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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MANDY LOUISE O'TOOLE

Before: Morgan LCJ, Weir LJ and Colton J

WEIR LJ (delivering the judgment of the court)

[1] The appellant appealed to this court with the leave of the Single Judge against a total sentence of four years imprisonment, being two years in custody and two years on licence, imposed upon her for an assault occasioning actual bodily harm ("the principal offence") for which she received a sentence of four years and a charge of assault upon the police and another of resisting the police, both of which occurred in the aftermath of the principal offence and for each of which she was sentenced to three months imprisonment, all three sentences to be concurrent. At the conclusion of the hearing this court determined to quash the custodial sentences and to substitute a probation order and it now gives its reasons.

[2] The circumstances of the offending were that at around 12.30 am on 18 December 2014 a man and a woman were walking together along Palestine Street in Belfast when they saw the applicant kicking the front door of a house and shouting. The woman, who was aged about 50 years, said that she shouted to the applicant asking her why she was kicking the door and at this the applicant suddenly ran over and attacked her. She grabbed the woman by the hair very roughly and pulled her to ground causing her to hit her head. Then, while she was on the ground, the applicant repeatedly punched the woman to the face and head and continued to pull her hair. The man managed to pull the appellant off and two other males led her away. A number of other witnesses made statements indicating that they had seen the assault and in which they supported the injured party's account of what had happened. Thereafter, in the course of being arrested, the applicant became involved in a violent struggle with the police.

[3] As a result of the assault the injured party suffered black eyes, cuts to her face, her hand and left elbow and clumps of her hair were removed. There was a fracture to the elbow which required immobilisation and a plaster cast. An issue arose at the hearing as to whether or not the appellant had kicked the injured party after she had been knocked to the ground. Prosecuting counsel very properly informed the sentencing judge that he had repeatedly viewed CCTV footage that showed the appellant kicking the injured party but that she was in a standing position when that occurred. However it appears implicitly from the sentencing remarks that the judge nonetheless proceeded on the erroneous basis that the injured party had indeed been kicked while on the ground.

[4] The appellant was born on 25 July 1992 so that she was 22 when these offences were committed. It is not clear why they should have taken almost two years to reach the point of sentence on 13 October of the present year. Her criminal record is extensive, especially for a person of her young age, with almost sixty convictions prior to the present offences and some fifteen thereafter. Her record began in 2007 with convictions for assaulting and resisting the police and criminal damage and a similar pattern of offending has continued relentlessly thereafter. Many efforts have been made at diversionary disposals such as community orders, probation, conditional discharges and youth conferencing, none of which seem to have produced improvement in her behaviour. Suspended sentences were then tried as were a short sentence in the Young Offenders' Centre, fines and ultimately short sentences of imprisonment. Again from those disposals no change in the pattern of offending has been demonstrated.

[5] The appellant has plainly had a very disadvantaged childhood and adolescence. The pre-sentence report indicates that the applicant is a vulnerable person who has been through the care system as a child and teenager due to neglect and abuse. She has been in secure accommodation on a number of occasions due to her behavioural difficulties and her substance abuse. In the past she has been diagnosed with complex Attention Deficit Hyperactivity Disorder and depression. The pre-sentence report assesses her as a person who is at high risk of re-offending albeit there are some protective factors now present in her life.

[6] A report to the sentencing court by Dr Pollock, consultant forensic and clinical psychologist, indicates that the applicant was prone to psychological crisis, impulsivity, failure to cope, impaired decision-making and judgment, anxiety states and depressive symptoms. Dr Pollock diagnosed an emotionally unstable personality disorder. He found that generally she demonstrated a low average intellectual functioning, some of which is explained by her impulsive response to the test questions and by her lack of self-confidence when she perceived her performance in answering to be poor. He noted that she appeared highly intoxicated at the time of her arrest. She told Dr Pollock that she had consumed vodka, cannabis and ten black-market Diazepam on the day of this offending and this was apparently her daily habit at that time. The clear connection between the

simultaneous ingestion of alcohol and Diazepam on the one hand and resultant violence on the other is now well established.

[7] It appears that two weeks before the present offences Social Services had removed her two children from her care and placed them with their paternal grandmother where she acknowledges they are well looked after. The appellant was distraught by this event and reported to Dr Pollock that as a result she suffered feelings of anxiety, anger and loss.

[8] Dr Pollock records that for some three months prior to his interview with the appellant in September 2016 she had been in a new relationship upon which she commented very positively and optimistically. She indicated to him that she was making efforts with the help of her new boyfriend to embrace a new way of life without drink and drugs and felt that she was now willing to ask for help.

[9] The grounds of appeal propounded by Mr Declan Quinn are eleven in number but may be subsumed under five broad headings:

(i) That a starting point of five years was excessive upon the facts of this case.

(ii) That the sentencing judge adopted an unconventional route to arrive at the sentence of four years imprisonment.

(iii) That the discount allowed for the pleas was insufficient.

(iv) That insufficient weight was given to the indicators of positive change from both Dr Pollock and the probation officer and to the alternative non-custodial sentences that might in those circumstances be appropriate.

(v) That the judge failed to adequately consider and give weight to the dicta of this court in R v Kennedy and Kennedy [2011] NICA 42 recalled with approval in R v PH [2011] NICA 64 that where a case is one which might have been dealt with in the Magistrates' Court an accused should not be more severely sentenced because the case had been dealt with in the Crown Court and the issue for this court is whether the sentence was out of all proportion to what a magistrate would have done.

The starting point

[10] This was undoubtedly an unpleasant and quite unprovoked attack upon a person unknown to the appellant who happened to be passing by while the latter was kicking at a door and who then turned to take her temper out violently on the passer-by causing not insignificant injuries. Fortunately her male companion was

able to intervene and afford some protection. In R v Ritchie [2003] NICA 45 Higgins J said at para [23]:

> "Assault occasioning actual bodily harm contrary to Section 47 of the Offences against the Person Act 1861 is an offence that can be committed in numerous ways with many different consequences. The circumstances that justify the accusation of assault are many and varied, and the harm that may be caused can be any bodily harm short of grievous bodily harm. Thus the Crown Court has to look not just at the type of assault committed, but also at the nature of the harm caused and determine where in the permitted range the appropriate sentence lies. In some cases the type of assault may be the predominating factor, in others the nature of the bodily harm, though more often it will be a combination of the two. Thus it is difficult to compare sentences in two cases of assault occasioning bodily harm. An appellate court has to perform a similar exercise and determine whether the sentence imposed falls within the range for the type of offence committed bearing in mind the other and perhaps more serious types of assault and harm that may be caused, yet fall within the same offence."

[11] It is therefore especially difficult to make worthwhile comparisons between the facts of previous offences and the circumstances of the offenders despite the tendency of industrious counsel to doggedly pursue that objective. However, bearing in mind that the maximum sentence for the very worst case of AOHB is seven years this court is satisfied that a starting point for the present offence and the present offender of five years was manifestly excessive. The case of Balmer and Wilson which appears to have influenced the judge in arriving at her starting point was on its facts a case of much greater gravity involving the concerted assault upon and humiliation of the victim by a gang over a protracted period and the filming by them of the results of their behaviour. In that case, which was contested, the principal offender had his sentence reduced by this court to one of four years, being two years in custody and two years on licence. The present case is not remotely comparable to that and to the extent that the present sentencing judge may have treated it as a guide to her starting point of five years on a contest it must necessarily have led her into error.

The route to the starting point

[11] The conventional approach to sentence is to consider the appropriate sentence for the offence, identifying and making allowance for any aggravating and

mitigating factors, so as to produce a starting point from which any discount due for a plea of guilty will be subtracted to produce the "net" sentence. In the present case the sentencing judge began with a starting point of five years after contest and reduced that figure by 25% for the appellant's pleas which would have produced a sentence of three years and nine months. However she then proceeded to add back aggravating factors which she identified as including features of the offence, the appellant's intoxication, her criminal record particularly for assaults and the high likelihood of re-offending. She also made what she described as "some allowance" in mitigation for the appellant's troubled history, her recognition of the harm caused to her victim and the effort she was making to try to tackle her addiction with the help of her new boyfriend. The judge then said that "taking account of all the factors in relation to this case" the appropriate sentence was one of four years.

[12] This was an unconventional approach which is likely to have led to some "double counting" and which seems to have resulted in an addition of about four further months to the initial starting point of five years because the judge expressly confirmed to defence counsel when he queried the extent of the discount that she was allowing 25% for the plea of guilty.

The insufficiency of the allowance for the plea

[13] This court is not persuaded that this is a point of any substance. Arguably it was a generous allowance given the late stage at which the plea to the principal offence was entered. Against that the appellant did plead guilty at arraignment to the counts of assaulting and resisting police and there appears to have been some issue about a fourth count of criminal damage which was not proceeded with when she pleaded guilty to the principal offence on re-arraignment.

That insufficient weight was given to mitigating factors

[14] It is difficult to assess the extent to which credit was given for mitigating factors. As we have noted the judge said that she was making "some allowance" for them but the structure of her sentencing remarks makes it impossible to gauge its degree. Certainly it cannot have been extensive.

Failure to observe the principle in R v Kennedy and Kennedy

[15] This was a case which might have been dealt with by the Magistrates' Court had not the prosecution elected, as we were informed, to send the appellant to the Crown Court because of her extensive record. Mr Purvis for the prosecution has pointed out in his very measured skeleton argument for this appeal that R v PH, which reaffirms the principle that sentencing in a case on indictment which might have been dealt with in the Magistrates' Court should not be out of proportion to sentences that would have been imposed on summary conviction, was drawn to the attention of the sentencing judge. However the circumstances of the present case are different from those in Kennedy and Kennedy where the defendants were dealt with

in the Crown Court only because of another charge which was ultimately not proceeded with. Even in those circumstances Morgan LCJ observed at [6] that the sentence could exceed the maximum which the Magistrates' Court can impose but that it is relevant to examine the sentence to see whether it is "out of all proportion" to what the magistrate would have done. In the subsequent case of PH the appellant had elected for trial by the Crown Court and there Morgan LCJ at [14] repeated the principle earlier expressed in Kennedy and Kennedy that an accused person should not be "especially sentenced" because of exercising their right to go to the Crown Court.

[16] We are satisfied that the nature of this unprovoked assault coupled with the appellant's extensive and apparently intractable offending history for matters of a similar kind made it entirely proper for this case to be sent to the Crown Court. The maximum custodial sentence available to the Magistrates' Court for this offence would have been twelve months' imprisonment which we are satisfied would have been inadequate in all the particular circumstances.

Conclusion

[17] This was a nasty, unprovoked attack upon a stranger who might well have been more gravely injured had not her male companion been there to intervene. The appellant has an extensive criminal record which commenced when she was 15 years old and has grown steadily in the intervening years notwithstanding the numerous efforts at diversion employed by the courts and others described above. Despite all that, this court is satisfied that the sentence imposed significantly exceeded that which was appropriate to the offence and the offender. It considers that an appropriate starting point would have been in the range of eighteen months to two years with a reduction of 20% to 25% for the pleas of guilty leading to a sentence of about eighteen months to be served as nine months custody followed by nine months on licence.

[18] That is the sentence which this court would have substituted but for a number of significant factors. Firstly, the appellant is in a new relationship and appears as a result to be well-motivated at present to effect change in the pattern of heavy drinking and drug taking which has led her into serially committing offences of violence. Secondly, the Probation Service has suggested that she might benefit at this point from programmes of alcohol and drug treatment and anger management. Thirdly, she has served some 7½ months on remand in custody for the present offences. Lastly, the court has confirmation from the prison authorities that the appellant is pregnant, is apparently 11½ weeks into her pregnancy and it has noted that she has in the past suffered two miscarriages.

[19] Accordingly this court decided to quash the custodial sentences and, exceptionally, to substitute therefor a probation order for a term of two years which the appellant has agreed to accept. That order will be subject to the following additional conditions:

"(i) The defendant shall present herself in accordance with the instructions given by the probation officer to participate actively in an alcohol/drug counselling and/or treatment programme during the probation period and comply with the instructions given by or under the authority of the person in charge.

(ii) The defendant shall present herself in accordance with the instructions given by the probation officer to participate actively in the RESOLVE programme during the probation period and comply with the instructions given by or under the authority of the person in charge."