

Neutral Citation No. [2015] NICA 15

Ref: **GIR9590**

*Judgment: approved by the Court for handing down*

Delivered: **27/03/2015**

*(subject to editorial corrections)\**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

—————  
**REGINA**

**-v-**

**CONNOR JOSEPH HAMILTON**  
—————

**Before: Girvan LJ, Coghlin LJ and Gillen LJ**  
—————

**GIRVAN LJ (delivering the judgment of the court)**

**Introduction**

[1] This is an appeal against sentence in respect of five counts of fraud by false representation. The appellant was sentenced to a combination order consisting of 100 hours community service and 12 months' probation concurrent on each count. The issue arising in this appeal is whether the imposition of the probation element in the combination order was wrong in principle having regard to the provisions of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order"). Leave to appeal was granted by the single judge.

[2] Mr Greene QC appeared for the appellant. Mr Magee appeared for the Crown. The court is grateful to counsel for their well presented and succinct submissions.

**History of the case**

[3] On 16 October 2013 the appellant was arraigned and pleaded not guilty to counts 1 - 8 (Count 1 - theft contrary to section 1 of the Theft Act (NI) 1969; Counts 2-4 and 6-8 - fraud by false representation contrary to section 1 of the Fraud Act 2006; and Count 5 - attempted fraud by false representation contrary to Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and section 1 of the Fraud Act 2006). On 16 December 2013, the appellant was re-arraigned and

pleaded guilty to counts 2, 3, 6 – 8. On 16 March 2014, the appellant was found not guilty by direction to counts 1, 4 and 5.

[4] On 1 May 2014, the appellant was sentenced in respect of the five counts of fraud by false representation. The learned judge imposed a combination order of 100 hours community service and one years' probation on each count, with a compensation order for £600.

### **Factual Background**

[5] The offences arose out of an incident arising on the 27 September 2012, in which the appellant and his co-accused were employed to do some work around the house of an elderly woman whose family the following day contacted the police when they noticed that her bank card was missing together with a note of her pin number. The appellant's co-accused had stolen the credit card which he used to withdraw cash from a cash machine and to make a number of purchases in Rushmere Shopping Centre amounting to £1,169. The appellant was present during these transactions. Over that day and the following, the card was used by the appellant's co-accused to a combined value of £2,970.

[6] In respect of the appellant's part in this enterprise there was an agreed basis of plea which is set out below:

“The defendant pleaded guilty to the offences for which he is now to be sentenced.

The defendant gave an account of his actions in interview.

The Crown accept that he was not present during the theft of the card and took no part in that theft. He was not involved in any dishonesty until the two defendants entered the Rushmere Shopping Centre.

Ronan Hamilton made all the purchases at Rushmere with the card.

There is no evidence that the defendant at any time possessed the card or knew that it belonged to Mrs Maguire. His knowledge extends to believing that the card was stolen.

There is a difference in culpability of both defendants.”

## Sentencing context

[7] The appellant had six previous convictions, including a conviction for the offence of theft committed on 21 February 2009. The five other convictions were categorised as four road traffic offences and one offence relating to the supply/use of drugs. A Pre-sentence Report was sought and provided on dated 28 April 2014. The Probation officer in her report made an assessment that there was a low likelihood of the appellant reoffending given the number of protective factors in his lifestyle including:

- (i) A stable relationship
- (ii) Good family support
- (iii) No issues relating to drugs and alcohol

It was noted that the appellant had no previous convictions of a 'specified' or 'serious' nature and as such he did not present as a significant risk of serious harm. The report stated that the appellant had a settled lifestyle and denied any issues with drugs or alcohol. He did not report any issues with debts and maintained that the offence was not financially motivated on his part. In respect of sentencing, the appellant was aware that he might face a custodial sentence. The report stated that, alternatively, the court might consider imposing a period of suspended custody to act as a deterrent to further offending and to serve as a reminder of the consequences of his actions. The report went on to state, "*Whilst a Probation Order is available to the Court, the Court may not deem this necessary given the absence of offending related lifestyle issues.*" The appellant was assessed as suitable for Community Service should the court deem this to be commensurate to the offence.

## Sentencing Remarks

[8] The learned trial judge remarked that whilst the appellant had not been involved in the original theft, he had taken the opportunity to benefit himself to the sum of £584. She added that the appellant would be required to make a compensation payment of £600 to the bank. She remarked that 'the community loses whenever there is a fraud like this' and concluded that the appellant should be required to put something back into the community. She sentenced the appellant to 100 hours community service and ordered the appellant to be placed on probation for one year. This sentence was concurrent on each of the counts. The appellant's counsel indicated to the judge that the pre-sentence report stated that while a probation order was available to the Court, the Court may not deem it necessary given the absence of offending related lifestyle issues. Counsel voiced the concern that Probation 'are basically saying, we don't want to waste our time with this man'. The Judge remarked that it was up to Probation to decide what support the defendant needed to prevent him re-offending. She went on to say:

'Why I am doing this ... The probation order is a useful additional power which has something of the equivalence of a suspended sentence, in the sense if someone offends during a period of Probation that will obviously be an issue for the court.'

### **The ground of appeal**

[9] The ground of appeal is that the combination order is wrong in principle in that the probation order element was not imposed for reasons consistent with article 15 of the 1996 Order. This ground is developed around the proposition that probation is imposed in order to assist in rehabilitation, protection of the public and prevention of further offences. The appellant submits that the need for supervision was not recommended by the probation service and that the learned judge intended the effect of the probation element to be similar to that of a suspended sentence. It is asserted that, when passing the probation part of the sentence, the judge did not bear in mind the considerations of assisting in rehabilitation, protection of the public and prevention of further offending. Therefore, this part of the sentence was wrong in principle and contrary to good sentencing practice.

[10] In granting leave to appeal O'Hara J stated:

"5. I accept that it is at least arguable in light of the pre-sentence report and all of the circumstances that the imposition of probation was wrong in principle. The learned trial judge's remarks .... are arguably misconceived and misdirected in that they do not focus on the statutory test as set out at Article 15(2) of the Criminal Justice (NI) Order 1996. I grant leave to appeal against sentence on that basis."

### **The Criminal Justice (Northern Ireland) Order 1996**

[11] Article 11(1) of the 1996 Order provides that a probation order may require an offender to comply with such requirements of the court as it considers desirable in the interests of:

- "(a) securing the rehabilitation of the offender; or
- (b) protecting the public from harm from him or preventing the commission by him of further offences."

[12] Article 13 refers to community service orders on their own. Article 13(4) provides:

“(4) A court shall not make a community service order in respect of any offender unless the offender consents and the court is satisfied –

- (a) after hearing (if the court thinks it necessary) a probation officer, that the offender is a suitable person to perform work under such an order; and
- (b) that provision can be made by the Probation Board for him to do so.”

[13] Article 15 refers to combination orders. Article 15(1)-(3) provides:

“(1) Where a court by or before which a person of or over the age of 16 years is convicted of an offence punishable with imprisonment (not being an offence for which the sentence is fixed by law or falls to be imposed under Article 70(2) of the Firearms (Northern Ireland) Order 2004 or paragraph 2(4) or (5) of Schedule 2 to the Violent Crime Reduction Act 2006 or Article 13 or 14 of the Criminal Justice (Northern Ireland) Order 2008 or section 7(2) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015) is of the opinion mentioned in paragraph (2), the court may make a combination order, that is to say, an order requiring him both –

- (a) 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; and
- (b) to perform unpaid work for a number of hours so specified, being in the aggregate not less than 40 nor more than 100.

(2) The opinion referred to in paragraph (1) is that the making of a combination order is desirable in the interests of –

- (a) securing the rehabilitation of the offender; or

- (b) protecting the public from harm from him or preventing the commission by him of further offences.
- (3) Before making a combination order, the court shall—
  - (a) state in open court that it is of the opinion that Article 8(1) applies and why it is of that opinion; and
  - (b) explain to the offender in ordinary language why it is making a combination order.”

## Discussion

[14] Allen and McAleenan in *Sentencing Law and Practice in Northern Ireland* (Third Edition) referring to ‘The National Standards for the Supervision of Offenders in the Community’ point out that:

“In practice, a combination order is likely to be most appropriate for an offender who has:

\*committed an offence which is amongst the most serious for which a community sentence may be imposed;

\*clearly identified areas of need that have contributed to the offending and which can be dealt with by probation supervision; and

\*a realistic prospect of completing such an order, including both the probation and community service elements.”

Paragraph 1.230 of Allen and McAleenan proceeds to comment on paragraph 9 of the ‘National Standards for the Supervision of Offenders in the Community’:

“ .... the order is unlikely to suit either, (i) those offenders with a chaotic lifestyle, caused by addiction to, or misuse of, drugs or alcohol, who may have difficulty in completing the community service requirements of the order or (ii) *those offenders who have a stable and well-ordered life and would therefore not require supervision under the probation element.* The onerous nature of the combination order may also

make it unsuitable for a young offender, or indeed, a more elderly offender. *In these circumstances it is clear that a pre-sentence report will be particularly helpful in establishing the compatibility of the order and the offender.*" (emphasis added)

[15] In para 1.170 of *The Sentence of the Court* (HMSO 1986), the aims and methods of probation are stated as follows:

"The fundamental aim of probation is to uphold the law and protect society by the probation service working with the offender to improve his behaviour. The particular object of placing an offender on probation is to leave him at liberty in the community but subject to certain requirements regarding his way of life with skilled help available to him from the probation service to cope with the problems and difficulties that may have led to his offending and with an obligation to co-operate with his supervising probation officer as regards reporting, receiving visits and heeding the advice given to him. This response to offending through the discipline of supervision by a probation officer, seeks to strengthen the offenders resources so that he becomes a more responsible person..."

[16] The *Report of the Departmental Committee on the Probation Service* suggested four conditions which should be met before making a probation order. These are still worthy of consideration:

"Firstly, the circumstances of the offence and the offender's record must not be such as to demand, in the interests of society, that some more severe method be adopted in dealing with the offender, secondly, the risk, if any, to society through setting the offender at liberty must be outweighed by the moral, social and economic arguments for not depriving him of it; thirdly, the offender must need continuing attention, since otherwise, if the second condition is satisfied, a fine or a discharge will suffice; and fourthly, the offender must be capable of responding to the attention while he is at liberty.""

[17] We consider that the position is accurately stated in Valentine's 'All the law of Northern Ireland', Folder 7 - Sentence/prisons where the learned editor highlights the purpose of probation. A probation order whether in the context of a

custody probation order or a combination order should only be made if the court considers that (a) probation will reduce the risk of harm to the public or make re-offending less likely; and (b) the defendant will co-operate and benefit from the rehabilitatory effects of probation (*cf Doyle* [1999] 7 BNIL 92). Where a probation officer has not recommended probation it is not normally appropriate to choose this option. The probation officer will generally be in the best position to decide these matters and the court should be slow to make such an order unless it has the support of the probation officer.

[18] The Probation Service does not have infinite resources and its officers are hard pressed in dealing with cases where probation will serve an important and useful purpose in rehabilitation and in crime prevention. A court should only impose a probation order where it is really required and will serve a useful purpose. While the learned judge's motivation in making the order was laudable we do not consider that the imposition of the order was called for in the context of this case having regard to the fact that the probation officer said nothing that indicated that such an order would be requisite and useful and indeed implied the opposite. Before making such an order a sentencing judge should find some material in the presentence report and in the circumstances of the case to show that it was appropriate to impose such an order. Certainly in the instant case, having regard to the views expressed by the probation officer in her report, the judge, if minded to impose a probation order, should have sought further input from the probation officer and explored what useful and meaningful work could be done with the appellant and was necessary to achieve the purposes of probation. We note the concession made by the Crown counsel that there was nothing to indicate that other sentencing judges were incorporating probation in combination orders to operate as a kind of suspended sentence. We further note that in imposing the order the judge omitted to follow the procedural steps required by article 10(3) of the 1996 Order. These require an explanation of what is actually required of the defendant in fulfilling probation requirement and the procedure available to apply at a later date to discharge the probation order.

[19] We accordingly allow the appeal and quash the probationary element of the combination order which thus becomes a straight forward community service order which has now been complied with.