would, in her view, present a challenge to a range of services. She tentatively suggested that "there is a glimmer of hope that he will turn over a new leaf".

### **The sentencing remarks**

[5] The sentencing judge in her sentencing remarks noted that the applicant was assessed by the Probation Service as a person who is at high risk of reoffending and she concluded that he presented a considerable risk to the public. She noted as two aggravating matters the fact that the offence which related to a house in a semi-rural setting was clearly premeditated and

the fact that the offence was committed when he was subject to a probation order under the custody probation order referred to. She noted as mitigating circumstances the fact that the house was unoccupied at the time of the burglary; the goods were returned and the applicant offered to purchase a further mobile phone; and the applicant pleaded guilty and admitted his guilt at interview. Reviewing the authorities the sentencing judge concluded that the proper sentence for the burglary offence was 2 years 6 months. She considered the imposition of a custody probation order but in view of his behaviour during the custody probation order which had been imposed on him she considered that a custody probation order was not appropriate in respect of this offence. In deciding to activate the suspended 9 months sentence and to make it consecutive to the 30 months sentence she took into account that the 9 months suspended sentence was the second suspended sentence imposed on him, a previous 6 months suspended sentence not having been previously activated when he was sentenced to the 9 months suspended sentence. When dealing with the question as to what should be done in relation to the applicant's breach of the custody probation order she noted that he was at high risk of offending. It was clear to her that subsequent to his release he had failed to engage proactively with the Probation Service and reoffended during the period of probation. The applicant had been warned as to the consequences of failing to actively engage with the Probation Service when the custody probation order was imposed. The sentencing judge concluded that she had no choice but to deal with the breach by way of imposition of a custodial sentence in respect of the probation element that had been breached.

### **The applicant's case**

[6] Ms McDermott QC who appeared with Mr Lindsay for the applicant argued that the applicant would require considerable multi-agency help when released from prison. For this reason and having regard to Dr Weir's conclusion that there may be a glimmer of hope for the applicant a further custody probation order would have been appropriate. When released from prison on completion of the custody element of his custody probation order there was nothing in place for the probation element of his sentence and he was thus not fully able to access various courses that should have been in place for him when the probation element of the custody probation order took effect. Ms McDermott argued that the total sentence incorporating the sentence for the burglary, the activation of the suspended sentence and the period of custody in respect of breach of the custody probation order was disproportionate and infringed the principle of totality.

### **Discussion**

[7] In view of Ms McDermott's plea we considered it appropriate to direct the Probation Service to provide an additional report dealing with the steps

which had been taken by the Probation Service to implement the probation aspect of the custody probation order; the steps taken to contact the applicant on his release from prison and the procedures following to draw attention to the applicant of the form and content of the probation order and his obligations thereunder. In the light of Dr Weir's report the further question was raised as to whether the Probation Service would have reached a different conclusion in the pre-sentence reports if it had had access to Dr Weir's report. In addition to a written report from Ms Grant dealing with these matters we heard oral evidence from her. Ms Grant is the Area Manager in the Probation Service responsible for the applicant.

[8] Following the release from custody of the applicant on 18 January 2008 he was given an induction interview on 21 January 2008 when the requirements of probation supervision were explained to him. He was informed that supervision was tight and that should he fail to comply enforcement would be by way of warrant. At a further meeting on 29 January 2008 he was encouraged to attend the Northern Ireland Attention Deficit and Hyperactivity Disorder Support Centre ("NIADD"), a voluntary organisation which supports and empowers individuals with ADHD. During the interview it was clear that the applicant had been drinking. It was suggested that he avail of hostel accommodation but he refused to contemplate such a course. At a home visit concerns were expressed about his escalating drinking. On 11 February 2008 the Probation Service and the applicant agreed to focus on training/employment; follow up with NIADD; attendance at Opportunity Youth to address lifestyle and addiction issues; and attendance at the PBNI car crime programme with a referral to the IMPACT project. The applicant signed the supervision plan. However within days the applicant was back in custody. He was released on bail on 16 April 2008 subject to a condition requiring residence at a hostel. He failed to return to the hostel on 4 May 2008 and he was returned to custody.

[9] Ms Grant in her report concluded that the applicant had made choices and decisions which prevented him from meaningfully engaging with the Probation Service. Although she accepted when questioned by Ms McDermott that the Probation Board could reassess the applicant and would provide probation supervision if required to do so by the court it was clear from her oral testimony that nothing had happened to change the Probation Service's conclusion that further probation was unlikely to be successful. She also made it clear that nothing in Dr Weir's report changed the position.

### **Disposal of the application**

[10] The sentencing judge's conclusion that a further custody probation order was inappropriate is one which she was fully entitled to reach. Indeed it was an inevitable conclusion in the light of the probation history. The suggestion that the applicant had not really had an opportunity to engage

meaningfully with the Probation Service had no foundation in light of the probation history outlined in Ms Grant's report and in her oral evidence. Ms McDermott did not and could not argue that the sentence imposed in respect of the burglary charge was wrong in principle or manifestly excessive. The argument that the activation of the suspended sentence and the sentencing of the applicant to custody following a breach of the custody probation order resulted in a disproportionately long overall sentence must likewise be rejected. The activation of the suspended sentence was entirely justified in the light of the history. It is to be noted that he had already had a previous suspended sentence which had not been activated. The decision to require the applicant to serve in custody the period of time that he would otherwise have served if he had not been made subject to a custody probation order to which he had agreed was likewise one which the sentencing judge was fully entitled to reach. Where a defendant is subject to a custody probation order and has failed to properly engage with the Probation Service and to comply with his obligations in respect of probation it would normally be appropriate to activate the balance of the sentence which would otherwise have been imposed if probation had not been added as an element under the custody probation order. . The sentencing judge's conclusion that the periods should each run consecutively cannot be criticised and was within the powers of the sentencing judge. In the circumstances the judge's sentence did not offend the principle of totality.

[11] Accordingly we must dismiss this application for leave to appeal against sentence. It is clear that this applicant on his release from prison will require considerable assistance and a multi-disciplinary approach to deal with his multi-faceted difficulties. Regrettably it appears that due to lack of resources in prison suitable programmes and courses designed to deal with his difficulties and assisting his re-integration into society cannot be provided. It is to be hoped in the interests both of the applicant and of society that during the remainder of the period of his sentence every effort will be made to ensure he will be able to have access to such assistance and facilities.