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Judgment: approved by the Court for handing down | *Delivered:* **18.10.02**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

SCOTT BROWN

Before: Carswell LCJ, McCollum LJ and Weatherup J

CARSWELL LCJ

[1] The appellant pleaded guilty at Downpatrick Crown Court on 24 Jamuary 2002 to the two counts on the indictment, armed robbery and assault occasioning actual bodily harm, and was sentenced on the same day by His Honour Judge Gibson QC to five years' imprisonment on the first count and eighteen months on the second, concurrent with the first sentence. The judge did not have a pre-sentence report before him and did not advert in his sentencing remarks to any consideration of a custody probation order. The appellant was on this ground given leave to appeal by the single judge.

[2] On 9 August 2001 the appellant entered a post office in Castle Street, Comber, seized a female customer and held a knife to her throat. He demanded money from the staff of the post office, whom he ordered to place bank notes in a bag and pass it under the counter screen to him. The customer held at knife point was terrified and pleaded with the staff to hand over the money. Mr Andrew Strain, a member of the post office staff, went to press the panic button, but the appellant warned him not to move and ordered the staff to hurry up in assembling the money. When he received the bag, which contained cash amounting to £3585.00, the appellant ran out of the shop and was pursued by Mr Strain and two members of the public. The appellant was cornered after a chase and engaged in a struggle with the three men, in the course of which he struck Mr Strain twice on the head and inflicted cuts on his right hand and left forearm with the knife. He escaped

but was again apprehended. Before he was finally detained the appellant dropped the knife into a drain.

[3] When interviewed by the police the appellant admitted the offences, although he denied punching Mr Strain. He said that he had decided that day to carry out the robbery, because of money worries. He claimed that he had turned the blade of the knife during the struggle so that it would not cause injury. He expressed regret at what he had done and apologised for it.

[4] The appellant was convicted in 1992 of offences of criminal damage and having a knife in a public place, for which he was fined. He stated to the probation officer that these arose out a fracas with a man who he believed had assaulted his girlfriend. He appears to have been in a jealous and drunken rage at the time.

[5] The pre-sentence report ordered by this court described the appellant's background as fairly stable until recent years. After a period of Army service he had a varied employment history, but commenced to abuse alcohol and incur debts. He borrowed a sum of money to pay them off, but lost his job through injury and was unable to meet the payments due. He told the probation officer that he was threatened by his creditors if the loan was not repaid and felt swamped by his financial worries.

[6] The probation officer stated in his report:

> "The present offences are indicative of the appellant's willingness to engage in risk taking behaviour with little insight for the consequences. He appears to be an individual who represses his problems until he feels so swamped by them that he is unable and unwilling to consider any other constructive possibilities … Mr Brown's willingness to carry a knife to intimidate reflects a degree of planning and a disregard for the possible consequences. It also illustrates his inability to consider any alternative steps he could have taken to deal with his financial problems … The risk of re-offending remains unless the appellant addresses the contributing factors to his offending. His willingness to carry a knife, for the second occasion, likewise reflects the potential risk of harm to the public."

He felt that the appellant would benefit from a period of statutory supervision on his release. The appellant wished, however, to return to Dorset when released and the probation officer was unable to confirm

whether the probation authorities in that county were in a position to accept the voluntary transfer of his supervision.

[7] In his sentencing remarks the judge referred to the mitigating factors, the appellant's early plea of guilty, the minor nature of the previous offences, his motive of attempting to obtain money to pay off his debt, his working record and the unplanned, amateurish nature of the robbery. He went on:

> "These points have been placed in the balance. In any view of them, however, this is a very serious case. A knife was put to the throat of a lady customer in the Post Office. Clearly she was terrified. Robberies of this type, with weapons being produced, of small shopkeepers and post offices are becoming increasingly prevalent. The persons who run such premises are entitled to protection, and despite the points made in mitigation, a significant sentence is called for."

He then imposed the sentences of five years and eighteen months respectively.

[8] The appellant sought and obtained leave to appeal out of time, advancing the ground that on reflection he felt that it was excessive, particularly in the absence of a pre-sentence report. His counsel Mr Cinnamond QC repeated and expanded on these points at the hearing before us. He submitted that the appellant could benefit from a period of supervision by a probation officer and asked the court to pursue the possibility of enforcing in Dorset an order for such supervision.

[9] It is regrettable that the judge did not give any overt consideration to the question of making a custody probation order, as he was required to do by Article 24 of the Criminal Justice (Northern Ireland) Order 1996. Nor did he obtain a pre-sentence report, as he was obliged to do by Article 21, or state that he regarded it as unnecessary. We might assume that the judge, for some reason which does not appear, had already decided that a custody probation order was not appropriate. He did not, however, so state in open court or give reasons for that conclusion, as required by Article 24(4). We have previously held that such failure to follow the mandatory statutory requirements for sentencers does not invalidate the sentences, but, as Girvan J stated in *R v Lunney* [1999] NIJB 158 at 162, it leaves this court uncertain whether the judge has properly considered the appropriateness of a custody probation order and rejected it on sustainable grounds. In these circumstances we must now consider this issue for ourselves, as well as the length of the sentences.

[10] In *R v Dunbar* (2002, unreported), in which we have just given judgment, we took the opportunity to review the level of sentencing for robbery of such premises as post offices, and we need not repeat what we said in that judgment. The judge was quite correct to regard offences of this type as serious and requiring proper deterrent sentencing to protect persons who run such premises. Sentencers should in our opinion take quite a high figure as their starting point when considering sentence in these cases. In the present case the appellant is entitled to credit for his plea of guilty, even though he had little option in the circumstances. His working record is also reasonably favourable. The judge was entitled to regard the previous offence as relatively minor; strictly, this is not a mitigating factor, but the absence of an aggravating one. We could not place much weight on the motives for the crime. We agree that it was an amateurish crime, and to a degree done on impulse, but such crimes are easy to commit and can be very frightening for the victims and other persons caught up in them. Having considered all the factors, we cannot regard the effective sentence of five years as anything but markedly lenient, and we should ourselves have imposed a materially heavier one.

[11] We have to agree with Mr Cinnamond's submission that a custody probation order ought to have been seriously considered in this case, in the light of the remarks in the pre-sentence report, and if the judge had had the benefit of such a report he would have undoubtedly felt obliged to give it careful consideration. We have done so now, but we have decided not to alter the judge's sentence, for two reasons:

(a) Although supervision by a probation officer could well be of assistance in the rehabilitation of the appellant, the practical difficulties in arranging for it in England have been brought to our attention on a number of occasions. We should, however, have adjourned the appeal to seek further information about the possibility if it were not for our second reason.

(b) Since the sentence on the robbery count appeared to us to be too low, we gave serious thought to the possibility of increasing the length of the term or of adding a period of probation supervision to the term imposed by the judge. In the end we decided against taking this course. We are not willing, however, to shorten the period of custody which the appellant must serve, and we therefore shall not substitute a custody probation order for the sentences imposed.

[12] We accordingly dismiss the appeal against sentence.