IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

STEVEN McCULLOUGH

CARSWELL LCJ (giving the judgment of the Court)
NICHOLSON LJ

This is an application for leave to appeal against a sentence of 2 years' imprisonment imposed by His Honour Judge Hart QC at Belfast Crown Court on 17 September 1997. On that date after the jury had been sworn the applicant changed his plea to guilty to a count of assault occasioning actual bodily harm to Nicola Cosgrove, contrary to common law and Section 47 of the Offences Against the Person Act 1861.

The incident giving rise to the charge occurred around 2.30am on Sunday 24 September 1995 after the injured party had gone to look at her cousin's flat at 49 Bleach Green Avenue, Newtownabbey, as she was keeping a watch on the flat while her cousin was on holiday. The applicant and the injured party's cousin had lived together at this flat before their relationship had broken down when the applicant had moved out. Miss Cosgrove believed that the applicant had moved back into the flat in her cousin's absence and without her knowledge. When Miss Cosgrove was in the vicinity of the flat she was noticed by the applicant, who shouted out of a window at her. Miss Cosgrove and her friend then proceeded to another flat at 35 Bleach Green Avenue to join a party. Shortly after Miss Cosgrove arrived at the other flat there was a banging on the front door and when she opened it she was confronted by the applicant, his twin brother and another male.

The applicant asked Miss Cosgrove what she was doing at his car and although she said she had not been at his car he grabbed her round the throat with both hands, banged her head off the wall and punched her twice in the face causing her nose to bleed. The following morning the injured party went to Whiteabbey Hospital, it was found that her nose was swollen, tender and appeared to be deviated to the right. 3 days later she returned to the hospital, where her nasal bones were manipulated into a straighter position under anaesthetic. In his statement Mr Roy Gibson FRCS stated that the fact that Miss Cosgrove's nasal bones could then be manipulated and that they were deviated to one side would indicate that they were fractured at the time of the assault by the applicant.

At the hearing the judge inspected the injured party to see the shape of her nose and concluded that there was "a slight but obvious bump on the bridge of her nose", which amounted to "a not inconsiderable disfigurement". It is noteworthy that at this stage no objection was taken by counsel then acting for the applicant: he did not dispute Crown counsel's attribution of the bump to the assault by the applicant or seek to call evidence that the bump had been present before that injury was sustained. Accordingly the learned trial judge concluded that the assault by the applicant had resulted in a fracture to the injured party's nose and a small but well healed scar within the left side of her nose. The learned trial judge said that this was a gratuitous assault which, in spite of the applicant's completely clear record, steady employment record since leaving school, and various family responsibilities, required an immediate custodial sentence. The learned trial judge gave careful consideration to placing this case in the general spectrum of assaults, bearing in mind that 3 to 4 years' imprisonment has been imposed in "glassing" cases where the injured party has suffered a significant degree of disfigurement. The judge referred to the applicant's guilty plea and pointed out that this had only come after the jury had been sworn and the trial was due to start. The judge correctly stated that in view of this the applicant could not receive the degree of credit which he would have been entitled to for an earlier plea.

When the matter came before this court Mr Boyd for the applicant did not seek to rely upon all of the grounds set out in the grounds of appeal. He did not ask for leave to call fresh evidence, nor did he contend that the judge should have held a "Newton" hearing.

Mr Boyd's submissions to this court can be summarised under 4 heads:

1. The judge failed to give enough weight to the background of the case.

2. The defence were not put on notice that it was part of the Crown case that the injured party had suffered a degree of disfigurement.

3. The judge started with the wrong comparisons in looking at "glassing" cases, generally charged under Section 18 or 20 of the Offences Against the Person Act 1861, as the proper level of sentence for assault occasioning actual bodily harm charged under Section 47 of the 1861 Act is materially lower.

4. The judge failed to give sufficient weight to the mitigating factors in this case.

We do not consider that the background to this case affords material assistance to the applicant by way of mitigation. Although the applicant may have been upset by what he regarded as interference with his affairs by the injured party and her friends, that can afford no excuse for this gratuitous and premeditated attack upon a vulnerable young woman. The only factors which can be relied upon in the applicant's favour are that he was not habitually violent, he was regularly employed

and had never been in trouble with the police before. We see no ground for complaint in the way the judge dealt with the injured party's appearance and the alteration of the shape of her nose. Mr Boyd for the applicant suggested on instructions that the injured party's nose had always had the same bump which, the judge concluded, had resulted from the applicant's assault. The applicant's counsel in the Crown Court did not, however, raise this point, made no objection to the course which the judge took and did not seek leave to obtain evidence about the previous shape of the injured party's nose, although he knew from the depositions that Miss Cosgrove had a displaced nasal fracture and therefore the question of her appearance would be significant.

Mr Boyd placed considerable emphasis on the fact that this was a Section 47 case and that generally sentences in respect of such are considerably lower than those in respect of Section 18 or 20 cases (although he acknowledged that Section 47 and Section 20 cases carry the same maximum sentence). Mr Boyd cited a number of authorities to support this submission, but this court has constantly sought to discourage appellants from seeking quantities of precedents in sentencing cases and from efforts to find an exact analogue of a case before the court. Previous decisions on sentence give no more than the most general guide to proper levels of sentencing. Different offences are not in watertight compartments for sentencing purposes and the facts of the particular case will govern the judge's approach. The best use of precedents other than guideline cases therefore is to give the court the trend of sentencing levels.

It cannot be said, nor did counsel so argue, that a sentence of 2 years on a very late plea of guilty was wrong in principle. On the other hand, although decisions may be found to justify any level of sentencing for assault occasioning actual bodily harm, including sentences materially higher than 2 years, it is true to say that the general trend is rather lower than 2 years and consistently lower than offences charged under Section 20 of the 1861 Act.

We have had the benefit of a recently compiled probation report, dated 27 November 1997, which was not available to the judge and which paints a more favourable picture of the applicant and his reaction to the offence and to the period of imprisonment since September of this year. We consider that the applicant is unlikely to re-offend and that his punishment has already been a salutary lesson. The consequences to himself and his dependants and family have been severe. We are satisfied that, while the learned trial judge was fully justified in imposing an immediate custodial sentence, which is required to mark society's condemnation of such brutal assaults and to deter young men from committing acts of violence on vulnerable victims, a period of 2 years' imprisonment was not required for these purposes. We have come to the conclusion that a sentence of 12 months would satisfactorily meet the requirements of this case.

Accordingly we grant the application for leave to appeal, allow the appeal and reduce the sentence to 12 months' imprisonment.