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(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 10 OF 2003) (JAMIE CLARKE)

Before: Carswell LCJ, Campbell LJ and Higgins J

CARSWELL LCJ

[1] The offender, who is aged 17 years, pleaded guilty on arraignment before His Honour Judge Gibson QC to one count of robbery, contrary to section of the Theft Act (Northern Ireland) 1969. On 6 June 2003 at Downpatrick Crown Court the judge imposed a probation order of eighteen months. 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 12 September 2003 and the hearing proceeded.

[2] The offence occurred in High Street, Holywood on 28 December 2002 at approximately 10.40 pm. Jonathan Stannage, a boy aged 14 years, was walking along High Street, accompanied by two girls. The offender and another youth, whom Stannage knew, approached the group and commenced to tease the girls, who ran off. The offender then asked Stannage if he had a mobile telephone and if he could borrow it. When Stannage said that he could not, since he Stannage was heading home, the offender grabbed him by the throat, punched him in the stomach and seized his mobile telephone from his trouser pocket. He also pulled a coin ring from Stannage's finger. The offender and his companion then made off.

[3] The victim reported the matter and the offender was arrested at his home a few days later. At interview he admitted taking the telephone, which he claimed to have passed on to another unnamed person, from whom he could retrieve it. He admitted taking the ring, which he said he had lost, but denied assaulting Stannage.

[4] The offender has quite an extensive criminal record for one of his age. It includes four convictions for theft, one for criminal damage, one for assault occasioning actual bodily harm and one for disorderly behaviour. He has been on probation, but the youth court ordered that he be detained in a young offenders' centre for breach of a probation order. In the early part of 2003, between the date of commission of the instant offence and the date of sentence, he served a period of some three months in a juvenile justice centre, a factor which was given some significance in the probation officer's pre-sentence report and the judge's sentencing remarks.

[5] The pre-sentence report dated 23 May 2003 shows a degree of aimlessness and resistance to parental authority on the offender's part, which had led to his leaving home and staying with a friend's family for a period before he went into custody. After his release he returned home and was seeking employment at the date of the report. The report referred to his criminal record and the author commented:

> "The defendants response to community supervision was poor and both the Community Service Order and Probation Order were returned to court at a very early stage. The experience of custody, however, seems to have had salutary effect on Mr Clarke and he has now returned home and is expressing a commitment to find employment and to avoid further offending."

The probation officer classified the offence as opportunistic and carried out for financial gain. The offender presented a risk of committing further similar offences, but that risk could be reduced by suitable community-based programmes. The probation officer expressed some reservations, however, about his response to such programmes, given his poor earlier response to community service and probation. Moreover, the offender failed to keep a second appointment with the probation officer before court.

[6] The learned trial judge in his carefully constructed sentencing remarks rehearsed the facts of the offence, the past history of the offender and the views of the probation officer in the pre-sentence report. He concluded:

> "This was clearly a nasty offence, carried out against the young boy which fully merits a period of custody. Having said that, the accused himself is only seventeen and this weighs heavily with the court. A long sentence could well be entirely counter productive. What is needed is a lengthy period of probation, subject to the strict conditions discussed by the probation officer in an attempt to

> persuade the accused to live a proper and stable life within the confines of his family and assisted by his parents. I make it clear that if he breaches any of the probation requirements he will be brought back to court forthwith and will receive a custodial sentence."

He therefore made a probation order for eighteen months.

[7] In the reference the Attorney General set out the following aggravating factors:

> "(a) the victim was vulnerable by reason of his age;
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> (b) violence was used in the course of the offence;
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> (c) the Defendant was on bail at the relevant time and subject to a Probation order;
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> (d) the Defendant had a relevant criminal record."

He also set out the mitigating factors:

> "(a) the Defendant admitted his involvement in the offence at the first interview;
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> (b) he pleaded guilty at the first opportunity;
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> (c) he is himself young and the offence was committed shortly after his 17th birthday;
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> (d) the Defendant has expressed remorse;
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> (e) the Defendant's circumstances are now more stable as a result of his decision to return home;
>
> (f) the Defendant has served a short period of detention in a YOC since the commission of this offence."

Counsel for the offender did not take exception to the formulation of these factors.

[8] The courts have in recent years emphasised their disapproval of street robberies or "muggings". In this jurisdiction this court in *R v Benson* (1997) *JSB Sentencing Guideline Cases,* page 5.1.25 dismissed an application for leave to appeal against a sentence of two and a half years for robbery, where a young man was grabbed by a group of youths, punched and kicked and his leather coat stolen. Similar cases may be found in the reported English authorities, then in *Attorney General's References Nos 4 and 7 of 2002 (Lobban and others)* [2002] 2 Cr App R (S) 77 the court, while not purporting to lay down guidelines, expressed the view that robbery of mobile telephones, which was far too prevalent, required a robust approach. Lord Woolf CJ said:

> "Custodial sentences will be the only option available to the courts when these offences are committed, unless there are exceptional circumstances. That will apply irrespective of the age of the offender and irrespective of whether the offender has previous convictions."

The sentencing bracket was stated to be eighteen months to five years for thefts of mobile telephones. There are no reported cases in which a non-custodial sentence has been upheld in cases involving street robberies.

[9] Mr O'Rourke on behalf of the offender pointed to the fact that the present offence was not premeditated, but escalated from teasing into bullying and thence into robbery. He cited in particular the views expressed by the Sentencing Advisory Panel in its consultation paper published in April 2003. In its proposals the Panel suggested that the sentencing levels set by the Court of Appeal for robbery were too high, especially when placed against those imposed for other offences. At paragraph 69 of the report it proposed a wider range of disposal options, propounding the starting point of a community sentence for a young offender, where there was no or only minimal force and no weapon was used.

[10] Counsel submitted that it was appropriate to admit a more flexible sentencing policy, on the lines of that suggested by the Sentencing Advisory Panel, than that adopted by the English Court of Appeal. In the present case there was some prospect that the course taken by the judge would result in the offender keeping out of trouble in the future. While he recognised that the courts have found it necessary to impose deterrent sentences in respect of this prevalent offence, it was not necessary to take such a draconian line as that set out in *Lobban and Others.*

[11] We consider that there is force in the submissions advanced on behalf of the offender. We must make it clear that the norm in robbery cases of this type must be a custodial sentence, whatever the age or background of the

offender, for these crimes have to be visited with severe punishment in order to mark the seriousness of these crimes and deter those who are prepared to commit what is all too prevalent an offence. We consider nevertheless that there must be room in our scale of sanctions for the exceptional case where a more lenient approach may be justified. In the present case the offender did have a spell in detention after he committed the instant offence, and there is much to be said for the view that he needs the support of the probation service if he is to cease offending. It is not possible to combine probation and a suspended sentence, which might be appropriate in the present case. Moreover, if the proper level of custodial sentence would be less than twelve months, the court cannot make a custody probation order, which might also be appropriate. As Mr O'Rourke pointed out with some cogency, the judge was left with the alternative of custody or probation.

[12] We have reached the conclusion, not without much anxious thought, that we cannot say that the sentence was unduly lenient and we do not propose to set it aside. The very experienced judge who imposed it did so with clear understanding of the options open to him, and took the view that the more lenient one might pay dividends in terms of turning the offender round from his cycle of offending. As we have often said, sentencing is an art and not a mathematical exercise, and there must always be room for the exercise of an informed judgment. We are therefore not prepared to set aside this disposition and refuse the application.