IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DANIEL LUNNEY

GIRVAN J

The appellant, who was born on 1 February 1979, brings this appeal against sentence by leave granted by Nicholson LJ on 19 January 1998. The appellant was on his plea of guilty convicted on a number of counts under 2 separate Bills of Indictment.

On Bill No 25/98 the defendant was convicted on Count 1 of attempting to rob Martin Smyth of a watch and on Counts 7, 8, 9 and 10 of common assault involving Martin Smyth and 3 other boys. The Learned Trial Judge sentenced the appellant to 2 years' detention on the attempted robbery count and gave sentences of 6 months each in respect of the common assault counts. All those sentences were ordered to run concurrently.

On Bill No 190/98 the appellant was convicted on Counts 1, 5 and 6, being counts of burglary in respect of Ward 44 and 2 locker rooms at the Royal Victoria Hospital, Belfast. The appellant was sentenced to 2 years on each count to run concurrently but consecutively to the sentences imposed under Bill No 25/98.

In the result the appellant was sentenced to a total of 4 years detention.

The offences charged on Bill No 25/98 related to an incident on 8 April 1997 on a bus travelling from the Malone Road to the centre of Belfast. The appellant, his co-accused McAnoy and a third youth got onto the bus near Queen's University and proceeded to bully and assault 4 schoolboys on the bus. The appellant attempted to pull a watch off the wrist of Martin Smyth who was 13½ years of age at the time and when he refused to co-operate the appellant struck him twice in the face. In addition the appellant assaulted 3 other boys.

In relation to the offences charged on Bill No.190/98 the appellant and his co-accused McAnoy were involved in burglaries at the Royal Victoria Hospital on 21 January 1998. The co-accused McAnoy produced a knife when confronted by a male

staff nurse who when he grabbed McAnoy received a cut on his left ring finger and a bruised shoulder. Two other female nurses helped to subdue McAnoy. The appellant, who denied any knowledge that McAnoy had a knife escaped. McAnoy alleged that it was the appellant who brought the knife into the hospital.

The appellant has a poor record, having been previously involved in a number of shoplifting and theft offences, an attempted robbery in May 1995 and possession of a Class B controlled drug. He received a Community Service Order in June 1996 and August 1996 and a Probation Order in August 1996. He broke the terms of his Community Service Order and was sentenced to 2 months' detention as a result in November 1997. In addition he failed to surrender to his bail in January 1998.

On behalf of the appellant it was argued that the learned trial judge had failed to give sufficient credit for the appellant's early pleas of guilty, failed to take proper account of his age at the time of the commission of the offences, failed to differentiate sufficiently between the appellant and the co-accused McAnoy in relation to the burglary, failed to adequately consider the total global sentence when he ordered consecutive sentences and failed to adequately consider whether a custody probation order would have been appropriate.

Notwithstanding counsel's careful and exhaustive submissions we do not consider that the appellant's criticisms of the sentences have any foundation save in respect of the issue whether the learned trial judge had adequately considered the question whether a custody probation order should have been made.

The "mugging" and associated offences committed by the appellant during the episode on the bus were nasty and gravely antisocial as were the burglary charges at the hospital. As this Court pointed out in R v Benson:

"`Mugging' is not only an unpleasant offence and a serious offence, it is also far too common ..."

The burglary charge likewise must be regarded as meriting a sentence of between 2 and 3 years in the light of this Court's approach in R v Lendrum [1993] 7 NIJB.

WHETHER A CUSTODY PROBATION ORDER SHOULD BE MADE

(i) **The Relevant Legislation**

In relation to the issue of whether a custody probation order should have been made it is necessary to have regard to the provisions of Article 24 of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order"). That Article so far as material provides as follows:

"(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence other than one fixed by law, a court has formed the opinion under Article 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both -

(a) to serve a custodial sentence;

(b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.

(2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences.

(3) A court shall not make a custody probation order in respect of any offender unless the offender consents and, where an offender does not so consent, the court shall not pass a custodial sentence of a greater length than the term the court would otherwise pass under Article 20.

(4) Where in any case the court does not consider a custody probation order to be appropriate, the court shall state in open court that it is of that opinion and why it is of that opinion.

(5) A court which makes a custody probation order shall state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the order."

Article 25(1) provides that the period of supervision under a custody probation order shall commence on the offender's release from custody at the expiry of the custodial sentence. Article 25(2)(b) provides that:

"in so far as it imposes such a requirement as is mentioned in paragraph (1)(b) of Article 24, this Part shall subject to paragraph (3), apply as if it were a probation order."

Article 25(3) then provides that in its application to a custody probation order, a court exercising its powers under paragraph 3(1)(d), 4(1)(d), 7(2)(a)(ii) or 8(2)(d) of Schedule 2 should have regard to the term of the custodial sentence which would

have been imposed by the court which made the order had the offender not consented to the order and to the term of the custodial sentence served by the offender in respect of the offence. The reference to Schedule 2 is a reference to the rules for the enforcement of community orders including a probation order and the consequences which flow from a breach of the requirements of the community order.

The custody probation order is unique to Northern Ireland and reflects the different regime in this jurisdiction relating to remission and the absence of a system of release on licence.

(ii) **The Court's Duty Under Article 24**

A consideration of Article 24 makes clear that the court, if of the opinion that a custodial sentence would be justified for the relevant offence, must consider whether it would be appropriate to make such an order and if not the court must state in open court that it does not consider a custody probation order appropriate and why it is of that opinion. The duty imposed upon the court to explain its reasoning in this context is part and parcel of the policy of the 1996 Order to ensure greater transparency in sentencing (cf Articles 19(4), 20(3), 21(1) and 33(2)). (See generally Allen & McAleenan "Sentencing Law and Practice in Northern Ireland" 2nd Edition at paragraph 2.19). Where a court fails to comply with the requirements of Article 24(4) an appellate court is left unclear and uncertain as to whether the sentencing court has properly considered the question raised by Article 24 and whether in passing sentence the court has properly considered and rejected the option of making a custody probation order. In the present case the sentencing remarks of the learned trial judge omit any consideration of the question whether a custody probation order should be made. It is thus necessary for this court to consider the question whether such an order should be made. This necessitates a consideration of the circumstances in the present appeal in the light of Article 24.

At the outset it may be stated that while the court is directed to consider whether it would be appropriate to make a custody probation order, the Article does not give rise to any statutory presumption in favour of a custody probation order. The court must be satisfied that the sentence which it ultimately imposes is the just and appropriate one in all the circumstances but before reaching that conclusion it must consider the question whether a custody probation order should be imposed rather than a straight forward sentence of imprisonment or detention.

The sentencing court, fulfilling its statutory functions under Article 24, must approach its task by, firstly, determining whether a custodial sentence of 12 months or more would be justified and, secondly, by considering whether it would be appropriate to make a Custody Probation Order in the circumstances. In the present case it is clear that the answer to the first question was in the affirmative.

(iii) **Relevant Factors**

In dealing with any particular defendant the sentencing court, amongst other matters, must have regard to securing so far as possible the protection of the public and the prevention of further offending by the defendant. In some cases the court may be satisfied that the offender presents no real ongoing risk to the public. In that event a custody probation order would be unnecessary and inappropriate. The court will reflect its views in a lesser period of imprisonment than would be the case where there is a risk to the public and/or the risk of reoffending. In other cases the risk to the public or risk of reoffending may be so clear that the court considers that the defendant should remain in prison throughout the period of sentence without the making of a custody probation order. In cases falling between those two situations the court would have to carefully weigh the arguments for and against the making of a custody probation order and the arguments in respect of the length of the supervision element of a custody probation order.

Although Section 24(2) requires a focusing on the need to protect the public from harm from the defendant and the prevention of the commission of further offences, before a court could be satisfied that a custody probation order is appropriate it would have to be satisfied that the defendant would meaningfully respond to the supervision of a probation officer for the period being considered. Probationary supervision is intended to have a rehabilitative purpose. Although Article 10(1) of the Criminal Justice (Northern Ireland) Order 1996 empowers the court to make a probation order if it considers that it is desirable to do so in the interests of securing the rehabilitation of the offender *or* protecting the public from harm from the defendant or preventing the commission by him of further offences, the rehabilitative nature and purpose of probation must remain at the heart of probationary supervision for if the court concludes that probation is not likely to bring about any rehabilitation on the part of the defendant there is little purpose in using probation as a mechanism for securing the safety of the public, a function for which the Probation Service is not really designed. The protection of the public by probation will be the consequence of the rehabilitative effects of probationary supervision rather than the end in itself of the supervision.

If satisfied that the defendant would meaningfully respond to probationary supervision and that it would tend to have a rehabilitative effect, the court would have to decide whether it should require him to be placed under probationary supervision after release and for how long.

In arriving at its determination the court will have regard to many factors. These will include:

(a) the record of the accused;

(b) any previous involvement with the Probation Service or other specialist agencies and the defendant's co-operation or lack of co-operation with them;

(c) his attitude to the offences and remorse in relation to them;

(d) the views of the Probation Officer in the pre-sentence report, in particular in relation to the value of a period of probationary supervision after the conclusion of any period of detention or imprisonment;

(e) the length of the sentence under consideration;

(f) the possibilities of a change of attitude or increasing maturity on the part of the accused during the period of custodial detention.

Other factors may be relevant in appropriate cases.

The court is called upon to exercise a judgment in relation to matters arising some (and in many cases some considerable) time in the future after the completion of a period of custodial detention. It will often be difficult to envisage the circumstances prevailing at the anticipated release date and the court will rarely have available to it material necessary to fashion wholly appropriate probation conditions such as may usefully be imposed under a straightforward immediately effective probation order under Article 10 and Schedule 1. A defendant may as a result of imprisonment or detention be rehabilitated or may mature to an unforeseeable degree. On the other hand his criminal attitudes and tendencies may become hardened. The court accordingly must proceed with care and caution before deciding to effectively reduce the period of detention or imprisonment by substituting a period of supervisory probation which of its very nature must be a limited protection to the public. In the Attorney General's Reference (No 1 of 1998) [1998] NI 232 this Court made clear that the sentencing Judge must have material upon which he can properly take the view that a custody probation order is appropriate.

(iv) **The Present Case**

In the present case the poor record of the appellant, the attitude he adopted when the pre-sentence report was being prepared, his previous re-offending both during and after a Probation Order was imposed and his non-compliance with Community Service Orders militate against the appropriateness of a custody probation order. On the other hand the appellant is young and the total sentence imposed by the learned trial judge is lengthy even if it could not be said to be wrong in principle. Supervision of the appellant after his release could prove to be an effective mechanism to reduce the risk of reoffending following his release.

The pre-sentence report of the Probation Officer provides little clear guidance to the Court on the issues that fall to be addressed under Article 24. Sentencing courts will generally find it helpful if those preparing pre-sentence reports specifically address the question of the suitability of a custody probation order in respect of the individual defendant. This must clearly be so since the Court is required under Article 24 in every case where a lengthy sentence is to be imposed to consider the question of a custody probation order. The court must satisfy itself that the statutory purposes envisaged by Article 24(2) are achievable in relation to the individual defendant and the views of the Probation Service on that must be highly relevant. Furthermore the custody probation order imposes obligations on the Probation Service which are potentially onerous and it is right that the Probation Service should be in a position to express a reasoned view on the issue before such an order is made.

In the circumstances we consider that it is appropriate to call for a supplementary pre-sentence report in which the relevant Probation Officer should specifically and expressly deal with the question of the suitability and appropriateness of making a custody probation order in respect of the appellant. His views also on the question of the length of any probationary period in relation to the individual appellant and based on experience in similar situations would be helpful.

GIRVAN J

Consequent on our earlier judgment in this appeal a report dated 4 May 1991 has been furnished to the Court by the Probation Board to assist the Court on the question whether it would be appropriate to make a custody probation order.

It is clear from his subsequent commission of offences after earlier probation orders that the defendant did not avail himself of the opportunity which he had to change his behaviour. The probation officer in his most recent report to the court does consider that the defendant would benefit from participation in an intensive programme of supervision after his release. He points out that unless the appellant takes serious steps to address his impulsivity and lack of concern for the consequence of his behaviour particularly for his victims the likelihood of further offending is present.

Having considered the report furnished to the court we are not satisfied that there is sufficient material to warrant the making of a custody probation order. In the circumstances we affirm the sentence imposed by the lower court.