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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 3 of 2006)
MICHAEL JOHN GILBERT

Before Kerr LCJ, Campbell LJ and Weatherup J

KERR LCJ

[1] The offender, Michael John Gilbert, was indicted on a series of charges relating to the aggravated burglary of a house in Belfast and the sexual assault of its female occupant on 18 March 2005. At that time she and her child lived there alone. On his arraignment on 11 November 2005 the offender pleaded guilty to two counts of rape, one of assault and one of burglary and a trial date of 6 March 2006 was set for three remaining counts. A further indictment was lodged alleging a further count of false imprisonment. The offender was re-arraigned on 6 March on this count and pleaded guilty to this count as well as to the three remaining counts from the earlier indictment; rape, grievous bodily harm and indecent assault.

[2] Gilbert's date of birth is 28 July 1989 and he was therefore 15 years old when these offences were committed and almost seventeen when he was sentenced on 15 May 2006 by Girvan J. The learned judge imposed a custody probation order on the offender in relation to each of the counts of rape. This comprised five years' custody and three years' probation. On each of two charges of indecent assault a sentence of five years' detention was ordered. On a charge of assault with intent to cause grievous bodily harm the offender was sentenced to four years' detention and on a charge of assault causing actual bodily harm to detention for one year. He was ordered to be detained for the period of one year on the charge of burglary and for three years on the charge of false imprisonment. All detention periods were ordered to be concurrent so that the effective total sentence was five years detention and three years' probation.

[3] The Attorney General sought leave to refer the sentences to this court under section 36 of the Criminal Justice Act 1988, on the ground that they were unduly lenient. We gave leave on 8 September 2006 and the application proceeded on that date.

The facts

[4] In the early hours of 18 March 2005 the occupant was asleep in her home when she was awakened by the offender and his male companion, Daniel Thomas Benson. Gilbert was armed with a screwdriver and a hammer. Having threatened the victim with the screwdriver, he then raped her for the first time. He also subjected the victim to an oral sexual assault. He then raped her again. Armed with the hammer he compelled the victim to perform fellatio on him, threatening her repeatedly and telling her to smile. He struck her with the hammer on the head, using considerable force. After striking her on the head again, he then raped her for a third time. Following this, he struck her on the head once more and, assisted by his co-accused, tied her hands . The co-accused then commented that he thought the offender had killed the victim. She raised her head at this point to see whether they had left and she was struck again on the head with the hammer. This blow was delivered with great force.

[5] In his reference to the court, the Attorney General suggested that the final blow had been dealt by Benson. This was plainly wrong. Examination of the transcript of the interview of the victim unmistakably discloses that Benson did not assault her and that it was Gilbert who wielded the hammer to deliver the final blow. Mr Larkin QC, who appeared with Mr Charles MacCreanor for the offender, suggested that this court was bound to proceed on the basis of the reference. We do not accept that. Where, as here, it is irrefutably clear that the reference has incorrectly stated a relevant fact, it would be absurd if this court was bound to deal with the application on that basis. We must proceed on the basis of facts established by the evidence.

[6] Both offenders repeatedly demanded that the victim produce jewellery and money. They stole house keys, passports, bank cards, a mobile phone and her handbag which contained many personal papers and other belongings.

[7] After the attack on her, the victim managed to get out of her house in a scarcely clothed state. She summoned help and was taken to hospital, bleeding profusely. On examination she was found to have an inverted "Y" shaped laceration on the right side of her head. This required six staples. She had extensive swelling and bruising to the left of her forehead. There were abrasions, lacerations and bruising over much of her body. By a cruel irony, when she was admitted to hospital she encountered the offender who was also awaiting treatment. When he saw her, he left.

[8] From this brief description it is clear that the injured party was subjected to an ordeal whose horror is difficult to contemplate. Quite apart from the degrading and repeated sexual attacks, the physical assault was of the most serious kind. A helpless vulnerable victim, asleep in her own home, was repeatedly and mercilessly beaten with the hammer and stabbed with the screwdriver. She was chosen by the offender precisely because she was unprotected and vulnerable. Striking her violently with a hammer on the head, the offender must have realised that very serious injuries, possibly fatal injuries, could have been sustained by her. It is difficult to imagine a more serious case of this type. The ordeal was not short lived. The occupant estimated that it lasted between forty five minutes and an hour. Gilbert himself said that they had been in the house for fifty minutes. Unsurprisingly, since the attack the victim has felt unable to return to her home other than to collect her possessions.

Personal background of the offender

[9] Gilbert was born in Scotland and after his parents separated he moved with his mother back and forth between Scotland and Northern Ireland. In a psychiatric report obtained for the trial, Dr Graeme McDonald summarised his background as follows:-

> "[The offender]…had a disturbed upbringing. He came from a broken home and suffered an interrupted education, culminating in his expulsion from formal education during his third year at secondary school. He had, by that time, already started a range of offending behaviours and also a range of harmful use of alcohol and illicit drugs. In this setting he showed further evidence of breakdown of boundaries by becoming sexually active and promiscuous."

[10] The offender has a history of anti-social behaviour and car crime, but no criminal record save for a caution for petty theft from a shop. He claimed that he had been sexually abused as a child but Dr McDonald stated that he "would not rely entirely on his account … without … confirmatory evidence". In any event he concluded that there was no evidence to link any possible childhood abuse with the offences. Despite claiming in police interview to have been a virgin before committing the rapes, it emerged from the history that he gave the psychiatrist that he has had two relationships since the age of 13 involving consensual heterosexual intercourse.

[11] Gilbert was also examined by Mr McClelland, a clinical psychologist. He concluded that the offender had a reasonable level of intelligence, with a verbal IQ of 87. He would be able "at least cognitively" to differentiate between right and wrong. Dr McDonald confirmed this, stating that Gilbert was capable of forming intent and did not suffer from a mental or behavioural disorder other than a conduct disorder. He did not require psychiatric treatment.

Attitude of the offender to the offences and risk of further offending

[12] It is claimed that the offender is truly remorseful for his involvement in this shocking episode. This claim must be viewed with some scepticism. During a number of interviews with police he continued to deny that he had been involved. Only when confronted with the fact that DNA evidence would establish his guilt did he begin to make limited admissions. Even then he made the preposterous claim that he had been forced to commit the rapes by his co-accused. A pre sentence probation report recorded that he remained unable to take full responsibility for his actions and had "limited insight into victim empathy". As we have said previously, it is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions. We have no doubt that the offender feels great regret at his present incarceration but we find scant evidence apart from his profession of it to suggest that he suffers genuine remorse.

[13] The pre sentence report also dealt with the risk of further offending. It was concluded that the current risk of reoffending or of harm to the public from the offender was high. This was due not only to his inability to take full responsibility for the crimes but also to the level of violence used, the violent nature of the sexual attack, alcohol and drug misuse, his propensity for rule breaking and his tendency to associate with a negative peer group. It was felt, however, that because of his youth and because he refused to acknowledge any sexual motivation for his actions a full and accurate assessment of the risk to the public was difficult to make. It was considered that the risk which the offender might present to the public should continue to be reviewed.

Aggravating and mitigating factors

[14] In his reference the Attorney General identified the following as aggravating features:-

(a) The attack occurred at night in the victim's home. She had been roused from sleep and was in a plainly vulnerable state.

(b) A second man was present while the attack took place.

(c) Serious injury was caused and this was intentionally inflicted. The offender made repeated use of a screwdriver and claw hammer to beat, injure and intimidate the victim, despite the fact that she offered no resistance and complied with his demands. The offender had armed himself with the screwdriver in order to break into the house. He had found the hammer in the kitchen and further armed himself with this before going upstairs to a victim who, he knew, could present no threat or opposition to him.

(d) Throughout the attack the offender threatened his victim with further violence and proceeded to carry it out. He commanded the victim to smile.

(e) The victim was tied up and gagged. She was left for dead, bleeding profusely.

(f) The victim endured three rapes and two acts of forced fellatio.

(g) Her ordeal lasted at least 45 minutes after which the victim's house was vandalised and many personal items, including passports, house keys, bank cards and a mobile phone were stolen.

(h) The effect on the victim was considerable.

[15] It was suggested that the following mitigating features were present:-

(a) The offender's plea of guilty to some charges at arraignment. The effect of this mitigating factor is reduced, however, by his initial denial of the offences in interview. The victim was required to prepare herself for trial and had visited the court. The offender continued to seek to place blame for his offending on his co-defendant.

(b) Although it was not accepted that the age of the offender mitigates the offence, the Attorney suggested that his age could be relevant to his ability to immediately accept responsibility for his actions and was therefore relevant to the period to be spent in custody.

The judge's sentencing remarks

[16] The judge considered that the offender's "essentially clear record", his youth, the plea of guilty, his expressed remorse and his dysfunctional background were mitigating features in the case. He identified as

aggravating features the "degree of callous viciousness with which he treated his victim"; the invasion of the victim's home and privacy; the timing of the events in the early hours of the morning; and the persistence of the defendant's sexual and physical abuse of the injured party.

[17] Having determined that a sentence of eight years was appropriate, the judge then considered whether a custody/probation order should be made under article 24 of the Criminal Justice (Northern Ireland) Order 1996 or an order that the offender should be released on licence under article 26. Taking into account the offender's youth and considering that he might well change his attitudes and behaviour while in custody, the judge chose to make an order under article 24. He commented:-

> "Bearing in mind that it is probably too early at this stage of his life to conclude that [there is a] need to protect the public from serious harm [and] the desirability of preventing the commission of further offences and securing his rehabilitation could not be achieved by the making of an order under article 24 as opposed to article 26."

Sentencing levels in rape cases

[18] Sentencing for rape in Northern Ireland has broadly followed levels in England and Wales although traditionally a somewhat higher starting point had been adopted. Thus a starting point of seven years rather than five years was considered appropriate in *R v Molloy* [1997] NIJB 241 where this court stated: -

> "We would return to the point which the court adumbrated in *R v JM* (1997, unreported), that in view of the increasing frequency of cases of rape, the courts will have to give serious consideration to reviewing the starting or baseline figure of 7 years for a contested rape. We consider that sentencers should in any event regard it as no more than a general guide, rather than a fixed tariff for rape cases. Certainly in cases where the offence is aggravated by violence, sexual indignities or perversions, the scale should rise steeply and judges should not hesitate to visit such cases with penalties that they consider appropriate."

[19] More recently, in *Attorney General's reference (No 2 of 2004) (O'Connell)* [2004] NICA 15, it has been stated that sentencers in this jurisdiction should

apply the starting points recommended by the Sentencing Advisory Panel in England and Wales in its 2002 guidelines – these are 5 years with no aggravating or mitigating factors and 8 years where a number of enumerated features are present. New draft guidelines have been prepared for sentences for offences (including rape) provided for in the Sexual Offences Act 2003. It may be necessary to review sentencing levels after the new guidelines for England and Wales have been finalised, although, of course, these will not apply directly to Northern Ireland.

[20] In the 2002 guidelines the panel adopted a three dimensional approach. Consideration was to be given to the degree of harm to the victim; the level of culpability of the offender; and the level of risk posed by him to society. The Court of Appeal in England endorsed this approach in *R v Milberry* [2002] 2 All ER 939, regarded by most commentators as the leading authority in the field. The three dimensional approach was again approved in *Attorney General's References Nos. 37, 38, 44, 54, 51, 53, 35, 40, 43, 45, 41, and 42 of 2003*, the Court of Appeal emphasising the need to focus on all three dimensions.

[21] The aggravating features outlined in the 2002 guidelines may be summarised as follows: -

(a) The use of gratuitous violence;

(b) The use of a weapon to frighten or injure the victim;

(c) Planning the offence;

(d) Significant physical or mental consequences for the victim;

(e) Further degradation of the victim (including forced oral sex);

(f) The victim's home having been broken into;

(g) The presence of children when the offence was committed;

(h) Covert use of a drug to overcome the victim's resistance or to obliterate his or her memory of the offence;

(i) Any history of sexual assaults or violence by the offender against the victim.

[22] In this case the features referred to in paragraphs (a), (b), (e) and (f) are certainly present. It was submitted on behalf of the Attorney General that there were significant mental consequences for the injured party in that she has not been able to return to live in her home and that she feels unable to live alone. Although these difficulties differ in character from the examples given

in the guidelines (resulting pregnancy, transmission of life-threatening disease) we consider that they are of sufficient moment to rank as significant mental consequences.

[23] The effect on sentence of the presence of several aggravating features is not to be calculated simply by an arithmetical tally of the number of such features. The degree of seriousness of each of the aggravating factors must also be taken into account. In the present case, not only are several features present, a number are of substantial gravity. The violence inflicted on the injured party, even if unaccompanied by sexual assault, would in itself warrant severe punishment. The victim offered no resistance but was brutally beaten, despite her submission. Not only was she further degraded by being compelled to perform fellatio on the offender, she was ordered to smile while this humiliating attack on her took place. We consider, therefore, that a substantial increase on the starting point was warranted.

[24] It is also important that the sentences for indecent assault should not become subsumed in the concurrent sentences for rape so that the offender effectively avoids punishment for these offences. In *Attorney General's Reference (No 9 of 2003)* [2003] NICA 41] this court dealt with this issue:-

> "When sentences for indecent assaults are made concurrent with sentences for rape, there may be a tendency to fail to place them at the level which they would attract if they stood on their own, and this appears to have been the case here. Since they may be relied on as precedents in submissions placed before sentencers in other cases, we think that they should always be fully realistic sentences in their own right."

[25] The guidelines recognised three principal categories of mitigating factors: a plea of guilty, although the reduction of sentence that a timely plea will warrant is to be adjusted if the plea was not prompt; the victim's behaviour (which is not relevant in this case); and the offender's good character (although absence of a criminal record should not necessarily be equated with good character). While youth was not treated as a mitigating factor *as such*, the panel noted that "custody will normally be the appropriate disposal, although the sentence will be significantly shorter for a young offender". On this last point, one may observe that this court has not given significant discount on the basis that the offender was young – see, for instance, *Murdock* and *Molloy*. It appears to us that the youth of the offender will have a variable effect on the sentence according to the nature of the crime and the awareness of the individual defendant of the nature of the offending behaviour.

[26] This court has recently dealt with the question of the amount of discount to be given where a plea of guilty has not been promptly made. In *Attorney General's reference (No 1 of 2006)(Maternaghan and others)* [2006] NICA 4, we said:-

> "[19] To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset."

[27] The further point that must be made in relation to the level of discount appropriate to the offender's plea of guilty is that his conviction of these offences was virtually inevitable in light of the DNA evidence. In *R v Pollock* [2005] NICA 43 this court declined to follow the approach recommended by the Sentencing Guidelines Council to the effect that there should be no reason that credit be withheld or reduced where an offender is caught red-handed. We said:-

> "[18] While we can understand the reasons that a reduction of the discount for having been caught red-handed should no longer apply in England and Wales, we do not believe that the situation in Northern Ireland should be taken to be equivalent. We consider that a strong case can still be made in this jurisdiction for distinguishing between those cases where the offender is caught red-handed and those where a viable defence is available. The incentive to plead guilty in the latter category of case should in our view continue to be enhanced in this jurisdiction. It follows that the discount in cases where the offender has been caught red-handed should not generally be as great as in those cases where a workable defence is possible."

Conclusions

[28] The starting point for offences of this gravity was eight years on a contest, applying the 2002 guidelines. For the reasons that we have given, a substantial increase in that starting point is warranted, to take account not only of the significant aggravating factors that are present but also to ensure that the offences relating to physical and indecent assault are properly catered

for in the ultimate disposal. We consider that a sentence of at least 15 years would have been justified if the case had been contested.

[29] In light of his plea of guilty, the offender is entitled to a discount on the sentence that would have been appropriate for a contested case but, again for the reasons earlier given, this cannot be of the full measure. He is also entitled to have his good record and his youth taken into account in deciding what the sentence should be but we consider that these factors should not have warranted a sentence of less than twelve years. It follows that we consider that the sentence passed by the judge was unduly lenient and must be quashed.

[30] We have considered whether an article 26 disposal would be more suitable in light of the continuing risk which, we are satisfied, the offender continues to present. But, as we have said on a number of occasions, the decision to select a custody/probation order involves the exercise of a discretion with which this court should be slow to interfere and we tend to agree with the learned judge that the long term risk is not easy to estimate. We will therefore not disturb his decision that a custody/probation order should be made.

[31] Taking account of double jeopardy, we have concluded that the period of custody must be increased from five to seven years. It is clear that if probation is to form part of the sentence, it must be for the maximum period of three years as recommended in the pre-sentence report. We will therefore make a custody/probation order comprising seven years' custody and three years' probation if the offender will agree to this disposal. We state that the sentence that would otherwise have been imposed would have been ten years' imprisonment.