Neutral Citation No: [2018] NICA 16 *Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **DEE10596** *Delivered:* **23/2/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

REGINA McNERN

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Before: Morgan LCJ and Deeny LJ

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DEENY LJ

[1] On 16 July 2016 the applicant for leave to appeal made an allegation of rape to a friend, a Mr Belco, initially and he contacted others at the Simon Community where Regina McNern was then residing. They then, understandably, contacted the police about this allegation that she had been raped in her home in that accommodation. She was then seen by the police, by a Constable Adams, at the home. She showed reluctance to pursue the matter but was persuaded that she should go to the Rowan Centre to have the tests appropriate for a victim of rape. Again there she showed some reluctance to go through the procedures, but ultimately did so. She also completed with Constable Adams of the PSNI a log relating to these matters in which she made a clear allegation of rape against an entirely innocent man who was named in that report. He was subsequently arrested by the police, very properly in the circumstances, and he was interviewed in accordance with the normal protocols and had samples taken from him. He was detained in all for about 18 hours. This was all as a result of and only as a result of McNern's allegation against him.

[2] Those events took place on 16 and 17 July. It appears that on 1 August the police then obtained CCTV footage from the Simon Community hostel but did not look at it on the day. Either on that day or around that time Constable McVeigh sought to interview the complainant as she then was, McNern, about these matters. She did not want to be interviewed when he sought her out on Tuesday 2 August 2016 but she did say she would like to speak to the police in Bangor police station and she was then taken to an interview room in Bangor police station. She reiterated

that she did not want to take part in the ABE interview and when asked why she replied that she did not want to as the allegation of rape was not true and it had not happened. She stated that she could not tell the truth until she had been moved out of the Simon Community and that was why she had waited until now to tell the truth. She had moved to a Women's Aid hostel in the interval.

[3] She was then cautioned and a statement taken from her and she was interviewed later in 2016. The matter then proceeded to a prosecution against her. It is apparent from the papers that when she was arraigned on this charge which was not until 5 September 2017 she denied it despite her earlier admission; she pleaded not guilty. She filed a defence statement denying her guilt and this proved unhelpful to her ultimately when it came to sentencing in that matter and is unhelpful to her now. Mr Tierney of counsel for her explains part of the reason was that because of her alcohol consumption on the night of these events she did not realise or remember that she had named another occupant of the hostel in the course of her discussions with the police. This only really became apparent when a week before the due date of trial, which was apparently 11 October 2017, the defence was served with this log which they had been seeking and it became clear that she had given a detailed allegation of rape to Constable Adams. Her advisors then informed the prosecution that she would be pleading guilty on 11 October and she was re-arraigned and did so.

[4] A sentencing hearing was arranged then and it seems that ultimately it was on 5 December 2017 that His Honour Judge Grant sentenced her. At that time he sentenced her to a period of 15 months and in accordance with normal practice half was to be served in custody and half on licence. The judge considered that the starting point was one of 18 months imprisonment. He did not give her full discount for the plea of guilty in view of the failure of the present applicant to plead guilty at the first opportunity, but gave her one sixth of a discount. It is submitted on her behalf that the sentence was manifestly excessive in the light of all the circumstances including her past clear record.

[5] When one examines the authorities one sees that a sentence in the range of 1 to 2 years would normally be a correct starting point, although it is right to say that the Court of Appeal in England has imposed lower sentences on occasion. As was mentioned in The Queen v Merritt [2005] EWCA Crim 2013 the sentence of 10 months was reduced to 4 months, but there were factors in that case, some factors were similar to this woman's case i.e. the unfortunate innocent man accused of rape was only under that threat for some weeks rather than months or years, but there are other factors which are not common with this case. Likewise in the The Queen v Brustenga Vilaseca]2012] 1 Cr App R (S)3 relied on by the defence, a sentence of 16 months was reduced to 6 months but in that case no rapist had been named and there were again some factors that were not present in this case.

[6] So the two issues the court has to look at here are; first of all, whether the starting point arrived at by the judge was correct and whether the discount of one sixth was reasonable in the circumstances. Regrettably when the matter is looked at it can be seen that the judge acted on two misapprehensions, one of which in particular was quite important. In his sentencing remarks he was critical of the applicant because it was "not until considerably later that eventually you admitted that there was no truth in the allegation and that was as a result of Constable McVeigh obtaining CCTV footage from the hospital and no one could be seen entering the bedroom that you occupied that afternoon or evening or any indication that was consistent with the allegations that you had now made." Now in fact although the CCTV had been obtained on 1 August it had not been looked at by the police at that time and as I have indicated earlier in these remarks it was the present applicant herself, McNern, who had volunteered to the police that her allegation of rape was untrue before the CCTV footage evidence had come to light. So this was a case of early self-reporting on her part and unfortunately the judge misunderstood that.

[7] Furthermore, there is the issue of alcohol. Now it is true to say that alcohol is normally treated as a neutral factor with regard to offences and issues of sentencing. But here it was intrinsically linked by way of the intent of the applicant at the time that she originally made the allegations. Counsel has drawn our attention to the fact that she showed reluctance to an official of the community about reporting the matter. As I have said she showed reluctance to the police about reporting the matter also. Her intent therefore to wrongly accuse somebody of rape is relevant to the issue of proper sentencing and her intent must have been coloured by the finding of a Dr M J Walker based on a sample of urine taken from this applicant on 17 July at about 2.40 or at 2.40 am in the morning as recorded on the sample and apparently with the name of this applicant. He states that she had at that time a reading of 348 mgs of alcohol per 100 mls of urine and that therefore is more than three times the legal limit in Northern Ireland which is 107 mgs alcohol in 100 mls of urine. So she had more than three times the level of alcohol for driving and a level which one might think from one's experience of the criminal courts would normally have deterred a police officer from taking a statement from the person, although it may not have been fully apparent to the constable on this occasion.

[8] Now unfortunately the judge misread that report and he in his remarks referred to a concentration of about 260 mgs in 107 mgs of alcohol; still more than twice the legal limit but not as great as in fact it was. These are two relevant factors. It is also right to say that she was not spoken to by police in the succeeding days. She first spoke to police and made the admission on 2 August a couple of weeks later when they spoke to her, when they sought to interview her with a view to prosecuting the other inmate of the Simon Community.

[9] Taking these factors into consideration and the submissions of counsel for the prosecution and the defence, the court concludes that a lower starting point would

be appropriate in this case. Rape is a serious offence. To be accused of it wrongly is a serious matter and for the reasons that have been stated in the authorities a custodial sentence will almost always have to follow. But a starting point of some 12 months would appear to be appropriate to this court rather than one of 18 months on the facts. There is then the case of the appropriate discount. The trial judge only gave one sixth because of her initial plea on arraignment of not guilty. Looking at all the facts including the alcohol consumption and the late disclosure of the sexual log and all the circumstances the court considers that while indeed she cannot ask for a full discount that a discount of 25% would be more appropriate. The court will therefore substitute a sentence of 9 months imprisonment in place of the one of 15 months to be served in accordance with the Prison Rules because of the duration of the sentence.