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HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

JAMES LEE ROY

NICHOLSON LJ: WEATHERUP J

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[1] This is an application for leave to appeal against sentences imposed by His Honour Judge Rodgers at Belfast Crown Court sitting at Antrim on 23 January 2002. The learned trial judge sentenced the applicant to ten years' imprisonment on Count 1 of Bill No 312/01. The charge was rape, contrary to common law. On Count 2 he sentenced him to eight years' imprisonment. The charge was false imprisonment. On Counts 3 and 4 he sentenced him to two years' imprisonment. The charges were burglary. On Count 5 he sentenced him to six months' imprisonment. The charge was possession of a controlled drug of Class B. The sentences on Counts 2 to 5 were to run concurrently with the sentence on Count 1. In respect of Count 1 the judge made an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996.

[2] On 23 April 2002 an application for leave to appeal was refused by Campbell LJ and the applicant subsequently applied for leave to the full court. The application was heard on Friday, 14 June 2002 and we reserved judgment.

[3] The applicant pleaded guilty to four out of the five offences on arraignment. One count of burglary was amended and he pleaded guilty to it on the day on which he was sentenced.

[4] On Friday, 29 June 2001, a young lady, aged twenty-six, was alone and asleep in bed at her home when she was awoken by the applicant, a stranger, who stormed into her bedroom. His face was covered to the eyes by a scarf. He jumped on her bed, punched her on the side of her head, put a gloved hand over her mouth and told her to keep quiet or he would hurt her. He asked for money and was told that there was none in the house. He became angry.

[5] He then embarked upon a sexual assault, first by digital penetration of her vagina, while he continued to ask for money. She tried to dissuade him, by telling him, falsely, that she was 3 months pregnant. He proceeded to rape her, threatening that if she looked at his face she would be killed. He interrupted the rape to ask her for a plastic bag which he used as a condom. He used this partly in order that there should be no DNA traces of his semen, throwing it to the floor when the sexual assault was completed.

[6] After the rape he continued to ask for jewellery and money, searched through the bedroom and her handbag. She told him that her cash cards were in her car and offered to accompany him to get money. He switched on the light, threw a towel over her face, tied her wrists, attempted to bind her ankles, gagged her and having threatened her with violence, went out to her car and stole a bank card. He returned to seek instructions as to how and where to use it.

[7] Before leaving the house he threatened her against moving or calling the police and shouted: “Don’t forget, I’ll be coming back, love”. She freed herself, dialled the police and sought refuge in a neighbour’s house, arriving there around 4.45 am. While she awaited the

police she saw him return to her home and then run off. The ordeal in the house lasted approximately twenty minutes.

[8] Before going to the victim's home he committed a burglary at another house nearby where he stole a mobile phone, two handbags and about £10 in cash.

[9] The police were searching for the applicant before he gave himself up on 3 July 2001, four days after the rape. A search of his home revealed a small quantity of cannabis resin concealed under a rug.

[10] He admitted the offences during interview with the police, claiming that he intended to steal. The items used in the attack on the victim were found around her bedroom. He said that he had consumed a good deal of alcohol, cannabis and ecstasy prior to the attack. He admitted that he had placed clothing worn by him during the attack on an unlit bonfire the following morning in order to hide evidence. At the end of the interview he said: "I am very sorry for what happened to the woman".

[11] The trial judge accurately and succinctly summarised the facts, as can be seen from his sentencing remarks. He then dealt with the personal background of the offender and the contents of a pre-sentence report. He referred to the applicant's previous criminal record, involving twenty-four appearances in court, mostly for theft and burglary. On 26 January 2001 at Belfast Crown Court he was sentenced to two years' imprisonment for assault occasioning actual bodily harm.

[12] He accurately summarised the pre-sentence report although he did not expressly refer to the passage:

> "There are clear aspects of the defendant's account which in my view seek to minimise and rationalise the level of predisposition to such behaviour, (and indicate) his low level of inhibition and reckless disregard for the impact of his attack upon this woman".

He cited the paragraph commencing:

> "The defendant has some insight into the victim aspects of this type of behaviour. He was quite emotional during interview and stated that he constantly re-lives the horror of what he put this young woman through."

He set out this paragraph in full and we need not repeat it, as it can be found in the sentencing remarks.

In addition the probation officer stated that the defendant would require intensive supervision upon his return to the community in order to reduce the risk of danger which he presents to the general public and the likelihood of re-offending.

[13] Dr Bownes in a psychiatric report concluded that the applicant's behaviour was likely to reflect a more generalized tendency to opportunistic and anti-social behaviour and a longstanding lack of regard for the rights and feelings of other people rather than pathological attitudes or deviant sexual interests. This was dealt with in detail by the judge.

[14] The judge then dealt with the Victim Impact Report setting out the conclusions. Again it is unnecessary to repeat what he said but as he pointed out the victim is suffering from post-traumatic stress disorder with delayed onset and moderate to severe clinical depression. Owing to the severity of her symptoms it is possible that it may take a long time, possibly years, before she begins to return to her pre-morbid state.

[15] The judge then dealt with the issue of sentence. He referred to two mitigating factors. The plea of guilty was, he rightly said, particularly important in sexual cases where it means that the injured party does not have to go through the indignity of giving evidence of private matters. Secondly, he pointed out, the applicant gave himself up. Quite clearly the police were aware of who the offender was but that showed a certain degree of remorse and he helped with the investigation. The judge then referred to some of the aggravating factors. The victim had to endure a terrifying and prolonged ordeal. The privacy of her home was violated, she suffered a very serious sexual assault and her property was taken.

[16] He considered the relevant authorities and in particular the English decision in R v Billam [1986] 8 C.A.R. (S) 47 at 50 in which it was stated:

> "Where a rape is committed … by a man who has broken into or otherwise gained access to a place where the victim is living … the starting point should be eight years".

The judge pointed out, correctly, that in Northern Ireland the starting point is higher than in England and therefore the starting point for rape by an intruder is ten years rather than eight years. This arises from the decision of the Court of Appeal in Northern Ireland in R v McDonald (1989) NI 37.

[17] We also approve of the practice which the judge adopted of assessing the sentence which he would have imposed, taking into account the aggravating factors before reducing the sentence by taking into account the mitigating factors. Judges are free to consider the mitigating factors first of all, as urged by Mr O'Rourke, counsel for the applicant, but we prefer the approach adopted by the judge. In addition to the factors mentioned by the judge it appears that the applicant raped his victim twice by interrupting the rape in order to obtain the plastic bag and then raping her again. It was not concern that he might make her pregnant that led to this course of action but an attempt to conceal his identity by destroying evidence of DNA. In the end he left the bag behind but he returned to the scene, leaving only because the police arrived.

[18] It was submitted by Mr O'Rourke that the judge was wrong to take into account the offence of actual bodily harm committed not long before the rape and for which he received a prison sentence for two years. It is apparent from the sentencing remarks of the judge that he was concerned about the increasing aggression of the applicant. The violence shown before, during and after the rape, coupled with the threats of violence, following so closely upon an assault which warranted a sentence of two years' imprisonment was, in our view, rightly stressed by the judge. Although he did not expressly state the serious harm about which he

was concerned, it is plain that the judge was concerned about serious personal injury, physical or psychological, occasioned by further offences, whether of a sexual or other nature. We do not see how the judge could have been more clear in expressing his concern.

We were told by Mr O'Rourke that the previous offence of assault occasioning actual bodily harm involved the beating up of a bus driver who suffered a black eye and facial bruising. We would have expected counsel for the applicant to inform the judge of the facts of that case. Whether he did or did not, we still consider the judge was entitled to take it into account as an aggravating factor.

[19] Mr O'Rourke in effect repeated the plea in mitigation which must have been made to the judge who took all the matters referred to by Mr O'Rourke into account. We reject his submission that a plea of guilty should entitle a defendant to a reduction of one-third in the sentence. In the present case the evidence against the applicant was overwhelming, the police were looking for him, he must have been aware of it when he gave himself up and his admissions were the inevitable consequences of his actions. We regard it as sinister that he was seen by the victim returning to her house as he had threatened to do and that he only made off when the police arrived.

[20] We reject the argument that there was no gratuitous violence. The punch which was inflicted may not have caused serious harm but that was good luck, rather than good judgment. The gagging and binding were gratuitous violence. Whether or not it was an opportunistic rape in the course of burglary, the same sort of opportunity might well present itself in the course of another burglary, a crime to which the applicant is prone. We do not accept that the digital penetration to which the victim was initially subjected should be ignored. It had a severe effect on the victim. But we accept that other kinds of sexual indignities would have made the offence graver. We consider that a custodial sentence of thirteen to fourteen years was appropriate on a contest and that a reduction to ten years in

view of the mitigating factors did not make this a severe sentence, let alone an excessive sentence or a manifestly excessive sentence. We have read the latest advice from the Sentencing Advisory Panel to the English Court of Appeal in May 2002 and nothing in it affects our overall view. The Panel makes no reference to the views of the Court of Appeal in Northern Ireland about Billam's case.

[21] It was argued that a custody probation order under Article 24 of the 1996 Order was more appropriate than an Article 26 Order and that the psychiatric report and the pre-sentence report did not justify the use of Article 26. We disagree. Before Article 26 can be applied the court must be satisfied that a sexual offence has been committed and that there is a need to protect the public from serious harm and it is desirable to prevent the commission of further offences and secure the offender's rehabilitation.

[22] There is no need to indicate to counsel that the court is considering the making of an Article 26 order. The power of the Court to impose it is set out in the statute and the conditions which must be satisfied are also set out.

[23] An order under Article 26 does not impact on the period in custody and the authorities cited by Mr O'Rourke on Section 2(2)(b) of the Criminal Justice Act 1991, which is comparable with Article 20(2)(b) of the 1996 Order, (protective sentences where the offence is a violent or sexual offence and the court is of the opinion it is necessary to protect the public from serious harm from the offender) do not apply to an order under Article 26.

[24] We express no decided view as to the standard of proof required under Article 20(2)(b) but note the standard of proof as expressed in R v Fawcett (1995) 16 Cr App R (S) 55. Article 20(2)(b) and section 2(2)(b) require the formation of an opinion as a precondition to a conclusion on the length of a protective sentence. Article 26(1)(b) permits the court to order the release on licence of a sexual offender 'having regard to' the need to protect the public from serious harm and the desirability of preventing the

commission of further offences and securing rehabilitation. This provision is different from Article 20(2)(b) in structure and content and effect and does not import the application of any criminal standard of proof before it can apply. We see no justification for applying to the provisions of Article 26 the principles which the English courts have applied to protective custodial sentences for violent or sexual offences.

[25] This court dealt with the appropriateness of making an Order under Article 26 in R v McGowan [2000] NIJB 305, R v Larmour (unreported: 22 June 2001) Attorney-General's Reference (No 1 of 2002) (unreported: 11 May 2002) and R v C (unreported: 10 May 2002).

In McGowan's case the Lord Chief Justice said at p 310:

> "We are equally satisfied that the judge was correct in his approach to Articles 24 and 26 of the Order. He established that in the public interest it would be advisable that the applicant should be under the supervision of a probation officer after his release. The conditions for the application of Article 24 and the making of a custody probation order therefore applied, and the judge could have made such an order if he thought fit. He regarded it as inappropriate, however, because of the availability in this case of the provisions of Article 26, under which the applicant will be released on licence instead of being granted remission and will be under the supervision of a probation officer until the completion of the full period of the sentence imposed. The provision is designed specifically for the supervision of persons convicted of sexual offences and should ordinarily be put into operation in such cases where the conditions contained in Article 26(1)(b) are satisfied, namely that the court is satisfied so to order, having regard to –
>
> (i) the need to protect the public from serious harm from him, and
>
> (ii) the desirability of preventing the commission by him of further offences and of securing his rehabilitation."

In R v Larmour the Lord Chief Justice stated that where a person is convicted of a sexual offence Article 26 should ordinarily be put into operation if the court is satisfied that the conditions in Article 26(1) have been fulfilled.

In the Attorney General's Reference (No 1 of 2002), the Lord Chief Justice said:

> "We consider that sentencers should always examine with care cases of sexual offences to determine the extent of the risk to the public of re-offending and whether an order under Article 26 is required."

In R v C the Lord Chief Justice repeated that Article 26 was designed specifically for the supervision of persons convicted of sexual offences.

[26] In the present case, despite the submissions of Mr O'Rourke to the contrary, we agree with the judge that the requirements of Article 26(1) are met. The public needs to be protected from serious harm from the applicant although it may not necessarily be serious sexual harm. The desirability of preventing the commission by him of further offences and of securing his rehabilitation was evident.

We commend the judge for the care which he took in his sentencing remarks. It is important that the reasons why a judge imposes an order under Article 26 are expressed by him or are implicit from his sentencing remarks.

We dismiss the application.

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JUDGMENT

OF

NICHOLSON LJ
