

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 12/9/2011

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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R

-v-

LEON OWENS
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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ

[1] This is an application for leave to appeal an extended custodial sentence imposed under the Criminal Justice (NI) Order 2008 (the 2008 Order) comprising a 2½ years custodial period and a 3 years licence period for the offence of assault occasioning actual bodily harm. At the end of the hearing we concluded that the test for dangerousness under Article 15 of the 2008 Order was not met and accordingly allowed the appeal and removed the extended sentence. This judgment contains our reasons which we had reserved.

Background

[2] On 12th February 2009 the applicant was arraigned and pleaded not guilty to three offences including assault occasioning actual bodily harm against C, threats to kill and intimidation of a witness in relation to an incident on 21 September 2008. On 9th March 2009 the applicant was re-arraigned and pleaded guilty to the assault occasioning actual bodily harm charge. The remaining offences were left on the books not to be proceeded with without leave. On 23rd April 2009 he was sentenced to an extended custodial sentence under the 2008 Order.

[3] The victim stated that the applicant had entered her home uninvited on the evening of the attack. She had challenged him about phone calls she alleged he had made and he then punched her on the face. She said that he had knocked her unconscious. She reported that the applicant had dragged her to the floor by the hair and kicked her around the face. The applicant had

lifted a poker but the victim's six year old son had placed himself between the applicant and the victim preventing the applicant from striking the victim. The victim stated that when she regained consciousness the applicant resumed punching her and stamped on her arms and body. She tried to throw a stereo out of the window to alert her neighbours and the applicant then left.

[4] The Forensic Medical Officer attended with the victim on 22nd September 2008. She outlined the history provided to her. The FMO observed bruising to the left hand side of the forehead and central region of the forehead, the nose was swollen, bruised and tender, the left eye was bruised and haemorrhaged, the lips were bruised and the left cheek and left side of the chin were bruised. There was swelling with black bruising to the left of the jawbone and an area of bruising at the front of the neck. There was a bruise inside the upper left arm, an abrasion and area of bruising on the inner left forearm. The trunk was tender on the left hand side.

[5] At the time of the offence, the applicant was subject to a Non Molestation Order in favour of the victim. The twelve month Order was due to expire on 9 May 2009. It is not in dispute, however, that the applicant, the victim and her six year old son had spent the day in a public house together watching a sporting event.

[6] In his police interview the applicant denied C's version of events. He stated he had been drinking in a bar with C and her son and that when he left the bar he was struck on the head by C. There was some forensic medical evidence to support this. He reported he had gone to another bar and on returning to C's house by taxi he entered the house and sat beside her. He then stated that she kicked him in the side, knocking him off the sofa and that when he went to get up he received blows to the head and that she spat on him. The applicant said that he then turned round and struck her with his hand closed on the face. He alleged that the victim sustained additional injuries when she fell as a result of the blow. The applicant denied making threats to kill by phone the next morning.

[7] In his sentencing remarks the trial judge indicated that he preferred the account of the complainant as it was more consistent with the injuries sustained by her. We can certainly appreciate the basis for the conclusion reached by the trial judge but if the applicant was persisting in his account this would have been a case for a Newton hearing since the prosecution relied on the persistence of the attack and the possession of the poker as aggravating factors. Prosecution counsel stated that that the prosecution sequence of events was accepted at the plea but the submissions of trial counsel for the applicant suggest that there may have been some confusion about this.

[8] The applicant had a substantial criminal record. He was convicted on seven occasions of breaches of non-molestation orders between February 2003

and January 2004 in connection with a previous relationship. He had two convictions for damage to property belonging to the same victim in January 2003. He was convicted of common assault of the same victim on 20 July 2003 as a result of which the victim sustained a bruise to the eye. He was convicted of assault occasioning actual bodily harm on the new partner of that victim and common assault of that victim on 2 November 2003. He was convicted of assault occasioning actual bodily harm on the present victim on 24 August 2007 when he struck her shoulder. He served sentences of imprisonment in relation to all of those matters.

[9] He was convicted of one count of unlawful carnal knowledge of a girl under 14 and two counts of indecent assault on a female arising from an incident on 17 August 2003 as a result of which he was sentenced to a period of 30 months imprisonment. He was assessed on 23 January 2007 as someone whose behaviour gave no current cause for concern with regard to his capacity to seriously harm other people or carry out a contact sexual offence.

Pre Sentence Report

[10] The probation officer noted that the applicant resided with C, the victim, for 2 years prior to the breakdown of the relationship when he then moved in with his family. However, the relationship continued on an ad hoc basis until the date of the offence. The PSNI have a record of calls to the Domestic Violence Unit in respect of the applicant and C from July 2007 to 1 July 2008. The probation officer also noted that the applicant has been subject to two probation orders and that his continual re-offending suggests that he has made limited progress.

[11] Following his convictions for indecent assault and unlawful carnal knowledge in 2004 the applicant's sentence was made subject to an Article 26 licence and he is also subject to the Sex Offenders Register. The applicant breached the licence in leaving the jurisdiction to work in Dublin without verification of address or employment. He was fined £200 for breach of the licence which expired on 21st March 2007. The probation officer considers that there appears to be a pattern of offending which involves the misuse of alcohol as a dis-inhibitor in the applicant's use of violence. He outlined the applicant's account of the index offence which is consistent with what he said to the police during his PACE interview. The applicant is aware that this account is contrary to that of the victim who reported a sustained and unprovoked attack. The applicant stated he recognised the need to address his alcohol misuse within relationships and he has now been assessed as suitable for the Men Overcoming Domestic Violence Programme.

[12] At a multi-agency risk management meeting on 20 April 2009 the applicant was classified as an offender who presented a high likelihood of further offending and whose offending posed a risk of serious harm. The

probation officer stated the assessed risk would decrease if the applicant attended and participated in all psychological assessments as instructed by PBNI, participated in alcohol assessment and treatment, completed the Men Overcoming Domestic Violence Programme and informed PBNI of all relationships as required to manage the risk of further offending. He considered that this work could commence in custody and continue upon his release as conditions of community supervision.

Discussion

[13] Chapter 3 of the 2008 Order provides a new sentencing regime for dangerous offenders. Schedule 2 lists specified violent and sexual offences. Assault occasioning actual bodily harm is a specified violent offence. Schedule 1 lists serious offences. This offence is not a serious offence for the purposes of the 2008 Order. Article 13 provides the circumstances in which an offender can be sentenced to an indeterminate custodial sentence if convicted of a serious offence.

[14] Article 14 of the 2008 Order provides that where an offender has been convicted of a specified offence and the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences the court shall impose on him an extended custodial sentence. The extended custodial sentence is a sentence of imprisonment, the term of which is equal to the aggregate of the custodial term and a further period for which the offender is to be subject to a licence of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences. Article 15 provides that the court can take into account all of the information before it in assessing dangerousness.

[15] Similar legislation was passed in England and Wales in the Criminal Justice Act 2003. The leading case on the interpretation of those provisions is R v Lang and others [2005] EWCA Crim 2864. We consider that much of what was said in that case is of assistance in interpreting the 2008 Order. In both provisions the risk of serious harm occasioned by the commission of further specified offences must be significant. This was a higher threshold than a mere possibility of occurrence and could be taken to mean noteworthy, of considerable amount or importance.

[16] The guidance in Lang also provides that if the foreseen specified offence is not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected

than past victims but this, of itself, did not give rise to significant risk of serious harm.

[17] Article 3 of the 2008 Order defines serious harm as meaning death or serious personal injury, whether physical or psychological. In R v Terrell [2007] EWCA 3079 Crim Ouseley J stated:

“The seriousness of the harm required by the Criminal Justice Act is emphasised by the words “death or serious personal injury.” The latter phrase is deliberately coloured by the associated word “death”, and stands in contrast with the language of the Sexual Offences Act. And it is on the serious harm occasioned by that offender’s re-offending which the Criminal Justice Act requires attention to be focused.”

[18] In R v Johnson and others [2006] EWCA Crim 2486 the Court of Appeal looked at Rose LJ’s suggestion in Lang that the prosecution should be in a position to describe the facts of previous specified offences. This is plainly desirable but not always practicable. There is no reason why the prosecution’s failure to comply with this good practice, even when it can and should, should either make an adjournment obligatory, or indeed preclude the imposition of the sentence, when appropriate. In any such case, counsel for the defendant should be in a position to explain the circumstances, on the basis of his instructions. If the Crown is not in a position to challenge those instructions, then the court may proceed on the information it has. Equally, there are some situations in which the sentence imposed by the court dealing with earlier specified offences may enable the sentencer to draw inferences about its seriousness or otherwise. In short, failure to comply with best practice on this point should be discouraged, but it does not normally preclude the imposition of the sentence.

[19] We have set out in some detail the injuries sustained by the victim at paragraph 4 above. These were accurately described by the trial judge as multiple superficial injuries. In their assessment of the risk of serious harm the multi-agency risk management meeting on 20 April 2009 proceeded on the basis that the offender was likely to re-offend and that the injuries inflicted in committing the offence constituted serious harm. We entirely accept the conclusion in relation to the risk of re-offending but our review of the caselaw above indicates that multiple superficial injuries are highly unlikely to constitute serious personal injury within the meaning of this legislation. The trial judge relied heavily on the conclusion in the pre-sentence report that the offender gave rise to a significant risk of serious harm but in our view that conclusion was flawed because of its assessment of serious personal injury.

[20] We have carefully examined the offender's previous convictions and have had the benefit of an analysis of the harm inflicted by him. None of the previous convictions for violent offences disclose the infliction of serious personal injury and there is no change to the assessment of risk in relation to sexual offences from the assessment made in 2007.

[21] It is a necessary condition for an extended sentence that there be a significant risk of serious harm as a result of the commission of further specified offences. In our view this was not established in this case and we accordingly were obliged to allow the appeal and revoke the extended custodial sentence.

[22] The appellant appealed the custodial sentence on the basis that it was manifestly excessive. In our view there was no merit in that submission. There were significant aggravating factors which amply justified the custodial term imposed.