IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

PATRICK JOSEPH McCOLGAN

CARSWELL LCJ

This is an application for leave to appeal against sentence. The applicant, Patrick Joseph McColgan, was charged on 4 counts and on 15 June 1996 he was convicted of 3 of these after a contested trial at Omagh Crown Court (sitting at Enniskillen); the fourth count, driving a motor vehicle while disqualified, was not proceeded with. On 26 June 1996, His Honour Judge Smyth QC sentenced him as follows:

Count 1 (Rape) - 7 years' imprisonment

Count 2 (Assaulting a constable) - 6 months' imprisonment

Count 3 (Obstructing a constable) - 3 months' imprisonment

All sentences were to be concurrent. At the same time a suspended sentence of 6 months' imprisonment, (imposed in August 1995 for driving while disqualified, and suspended for 2 years') was put into operation, to be served consecutively to the period of imprisonment the subject of this application.

The applicant is seeking leave to appeal against the sentence of 7 years' imprisonment imposed on the count of rape. The relevant grounds of appeal put forward by the applicant were as follows:

"The sentence imposed upon the applicant by the learned trial judge was in all the circumstances of the case manifestly excessive and wrong in principle.

...

3. Clearly most matters were in issue during the course of the trial but the applicant [respectfully] submits that some very important evidence relating to the

rape charge was not in issue and should have been taken into account by the learned trial judge when passing sentence.

a. The injured party and the applicant had been in a serious long-term relationship (over a 3 year period) until about 4 weeks prior to the offence and the evidence was that there was a discussion about the resumption of the relationship.

b. At the time of complaint of the offence the injured party stated to the police Doctor that no violence had been involved.

c. The independent evidence through the complete absence of marks to the injured party and the complete lack of damage to clothing indicated that there was no violence.

d. There were no aggravating features.

4. It is respectfully submitted that in sentencing the applicant the learned trial judge did not sufficiently take into account in passing sentence the above mitigating features."

The single judge refused leave to appeal, and the application was renewed before this court.

The incident out of which the rape charge arose occurred just shortly after 7.45 am on 22 August 1995. Miss Frances McConnell had spent the night of 21-22 August 1995 chatting to various people on her CB radio. From around 6.30 am to 7.00 am Miss McConnell talked on CB radio to the applicant, with whom she had gone out from 1992 until May of 1995. While talking on the radio the applicant asked Miss McConnell to go out for a chat with him and around 7.45 am Miss McConnell left her house, walked down the lane, met the applicant and got into his car. Miss McConnell and the applicant chatted about Miss McConnell's current boyfriend and the applicant's girlfriend.

After about 5 minutes the applicant said he was going down the road to turn the car at a particular point, but instead of stopping at that point the applicant drew on to the entrance way to a field where he and Miss McConnell began chatting again. By this stage Miss McConnell had noticed that the applicant's artificial (right) leg was lying on the back seat inside his jeans. The applicant started to get nasty towards Miss McConnell and in her statement she said:

"He kept telling me to finish with Paul and go back with him but I said no. Then he started to call me a whore and said that I was rid out."

At this stage Miss McConnell tried to leave the car, but the applicant grabbed her round the neck and shoulders and pulled her back in. When the applicant tried to kiss her Miss McConnell pushed him away. In the subsequent struggle, the applicant used his superior weight and strength to overpower and partly undress Miss McConnell. He wound down the seat and removed his own jogging trousers. When the applicant asked Miss McConnell to have intercourse with him, she refused. In her statement she said that she kept trying to fight him off all the time but he was too strong. In his attack he hurt her leg, because she suffered from a congenital condition in her left hip. The applicant went on to rape Miss McConnell and had intercourse with her for about 5 minutes, after which he got out of the car, replaced the T-shirt he had been wearing with another T-shirt, and put on his jeans. When the applicant got back into the car he told Miss McConnell that he had VD. When he drove her home the applicant told Miss McConnell that she should finish with her current boyfriend and return to keeping company with him. Miss McConnell replied that she was not going to finish with her current boyfriend. Miss McConnell got home about 9.15 am when she told her mother what had happened. After sleeping for the next 4 or 5 hours, Miss McConnell had a further discussion with her mother and she also discussed it with her boyfriend, after which she decided to report the matter.

Imposing the appropriate sentence where the accused has been found guilty of rape can be a difficult task because of the many considerations which may have to be taken into account, including aggravating and mitigating factors which may often exist. Nonetheless, Crown Court judges have the benefit of well established guideline cases in relation to rape. In R v Billam [1986] 8 Cr.App.R (S) 48 it was held in England that 5 years' should be the starting point in a sentencer's assessment of the proper sentence in a contested rape case, and from that base the sentence would be increased or reduced, depending on the nature of any aggravating or mitigating factors present in the case. In this jurisdiction in R v McDonald [1989] NI 37 the appropriate starting point was declared to be 7 rather than 5 years. Hutton LCJ stated at page 41:

"We think it desirable to make clear that whilst we state that 7 years' should be the starting point for rape committed by an adult in a contested case where there are no aggravating or mitigating features, the sentence should be higher, and perhaps very much higher, if there are aggravating features, and also the sentence should be lower if there are mitigating factors."

In McDonald the court adopted with approval the aggravating factors set out in Billam to which courts in such cases should have regard:

"The crime should in any event be treated as aggravated by any one of the following factors:

(1) violence is used over and above the force necessary to commit the rape;

(2) a weapon is used to frighten or wound the victim;

(3) the rape is repeated;

(4) the rape has been carefully planned;

(5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind;

(6) the victim is subjected to further sexual indignities or perversions;

(7) the victim is either very old or very young;

(8) the effect upon the victim, whether physical or mental, is of special seriousness.

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point."

The court also said that -

"The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence ..."

Unfortunately we do not have the benefit of a transcript of the judge's sentencing remarks, due to a failure of the recording equipment. A brief note made by the applicant's solicitor has, however, been helpfully made available to us in which it is stated that there were no aggravating features, but that the previous relationship was not a mitigating factor. It appears that the learned trial judge in this case imposed the guideline sentence for a contested rape with no aggravating or mitigating features.

Mr Philip Mooney QC on behalf of the applicant accepted that a sentence of 7 years would be appropriate for a contested rape case where there were no aggravating or mitigating features. The applicant has a long criminal record, almost all of which relates to driving offences and offences of dishonesty. These offences are not directly material to the rape conviction, save that they show the applicant's propensity to pay no regard to the strictures of the law. A significant entry in his record, however, is that of indecent assault on a female in 1994. The court was informed that on that occasion the applicant persuaded the injured party, a girl of 15, to get into his car which he drove for a while and then stopped. At this stage the applicant tried to make the girl kiss him, without success, whereupon he drove on, stopped again, grabbed the girl over her clothes on her private parts and desisted when she would

not stop screaming. On that occasion the applicant was sentenced to 6 months' imprisonment, suspended for 3 years.

Mr Mooney submitted that the entry in the applicant's criminal record relating to the indecent assault and the fact that he told Miss McConnell that he had VD after he raped her were not of such significance to constitute aggravating factors within the terms of Billam.

In respect of mitigation, Mr Mooney submitted that there were 3 features of the case which should be regarded as having some effect. First, he referred to the fact that Miss McConnell and the applicant had a pre-existing sexual relationship and, in reliance on the case of R v Maskell [1991] 12 Cr.App.R (S) 638, submitted that this should be regarded as a mitigating factor. The facts of that case were rather different from the situation in the instant case, where the relationship had clearly been terminated and both Miss McConnell and the applicant had become involved with new partners. In respect of a rape committed by a previous sexual partner we would refer to a passage from the judgment of Mustill LJ in the case of R v Berry [1988] 10 Cr.App.R (S) 13, 15:

"The relevance of a previous settled sexual relationship was made plain by the decision of this Court in Cox [1985] 7 Cr.App.R (S) 104. The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be: see also Stockwell [1984] 6 Cr.App.R (S) 4. To our mind these cases show that in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship."

In Attorney-General's Reference No 7 of 1989 12 Cr App R (S) 1, 6 Lord Lane CJ said:

"The mere fact that the parties have over a period of nearly 2 years - 20 months - been living together and having regular sexual intercourse obviously does not license the man once that cohabitation or sexual intercourse has ceased to have intercourse with the girl willy-nilly. It is however a factor to which some weight can be given by the sentencing court for the reasons which Mustill LJ set out in the passage in his judgment [Berry] which we have cited."

Secondly, Mr Mooney urged us to consider by way of mitigation the fact that at one stage the complainant hesitated about proceeding with her complaint, relying upon the case of R v Henshall 16 Cr.App.R (S) 388. We consider that there is a clear distinction between the facts of Henshall, where there appears to have been an element of forgiveness, and the facts of the instant case. In the present case the injured party is awaiting the birth of a child to another man and at one stage she had indicated that she did not wish to proceed with her complaint against the applicant because of the stress to herself and the possible risk to her unborn child. She

subsequently changed her mind and indicated that she was quite willing to proceed with the complaint.

Thirdly, Mr Mooney submitted that, in considering the sentence imposed on the applicant, the court should take account of his personal circumstances, particularly that he has a deformed hand and additionally that he lost a leg when he was aged 13 through no fault of his own.

Having looked at all the circumstances of this case we consider that there are features of this case which might be regarded as aggravating factors, namely the applicant's previous record and the fact that after he had raped the complainant he told her that he had VD. We do not think, however, that these features would make a substantial difference to the tariff sentence of 7 years for a contested rape. On the other side of the scale, we do not consider that the fact that the applicant and Miss McConnell had been in a pre-existing sexual relationship, terminated some time previously, is a factor which contains enough element of mitigation to do more than offset the slight aggravation of the contrary factors. We do not think that the applicant can obtain assistance from the fact that the complainant, for reasons to do with her own health and that of her unborn child, at one stage did not wish to proceed with the complaint.

Regarding the applicant's personal circumstances, we note that there are cases where courts have reduced or suspended sentences because of an offender's physical disability or illness. There may be cases in which it would be proper for a court to make some merciful allowance for such factors. This court has often said, however, that many offences are so serious and the need to punish and deter is so great that this must outweigh any possible personal mitigating circumstances. We adopt that view in relation to this case.

Our conclusion is that the applicant has not in our view established any factors which would take this case out of the ordinary range of sentence for a contested rape where the defendant has been found guilty. This court is satisfied that the learned trial judge in this case was entirely justified in imposing the guideline sentence of 7 years for a contested rape where there were no aggravating or mitigating factors. We do not consider that the sentence was in any way excessive, let alone manifestly excessive, for a deliberate rape which appears to have been an act of revenge when Miss McConnell declined to resume her relationship with the applicant. The application for leave to appeal against sentence is therefore refused.