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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (No 6 of 2008)

THE QUEEN

-v-

MARC DOUGLAS HAGGAN

Reference under Section 36 of the Criminal Justice Act 1988

Before: Higgins LJ, Coghlin LJ and Morgan J

HIGGINS LJ

[1] This is an application by the Attorney-General for leave under section 36 of the Criminal Justice Act 1988, to refer to the Court of Appeal a sentence which she submits is unduly lenient. The relevant provisions of that section are as follows:

> "(1) If it appears to the Attorney-General —
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> (a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient … he may with the leave of the Court of Appeal, refer the case to them to review the sentencing of that person; and on such a reference the Court of Appeal may —
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> (i) quash any sentence passed on him in the proceeding; and
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> (ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him."

[2] On 23 May 2008 at the Crown Court sitting at Craigavon Her Honour Judge Loughran sentenced Marc Douglas Haggan (the offender) to three months' imprisonment, two years probation and 90 hours community service for nine separate offences. He was arraigned on 30th November, 2007 and pleaded not guilty to all nine counts on the indictment. The trial was scheduled to commence on 7th April 2008. On that date a Rooney hearing was held and on the following day he pleaded guilty to all counts against him. They included three 3 counts of Assault Occasioning Actual Bodily Harm contrary to section 47 Offences against the Person 1861(maximum sentence seven years imprisonment), three counts of Threats to Kill contrary to section 16 of the same Act (maximum sentence ten years imprisonment) and three counts of Intimidation, contrary to section 1 (a) of the Protection of the Person and Property Act (NI) 1969 (maximum sentence five years imprisonment). He was sentenced on 23rd May 2008 to a total sentence of 3 months' imprisonment, 2 years' probation and 90 hours' community service. The Attorney General now seeks leave to refer the sentence under section 36 of the Criminal Justice Act 1988 to the Court of Appeal as being unduly lenient. Two other co-defendants were sentenced on the same occasion but their sentences are not the subject of a reference under section 36.

[3] It is noteworthy that the only offences which bring this case within Part IV of the 1988 Act are the Threats to Kill (counts 4-6) as this offence (which may be tried summarily) is listed in the Order made pursuant to the Criminal Justice Act 1988 which sets out those offences which may be referred by the Attorney General to the Court of Appeal. Section 36 of the 1988 Act applies automatically to indictable offences. One qualifying offence is sufficient to permit the Attorney General to refer all the sentences in the case to the Court of Appeal. The Attorney General's reference specifies the sentence imposed for Assault Occasioning Actual Bodily Harm as Twenty Hours Community Service, whereas the Record of Conviction specifies Three Months Imprisonment in addition to the Community Service. I shall refer to this discrepancy later in this judgment.

[4] The factual background to the charges faced by the appellant, which is taken principally from the Attorney General's Reference, was as follows. At approximately 0100 hours on Sunday 10th December. 2006 Stevie-Lee Watson and Nicole Gibson were at their home at 5 Braemar Avenue, Lurgan. Present in the house were Stephen Kelly and two other males. Haggan knocked at the door which was answered by Stephen Kelly. Haggan pushed Kelly to the floor, put his foot on Kelly's neck, took Kelly's head in his hands and banged it against the skirting board, causing bleeding from the ear and nose. (Count 2 on the indictment relates to this incident). Steven Watson then arrived at the scene and, having cleaned Stephen Kelly of blood, took him to his (Kelly's) home. Because of her concern for Nicole Gibson, who was 4 months pregnant, Joanne Watson, sometime later but still in the early hours of the morning, went to Stevie-Lee Watson's house to check on Nicole Gibson. Her

passage to the house was blocked by Haggan and others. Haggan, and two of the others, grabbed her, put her to the ground and struck and kicked her repeatedly. (Count 1 in the indictment relates to this incident). As Joanne Watson made her way to her son's house Haggan shouted to her "You will be put out of your house if you go to the police about this" (Count 7 in the indictment relates to this remark). Haggan then saw Nicole Gibson standing at the upstairs bedroom window. He shouted to her "I'll slice your throat you bitch", at the same time making a slicing motion across his own throat with his finger. He then pointed at the ground and made a 'goodbye' gesture. (Count 6 in the indictment relates to this remark). He also saw Stevie-Lee Watson and shouted at him "I'll put you out, you wee bastard" (Count 8 in the indictment relates to this remark). At approximately 1400 hours on the same date Stephen Kelly was in his home at 29 Princetown Avenue, Lurgan. He answered a knock at the door to find Haggan and another man there. Haggan grabbed him by the throat saying "You're nothing but a fenian bastard" and accused Kelly of hitting his (Haggan's) girlfriend. Elizabeth Georgina Watson came to the door trying to put herself between Haggan and Kelly. Haggan said to her "Sit down you fucking bitch or you will be shot". (Count 5 in the indictment relates to this remark). Haggan hit Kelly on the right ear with his fist, causing the ear to bleed. (Count 3 in the indictment relates to this assault). He told Kelly "If you had answered that door at 5.30 a.m. this morning you would have been killed". He then said to the other person: "Go and get the gun now and I will do the fucking fenian bastard now". Eventually Haggan was persuaded by the other man to leave. As he did so, he said to Kelly, "If you tell the police about this I will put a pipe bomb through your doors and windows" and "This is not forgot about. I am going to kill you stone dead". (Counts 4 and 9 in the indictment relate to these threats).

[5] As a result of the assaults, Kelly sustained a 2 centimetre abrasion/friction burn on the posterior aspect of the left shoulder; a 4 centimetre large bruise to the posterior aspect of the right thigh; a bruised left ear; a 1 centimetre laceration on the right ear lobe. A subsequent x-ray examination of Joanne Watson (February 2007) revealed healing fractures of the 8th and 9th ribs. The doctor was unable to say when the fractures had been caused. As a result of the threats each of the families left their respective homes, and each family remained out of their home until such time as Haggan (and a co-accused) had been remanded in custody. Thereafter two of the families made security improvements to their homes, installing CCTV and security doors and lighting; Kelly moved away from the area.

[6] It is evident from this summary that the first incident, Count 2 occurred at approximately 0100, the second incident, comprising counts 1,7,6 and 8, occurred about an hour later and the third incident, comprising Counts 5,3,4 and 9 occurred about thirteen hours later, around 2pm.

[7] The Attorney General has identified several aggravating features about this series of incidents. These are

> a) The offending involved a number of separate incidents, extending over a period of some 13 hours, and was directed against 6 different persons;
> b) The behaviour was sufficiently serious to cause those persons to leave their homes for a period of time;
> c) The behaviour was accompanied with sectarian abuse;
> d) The offender's criminal record. At the time of commission of the offences he was the subject of a suspended sentence of imprisonment, for an offence of disorderly behaviour, which had been passed on him less than 3 months prior to the commission of these offences. In addition his criminal record included an offence of affray for which, on 29th January 2003, he received a sentence of 6 months imprisonment suspended for 2 years.

[8] The only identifiable mitigating factor is the offender's plea of guilty, which occurred on the second scheduled day of trial. This was not at the earliest opportunity and qualified for limited credit only.

[9] A Pre-sentence Report from the Probation Service, dated 13th May, 2008, assessed the respondent as posing a medium risk of re-offending. The factors which influenced this assessment included minimisation of personal responsibility, impulsive and violent behaviour, alcohol misuse, association with negative peers, limited self-control in conflictual (sic) situations and inability to think through the consequences of his actions. The report suggested that 'a Custody Probation Order would enable the defendant to begin to address difficulties in his life.' It also considered a suspended sentence disposal but noted that the respondent was already under a three months suspended sentence. Alternatively, since the respondent had already served three months on remand prior to the trial, the report suggested that the court may wish to consider imposing a Probation Order.

[10] The offender was arrested and interviewed by the police on 20 December 2006. He denied involvement in any criminal offence. He was charged and remanded in custody. He spent three months in prison on remand before being released on bail on 30 March 2008. He was returned for trial to Craigavon Crown Court on the present charges and was arraigned at that Court on 30 November 2007 when he pleaded not guilty to all nine counts in the indictment. Two other defendants appeared on the same indictment.

[11] The trial of all three defendants was fixed to proceed on 7 April 2008 on which date a jury panel was present from which a jury would be

empanelled. No jury was empanelled that day. Instead there were lengthy discussions between counsel for all of the accused during which time further disclosure was made by the prosecution. There were also discussions between prosecuting counsel and the officer in charge of the case. Mr Kennedy QC who appeared on behalf of the offender both in the Crown Court (but not for the other defendants) and before this Court, expressed himself as dissatisfied about the extent of disclosure and requested further documents. He informed this court that there was a history to the counts in the indictment and between the parties, that there was a tense atmosphere in the Court and that a police riot squad was on stand-by. Prosecution and defence counsel saw the learned Trial Judge in her chambers and kept her informed as to the reasons for the delay. Mr Kennedy QC informed this court that the meeting with the trial judge was lengthy and was "largely about disclosure and moving the case forward and not about the facts of the case".

[12] Mr Simpson QC appeared on behalf of the Attorney General. He did not appear in the Crown Court. No record of the discussions in the Judge's chambers was produced. This meeting took place either before or just after the luncheon adjournment. In his skeleton argument at paragraph 8 Mr Kennedy described the events in these terms –

> "8. Matters were then listed for 7 April 2008. On this, as on previous occasions the atmosphere in court and in the court precincts was highly charged and tense. A large police presence was in existence as much for protection of the defendants on charge as to prevent a breach of peace generally. Counsel for the Crown and the defence were engaged in protracted and detailed discussions about the background to the case generally. The Trial Judge was kept informed of the detail. The learned Trial Judge was fully versed in the factual background, at one stage meeting with all counsel concerned in chambers to clarify where necessary any detail of the factual background and assisting the parties to properly identify and address all relevant issues. The risk of an ongoing feud between factions spilling into the court proceedings was tangible. Great sensitivity and caution on the part of all concerned prevailed and was effective in maintaining reason throughout. At all times counsel for the prosecution acted with the greatest care and chose his words advisedly. Similarly the trial Judge chose her work (*sic*) with great caution. The result was to diffuse (*sic*) the enormous tension that had been omnipresent throughout. With respect to the reference herein it is submitted that it unwittingly

> misinterprets, misrepresents and underestimates the great care that was applied by the Crown representatives and the trial Judge in their painstaking efforts to pour oil on trouble waters (*sic*) while effecting a just outcome to the proceedings."

[13] Late in the afternoon the court sat and defence counsel requested that the Judge conduct a *Rooney* hearing as to the sentences the accused might expect if they pleaded guilty. The judge agreed to do so. Prosecuting counsel referred the Judge to the statements contained in the committal papers. The Judge indicated that she had read them. Prosecuting counsel then summarised briefly the case against the defendants. In some important respects his summation did not accord with the statements of the prosecution witnesses contained in the committal papers nor was it a reasonable analysis of the events. Mr Kennedy QC maintained that this was an agreed summation and he believed that prosecuting counsel had reduced the agreement to writing. No such document was produced and Mr Simpson QC said he had no instructions about any agreed written version of the facts. In referring to Counts 4 to 9 in the indictment prosecuting counsel stated that they related to a series of words spoken in the heat of the moment. In fact they were hours apart and could not be described as being in the heat of the moment. At the Rooney hearing the Judge indicated that she would not impose a term which would involve immediate imprisonment. I will refer later to the words used.

[14] The defendants were given time to consider the situation overnight and the following morning pleas of guilty were entered. Mr Kennedy QC informed this court that the *Rooney* hearing was "the basis upon which he [the offender] pleaded guilty, though he was advised there could be a reference". He described the offender's change of plea as being 'pragmatic'. The case was adjourned for pre-sentence reports.

[15] The court reconvened on 23 May 2008. On this occasion prosecuting counsel gave the learned Trial Judge a second recitation of the facts of the case. In the course of this he referred to the third (and last) incident as occurring second in the sequence, that is, one hour after the first and not some thirteen hours later, as it was in fact. It seems that the Judge had no clear recollection or note of what had been said by her at the conclusion of the *Rooney* hearing. Furthermore it appears that prosecuting counsel had no note or a clear recollection of what had occurred. At an early stage of the hearing on 23 May the Judge intervened and stated that the pleas of guilty had been made at the earliest opportunity. Prosecuting counsel did not correct this error. After hearing defence counsel in mitigation the learned Trial Judge passed sentence.

[16] The certificate of conviction in respect of Count 1 (assault occasioning actual bodily harm) is at variance with the Judge's remarks on sentencing the

offender. The certificate records that the offender was sentenced to 3 months imprisonment. The Judge's remarks would indicate that she imposed 20 hours Community Service and that she put into effect the suspended sentence. This confusion, which should not have occurred, probably arises from the fact that the offender committed these offences during the currency of a suspended sentence of 3 months imprisonment. The learned Trial Judge was required to consider that suspended sentence. Before this Court counsel were not in agreement as to what sentence was passed on count 1. Mr Simpson QC was of the view that a sentence of 20 hours community service was passed and that the suspended sentence was put into effect with credit afforded for time spent in custody in respect of the current offences. Mr Kennedy QC was adamant that the suspended sentence was not put into effect as the Judge was advised by prosecuting counsel that if she did so, the offender would have to go into custody. He said the offender was sentenced to 3 months imprisonment on Count 1 and the learned Trial Judge chose not to put the suspended sentence into effect. Mr Simpson QC helpfully informed the Court that prosecuting counsel's note stated that the suspended sentence was not put into effect. It seems inquiries were made from the prison authorities about the effect of time spent on remand in custody. Whether this was in relation to the current offence or the effect of activating the suspended sentence is not clear. Undoubtedly, if the suspended sentence was put into effect time spent on remand in relation to another unrelated offence could not count towards a sentence arising from a suspended sentence being activated. It was suggested that this Court could ask the Trial Judge. This was not considered to be an appropriate course of action when the Judge's sentence was under challenge by the Attorney General.

[17] The certificate of conviction, which declares that a sentence of 3 months imprisonment was passed on Count 1, should stand, unless varied by the Crown Court. Whether the suspended sentence was put into effect or not the learned Trial Judge was required to address it and either put it into effect in whole or in part, vary it or state her reasons why it would be unjust to put it into effect – see Section 19(1) of the Treatment of Offenders Act (Northern Ireland) 1968. The offender's co-defendants each received a suspended sentence. They were not charged with the same number of offences and no reference was made in respect of their sentences.

[18] Mr Simpson QC submitted that it is the duty of prosecuting counsel to set out in open court before the Trial Judge the proper facts and circumstances to enable the Judge to pass an appropriate sentence. In addition he should raise and discuss with the Judge any guideline cases relevant to the offences. Where a *Rooney* hearing takes place an agreed account as to the facts should be read out and made available to the Trial Judge. This document should be seen by the defence and agreed beforehand. Where the Trial Judge makes a statement either in the course of the hearing (whether a substantive hearing or a *Rooney* hearing) or in his sentencing remarks, which is inaccurate or

discloses an incomplete understanding of the case or any authority, it is the duty of prosecuting counsel to intervene and advise the Trial Judge appropriately. This is a continuing duty throughout the hearing as the Judge is obliged to sentence on the true factual basis. In the instant case the Trial Judge was provided with incomplete and inaccurate accounts of the proper factual background to the offences. When the Trial Judge stated that the offender pleaded guilty at the first opportunity prosecuting counsel should have intervened and advised the Judge that this was not so. Furthermore the Judge should not have given credit to the offender or sentenced him on that basis. In addition when it was apparent that the Judge was approaching the case as if it was one single incident rather than three incidents spread over at least thirteen hours, prosecuting counsel should have advised the Judge that this was not so. This was a serious incident and whether the sentence was three months imprisonment or a suspended sentence of the same length combined with probation and community service, it was submitted that the sentences were unduly lenient in the circumstances and should be quashed and appropriate sentences substituted. Mr Simpson QC referred to a number of cases involving sentences for these types of offences.

[19] Mr Kennedy QC submitted that this Reference by the Attorney General was misguided. The offences arose out of an ongoing feud between two families. A tense situation had developed and all counsel were required to "tread carefully in their remarks to the Court". There were "two sides to the story" about the events on 10 December 2006 and much of the factual background was disputed and the veracity of certain witnesses challenged. The Judge became aware of the disputed background and consequently in her sentencing remarks, addressed to all parties (whether in the dock or otherwise), spoke sensitively and sensibly. He emphasised the advantage that a trial judge has over this court particularly in relation to the tense situation which pertained at the Crown Court. He accepted that the guilty pleas were not entered at the first opportunity, but submitted that it was not inappropriate for counsel to say that the plea was entered after disclosure by the prosecution was completed. Much of the issue relating to disclosure centred on a statement made by one of the co-defendants concerning an alleged assault using a baseball bat. Finally Mr Kennedy submitted that the offender has been in contact with probation services, has stopped drinking, has moved to a different area and would lose his current employment if a custodial sentence were imposed.

[20] At the conclusion of her sentencing remarks the learned Trial Judge stated that she was going to impose a probation order of two years and the maximum period of community service, namely 100 hours. She divided it up in the following way. For three assaults occasioning actual bodily harm the offender was sentenced to 20 hours community service on each count. For three offences of making threats to kill he was sentenced to probation for one year on each count with one count being consecutive making two years

probation in total. For three offences of intimidation he was sentenced to 10 hours community service on each count. Thus the total amount of community service was 909 hours not 100 hours.

[21] These sentences were lenient and unduly so. We are of that opinion for the following reasons. The three assaults involved separate incidents spread over a period of time and resulted in injuries to the victims, although the injuries were not the most serious. One person was assaulted twice within that period of time. The threats to kill were separate and over time and involved several different persons for whom the threats had significant consequences. The threats included gestures that the victim's throat would be cut and reference was made to getting a firearm and using it immediately. Making a threat to kill another person is a serious offence and warrants, exceptional circumstances apart, a term of immediate imprisonment. Four persons were intimidated and caused to leave their homes for a period of time. Intimidation is a serious offence and where it results in a person leaving their home, if only for a period, warrants a term of immediate imprisonment. While these offences were linked they occurred over time and the judge would have been entitled to consider whether some of the offences merited consecutive sentences, beyond consecutive probation orders. We were referred to a number of cases involving sentences for these types of offences. As has been observed on previous occasions there is little to be gained from comparing sentences in different cases. Guideline cases apart they are all fact specific. Here the basic facts speak for themselves and warranted immediate terms of imprisonment. However composed, whether consecutive sentences or globally, the offender merited a sentence somewhere in a range between three and five years imprisonment and his outstanding suspended sentence should have been put into effect consecutively.

[22] Having concluded that the sentences imposed were unduly lenient the only issue remaining is whether the court should exercise its discretion and quash the sentences and substitute a sentence which we consider appropriate in the circumstances. It is now well settled that even where this Court concludes that the sentences were unduly lenient it retains a discretion whether to quash the sentences and impose a different and more severe penalty. What is less clear are the circumstances which would justify the exercise of that discretion in the offender's favour. In *Attorney General's Reference (No 4 of 1989)* 1990 1 WLR 41 Lord Lane LCJ referred to the existence of the discretion and when it might be exercised. At page 46 he said

> "… even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we

> mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned."

[23] It was submitted by Mr Kennedy that this was a case in which this Court should exercise its discretion and not interfere with the Judge's sentences. He submitted that the offender had pleaded guilty following the *Rooney* hearing on the basis of prosecuting counsel's summation of the facts, the comments and conclusions of the learned Trial Judge and in particular the lack of dissent by prosecuting counsel at the judge's conclusion. Otherwise he would have maintained his plea of not guilty and challenged the veracity of the prosecution witnesses.

[24] The exercise of this Court's discretion following a judicial indication of likely sentence should the offender plead guilty was considered by this Court in *Attorney General's Reference (Nos 11, 12 and 13 of 2004 Dawson et al)* 2005 NICA 18. In that case the judge gave an indication that he would not impose an immediate term of imprisonment should the offender plead guilty. Counsel appearing on behalf of the offender invited this Court to refuse leave to the Attorney General to apply under section 36 because counsel for the prosecution raised no objection to the indication given by the Trial Judge. It was observed at paragraph 39 of the judgment that to accede to that invitation involved a different exercise from that contemplated by Lord Lane in the passage quoted above. There Lord Lane was considering the exercise of the discretion in an application under section 36, properly brought, in which the Court concluded that the sentence imposed was unduly lenient but declined to quash the sentence on the basis of events which had occurred since the trial.

[25] In its judgment in *Dawson* this Court went on to consider the question of the propriety of section 36 applications where an indication had been given by the trial judge of the likely sentence. Having considered several cases in England and Wales it concluded that the failure of prosecuting counsel to inform the judge of relevant authorities on sentencing for particular offences or to make submissions in relation to them did not preclude the Attorney General from making an application under section 36. However Sir Brian Kerr LCJ said at paragraph 44 –

> **"[44]** We strongly agree with the sentiment expressed in *Attorney General's Reference Nos 86 and 87 of 1999* that where an indication is given by a trial judge as to the level of sentencing and that indication is one which prosecuting counsel considers to be

> inappropriate, or would have considered to be inappropriate if he had applied his mind to it, he should invite the attention of the Court to any relevant authorities. We believe that the attention of the trial judge in this case should have been directed by counsel for the prosecution to the well-known authorities that we have discussed above. We do not suggest that this should necessarily have been done in chambers. But counsel was aware that the intention of the judge was to pass a non-custodial sentence. When the plea in mitigation was made counsel for the prosecution had the opportunity to refer the judge to relevant authorities. We consider that he should have availed of that opportunity. This is not to suggest that this must take place on every occasion (although, as a matter of good practice, we think it is desirable that prosecuting counsel should bring relevant guideline cases to the attention of the judge.) There were particular features about this case, however, that strongly favoured that course. The judge had given an indication of his likely sentence. Prosecuting counsel should have been aware of decisions of this court that were plainly at odds with the sentence that the judge proposed to pass. In those particular circumstances we consider that the judge should have been referred to the relevant authorities."

[26] One of the cases referred to was *Attorney General's Reference (No 19 of 2004 Charlton)* 2004 EWCA Crim 1239. In that case an indication of likely sentence was given in the judge's chambers and prosecuting counsel observed that it looked as though the matter could be resolved. At paragraph 21 Latham LJ observed –

> "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. But we have, it seems to us, to look in the light of that principle at the facts of each particular case."

In *Dawson* the Court went on to consider the particular circumstances of that case and concluded that it could not exclude the possibility that the failure of

the prosecution to intervene had played a part in giving the offender a relevant expectation and declined to quash the sentence imposed. The conclusions of the Court are set out in paragraphs 46 and 47 of the judgment.

> **"[46]** In the present case the judge characterised the change in Dawson's stance as 'pragmatic'. We deduce from this that he had concluded that Dawson might well have had a viable defence to the charge but had elected not to pursue it on the basis that he would not be sent to prison if he pleaded guilty. As we have made clear, great care is required in allowing the possibility of a successful defence to influence the judge in indicating what sentence he is minded to pass if the defendant pleads guilty. But here it appears at least possible that prosecuting counsel knew that a plea of guilty to the lesser charge was being made solely on the basis that the offender would not receive a sentence involving immediate imprisonment. In those circumstances his silence when the judge indicated that a non-custodial sentence might be passed is much more significant than where there is a mere failure to draw to the attention of the judge relevant guideline cases. In the latter case silence on the part of a prosecutor does not contribute to the decision of the offender to plead guilty. By contrast, where, to the knowledge of the prosecutor, the basis of the plea of guilty is that the offender will not be sent to prison and the judge indicates that this is the outcome that he has in mind, if prosecuting counsel remains silent, it may more readily be said that such silence contributes to the offender's decision to plead guilty.
>
> **[47]** Although, on the facts as they have been presented to us, we consider that a custodial sentence was certainly merited in Dawson's case, we believe that the real possibility of his having been misled by the failure of the prosecution to intervene when the judge indicated that a non-custodial sentence would be passed, makes this an unsuitable case in which to quash the sentence imposed on him. We therefore refuse the Attorney General's application in his case. We emphasise that this decision reflects our consideration of a set of facts that are unique to this case. We do not seek to propound any different test as to the circumstances in which discussions with the

> sentencing judge will lead to a refusal of a reference from that set out in the cases referred to above. As the Court of Appeal in *Charlton* made clear, 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, it would not be appropriate to accede to the Attorney's application. It is because we feel unable to dismiss the possibility that this is what happened in the present case that we feel obliged to dismiss the application in relation to Dawson."

[27] In the present case the *Rooney* hearing began with prosecuting counsel outlining the facts. As I have already observed this was characterised by several significant errors. The learned trial judge referred to the incidents as 'very unseemly' and 'thuggish'. She dealt first with the two co-defendants whom she considered to have been least involved. She concluded that they would not receive an immediate custodial sentence should they plead guilty. She then considered the offender, the subject of this reference. She stated that the Crown had accepted that the threats to kill were made in the heat of the moment. She then stated –

> "Now I think the position in terms of Mr Haggen (*sic*) is that he will face sentences of imprisonment in respect of these offences should he plead guilty to them but because he has time served he will not have to go back to prison immediately but he is likely to face, if he pleads guilty, a very long prison sentence suspended for a very long time."

The first observation to make about this passage is its lack of clarity, an unusual observation to make about this particular Judge's method of expression. However it would appear that the Judge considered initially a short prison sentence which with time served would lead to his immediate release, but then changed her mind to a long suspended sentence. Prosecuting counsel did not dissent at this potential sentence or refer the learned Trial Judge to any authorities which might have assisted her in arriving at the appropriate sentence.

[28] On the day of sentencing the following exchange took place between the Judge and prosecuting counsel –

> "Judge: So will the Crown accept that there was a plea of guilty at the earliest opportunity?
> Counsel: Yes, Your Honour, on the basis that it was a confused situation.

> ……
> Judge: …. I am giving full discount to each of the defendants for pleading guilty at the earliest possible opportunity."

There was no dissent by prosecuting counsel from this obvious error. He then opened the facts in greater detail again making some significant errors. In the course of this the Judge enquired as to the indication she had given in respect of the offender. Prosecuting counsel was unable to assist as he had not noted it. Mr Kennedy replied "Non custodial, suspended". Prosecuting counsel then stated "We accept that the bulk of the threats were in the heat of the moment, but that the pipe bombing threat was particularly nasty." Later during the plea in mitigation the judge asked "What exactly did I say in the Rooney hearing? Mr Kennedy replied "You did say that you were going to suspend the sentence … and that he would not have a custodial sentence". There then followed a discussion about the effect of the suspended sentence which had been imposed on the offender earlier. It is clear that the Judge thought, wrongly as it turns out, that if she imposed the suspended sentence that the time spent in custody by the offender for the current offences would count towards that and he would be subject to immediate release. Therein lay the seeds for much of the confusion that arose about the actual sentences imposed. Although it is not entirely clear it would appear that the Judge returned to the suspended sentence later after it was pointed out by the prison authorities that the offender would not be released immediately should the suspended sentence be put into effect and it was ordered not to take effect.

[29] Undoubtedly the learned Trial Judge believed that she had given a commitment that the offender would not return to prison. She regarded this as significant and sought to honour it at the substantive hearing on 23 May 2008. However the significance of that belief by the learned Trial Judge for the Reference before this Court is much greater. It is clear that the Judge was at pains to structure the sentences in such a way that the offender would not return to prison. She did so for the reason that she considered she had given a commitment in open court at the Rooney hearing that the offender would not return to custody. This is evident from her remark at page 34 of the transcript – "But I just want to be sure that I keep faith with the Rooney hearing". It is in this context that the failure of prosecuting counsel at the Rooney hearing to adequately set out the prosecution case and alert the Judge to relevant authorities on sentencing for what were serious charges, has to be considered. We accept, even from the written transcript, that there was a background to this case, possibly involving an uneasy truce between two factions which was not sectarian, despite some of the comments that were made and that the learned Trial Judge dealt with this aspect of the case sensitively. Nonetheless at the Rooney hearing the judge was entitled to a proper view of the facts as well as assistance in determining the likely appropriate sentences on a plea of

guilty. This was all the more so in a case involving three separate incidents and three different offences each of which carry substantial maximum terms of imprisonment. This should have been apparent if only from the most serious, namely, making threats to kill.

[30] This was a serious case which on the facts presented to us merited immediate terms of imprisonment. The Trial Judge clearly felt that she had given a commitment that the offender would not return to prison and the prosecution did not dissent from that. After much thought and not without some misgivings we have concluded that we cannot exclude the real possibility that a situation had occurred in which a relevant expectation was created and the prosecution played a part in that. In those circumstances we do not consider this to be a suitable case in which to quash the sentences imposed. Accordingly in the exercise of our discretion we decline to quash the sentences imposed and refuse the application under section 36.