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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BRIAN MONGAN

Before: Morgan LCJ, Weatherup LJ and Colton J

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal with the leave of Stephens J against an extended custodial sentence of 9 years with a licence period of 3 years imposed by HHJ McFarland the Recorder of Belfast at Belfast Crown Court on 30 January 2015 for the offence of wounding with intent to commit GBH and a concurrent sentence of 9 years with an extended licence of 1 year imposed for threats to kill. The appellant was arraigned on both counts on 5 November 2014 and entered a plea of not guilty. His trial was fixed for 19 November 2014 on which day he was re-arraigned and pleaded guilty to both counts. Mr O'Donoghue QC and Mr Brolly appeared for the appellant and Mr Russell for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

The factual background

[2] The injured party and the appellant were in a relationship together for approximately two years prior to the commission of the offences on 24 March 2014. They had spent the afternoon in two public houses in Belfast that day drinking heavily. They returned to the injured party's flat sometime after 6 pm and continued drinking. They began to argue about 10pm. This was not unusual although there was no evidence of any prior history of the use of physical violence. On this occasion the victim became terrified and tried to back away from the appellant. He lunged at her and struck her on her face and head with a beer bottle from which he had been drinking. She estimated that the appellant struck her with the bottle ten times. There is no evidence that the beer bottle was other than intact in the course of the assault.

He pushed her into the bathroom in the course of the attack. She wanted to go to hospital because of the bleeding but he told her to go to bed. She managed to run out of the apartment and telephoned the police.

[3] When the victim was interviewed by police she initially told them that three masked men had entered the flat and assaulted her. She said that she did so because she was afraid of the appellant but also because she loved him and did not want to get him into trouble. A short time later she received a number of abusive texts from the appellant asking her not to cooperate with the police and then threatening her with further violence. She showed these to police at the hospital and told them what had occurred. The appellant was arrested at 2.55 am and was noted to be intoxicated. During subsequent police interviews he denied committing the assault or sending the text messages.

[4] On examination at the hospital the victim was found to have deep lacerations to her forehead and upper lip. She had marked swelling and bruising to her left eye to the extent that she was unable to open it. She had seven stitches in her forehead and four stitches in her upper lip. She was detained overnight for observation for her head injury but discharged the following day. There is no evidence of any permanent eye injury beyond the swelling and bruising. The victim did not attend for a review appointment.

The appellant's background

[5] The appellant has a total of 144 previous convictions dating back to 1991 when he was 18 years old. He has convictions for a variety of offences including financial gain although his offending was mainly motoring related. This has resulted in him being disqualified from driving on a number of occasions including a 15 year ban imposed in 2008. In 1997 he was convicted of Grievous Bodily Harm which he told Probation related to a fight in a Traveller camp. He was convicted of hijacking in 2002 and attempted robbery in 2004. The appellant has breached a large number of Non-molestation Orders over the years. He accepts responsibility for some, but blames his ex-wife for others claiming he was tricked into approaching her house. His conviction for improper use of Public Electronic Communications in 2012 arose from the appellant repeatedly phoning the PSNI during a domestic disturbance. In April 2014 the appellant was convicted of making threats to kill against the present injured party two months before he committed the index offences. He was sentenced to three months in custody.

[6] In 2005 he was sentenced to a Custody Probation Order which included Probation for 2 years for offences including the breach of a Non-Molestation Order. He commenced the probation period of the sentence in February 2006 with the requirement that he reside in a probation approved hostel and complete the PBNI Men Overcoming Domestic Violence Programme (MODV) and Alcohol Management Programme. He breached this Order shortly after release by not

returning to the hostel and was subsequently sentenced to imprisonment for 2 years in May 2006. He was released in April 2007 only to be returned to prison almost immediately for a further breach of a Non-Molestation Order. There were further custodial sentences imposed in 2009, 2010 and 2011 for breaches of Non-Molestation Orders.

[7] The appellant has been sentenced to a number of community sentences. In addition to the above a Probation Order for 2 years was imposed at Lisburn Magistrates Court in 2007 with the additional requirements that he reside in approved accommodation and participate in the Integrated Domestic Abuse Programme. Initially he complied with the requirements of supervision but his lifestyle remained unstable and he breached this Order and was sentenced to 2 months imprisonment in June 2008. In 2010, the appellant was sentenced to a Community Service Order for assault on a boy under 14. A previous Pre-sentence report stated that the victim of this offence was his nephew and the offence occurred at the funeral of his brother–in-law. The appellant did not comply with the Order and it was revoked.

The Pre-Sentence Report

[8] The pre-sentence report noted the background. He had a history of alcohol abuse and an aimless and unstable lifestyle characterised by substance abuse and a lack of consequential thinking. Social Services were involved with the family and the children were removed from the care of both parents. The appellant has not had any contact with his wife or children for approximately 3 years. These offences, which are an escalation in seriousness, highlight that the appellant's offending within a domestic context had continued. Although the appellant had not committed serious violence prior to 2014 since the GBH in 1995, he had been assessed as a significant risk of serious harm to any potential future partner for the following reasons:

a. The index offence evidences an escalation in violence within a domestic context

b. It involved the use of a weapon to inflict injury during a sustained assault

c. The appellant has not complied with previous PBNI programmes designed to address domestic violence

d. The appellant has a history of failure to abide by Court sanctions designed to provide protection to his ex-wife and children

e. The appellant has demonstrated continued distorted thinking regarding his culpability for domestic related offending

f. As well as physical injury the appellant now has two convictions for 'Threats to Kill' directed towards his most recent partner, the present injured party.

[9] In this context it is also material to take into account that there has been a reconciliation between the appellant and the injured party. It appears that subsequent to his conviction the injured party has been visiting him in prison. He has proposed to her and she has accepted his offer of marriage. They are both anxious that he should be released as soon as possible so that they can begin married life together.

The Sentencing Remarks

[10] The Recorder considered that the index incident was a sustained attack. It was not just a single moment of madness, it was a succession of blows moving from room to room whereby the appellant had armed himself with a bottle and repeatedly struck the injured party with that bottle.

[11] The aggravating factors were:-

a. That the appellant was on bail at the time

b. The incident itself was in the context of domestic violence

c. A weapon was used and this was a sustained assault; and

d. There was a denial initially of medical assistance.

e. In relation to the threat to kill, the aggravating factor was the fact that the threat was made in the context of essentially attempting to pervert the course of justice, in other words attempting to prevent the injured party from reporting the matter to the police.

[12] In mitigation he took into account the plea of guilty albeit on the morning of the trial. He also took into account the apparent remorse that had been shown by the appellant. He concluded that there was a significant risk of serious harm and therefore found the appellant dangerous for the purposes of the 2008 Order.

The appropriate determinate sentence

[13] The appeal focused on the wounding with intent count. Mr O'Donoghue correctly identified DDP's Ref (Nos 2 and 3 of 2010) (McAuley and Seaward) [2010] NICA 36 as the guideline case in this area. The operative part of the guidance is contained in paragraph 7: –

> "We consider that the sentencing range identified in McArdle of seven to fifteen years imprisonment after conviction on a contest is generally appropriate where the offence under section 18 is committed by attacking a victim who is lying on the ground with a shod foot with intent to cause him grievous bodily harm. In virtually every case the fact that an attack of this kind is launched will of itself be an indicator of high culpability in the commission of the offence under section 18. The place within this bracket will generally be determined by the extent of the harm caused and any other aggravating and mitigating factors. Exceptionally there may be cases of slightly lower culpability, such as where only one blow was struck, and where the harm caused is at the lower end of the scale which would justify a marginally reduced starting point. With that in mind we turn to the individual cases."

[14] We were advised that the insertion of the comma after the word "struck" in the penultimate sentence had given rise to a practice that a lower starting point could be used either where there was slightly lower culpability or where the harm caused was at the lower end of the scale. We wish to make it clear that it was not intended to be read in that way. The portion between the commas in the relevant sentence is simply an example of circumstances that might give rise to slightly lower culpability. Slightly lower culpability and lower harm are generally required before a lower starting point can apply. This judgment should be drawn to the attention of trial judges in the event that any such submission is made hereafter.

[15] The guidance in McAuley and Seaward was given in relation to the offence of causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861. It is generally applicable to cases of wounding with intent to cause grievous bodily harm subject to the observation that the wounding offence can be committed by any breach in the continuity of the skin. In certain circumstances, therefore, the degree of harm may not reach the threshold of really serious bodily harm which is required in order to prove the offence of causing grievous bodily harm with intent. In cases where the harm caused in the wounding with intent offence is materially below the threshold of really serious bodily harm a marginally reduced starting point may be appropriate. R v Brownlee [2015] NICA 58 is an example of such a case.

[16] Applying those principles to this case we consider that the injuries sustained by the victim were significant and comparable to those constituting really serious bodily harm. We consider, therefore, that the range set out in McAuley and Seaward was appropriate. We accept, however, that there was no evidence of any material

long-term consequence as a result of the injury and that it should be assessed as being at the lower end of the range for this type of offence.

[17] That range is, of course, only appropriate for cases of high culpability and it is important, therefore, not to double count by way of aggravation factors which had been taken into account in placing the case within the range. The use of the weapon and the number of blows struck are clearly material to culpability as is the domestic setting of the offence. The latter, however, will often push a case above the lower end of the range although the extent to which it does so will depend upon any history of domestic violence within the relationship. There was nothing in the materials before us to suggest any such history of physical violence although there was clear evidence as a result of the breaches of the Non-Molestation Orders of disrespect for the entitlement of female partners to feel safe and free from intimidation.

[18] There were aggravating factors in relation to the appellant himself. He was on bail at the time of the commission of the offence. He had a previous conviction for making threats to kill the same partner some two months before this incident and the commission of that offence on this occasion was with a view to persuading the victim not to proceed with the prosecution. He had a conviction for serious violence but that was almost 20 years old and there was evidence of only a single act of violence in the 10 years prior to his sentencing. It followed, therefore, that this violent attack represented an escalation in his offending.

[19] The learned trial judge considered that a starting point of 11 years was appropriate before taking into account the discount for the late plea and remorse in fixing the appropriate determinate custodial sentence. We consider that such a starting point in a case of low harm was too high even taking into account the aggravating factors. In our view the appropriate starting point was nine years. Taking into account the late plea and the appellant's remorse as found by the learned trial judge we substitute for the custodial element of the sentence a period of 7 years.

Dangerousness

[20] The Recorder was of the opinion that there was a significant risk to members of the public of serious harm occasioned by the commission by the appellant of further specified offences and accordingly pursuant to Article 14 of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order) he imposed an extension period of 3 years being the period which he considered necessary for the purpose of protecting members of the public from serious harm.

[21] There is no dispute about the principles applicable to such a decision. The custodial term is designed principally to punish the offender in relation to past conduct. The extension period looks to the risk of future harm and is designed to secure protection for the public. The public includes those members of the public

with whom the appellant may reside. The 2008 Order itself seeks to secure proportionality by providing in Article 14(8)(a) that the extension period in respect of a specified violent offence shall not exceed 5 years. Article 14(9) also provides that the term of an extended custodial sentence in respect of an offence shall not exceed the maximum term. An extended sentence does not involve the imposition of a custodial term longer than is commensurate with the seriousness of the offence. The extension is the period necessary for the purpose of protecting the public from harm (A G's Ref No 27 of 2013 [2014] EWCA Crim 334). Such an exercise has to be carried out bearing in mind the differing objectives of the two elements making up the total sentence. The analysis is likely to be highly fact sensitive.

[22] The guiding principles on the assessment of dangerousness were set out in R v Lang [2005] EWCA Crim 2864, adopted in this jurisdiction in R v EB [2010] NICA 40 and reconsidered recently in the context of domestic violence in R v Brownlee [2015] NICA 58. The statutory requirement is that there should be a significant risk to members of the public of serious harm. Serious harm is defined in the 2008 Order as meaning death or serious personal injury (see R v Terrell [2007] EWCA Crim 3079).

[23] In order to deal with the issue of dangerousness the appellant wanted to apply under section 25 of the Criminal Appeal (Northern Ireland) Act 1980 to introduce evidence from Dr Maria O'Kane, a consultant psychiatrist. We have had an opportunity to see two psychiatric reports prepared by Dr O'Kane. In the second of those reports she considered the issue of dangerousness and first reviewed the appellant's prison medical notes and records. These included an admission to the prison hospital with depression and a diagnosis of pathological jealousy and alcohol dependency.

[24] She then reviewed the presentence report and the background to the incident noting that the appellant believed that he lost control under the influence of drink before striking the victim with a bottle. He said that he had never been violent towards the victim in the past although there had been lots of shouting. She noted the history of difficult family circumstances including violence within his parents' home and the appellant's problem with alcoholism. She concluded that the appellant was mentally well but had a history of alcoholism, substance misuse, depression and suicide attempts.

[25] She noted that the appellant had not engaged in violent crime towards another person since 1997. In her opinion the appellant needed to stop drinking completely and was willing to do this. If he did not do so he ran the risk of reoffending. She noted that there was no pattern of violent behaviour. This was a spontaneous alcohol fuelled episode. She considered it unlikely to recur and that the test for dangerousness was not, therefore, satisfied.

[26] Although we recognise Dr O'Kane's expertise in relation to the diagnosis and prognosis of the appellant's mental health we find nothing within her area of expertise to assist us in the determination of dangerousness. Her opinions as to whether or not he was likely to stop drinking or repeat this conduct despite the absence of a pattern of previous violent behaviour were not matters of expertise and consequently her opinions on those matters did not carry any weight. Having considered the report we concluded that there was no purpose to be served by receiving evidence from Dr O'Kane.

[27] It does not follow from the fact that there has been no actual harm caused by the offender in the past that the risk that he will do so in future is not significant (see R v Johnson [2006] EWCA Crim 2486). There had been a history of arguments between the appellant and the victim fuelled by alcohol. His previous history of breaches of Non-Molestation Orders showed a tendency to disrespect and intimidate female partners. In the course of this argument he formed the intention to cause grievous bodily harm and then set about the victim with a bottle causing her significant injury in a sustained attack.

[28] There is evidence of remorse. The difficulty is that the appellant's dependence on alcohol is well established. The appellant and the victim have now reconciled and intend to marry. The history between the appellant and the victim inevitably means that future arguments will occur. This incident constituted an escalation in his behaviour in which the consumption of alcohol by him played a significant part. There is plainly a significant risk that this or similar behaviour will be repeated resulting in serious harm to the victim. That risk arises in respect of any future partner of the appellant. We are satisfied that the Recorder was correct to impose an extended term of 3 years.

Conclusion

[29] For the reasons given we allow the appeal by reducing the appropriate custodial period to 7 years but otherwise affirm the extension period of 3 years in respect of the wounding with intent offence. Although there was little said in this appeal about the threats to kill sentence this was not a case where there was any planning or preparation by the offender. The victim feared that the threat might be carried out but clearly has no longer any lasting concerns. A starting point of 9 years was not appropriate since the maximum sentence is 10 years. We will substitute a concurrent extended sentence comprising 3 years custody and 3 years extension.