IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

COLM McQUILLAN and JOSEPH McCORMICK

MacDERMOTT LJ

CAMPBELL J

At Antrim Crown Court on 12 June 1996 the 2 applicants Colm McQuillan and Joseph McCormick were sentenced to effective terms of imprisonment of 12 years' (McQuillan) and 10 years' (McCormick).

They had been charged on one indictment containing 4 counts:

Count 1 charged McQuillan with the rape of Dagmar Zeyn between 22 May 1995 and 25 May 1995. In fact the actual period during which the incident occurred was from shortly before midnight on 23 May to shortly after midnight on 24 May. The place was Cushendun in County Antrim.

Count 2 charged McCormick with the attempted rape of Miss Zeyn at the same time.

Count 3 charged McCormick with unlawfully wounding Miss Zeyn on 24 May

Count 4 charged McCormick with arson - namely burning Miss Zeyn's tent and equipment on 24 May.

The applicants were arrested and McCormick speedily admitted his involvement. McQuillan denied that he was involved. At his first arraignment in February 1996 McCormick pleaded guilty to the 3 counts which stood against him. McQuillan pleaded not guilty.

The case came on for hearing on 22 April 1996 and unfortunately had to be aborted during the course of the hearing. On 3 June 1996 a second trial began before Carswell LJ (as he then was) and a jury. The jury convicted McQuillan of rape and

after hearing pleas in mitigation on behalf of both applicants they were sentenced to terms of 12 and 10 years' imprisonment. It is against those sentences that this appeal is brought. McQuillan had appealed against his conviction but that aspect of his appeal was withdrawn some time ago.

The background facts

Miss Zeyn is a young German lady who arrived in Northern Ireland at Larne to commence a cycling tour. After a few days in that area she proceeded to Waterfoot and during the evening of 23 May cycled up to Cushendun. She stopped at the public toilets and on discovering that the back wheel of her bicycle was punctured decided to camp nearby in a wooded area. She pitched her tent and was preparing her evening meal when "two young guys" came up to her fire. They were relatively drunk and started chatting. She asked them to leave. One walked away a bit but remained in the vicinity. The other pulled out a knife and put it to her throat telling her to lie down. There is no doubt that these 2 were McQuillan and McCormick and that it was McCormick who produced the knife and McQuillan who initially walked away.

McCormick removed Miss Zeyn's lower clothing and lay on top of her and tried to rape her but failed as he was unable to obtain an erection presumably because of his drink-taken state. All this McCormick admitted firstly at interview and secondly at the trial as he was called by the Crown as a witness. McCormick left and McQuillan, as the jury by its verdict found, came over to Miss Zeyn almost immediately. He told her to sit down. She was still half dressed and he forced her to sit down. He told her that if she screamed he would shoot her. In fact as Miss Philpott QC (who appeared with Mr Fowler for McQuillan) pointed out she did not believe this - clearly Miss Zeyn was a most resolute lady. With the weight of his body McQuillan forced her to lie down and raped her. In the middle of raping her, which took about 5 minutes, he told "the other guy" (McCormick) to watch the car park. After he discharged he got up and left with McCormick.

Miss Zeyn got herself dressed and when looking for her CS gas container found a knife lying on the ground. About 15 minutes later McCormick returned and tried to push her down again - she managed to get her CS gas container out and sprayed McCormick. He left.

Miss Zeyn ran towards the village and found a phone box. She rang the emergency services and got through to the police. She then saw McCormick coming up the road and he saw her. He came over seeking his knife and then started kicking her. He then got a stone and threw it at her 4 or 5 times. He dragged her from the phone box and she thought he would kill her. He threw her to the ground and again tried to pull her trousers off. Fortunately a passer-by turned up and McCormick ran off. Clearly this was a very serious attack on Miss Zeyn who was

taken by ambulance to hospital where cuts and bruises to her face and hands were treated.

Earlier a group of young men, including the applicants had gathered at the car park and were drinking beer. The arrival of Miss Zeyn was noticed and McCormick indicated an interest in her. After the others left, McCormick and McQuillan moved over to where Miss Zeyn had set up camp and the events which we have already described occurred.

Beyond question this was an outrageous attack by these 2 young men on a lone girl who had set up camp at night. When passing sentence the learned trial judge who had heard the whole matter described in detail over several days and seen and heard both McQuillan and McCormick in the witness-box saw fit to say:

"They make up an appalling catalogue of barbaric and brutal behaviour on the part of you 2 young men. Between you you decided quite deliberately to seek out this young woman camping on her own at this quiet site at the beach at Cushendun and to rape her, to have sex with her against her will just because she was there alone; a lone female who was vulnerable. No doubt you were inflamed by the drink which you had consumed but that does not give you any vestige of an excuse."

We have only the bare transcript to guide us but this assessment was clearly well founded. This was also as the learned trial judge observed one of those predatory attacks on vulnerable women which sadly are all too common.

Before turning to consider the submissions on behalf of each applicant we pause to remind ourselves of what Lord Lane said in R v Roberts and Roberts [1982] 4 Cr.App.R(S) 8 at 10:

"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case."

That was the case in which Lord Lane set out for the first time a list of circumstances which may aggravate the offence of rape and which he repeated in the better known case of R v Billam & Others [1986] 8 Cr.App.R(S) 48. It is recognised as a "guideline" case as he set out the appropriate "starting points" to be considered by sentencers when passing sentence. That list is not, and should not be treated as, a comprehensive list of factors which should be viewed as of an aggravating nature

because rapes occur in such a variety of circumstances that no list could possibly be all embracing. Lord Lane himself made this clear in Roberts when he introduced his list by saying "some of the features which may aggravate the crime are as follows" (page 10) and more recently Lord Taylor observed in the Attorney-General's Reference (No 16 of 1992)14 Cr.App.R(S) 319 at 323:

"One cannot categorise rigidly the factors which render a particular sentence appropriate or inappropriate. There are infinite variants in the circumstances of cases of rape which come before the Court. Whether someone who breaks into a victim's house and rapes her there is in all circumstances any worse than someone who preys upon a single woman out walking on the common is not easy to decide."

In the context of the present case that observation is particularly pertinent.

McQuillan's case

Miss Philpott by way of introduction to her principal submission made several subsidiary points.

Firstly she recognised that McQuillan could not claim the benefit which flows from a plea of guilty but submitted that points could have been taken against his conviction, though, he has now accepted the reality of the situation and his guilt. That may or may not be so but is in no way akin to a plea of guilty or a clear statement of genuine remorse in open court.

Secondly she pointed out that Miss Zeyn's account was not challenged except in so far as her evidence identified McQuillan. Accordingly she was not required to rehearse the indignities to which she had been subjected. This does not appear to be a matter which accrues to the credit of the applicant who by lying and general deviousness did all that he could to avoid apprehension and conviction.

Thirdly she drew our attention to the report by Dr Bownes, consultant forensic psychiatrist, dated 4 February 1996. It does not, she submitted, suggest that McQuillan has a socially inappropriate attitude or hostility to women or is generally dangerous towards women. He did however state in his opinion:-

"Mr McQuillan's account of his personal history clearly indicates a persistent tendency to disregard social norms with respect to lawful behaviours. He appears to have limited appreciation and concern for the effects of his actions on others. Mr McQuillan is evidently capable of acting in an irresponsible and exploitative manner."

He is also, as the jury's verdict makes clear, a person who was prepared to take advantage of the woman and rape her.

Fourthly she emphasised that McQuillan had the misfortune to be born with congenitally deformed fore-arms as Mr Matthews' report of 22 April 1997 makes clear. That is, of course, a serious misfortune but did not prevent his pushing Miss Zeyn to the ground and raping her.

Miss Philpott's principal argument was that unpleasant though this incident must have been for Miss Zeyn it was a case which in reality did not contain any of the aggravating features listed by Lord Lane in Billam and adopted by this court in R v McDonald and Others [1989] NI 37. The proper sentence she claimed would have been in the region of 8 years' imprisonment.

Before considering this submission we would repeat what Lord Lane did say and we do so by quoting from the judgment of Lord Hutton in McDonald at pages 39/40

"In *Billam's* case in February 1986 in a judgment delivered by Lord Lane LCJ the English Court of Appeal gave guidance to the judges in England in respect of the principles which they should adopt in sentencing for rape. We would wish to acknowledge our indebtedness to that judgment and the great assistance which we have derived from it. We respectfully agree with the English Court of Appeal that:

`Rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances.'

The guidance given in *Billam's* case can be regarded as consisting of 2 parts. The first part was where the court laid down the sentence which should be regarded as the starting point in a contested case. At 50 Lord Lane stated:

`For rape committed by an adult without any aggravating or mitigating features a figure of 5 years should be taken as the starting point in a contested case.'

Having stated the starting point Lord Lane then proceeded to state the matters which should be regarded as aggravating or mitigating features as follows:

`Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be 8 years.

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

The crime should in any event be treated as aggravated by any 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 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. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.'"

In McDonald the court made it clear that it considered the proper starting point in a contested rape case should be 7 years rather than 5 and at page 41 this passage occurs:

"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 increasing 5 years to 7 years the court was applying, in effect, a 40% uplift. It is rational to deal similarly with Lord Lane's earlier figure of 8 years and which would lead to a figure of some 11 years. Applying not arithmetic but fairness we are satisfied that such a staring point is appropriate when a court is dealing with a case where 2 or more men are acting together, or the offender gains access to the victims home or is in a position of responsibility towards the victim or there is an element of abduction in the case.

Miss Philpott directed the thrust of her argument towards Lord Lane's list of 8 aggravating factors. We shall look at each shortly.

1. The absence of abnormal violence by McQuillan. That is so. But he was acting in concert with McCormick who did produce a knife and held it to Miss Zeyn's throat. This is a case of 2 young men who when drinking with others observed Miss Zeyn arrive and set up camp; they waited until the others left; together they went over and chatted her up; McQuillan moved away but remained in the vicinity; McCormick produced his knife and tried to rape Miss Zeyn; when he left McQuillan moved forward for his "turn". As McCormick told the jury (transcript page 8) "Then McQuillan came back and told him to get off her, it's his turn." In our judgment it would be quite inappropriate to ignore the climate of violence which existed when McQuillan moved forward to attack this half dressed woman for the second time.

2. The use of a weapon. We have already dealt with this point.

3. The rape is repeated. Repetition, especially where several men are involved is a particularly serious aspect of any rape. The significance of this point is not undermined by the fact that McCormick's attempt failed. To adopt the words of Stuart-Smith LJ in R v Drabble [1996] 2 Cr.App.R(S) 322 at 325 "in the circumstances of this case, that makes very little difference."

4. The rape has been carefully planned. Miss Philpott is right to say that there is nothing to suggest long term pre-planning. This is a case where 2 men took advantage of the lone situation of Miss Zeyn and together decided to attack her. In such circumstances their attitude is equally culpable whether or not they thought the matter over during 10 minutes, half an hour or several hours.

5. Lack of relevant convictions. This is so and applies to both applicants.

6. Lack of other sexual indignities. Again this is so and applies to both applicants.

7. "The victim is either very old or very young". This formulation is often difficult to apply as Lawton LJ said in R v Daley [1986] 8 Cr.App.R(S) 429 "Those are words of very wide meaning." The sense of the observation is that it recognises that some women are particularly vulnerable in that context age is a factor but far from the only relevant factor. Women walking the streets, especially at night, are vulnerable;

tourists camping are vulnerable. We have no doubt that all such women whose vulnerability can arise in so many ways deserve such protection as the law can give.

8. The effect upon the victim. As we have observed Miss Zeyn is clearly a resolute lady and she may, as Miss Philpott suggests, not have been as seriously affected as someone less resolute. That said the courts will recognise that rape is a demeaning, offensive and traumatic experience. We make no apology for repeating the passage from the Criminal Law Revision Committee's 1st Report on Sexual Offences cited by Lord Lane in Billam.

"Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value."

Having regard to the matters which we have mentioned we are satisfied that there were aggravating features in this case and the fact that they may not fit squarely into any one of Lord Lane's headings does not mean they are not relevant aggravating factors and does not mean that the appropriate sentence is in or around the starting point of 7 years.

Quite apart from these features the seriousness of this case lies in that this was an attack by 2 men on a lone woman at night in what at the time ought to have been the privacy and security of her home - on this occasion her tent. This is a case which falls squarely within that class of particularly serious situations which Lord Lane indicated required a sentence of at least 8 years and which in this jurisdiction should be read as some 11 years.

Billam is a well recognised and helpful guideline case. It does not presume to set a firm tariff for all rape cases. It provides guidance as to how a sentencer should approach the difficult task of sentencing in rape cases because uniformity of approach is important. As Sedley J said in R v Doe [1994] 16 Cr.App.R(S) 718 at 720

"Billam is a guideline case, but it is not a definitive statement of the sentences to be imposed or enacted. It is certainly not a set of rules."

Miss Philpott made one other point. It was McCormick who produced the knife and who persisted in this attack upon Miss Zeyn and her property and it could be perceived as unfair that McQuillan should receive a longer sentence. If such a perception exists it would be ill founded. McCormick accepted his responsibility from the outset and pleaded guilty at the earliest opportunity - actions for which he is entitled to a considerable discount. Further he was of assistance to the Crown in that he gave evidence which enabled the jury to be sure as to what had happened. The learned trial judge when passing sentence referred to the facts in this way.

"They make up an appalling catalogue of barbaric and brutal behaviour on the part of you 2 young men. Between you, you decided quite deliberately to seek out this young woman camping on her own at this quiet site at the beach at Cushendun and to rape her, to have sex with her against her will just because she was there alone; a lone female who was vulnerable. No doubt you were inflamed by the drink which you had consumed but that does not give you any vestige of an excuse."

We readily endorse those remarks. We do so specifically because Miss Philpott saw fit to suggest that if Miss Zeyn had not been a German tourist visiting Northern Ireland her client would not have received as severe a sentence as one of 12 years. This sentence was not passed because she was German or a tourist. It was passed because she was a vulnerable young woman who was the victim of a predatory attack by the 2 applicants and it mattered not if she was a local or a foreigner; a resident or a visitor. All require equal consideration in the eyes of the law.

Looking at all the evidence, having regard to the good sense enshrined in Billam and bearing in mind counsels helpful submissions we are entirely satisfied that McQuillan's sentence of 12 years' imprisonment was an entirely proper one. It is not excessive - much less manifestly excessive. His application is refused and his appeal is dismissed.

McCormick's case

Mr Philip Mooney QC appeared with Mr McNeill for this applicant. With understandable candour he frankly accepted that there were serious aggravating factors in the case against McCormick - the use of a knife to subdue Miss Zeyn and his persistence in returning to the tent and in attacking her at the phone box despite having earlier been driven off by the CS gas. He also reminded us that McCormick was guilty not of rape but of attempted rape but we agree with the learned trial judge that this is one of those cases were very little distinction can be made between McCormick's attempt and McQuillan's completion of the offence of rape.

There were however significant mitigating factors. Firstly his early expression of sincere remorse and sense of shame and disgrace which had been brought to the area. Secondly his early plea of "guilty". Thirdly his assistance to the Crown by

giving evidence. Such evidence being of significant value as McQuillan was seeking to claim that he had not been involved.

There is no doubt that it is both sound law and good sense that a plea of guilty in this type of case is a very material mitigating factor which will attract a considerable reduction in the total sentence which would have been appropriate if the case had been contested. Understandably, however, judges have declined to define even in general terms the appropriate amount of any discount because the circumstances of cases are infinitely varied. That said it is well recognised that the earlier a guilty plea is entered the greater will be the amount of discount. Mr Mooney suggested that the learned trial judge did not have sufficient regard to this principle.

In relation to the giving of a `discount' to an offender who assists the police or the Crown it is equally clear that such conduct should be recognised by the giving of a lesser sentence than would otherwise be appropriate. Again, however, the amount of such `discount' depends on the circumstances of each individual case.

Mindful of the very limited value of a citation of sentences in other cases (see the Judgment of Carswell LJ (as he then was) in R v Williamson (1995 - presently unreported) Mr Mooney referred us to several authorities including R v Behich 1986] 8 Cr.App.R.(S) J87 and R v Rowe [1989] 11 Cr.App.R(S) 342. We have looked afresh at the judgments in those cases but discern no statement of principle which aids us in this case. We note, however, the observation of Waterhouse J in Behich when he said:

> "It was right for the judge, when sentencing the appellant, to have witnessed the hardening climate of opinion about offences of this kind which has been reflected in guidelines from the courts and in legislation."

The last decade has regrettably seen an upsurge in cases of rape and other sexual offences. The courts must recognise such a development and the public's abhorrence of it and this will inevitably and properly lead to the imposition of longer sentences.

Mr Mooney also referred to R v Wood [1987] 9 Cr.App.R(S) 238. In that case the appellant identified a co-accused to the police and gave evidence against another person who was in the event acquitted. In passing sentence no mention was made of this fact. Giving the judgment of the court Roch J said:

> "As the single judge observed there is in the sentencing remarks of the Crown Court judge no reference to this factor. There are numerous decisions of this Court in which the Court has said that it is to the advantage of the law-abiding public that criminals should be encouraged to inform on other criminals and to give evidence against them. That encouragement takes the form of a discount in the sentence imposed from the sentence which would otherwise be the proper sentence for those offences and that offender.

It is in the view of this Court in cases such as this, desirable that where a defendant has rendered assistance to the prosecuting authorities, it should be made clear that credit for that assistance is being given to the defendant when he is being sentenced."

Mr Mooney drew our attention to the fact that the learned trial judge had omitted from his sentencing remarks any reference to the fact that McCormick had given evidence and so assisted the Crown. Accordingly, he submitted, that there was an error in principle and that this court should reduce the sentence for that reason also. In response Mr James Lavery QC (who appeared with Mr Richard Weir for the Crown) drew our attention to the learned trial judges remarks at page 87 when he said:

"This was a very bad case and you 2 young men will have to be punished accordingly. I have taken into account McCormick's relative youth. I have considered the records of each of you and the psychiatric reports and the probation reports. I have made allowances for the fact that the records contain different classes of offences. I have also had regard to what counsel have said on behalf of each of you. I regard the totality of the behaviour of each of you as closely comparable in intention and effect. I would have made no difference between you in sentence but I have made some reduction in sentence for McCormick's plea of guilty."

As to what Mr Mooney had said he referred to page 83 which shows that Mr Mooney concluded his submissions by saying:

"The only point that I would make in favour of my client, and I would respectfully submit that it is a strong point as well is that my client himself has given evidence in this case on behalf of the Crown. That is something which is unusual and in my respectful submission in the circumstances where there is absolutely no indication to my client as to what benefit it might be to him or as to how he would benefit in any way. I would respectfully submit that that is an important matter in his favour."

The learned trial judge proceeded to sentence both applicants at the conclusion of Miss Philpott's submissions as there clearly was no need to postpone or delay sentencing. We have no doubt that Mr Mooney's final point, which was an obvious one, will have been fresh in his mind when he decided on the appropriate sentence which he will have done before making his remarks. In complicated cases or when sentencing is distanced from counsels pleas in mitigation it may be "desirable" (to use Roch J's expression) to mention that credit is being given for assistance but it is not a mandatory requirement.

We have looked afresh at all aspects of McCormick's case and referred to both the aggravating and mitigating factors which related to his participation in this very serious offence. We have no doubt that he received every proper discount before a

final sentence of 10 years was reached. Accordingly we are satisfied that the 10 year sentence is appropriate, the application is refused and the appeal is dismissed.