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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **16/02/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ROBERT LOWEY and DAVID ALEXANDER BENNETT

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Before Kerr LCJ and Girvan LJ

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KERR LCJ

Introduction

[1] On 29 August 2006 at Belfast Crown Court, before His Honour Judge Rodgers, the appellants pleaded guilty to a joint charge of blackmail. They each also pleaded to a single charge of professing to belong to an illegal organisation, namely, the Ulster Volunteer Force. They were sentenced to eight years' imprisonment on the charge of blackmail and to one year's imprisonment on the second charge. Both sentences were ordered to run concurrently. The appellants appeal against the sentence imposed on the charge of blackmail.

The facts

[2] In early August 2005 police were informed that money was being demanded for "security services" on behalf of the UVF at three building sites belonging to the Carvill Construction Group, one on Templemore Avenue, the others on Woodstock Road, in Belfast. Accordingly, an undercover officer identified as "Neil" contacted the two men who had made the demands, using telephone numbers that they had given to the firm. Arrangements were made to meet and these meetings took place on 10, 16 and 18 August 2005. On each occasion he met the two appellants and the protection demand was discussed with them. All the meetings were taped, although the tape recorder malfunctioned on 16 August. On that date a third man was summoned by the appellants to provide assurances that the UVF would guarantee site security.

He attended the meeting briefly but has not been arrested or charged in these proceedings. During one of these meetings, Neil asked what would happen if money was not forthcoming and the appellants indicated that "everybody would be put off the sites" and "the sites would be damaged."

[3] The appellants demanded payment of £500 per week in respect of the Templemore Avenue site and £300 weekly for each of the other two sites. They informed the undercover officer that they would require payment in advance of six months' at these rates, amounting to some £27,000. Various discussions about the figures to be paid took place at a number of meetings. In the course of these discussions both appellants assured Neil that the UVF would 'control' the sites and that no damage to plant or equipment would occur. The third man summoned to the meeting on 16 August said that he would speak to members of the Ulster Defence Association to get them to 'back off' as the UVF would 'run the sites'. At a later meeting the appellants told Neil that an arrangement had been made that the protection money was to be split between UDA and UVF.

[4] At 4.30pm on 18 August 2005, Neil met the two appellants in the car park of McDonald's restaurant in the Connswater Shopping Centre and handed over a sum of money in a rucksack. In a planned operation uniformed officers arrested them both as they left the scene. They attempted to escape but this was easily foiled.

[5] The evidence against the appellants was overwhelming. As well as being caught in the act of removing the money they were linked to the sequence of events by mobile telephone records and the vehicle used to attend the meeting with Neil.

Personal background of the appellants

[6] Both appellants are from East Belfast. Bennett was brought up by his mother, his father having left home when the appellant was six months old. He fell in with a negative peer group as an adolescent and progressed from solvent abuse at 14 to regular use of cannabis and LSD at weekends. He left school at 15 with no qualifications but nonetheless maintained a good employment record. He worked for six years as a painter for a firm of subcontractors at Harland and Wolff. He has been in a stable relationship since the age of 21 and lives with his girlfriend.

[7] In 2001 Bennett became a regular cocaine user using up to £200 a day at some points. In 2002 he was made redundant and has not obtained further employment. He developed a problem gambling habit on fruit machines. In 2003-2004, at his girlfriend's instigation, he sought help in relation to his addiction to cocaine, but subsequently lapsed.

[8] Lowey also had a significant cocaine habit before arrest spending £150 every 2-3 days. He also abused steroids but he informed the probation officer who prepared the pre-sentence report that he had stopped this habit without assistance while he was on remand. He and his fiancée had just paid a £1,000 deposit on a house in Muckamore, County Antrim and they planned to marry in August 2006. These plans had been put on hold due to his arrest. Lowey is unemployed and his fiancée was unaware of his cocaine habit or the credit card debts by which he was financing it before his arrest. However, she is giving him "a second chance". He claims not to have used drugs since being committed to prison.

[9] Lowey informed the probation officer that he had had a happy childhood until he was 11 years old when his parents separated. He had sporadic contact with his father during his teenage years. At this time he formed a pattern of solvent abuse, truanting and offending.

[10] In the case of both appellants, the probation officers who prepared the pre-sentence reports stated that, owing to the nature of the offences, no offence analysis or assessment of risk to the public from future offending was undertaken. In both pre-sentence reports, however, it is suggested that the appellants will have to address their use of drugs when they are released from prison.

Previous convictions

[11] Lowey's criminal convictions began with an appearance at Belfast Juvenile court in 1988 on a charge of criminal damage, for which an attendance centre order was imposed. In 1991 he appeared at Belfast Juvenile Court for a large number of offences that had occurred in June 1990. These involved theft, burglary, disorderly behaviour, common assault and criminal damage. The criminal damage consisted of breaking windows in a Catholic church in East Belfast. He was also charged with possession of an offensive weapon in relation to that incident. A further charge of theft in December 1990 led to another court appearance in July 1991. In June 1995 he was convicted of taking a vehicle without the owner's consent, assault occasioning actual bodily harm and driving with no insurance. He was given a suspended prison sentence on the assault charge. In August 2000 he was convicted of common assault and this resulted in a 12 month probation supervision order, as part of which he completed an anger management programme. His most recent conviction was for driving with no insurance in November 2003, for which he received a fine and was disqualified from driving.

[12] Bennett has a less substantial criminal record. This consists of four court appearances between 1990 and 2002 on a range of charges including theft, criminal damage and driving whilst unfit through drink or drugs. He has

been dealt with either by fine, disqualification from driving, conditional discharge and attendance centre orders.

The judge's sentencing remarks

[13] The judge referred to two mitigating factors that were common to both cases. The first of these was the relatively limited previous record of both appellants and the second that they had pleaded guilty at the first opportunity. Although he noted that there was little option for them to do otherwise, the judge stated that they must be given due credit for their plea as required by article 33 of the Criminal Justice (Northern Ireland) Order 1996.

[14] The case of *Attorney General's reference No 5 of 2004 (Thomas Potts)* [2004] NICA 27 was identified by the judge as providing the most pertinent guidance as to the range of sentences to be imposed. In that case the offender on the second day of his trial pleaded guilty to one count out of four on the indictment charging him with blackmail over the period from 8 August 2002 to 14 August 2002. The Crown accepted that plea. Five aggravating features were present and these were set out in paragraph [13] of the judgment of this court as follows: -

> 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.

[15] In the present case the judge observed that all but two of these features were present. He acknowledged that it had not been established that the appellants had high paramilitary profiles and that their criminal records were

not as bad as had been the case with Potts. He commented that, despite the appellants' drug problems, the offence seemed to be carefully planned, and did not appear to have been born out of desperation.

The appeal

[16] The principal ground on which both appellants relied in their challenge to the decision of the sentencing judge was that he had failed sufficiently to distinguish the present case from that of *Potts*. Not only had the appellants lesser criminal records and no proven link with a paramilitary organisation, they had pleaded guilty from the outset.

[17] Mr Hopley QC for the appellant Bennett also argued that the judge should have considered making a custody/probation order. Although this had not been recommended by the probation officer, the appellant was obviously in need of post release supervision in relation to his drug habit, Mr Hopley said. This made him a suitable candidate for custody/probation disposal.

Conclusions

[18] It is unquestionably true that there are aspects of the *Potts* case that are not present in this. Although the appellants were confident in their claim that they would not only ensure that the UVF would protect the sites but that they could prevent another paramilitary organisation from damaging plant and equipment (which suggests strongly that they at least had paramilitary connections), there is no tangible evidence such as was unmistakably present in *Potts* that they were members of a paramilitary group. It is also relevant that the appellants did not have as serious a criminal record as the offender in the earlier case. And it is true that a particularly grave dimension in the *Potts* case was that the offence had been committed while the offender was on bail for a serious scheduled offence. Finally, these appellants pleaded guilty at a much earlier stage in the proceedings than did Potts.

[19] As against that, the sums demanded here were substantially greater than those involved in the earlier case. Moreover, the attempts by the appellants to extort this money were even more concerted and determined than was the case in *Potts*. A further consideration is that, despite the warning contained in the *Potts* judgment that severe deterrent penalties were warranted in cases of blackmail, as this appeal and the recent case of *Attorney General's reference No 5 of 2006 (O'Donnell)* [2006] NICA 38 illustrate, this type of offence continues to plague our community.

[20] In *Potts* this court said that in a paramilitary context the appropriate penalty for blackmail, after a contested trial, was between ten and fourteen years, depending on the seriousness of the offence. We consider that the

offence here (as opposed to the characteristics of the respective offenders) was every bit as serious as that in the *Potts* case and, for the reasons given earlier, arguably more so. The range of sentences appropriate to the present case was, therefore, in our judgment, between ten and twelve years after a contested trial.

[21] It should be noted that in *Potts* we said that the *minimum* sentence on a plea of guilty should have been one of eight years. Because of the effect of double jeopardy the sentence in fact imposed was seven years' imprisonment. Not without misgivings, this court did not interfere with the sentencing judge's decision to make a custody/probation order.

[22] Given that eight years was the least punishment that this court considered was appropriate in *Potts* we find it quite impossible to agree that a sentence of eight years' imprisonment in the present case is manifestly excessive. We have carefully considered the differences that exist between the two cases but we do not consider that these are of sufficient moment to warrant any other conclusion. Although the appellants pleaded guilty much earlier than Potts, they were bound to be convicted and, as this court has said in *R v Pollock* [2005] NICA 43, "the discount in cases where the offender has been caught red-handed should not generally be as great as in those cases where a workable defence is possible". The fact that the offender in *Potts* had a much more serious criminal record and that he had a high profile in a paramilitary organisation and had committed the offence while on bail, while important factors, do not sufficiently distinguish that case from the present to justify the view that the sentencing judge's disposal here was wrong.

[23] The probation officers in the present cases did not provide the judge with material on which he could properly have made a custody probation order. This fact was well known to the appellants and their advisers before sentencing took place and it must be presumed that they acquiesced in the omission. The pre-sentence probation report should normally contain an offence analysis and assessment of risk to the public from future offending and we do not consider that the nature of the offences here would *per se* make it unsuitable to carry out such an exercise. In the event, however, we find ourselves unable to consider such an order and do not believe that it would be appropriate for us to direct that such an assessment be now carried out.

[24] The appeals are dismissed.