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

Delivered:	**27.01.2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

- v –

JAMES WILLIAM TAGGART

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Before: Morgan LCJ, Weir LJ and Colton J

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Weir LJ (delivering the judgment of the court)

The nature of the appeal

[1] This is an appeal with leave of the single judge against the sentence imposed by Her Honour Judge McReynolds following the appellant's conviction on 29 September 2014 at Dungannon Crown Court of one count of rape contrary to Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008 and one count of common assault contrary to section 47 of the Offences against the Person Act 1861. An application for leave to appeal against conviction was not pursued.

[2] The sentence imposed on 26 March 2015 was an extended custodial sentence consisting of a custodial element of nine years with two years' extended licence for the rape and a concurrent sentence of three months imprisonment for the assault. The appeal relates to the sentence imposed on the count of rape which it is contended was manifestly excessive and wrong in principle.

[3] Counsel for the appellant were Mr Gallagher QC with Mr Swift and for the prosecution Mr Weir QC with Ms Gallagher. We acknowledge the considerable assistance afforded by the written and oral submissions.

Factual background

[4] On the night of 15/16 February 2012 the appellant and the injured party were both out in Enniskillen. They were aged 17 and a half and 19 respectively, had been previously acquainted and had kissed on more than one prior occasion. On this night both had been drinking and met in a bar in Enniskillen. The injured party left her car back to her home and then, on a second visit to the bar, the two parties met up and kissed both in the licensed premises and in a taxi en route to the applicant's home.

[5] CCTV footage within the licensed premises showed interaction between the applicant and the injured party which included kissing and dancing. In the words of the sentencing judge "the interaction was far from one sided", although the injured party suggested in her evidence that at times she acted dismissively towards the applicant.

[6] There was common evidence given by the injured party and the appellant in respect of some of the verbal exchanges within the nightclub, such as discussion of the injured party becoming the girlfriend of the applicant and there were points at which their recall of the discussion was at odds. There was considerable consumption of alcohol by both parties.

[7] It was agreed that the injured party would return to the appellant's house and
share his bed. However the injured party gave evidence that she clearly stated that there would not be any question of sexual intercourse, saying that she was menstruating. She said that she got into the bed fully clothed and that the applicant also got into bed. There was some more kissing and she asserted that he tried to pull her round to face him. The injured party stated that she said "no, I just want to go to sleep" whereupon she said that the applicant "flipped" in that he became frighteningly violent and grabbed her neck, effectively throttling her, initially with both hands and then with one. She described the downward pressure applied as being such that she could scarcely breathe and that she feared for her life. She gave evidence that then with his other hand the applicant removed her clothing and that he got on top of her and penetrated her.

[8] The appellant did not give evidence at his trial but in his interviews with the Police he accepted that he got on top of the injured party. He said he sat there for a brief time and penetrated her but he claimed that at that

time this was consensual. There was no ejaculation. He suggested that intercourse ended simply because he became tired.

[9] The injured party gave evidence that she managed to struggle free from the assault to go to the bathroom and dress. It was accepted that she left the home of the applicant at 3.14 a.m. She said he apologised and offered to contact a taxi for her but that after a short time in the toilet she left the building alone. He suggested there was no conversation really apart from "chat later". His call to a taxi firm was confirmed by his mobile phone.

[10] A taxi was found for the injured party by some males who helped her when she was out on the street in a distressed state and she gave evidence that she firstly went home to try to rouse a house mate with a view to that person accompanying her to the police station but that when she was unable to rouse anyone she was then taken to the police station by the taxi driver. When the appellant was arrested later in the morning he indicated he had been involved in consensual intercourse ending without ejaculation and that he had called a taxi for the injured party. He denied any sudden angry transformation or "flipping" and/or of any violence. He denied that marks on the injured party's neck were attributable to violence emanating from him.

Previous convictions

[11] The appellant has convictions for thirteen previous offences including an aggravated assault and aggravated vehicle taking and driving while disqualified by reason of age, grievous bodily harm for which he received a custodial sentence, three for common assault, four for disorderly behaviour, one for assault occasioning actual bodily harm and one for causing grievous bodily harm with intent in December 2011 for which in September 2013 he was sentenced to an extended custodial sentence comprising three years' imprisonment with an extended licence period of two years which necessarily means that that sentencing court must have made a finding of dangerousness. He has also twice received custodial sentences as a result of breaches of Youth Conference Orders.

Reports on the appellant

[12] Dr Fred Browne, Consultant Forensic Psychiatrist, provided a lengthy report based upon his interview with the appellant on 7 January

2015 in which he concluded that the appellant's history gave the impression of an insecure childhood with lack of clear structure and boundaries in which he was subjected to threats, violence and verbal abuse. He was suspended from primary school and around the time of his finishing at that school his parents separated, his father ultimately moving to England, and his grandmother died. He was expelled from secondary school and had problems with his temper and difficulty accepting criticism. He was deemed beyond parental control and was placed in a succession of care settings. Despite poor engagement with educational services he was noted to be more educationally advanced than most of his peers. He abused alcohol and a wide range of psychoactive substances and there were a number of incidents of self-harm. Dr Browne concluded that he had demonstrated a pattern of conduct disorder from an early age that was closely related to the disturbed environment in which he was raised, and that this led in his adult years to dissocial personality disorder and substance misuse.

[13] However, Dr Browne noted a substantial improvement in the appellant's presentation since he had previously interviewed him in April 2013 in terms of his being much more relaxed, capable of talking about his personal history, and acknowledging that there had been difficulties with impulsivity and control of anger and that he had contributed to some of the difficulties he had experienced. While in custody on this occasion he had engaged in education and a range of constructive activities and obtained favourable reports from professionals.

[14] Dr Browne stated that at the time of his interview the appellant denied committing the offence. He said the court would be aware that many sexual offenders deny having committed the offences and that the appellant found it difficult to empathise with the feelings that an injured party may experience. The opinion of the Probation Board case conference in November 2014 was that the applicant continued to meet the threshold for presenting a significant risk of serious harm and Dr Browne agreed with this assessment. He noted that the appellant had made progress within the structured environment of the Young Offenders Centre ("YOC"). He had stopped smoking, avoided drugs, made a marked reduction in impulsive and confrontational behaviour and positively engaged in constructive and prosocial activities and it would be important for the applicant to continue to engage in further programmes.

[15] Dr Browne's report indicated that the appellant did not participate in the preparation of the pre-sentence report on the basis that he had not committed the offence and wished to appeal. The report had therefore to be prepared solely from the records and other information available to the probation officer. It confirmed what Dr Browne had reported about the appellant's participation in courses within the YOC and his positive progress there. However the probation officer's view was that, whilst encouraged that the appellant had engaged positively and purposefully during his time in custody, his commitment to sustaining those positive changes could only be tested when he returned to the community. The Probation Service continued to assess him as meeting the threshold for presenting a Significant Risk of Serious Harm.

The Victim Impact Report

[16] A victim impact report by Mrs Boyd, a senior social worker, dated 18 December 2014 and therefore written before the trial process had commenced, concluded that the injured party remained greatly affected and traumatised and that she would only begin to recover when the court process concluded. The injured party was recorded as having positive family relationships and at the time of the report was doing a university degree in England. The report indicated significant emotional and psychological distress during the assault and initial and long term interference to her emotional, psychological and behavioural functioning. In respect of prognosis, positive factors were that the injured party had a close and positive relationship with her family; she was intelligent and could hopefully complete her degree and she was planning to avail of professional counselling. Negative factors were the severity of the assault, accompanying violence and perceived threat to life, the fact the appellant was known to the injured party, the continued perceived threat from the applicant and hostile responses from his family and friends, the absence of available support on a regular basis from family and friends and that the injured party lived away from the locality, and the secondary traumatisation caused by the court process. She would benefit from the professional counselling and a greater support network when apart from her family.

The Judge's approach to sentencing

[17] In imposing a commensurate term of nine years followed by an extended licence period of two years on the count of rape with a concurrent term of three months on the count of assault, the learned judge identified relevant features of the appellant as being that he was now 20 but was 17 at the time of the offence when he was a sentenced prisoner in respect of other matters and the subject of an extended custodial sentence; alcohol and violence characterised his antecedents; he did not have previous offending of a sexual nature but his previous record included a conviction for violence directed at his mother and a series of unprovoked street attacks which included grievous bodily harm. The judge:

- identified aggravating features as being (i) that violence accompanied the rape to the extent that the injured party feared for her life, and (ii) that the offence was committed in breach of custodial release conditions;

- identified the mitigating features as being that (i) the appellant was a very young person and that Dr Browne highlighted the authorities in respect of the possibility for change and the progress already made by the appellant; (ii) the appellant had had a very difficult early life having been on the Child Protection Register for emotional abuse, suspected physical abuse and confirmed neglect abuse. The effect of his upbringing was two-fold in that he had poor adult relationship role models and, because he had been in custody from adolescence onwards, he had no chance to learn to be a teenager or to engage with the opposite sex in an appropriate manner;

- in terms of harm, noted that the injured party was recalled at the start of the autumn term from university and was subject to lengthy cross examination in

which she was required to demonstrate physically the experience of having finger tips pressed down on her throat and it was suggested that she was a dishonest complainant. The injured party had been profoundly affected by the experience and would have issues in respect of relationship forming and trust;

- referred to AG's Ref. (No. 3 of 2006) (Gilbert) [2006] NICA 36, which involved a defendant aged 15 and in which the court indicated that a starting point of 8 years met with general approval in terms of the approach in R v Milberry [2002] 2 All ER 939;

- stated that when a defendant has attained the age of 18 but committed the offence while under 18 culpability should be judged by reference to age at the time of the offence as a starting point. The sentence that would have been imposed at the time of the commission of the offence is a powerful factor but not the sole or determining factor and the sentence has to take account of other matters which govern sentence including deterrence R v ML [2013] NICA 27; R v Bowker [2008] 1Cr App R (S) 412; R v Bateson [2005] NICA 37).

- took account of the decisions in non-sexual cases involving young offenders in Northern Ireland R v McConville and Wootton [2014] NICA 41 and in England against the backcloth of the UK's obligations under relevant international conventions involving young persons.

The grounds of appeal

[18] The grounds of appeal are that the sentence was manifestly excessive and wrong in principle. Counsel for the appellant submitted, rather faintly, that "it is at least questionable" whether the judge was justified in concluding that there was a significant risk of serious harm to members of the public so as to trigger an extended custodial sentence and further submitted that in any event the commensurate term of nine years was itself excessive. He relied upon the guidance provided by this court in R v Kubik [2016] NICA 3 in support of the latter proposition.

Consideration

[19] Dealing in turn with the two limbs of the appeal, we do not accept the first submission that the imposition of the extended custodial term was not warranted. It is clear from his offending history that the appellant has in the past demonstrated a well-established propensity to commit acts of violence and to breach controls intended to regulate his behaviour. Indeed the present offences were committed while he was on home leave subject to conditions from the Juvenile Justice Centre. As we noted above, the probation officer has said that his motivation and commitment to maintaining the positive changes that he has since made in custody can only really be tested when he returns to live in the community and we agree with that assessment. Dr Browne also agrees with the conclusion of probation service. We consider that the imposition of an extended custodial term of two years was entirely appropriate.

[20] Turning to the length of the commensurate term, Morgan LCJ summarised the relevant current sentencing principles pertaining to the crime of rape in R v Kubik [2016] NICA 3, a decision which we point out was not available to the judge when the present sentences were passed. The following passages are material:

> **'[14]** Sentencing levels in rape cases in this jurisdiction were specifically addressed in *Attorney General's reference (No 2 of 2004) (O'Connell)* [2004] NICA 15 where it was stated that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel in

England and Wales ("the Panel") in its 2002 guidelines – these are five years with no aggravating or mitigating factors and eight years where a number of enumerated features are present. That approach was reaffirmed by this court in *Attorney General's Reference (No.3 of 2006)(Martin John Gilbert)* [2006] NICA 36. Where, however, there has been a campaign of sexual violence against one or more victims a sentence of 15 years or more is appropriate as the recent decision in *R v Ayton* demonstrates.

[15] It is important to remember, however, the advice in *R v Molloy* [1997] NIJB 241 that sentencers should not view starting points as fixed tariffs for rape cases. In *R v Millberry and others* [2002] EWCA Crim 2891, [2003] 2 All ER 939 the English Court of Appeal approved the recommendations of the Panel but emphasised that guidelines can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach. It is important to stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Guideline judgments are intended to assist the judge to arrive at the current sentence but they do not purport to identify the correct sentence. Doing so is the task of the trial judge.

[16] With that health warning in mind, since the recommendations of the Panel in 2002 remain the principal guidance on sentencing in rape cases in this jurisdiction, we consider it appropriate to set out a little more fully the content of the recommendations. The previous guidance had identified a number of different starting points for cases with particular features and the Panel concluded that its recommendation should follow that approach. It recommended a starting point of five years on a contest for a single offence of rape of an adult victim with no aggravating or mitigating factors. A starting point of eight years was appropriate where the following factors were present:

(i) the rape is committed by two or more offenders acting together

(ii) the offender is in a position of responsibility towards the victim (eg in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (eg a clergyman, an emergency services patrolman, a taxi driver, or a police officer)

(iii) the offender abducts the victim and holds him or her captive

(iv) rape of a child, or of a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability

(v) racially aggravated rape and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (eg homophobic rape)

(vi) repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped)

(vii) rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

[17] In either case a number of aggravating factors were identified which would result in a sentence above either starting point:

(i) the use of violence over and above the force necessary to commit the rape

(ii) use of a weapon to frighten or injure the victim

(iii) the offence was planned

(iv) an especially serious physical or mental effect on the victim; this would include, e.g., a rape resulting in pregnancy, or in the transmission of a life-threatening or serious disease

(v) further degradation of the victim, e.g. by forced oral sex or urination on the victim (referred to in *Billam* as 'further sexual indignities or perversions')

(vi) the offender has broken into or otherwise gained access to the place where the victim is living (mentioned in *Billam* as a factor attracting the eight year starting point)

(vii) the presence of children when the offence is committed (cf. *Collier* (1992) 13 Cr App Rep (S) 33)

(viii) the covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence

(ix) a history of sexual assaults or violence by the offender against the victim.

The Panel recommended a starting point of 15 years in relation to offences amounting to a campaign of rape and recognised that in such cases the issue of risk to society arose. Those are cases that inevitably are going to give rise to issues of dangerousness under the 2008 Order.

[18] We would emphasise that neither the factors indicating an increased starting points nor those setting out aggravating circumstances should be applied mechanistically. Secondly, they are not comprehensive. Where other aggravating or mitigating factors are in play they need to be taken into account. Thirdly, the court in *Gilbert* summarised the aggravating factors at para 21. We have set out the factors as contained in the Panel's recommendations as these help to explain more fully the Panel's approach. We do not consider that the summary in *Gilbert* was intended to indicate any difference of approach. Fourthly, the purpose of sentencing guidelines is to ensure consistency of sentencing. The proper discretion of the judge should be exercised with that in mind. Members of the public are entitled to feel aggrieved or confused if like cases are dealt with differently.

[19] This court noted the assistance to be derived from the aggravating and mitigating factors identified by the Sentencing Council in its various guidelines at para 22 of *R v McCaughey and Smyth* [2014] NICA 61 but discouraged judges and practitioners from being constrained by the brackets of sentencing set out in the guidance. The court noted the rationale for that approach at para 25 of *R v McKeown, R v Han Lin (DDP's Reference Nos 2 and 3 of 2013)*:

> 'The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted

> from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of consideration depending on the precise circumstances of the individual case.'

[20] As the guidance produced by the Sentencing Council has developed over the years it has tended to become more prescriptive and instead of the broad starting points given in the 2002 recommendations of the Panel, the Sexual Offences Definitive Guidelines, produced by the Sentencing Council in 2014, now contain ranges of sentencing dependent upon an ever more precise categorisation of the circumstances of the offence. We would discourage sentencers from attempting to categorise each case

> in that way and consequently the ranges suggested in the Guidelines will constitute assistance by way of general background only."

[21] Applying that guidance to the facts of the present case we consider that although unfortunately the judge did not identify her starting point it must have been of the order of eight years rather than of the five years indicated for the single rape of an adult victim. Undoubtedly violence was employed as confirmed by the marks on the complainant's neck but while that was no doubt an aggravating feature it may be doubted whether it constituted "violence over and above the force necessary to commit the rape" such as to attract an eight year starting point. There was no violence before or after the rape which the judge described as "mercifully brief" and we consider there is substance in Mr Gallagher's submission that this was "a single impulsive act" as described at para [26] of Kubik. The complainant said in her ABE interview that after the rape the accused kept saying he was sorry and cried and that he had offered to get her a taxi.

[22] The judge in referring to the appellant's youth at the time of the offence mentioned the case of A.G.'s Reference (No 3of 2006) Gilbert in which a sentence of seven years' custody together with three years' probation was imposed upon a fifteen year old who had pleaded guilty but, as Mr Gallagher pointed out, that was a much graver case than the present because it involved several rapes and the use of extreme violence perpetrated after that complainant's home had been broken into and involved the infliction of serious head wounds with a hammer.

[23] It appears from the sentencing remarks that in assessing the extent of victim impact the judge was influenced by the fact that the complainant had to return from university to give evidence at the trial and was subjected to lengthy cross-examination during which it was suggested that she was dishonest. It is hardly necessary to say that any accused person is entitled to require the prosecution to prove its case at trial by calling the relevant witnesses and to be defended by counsel in a way that may involve the putting of unwelcome or upsetting questions to persons who would rather not have to respond to them or indeed give evidence at all. Upon conviction such a course is not an aggravating factor but rather constitutes the absence of the mitigating one that a plea of guilty would have afforded.

[24] This court considers that the particular circumstances of this offence and of the offender set out above indicate a starting point of about five years to which the aggravating factors of the degree of violence used and that the offences were committed while the accused was on home release subject to conditions which he breached, indicate a commensurate term of seven years on the count of rape rather than the nine years imposed by the judge and we accordingly vary that sentence. We do not interfere with the extended licence period of two years so that the extended custodial sentence on count 1 will consist of a custodial element of seven years followed by an extended period of licence of two years' duration. We were not invited to and do not alter the concurrent sentence of three months' imprisonment on count 2.