Neutral Citation no. [2003] NICA 52 | *Ref:* **KERC4055**

Judgment: approved by the Court for handing down | *Delivered:* **05/12/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WILLIAM THOMAS KERNAGHAN

Before Carswell LCJ and Kerr J

KERR J

Introduction

[1] This is an application by William Thomas Kernaghan for leave to appeal against sentences imposed by Coghlin J at Downpatrick Crown Court on 23 June 2003, leave having been refused by the single judge.

[2] The applicant had been charged on an indictment containing eight counts:

1. Attempted murder of victim A contrary to article 3 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law;
2. Causing grievous bodily harm to victim A with intent contrary to section 18 of the Offences against the Person Act 1861;
3. Unlawfully wounding victim B with intent to do her grievous bodily harm contrary to section 18 of the 1861 Act;
4. Aggravated burglary contrary to section 10 (1) of the Theft Act (Northern Ireland) 1969;
5. Kidnapping victim B contrary to common law;
6. Indecent assault of victim B contrary to section 52 of the 1861 Act;
7. Assault of victim B contrary to section 47 of the 1861 Act; and
8. A further charge of assault of victim B contrary to section 47 of the 1861 Act.

[3] The applicant pleaded guilty to counts 2 – 9 and it was ordered that the first count should not be proceeded with without leave of the court. He was sentenced on the second count to 12 years' imprisonment; on counts 3 and 4 to 8 years' imprisonment; on count 5 to 2 years' imprisonment; and on counts 6, 7 and 8 to one year's imprisonment. All sentences were ordered to be concurrent. On the applicant giving his consent to a custody probation order under article 24 of the Criminal Justice (Northern Ireland) Order 1996, it was ordered that he be subject to a probation order for eighteen months on his release. The period of custody was therefore reduced to ten and a half years.

Background facts

[4] In February 2001 the applicant met and began a relationship with victim B, a 27-year-old woman. The applicant had separated from his wife some months earlier. Victim B had also recently separated from her husband, victim A, although they continued to see each other from time to time and they shared custody of their two children. Victim A had moved to a flat in Newtownards and victim B had helped him to decorate the flat and had given him money to pay bills.

[5] The continued contact with her husband caused disharmony between victim B and the applicant. There was at least one violent encounter between the two men and, according to victim B, the applicant had frequent arguments with her about her continuing to see her husband. He had assaulted her violently several times, on one occasion holding her head below water having forced her into a bath. These arguments continued on virtually a weekly basis until the end of May 2002.

[6] The applicant and victim B had lived together sporadically after their relationship began. The pattern appears to have been that he would stay at her home for about a week and then, usually after an argument, he would leave for a few days. He had not been with her for some ten days before 30 May but returned on that day and stayed overnight, leaving again on the morning of 31 May 2002. After he left, victim B sent the applicant a text message on his mobile telephone telling him that their relationship was over, that she "could not take any more" and that she was frightened. He replied by text, asking to be given another chance. He then telephoned her, again asking to be taken back, but victim B refused, saying that it was over between them. He said that he would come and see her the following day but she told him not to do so.

[7] Victim B contacted her husband and they met at his flat on the evening of 31 May. They spent the evening together and returned to the flat in the early hours of the morning. They were in bed when the applicant burst in. He was carrying a telescopic baton and struck victim B with it, crying out that he

would kill both her and victim A. He then struck victim A as he was rising from the bed. The applicant claims that victim A had a hammer which he managed to wrest from him. He then used the hammer to rain blows on victim A's head and body. He also kicked him as he lay on the floor. At this stage it is likely that victim A was unconscious as a result of the first blows struck by Kernaghan.

[8] The applicant also attacked victim B, striking her with the hammer about the head and body. She lay on the bed feigning death but Kernaghan pulled her from the flat and forced her into his car and drove off. While in the car he subjected her to a violent indecent assault. After driving about for some time, he returned to the area of victim' A's flat, pushed her out of the car and left the scene. Some time later after speaking to a friend he drove to Dundonald police station where he surrendered to police.

The injuries

[9] The blows to victim A's head caused a depressed skull fracture with bilateral parietal intracranial haemorrhage. He suffered injuries to his scrotum which required the removal of a testicle. As a result of the head injury he has developed epilepsy. He has experienced left sided weakness and continues to have reduction of function of the left arm. Because of a significant skull defect he may require a cranioplasty. He has had to leave his job and he will have difficulty in obtaining employment because of the epilepsy and difficulties with his arm. He has required treatment for depression.

[10] Victim B has been diagnosed as suffering from post traumatic stress disorder. She blames herself for the injuries suffered by her husband and the fact that their marriage has now broken down completely. Dr Helen Harbinson, consultant psychiatrist, considered that victim B would be "mentally scarred for the rest of her life" as a result of her experience.

The pre-sentence reports

[11] Dr Bownes examined the applicant on the instructions of his solicitor. He found no evidence of a personality disorder and considered that the applicant understood and accepted that his behaviour had been wrong. He displayed evidence of concern about the consequences of his actions and the effect that they had had on others.

[12] In the Probation Board's pre-sentence report, Mr Winnington, probation officer, recorded that the applicant had expressed a strong sense of regret and remorse. He clearly recognised that he had inflicted very serious injuries on victim A. He accepted that he had to address a number of issues, particularly

his future relationships with women; anger and conflict management; and alcohol management.

The judge's findings

[13] The judge accepted that victim A had attempted to defend himself with the hammer and that the applicant wrested it from him and used it to attack victim A and B. He also accepted that the amount of alcohol that Kernaghan had consumed might have fuelled his anger. The applicant had claimed that he had begun to realise the enormity of what he had done before leaving the flat and had placed victim A in the recovery position and the judge accepted this claim also.

[14] The judge acknowledged that the applicant had given himself up to police although, as the judge observed, it was in any event inevitable that he would have been apprehended. He also gave credit to the applicant for his plea of guilty, while making clear that it was also necessary to have regard for the devastating injuries suffered by victim A and B.

The appeal

[15] While accepting that the sentences to be imposed depended primarily on the particular facts of the case, Mr O'Donoghue QC for the applicant submitted that comparison with similar cases revealed a significant disparity between the sentences imposed in this instance and those in other cases where violence of a like degree had been used. Mr O'Donoghue referred particularly to the cases of *R v Christopher Moseley* [1999] 1 Cr. App. R. (S) 452; *R v Frederick Robertson* [2003] 1 Cr. App. R. (S) 31 and *R v Nigel Lyndon Hudson* [2003] 2 Cr. App. R. (S) 52.

[16] In *Moseley* sentences totalling ten years were upheld on a man who had attacked two people with a wheel brace, causing brain damage to one of them. In that case the brain damage had caused a speech impediment in the form of bad stuttering and an inability to pronounce certain words. The attack had taken place over a relatively short period of time and there was no question of either of the victims being abducted. The judge approached the sentencing of the appellant on the basis that 10 years in total was appropriate. He therefore imposed a sentence of six years' imprisonment for causing grievous bodily harm and four years' imprisonment consecutive for wounding with intent to cause grievous bodily harm. He pointed out that longer sentences would have been imposed if they had been concurrent. The Court of Appeal affirmed the sentences, observing,

> "This was … a severe sentence, but unfortunately these crimes merited a severe sentence. For the offences with which this court is now concerned

> and their traumatic effect on two lives and the significant permanent disability that will remain in the case of one of the victims, we are driven to the conclusion that the total sentence of 10 years' imprisonment is neither manifestly excessive nor wrong in principle."

[17] In *Robertson* nine years' imprisonment had been imposed by the trial judge for an offence of causing grievous bodily harm with intent by striking a man repeated hammer blows so as to cause a fractured skull. Both the appellant and his victim were alcoholics. The injured party suffered a depressed fracture of the skull and was at risk of developing epilepsy. He had impaired memory, a speech impediment and dysfunction of an arm. The sentence was reduced on appeal to seven years' imprisonment, the court holding that the proper starting point would have been nine or ten years and that an insufficient discount had been given for the appellant's plea of guilty. In that case of course there was only one victim; the injuries were not as severe as were suffered by victim A and the attack was not prolonged.

[18] In *Hudson* a sentence of six years' imprisonment for wounding with intent to cause grievous bodily harm was upheld by the Court of Appeal. That case also involved a hammer attack causing grave injuries. The victim had been harassing and abusing his former partner (with whom the appellant had formed a relationship). The Court of Appeal accepted that the appellant had acted out of the wish to protect her. Again the injuries suffered by the victim were not as serious as those suffered by victim A.

Conclusions

[19] Comparisons of sentences in other cases must be carefully undertaken especially where offences of violence are involved since these are usually highly fact specific and cannot therefore provide an infallible guide to the appropriate sentence even where the circumstances appear similar. In any event, we do not consider that the sentences imposed in the present case are in any way out of line with the sentences in the cases relied on by the applicant.

[20] In *Moseley* the total sentence was composed of two separate consecutive periods of imprisonment but as the court observed in *Attorney General's References (Nos 120, 91 and 119 of 2002)* [2003] 2 All ER 955, where a court imposes concurrent sentences for separate offences which could justifiably be made consecutive, it may properly increase the level of the overall sentence to take account of the principle of totality. Commenting on this in the recent case of *Attorney General's reference (No 9 of 2003)* this court said: -

> "Totality, in other words, is not merely a reducing factor when considering the effect of consecutive sentences; it may increase the length of sentences made to run concurrently in order to bring the total to a level proper to reflect the gravity of the offences."

In the present case the judge could quite properly have imposed consecutive sentences on the applicant for the several offences committed by him.

[21] We bear in mind, as did the sentencing judge, that the applicant gave himself up to the police; that he pleaded guilty at an early stage; that he has a clear record; and that he was undergoing considerable emotional turmoil at the time that these offences were committed. Having regard to the devastating consequences on his victims, the prolonged attack (particularly on victim A) and the abduction of victim B, we do not regard the total sentence passed as being excessive or in any way wrong in principle. The application for leave to appeal against sentence is therefore dismissed.