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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 1 of 2005)
BERNARD PHILIP MARY ROONEY, DENIS MICHAEL DORRIAN, GERARD MARTIN PAUL IRVINE, SEAMUS PATRICK CUNNINGHAM and SEAN MARTIN JOSEPH DORAN
(AG Ref 6-10 of 2005)

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] On 1 April 2005 at Antrim Crown Court the offender, Bernard Rooney, pleaded guilty to robbery contrary to section 8(1) of the Theft Act (Northern Ireland) 1969 and to one count of handling stolen goods, contrary to section 21. On 6 June he was sentenced to 9 years imprisonment for the robbery and 2 years imprisonment for handling stolen goods. The sentences were ordered to run concurrently with each other and with a sentence of 15 years imprisonment which the offender was then serving and which had been imposed at Belfast Crown Court on 27 November 2003 for five offences of robbery and one offence of conspiracy to rob.

[2] On 12 April 2005, also before Antrim Crown Court, the offender, Denis Dorrian, pleaded guilty to robbery. He absconded whilst on bail awaiting sentence. On 21 June, after he had been apprehended, Dorrian was sentenced to a custody probation order of 7 years and 9 months made up of 6 years and 3 months imprisonment and 18 months probation.

[3] At the same court on 12 April 2005, the offender, Gerard Irvine, pleaded guilty to robbery and on 6 June he was sentenced to a custody probation order of 7½ years comprising 6 years imprisonment and 18 months probation.

The offender, Seamus Patrick Cunningham, pleaded guilty to robbery and he was also sentenced on 6 June to a custody probation order of 7½ years made up of 6 years imprisonment and 18 months probation. Sean Doran also pleaded guilty to robbery and he was sentenced to a custody probation order of 7 years consisting of 5½ years imprisonment and 18 months probation.

[4] The Attorney General sought leave to refer the sentences to this court under section 36 of the Criminal Justice Act 1988, on the ground that they were unduly lenient. We gave leave on 23 September 2005 and the application proceeded on that date.

Factual background

[5] The robbery offence to which all the offenders pleaded guilty took place at approximately 12.15 pm on 7 January 2003 outside the Ulster Bank, Market Square, Antrim. Police had been informed that an armed gang intended to rob Securicor staff while they carried out a transaction at the bank. A police surveillance team was put in place and police officers took on the role of the Securicor staff who would normally have been involved in the delivery to the bank. While walking from the Securicor vehicle to the bank, one of these officers (who was carrying a cash box containing £25000) was approached from behind and struck on the head with a gun by the offender Doran who then snatched the cash box. Immediately after that other police officers came to the scene; they apprehended Doran and recovered the weapon and the cash box. It was found that the firearm was imitation. A second person (who was arrested at the scene but later absconded) was arrested a short distance away. He was driving a stolen vehicle in which a bin filled with water was discovered. The driver was found to have two mobile telephones in his possession and a set of keys for a Volvo motor car.

[6] Rooney, Cunningham, Irvine and Dorrian were arrested in a van at High Street, Antrim, some 300 metres from the scene of the robbery. While making these arrests police recovered two mobile telephones. One of these was found to have been broken open, and the 'Sim' card had been thrown away. It was deduced that this had been done in an attempt to prevent analysis of calls that had been made earlier. Police had, however, observed earlier interaction between the occupants of this van and two other vehicles, one of which was the Volvo. The van had been seen parked beside these vehicles at other locations in Antrim before the robbery. Rooney's fingerprints were found inside the Volvo and on a can that had been discarded in that vehicle. The word "Roon" was also found written on the inside of the car's sunroof. Forensic evidence found a link between Rooney's telephone and the driver of the vehicle who was arrested near the scene. Other links were established between Rooney and Irvine. Based on these findings the prosecution case was that Rooney had a major role in the planning and execution of the robbery.

Discussions with the judge

[7] When the Attorney General's reference was sent to the solicitors for Rooney they responded by letter of 8 July 2005. In that letter they suggested that the reference was 'misconceived' in light of the circumstances that had preceded their client's plea of guilty. They asserted that Rooney had pleaded guilty on the basis of an indication as to sentence which the trial judge had given. They claimed that prosecuting counsel had agreed to defence counsel going alone to see the judge to discuss the likely sentence and it was 'part of the agreement' that defence counsel could indicate to the trial judge that the prosecution had no objection to concurrent sentences being imposed. Finally, they suggested that the prosecution had approbated the approach that the trial judge had proposed (*i.e.* that sentences concurrent with those already being served by Rooney would be passed).

[8] Counsel for the prosecution gave his account of the discussions with the judge in a letter to the deputy Director of Public Prosecutions of 25 July 2005. He said that counsel for Rooney had told him of his intention to go to see the judge but did not ask for his agreement to that course. He denied that he had said that he had no objection to a concurrent sentence. He claimed that he had said that if a concurrent sentence was imposed "the matter would be out of [his] hands". He was subsequently informed that the judge had agreed to pass a concurrent sentence. The judge had not sought his views at any time and he did not consider it appropriate to raise the matter with the judge because, as far as he was concerned, the judge had taken his decision.

[9] In his letter counsel also dealt with discussions that took place with the judge about the other accused. Although he had not attended the meeting between the judge and counsel for Rooney, prosecuting counsel was present when there was an exchange between the judge and counsel for the other defendants. In his letter to the deputy Director the prosecutor said that the judge was aware of his view as to the appropriate range of sentence for the offence of robbery. He stated that he had told the judge on this and other occasions that "historically" the range of sentences was between four and ten years for this type of offence.

[10] Unfortunately, no record of what was said in the judge's chambers was made and we shall have something to say about that presently. The judge's notes are no longer available. In consequence, we have been presented with diametrically differing accounts of what is said to have been agreed between the parties before the discussion in the judge's chambers took place and we have now no reliable means of establishing what was said in chambers. To say that this is deeply unsatisfactory is to gravely understate our concern about the way in which this matter was handled. Again, we shall have something further to say about this in due course.

Aggravating and mitigating features

[11] Counsel for the Attorney General, Mr McCloskey QC, submitted that the following were aggravating features in all cases: -

1. The robbery involved detailed planning and careful reconnaissance;

2. A number of people were involved;

3. It was intended that a large amount of money be stolen; and

4. Violence was used.

[12] Further aggravating features were present, Mr McCloskey said, in Rooney's case. These were: -

1. The robbery was carried out while Rooney was on bail, awaiting trial for five robberies and one conspiracy to rob at Belfast Crown Court.

2. He had a very extensive criminal record. At the time of sentencing, he had committed six previous offences of robbery, thirty-two offences of theft, three offences of burglary, three offences of handling stolen goods and one offence of forgery, amongst other offences.

Some of the other offenders had criminal records but these were not as serious as Rooney's.

[13] The only mitigating factor in favour of the offenders was their plea of guilty but in none of the cases had this been entered at an early stage in the proceedings. Mr McCloskey submitted that discount on the sentences to take account of the guilty pleas should therefore be reduced.

Sentencing in robbery cases

[14] The maximum penalty for robbery is life imprisonment - section 8(2) of the Theft Act (Northern Ireland) 1967. Because of its current prevalence in our community and the very serious nature of the crime severe penalties for this type of offence are warranted. Unfortunately, however, the frequency of robbery offences is in no way a recent trend. In *R -v- O'Neill* [1984] 13 NIJB, Gibson LJ referred to the phenomenon and laid down guidelines as to the range of sentences that should be imposed for this type of offence in the following passage: -

> "In circumstances such as obtain nowadays in Northern Ireland where firearms are frequently

> used to rob banks and post offices this Court would re-affirm that a sentence of 13 years or upwards should not now be considered outside the norm for a deterrent sentence for this type of offence. Indeed, it would be appropriate for a judge to regard a sentence within the range of 10 to 13 years as a starting point for consideration, which sentences may be increased if there is a high degree of planning and organisation, or if force is actually used, or if the accused has been involved in more than one such crime. Equally it would be appropriate to reduce the sentence if the degree of preparation or the efficiency of performance is low, or if the money and weapons have been recovered, or if the accused has shown contrition and pleaded guilty to the charge, or if there are other special features which ought to be treated as grounds for reduction of the penalty."

[15] The imposition of severe sentences following *O'Neill* regrettably did not bring about a reduction in the incidence of robbery in this jurisdiction. In *R v Colhoun* [1988] 12 NIJB 16, the Court of Appeal affirmed a sentence of 10 years imprisonment for the armed robbery of £50 from a small shop. Hutton LCJ said: -

> "Since the judgment of this court in *R -v- O'Neill* there has been no diminution in the number of armed robberies. They are very serious crimes which put innocent members of the public in fear and this court desires to emphasize again that armed robbery is an offence which must be met by severe sentences which contain an element of deterrence."

The appeal was dismissed with the observation that 10 years' imprisonment was an "entirely proper sentence".

[16] In *R -v- Coates* [unreported, 1998] the Court of Appeal dismissed an appeal against a sentence of 10 years' imprisonment imposed for armed robbery of almost £9,000 from a bank. MacDermott LJ stated:

> "Armed robbery at banks is a growing form of criminal activity and the efforts of the courts to deter do not appear to be achieving appreciable success. Accordingly we are satisfied that the present situation requires us to … to affirm that 15

> years is the correct starting point when seeking to sentence a prisoner convicted of armed robbery ... that figure will, of course, be varied to reflect relevant aggravating and mitigating factors."

[17] In *R -v- McKeown* (1999) 7 BNIL 90 the Court of Appeal dismissed appeals against sentences of 12 years imprisonment for conspiracy to rob (following guilty pleas) in circumstances where the offenders, who had no criminal records, burst into the family home of the manageress of a sub post office, their faces masked by balaclavas, with an imitation gun and an iron bar; seized the lady; threatened family members; and demanded that she go to the post office and get £100,000 and all available stamps for them.

[18] Recently in *Attorney General's Reference No 1 of 2004* [2004] NICA 6 this court confirmed that the Sentencing Advisory Panel consultation paper published in April 2003 should be regarded as providing authoritative guidance as to levels of sentencing in robbery cases. The panel recommended that for professionally planned commercial robberies *R -v- Turner* [1975] 61 CAR 67 remained the touchstone for sentencing ranges. In that case Lawton LJ said that the normal starting point for anyone taking part in a bank robbery or the "hold up" of a security or Post Office vehicle should be 15 years, if firearms were carried and no serious injury inflicted and that the absence of a criminal record should not be considered a strong mitigating factor.

[19] We wish, therefore, to make absolutely clear that for a commercial robbery carried out as a well planned venture, where firearms or imitation firearms are used and where the perpetrators use or are prepared to use violence, the starting point for sentence after a contest should be fifteen years. On a plea of guilty at the earliest opportunity the appropriate starting point is ten years' imprisonment. Where a plea is made later than the first opportunity the reduction should be adjusted to take account of the lateness of the plea and the reasons that it was not entered earlier.

[20] It follows that we regard the sentences imposed in the present case as unduly lenient. Prosecuting counsel's view that the sentencing range for robberies of this type was between four and ten years was plainly wrong. We do not consider that his suggestion that this is the 'historical' range can be supported by reference to guideline cases in this court.

The passing of concurrent sentences

[21] The decision of the judge to impose sentences on Rooney that were concurrent with the sentences passed on 27 November 2003 had the effect that he would not be imprisoned for any longer than the period of the original sentences. In our judgment this was a disposal that was fundamentally

wrong in principle. In effect under this disposal Rooney would escape punishment for the robbery on 7 January 2003.

[22] In *R -v- Kastercum* [1972] 56 CAR 298, 299 Lord Widgery CJ dealt with the circumstances in which concurrent sentences would be appropriate in the following passage: -

> "… where several offences are tried together and arise out of the same transaction, it is a good working rule that the sentences imposed for those offences should be made concurrent. The reason for this is if a man is charged with several serious offences arising out of the same situation and consecutive sentences are imposed, the total very often proves to be much too great for the incident in question. That is only an ordinary working rule; it is perfectly open to a trial judge in a case such as the present to approach this in one of two ways."

[23] This passage was approved by the Court of Appeal in this jurisdiction in *Attorney General's Reference No. 1 of 1991* [1991] NI 218 where Hutton LCJ said [at p. 224G/H]: -

> "… we do not consider that there is a principle that a trial judge necessarily errs if he imposes concurrent and not consecutive sentences. Moreover, we consider that in Northern Ireland concurrent sentences are imposed more frequently than in England. We are of opinion that it would be undesirable in this jurisdiction to limit the discretion of the trial judge as to whether he should impose concurrent or consecutive sentence. The over-riding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, must be appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences. In other cases he may achieve it more satisfactorily by imposing concurrent sentences … We stress that, whether the sentences are concurrent or consecutive, the over-riding and important consideration is that the total global sentence should be just and appropriate."

[24] While acknowledging that in Northern Ireland judges enjoy a wide discretion as to the choice of concurrent or consecutive sentences we feel bound to say that the imposition of concurrent sentences to those for which

Rooney had been sentenced in November 2003 was entirely inapposite. The global sentence in Rooney's case ought plainly to have been more than the sentence imposed in November 2003. The five robbery offences and one offence of conspiracy to rob for which he was sentenced at that time were carried out by him during a three-month period, from July to October 2001. Each of these offences involved the robbery of Securicor employees making deliveries to banks. The present offence of robbery was entirely unrelated to the earlier group of six offences. Moreover, the present offence was committed while he was on bail awaiting trial for the six earlier offences. That he should evade spending any further period in prison in relation to the offences committed in January 2003 is indefensible. Sentences consecutive to those imposed in November 2003 should have been passed for the offences to which he pleaded guilty in April 2005.

The effect of the discussions between the judge and counsel

[25] In *Attorney General's reference (No 8 of 2004) – Dawson and others* [2005] NICA 18 this court observed that the failure to keep a verbatim note of what was said in chambers was to be deprecated. It runs completely counter to the direction given by this court in *Attorney General's reference (No 3 of 2003) (Rogan)* [2001] NI 366 where Carswell LCJ said:-

> "A full and where possible verbatim note should be made of all discussions in chambers, preferably by a shorthand writer. Where this is not practicable, the judge should take a full note or ask counsel to take a note and furnish it for agreement."

[26] In this case, not only was a note of what passed between counsel for Rooney and the judge not kept but prosecuting counsel did not even attend the meeting where these discussions occurred. Counsel appears to suggest in correspondence with the Department of Public Prosecutions that he could not object to the meeting taking place. We wish to make abundantly clear our complete disagreement with that stance. He ought to have objected to such a meeting proceeding without his being present and he should have conveyed to the judge that he did not agree to it. There is no reason that counsel should have absented himself from that meeting and every reason that he should have attended it. By the same token the judge should not have discussed sentencing with defence counsel in the absence of prosecuting counsel. We shall set out below our views as to how such discussions should take place but of fundamental importance is that these should *only* occur when both prosecuting and defence counsel are present, whatever may be the agreement between them. Judges should not in any circumstances discuss sentencing with counsel unless both defence and prosecution are represented.

[27] The failure to ensure that both counsel were present when the discussion about sentence took place and that a note was taken of what passed between the judge and counsel for Rooney places this court in an impossible position. We are confronted by two directly conflicting accounts of what was agreed between counsel in advance of the meeting. We have no means of confidently deciding what was in fact said at that meeting. It is impossible (without having counsel give evidence about the competing claims, and that is clearly not realistic) to gainsay the assertion that Rooney pleaded guilty because the judge indicated that he would not impose a consecutive sentence and that counsel for the prosecution had intimated his agreement to that course. This situation should never have arisen.

[28] Since it is at least distinctly possible that Rooney pleaded guilty because he knew that the judge would not impose a consecutive sentence and that the judge had given that indication influenced in part by his belief that prosecuting counsel had signified that he did not oppose that course, we find ourselves unable to accede to the Attorney General's application.

[29] In *Attorney General's Reference No 4 of 1996 (Robinson)* [1997] 1 Cr. App. R. (S) 357 Lord Bingham CJ said that the giving of an indication as to sentence by a judge does not preclude the Attorney General from referring the matter to the Court of Appeal but this would be an important matter for the court to take into consideration when deciding how to dispose of the reference. In *Attorney General's reference (No 19 of 2004) (Charlton)* [2004] EWCA Crim 1239 Latham LJ said: -

> "It is undoubtedly right that if the prosecution has acted in ways in which it could be said that it had played a part in giving the offender the relevant expectation, then clearly it would not be appropriate for this court to permit the Attorney General to argue that the sentence which was imposed, partly as a result of what the prosecution had said or done, was unduly lenient."

[30] In the present case it has not been established that the prosecution acted in a way that gave the offender the relevant expectation but when prosecuting counsel became aware that the judge intended to pass a concurrent sentence on Rooney he did nothing about it. He has claimed that he refrained from taking action because 'the judge had taken his decision' but we cannot accept that this was a proper stance. He had not participated in discussions with the judge. He was perfectly entitled to register his disagreement with the course proposed and, in our judgment, should have done so. In these circumstances the giving of the indication by the judge and the failure of prosecuting counsel to comment on it assume a greater significance in deciding how to deal with the reference.

[31] In *Attorney General's reference No 8 of 2004 (Dawson and others)* [2005] NICA 18 this court said that where a prosecutor was aware that a plea of guilty was being entered because a defendant expected to have a particular sentence passed (in that case a suspended sentence) and the prosecutor remained silent as to the inappropriateness of the proposed sentence, it may more readily be inferred that such silence contributed to the offender's decision to plead guilty. Although there was a substantial case against Rooney, we have been told by his counsel that the case would have been contested, particularly on the issue of similar fact evidence which the prosecution intended to introduce, if the offender had not been told that he would receive a sentence concurrent with that which he was already serving.

The effect of prosecuting counsel's statement as to the range of sentences

[32] Prosecuting counsel has confirmed that he told the judge both in chambers and in court that the sentencing range was between 4 and 10 years. Defence counsel were present on one of the occasions that he told the judge this. The judge indicated to counsel for the accused that he had in mind a sentence of seven years for those who had no relevant record and that the option of a custody probation order would be considered. On this occasion Crown counsel agreed that a seven years' sentence was 'not out of keeping with the guideline cases'. For the reasons that we have given, we consider that this was plainly wrong. The question arises, however, whether this indication to the judge was instrumental in securing the plea of guilty by the other offenders.

[33] It is impossible to dismiss the possibility that the statement by prosecuting counsel that a seven year sentence was appropriate contributed to the decision to plead guilty. Not only did counsel for the defence know that this was the sentence that was in the judge's mind, they were aware that it was supported by the prosecutor. The offenders could feel confident, in the knowledge that the prosecutor had supported the proposed sentence, that no heavier penalty would be imposed. In these circumstances we feel bound to exercise our discretion to refuse the Attorney General's application in their cases also.

The current guidelines about discussions between judge and counsel

[34] In the *Rogan* case (referred to above at [25]) this court commented on the practice of counsel seeing the judge in chambers. The court said that it was a basic principle that justice was "done in public, for all to see and hear, and all communications between counsel and judge should wherever possible be made in open court". We wish to strongly reiterate and emphasise that principle. The court in *Rogan* acknowledged that freedom of access for counsel to the judge had been an important part of the practice prevailing

both in England and Northern Ireland and it referred to the decisions of *R v Turner* [1970] 2 QB 321 and, in Northern Ireland, *R v McNeill* [1993] NI 43 to that effect. Recognising that the frequency of such meetings, the more ready access by counsel to the judge and freer discussion about sentence that obtain in Northern Ireland might erode the primacy of the principle of open justice, the court laid down certain rules of practice to govern discussions in chambers (at page 377): -

> "1. There should be freedom of access for counsel to judges, but that does not mean freedom to discuss matters which can perfectly well be discussed in open court. The basic principle is that access to the judge is to enable matters to be discussed which cannot be referred to in court without creating some difficulty.
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> 2. Inquiries about possible sentences should not be entertained by judges unless they are genuinely necessary to permit counsel to advise their clients on their course of action, *e.g.* if considering pleading guilty to a lesser charge.
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> 3. Where they think it proper to give an indication of the type of sentence which they propose to impose, judges should be cautious about how specific they are. It is rarely advisable to do more than state whether the sentence will take a particular form, whatever the plea, or indicate in general terms how seriously the court views the case.
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> 4. A full and where possible verbatim note should be made of all discussions in chambers, preferably by a shorthand writer. Where this is not practicable, the judge should take a full note or ask counsel to take a note and furnish it for agreement."

R v Goodyear

[35] The guidelines provided in England and Wales by the case of *Turner* have been considered recently by the Court of Appeal in that jurisdiction in *R v Goodyear* [2005] EWCA Crim 888. In *Turner* the court had stated that, subject to the one exception, the judge should never indicate the sentence which he is minded to impose. The single exception referred to the case where the judge felt able to say that whether the accused pleaded guilty or not guilty, the sentence would or would not take a particular form *e.g.* a probation order or a fine, or a custodial sentence. In *Goodyear* a panel consisting of five judges (on which Lord Woolf CJ presided) concluded that the guidelines in *Turner*

should be reconsidered. The court decided that a defendant should be permitted to instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed if a plea of guilty were tendered at the stage at which the indication was sought. Moreover, in suitable circumstances the judge should be free to remind counsel in open court of the defendant's entitlement to seek an advance indication of sentence but, unless requested to do so, he should not offer this. In whatever circumstances an indication is sought, the judge has an unfettered discretion to refuse to give one or to postpone the decision as to whether to give it.

[36] The court in *Goodyear* decided that it would not be appropriate for the judge to indicate his view of the maximum possible level of sentence following conviction by the jury. This would have two disadvantages. Firstly, it might bind the judge to a level of sentence which could be deemed unsuitable after evidence had been given in the trial. Secondly, it could be perceived as exerting pressure to tender a guilty plea.

[37] On the binding effect of the indication the court said (at paragraph 61): -

> "Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect."

[38] On the procedure to be followed, the court said that an indication should not be sought on a basis of hypothetical facts. The factual basis on which the plea is made should be agreed between the prosecution and the defence. Where appropriate, there must be an agreed, written basis of plea. Unless there is, the judge should refuse to give an indication. The court also emphasised the need to ensure that this process was not begun without the express consent of the defendant. Counsel should not initiate the process

without written authority, signed by the client, that he wishes to obtain an indication. Further specific duties of counsel are outlined in the judgment at paragraphs [63] to [70] and we shall refer to some of these in our summary of the procedure that should now be followed in this jurisdiction.

[39] The court in *Goodyear* stated that the hearing of an application for a sentence indication should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence. It envisaged that this would usually occur at the plea and case management hearing which is customarily the first opportunity for a defendant to plead guilty.

Guidelines for the future

[40] We consider that it is opportune to look again at the question of how discussions between judges and counsel as to possible sentence should be conducted in this jurisdiction. The re-examination of this question in *Goodyear* was prompted in part by the Report of the Royal Commission on Criminal Justice (1993) (Cmd 2263) where at chapter 7, paragraph 48 it was stated: -

> "A significant number of those who now plead guilty at the last minute would be more ready to declare their hand at an earlier stage if they were given a reliable early indication of the maximum sentence that they would face if found guilty."

and at paragraphs 50/51, after referring to the overwhelming support for change among barristers and judges: -

> "… at the request of defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point on the basis of the facts as put to them … We envisage that the procedure which we recommend would be initiated solely by, and for the benefit of, defendants who wish to exercise a right to be told the consequences of a decision which is theirs alone."

[41] The court in *Goodyear* also referred to the recommendations of Sir Robin Auld in his Review of the Criminal Courts of England and Wales, October 2001. Sir Robin recommended that, subject to a number of safeguards, on the request of a defendant, through his advocate, the judge should be entitled, formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial.

[42] It would be wrong to assume that these recommendations or the research on which they were based can be applied, without qualification, to the experience in Northern Ireland. It is significant that the practice here has differed from that based on *Turner* in a number of material respects. In particular, in this jurisdiction it has been the practice of many judges to indicate what type of sentence would be imposed if a plea of guilty was entered. Indeed, it is our impression that, despite the call for reticence voiced in *Rogan*, many judges have been prepared to specify with some precision the length of sentence that might be imposed.

[43] Notwithstanding that there have been significant differences between the experience in Northern Ireland and that in England and Wales, as a matter of principle we consider that some of the recommendations contained in *Goodyear* can be incorporated into a set of rules that should govern requests for advance indication of sentence in this jurisdiction. If there is to be such a system as, largely for the reasons given in *Goodyear*, we believe there should be, then many of the recommendations follow naturally and inevitably, such as the requirement that the procedure should normally be initiated by the defendant; that proper safeguards should be in place to ensure that the defendant is not put under pressure; that the indication should be given on an agreed factual basis; and that the judge should be free to refuse to give an indication. All of these are indispensable features of a system of advance indication of sentence that respects and complies with the basic requirements of a fair trial.

[44] There is a further reason that the promulgation of a standard procedure for this matter is not only timely but necessary. From recent experience in this court, we have concluded that the manner in which advance indications are given varies from court to court and there is no uniform approach to this difficult issue. This is wholly undesirable. There should be a consistent practice, the basic elements of which should be unfailingly applied to all advance indication situations, whether they arise in the Crown Court or the Magistrates' Courts in any of their divisions.

[45] Some of the rules of practice propounded in *Goodyear* may be less suitable for this jurisdiction. In particular, the proposal that the hearing of the application for an advance indication should be held in open court may not always be as readily achievable in this jurisdiction where there is not a direct equivalent of the plea and case management hearing. It is, of course, necessary that this part of the proceedings, as with all other aspects of the trial, be conducted as openly and transparently as possible. But we recognise that the interests of justice may demand that this part of the trial process be undertaken in a somewhat different milieu.

[46] In our experience most defendants will be unwilling to make public their wish to have such an indication and judges should be prepared to consider

alternative ways of proceeding such as the adjournment of the trial (if it has begun) into chambers or, if the trial has not started, by the convening of a hearing with the court sitting in chambers. In that way the defendant will be present, as will the legal representatives of prosecution and defence. The proceedings will be recorded and the record of what took place will be available in the event of later controversy about what was said. It is clear that the Crown Court has an inherent power to adjourn into chambers but it is equally clear that this power should be exercised only where the interests of justice demand it. The principle was described in *Valentine - The law of Northern Ireland – Criminal Law* in this way: -

> "As a court of law, all proceedings in the Crown Court or other criminal court must be heard in public … [but] … the rule of open justice is subject to statutory provisions and to the power to sit in total or partial privacy if a public hearing may defeat the ends of justice."

[47] The rule that normally proceedings be conducted in open court is a strong one. In *Attorney General v Leveller Magazine* [1979] AC 440, 449 Lord Diplock said: -

> "As a general rule the English system of administering justice does require that it be done in public: *Scott v. Scott* [1913] A.C. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.
>
> However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or

> would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice."

[48] Notwithstanding the force of the rule that proceedings should normally be conducted in open court, we recognise that in many, if not most, instances defendants will not be willing to have it revealed that they are seeking an advance indication of sentence. A requirement that these applications be conducted in open court could inhibit rather than secure the achievement of justice. We therefore consider that adjourning the trial into chambers is the option that will most often be suitable. This will make it unnecessary for these applications to be made in judges' rooms and we consider that such applications should no longer take place other than in court, albeit a court sitting in chambers. An application for advance indication of sentence – or indeed, any discussion about possible sentence – should no longer take place in the room of a judge.

[49] We should like to emphasise that, where applications for an advance indication take place in a court sitting in chambers, a full record will be kept. The perception that a plea bargain has been done in secret can only be corrosive of the confidence that those associated with a case (especially the victims) and the public at large are entitled to have in the proper disposal of proceedings and the imposition of appropriate sentences for criminal offences. It is of the essence that a record of what takes place during a hearing in chambers be available to allay fears that a 'deal' has been done which fails fully to reflect the concerns of the victim or is in any other way not in the interests of justice.

[50] The following rules of practice should be observed by all courts where advance indication of sentence has been sought: -

1. The judge should only give advance indication of sentence when this has been requested by the defendant. He should not otherwise offer such an indication but he may, where he is satisfied that to do so would not create pressure on the defendant, remind counsel in open court of the defendant's entitlement to seek an advance indication of sentence.

2. All applications for advance indication of sentence, if they do not take place in open court, should be conducted in court in an 'in chambers' hearing with the defendant and advocates for the prosecution and the defence present.

3. The judge may refuse to give an indication of sentence and should refuse if he considers that to do so would create pressure on the defendant to plead guilty. Alternatively, he may postpone the giving of an indication until such time as he considers it appropriate to do so.

4. The judge should not indicate his view of the maximum possible level of sentence following conviction by the jury.

5. An indication should only be given where there is an agreed factual basis on which the plea of guilty is to be made. The judge should not give an indication on a basis of hypothetical facts. Where there has been a dispute on the facts, the judge should refrain from giving an indication until that dispute is resolved and an agreed, written basis of plea has been furnished. If relevant material that might affect the judge's decision as to the advance indication is outstanding the judge should postpone giving an indication until that information has been obtained.

6. The judge should treat the application for a sentence indication as a request to indicate the maximum sentence to be passed on the defendant if he were to plead guilty at the stage that the application is made.

7. An indication, once given, will be binding on the judge who gives it or on another judge who carries out the sentencing exercise provided that there has not been a material change in circumstances between the time of giving the indication and the time that sentence is to be passed. In this context a material change in circumstances would arise, for example, by the receipt of information which alters the basis on which the indication was given. Generally, this should not happen (see 6 above). The judge who gives the indication will also be the sentencing judge unless exceptional circumstances arise.

8. If a defendant is given a sentencing indication and fails to enter a plea of guilty after a reasonable opportunity to consider his position in the light of the indication, it will cease to have effect. In any event where, after the indication has been given, it is not acted upon before the trial resumes, it will no longer have effect.

9. The advocate who appears for the defendant is responsible for ensuring that his client is fully advised on the following issues: (a) he

should only plead guilty if the plea is voluntary and he is free from any improper pressure; (b) the Attorney General will remain entitled to refer an unduly lenient sentence to the Court of Appeal; (c) any indication given by the judge is effective only in relation to the facts as they are then known and agreed; (d) if a 'guilty plea' is not tendered after a reasonable opportunity to consider it, the indication ceases to have effect.

10. It is the duty of the prosecutor to ensure that the judge is in possession of all material necessary for him to give a properly informed indication. If there is a dispute as to the basis on which the proposed plea is to be made, the prosecutor should make the judge aware of this.

11. The prosecutor should draw to the judge's attention any relevant guideline cases and, where they exist, any minimum or mandatory statutory sentencing requirements.

12. Where an advance indication has been given by a judge, he should provide a summary of the application in his sentencing remarks.

[51] The above rules of practice are provided for the guidance of sentencers and advocates in courts at all levels. They should, of course, be applied in a way designed to ensure that there is no derogation from the fundamental principle that the defendant's plea must always be made voluntarily. This is not a charter for plea bargaining. The judge will not become involved in any exchange with advocates beyond providing his indication in response to an advocate's request for it. It will be for the judge to decide whether members of the press should be present during the hearing of the application but, in the event that they are present, it is likely that the judge will direct that there should be no report of the application until the trial has ended and, if it arises, sentence has been passed.

[52] It is to be hoped that the rigorous and consistent application of these rules will help to achieve openness in an area that has too often been cloaked in unnecessary secrecy, while enabling the expeditious dispatch of cases in which defendants may be encouraged to enter early pleas of guilty on a properly informed basis and free from any improper pressure.