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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (NUMBER 5 OF 2004)
THOMAS POTTS
(AG REF 10 of 2004)

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] On 3 October 2003 the offender, Thomas Potts, was arraigned on four counts of blackmail covering the period from 8 August 2002 to 14 August 2002. He pleaded not guilty and his trial began before Weatherup J and a jury on 8 December 2003. On the second day of the trial the offender asked to be re-arraigned whereupon he pleaded guilty to the first count which had been amended with the leave of the court to encompass the period from 7 August 2002 to 15 August 2002. The remaining counts were not proceeded with but were ordered to remain on the books of the Court.

[2] Sentencing was adjourned in order to obtain pre-sentence reports. On 6 February 2004 Weatherup J imposed a custody probation order comprising three years' custody and two years' probation. The learned judge indicated that if the offender had not agreed to the probation element of the sentence he would have imposed five years' imprisonment. 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 and the application proceeded.

Background facts

[3] The factual background to the offences with which the offender was charged was set out in paragraph 3 of the reference as follows: -

"(a) Police mounted an operation to deal with suspected extortion in relation to the development of a retail site in North Belfast by a building company.

(b) Between 8 August 2002 and 14 August 2002 an undercover police officer had various conversations with the offender in respect of the payment of a sum of £1,500 and a weekly payment of £125 to ensure that no further damage was caused to the site in the course of the contract.

(c) At approximately 3.10 pm on 14 August 2002 the offender was arrested while on the telephone to the undercover police officer discussing the terms of payment.

(d) At interview the offender claimed that the undercover police officer had discussed making a voluntary donation to the Loyalist Prisoners' Association and agreed that the voice on tape was his.

(e) Throughout the conversations the offender described himself as *"John"*.

(f) In the course of his first conversation the offender says that an amount of £3,000 together with £175 per week would be the norm for a firm of a particular size that would make a donation to the likes of the Loyalist Prisoners' Association."

Personal background

[4] The offender is a 35-year-old married man with a 5-year-old daughter. He has been separated from his wife for 3 years. Prior to being remanded into custody the offender was employed as a community worker in the Lower Shankill Community Centre. In the course of discussions with a probation officer for the preparation of a pre-sentence report the offender stated that his paramilitary background had had an impact on his work and family life. As

to the present offence, the offender accepted that the victim would have felt threatened, but he denied having made explicit threats. He regretted his involvement with Loyalist Prisoners' Aid and expressed confidence that he would be able to put his paramilitary connections behind him on release.

[5] A full assessment of risk was not undertaken by the probation officer as the offending was linked to paramilitary activity. The probation report discussed but did not recommend, custody probation, but the officer observed that the prisoner was willing to engage in supervision to address anger management and employability.

[6] A medical report from the family GP stated that the offender's parents were both in very poor health and were unable to travel.

[7] Eleven character references (originally provided for the purpose of a bail application) attested to the offender's industry and helpfulness. A letter from Councillor Tommy Kirkham stated that he played a positive role in "bringing life back to normal after the Shankill feud" while another from Ruth Petticrew of the Townsend Street Social Outreach Centre stated that the offender has worked to bring peace and unity to the Shankill. Councillor Frank McCoubrey described the offender as "a considerable asset to the community…" He continued: -

> "To date he has been credited with the clean up of the Lower Shankill Area, addressing social and economic needs of the less fortunate in that area, contacting the local Housing Executive to ensure work was carried out for the residents to a satisfactory conclusion, aiding long term unemployed back into employment or further education programmes, setting in place an after schools club for the youth of the area plus trips and away days."

Fred Cobain MLA commented on the offender's valuable input into community projects. John McArthur (who is described as an evangelist) stated that the offender had taken an interest in spiritual matters while a prisoner.

[8] Set against these glowing references is the offender's criminal record. He has a long and relevant criminal record. It is notable that he was on bail at the time of this offence and on 27 June 2003 was sentenced to 4 years' imprisonment for grievous bodily harm with intent. His release date was 14 August 2004. The offender's record consists of 12 separate court appearances between 1987 and 2003, and comprises 20 offences. Five of the previous appearances have been in the Crown Court. The most serious convictions

date from May 1993 when the offender was sentenced by Belfast Crown Court to 16 years' imprisonment for conspiracy to murder and possession of firearms. He was subsequently released under the Northern Ireland (Sentences) Act 1998. Accordingly, save for the exceptional provisions of the Northern Ireland (Sentences) Act 1998, the offender would have been on licence when the index offence was committed.

[9] In March 1998 the offender had been imprisoned for 2 years, concurrent with the sentence he was then serving, for perverting the course of justice. His first custodial sentence was imposed by Belfast Crown Court in May 1990 when he received 3 years detention in the YOC for ammunition offences. While the other convictions on the offender's record have been for serious offences such as assault occasioning actual bodily harm and robbery they have not resulted in immediate custodial sentences.

Judge's sentencing remarks

[10] The judge described the offence to which the offender had pleaded guilty as serious. He outlined the damaging effect the crime of blackmail had on industry and employment. He gave credit for the guilty plea and took account of the fact that civilian witnesses had been spared the ordeal of giving evidence. He acknowledged that the offender had made a contribution to his community and he also took account of the offender's family circumstances. The judge noted the offender's poor criminal record.

[11] The judge commented that the probation report indicated that a custody probation order may be appropriate and accordingly concluded that this form of disposal should be chosen. This court is rather less certain than was the trial judge that the probation service considered that a custody probation order was suitable in the offender's case. The conclusion of the probation officer was expressed thus: -

> "It is anticipated that the Court may wish to consider the imposition of a custody probation order today and this has been fully discussed with Mr Potts. He has expressed his willingness to engage with supervision and address the identified issues of anger management and employability. Given the defendant's past high profile paramilitary associations it is not considered appropriate for him to attend PBNI anger management programme and consideration would be given to the most appropriate ways of engaging Mr Potts in the areas of work identified prior to his release. Nonetheless he understands that he would be required to comply in line with

> agreed standards as instructed, and that non-compliance would lead to swift breach action and a likely return to imprisonment."

[12] This seems to us at best a rather lukewarm support for custody probation disposal. In a recent reference, *Attorney General's Reference (No 3 of 2004) Thomas John Hazlett,* this court observed that "where a probation officer has not recommended a period of probation following time spent in prison, it will not normally be appropriate for a sentencer to choose this option". We consider that this point bears repetition. The success of custody probation orders depends critically on the aptitude and willingness of the prisoner to benefit from that form of disposal. The probation officer will generally be in the best position to decide these matters and the court should be slow to make such an order unless it has the support of the probation officer. In the present case the compiler of the pre-sentence report did not recommend that a custody probation order should *not* be made, however. As we have recently stated (in *Attorney General's reference (No 2 of 2004)* [2004] NICA 15) the exercise of the court's discretion in deciding whether to impose a custody/probation order should not be interfered with lightly. We consider, therefore, that it would not be appropriate to depart from this form of disposal.

Aggravating features

[13] The following aggravating features are present in this case: -

1. The offence had all the characteristics of a protection racket.
2. A large amount of money (some £10000) was involved.
3. The way in which discussions between the offender and the undercover police officer were conducted suggested the involvement of paramilitaries.
4. The offender himself had a high paramilitary profile and had been involved in violent and dishonest paramilitary offending in the past.
5. Quite apart from his bad criminal record, this offence was committed by the offender while he was on bail for a serious scheduled offence.
6. The crime was not at all spontaneous. It was planned and the level of contact between the offender and the police officer

> was evidence of the offender's determination to carry it through.

Mitigating factors

[14] The only mitigating factor of any consequence was the offender's plea of guilty. This could not have the mitigating effect that might normally be attracted by a guilty plea, however, because of the lateness of the plea and the strength of the evidence against him.

[15] Despite his formidable criminal record the offender is well regarded by a number of persons in influential positions in the community. While this is a factor of some importance the weight to be attached to it is not substantial in view of the extremely serious nature of the offence involved and the significant previous criminal record of the offender.

Sentencing guidelines

[16] We were referred to a number of decisions both in this jurisdiction and in England and Wales where sentences have been passed for the offence of blackmail. We have not derived a great deal of help from most of these because virtually all the cases are highly fact specific. Of perhaps most assistance was the decision of this court in *R v Hughes* [2003] NICA. In that case the appellant, a coal merchant, owed a substantial amount of money to his supplier. The supplier issued a statutory demand for the amount owed. In a police operation the appellant was recorded issuing threats to the supplier. He was charged on three counts, threatening to damage or destroy property, blackmail and conspiracy to damage property. He pleaded not guilty on arraignment, but changed his plea to guilty on the day when the trial was due to begin, although he appears to have indicated about a week before that he was likely to take this course. The Court of Appeal upheld the sentence of the lower court which was a custody probation order consisting of four years' custody, followed by one year's probation that had been imposed by His Honour Judge McFarland. The Court of Appeal received a submission that relied on a decision in *R v Hanratty* (unreported), to the effect that a sentence of five years imprisonment was 'out of line' for blackmail cases. This submission was dismissed in the following passage: -

> "[9] We do not consider that that decision is a guide to the level of sentence required in the present case. From his own representations to the victim the appellant was very close to the organisation and we share the judge's view that he had a considerable degree of control over the acts which they would carry out. It was he who was making the threats directly to the victim and he

was deeply involved in the conspiracy to damage his property. The judge quite justifiably condemned the paramilitary organisations as a cancer in our society and their extortion activities, which society must face and eliminate. The courts will play their part in imposing severe deterrent sentences on those who are convicted of such offences, which requires the help of courageous citizens. We would echo the remarks of Scott Baker J in *R v Cioffo* [1996] 1 Cr App R (S) 427, where he stated at page 429:

> "Blackmail is always a serious offence. As has been said by this Court in the past it preys on the soul of the victim, in this case not only the victim but his family too. Deterrent sentences have to be passed by the courts when those guilty of these offences are brought to justice."

[10] Examples may be found among the reported authorities of sentences for blackmail ranging from three years (*R v Hoey and Sherwood* (1992) 13 Cr App R (S) 177) to 17 years (*R v Witchelo* (1992) 13 Cr App R (S) 371). The breadth of the range underlines the correctness of the remark of Sachs J in *R v Darling* (1994) 15 Cr App R (S) 855 at page 856 that blackmail cases vary infinitely and that it is important to have regard to the facts. Mr Cinnamond referred to the decisions in this jurisdiction of *R v Robinson* and *R v Officer*, both of which were mentioned by the judge, and sought to distinguish them on the ground that in each of these cases the threats were made directly by members of paramilitary organisations or on behalf of such organisations, so that the sentences of six years contained an element of deterrence of paramilitary activity. A more direct analogy may be found in *R v Logue* (2001, unreported), in which the defendants made death threats to the staff of post offices in order to extort money. The trial judge Nicholson LJ stated that he went on the assumption that there was no paramilitary organisation involved. On a (last-minute) plea of guilty the main perpetrators were each sentenced to five years and withdrew their subsequent

> appeals. In *R v Locke* (1998, unreported) a sentence of six years imposed by Kelly LJ after a trial was affirmed by this court. The appellants had engaged in a protection and extortion racket and had obtained money and cars from the victims under threat of violence, reference being made to paramilitary connections."

The offence of blackmail in Northern Ireland

[17] As Scott Baker J said in *Cioffo,* blackmail is always a serious offence. It is a particularly grave crime in Northern Ireland. The presence of paramilitary organisations in our community and their criminal activities cause many people in Northern Ireland to feel vulnerable to pressure that is exerted overtly or nominally on behalf of those organisations. More seriously than that, however, is the threat that paramilitaries in general and blackmail carried out in their name particularly, pose to the peace and good order of our society. The purpose of these organisations is to set up parallel and alternative structures to the institutions of the state. They are determined to undermine the rule of law. They seek to enforce their own code of conduct and to thwart the proper administration of justice. Crimes committed by paramilitary organisations or ostensibly on their behalf must occupy a more serious category on that account.

[18] In *Attorney General's reference (No 3 of 2004)* this court observed that, "[s]o long as paramilitary violence continues in our society … those convicted of offences associated with that type of violence should receive more severe sentences, as a general rule, than those whose crimes are committed in a non-terrorist context". We consider that this applies equally to crimes such as blackmail where violence is threatened. As a matter of course, therefore, crimes with a terrorist or paramilitary dimension should be visited with greater penalties than their non-terrorist counterparts.

[19] A further aspect of blackmail offences carried out on behalf of or represented to be on behalf of paramilitary organisations is the natural reluctance of victims to alert the police to their occurrence. People are understandably afraid to reveal that they have become the targets of those who stand for paramilitary organisations. They are afraid to give evidence. The courts must respond to this by imposing severe penalties where victims are prepared to testify so as to convey to those who might be tempted to perpetrate such crimes that the consequence will be, where they are detected and successfully prosecuted, a substantial penalty.

Disposal

[20] The maximum penalty for blackmail is 14 years – section 20 of the Theft Act (Northern Ireland) 1969. In a paramilitary context we consider that the normal range for such an offence after a contest should be between 10 and 14 years, depending on the seriousness of the offence. In the present case an appropriate penalty after a contest would have been, in our judgment 10 to 12 years.

[21] The reduction for the offender's plea of guilty should not have been substantial, for the reasons that we have given. The minimum penalty on a plea of guilty in the present case should have been one of eight years, in our opinion. Given the lateness of the plea and the virtual inevitability of conviction even if the charge had been contested, no more substantial reduction could be justified.

[22] We have concluded, therefore, that the sentence imposed was unduly lenient. Taking account of double jeopardy we consider that the appropriate penalty is seven years' imprisonment. Not without hesitation we will make a custody probation order. This will be comprised of five years' custody and two years' probation. This order is made, of course, on the assumption that the offender is prepared to consent to it.