

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: 12/11/04

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (Number 7 of 2004)  
GARY EDWARD HOLMES  
(AG REF 17 of 2004)

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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**KERR LCJ**

*Introduction*

[1] Having pleaded guilty at arraignment on 5 May 2004 to a count of robbery (and another of no insurance) the offender appeared before His Honour Judge Marrinan at Belfast Crown Court on 30 June 2004 when he was sentenced to a custody probation order consisting of 18 months imprisonment to be followed by 2 years' probation. The learned judge indicated that, if the offender had not consented to the custody probation order, a sentence of 3 ½ years would have been imposed. He was also fined with immediate warrant on the no insurance count.

[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 and the application proceeded.

*Background facts*

[3] The written reference summarises the factual background to the application as follows:-

“At around 11.00 a.m. on 1 May 2003, two male persons, both wearing yellow fluorescent jackets and one with a balaclava masking his face and

brandishing a hammer entered the premises of an insurance business at Spencer Road, Londonderry. They demanded money from the staff and duly secured possession of three cash boxes containing (a) £6,694.73 in cash and (b) 60 Euros in cash and (c) a quantity of cheques to the value of £8,497. They then made good their escape and were transported from the vicinity in a white Ford Mondeo vehicle. The offender was the driver of this vehicle. As a result of the observations of witnesses and a report to the police, the offender and two other occupants of the vehicle were apprehended by police at the Templemore Road, Londonderry, approximately forty-five minutes later. All three persons denied any involvement in the offence. The offender claimed that he had encountered the other two males by chance and had given them a lift in his vehicle in consequence. The offender ultimately pleaded guilty to the charge. The stolen money and cheques were at no time recovered. There was a suspicion the funds of the robbery would in whole or part pass to a paramilitary group."

#### *Personal background*

[4] Christine Donnelly, probation officer, provided a pre-sentence report on the offender. He lives in the Waterside area of Londonderry with his wife, their young child and his wife's children from a previous marriage. He was brought up in the Waterside and came from a stable family background. He attended Faughan Valley Secondary School, leaving at 16 to join the Army. He was discharged on medical grounds at 19. He had worked since as a doorman at various venues in Londonderry, but that came to an end when he was injured while employed in building work in April 2002. The accident had a significant emotional impact due to the loss of independence that it occasioned, and he suffered depression and poor sleep. According to Ms Donnelly, the offender presented as "extremely emotional and frustrated at how events have affected him as he would always have viewed himself as the person everyone else depended on."

[5] As to the present offence, the offender told the probation officer that he was not present in the insurance premises and was unaware that a robbery was taking place. He stated that he had become involved because he had been threatened. The limit of his involvement was, he claimed, driving others for an unknown purpose. The report referred to two previous court appearances, in 2001 and 2003. The first concerned making a false statement

to obtain benefit. He was fined. The second was for driving at excess speed and no insurance.

[6] Ms Donnelly assessed the offender as being at low risk of reoffending or harming the public. Her report stated:-

“There is little to suggest...from the defendant’s attitude, demeanour in interview, or lifestyle in general to suggest that he is an individual prone to offending. The offender expressed regret at his involvement and frustration that he allowed himself to be intimidated ... If probation supervision was thought appropriate it might deal with enhancing victim insight, susceptibility to negative influence and emotional difficulties.”

[7] A psychology report from Dr Ian Hanley was provided which concluded that the offender had significant psychological problems dating back to the time of an industrial accident in 2002:-

“Although he did not sustain significant physical injury he has suffered low mood, pain, sleep disturbance and nightmares since this time. He has not returned to work, stopped physical exercise and gained significant weight ... In my opinion Mr Holmes has a predisposition to depression and this would account for previous episodes in 1995 and 1999. On both previous occasions, as at the present time, he showed a difficulty in adjusting to changed circumstances ... He does not regard himself as fit to stand up to outside threats at the present time. If threatened it would be entirely consistent with his background and personality that he would go to great lengths to ensure the welfare of family members...As a consequence of a depression characterised by guilt, loss of confidence and low self-esteem it would be my view that Mr Holmes would be a[t] some risk of conceding to the will of others in circumstances w[h]ere his family were threatened.... He needs to be helped to develop and implement an active plan to address his current difficulties and improve his confidence, mood and self-esteem.”

*Aggravating and mitigating factors*

[8] The Attorney General identified the following aggravating factors:-

- “(a) The amounts involved in the robbery.
- (b) The use of a hammer and the threat of force against innocent citizens.
- (c) The apparently planned nature of the robbery.”

[9] The following mitigating factors were acknowledged:-

- “(a) The offender’s plea of guilty.
- (b) His personal and family circumstances.”

[10] While it is unquestionably right that the use of any weapon in the course of a robbery is an aggravating feature, it is nevertheless relevant that, if the offender is to be believed that he was not aware of what was taking place in the premises while the robbery occurred, this is not as substantial a factor in his case as it would have been. As we shall see, it appears that the sentencing judge accepted that the offender did not know that a hammer was used.

*Judge’s sentencing remarks*

[11] The judge observed that the offender had become involved with people more sinister than himself. He said:-

“It appears to me that they have used you. I am particularly amazed that your own family car, in fact, your wife’s car, was used in this escapade. No career criminal or serious criminal would ever use their own vehicle in broad daylight, yet that’s exactly what you did, so I am sympathetic to the notion that this was very much a last-minute thing that you were persuaded through some irrational move. Obviously the money motive is always there but I don’t believe it was entirely that. There was something else working on your mind. It may be, as Counsel hinted and indeed said, that these were people that you maybe didn’t lightly refuse, but a duress case has not been made in this case otherwise the case would have been contested, so I have to work on the pre-supposition that you were

willing at least in the sense of not being able to avail of the legal defence of duress.”

The judge explained that the offender faced a very serious charge, and continued:-

“I have agonised about what the right sentence should be in your case because I’m acutely aware of your medical problems, your remorse, and I have listened very carefully to what the Detective Constable in the case told me and I take it very much into account. When the police come forward to speak so highly of someone as the officer did in your case it’s obviously a message to the Court, a very clear message, that this is a person the police very much hope and very much expect will not come back before the Court again.”

#### *Sentencing Guidelines - Robbery*

[12] On 5 May 2004 the Sentencing Advisory Panel issued advice to the Sentencing Guidelines Council on robbery offences. The panel concluded that it was the element of violence that was considered to be the most serious part of the offence of robbery; gratuitous and unnecessary violence will always be an aggravating factor in robbery cases; the threat of violence can also have a profound effect on the victim.

[13] The present case would seem to fall into the second level of the panel’s definition of seriousness, *i.e.*:-

“An offence at this level would involve significant force, equating to actual bodily harm and/or the use of a weapon to threaten or put the victim in fear.”

The relative seriousness of offences within this level would depend on: (a) the nature and duration of the threat or intimidation; (b) the extent of injury (if any) to the victim; (c) the nature of the weapon used (if any); and (d) the value of the property taken.” In the panel’s estimation level 2 offences would, in the panel’s view, attract sentences of 2-4 years custody, with a starting point of 3 years’ custody.

[14] This court has recently had occasion to comment on the appropriate level of sentences for robbery of commercial premises in *Attorney General’s reference No 1 of 2004 (Zoe Pearson)* [2004] NICA. In that case the court said:-

“The normal starting point for robbery where the defendant has not played a central role should be in the range of 5 to 7 years on a plea of guilty. Obviously, the range of sentences for those who (like the offender’s accomplice) play a central role should be much higher.”

In that case, however, the robber had placed a postmaster on the ground, put his foot on his neck and threatened him repeatedly. He also struck the postmaster on the head with the gun, slapped him about the head and threatened to shoot him if a police officer entered the premises. He put the gun to the postmaster’s head while uttering these threats. The customers in the shop were herded behind the counter and forced to lie or crouch behind it. These included a woman with her two grandchildren, aged 7 and 2. Unsurprisingly, the children were hysterical while this episode took place.

### *Conclusions*

[15] We consider that the starting point in this case on a plea of guilty should have been four to five years’ imprisonment. The personal circumstances of the offender, while of some importance in this particular instance, could not have removed the case from the category of normal disposal. The judge was entitled to pay considerable attention to the fact that the police had spoken highly of the offender during the plea in mitigation, but we do not consider that this would warrant a significantly different outcome than would normally be suitable. Such factors will always be of limited effect in the choice of appropriate sentence.

[16] The sentence imposed was, in our view, unduly lenient but, as has been said many times, it does not follow automatically that the sentence must be quashed – see, for instance, *Attorney General's Reference (No.1 of 1993) (R v Stephen Victor McNeill)* [1993] NI 38. We must take account of the effect of double jeopardy. The offender has had to face the ordeal of a second sentencing exercise and the worry and uncertainty that this inevitably entails. On that account, not without some misgivings, we have concluded that it would not be appropriate to alter the sentence in the present case.