Neutral Citation No. [2015] NICA 40 | *Ref:* **COG9678**

Judgment: approved by the Court for handing down | *Delivered:* **17/06/2015**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

PAUL JOSHUA BALMER
PAULA WILSON

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Before: Coghlin LJ, Weatherup J and Treacy J

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COGHLIN LJ (delivering the judgment of the court)

[1] Paul Joshua Balmer and Paula Wilson ("the appellants") appeal against sentences passed by Her Honour Judge McColgan QC on 7 January 2015 after a trial commencing on 22 September and concluding on 25 September 2014. The appellant Balmer pleaded not guilty but was convicted of two counts of assault occasioning actual bodily harm contrary to Section 47 of the Offences Against the Person Act 1861 and one count of common assault contrary to the same provision. He received sentences of five years concurrent in respect of the assaults occasioning actual bodily harm and 12 months imprisonment concurrent in respect of the common assault offence. In each case the assaults were alleged to have been committed upon Lesley McCloud. The learned trial judge declined to rule that Balmer qualified for the imposition of an extended sentence of imprisonment. The appellant Wilson, who pleaded guilty, received sentences of 2 years and 8 months in custody in respect of two counts of aiding and abetting assault occasioning actual bodily harm and 12 months imprisonment concurrent for the offence of aiding and abetting common assault. The appellants appealed with leave of the Single Judge. Mr McMahon QC and Mr Aaron Thompson appeared on behalf of the appellant Balmer while the appellant Wilson was represented by Mr Brian

McCartney QC and Mr Eoghan Devlin. Mr Neil Connor QC appeared on behalf of the DPP. The court is grateful for the assistance that it derived from their carefully prepared and eloquently delivered written and oral submissions.

Background facts

[2] In May 2013 the injured party, Lesley McCloud, a 31 year old female, attended a party at a flat which was also attended by the appellants and two other males, one of whom was her boyfriend. She had met her then boyfriend, one of the co-accused, when they were both living in the local Simon community. The injured party consumed two ten glass bottles of vodka and passed out. When she awoke she found that her eyebrows and half of her head hair had been shaved off. She carried on drinking the following morning, passed out again, and when she awoke and looked in a mirror she discovered that she was completely bald. It appears that other persons present at the party also consumed significant quantities of alcohol with some associated use of drugs.

[3] In October 2013 police obtained possession of a Samsung Galaxy phone belonging to the appellant Wilson. It was examined and found to contain footage taken by the appellant Wilson of the appellant Balmer and two other males shaving the injured party's eyebrows and hair. The court has viewed that material. Each of the three males can be heard laughing and joking. The appellant Balmer can be heard saying: "There is no point in going easy on her" "I'm a democratic sort of person, if yous want me to baldy her, I'll baldy her." The appellant Wilson can be heard telling the males to "hurry up" as her phone is about to run out of charge. At one stage, an attempt is made to set fire to the injured party's hair with a cigarette lighter. During the course of her hair being shaved the injured party remained virtually comatose capable only of inarticulate groans and grunts. The shaving appears to have taken place over two nights. After having all of her head hair removed the injured party can be seen lying on a settee as each of the three males strike her forcibly on the face. In addition to the video the appellant Wilson's phone also contained a number of 'trophy' still photographs illustrating members of the group sitting on the settee posing beside the shaved and insensible injured party. When she finally came to the injured party was ordered by her then

boyfriend to leave the flat and given very little time to get her belongings together.

[4] After being told to leave the flat the injured party returned to the Simon Community and ultimately contacted the police. The injured party declined to make a Victim Impact statement and indicated that she did not wish to be the subject of expert medical examination.

The grounds of appeal

[5] (*i*) Paul Joshua Balmer

(*a*) That the sentence of five years in custody was manifestly excessive and wrong in principle.

(*ii*) Paula Wilson

(*a*) That the sentence of 32 months in custody was manifestly excessive and wrong in principle.

(*b*) That the learned trial judge gave insufficient weight to the applicant's age, background and clear record.

(*c*) That the learned trial judge erred in attributing a higher level of culpability to the applicant than was otherwise supported by the evidence.

(*d*) The learned trial judge erred in her failure to attach appropriate weight to the findings and conclusions of the various expert reports obtained on behalf of the applicant.

(*e*) That the learned trial judge erred in her assumption that the failure by expert witnesses to view the video evidence materially affected the validity of their conclusions.

(*f*) The learned trial judge erred in adopting or otherwise failing to correct the emotive description of the events described within the video evidence and in particular the highly misleading and inaccurate role attributed to the applicant by media sources.

The respective criminal records

[6] The appellant Paula Wilson had a clear record. The appellant Paul Balmer has been convicted of some two hundred and sixty one criminal offences including ten common assaults, three assaults occasioning actual bodily harm and eight assaults on the police together with convictions for possession of a firearm and ammunition with intent to endanger life and possession of a bladed article in public. At 41 years of age he was approximately twice the age of each of his three co-accused.

Pre-sentence and medical reports

[7] The pre-sentence report in respect of the appellant Balmer records that he left school at the age of 16 without any formal qualifications and has no significant record of employment. He acknowledges that he has been addicted to heroin from approximately aged 25. He informed the Probation Service that he had engaged with various treatment programmes although no corroborative evidence of his having done so was placed before the court. He has also abused alcohol. It appears that the appellant tends to highlight the failures of others to support him and has not demonstrated any real motivation to change. While he contested all of the charges at trial, he told the PBNI officer that he accepted guilt and expressed an apology to the injured party. He did not perceive his behaviour as offensive or aggressive but saw it in the context of a drunken group "practical joke" which had got out hand. He claimed that, when he had been released from prison, some two days prior to these offences, he had not been supplied with prescribed medication for his withdrawal symptoms and that he had gone into Ballymena "to get a drink" to calm himself down. He said that he had covered his face during the course of the assaults upon the injured party because he knew that Paula Wilson was recording the offences and he did not want to be recognisable on Facebook. The Probation Service assessed the appellant as having a high likelihood of re-offending and representing a significant risk of serious harm to the public although, as noted above, the learned trial judge did not come to such a conclusion.

[8] When interviewed for a pre-sentence report the appellant Pamela Wilson confirmed that she had commenced drinking at the age of 17 and that, as time progressed, she began to increasingly abuse alcohol, especially when she was unemployed and had no structure to her day. On the night of the offences she said that she had consumed a litre bottle of vodka

together with a number of "Alco pops" and possibly methadone. Ms Wilson had been going out with one of the other co-accused and she described how they had all been drinking together and 'having a laugh'. Ms Wilson accepted responsibility for the role she had played in the humiliation and degradation of another vulnerable female but was quite unable to provide the probation officer with any explanation as to why she had partaken in such an incident. She did say that she was ashamed of her actions for which she was sorry. She accepted that she had videoed the three males hacking off the injured party's hair with razors and that she had also arranged for photographs to be taken of herself posing with the comatose victim.

[9] Medical reports from Dr Hanley, consultant psychologist, Dr Maria O'Kane, consultant psychiatrist, and a report from Mr Noel Rooney, who has served as a senior social worker, a Director for the Delivery of Community Services and the Chief Executive of the Probation Board Northern Ireland, were furnished to the learned trial judge on behalf of the appellant Wilson. It is rather difficult to attribute appropriate weight to these reports in the context of the fact that there must be a real doubt as to the appellant's credibility when her attendances upon the relevant experts are compared. For example, the appellant appears to have told Dr Hanley that she was not close to either of her parents and he could not determine why she currently had no contact with her father and only a 'distant relationship' with her mother whereas during her interview with Mr Rooney she referred to her 'supportive mother'. Again, she informed Dr Hanley that she remembered everything clearly, that she had not taken any drugs and only a little alcohol and that she recalled "having a laugh". She described the injured party as also laughing. By contrast she told Dr O'Kane:

> "I was blocked and taking drugs. I don't know why they did it or why I even had it on my phone. … On the day that this happened I had taken a one litre bottle of vodka and ten small WKD. I can't remember how much I had had before that. We were partying all night. I am not clear of how much drugs I'd had, but there was cannabis, cocaine and methadone. I'm not always good at remembering things and drugs and alcohol just make it worse."

Discussion

[10] This court has emphasised upon many occasions that the variety of fact specific circumstances in which offences of assault may be committed significantly reduces the assistance that may be extracted from other cases and/or statutory guidelines. In R v Terence Joseph Ritchie [2003] NICA 45 Higgins LJ, delivering the judgment of the court, said at paragraph [23]:

> "[23] Assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861 is an offence that can be committed in numerous ways with many different consequences. The circumstances that justify the accusation of assault are many and varied, and the harm that may be caused can be any bodily harm short of grievous bodily harm. Thus the Crown Court has to look not just at the type of assault committed, but also at the nature of the harm caused and determine where in the permitted range the appropriate sentence lies. In some cases the type of assault may be the predominating factor, in others the nature of the bodily harm, though more often it will be a combination of the two. Thus it is difficult to compare sentences in two cases of assault occasioning bodily harm."

Ultimately, the court has to consider the culpability of the particular offender and the degree of harm sustained by the particular victim within the fact-specific matrix of the particular case. In cases of physical violence the requirements of retribution and/or deterrence may outweigh to a greater or lesser extent the personal characteristics of the offender.

[11] We also bear in mind that in England and Wales the maximum sentence for assault occasioning actual bodily harm is five years whereas, in September 2004, the maximum sentence for the same offence in this jurisdiction was increased from five years to seven years. It is clear from cases such as the decision of the England and Wales Court of Appeal Criminal Division in R v L (The Times 28 April 1998) that such an increase in the statutory maximum renders pre-existing sentencing authorities of much less assistance.

Paul Joshua Balmer

[12] Despite his ultimate admissions during the pre-sentence report interviews, this appellant contested the case and, therefore, is not entitled to any discount in respect of his plea. He has an appalling criminal record including a significant number of convictions for violent offences. He has been provided with opportunities to take advantage of many non-custodial disposals during the course of his criminal career, apparently, without any significant effect. The pre-sentence report confirms that he has failed to address his addictions to date in a motivated and determined way and that he tends to attribute his inability to do so to the failures of others to support him. He was significantly older than his three co-accused and, while he informed PBNI that he had been drinking vodka for a period of time it is significant that, unlike the two other males accused, he kept his face covered as he knew that the appellant Wilson was recording the offences and he "… did not want to be recognisable on Facebook". The video indicates that he took a leading role. In the particular circumstances, it is difficult to identify any significant mitigation to be advanced on behalf of this appellant. We fully understand the learned trial judge's decision that, in principle, these cases warranted severe custodial sentences. However, after giving the matter some anxious consideration, we have reached the conclusion that this sentence was manifestly excessive and, accordingly, we propose to substitute a determinate custodial sentence of four years composed of two years in custody followed by two years licence in respect of the assault occasioning actual bodily harm convictions. The concurrent sentence of twelve months in respect of the common assault conviction will remain. To that extent, the appellant's appeal will be allowed.

Paula Wilson

[13] This appellant was 20 years of age at the time of the offences and she had no criminal record. It is difficult to form an accurate view as to her personal and developmental background because of the self-contradictory information that she has provided. However, it does appear that from shortly after leaving school she has followed a rather purposeless and unstructured existence fuelled by alcohol and drugs and lacking any degree of effective supervision or discipline. Nevertheless, even in the context of her rather aimless and self-destructive existence, it is very

difficult to understand how this appellant appears to have felt no compunction about encouraging others to subject a totally comatose and vulnerable fellow female to such sordid and degrading treatment. There seems to be little doubt but that the images recorded by this appellant upon her mobile phone were to be transmitted across social media thereby reinforcing the degree of degradation and loss of self-esteem of the victim. The still photographs showing this appellant posing beside the shaved and insensible victim are particularly repellent.

[14] The fundamental question for the court when determining the appropriate sentence to be imposed upon this appellant, bearing in mind her youth, her lack of a previous criminal record to date and her plea of guilty, is whether retribution/deterrence requires significant containment by way of a custodial sentence or whether there is still some prospect of personal and social rehabilitation by way of a more positive regime. In the circumstances, we propose to allow the appeal in respect of the convictions of aiding and abetting assault occasioning actual bodily harm and substitute a determinate sentence of 2 years, 12 months of which will be spent in custody and 12 months on licence in accordance with the recommendations contained in the pre-sentence report. It may well be that the PBNI will wish to take account of the reports from Dr Hanley and Dr O'Kane. The twelve month concurrent sentence in respect of the conviction of aiding and abetting common assault will remain.