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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

JOHN PAUL PATRICK FRANCIS McDONNELL

CARSWELL LCJ

The appellant pleaded guilty at Belfast Crown Court on 26 August 1999 to two counts:

1. Robbery, contrary to section 8(1) of the Theft Act (Northern Ireland) 1969;

2. Making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861.

On 23 September 1999 the Recorder of Belfast His Honour Judge Hart QC made a custody probation order pursuant to Article 24 of the Criminal Justice (Northern Ireland) Order 1996, whereby, after stating that the term to which he would have sentenced the appellant on Count 1 would have been four and a half years, he ordered that he serve a custodial sentence of three years and eight months, and that on his release from custody he should be under the supervision of a probation officer for a period of two years. On Count 2 he imposed a sentence of three months' imprisonment, to run concurrently with the sentence on Count 1. He also put into effect a suspended sentence of four months imposed at Lisburn Magistrates' Court on 20 October 1997, to run consecutively to the custodial term on Count 1. The effective sentence was therefore four years' custody, to be followed by two years' probation.

The appellant served a notice of appeal containing two main grounds (a) that the sentence was manifestly excessive and/or wrong in principle (b) that the judge did not reduce the custodial element of the sentence sufficiently to take proper account of the period of probation. Gillen J gave leave to appeal, limited to the second ground. At the hearing before us

Mr Cushinan did not press the first ground, although not abandoning it, and concentrated on the second.

The incident out of which the prosecution arose took place on the evening of 20 September 1998. At approximately 10 pm the appellant and another man entered Mr Michael Kelly's flat, situated at 31 Camden Street, Belfast via a fire escape and a rear window. The appellant did not wear a mask although the other man tied his shirt around his head to conceal his face. The appellant carried a screwdriver. Mr Kelly was disturbed by the men as he sat watching television in the living room. They made him untangle the wires behind the television, provide them with a bag and help them load the goods to be stolen. The appellant gave the injured party a cigarette and prevented the other man from taking his bank cards. Mr Kelly's hands were tied with the flex from the telephone, and his feet with the flex from an electric guitar, leaving him lying face down on the sofa. The appellant then told Mr Kelly not to go to the police, on threat of death, and threatened to beat him to get information about the whereabouts of money in the flat. Mr Kelly was made to give the appellant £40 from his own room and was then made to search his flatmate's room. In the course of the robbery the appellant stole £40 in cash, a video and Playstation as well as a watch valued at £535, a hat and a bottle of wine. The appellant indicated in police interview that he was unaware that the flat was occupied and that the motivation for the robbery was to obtain money for drink.

The appellant, who is aged 25 years, has a record involving burglary and theft going back to 1991. The most recent of this nature – though not the last involving dishonesty -- was a conviction on 20 October 1997, when Lisburn Magistrates' Court imposed a sentence of four months' imprisonment, suspended for two years.

In his sentencing remarks the judge expressed the seriousness with which the court must view offences in which incursions are made into people's homes, the more so where they are attacked and put in fear. He accepted that it was an opportunist crime in that it was not carefully premeditated, but went on to say that the perpetrators had no hesitation in resorting to violence and the threat of violence. The fact that the appellant was grossly intoxicated was neither an excuse nor a mitigating factor. He therefore concluded very properly that crimes of this nature require immediate custodial sentences of substantial amount. We are quite satisfied that the term which he would have considered it right to impose for the robbery of four and a half years was fully justified and was in no respect excessive.

The judge had before him a pre-sentence report dated 15 September 1999, which deals in detail with the appellant's circumstances as at that date and the background of excessive drinking which lay behind this offence and those of which he was previously convicted. He had been

living for some six months with a partner in a settled relationship and has a daughter by her. The couple then stated their intention to marry. He had obtained and retained useful employment. The judge accepted that these were encouraging signs for the future that the appellant had started to settle down and that he realised that he had to abstain completely from the drinking of alcohol. They led him to the conclusion, we think rightly, that the court should consider a custody probation order. We also agree with his decision to put the suspended sentence into operation, and we do not consider that the overall length of the sentences of four years and ten months, before allowance for the probation element, offended against the totality principle.

The issue upon which the argument centred was whether the judge, in making an allowance of ten months against the custodial element while ordering that the probation element should last for two years, acted in contravention of the principles which he should have applied in making a custody probation order. Article 24 of the Criminal Justice (Northern Ireland) Order 1996 makes provision for custody probation orders in the following terms:

> " **24**.-(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence other than one fixed by law, a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both -
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> (a) to serve a custodial sentence; and
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> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.
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> (2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences.
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> (3) A court shall not make a custody probation order in respect of any offender unless the offender consents and, where an offender does not so consent, the court shall not pass a custodial sentence of a greater length than the term the court would otherwise pass under Article 20.

> (4) Where in any case a court does not consider a custody probation order to be appropriate, the court shall state in open court that it is of that opinion and why it is of that opinion.
>
> (5) A court which makes a custody probation order shall state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the order."

For convenience we shall refer to the term of custodial imprisonment which the court would pass under Article 20 as the "gross sentence", the period of supervision by the probation officer as the "probation period", the amount which the court takes off to take account of the probation period as the "reduction" and the custodial element as shortened by the reduction as the "net sentence".

Mr Cushinan did not attempt to argue that the judge was obliged under these provisions to observe an exact equivalence between the reduction and the length of the probation period. There is no assistance to be obtained from English authorities, since the custody probation option is not available in that jurisdiction, so we have to attempt to find the intention of the legislature from the construction of Article 24 and what we assess to be the object of the provision.

In our opinion the following propositions can be deduced:

1. It is clear from the terms of Article 24(2) that since the court can deduct such period as it thinks appropriate to "take account of" the effect of the probation that is quite inconsistent with any requirement of mathematical equivalence. It may in many cases appear appropriate to the court to make the reduction the same length as the probation period, but it is not compelled to do so in every instance, and it may exercise its discretion in determining the amount of the reduction. We consider, however, that the reduction should bear some relation to the length of the probation period. There should also be some balance between the custodial and probation elements.

2. There should ordinarily be a significant period of custody before the offender is released to commence the period of supervision. The supervision seems to us to be intended to operate as an additional element which is designed to help the offender to keep out of trouble after his release rather than constituting the main element in the arrangement. It should be borne in mind that a custody probation order cannot be made unless the court regards a gross sentence of twelve months or more to be justified, so that it is not appropriate where the court might think in terms of a short sentence on the "clang of the prison gates" principle.

3. We therefore do not think that it would ordinarily be in accordance with the legislature's intention to make an order by which the custody element is very much shorter than the

probation period, for in such a case it is doubtful whether a sentence of twelve months would have been justified in the first place, and the court should be giving consideration to other forms of sanction.

4. For the same reasons we doubt whether a reduction in the gross sentence which is materially greater than the length of the probation period would be a desirable disposition in most cases.

5. On the other hand, if the reduction in the gross sentence is materially less than the length of the probation period, that would savour of a double penalty, consisting of most of the appropriate gross sentence plus a significant length of probation. We doubt whether that would accord with the statutory intention.

In the present case the reduction in the gross sentence was substantially less than the length of the probation period, being some ten months (out of a gross sentence of 54 months) against a probation period of two years. The effect would be that the appellant would have to serve the bulk of the gross sentence and then remain subject to the supervision of a probation officer for a further two years. We consider that this is not in accordance with the intention behind Article 24 and that a larger reduction should have been made. We propose accordingly, while leaving the gross sentence on Count 1 at four and a half years, to increase the reduction under Article 24(2) from ten months to eighteen months. The net sentence will therefore be reduced to three years, on top of which there will be the four-month period of the suspended sentence put into operation. The effect will be that the total net sentence will be three years and four months instead of four years, followed on the appellant's release by a period of two years' supervision by a probation officer.

The appeal will accordingly be allowed and the sentence varied accordingly.

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JUDGMENT

OF

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