Neutral Citation No: [2023] NICA 23 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE12133** *ICOS*: **20/22772/A01** *Delivered:* **14/04/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

DYLAN MULHOLLAND

David McKeown BL (instructed by Joe Mulholland & Co Solicitors) for the Appellant
Nicola Auret BL (instructed by the PPS) for the Respondent

Before: Treacy LJ, Sir Paul Maguire & Keegan LCJ

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] Following the refusal of leave by the Single Judge, Rooney J, Dylan Francis Mulholland ("the applicant") renewed his application for leave to appeal against sentence in relation to the conviction set out below. At the conclusion of the hearing before us we refused leave and dismissed the appeal.

Background to the application

[2] On 14 October 2020 the applicant was convicted after trial before his Honour Judge Lynch QC of one count of assaulting Theresa Lavery thereby occasioning her actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861 ("the 1861 Act") and one count of assaulting Catherine Wilson, contrary to section 47 of the same Act. The date of the offences were 16 August 2019.

[3] On the same day he was acquitted of one count of attempted grievous bodily harm with intent of Theresa Lavery, contrary to section 18 of the 1861 Act, also on 16 August 2019.

[4] The case was adjourned, and a pre-sentence report and psychology report were obtained. Following the sentencing hearing the judge sentenced the applicant

to five years for this section47 assault – two years and six months in custody and two years and six months on licence.

Factual Background

[5] The events giving rise to these convictions happened on 16 August 2019 at the home of Ms Wilson. The two victims and the applicant, together with two others were having a drink together at that house on the evening of 15 August. The two others went upstairs to sleep, and the applicant fell asleep on the sofa. Around 2:00am he woke, an altercation developed and the victim, Ms Lavery, alleged she was assaulted by being punched and slapped on the face, strangled until she passed out and kicked all over her body. She claimed the assault lasted for several hours.

[6] Ms Wilson initially made a statement supporting this account. She said she had intervened to protect Ms Lavery but she was also assaulted and pushed out of the way by the applicant. She later withdrew this statement and made contradictory statements leading to her being declared a hostile witness. In his sentencing remarks the judge commented as follows on the evidence of Ms Wilson:

> "A witness statement had been recorded from her. She had been declared hostile, and the statement was then put to her and became part of the evidence upon which the jury were entitled to take a view …"

[7] The jury convicted the applicant of the assault on Ms Wilson which she described in her original statement. He received a sentence of three months for that assault to run concurrently with the sentence for the assault on Ms Lavery. That sentence is not an issue in the present appeal.

[8] In his sentencing remarks the judge noted that the jury convicted the applicant of the common assault on Ms Wilson:

> "… on the basis that they accepted that that part of the allegation in her statement was true."

[9] He continued:

> "It's difficult to know to what extent they place reliance upon Catherine Wilson's statement but it does corroborate in material details the evidence as given by the complainant. I'm satisfied, therefore, that the fundamental elements, as alleged by the complainant are, in fact, true and included the fact that she was subjected to a protracted assault over several hours and subjected to strangulation by the defendant in this case. These are the

> serious aspects of the allegations against the defendant himself, as proven before a jury of his peers."

[10] The judge therefore finds as a fact that the central allegations made by Ms Lavery are true and these are the "serious aspects" of the case which he addresses in his sentence.

[11] The judge sentenced the appellant to five years for this assault – two years and six months in custody and two years and six months on licence. This is the sentence the appellant seeks to appeal.

Grounds of appeal

[12] The grounds of appeal are expressed in the applicant's skeleton argument as follows:

> "The sentence imposed ... is manifestly excessive and wrong in principle for the following reasons:
>
> (i) The sentence of 5 years was manifestly excessive and/or wrong in principle in all the circumstances of the case.
>
> (ii) The learned trial judge failed to properly consider or give appropriate weight to the personal mitigating factors of the defendant."

[13] In support of ground (i) the applicant asserts:

> "… on the facts of this case, the … judge has erred in assessing the applicant as having caused the highest or greatest degree of harm within the Actual Bodily Harm Range."

[14] In support of ground (ii) the applicant asserts that:

> "… the following mitigating features are present:
>
> (i) The absence of any evidence of any permanent or long term sequelae on the part of the victim;
>
> (ii) The limited record for serious violence on behalf of the defendant generally and particularly for offences of domestic violence;
>
> (iii) The offence arose out of a spontaneous argument and was not premeditated;
>
> (iv) The low IQ of the defendant;

(v) The personal history of the defendant giving rise to mental health and drug addiction issues."

Consideration

[15] Having reviewed the judge's sentencing remarks in relation to these grounds we draw attention to the following matters.

[16] First, the judge specifically reminds himself that the maximum sentence for assault occasioning actual bodily harm in Northern Ireland is now seven years imprisonment "increased in September 2004 from the original five years."

[17] He reminds himself therefore:

> "Maximum sentences are set for a reason, and the court must take regard to that."

[18] He notes that the maximum sentence is now on a par with convictions for the more serious offences of assault occasioning grievous bodily harm or malicious wounding which are available under section 20. He comments:

> "The legislatures must have intended that there be circumstances where the gravity and assault occasioning actual bodily harm would be on par of either the two offences under section 20 in the certain circumstances."

And asks himself:

> "Do those circumstances prevail here?"

[19] In light of all the evidence he had recently heard he concludes:

> "… it's very difficult to see a worse case than this, given the extended nature of the assault itself and given, in particular, the attempted strangulation."

[20] It is clear that the judge gave significant weight to the extended nature of the assault and the strangulation element of it when working out his starting point. This approach is based on the guideline judgment of Stephens LJ in *R v Campbell Allen* [2020] NICA 25 in which the risks of strangulation and its effects on victims are discussed at length. The sentencing judge was legally entitled to give strong weight to this element as an aggravating feature in the case. He concluded:

> "This is a case that very closely approaches the maximum sentence, in my view. Maximum sentences are set for a reason, and the court must take regard to that."

[21] In view of the intention of the legislature in raising the maximum sentence for causing actual bodily harm to seven years, and in light of the guidance given in the case of *Campbell Allen*, this was a reasonable approach for him to take.

[22] In relation to the mitigating factors claimed by the applicant and set out at para [12] above, we note the comments in the *Campbell Allen* case in relation to the lack of observable physical injuries immediately following strangulation events. As Stephens LJ noted at para [48] of that case it is a feature of non-fatal strangulation that it leaves few marks and that there is no inevitable commensurate relationship between signs of injury and the degree of force used. Further, at para [52] the Court of Appeal considered that strangulation is a "substantial" aggravating factor.

[23] We also note that the judge gave the applicant credit for his lack of previous convictions for domestic violence even though the absence of such convictions is not a mitigating factor – it is the absence of what, had they been present, would have amounted to an aggravating factor. Nonetheless, this generous credit must have served to reduce the sentence from his starting point which "closely approached" the maximum sentence. The applicant [DOB: 17/04/1993] did however have a not insignificant criminal record for a variety of offences including assaults on the police and drugs offences

[24] The applicant asserts that he should receive mitigation because this assault was "not premeditated" and because of his personal circumstances, particularly the fact that he has a low IQ and a history of drug addiction. The judge did not discount the sentence substantially because of these circumstances which is a legally permissible approach in the context of what he describes as:

> "… a cowardly and sustained attack by a man who was out of control, [who] allowed his most primitive impulses to take over by virtue of the ingestion of alcohol and/or drugs on this particular evening."

[25] Attributing low mitigation value to personal circumstances in serious assault cases chimes with the comments of Kerr LCJ in *Attorney General's Ref (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33:

> "[33] … As this court has frequently observed, the personal circumstances of an offender will not normally rank high in terms of mitigation, particularly where the offences is as serious as that in the present case."

Conclusion

[26] In all the circumstances, we are satisfied that there is no basis for this court to interfere with the decision of the sentencing Judge. We refuse leave and dismiss this appeal.