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Judgment: approved by the Court for handing down | *Delivered:* **16/09/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 3 OF 2003) (RYAN THOMAS JOHN FLYNN)

Before: Carswell LCJ, Nicholson LJ and Kerr J

CARSWELL LCJ

[1] The offender, now aged 18 years, pleaded guilty on arraignment on 10 January 2003 to one count of robbery. A pre-sentence report was obtained and on 14 February 2003 His Honour Judge Foote QC imposed a probation order for two years with the offender's consent.

[2] The Attorney General sought leave to refer the sentence to this court under section 36 of the Criminal Justice Act 1988, on the ground that it was unduly lenient. We gave leave at the hearing before us on 26 June 2003 and the hearing proceeded. At its conclusion we announced that we would quash the sentence and substitute for the probation order a custody probation order consisting of twelve months' detention and twelve months' supervision by a probation officer, to which the offender gave his consent. We indicated that if he had not consented to the custody probation order the sentence would have been one of two years' detention. We stated that we would give our reasons in a written judgment in due course. This judgment now contains those reasons.

[3] On 11 June 2002 at approximately 4.25 pm the offender, then aged 17 years, entered the shop attached to the Jet filling station at Holywood Road, Belfast, wearing a balaclava and carrying a firearm. He approached the two members of staff at the till area, pointed the gun at them and demanded the money from the tills. They handed over approximately £425.00 in cash and he left the premises. The woman member of staff stated to the police that she was very frightened by the incident.

[4] The offender was readily identified from CCTV pictures, since he had been hanging about the premises before the robbery awaiting his opportunity, and was not masked at that time. He was apprehended by police about an hour later and the sum of £425.00 in bank notes was found in his pocket. He claimed at that time that he had obtained the money from a bank, but when taken to the police station he admitted his guilt and made full admissions in interview that evening.

[5] The pre-sentence report states that the offender had a stable family background, but commenced drug abuse at the age of 15 years and in consequence incurred debts and became involved with undesirable company. Prior to the commission of the instant offence he had been pursuing a rather aimless lifestyle. The offender stated in interview that he was in debt in an amount between £300.00 and £400.00 and was in fear that if he failed to make the payment due that day he would suffer severe physical consequences. About two or three weeks before he had purchased a balaclava and a gun described as a "G10 repeater", which we were informed is a weapon which shoots ball bearings. The day before the commission of the offence he received threats of immediate assault if he did not pay the money due, so he decided to rob the filling station the next day. He hid in nearby bushes until there were no customers in the shop, then went in and demanded the money.

[6] On 15 May 2002 the offender had been caught shoplifting and was on police bail at the time of the instant offence. He was subsequently given a conditional discharge for 18 months for the shoplifting offence. He has no other criminal record.

[7] The offender suffered from a blood disorder, but the medical reports are fairly reassuring that this was due to a viral reaction and should clear up. Since his arrest his mother has paid off his debts, he has obtained employment and the probation officer states that he has ceased drug abuse and avoided undesirable company. This was confirmed by the police officer in charge of the case, who gave evidence to the sentencing court, expressing the opinion that he was unlikely to commit a similar offence again. In a further report dated 21 June 2003 the probation officer stated that during the currency of the probation order the offender's attendance and motivation had been of a very high standard. He had been in employment and had repaid to his mother the amount of the debt which she had paid off on his behalf. Due to his progress the risk of reoffending and risk of harm to others remained low.

[8] The judge recognised that such armed robberies will ordinarily result in an immediate custodial sentence. The factors in the offender's favour were such, however, that he felt that he could treat it as an exceptional case and deal with it by way of a probation order.

[9] The aggravating factors set out in paragraph 8 of the reference are the following:

> "(a) the shop in question was a vulnerable target and precisely of the type that the Courts have recognised needs to be protected in respect of offences of this nature;
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> (b) an imitation firearm was used:
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> (c) the Offender accepted that he had planned this attack over the course of the preceding days. He had purchased the balaclava and the imitation firearm some weeks beforehand;
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> (d) the victims were threatened with the imitation firearm and were frightened;
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> (e) the robbery was committed less than a month after he had been apprehended for shoplifting;
>
> (e) the amount of money stolen was considerable."

[10] The mitigating factors are set out in paragraph 9 of the reference:

> "(a) the Offender made full admissions and pleaded guilty at the earliest opportunity;
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> (b) all the money stolen was recovered;
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> (c) the Offender expressed regret and remorse for what he had done;
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> (d) the Offender's involvement in the offence appears to have been prompted by his fear of retribution from the person who had loaned him money;
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> (e) the Offender's involvement in the offence coincided with a period in his life when he had experimented with drugs from which he had subsequently rehabilitated;

(f) the investigating officer gave evidence at the Offender's trial that he did not believe the Offender was a person who was likely to commit any such offence in future."

[11] We recently reviewed in this court the levels of sentencing for armed robbery of shops and similar premises in *R v Dunbar* [2002] NICA 44, and it would be superfluous for us to repeat now what we said in that case. We would only draw attention to the emphasis laid by the English Court of Appeal (and echoed in this court) in such cases as *Attorney General's Reference (No 9 of 1989) (Lacey)* (1990) 12 Cr App R (S) 7 and *Attorney General's References (Nos 23 and 24 of 1996)* [1997] 1 Cr App R (S) 174 on the importance of protecting the owners and staff of premises such as those involved in the present case. The courts have to protect the public and impose sentences which will deter others who might be tempted to seek out such easy and vulnerable targets.

[12] The offender's counsel referred us to a number of reported decisions on sentencing for armed robbery in which custodial sentences were said to be required, and pointed out that in each the offender used actual violence or there were other features which made the cases more serious. We have considered these decisions, in particular *Attorney General's Reference (No 9 of 1989) (Lacey)* (1990) 12 Cr App R (S) 7, *Attorney General's Reference (No 21 of 1991) (Gormley) 1992*) 13 Cr App R (S) 689 and *R v Brown* [2002] NICA 45, and we also referred to *R v Coates* (*JSB Sentencing Guidelines,* 5.1.28) and *R v McKeown* (*ibid* 5.1.34). It is quite correct that in all these cases the heinousness of the offence was greater than that in the present case. It has to be borne in mind, however, that the starting point for sentencing for robbery of small businesses recommended by the Sentencing Advisory Panel in its consultation paper published this year is seven to nine years on a plea of guilty, increasing sharply where violence is employed or the robbery is a large-scale, professionally planned crime. The mitigating factors present in the instant case can serve to reduce the length of the sentence, but only in exceptional cases can they be sufficient to permit the court not to impose a sentence of immediate custody.

[13] We take into account the amateur nature of the present offence and the absence of violence or threats. We appreciate very clearly that if one were to look only at the type of disposition most appropriate for deterrence and rehabilitation of the offender himself, the sentence imposed by the judge could be justified. It is, however, impossible to overlook the need to pass condign deterrent sentences in such cases. As Lord Bingham of Cornhill CJ said in *Attorney General's References (Nos 23 and 24 of 1996)* [1997] 1 Cr App R (S) 174 at 177:

> "It has been said that in this field the public interest to protect such people [shop assistants etc] is paramount and must override any personal considerations which would otherwise weigh in favour of a defendant."

[14] For the reasons which we have given we reached the conclusion that the judge's sentence must be regarded as unduly lenient and that we had no alternative but to impose a sentence of immediate custody, notwithstanding the factors which operate in favour of the offender. We took the view that the least sentence which could be imposed, taking into account the question of double jeopardy, was one of two years' detention. We considered, however, that in view of the opinions expressed by the probation officers and the progress made by the offender under their supervision, a custody probation order would be a particularly useful disposition in the present case. We accordingly quashed the judge's sentence and substituted a custody probation order, the offender consenting, of twelve months' detention and twelve months' probation supervision.