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*Judgment: approved by the Court for handing down*

Delivered: 04/07/2005

*(subject to editorial corrections)*

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

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**THE QUEEN**

**-v-**

**SAMUEL KENNETH MURPHY**

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**Before: Lord Justice Campbell and Mr Justice Gillen**

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[1] At the Crown Court sitting in Londonderry on 9 October 2003, Samuel Kenneth Murphy (the applicant) pleaded guilty before the Recorder of Londonderry to two counts of causing grievous bodily harm with intent, arising out of an incident that occurred on 31 October 2002. On 4 December 2003 he was sentenced to 5 years' imprisonment and 1 year probation. The judge indicated that had he not consented to the period of probation the sentence that she would have imposed was 6 years' imprisonment. The applicant has not sought leave to appeal against this sentence.

[2] On 4 November 2003 the applicant pleaded guilty, before the same judge, to one count of theft and another of robbery arising out of an incident on 3 October 2002. On 30 April 2004 he was sentenced to a total of 15 months' imprisonment to be served consecutively to the earlier sentence of 5 years' imprisonment and 1 year probation. He now seeks leave to appeal against this sentence, the time for doing so having been extended by the single judge and leave to appeal refused.

*The facts*

[3] At around 2pm on Thursday 3 October 2002 William McLaughlin, the administrative manager of the B&Q store at Lisnagelvin, Londonderry, became suspicious of three men who were standing outside the store. He returned to the check out area to inform the security staff and as he did so Mr Kieran Browne, another employee of B&Q, drew his attention to the applicant who was making his way out through the entrance door which was being held open by a co-accused Gareth William Wray. The applicant was carrying a box containing a tile cutter for which he had not paid.

[4] Mr McLaughlin said "excuse me" to the applicant who then shouted to his two accomplices to run. Both the applicant and Wray ran towards a subway pursued by Mr McLaughlin and Mr Browne. In the course of the chase Wray told the applicant to "leave it". On reaching the subway the two men stopped running and Mr McLaughlin told the applicant to surrender the tile cutter. He replied: "No, just you go back". When Mr McLaughlin told them that security guards were on their way the applicant placed the tile cutter on the ground.

[5] Mr McLaughlin and Mr Browne retrieved the tile cutter and as they were leaving the scene there was a further exchange during which Mr McLaughlin told the men to stay away from the store. The applicant then approached him and said: "Do you want a blade?" at which stage he was joined by the other two men. Mr McLaughlin was then punched on the side of the face and knocked to the ground and the applicant punched him on the bridge of the nose. Mr Browne was also attacked in the course of the melee. The three men then made off taking the tile cutter with them. Mr McLaughlin and Mr Browne returned to the store and contacted the police and later they both attended hospital where they were treated for minor injuries.

[6] During his police interview following his arrest the applicant was shown CCTV footage of the incident but he denied that he had been involved in it.

[7] Gareth William Wray pleaded guilty and he was sentenced to 12 months' imprisonment consecutive to an existing sentence and David Alan William Blair, the other accused, received a community based sentence.

*Personal background*

[8] Details of the applicant's personal background are contained in a pre-sentence probation report from Alison McClay, dated 28 November 2003.

[9] He trained as an auxiliary nurse and has been unemployed and receiving benefits since 1992. He has two children from a past relationship. At a very young age he began to drink and associate with a negative peer group and his alcohol and drug abuse soon spiralled out of control resulting in mental health problems. When Ms McClay interviewed the applicant he showed insight into both the causes and consequences of his offending and expressed remorse at his involvement. He also recognised the need to address his alcohol misuse and dependency. He was assessed as presenting a high risk of harm to the public. In the opinion of Ms McClay in order to reduce the likelihood of re-offending the applicant needs to address issues surrounding alcohol, anger and victim awareness which she considered could be done through a custody probation order. The report prepared by Ms. McClay was intended to deal not only with the theft and robbery offences but also with the earlier charges of grievous bodily harm for which the applicant was sentenced in December 2003.

[10] Mr Talbot (who appeared for the applicant) said that the applicant's father died two months ago and two week ago his brother was kicked to death in Londonderry. His mother is now reliant upon him for support. Mr Talbot emphasised that his client pleaded guilty to the theft and robbery on arraignment. He then had to await sentence for almost six months as his co-accused pleaded not guilty and changed their pleas after the commencement of their trial. Mr Talbot submitted that the sentence should have been made concurrent with the five year sentence passed earlier for causing grievous bodily harm with intent. He said that the Recorder had overlooked the fact that the sentence of 15 months' imprisonment would reduce the period of probation ordered under the earlier sentence to only four and a half months.

[11] The applicant's criminal record extends to 19 pages and refers to 46 appearances before the courts between 1982 and 2003 All but five of these offences were dealt with in the magistrates' court. His record is dominated by offences of dishonesty with multiple convictions for theft, burglary and deception. The applicant's offending has been met with a conditional discharge, community service, probation, fines, suspended sentences, orders for immediate custody and custody probation orders. Although this is his first conviction for robbery he has a number of convictions for

assaults. When the offences were committed on 3 October 2002 he was within the active period of 3 suspended sentences.

[12] These were distinct incidents of offending and in our view the Recorder was entitled to exercise her discretion by making the sentences consecutive. In her sentencing remarks the Recorder had regard to the totality of the sentence, as he was already serving the sentence of 5 years' and she considered whether the aggregate sentence of an additional 15 months' was just and appropriate. In doing so she was following the established principle of totality as it applies where there are different indictments (*R v Jones* [1996] 1 Cr.App.R. (S) 153).

[13] A sentence of 15 months for robbery with violence and theft such as occurred in this case is neither manifestly excessive nor wrong in principle. Taking into account the sentence of 5 years' imprisonment and 1 year probation for the earlier offences we do not regard the total sentence of 6 years' and 3 months either manifestly excessive or wrong in principle.

[14] In making an order of 5 years' imprisonment and 1 year probation the Recorder clearly considered that the applicant would benefit from a period of statutory supervision following his release. When she imposed the sentence of 15 months' in respect of the robbery and theft she concluded her sentencing remarks by saying that in her view this sentence was not of such a length that it would interfere with the applicants desire to reach the probation element of the custody probation order. If Mr Talbot's submission is correct the applicant will be on probation for a third of the period of time envisaged by the Recorder in her original order.

### *The legislation*

[15] Articles 24 and 25 of the Criminal Justice (Northern Ireland) Order 1996 provide:

"24. – (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 Articles 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; and

(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...

(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.

25.—(1) 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.

(2) Subject to Article 24(1), in relation to a custody probation order —

(a) in so far as it imposes a custodial sentence, all statutory provisions relating to such custodial sentences shall apply as if it were such a sentence; and

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

(3) 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)(b) of Schedule 2 shall 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.

(4) In relation to release from custody under paragraph (1), section 13(7) of the Prison Act (Northern Ireland) 1953 (prison rules) shall have effect as if the words from "and on the discharge" onwards were omitted."

In relation to an offender of or over the age of 21 years "custodial sentence" is defined in article 2(2) (a) of the Order as a sentence of imprisonment.

[16] If the applicant is correct a later term of imprisonment, depending upon its length, may have the effect of reducing or possibly extinguishing the probation element of a custody probation order made previously. It is difficult to accept that such a result was the legislative intention since the period of supervision on release from custody must be considered by a court to be appropriate to protect the public from harm from the offender or the commission by him of further offences.

[17] Supervision of an offender under a custody probation order cannot take place while he is in custody. Therefore to say that the period of his supervision has been reduced by a period when the offender was in custody for another offence is not consonant with the Order.

[18] When the offender is released from custody at the expiry of the custodial sentence the period of supervision commences (Article 25 (1)). Although his custodial sentence may have expired the offender will not be released from custody if he has another sentence of imprisonment to serve. It is only on his release at the expiry of this sentence that it is possible for the period of supervision under the custody probation order to commence.

[19] By adopting this literal interpretation of Article 25 (1) the purpose of the legislation is achieved. It could lead to an anomalous situation if, for

example, an offender subject to a custody probation order was sentenced to life imprisonment while serving the custodial sentence of a custody probation order. We do not regard this possibility as providing sufficient reason for adopting the argument advanced on behalf of the applicant.

[20] The entire one year period of supervision of the applicant provided for by the order of 4 December 2003 will therefore commence on his release from custody on the expiry of the sentence of 15 months' imprisonment imposed on 30 April 2004.

[21] The application for leave to appeal is refused.