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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

**Delivered: 10/10/2018
and 11/01/2019**

**IN THE COUNTY COURT FOR THE DIVISION OF
FERMANAGH AND TYRONE
ON APPEAL FROM THE PETTY SESSIONS DISTRICT OF DUNGANNON**

QUEEN

v

JAMES MALONEY

(Conviction and Sentencing Remarks)

HIS HONOUR JUDGE FOWLER QC

1. This is an appeal by James Maloney against his conviction at Dungannon Magistrates' Court for an offence of attempting to obtain sexual services from a person in exchange for payment by him, contrary to Article 64A of the Sexual Offences (NI) Order 2008 and Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983.

Factual Background

2. At about 6:15 am on 28 August 2016 Alexandra Zielinska was at work in the forecourt of Sainsbury's garage in Dungannon. As she was cleaning the petrol pumps a black Audi A3 entered the forecourt. She described the car stopping between pumps 2 and 3 and she noted that a male was in the car. She was

alone at the time the car stopped close to her. At this point in time she claimed that the male in the car put down the passenger side window and took a bundle of money from his pocket. She thought he wanted to know when the shop opened as it was not due to open until 6:30am. However, at this stage she said he pointed to his crotch and made a gesture with his hand close to his mouth indicating to her as she believed that he wanted oral sex. She demonstrated to the court the hand movement she alleged was made towards her and it was in the courts view unambiguously a sexual gesture signally that he wanted his victim to perform oral sex on him. She described that the car then left but returned about five minutes later she alleged that the male showed her the money and made a similar gesture. The victim saw a friend called Frank approaching and called to him at which point the car drove off. She described how she felt scared at the time.

3. She told other work colleagues what had happened and reported the incident to her line manager. It was then reported to a manager in Sainsbury's who reported the matter to police. Police attended the scene and seized the CCTV footage covering the incident. As a result of viewing the CCTV and using the zoom facility of the camera equipment the police ascertained the car registration to be either SY57TYD or SY57TVD. On further enquiry it was established no vehicle with the registration number SY57TVD existed on the police data base while the registration number SY57TYD was ascribed to a black Audi A3 vehicle. This car had a registered owner in Larne but was insured by the defendant James Maloney with an address at 3 Drumarg Villas in Armagh. It was further ascertained from police data that he had a date of birth of 10/11/1994 and that no one else with that name lived at that address.
4. The defendant was arrested and interviewed and made no answer to police questioning. He was asked if he would take part in a viper identification procedure but refused. Subsequently, a covert viper identification procedure was performed and Ms Zielinska purported to identify the defendant.

5. In cross-examination Mr Lannon BL questioned Ms Zeilinska concerning what she saw at the time of the incident. It was suggested she only saw the left side of the male persons face. Ms Zielinska was emphatic that she saw the whole of the male's face as it was turned to the left. Tellingly she said if I hadn't seen his whole face she could not have said he had stubble and dark hair and that she was surprised he was doing this because he was quite a handsome young man.
6. She was asked by the defence about her identification of the defendant in the viper procedure and it was put to her that her identification was qualified in that she said No 3 'it's similar' and 'that is similar'. When pressed by Mr Lannon she further elaborated and told him she had said he was very similar and she was 99% sure but that she never said she was 100% sure. In essence, after cross examination her evidence of a qualified identification was firmed up into one which was unqualified.
7. She was questioned about her discussions over a prolonged period with her line manager about the incident where she agreed no notes were taken.
8. She was asked could she not be mistaken in that the hand gesture might have been someone indicating looking for a drink. She roundly refuted this suggestion which was a speculative question by Mr Lannon and not based on any instruction.
9. Mr Lannon pressed her on a number of inconsistencies between her statement to police and her evidence in chief. Specifically that she claimed in her statement that the male spoke English to her but she didn't understand yet in oral evidence claimed he said nothing. That she said she saw him open his trousers yet in cross examination said did not see his torso.
10. After the close of the prosecution case Mr Lannon applied for a direction of no case to answer which I refused giving my reasons for so refusing at the time. At this stage I asked Mr Lannon BL had he advised his client that the stage had now been reached when the defendant may give evidence and, if he

chose not to do so the court may draw such inferences as appear proper from his failure to do so. Mr Lannon BL requested some time to advise his client and take instructions which was given. After time being given the defendant through counsel indicated he was not giving evidence.

Legal Consideration

In relation to where I state I am satisfied of certain matter in the rest of this judgment this is to be taken as to mean I am satisfied to the criminal standard – beyond reasonable doubt.

11. This case involves identification evidence, though that is not in my view the sole and decisive evidence. Since the case involves identification evidence I remind myself of the inherent dangers associated with such evidence and the need for special caution when approaching evidence of that nature and the possibility that a mistaken witness can be a convincing witness.
12. Accordingly it is incumbent to examine the circumstances the identification came to be made. This is made all the more simple in this case given that the incident was captured on CCTV. The identification took place in broad daylight on a dry clear summer morning. There were no other cars or persons on the forecourt. The complainant was within a meter or so of the defendant. There were no obstructions to her view of the defendant's face – the window of the car was down. The observation was over a short period but in almost perfect circumstances and the complainant was able to see his full face. Even from the CCTV footage it is possible to make out hand movement within the car albeit not the precise gesture. There were no material discrepancies concerning the identifiable features reported at the time. In my view the quality of the identification evidence and the circumstances in which it was made in this case was and remains good.

13. Mr Lannon BL submitted that that the identification evidence of Ms Zielinska in the viper procedure that 'No. 3 It's similar and 'that is similar' could not be regarded as anything other than a qualified identification and that a qualified identification could not become an unqualified or positive identification at trial through questioning. He relied upon the authority of R v George [2002] AER 441 and R v Brown [2011] AER 186. Mrs Kennedy BL for the prosecution argued that the prosecution could not have elicited a more favourable or positive identification and she had not done so or attempted to do so this resulted from defence cross examination.

14. Both counsel relied upon para 34 and 35 of which reads as follows :-

34. We fully recognise the dangers involved of wrong convictions occurring in identification cases. This is the reason for the requirement that in all identification cases clear *Turnbull* directions must be given. We also accept that counsel for the defence is usually faced with a difficult task in challenging an honest witness who has made a mistaken identity. We also agree that prosecuting counsel must be cautious and avoid conducting his examination of a witness who has failed to make a positive identification in a manner which suggests to the witness that but for this fact or that fact that the witness would have made a positive identification. An identification which is qualified cannot be transformed into one which is unqualified by careful questioning. It remains qualified and the jury should be aware of this. Equally a defendant must not be convicted on the evidence of a qualified identification alone.

35. However, there are at least two situations where a qualified identification may in appropriate circumstances be both relevant and probative. First, where although the weight of the evidence will still be less than a positive identification, it supports or at least is consistent with other evidence that indicates the defendant committed the crime with which he is charged. Secondly, the explanation for a non or qualified identification may help to place the non or qualified identification in its proper context and so, for example, show that the other evidence given by the witness may still be correct. Otherwise, a non or qualified identification could be used to attack the credibility of other evidence given by a witness when the explanation for this may show that such an attack is unjustified.

15. I am quite satisfied that by the conclusion Ms Zeilinka's evidence and cross-examination she purported to give an unqualified identification of the defendant. However, if I am wrong in that conclusion any qualification to her identification is in the circumstances of this case both relevant and probative and while the weight to be attached to any such qualified identification will be less than an unqualified identification it nonetheless in the circumstances of this case supports and is consistent with the other evidence in this case which indicates the defendant committed this offence.
16. Bearing that in mind I take into account the CCTV evidence in this case in my view it is entirely consistent with the evidence of Ms Zielinska in terms of the time of the incident, the description of the movements of the car, its positioning, how it approached her and while Mr Lannon BL suggested nothing could be seen in the car this was not correct - it was clear from the CCTV that a hand could be seen moving in the car level with the windscreen, to the driver's left. This coupled with the evidence of the registration of the car being captured on the CCTV and it being a car the only insured driver recorded is the defendant lends strong support to the correctness of the identification. In my view this is not diminished as suggested by Mr Lannon BL by no enquiry being made of the registered owner on the basis of the police evidence from Constable Price that it is not uncommon for the name of a previous owner to remain connected to the car and that the identity of the insured is usually the closest connection.
17. Mr Lannon BL has also criticised the police in failing to speak to staff and managers at Sainsburys and criticises Ms Zielinska for not making a personal report to the police. Well, it was very clear from the evidence of Ms Zeilenska that she has a limited grasp of English and little if anything in my view would have been gleaned from any enquiries from the staff and manager since no notes were taken. These were ordinary people working in Sainsburys serving the public and are not to be expected to stop everything and make notes of what a colleague says. They did the right and responsible thing in facilitating

it to be reported to police on behalf of their work colleague who had a limited grasp of English.

18. Finally, when questioned by police and on being called on by the court to give evidence and being warned that his failure to give an account may result in the court drawing such inferences as appear proper from his failure to do so. In this regard I remind myself I must not convict the defendant solely based on his failure to give evidence. However, I am entitled to draw such inferences as appear proper from his failure to answer questions and to testify. In my view given the overwhelming evidence against him in this case I am satisfied that the only reason the defendant did not answer questions and failed to testify is because any account he could give or any answers he was likely to make would not withstand scrutiny and he was well aware of that. In this case I am compelled to such an adverse conclusion.
19. Finally, drawing all these different strains of this case together I further remind myself that the defendant should not be convicted upon qualified identification evidence alone and although the weight of qualified evidence will be less than that of an unqualified, such an identification may well serve to support or be consistent with other evidence indicating the accused committed this offence.
20. Accordingly, having reviewed all the evidence in this case and reminding myself of the necessary legal warning I am satisfied beyond reasonable doubt that the defendant is guilty of the charge levelled against him and affirm the conviction of the lower court.

SENTENCING REMARKS

1. The appellant was charged by way of summons with attempting, on 28 August 2016, to obtain sexual services from a person, namely, Aleksandra Zielinska, in exchange for payment made or promised by him, contrary to

Article 64(1) (a) of the Sexual Offences (NI) Order 2008 and the Criminal Attempts and Conspiracy (NI) Order 1983. He pleaded not guilty at the Magistrates' Court sitting in Dungannon and was convicted of the offence charged after a contested hearing on 22 June 2018. Following a sentencing hearing on 6 July 2018 at Dungannon Magistrates' Court he received a prison sentence of three months together with an offender's levy of £25.

2. The appellant lodged an appeal against his conviction and sentence on 6 July 2018. The appeal was heard before me sitting at Omagh County Court over the course of three days on eighth, ninth and tenth October 2018. I was satisfied beyond reasonable doubt that the appellant had committed the offence alleged and affirmed the conviction of the lower court. I gave detailed reasons for my decision at the time of conviction.

FACTUAL BACKGROUND FOR THE PURPOSE OF SENTENCE

3. The victim of this offence, Ms Aleksandra Zielinska, was working in the forecourt of Sainsbury's filling station at the Oaks Centre in Dungannon on the morning of Sunday, 28 August, 2016. At approximately 06:15am she was engaged in washing the petrol pumps. She was alone at the time in the forecourt of the garage. While she was working a black Audi car entered the filling station and stopped adjacent to the petrol pumps. The driver was a male person identified as the appellant and he called Ms Zielinska over to his car. She approached the passenger side of the vehicle and observed that the appellant who was driving the car showed her a wad of rolled up money he was holding in his hand. He then opened his trousers and made a gesture at his mouth and his groin suggesting that he wanted Ms Zielinska to perform oral sex on him. Ms Zielinska told him to 'go' and turned away from him and he drove off. Ms Zielinska stated that he was alone in the vehicle. The car returned again and the appellant approached Ms Zielinska for a second time repeating the offer of money and the gesture wanting oral sex. Ms Zielinska noticed a man she knew entering the garage forecourt and called to him and the appellant drove off.

4. Ms Zielinska reported this incident to her work colleagues and her line manager who very properly reported it to police. CCTV from the forecourt was viewed by police and registration number of the Black Audi which approached Ms Zielinska was ascertained to be either SY57 TYD or SY57 TVD. On checking the police data base it was discovered that registration number SY57 TYD came back as a Black Audi A3 insured by the defendant.
5. The defendant was interviewed by police in respect of this offence on 13 October, 2016 when the allegations were put to him and he remained silent throughout interview when being questioned. He refused to take part in a viper identification procedure.
6. I have carefully considered the presentence reports and Psychiatric report from Dr Loughry, consultant psychiatrist, placed before me. In terms of personal mitigation the defendant is 24 years of age and presents as a medium likelihood of reoffending as a result of his previous offending and criminal record. On a positive note the presentence report indicates the defendant has no issues with drugs or alcohol and is a fulltime carer for his younger brother who suffered life changing injuries in a road traffic collision in 2014. He is also in a relationship and has a one year old son. It is clear from the report of Dr Loughrey that the appellant has not been without his troubles growing up and his early family life was less than ideal. He has had frequent interventions by mental health services and is on medication for depression. Dr Loughry considers he suffers from recurrent depressive disorder and possible personality disorder.
7. However, this personal mitigation has to be assessed in the context of this case as a whole and this requires a careful assessment of the aggravating features present. I accept the following to be aggravating features:-
 - the victim was vulnerable by virtue of her employment and the time of the morning she was required to perform her cleaning duties. The

Sainsburys garage shop was not open at 06:15am and she had nowhere to retreat to at the time of the defendant's approach.

- The appellant was persistent in his approach.
- The defendant appears with a criminal record for assaults albeit no offences of this type or nature.

8. In coming to an assessment of the appropriate sentence in this case I consider first of all the culpability of the defendant, secondly the harm occasioned to the victim and thirdly the risk to the public of the defendant committing further offences of this type. I am of the view that this was a blatant attempt to proposition sexually a vulnerable victim who was simply carrying out an honest day's work and should never have been subjected to this humiliation and degradation. Taking also into account the persistence of his approach to the victim I consider the defendant's culpability to be high. In terms of harm to the victim this was indeed a distressing and disturbing event which made her considerably apprehensive about going to work in the early hours of the morning and required her partner to walk her to work. Given the defendant's record and possible personality disorder the potential for similar behaviour moving into the future is present.

9. In terms of the sentencing options available to the court I directed that counsel in the case consider the following points: -

- The power of the court to order forfeiture of the vehicle used by the appellant in the commission of this offence;
- Whether there was a notification requirement under the Sexual Offences Act 2003 ("the 2003 Act") for a person convicted under Article 64A of the Sexual Offences (NI) Order 2008;
- The power of the court to order disqualification from driving of an offender using a vehicle to commit such an offence.

10. Having considered the submissions of counsel I consider that the court has power to order seizure of any vehicle used in the commission of such an offence and if necessary to disqualify a person from driving if it is considered necessary and proportionate in the circumstances of the case. I am also satisfied there is no notification requirement under the 2003 Act. However, in the circumstances of this case given the fact that the car involved in this case has been disposed of I do not intend to make any forfeiture order in respect of the car or disqualify the appellant from driving.
11. In terms of sentence I have been reminded by counsel for the defence that this case arose in August 2016 and it has been suggested by counsel for the defence that delay in processing this case should be taken into account. In this regard I do not consider the delay in this case, if it be such, as to merit a reduction sentence. This is an offence which carries a maximum sentence of six months imprisonment or a fine not exceeding the statutory maximum or both. Having considered the mitigating and aggravating features and the very fact specific circumstances of this case I am of the view that the sentence of three months custody passed by the learned district judge, after a contested hearing, was entirely appropriate and accordingly I affirm the sentence of the lower court in every respect.