IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

WILLIAM DESMOND GALLAGHER

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HUTTON LCJ

This is an appeal against sentence by William Desmond Gallagher who pleaded guilty before Higgins J at Belfast Crown Court to a number of very grave offences and was sentenced on 15 December 1989.

On the fifth count of committing rape against a young woman he was sentenced to 12 years' imprisonment.

On the eighth count of aiding and abetting another accused to commit rape against the same young woman he was sentenced to 12 years' imprisonment. On the first three counts he was sentenced to 7 years' imprisonment on each count for the offence of armed robbery.

On the fourth count he was sentenced to 7 years' imprisonment for the offence of hi-jacking a motor car.

On the eleventh and twelfth counts he was sentenced to 2 years' imprisonment on each count for the offence of assault occasioning actual bodily harm, the assaults being carried out on two young men.

All of these counts related to offences carried out on the night of 22 April 1989.

The thirteenth and fourteenth counts related to burglaries carried out on earlier dates in April 1989 and on each of these 2 counts he was sentenced to 18 months' imprisonment in respect of those burglaries. All of the sentences were to run concurrently. The appeal as presented by Mr Finnegan QC is only against the sentences of 12 years' imprisonment for rape.

On the 22 April l989 the appellant and 2 accomplices subjected a young woman and 2 young men to horrible and frightening treatment, particularly the young woman. About 11 pm on the night of 22 April the young woman aged 19, and the young man with whom she lived, aged 17, were sitting in the living room of their flat in East Belfast. Another young man, aged 19, who was a friend, was sitting with them.

The accused and 2 accomplices, who were wearing balaclava helmets to conceal their faces, suddenly burst down the door of the flat and came into the room. One of them was armed with a pistol, which appears to have been a starting pistol, and another was carrying the heavy end of a snooker cue to use as a club. The intruders said that they were UVF or UDA.

The young woman and the 2 young men were forced to hand over their money, which amounted to about £20.00. They were then ordered to lie face down on the floor and the pistol was pointed at the heads and kneecaps of the 2 young men and they were told that they would be shot. Each young man was then struck on the back of the head and were knocked unconscious or virtually unconscious and when they came round each of them felt blood running down his face.

2 of the intruders took the young woman into the bedroom next door and one of them raped her. Then the second intruder raped her and while he was committing this rape one of the other intruders, by compulsion, committed an act of disgusting sexual perversion in relation to the young woman. After this the intruder who had committed the act of sexual perversion raped the young woman and another of the intruders who had previously raped her, by compulsion, committed a further act of disgusting sexual perversion in relation to her.

Subsequent to this 2 of the intruders left the bedroom and the third intruder raped the young woman. At this stage the trousers and pants of the young woman were pulled down round her knees.

About this time 2 of the intruders forced the young woman's boyfriend to drive them away from the flat in his car with her video recorder. The young woman went back into the sitting room and saw the second young man lying on a bed in that room with his head down and she could see two pools of blood on the bedclothes.

The third intruder then ordered the young woman to go down the stairs to the front door and then to go up the stairs again.

When she came up to the landing outside the sitting room the intruder shouted into the young man in the living room that if he moved she (the young woman) was dead. The intruder then ordered the young woman to strip off her clothing, which she did until she was naked and the intruder then ordered her to lie down on the floor and he raped her in that position.

At this stage the young woman's boyfriend had managed to return to the house and began banging on the front door whereupon the third intruder made off through the back door but before doing so he warned the young woman that if the police found out what had happened she and her 2 friends would get their kneecaps blown off because they were from the UDA.

At one point in her police statement the young woman states:

"During this whole nightmare I couldn't see what any of them looked like."

After what the young woman rightly described as this "whole nightmare" it is not in the least surprising to read in the medical reports upon her that she suffered from severe symptoms of stress which included nightmares, inability to sleep, lack of confidence and other feelings of stress. On 2 occasions she inflicted harm on herself, once by taking an overdose of tablets and on another occasion by cutting her wrists with scissors when she was drunk. These can be regarded as suicide attempts, although the psychiatrists take the view that they were not serious attempts. Fortunately the young woman seems to be making some degree of recovery from these symptoms of stress although in a report in November 1989 a psychiatrist states:-

"She is likely however to remain quite vulnerable to stress for some time, for possibly up to two years. It will take her much longer, if ever, to feel at ease with strange men who appear threatening or suspicious to her."

Another consequence of the rapes was that the young woman developed a sexual infection which she then passed on to her boyfriend. But fortunately it appears that these infections were soon cleared up by treatment.

In passing sentence the trial judge said:

"These offences are of the utmost gravity, particularly because the defendant subjected a young woman to a horrible and degrading experience."

Those are words with which this Court is in complete agreement.

The appellant was born on 1 August 1970 and was aged 19 when the offences were committed. He has a very bad criminal record which commenced in August 1982 when he was convicted in a Juvenile Court of causing criminal damage. Thereafter he appeared in court on 9 occasions and has many convictions for offences which include burglary and theft, assaulting the police and disorderly behaviour, and unlawful carnal knowledge of a girl under 17 and of a girl under 14. He has been sentenced to detention in the Young Offenders Centre on a number of occasions and

had been released from the Young Offenders Centre only a few weeks before the commission of these offences.

There is no doubt that he had a very unhappy and unsettled home background and childhood which is fully set out in the probation report and in the report of the psychiatrist who examined him at the request of his solicitor and the Court has carefully considered those reports.

As we have stated these were offences of the utmost gravity. In its judgment in R v McDonald, Taggart and Farquhar this Court stated that the starting point in imposing a sentence for rape where the case was contested was seven years. This Court further stated that subject to this the courts in this jurisdiction should have regard to the guidance given by the judgment of Lord Lane in R v Billam [1986] 8 CAR (S) 48. In that case Lord Lane referred to factors which would cause a case to be regarded as having aggravating features. Many of those aggravating features are present in the present case.

In Billam's case at 50 Lord Lane stated:

"For rape committed by an adult without any aggravating or mitigating features, a figure of 5 years should be taken as the starting point in a contested case. Where a rape is committed by 2 or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living or by a person who is in a position of responsibility towards the victim, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be 8 years."

It is significant that in his medical report on the young woman the psychiatrist refers to her being raped "in the security of her own flat".

In McDonald's case this Court stated that the starting point for rape without any aggravating or mitigating features should be 7 years and not 5 years. Therefore, as Higgins J observed, the starting point for a case with the aggravating features specified by Lord Lane in the passage I have just read should be 10 years in this jurisdiction and not 8 years as in England.

In addition Lord Lane stated at 51:-

"The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special

seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested."

The summary of the facts which I have already given makes it clear that this was an appalling case of rape which demands a very severe sentence. On analysing the facts it is apparent that the following aggravating features were present:

1. The rapes were committed by a number of men.

2. The men had broken into the place where the victim lived.

3. Violence was used over and above the force necessary to commit the rapes.

4. Weapons were used to frighten the victim and to wound her friends.

5. The rape was repeated.

6. The victim was subjected to further sexual perversions.

7. After the rape the victim suffered specially serious symptoms of stress and also sustained an infection.

In his submissions on behalf of the appellant, Mr Finnegan advanced a number of points and he said all that could be said on behalf of this appellant.

The first point which Mr Finnegan made was that in this case, as in other cases, the plea of Guilty was a very important mitigating factor. This Court accepts that submission but this case was a very serious one and we are satisfied that if this case had been contested and the appellant had been convicted that the learned trial judge would have imposed a sentence very considerably in excess of 12 years and we consider that he would be entitled to do so.

The second point which Mr Finnegan made which was related to his first point was that when the learned trial judge stated in his judgment that the starting point in a contested case in this jurisdiction where a rape had been committed by two or more men acting together, or by a man who had broken into the place where the victim lived, should be 10 years, that at that point the learned trial judge should then have

given the discount for the plea of Guilty which would have considerably reduced the sentence below 10 years and having done that, the learned trial judge should then have considered the additional mitigating factors and should have considered to what extent he should increase the sentence by reason of them.

This Court does not accept that submission for two reasons. First, we consider it to be clear that in deciding on sentence the Court should look at the entire case in the round and should assess all the factors before it considers what should be the reduction in respect of a plea of Guilty.

Secondly and this point is linked to the observations which the Court has just made, it is clear that in referring to a starting point of 10 years, the learned trial judge was having regard to what Lord Lane had said about aggravating features in Billam at p50, but then at p51 Lord Lane went on to list a number of other aggravating features and there is no reason, either in logic or in practice, why the judge should give the discount in respect of the plea of Guilty midway between the various aggravating features.

The third point made by Mr Finnegan was that, although very sensible and properly, he did not lay stress on this point as a strong point in isolation but rather referred to it as one of the factors on which he relied, he submitted that there was, in effect, a degree of disparity between the sentence of 12 years passed upon this appellant who is a young man aged l9 and the sentences of 10 years passed on the other two accused. We consider that there is no ground for considering the sentence of 12 years as being excessive or wrong in principle, because the learned trial judge did not have regard to the age of the appellant. It is clear from the express terms of his judgment that he did take into account his age, but we consider that there was no disparity, because the other two accused were considerably younger, one was aged l7½ and the other was aged l6½, and, moreover, the criminal record of this appellant was a more serious record than of the other 2 accused, so, therefore, we do not accept that there was any grounds for criticising the sentence by reason of disparity or a failure to take account of the relative youth of this appellant and, unfortunately, as the Court has observed, despite being aged l9, he has a lengthy and a bad criminal record.

The fourth point made by Mr Finnegan was that, by reason of the dates in this case, the appellant will suffer because of the change that has been in the periods of remission granted to those serving prison sentences, but we consider it to be clear that that is not a factor which we can or should take into account.

The fifth point made by Mr Finnegan related to that portion of the trial judge's judgment at p4 where he referred to features which he stated were neutral and in his judgment the learned trial judge said:-

"On the defendants' behalf their Counsel, Mr Finnegan and Mr Cinnamon, made the point that the rapes were not premeditated and but for the fact that the defendants at the time were all under the influence of alcohol and solvents they would not have committed the offence of rape. I think that each of these points is probably correct, but they do not amount to mitigating factors; they are neutral features. The only mitigating feature is that the defendants have pleaded Guilty to the offence and that in the course of the interviews with the police eventually admitted their guilt."

Mr Finnegan submits that in this passage of his judgment the learned trial judge erred or, if he did not err, he did not give fair weight to the points which Counsel had made. We do not accept that submission. We consider that the learned trial judge was right to take the view that the consideration that these rapes were not premeditated did not amount to mitigation but, as he said, were neutral factors and, as appears from Lord Lane's judgment in Billam, if the rapes had been premeditated, that would have been an additional aggravated feature, but the fact that that additional aggravated feature was absent, does not in itself constitute mitigation. If these rapes had been premeditated, that would have been an additional aggravated feature, but this Court wishes to make it quite clear that, if men break into the flat or the house of a woman to rob it, or to commit some other criminal offence therein and then on seeing the woman decide to rape her, that in itself is a most serious criminal offence and that is an offence which this Court and the Crown Courts must seek to deter by stringent deterrent sentences.

The next point made by Mr Finnegan was that he relied upon the judgment of this Court in the case of R v McDonald. That was a case where the appellant had known the victim and they had been out together in a nightclub and the victim then agreed that she would walk the appellant home to his flat; then, having walked the appellant home to his flat, she agreed to go in for a short time, but once she was in the flat, the appellant locked the door and then punched her on the face a number of times and trailed her across the floor by her hair and then raped her. In upholding the sentence of 10 years imposed upon that appellant, this Court said that the sentence of 10 years was a severe one, but, nonetheless, it was not so severe that this Court should reduce it and the Court further referred to the fact that, in that case, the victim had sustained severe bruising to her face. Mr Finnegan has advanced the submission that, because in that case the victim was severely punched and because the Court said that the sentence of 10 years was a severe sentence, that is an indication that in this case a sentence of 10 years would have been a severe sentence and would have been appropriate and that, therefore, the sentence of 12 years was excessive. We consider that, whilst the case of McDonald was a bad case, this case, by reason of all the circumstances that have already been referred to, was an even worse case and we consider that the appellant cannot rely upon any argument based upon McDonald's decision to lead to the conclusion that the sentence in this case was excessive.

Taking account of all the aggravating circumstances to which we have referred, and also taking into consideration in ease of the appellant, his very unhappy and unsettled childhood and the consideration, which is in his favour, that he pleaded Guilty, we consider that the sentences of 12 years imposed for rape were in no way excessive and were clearly not wrong in principle. Rather we are of the opinion that these sentences were fully deserved. If the appellant had pleaded not guilty and had been convicted the trial judge would have been entitled to impose sentences for the rape much in excess of 12 years.

In passing sentence the trial judge said:

"The offence of rape has been occurring more and more frequently and the courts in sentencing must attempt not only to punish those who are detected but also to deter those who might commit the offence. That can be achieved only by the imposition of heavy sentences even in the case of youths."

That is a statement which this court expressly and emphatically endorses.

The sentence of 12 years upheld by the Court is a clear warning that if a youth or man breaks into the home of a woman and rapes her, whether he be drunk or sober or under the influence of drugs or glue or not and whatever be his age, he will be punished with the utmost severity, and if violence is used against the woman or if a gang of men are involved or if the woman is submitted to further perversions, the punishment will be all the more severe.

The appeal is dismissed.