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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

PATRICK McCOLGAN

_____

Before Kerr LCJ, Campbell LJ and Sheil LJ

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KERR LCJ

Introduction

[1] On 3 October 2006 this court heard and dismissed an appeal by Patrick McColgan against his conviction on a number of counts relating to an incident that occurred in the early hours of 26 April 2003. The application for leave to appeal against sentences imposed in respect of those offences took place on 6 October. We reserved our decision on that application until today.

[2] After a trial before His Honour Judge McFarland and a jury at Dungannon Crown Court, the applicant was convicted on 16 February 2005 of the following offences: indecent assault of a female (whom we shall refer to as Ms H); false imprisonment of Ms H; assault of the same victim, occasioning actual bodily harm to her; driving without insurance; and driving whilst disqualified. On the direction of the judge he was acquitted of an offence of assault with intent to rape. The jury also acquitted him of an offence of kidnap. On 28 April 2005, the applicant was sentenced to ten years' imprisonment for the indecent assault; to twenty years' imprisonment for false imprisonment; to five years in respect of the assault occasioning actual bodily harm; and to one year's imprisonment for driving while disqualified. He was ordered to be disqualified from driving for a period of twenty-five years and was fined £750 for driving without insurance.

Background

[3] McColgan was released from prison on licence on 16 April 2003, having served six and a half years for offences including attempted rape and indecent assault of a child. At that time he was disqualified from driving as a result of earlier convictions for driving offences. Despite this, on 26 April 2003 in the early hours of the morning he was driving in the area of Sion Mills.

[4] Some time after 1am on the same date, Ms H was walking home from a public house. When she was less than a minute's walk from her home (which was also in Sion Mills) a car driven by McColgan stopped beside her. He leaned across and opened the nearside front window and spoke to Ms H. Because she had difficulty hearing what he said, Ms H got into the car and, when she did so, she heard a click as if the central locking system had been activated. McColgan then drove off in the direction of Strabane with Ms H on board. She became fearful and while the car was travelling through Strabane, as a ruse to get him to release her, she suggested to McColgan that he stop and that she would buy him a drink. He replied that he would let her out at Victoria, which she took to be a reference to Victoria Bridge.

[5] The applicant did not stop at Victoria Bridge. Instead he travelled along unlit back roads until he came to a remote spot where he brought the car to a halt. He asked the young woman for a kiss and when she refused he proceeded to kiss her on the lips despite her protests and resistance. She started to scream and he banged her head against the steering wheel and interior mirror. He punched her on the head repeatedly. During the struggle the injured party, while trying to fend off McColgan's attack on her, kicked the door several times and eventually it opened and she tried to get out. The applicant pulled her back but she managed to get free and escaped from the car. She fled from the scene making her way over barbed wire fences and across fields until eventually she reached the sanctuary of a farmhouse.

[6] Later that day Ms H was medically examined and found to have bruising to both ankles and the front of the thighs, the right kneecap and the right calf. She had linear abrasions to the left shin. She had sustained linear abrasions and more diffuse bruising on both arms and an abrasion of the back. She also suffered abrasions and lacerations of the right hand. Finally, she had multiple, mainly superficial injuries to the face and head.

[7] In a victim impact report prepared by a consultant psychiatrist following an examination on 22 March 2005, the opinion was given that Ms H suffered from post traumatic stress disorder. At the time of the examination she continued to experience severe sleep disturbance, nightmares, flashbacks, hypervigilance and fear for her own security. Her relationship with her

partner had been affected. She suffered from a loss of libido. Prognosis for recovery from this condition and the symptoms that it caused was stated to be guarded.

The applicant's previous convictions

[8] McColgan has an enormous criminal record. As the sentencing judge observed, he has no fewer than four hundred and twenty one previous convictions. He has been convicted more than one hundred and twenty times of driving whilst disqualified. His record is punctuated by these offences, many of them occurring within days of each other and plainly he is utterly impervious to the possibility of deterrence or reform by repeated sentences of imprisonment. He has been convicted on several occasions of offences of violence. And, most significantly so far as concerns the present application, he has been convicted of a number of offences of sexual assault.

[9] On 26 September 1996 he was convicted of rape, that offence having taken place on 2 August 1995. He was sentenced to seven years' imprisonment. On the same date a concurrent sentence of six months' imprisonment was imposed for an offence of indecent assault on a female. On 15 May 1998 he was sentenced to ten years' imprisonment for an attempted rape that had been committed in August 1996, just weeks before his conviction of rape. For the offence of indecent assault on a female child he was given a concurrent sentence of four years' imprisonment. He was released on licence some ten days before committing the offences which are the subject of this application.

[10] The sexual attacks which resulted in convictions (and another which did not but about which evidence was given during the applicant's trial) bore a number of similarities. In each of the four cases he had taken his female victims by car to a remote location, he had refused their pleas to be allowed to leave the car and had then attacked them while they were in the car. One was raped, another was the victim of an attempted rape and the other two (including the injured party in this case) were indecently assaulted but managed to escape before more serious assault was perpetrated. Violence was used on each occasion.

The judge's sentencing remarks

[11] In a carefully constructed judgment the judge outlined the framework of his sentencing remarks. He dealt first with the fact that the applicant had been released on licence and whether this required that he be returned to custody to serve the unexpired portion of that sentence before beginning any period of imprisonment for the offences for which he was then due to be sentenced. Then he considered whether the applicant should be sentenced to a discretionary life sentence on the false imprisonment charge. Next, he

discussed whether, by the application of article 20 of the Criminal Justice (Northern Ireland) Order 1996, the applicant should receive longer sentences in respect of the offences of false imprisonment, indecent assault and assault occasioning actual bodily harm to reflect the need for what is described as 'the protective element'. Finally, he made a sexual offences prohibition order forbidding the applicant from being present in a motor vehicle with a female.

[12] The judge concluded that it would be an "affront to justice" if the applicant was not required to serve the remainder of the sentence imposed in May 1998 and, exercising his powers under article 3 of the Treatment of Offenders (Northern Ireland) Order 1976, he ordered that McColgan be returned to prison to serve the unexpired portion of that sentence. This meant that the other sentences imposed would not begin to run until 15 April 2008.

[13] On the issue of whether a life sentence should be imposed on the false imprisonment count, the judge followed the approach of this court in *R v Gallagher* and concluded that since the offence could not be characterised as extremely grave of itself, a discretionary life sentence was not appropriate. This court had stated that it would be wrong to impose a life sentence solely because it was considered that the offender was likely to re-offend after release from a determinate sentence. The guiding principle must be whether the offence is intrinsically of the most serious type.

[14] Dealing with the application of article 20 of the 1996 Order, the judge stated that the commensurate sentence for the false imprisonment charge was one of eight years' imprisonment; for the indecent assault six years and for the assault occasioning actual bodily three years. He expressed himself satisfied that the conditions required to invoke article 20 were present and imposed sentences of twenty years, ten years and five years respectively for these offences. The judge chose the figure of twenty years by applying an uplift of 150% to the commensurate sentence of eight years on the false imprisonment charge. Such an exercise was not possible in relation to the other two sentences because article 20 provides that the increase in sentence to cater for the protective element must not exceed the maximum permitted sentence and in the case of both the indecent assault and assault occasioning actual bodily harm, the sentences chosen by the judge were the maximum permitted by law.

The application for leave to appeal

[15] For the applicant, Mr Philip Mooney QC did not challenge the correctness of the judge's decision to return the applicant to prison to serve the remainder of the sentence imposed in May 1998 or the decision not to impose a life sentence on the false imprisonment count. Indeed Mr Mooney submitted that to impose a discretionary life sentence would have plainly

been wrong. Counsel did not criticise the conclusion that a longer than commensurate sentence in respect of each of the offences of false imprisonment, indecent assault and assault occasioning actual bodily harm was warranted. He accepted, albeit implicitly, that the judge was right to invoke article 20. He argued, however, that the judge was wrong to fix the commensurate sentence for the false imprisonment charge at eight years. He also submitted (and this was his principal argument) that the increase in this sentence to cater for the need to protect the public from serious harm was excessive.

Article 20

[16] Article 20 of the Criminal Justice (Northern Ireland) Order 1996 (No. 3160 (N.I. 24)) provides: -

> "**20.** — (1) This Article applies where a court passes a custodial sentence other than one fixed by law.
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> (2) The custodial sentence shall be—
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> (a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or
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> (b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

[17] All three offences (of false imprisonment, indecent assault and assault occasioning actual bodily harm) qualified for article 20 (2) (b) disposal since each was either a violent or sexual offences. Article 2 (2) defines a violent offence as an offence which leads, or is intended or likely to lead, to a person's death or to physical injury to a person. But false imprisonment can be deemed a violent offence, according to the particular circumstances in which it occurs – see, for instance, *R v Watford* [1994] 15 Cr. App. R. (S.) 730. In *R v Zoszco* [1994] 16 Cr. App. R. (S) 354 the Court of Appeal in England held that an indirect connection between the offence and the injury is sufficient. In the present case, the injuries suffered by Ms H as she was attacked and restrained in the motor vehicle provide a sufficient connection to the offence of false imprisonment to bring this offence within the purview of the statutory

provision. The sentencing judge so concluded and Mr Mooney did not seek to argue otherwise.

[18] The second pre-condition for the invocation of article 20 (that it is necessary to protect the public from serious harm from the offender) is also clearly fulfilled in this case. The brazen manner in which the applicant carried out these attacks, the similarity of his *modus operandi* on each occasion and the fact that the index offences were committed within a short time of his release from custody all point strongly to the need for a protective element to the sentences to be passed.

The commensurate sentences

[19] Mr Mooney concentrated his attack on the commensurate sentence indicated by the judge for the false imprisonment charge. Referring to a number of cases both in this jurisdiction and in England and Wales, he sought to demonstrate what he claimed was a marked discrepancy between the sentence of eight years selected in this case and that passed in avowedly similar cases in the past. We do not feel it necessary to review those decisions. As Mr Mooney was quick to accept, the facts of such cases vary widely. The impact on victims, the culpability of the offenders and the circumstances of the detention of the injured parties invariably differ greatly so that limited assistance can be found in an examination of other cases.

[20] The maximum penalty for this offence is life imprisonment. When one considers that this young woman must have been terrified throughout the time that the applicant drove her through dark country roads ignoring her pleas to be released and that this ordeal has had a lasting and substantial effect on her well-being, it is, we consider, quite impossible to say that a sentence of eight years is manifestly excessive. Likewise the sentences stipulated by the judge as those commensurate with the offences of indecent assault and assault occasioning actual bodily harm appear to us to be wholly unexceptionable.

The approach to the protective element

[21] The judge explained his selection of the protective element of the penalty by saying: -

> "I am obliged to consider what the appropriate protective element of the sentence should be. Having considered all the facts of this case and, in relation to your background, I am of a view that this should be 150% of the commensurate sentence. In coming to that conclusion, I have taken into account the principle of proportionality.

> There is a risk, a very serious risk and I consider that this is not wholly disproportionate to the gravity of these offences and that risk."

[22] The application of a percentage uplift on the commensurate sentence has some echoes of the approach of the Court of Appeal in England in cases referred to by Otton LJ in *R v Smith* [2001] 2 Cr App R (S) 160 where he said that earlier decisions had tended to suggest "an uplift of 50 to 100%". We do not construe this reference, however to suggest that the protective element of the sentence should be fixed as a percentage increase of the commensurate sentence. On the contrary, the selection of the protective element should be geared specifically to meet the statutory objective *viz* the protection of the public from serious harm.

[23] Mr McMahon QC (who appeared for the prosecution) suggested that the judge had not chosen the protective element by applying a percentage uplift to the commensurate sentence and that his reference to 150% was merely a statement of the number of years selected expressed somewhat unusually. We cannot accept that suggestion. The judge quite clearly stated that the protective element "should be" 150% of the commensurate sentence and we therefore consider that he consciously linked the two elements in this manner.

[24] We are of the view that this was not a correct approach. The two aspects of the sentence serve different purposes. The first is to punish and the second is to protect. The punishment element cannot dictate the period required to ensure the necessary level of protection. The sentence in respect of the protective element should reflect what is considered necessary to protect the public from serious harm. The sentencing exercise for this aspect therefore calls for an evaluation of the risk that the offender is likely to present and the selection of a period of imprisonment designed to meet that risk.

Proportionality

[25] In *R v Mansell* [1994] 15 Cr App R (S) 771 Lord Taylor C J, dealing with the equivalent provision in England and Wales, examined the relationship between the protective element of the sentence and the principle of proportionality. At page 775 he said: -

> "However, when one goes on to consider what would be the appropriate period to add, the learned judge has to perform a balancing act. In theory, someone who is addicted to conduct which could cause serious harm to members of the public may need to be prevented from doing that for a

> very long time. In the ultimate case, an indeterminate sentence may be necessary where the harm is likely to be very serious and the predilection for indulging in such conduct looks likely to continue for an indefinite time, but the learned judge in each individual case has to try to balance the need to protect the public on the one hand with the need to look at the totality of the sentence and to see that it is not out of all proportion to the nature of the offending."

[26] More recently, Lord Bingham CJ in *R v de Silva* [2000] 2 Cr. App. R. (S) 408 said that there had to be "some proportion" between the total sentence and the gravity of the offences.

[27] The need for proportionality between the sentence passed and the gravity of the offence (as opposed to, for instance, the magnitude of the risk of harm to the public) does not arise from the text of the provision. This enjoins the sentencer to pass a sentence appropriate to the protection of the public from serious harm. But as Mr Mooney has pointed out, the legislature clearly decided that some restriction on the length of the protective element in the case of determinate sentences was appropriate since it stipulated that this must not exceed the maximum penalty otherwise permitted. No such restriction is specified for offences where there is no statutory maximum but we incline to agree with Mr Mooney that it cannot have been intended that article 20 (2) (b) would be used in order to pass sentences that were wholly disproportionate to the nature of the offending.

[28] The principal factor in the selection of this element must always be the protection of the public and while the need for proportionality will serve as a check against a wholly excessive sentence, this will always be essentially secondary to the main purpose of the provision.

Conclusions

[29] As we have said, we are of the view that the commensurate sentences indicated by the judge are entirely in keeping with the range of permissible disposals in this case. We further consider that the sentences chosen for the protective element in the indecent assault and assault occasioning actual bodily harm offences properly reflect the gravity of the risk of serious harm to the public that the offender presents. We do not consider that the final sentences imposed for those offences are in any way disproportionate.

[30] We have concluded, however, that the judge was wrong to apply a percentage uplift to the commensurate sentence in order to determine the protective element of the sentence for false imprisonment. This approach, we

believe, led to his selection of a greater sentence for this element than was appropriate. We are not unmindful of the substantial risk that this offender presents, not least because of his resolute denial of involvement in the index offences when the evidence against him was overwhelming. But we consider that a protective element of twelve years is excessive, especially since this was imposed on the false imprisonment charge. We will therefore grant leave to appeal against the sentence imposed on that count and allow the appeal. We will substitute for the sentence of twenty years one of fifteen years' imprisonment. We state that the commensurate element of that sentence is eight years. The application for leave to appeal against all the other sentences is dismissed.