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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

FRANK GRIBBEN

Mr Blackburn (instructed by Joe Mulholland Solicitors) for the Applicant
Mr McClean (instructed by the PPS) for the Respondent

Before: Keegan LCJ, Treacy LJ and Rooney J

Ex Tempore

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a case where leave to appeal was refused by the single judge, Colton J. The applicant renews the application for leave to appeal the sentence imposed on him by His Honour Judge Miller KC ("the judge") on 25 March 2022. That was a sentence of three years' imprisonment split equally between custody and licence for one count of wounding, contrary to section 20 of the Offences against the Person Act 1861. A Violent Offences Prevention Order ("VOPO") was also made for five years as part of the sentencing process. No appeal is mounted in relation to that. The sole ground of appeal as appears in the Notice of Appeal is that the sentence is manifestly excessive. An ancillary point raised in a supplementary skeleton argument is that the court, if unpersuaded of that argument, should look at the balance of the sentence between custody and licence.

Factual Background

[2] The factual background can be summarised as follows. On 19 November 2019 the applicant and the injured party, a Mr David Quail, went to a bar in Castlewellan together. Afterwards they continued drinking. They each bought a bottle of Buckfast and went to their friend, Mr Hugh Jennings' house. A Mr Burns was also

there. It is reported that all were in good form to begin. Subsequently, there was an altercation between the applicant and the injured party. The features of the altercation are worth recording as they frame this case. The injured party was headbutted by the applicant as he sat in a chair, he then fell to the floor. Whilst on the floor the applicant lifted one of the Buckfast bottles and smashed it over the injured party's head. An ambulance was called. The injured party required 13 staples to a laceration at the back of his head and left ear. In addition, the injured party suffered mental health effects as evidenced by the victim impact statement that we have read.

[3] The applicant ultimately pleaded guilty to this offence but only after the following steps within the court proceedings. On 29 October 2020 he was committed for trial on the section 20 count. He was arraigned on 26 November 2020 and pleaded not guilty. At a case conference on 27 January 2021, the prosecution indicated that a plea to the section 20 offence was accepted. The applicant did not plead guilty at that time. The case was listed on three occasions before, almost one year later on 18 January 2022, he pleaded to the section 20 offence and was sentenced.

[4] Pausing at this point, we note and Mr McClean for the prosecution accepts that there were some evidential difficulties in this case. One of the potential witnesses had died and the other witness was proving difficult to engage. It was therefore anticipated that there would have to be hearsay applications made. In any event the applicant sought a *Rooney* hearing at an early stage of the case conference in January 2021. At that stage the trial judge said indicated that a starting point of four years would be imposed on the applicant; however, he would reduce that by one third for an early plea to reach a sentence of two years and eight months.

[5] By the time of sentencing for this offence in January 2022 the judge altered the reduction for the guilty plea to 25% given what had transpired. The judge explains this in his sentencing remarks which we have read.

Explanation of the sentence

[6] For the purposes of sentencing the judge had the benefit of a pre-sentence report compiled by Aisling Finnegan of 14 March 2022. This report refers to the applicant's circumstances. He is a 28 year old single man with five children, who is homeless at present. He has alcohol addiction and anger management problems. It also refers to his 14 previous convictions, the majority of which were of a violent nature. They also involve driving and drug related offending. The index offending occurred during a period when the applicant was subject to suspended sentences amounting to seven months' imprisonment. We have also been informed that post this sentence the applicant was convicted of failing to provide a specimen, however, no other violent offences occurred between 2019 and 2021.

[7] The probation report refers to the risk of the applicant committing further offences and describes this as of high likelihood. It supports the making of a VOPO. The report refers to some attempts by the applicant to deal with alcohol addiction which were unsuccessful. Reference is also made to a willingness on his part to take some further steps to address addiction issues without any meat on the bones in relation to that. Overall, the report does not paint an encouraging picture. In addition, the probation officer highlights concern regarding this applicant's ability to comply with orders due to alcohol dependency together with health and safety issues.

[8] The judge reflects all of the above in his careful sentencing remarks. He particularly noted the aggravating features in this case which Mr Blackburn does not dispute. They are the use of glass, the violence meted out in addition to the glassing and the applicant's previous convictions of a violent nature. The judge referenced the suspended sentences but did not activate them on the basis of totality. He also considered the plea and afforded the discount of 25% as we have said.

[9] In his skeleton argument Mr Blackburn relies on the case of *R v Wilson* [2021] NICA 38. There the court examined a sentence for similar offences and stated quite clearly that glassing cases are extremely serious and will attract custodial sentences. This court repeats the facts that violent offences of this nature involving glassing are deprecated by the courts, see para [26] of *Wilson*.

> "[26] Offenders who use gratuitous violence by injuring others by glassing them in the face must expect stiff prison terms. Drink is no excuse. On the contrary it is, as these courts have repeatedly said, an aggravating feature. The fact that offenders are young or female is no reason why they should not be punished severely for such conduct. As we said earlier in this judgment the need for deterrent sentences to discourage such violence is obvious. Part of the function of the court is to protect the public and one of the means by which we attempt to achieve that goal is by imposing deterrent periods of imprisonment particularly for offences of the kind committed in this case. It is unrealistic to contend that a deterrent sentence was not justified and that the court should have instead imposed a suspended sentence or probation. We emphasise that offences of section 20 wounding by glassing in the face will generally require deterrent custodial sentences. Such sentences should only be suspended where the court finds exceptional circumstances."

[10] The applicant in *Wilson* had a clear record, employment prospects, was remorseful and was assessed as having a low likelihood of reoffending and it was a

single act. The facts of this case are very different. Here there was more than one blow, the applicant has relevant previous convictions, and the probation report is not as positive.

[11] The maximum sentence for this offence is seven years. Where a case falls within a range will depend on the facts. Given the circumstances of this case, the aggravating factors that we have pointed out and the previous convictions we consider that four years was an appropriate point for the judge to reach prior to reduction for the guilty plea. We consider that the judge looked at this case fairly by not activating the suspended sentence. He was quite entitled to apply the 25% reduction.

[12] In our view the final sentence of three years is the correct sentence in the overall circumstances of this case. We do not consider it manifestly excessive or that the judge erred in principle.

[13] An ancillary point raised in the supplementary skeleton argument is in relation to the balance of the sentence. This constitutes a plea to the court to look at recalibrating the 50/50 balance between imprisonment and licence to one year imprisonment and two years' licence. This point was not canvassed before the trial judge and so no error attaches to him. However, we have considered this issue ourselves given the applicants personal circumstances.

[14] The statutory test pursuant to Article 8 of the Criminal Justice (Northern Ireland) Order 2008 is as follows:

> "8.—(1) This Article applies where a court passes—
>
> (a) a sentence of imprisonment for a determinate term, other than an extended custodial sentence, or
>
> (b) a sentence of detention in a young offenders' centre in respect of an offence committed after the commencement of this Article.
>
> (2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17.
>
> (3) The custodial period shall not exceed one half of the term of the sentence.
>
> (4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period.

> (5) In paragraph (4) "the licence period" means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—
>
> (a) in protecting the public from harm from the offender; and
>
> (b) in preventing the commission by the offender of further offences."

[15] At para [31] of *R v McKeown* [2013] NICA 38 the Court of Appeal also offered the following guidance which we adopt:

> "The duration of the licence period is dependent upon the assessment by the judge of the effect of probation supervision in protecting the public from harm from the offender and preventing his commission of further offences. It is apparent from the test that the source of the material upon which to exercise the judgment is likely to be found particularly in the pre-sentence report although sources such as expert reports may also be available. When a judge decides to impose a period of licence in excess of the minimum period of 50% of the determinate sentence, he should give brief reasons for that decision which will often include reference to matters contained in the probation or other relevant reports. Where he rejects such a submission, he should also give reasons. That is necessary to make the sentence transparent."

[16] This provision was considered in the case of *R v Somers* [2015] NICA 17 as follows at para [25] where the courts stated as follows:

> "Where the licence period is to be extended beyond one half of the term of the sentence the judge must explain why such a disposal will achieve the statutory objectives contained in Article 8 (5) of the Criminal Justice (Northern Ireland) Order 2008. In this case the most that can be said is that there is some support for the view that both appellants should undertake courses during the post-custody period. There is no information about the duration of such courses. No material has been opened to us which would have justified a period of licence of more than one half of the term."

[17] This court reiterates the guidance provided by the previous cases we have referred to. We understand there may be an intention to undertake certain courses in prison on the part of the applicant and we certainly do not discourage that. However, the present case is not one where the court could viably look at rebalancing the period between imprisonment and licence. The probation report is not encouraging. We do not have evidence of specific courses that require additional time on licence and would meet the statutory test in Article 8(5) to protect the public and prevent the commission of further offences. Overall, we have found Mr McClean's written argument the more compelling on this issue.

Conclusion

[18] We grant leave in relation to the ancillary point raised, however, for the reasons we have given we dismiss the appeal.