Neutral Citation No [2011] NICA 64 | *Ref:* **MOR8335**

Judgment: approved by the Court for handing down | *Delivered:* **7/10/2011**
(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R v. PH

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivered ex tempore)

[1] On 15 March 2011 the appellant pleaded not guilty to five counts consisting of two counts of common assault contrary to Section 47 of the Offences Against the Person Act 1861, one count of criminal damage, one count of assault by penetration contrary to Article 6(1) of the Sexual Offences (Northern Ireland) Order 2008 one count of harassment contrary to Article 3 and 4 of The Protection from Harassment (Northern Ireland) Order 1997. On 11 May 2011 the jury was sworn. The case was adjourned overnight and on 12 May 2011 the appellant was rearraigned and pleaded guilty to the counts of criminal damage and common assault. He was found not guilty of harassment by direction of the judge and not guilty of sexual penetration by verdict. He was sentenced to a period of 4 months imprisonment in respect of the criminal damage count, a concurrent term of 8 months imprisonment in respect of the common assault committed on the same date, 15 May 2010, and 3 months imprisonment consecutive in relation to the common assault committed on 22 May 2010.

Background

[2] The appellant had been in a relationship with the injured party for about a year between early 2009 and March 2010 at which stage the relationship ended. A reason for the break down was the appellant's acknowledged alcoholism. The appellant did not accept that the relationship was over and he became fixated with the idea that his former partner had found someone else. On 15 May 2010 he visited the injured party. Relations at that stage were cordial. The trial judge was satisfied that when the injured party left her house the appellant went with her but rather than get on the bus to go home he returned to the injured party's home, borrowed a ladder from a neighbour and then entered her house at a time when he was heavily intoxicated.

[3] The first and second counts of criminal damage and assault occurred between 4 and 5 pm on 15 May 2010 when the injured party returned to her home. The appellant subjected her to vile accusations of a sexualised nature, punched her to the chest several times and pushed her against units in the kitchen causing her to hit her head. He then spat in her face, grabbed her mobile phone and squeezed it until the LCD screen broke. His actions also caused damage to her glasses, her watch and a vase which sat on the table in the kitchen. There was no medical evidence but in her statement to the police in relation to this she reported injuries to her back, bruising and swelling to her breast and bruising and scrapes to her arms and wrists.

[4] On 22 May 2010 the appellant returned to the injured party's home, he pushed her against the wall and when she retreated to the bathroom awaiting the arrival of police he called her on her mobile phone. There was evidence that he had kicked the door at that stage on that occasion.

[5] So far as his background is concerned he was convicted on 15 February 2008 on three counts of distributing indecent photographs of children and nineteen counts of possessing indecent photographs of children and was sentenced to 6 months imprisonment suspended for 3 years. On 15 May 2008 he was convicted of driving with excess alcohol and failing to provide a specimen. On 19 May 2008 he was convicted of further driving offences and was further disqualified. On 4 September 2008 he was convicted of disorderly behaviour and given a probation order. A number of those offences appear to be related to his drinking.

[6] So far as the victim was concerned she has indicated that as a result of this she had tried to take an overdose, that she thought about hanging herself, that during the first few days she was blaming herself for what had happened and that she had become tired, anxious and depressed all the time.

[7] The pre sentence report indicated that events in the appellant's life had attributed to his decline in mental health, he admitted to using alcohol as a coping mechanism during his adult life and described himself as an alcoholic. He admitted to drinking in recent weeks and was found to be intoxicated on 14 June 2011 the day before the probation report was submitted. He had been receiving assistance from support services but at the time of the offences he had been out of contact with the service providers for about 6 months. The author noted that he had attended for assessment at the community addiction team on 1 June 2011 but assessed his attitude towards taking proactive steps to deal with his problems as ambivalent. He was assessed as posing a high likelihood of committing another offence within the next 2 years and that was related to his difficulties with alcohol.

[8] So far as the offences are concerned we consider that there are seven aggravating factors in this case. The first is the premeditation which was evidenced by the borrowing of the ladder and the determined way in which he gained access to

the injured party's home. The second is that this was an offence committed within the security of the injured party's home and the third is related in the sense that this arose in the context of domestic violence where it appears that this appellant had been unable to accept that the injured party had made it clear that the relationship was over. The fourth is the vulnerability of this lady living alone as she did and being subject to an appellant who clearly was able to overpower her. The fifth is the degradation to which she was subjected, not just physical degradation but the verbal insults that were reigned upon her and the fact that there was spitting upon her. The sixth was the harm caused to her as a result of this outrageous incident and the seventh which was reflected in the consecutive sentence is the fact that this assault upon her was repeated a week later.

[9] In mitigation it is contended that some allowance should be made for the plea which was entered at a very late stage indeed in this case. Secondly the appellant relies upon the fact that minor injury was caused to this lady and indeed no medical report was produced in relation to her and the third and most substantial point in the appeal relates to the fact that were it not for the offences of assault by penetration and harassment this case would have proceeded in the Magistrates' Court where it would have been prosecuted either under Section 43 of the 1861 Act where the maximum term is 6 months or alternatively under Section 47 of the 1861 Act where the maximum period is 12 months imprisonment. It is agreed that prosecution under Section 47 is unusual in these circumstances.

[10] Sentencing guidelines in relation to assault in the Magistrates' Court have recently been prepared by the District Judges in Northern Ireland acting as a body and these guidelines have now been published on the JSBNI website. In relation to the offence of actual bodily harm contrary to Section 47 of the 1861 Act where the offence consists of assault resulting in relatively minor injury but amounting to actual bodily harm the starting point is 3 months custody with a compensation order and the sentencing range is identified as community order to 6 months custody together with a compensation order.

[11] It is important to note, however, that the advice is that where the offence was committed in the context of domestic violence or where the victim was engaged in providing a service to the public the court shall use a starting point higher than that prescribed. Similarly where the court finds in relation to the sentencing range that the offence was committed in the context of domestic violence or where the victim was engaged in providing a service to the public it may impose a sentence outside the prescribed sentencing range. Among the aggravating factors which are listed in relation to that offence are (1) spitting, (2) premeditation of the offence, (6) the fact that the victim was particularly vulnerable, (7) additional degradation of the victim and (9) that the offence was committed in the victim's home or workplace – all factors which were present in this case.

[12] In relation to the offence of common assault where the assault is one resulting in some injury but not amounting to actual bodily harm the starting point is 2 months custody with a compensation order and the range of sentences is a community order to 6 months custody which of course is the maximum under Section 42 as amended since July 2011. But, again, there is a note which specifically records that where the court finds that the offence was committed in the context of domestic violence or where the victim was engaged in providing a service to the public the court shall use a higher starting point than that which was prescribed.

[13] The sentencing guidelines promoted by the District Judges in relation to these matters are intended to be of considerable advantage to District Judges in the determination of sentences in the cases that come before them. Similarly they are intended to assist County Court Judges dealing with appeals and indeed this court in cases where issues of this sort arise. In relation to the guidelines to which I have referred we have no hesitation in recognising that they represent appropriate sentencing approaches.

[14] In so far as the issues in the case are concerned Mr Orr QC for the appellant correctly noted that there has been recent authority from this court in relation to the approach which should be taken where the position is that a person finds himself before the Crown Court for sentencing in a case which might have been dealt with within the Magistrates' Court. This was considered in R v Kennedy and Kennedy [2011] NICA 42. The court indicated that it should bear in mind what was likely to have happened to the appellant if he had elected for trial by the Magistrates' Court when considering the sentence that should be imposed. It concluded that an accused person should not be especially sentenced because of exercising their right to go to the Crown Court. The issue in each case is whether the sentence was out of all proportion to what the Magistrate would have done and that is the test which we apply in considering the sentences that were imposed in this case.

[15] In our view in light of the extensive aggravating factors that were present in relation to the commission of this offence whether or not prosecuted under Section 43 or Section 47 it does not appear to us that it could be said that the sentence of 8 months imprisonment imposed in relation to the common assault was out of proportion albeit that it might have been a stiff sentence and in those circumstances therefore we see no reason to interfere with the overall sentence of 11 months imprisonment which as a matter of totality again appears to be appropriate.