

Judicial Communications Office

5 May 2020

COURT DISMISSES APPEAL AGAINST SENTENCE IN DOMESTIC VIOLENCE STRANGULATION CASE

Summary of Judgment

The Court of Appeal¹ today dismissed an appeal against sentence and emphasised the feature of strangulation as a separate and distinct aggravating feature in sentencing for domestic violence.

Factual Background

Campbell Allen (“the appellant”) was sentenced on 5 March 2020 to one year’s imprisonment following a plea of guilty to two counts of (a) common assault and (b) assault and false imprisonment. The offences were committed on 11 and 12 July 2019. At that time the appellant was living in his partner’s home which she shared with her two young children. On 11 July the appellant and his partner argued. He grabbed her by the throat squeezing hard and pushed her back into the kitchen where she hit her head off the corner of the wall and fell backwards. These facts constituted the first offence of common assault. Early the next morning the appellant and his partner began to argue again. At around 4:00 am, the appellant’s partner tried to leave the bedroom but he held onto the door handle and would not let her go. He punched her in the face, pushed her onto the bed and began to strangle her with both hands to the point where she felt she could hardly breathe. The appellant again prevented her from leaving the bedroom. The false imprisonment lasted around one hour. The incident ended with the appellant leaving the house at which point his partner phoned the police. These facts constituted the second assault and the false imprisonment. The police attended and took photographs of the appellant’s partner’s neck and her arm. The Court said the strangulation mark on her neck caused considerable concern.

The appellant was arrested at approximately 12 noon on 12 July 2019. He claimed during interview that he had not been drinking and had not taken any drugs. He made admissions to having assaulted his partner and to falsely imprisoning her. He said he punched her in the face in order to scare her and that he had hands on her neck but that “you can check her throat there was not even a mark from that”. He said the relationship between him and his partner was now over, apologised for his actions and that he was not proud of what he had done.

The appellant and his partner resumed their relationship in August 2019 but separated in early October 2019. He admitted to one assault during this period when he punched his partner on the area near her bottom. There was another incident a few days after they separated in early October when he entered her home and found her in bed with a new boyfriend. The appellant denies an allegation that he kicked her television and broke a fish tank. He did accept that he was engaged in a scuffle with the new boyfriend. The appellant is to be prosecuted summarily for these offences.

Counsel for the appellant provided the Court with a copy of a non-molestation order which the appellant’s ex-partner obtained on 11 March 2020. This was to demonstrate that if a probation order

¹ The panel was the Lord Chief Justice and Lord Justice Stephens. Lord Justice Stephens delivered the judgment of the court.

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was made the appellant's ex-partner had the protection of the order. The Court noted, however, that the appellant's ex-partner had made numerous additional allegations of physical, emotional and financial abuse in her statement supporting her application for the non-molestation order.

On 8 January 2020, the appellant pleaded not guilty at arraignment to all counts. On 30 January, he was re-arraigned and pleaded guilty to counts of common assault committed on 11 July and assault and false imprisonment on 12 July with count three (common assault committed on 12 July) being left on the books. The Crown Court had access to a pre-sentence report and a report prepared by a Consultant Psychiatrist. The Psychiatrist was not aware of the allegations contained in his ex-partner's application for a non-molestation order nor did the appellant inform him that his ex-partner considered that if she did not seek the protection of the court the appellant may try to harm her further.

The appellant's partner did not make a victim impact statement saying she had not been approached by Victim Support or Women's Aid to do so. The Court of Appeal noted that the absence of victim statement should not be taken to indicate the absence of harm as it was obvious that to be imprisoned, shouted at, struck in the face and strangled to the extent that she found it hard to breathe would have an immediate serious adverse effect on the victim in this case. Furthermore such an incident would undoubtedly have ongoing effects on both the victim and her children.

The Pre-Sentence Report

The PBNI report assessed the appellant as a medium likelihood of reoffending but not currently reaching the threshold to be assessed as a significant risk of serious harm to others. He was assessed as suitable for supervision in the community under a probation order requiring him to undertake specified programmes. The PBNI suggested a period of 18 months' supervision was necessary to complete the programme. An essential basis of the assessment was that the appellant had endured an abusive father, was fearful that he had absorbed and normalised his father's attitudes, had insight into and genuine remorse for the offences he had committed and that these were all indicators that he would be assisted by targeted intervention in the community.

Sentencing in the Crown Court

The trial judge considered there was a choice between custody and probation. He posed the question "should someone who has assaulted a woman in these circumstances be placed on probation by the Crown Court?" and answered this in the negative as he considered the offences to be so serious to merit an immediate custodial sentence. The trial judge determined the length of sentence by taking into account two aggravating features: this was a domestic incident in his ex-partner's home where she should have been protected within the home and the relationship; and she was vulnerable being the mother of two children. The trial judge selected a starting point on a contest of 18 months in custody but reduced this by one third given the admissions made by the appellant during his police interview and consideration of the appellant's turbulent upbringing. The trial judge imposed a determinate custodial sentence of 12 months' custody.

Grounds of Appeal

There were two grounds of appeal although Counsel for the appellant concentrated on the second. The first was based on the proposition that the starting point of 18 months was manifestly excessive

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and wrong in principle. Counsel relied on case law from 1997² relating to a tiger kidnapping which stated that there was a category of offences which could scarcely be classed as kidnapping which “very often arise as a sequel to family tiffs or lovers’ disputes, and they seldom require anything more than 18 months’ imprisonment, sometimes a great deal less”. The second ground of appeal was based on the proposition that both the Consultant Psychiatrist and PBNI supported a probation order to enable the rehabilitation of the appellant. Counsel submitted that the trial judge should have imposed a probation order as it would have been more appropriate in the public interest than a short custodial sentence.

Court of Appeal’s observations on domestic violence and strangulation

The Court said that the terminology and concepts of “family tiffs or lover’s disputes” relied on by Counsel for the appellant were simply not appropriate in the context of domestic violence:

“Those concepts diminish culpability by suggesting that it is “only a domestic incident” or by excusing the offender on the basis that he or she is “not normally violent.” We utterly reject such an approach to culpability. These are serious crimes physically and mentally damaging wives, husbands, partners and children. We repeat again the consistent approach of this court that the domestic context is a significant aggravating feature. We emphasise that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the offender to have a public and a private face so that an offender’s good character in relation to conduct outside the offences should generally be of no relevance where there is a proven pattern of behaviour in the domestic context.”

The Court said that relatively modest pressure during strangulation over a short period of time can cause problems which can be fatal or non-fatal. On occasions when fatal the offender may not have had an intention to kill:

“Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The intention of the offender may be to create a shared understanding that death, should the offender so choose, is only seconds away. The act of strangulation symbolizes an abuser’s power and control over the victim, most of whom are female. It is a feature of non-fatal strangulation that it leaves few marks immediately afterwards and this paucity and in some cases lack of observable physical injuries to the victim leads to its seriousness not being correctly assessed. Furthermore in general there is no inevitable commensurate relationship between signs of injury and the degree of force used.”

The Court noted that non-fatal strangulation can lead to physical and psychological problems such as damage to the muscles and blood vessels in the neck and to the vocal cords. It may also be a predictor of the future use of lethal force³. The Court further noted that the seriousness of

² R v McKeown and Others (unreported, 18 December 1997)

³ Studies in both Australia and New Zealand found that strangulation is a significant factor in risk assessment for homicide of women in the domestic context.

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strangulation has led to the introduction of legislation in other jurisdictions criminalising the act of strangulation as a stand-alone offence and increased sentencing where it is a feature⁴.

Both Counsel for the prosecution and the appellant in this case recognised that strangulation should be an aggravating feature to be taken into account by courts when imposing sentence. The Court agreed and said it considered it to be a substantial aggravating factor. The Court also considered that the use of body force to strangle is no less heinous than the use of a weapon and emphasised the need to give consideration to that feature when forming a view as to future risks.

Aggravating and mitigating features

The Court considered the following aggravating features to be present:

- *Domestic abuse*: “To be assaulted, imprisoned and intimidated by someone close with whom the victim should be most secure represents an appalling violation of the trust and security that should normally exist between people in an intimate or family relationship.”
- *The offences occurred in her home*: “These assaults, the imprisonment and the intimidation occurred in her own home, where she should feel most safe. We consider this also to be a significant aggravating feature.”
- *Strangulation*: Both assaults involved strangulation and in relation to both counts one and two this was a substantial aggravating feature.
- *Adverse impact on two children*: The Court considered it highly likely that the children heard the incident on 12 July given that there was considerable shouting over a prolonged period of time together with the sounds of violence in close proximity to them. It said that in any event an adverse impact on the children’s mother adversely impacts on the care that she can provide to her children as their primary carer. The Court also emphasised that abusive conduct can lead to children accepting it as a norm in adulthood.
- *The number of offences*: As concurrent sentences were being imposed and the primary offence was count two of assault and false imprisonment then the common assault in count one is an aggravating feature. Furthermore it has to be recognised that count two involved two offences.
- *Relevant criminal record*: The appellant has previous relevant convictions⁵ but the Court agreed with the trial judge’s assessment that the record is “reasonably modest.”
- *Vulnerability*: The Court considered that some caution has to be exercised in considering the factor of vulnerability so that it is limited to some *particular* vulnerability. The reason being that all victims of domestic abuse are potentially vulnerable due to the nature of the abuse, but some victims of domestic abuse may be more vulnerable than others: “It is that additional vulnerability that is an aggravating feature but we emphasise that a court in imposing sentence has an obligation to consider that not all vulnerabilities are immediately apparent. In this case we consider that there was no particular vulnerability so that this additional aggravating feature is not present.”

⁴ A new offence came into operation in New Zealand on 3 December 2018 and there are 44 states in the USA which have such an offence. In this jurisdiction there is no stand-alone offence but rather section 21 of the Offences against the Person Act 1861 criminalises attempting “to choke, suffocate or strangle ... with intent ... to commit ... any indictable offence.”

⁵ One offence of common assault on his mother in 2014 and a second of assaulting police in 2018 which was committed when police were transporting him to the station following a dispute at a party.

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- *Weapon:* In the first assault the appellant's partner's head hit the corner of a wall. The Court emphasised that a wall or even more so the corner of a wall can be used as a weapon: "Striking a person's head against a wall can be the exact equivalent of picking up a hard object and striking a person's head with that object. The object would be a weapon as would be the wall if the perpetrator chose to use the wall as a method of increasing the physical impact of the assault. On the facts of this case whilst it is possible this aggravating feature is present we do not consider that there is sufficient to establish it to the criminal standard."

The Court gave consideration to the following points in mitigation:

- *Plea of guilty:* The offender pleaded guilty and made substantial admissions at interview. This was the most significant mitigating feature;
- *Recognition of the need for change:* The Court said there was evidence that the appellant recognises the need for change but said that for that to be a significant mitigating feature it would have to be genuine. It accepted that in this case it was genuine but said there had to be evidence of obtaining help or treatment to effect that change. It noted there was no such evidence in this case: "Generally it is not sufficient for an offender to assert that they recognise that they should change if they fail to do anything about effecting that change."
- *Personal circumstances:* The Court took into account the appellant's personal circumstances but said these are of limited effect in the choice of sentence.

Discussion

In relation to the first ground of appeal, the Court said the sentencing range referred to in the cases cited by Counsel for the appellant envisaged sentences in excess of 18 months' imprisonment in some instances whilst also recognising that sometimes a great deal less would be appropriate. The Court said the sentencing exercise in this case involved not only false imprisonment but also two assaults with all the aggravating features detailed above: "The starting point most certainly does not fall into the category of a great deal less or indeed any less than 18 months." The Court dismissed this ground of appeal.

The substantial ground of appeal related to the issue as to whether a 12 month prison sentence was wrong in principle or manifestly excessive as opposed to two years' probation. The Court said this was an area of discretionary judgment for the trial judge as to the competing interests of punishment, deterrence and rehabilitation. It said the trial judge exercised that discretion on the basis of the seriousness of the offences. The Court accepted that probation would assist the appellant and also would be of benefit to the public but said there is no doubt that the trial judge was correct in assessing these offences as serious and that there would be a public benefit through retribution and deterrence involved in a prison sentence. It concluded that the trial judge was not only entitled to but was correct to exercise his discretion on the basis of the seriousness of the offending and to impose a 12 month sentence of imprisonment. The Court also dismissed this ground of appeal.

Conclusion

The Court dismissed the appeal.

NOTES TO EDITORS

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1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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