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*(subject to editorial corrections)*

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND.**

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**THE QUEEN**

**-v-**

**TERENCE JOSEPH RITCHIE**

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**Before: Carswell LCJ and Higgins J**

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**HIGGINS J**

[1] On 7 March 2003, following a trial before His Honour Judge McFarland and a jury at Londonderry Crown Court, the appellant was convicted of one count of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861. On 13 June 2003 the appellant was sentenced to 4 years' imprisonment. He appeals against that sentence with leave of the single Judge.

[2] On the afternoon of Wednesday 11 July 2001 the appellant and his girlfriend went to Sandino's Bar, Water Street, Londonderry. The appellant had previously worked in the bar but had been dismissed some months earlier. The couple ordered drinks and sat upstairs. In the course of the afternoon they were served three times by the barman. After serving the pair their third round of drinks it came to the barman's attention that the upstairs toilets had been vandalised. Suspecting that the appellant was responsible the barman consulted with his manager and they decided that the appellant should not be served more drinks. When the appellant next came to the bar he was told that he had had enough and to go home. The barman described the appellant as "irate" and said that he started "shouting and roaring" at both himself and the manager. A customer intervened to place a distance between the appellant and the manager, and at that point the barman put his left hand up to the appellant's face to push

him away. The appellant then bit the barman's middle finger, holding it between his teeth while shaking his head from side to side and growling. The barman estimated that the biting incident lasted between 1 and 2 minutes during which other staff and customers tried to pull the appellant away. The appellant was put out of the premises when he finally released the barman from his grip. A taxi was called to bring him to hospital, but as he left the bar the appellant squared up to him with clenched fists in the street. Thinking that he was about to be set upon the barman punched the appellant to the ground.

[3] The barman was taken to the A&E department of Altnagelvin Hospital where his injured finger was treated in iodine, he received a tetanus injection, the wound was dressed and he was prescribed antibiotics. A statement from Dr A Orr states that he suffered a laceration to the nail bed of the left middle finger and a corresponding laceration to the pulp of the finger.

[4] In August 2001 the appellant was interviewed by the police. He claimed that he was assaulted by the injured party and another man. He said that during this assault, in which the appellant was injured, the injured party's hand came into contact with the appellant's face. At his trial in March 2003 the appellant pleaded not guilty and maintained that he acted in self-defence.

[5] The appellant has a short, but relevant, criminal record. On 7 September 1994 at East Tyrone Magistrates' Court he was conditionally discharged for two years for common assault. At Londonderry Crown Court on 19 November 1998 he was sentenced to a custody probation order of 6 months' imprisonment and 2 years' probation for causing grievous bodily harm with intent. This last conviction involved the appellant biting the nose of his girlfriend's stepfather and he was alleged at the same time to have growled and shaken his head in a similar manner to the present offence.

[6] A pre-sentence probation report was before the court. The probation officer commented that during the custody probation order "he engaged well in supervision taking advantage of all opportunities offered to him. He completed the Alcohol Management Programme, Anger Management work and engaged in positive diversionary activities in the community including the Duke of Edinburgh Award Scheme. Unfortunately he re-offended which would suggest that the learning and skills he acquired

through this Order were not sufficiently maintained to help him avoid re-offending". The report refers to recent qualifications he has gained as well as his endeavours to improve his employment prospects. It appears that since October 2002 he has abstained from alcohol. The probation officer commented "When under the influence of alcohol Mr Ritchie clearly has the capacity for violent and quite disturbing behaviour in terms of biting, growling and shaking his head from side to side…This does not appear to have been a premeditated offence and whilst the defendant being sacked from his job in this establishment could provide a motive, I do not believe it was Mr Ritchie's intent to commit such an offence when he went to the bar. The impulsive, violent nature of the offence will undoubtedly concern the Court. Whilst the defendant expresses regret for his behaviour and empathy for his victim, the fact that he has involved himself in similar offending in the past would suggest that this insight is significantly limited. Mr Ritchie would consider himself a victim on this occasion given the treatment he received from the injured party prior to being escorted from the bar and after."

[7] As to future risk, the probation officer stated that "the defendant can be a dangerous and volatile individual when under the influence of alcohol". She considered him to present a medium risk of re-offending, given his propensity to relapse into excessive drinking at times of emotional crisis, and suggested that he might benefit from relapse prevention work. She recommended that the appellant should be monitored by the Probation Service upon release.

[8] Three psychological reports by Dr Ian Hanley were considered at the Crown Court. The earliest had been obtained for the appellant's appearance at Londonderry Crown Court in 1998. This report dated 23 April 1998 detailed a history of physical and sexual abuse in childhood. Dr Hanley did not consider that the appellant had a problem with anger management and was of the view that there was evidence that the appellant was beginning to make a success of his life. A further report dated August 1998 noted that a psychiatrist had reported in 1993 that the appellant was "deeply disturbed". Dr Hanley went on to state that the appellant was not a violent man and did not consider that there would be a repetition of this type of offence. Dr Hanley stated that "when one considers the damage so often done to individuals by systematic and prolonged childhood abuse it is immensely gratifying to see someone who has escaped this and instead become a warm and caring human being."

[9] In his report dated 1 April 2003 Dr Hanley accepts that he had underestimated the risk of angry, violent behaviour in the context of continuing alcohol abuse. He wrote that "the recent history supports the view that Mr Ritchie is basically a well-intentioned individual but prone, especially when intoxicated, to episodes of emotional disturbance and anger which are triggered by memories of being abused or taken advantage of by others. The current offence occurred in this context." Dr Hanley was of the view that the appellant had made considerable progress in resolving his personal emotional difficulties and stated that he might benefit from a short course of cognitive behavioural therapy. He remained optimistic about the appellant and stated that he is "at low risk of re-offending providing he continues to abstain from alcohol".

[10] It was submitted to the trial judge that as the prosecution were content for the case to proceed in the Magistrate's Court the appellant should be sentenced as if the Crown Court had no greater powers than the magistrate would have had for the same offence. This would have the effect that the maximum sentence that could be imposed would have been a sentence of imprisonment for twelve months or a fine of £1000, rather than the five years imprisonment permitted by section 47 of the Offences against the Person Act 1861. The trial judge did not accept that argument and said so in these terms –

> "I do not accept that argument. This is a Section 47 offence, the maximum is five years. The director decided to bring the case before the magistrate. That's a decision for the director to make and there are all sorts of reasons for that decision, but you have made an election for trial. No doubt you were advised before you made that election, as to the consequences and I do not consider myself to be restricted in any way with regard to sentence save, of course, the maximum that the law lays down, which is five years, and I do not believe there's any breach of any Article 6 matters."

[11] The trial judge considered the different types of offence created by various sections of the Offences against the Person Act 1861. He referred to the analysis of these offences in the decision of the Court of Appeal in *R v Benson* (unreported) and quoted the following passage from the judgment of the Lord Chief Justice -

> "[7]We have to consider as an appellate tribunal the relationship between this offence and the maximum for an offence under Section 47 of the Offences Against the Persons Act 1861 and also the relationship between this and the more serious offences under Section 20 and Section 18. As we stated in the course of the argument these are not watertight categories and a case may involve a more serious quality of acts although not resulting in wounding or grievous bodily harm and therefore be charged under Section 47; whereas a case which involves a less serious quality of acts but results in more serious consequences may be charged under one of the other sections. Therefore one cannot simply say that all Section 18 cases must be at the top level, Section 20 the next and Section 47 below it. It is necessary to keep a sense of proportion between the consequences of the acts and the actions of the particular accused.

[12] That appeal related to two offences of assault occasioning actual bodily harm and two offences of assaulting a constable and one offence of criminal damage. The appellant had a very long criminal record and a very serious and longstanding alcohol problem. On the occasion in question he had been admitted to hospital suffering from an overdose of alcohol and drugs. While in the hospital he grabbed a nurse by the neck of her uniform tearing her clothes and stabbed her in the leg with a fountain pen. Other staff came to her assistance and got him to the ground where he continued to struggle and then he punched another nurse in the face. The learned trial judge said the case warranted a sentence of three years. The Court of Appeal reduced the sentence to two years. After the passage quoted above the Lord Chief Justice went on to say -

> "[8]Having done that and considering the circumstances of the defence this was a bad enough case of assault occasioning actual bodily harm. But what we have to keep in mind is that if it is three years on a plea that represents something near the top of scale for such offences and we consider that it may not be one of the very worst cases under Section 47 and it is always necessary to keep in mind the

> possibility of an even worse case. Secondly, the run of sentences for grievous bodily harm or unlawful wounding and assault occasioning actual bodily harm is such that three years on a plea generally represents a somewhat worse case than the present. We are reluctant to be prescriptive, and it is not our intention on this appeal to lay down guidelines for the different types of assault cases, but we have come to the conclusion that the sentence is to some extent out of line as an equivalent of three years and that it should be reduced."

[13] In his sentencing remarks in the instant case the trial judge recognised that there were aggravating factors, not least of which was the previous conviction for a rather similar offence. He went on to say –

> "As I have indicated you're clearly a troubled man, you have difficulties, but you are violent, you have little self-control, you do consume alcohol ( I appreciate you may be alcohol free for – it may be six months now) but I do believe that you are a danger to the public and that is confirmed by the Probation Report and the Probation Officer.
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> So taking everything into account I believe this is a very serious case – it falls into the more serious aspect of the Section 47 charge – which is a maximum of five years and I'm going to impose a sentence of four years imprisonment."

[14] The trial judge then went on to consider whether or not he should impose a custody probation order. He decided it was not appropriate to do so as the present offence occurred within six months of the appellant completing the probation element of his previous sentence and because the probation order had "really no impact on you whatsoever".

[15] The grounds of appeal against the sentence imposed were formulated in the following terms –

> "The sentence imposed on the Appellant was manifestly excessive and wrong in principal having regard to :
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> (a) all the circumstances of the offence;
> (b) the injuries suffered by the Appellant;
> (c) the level of injury suffered by the injured party;
> (d) the age and personal circumstances of the Appellant;
> (e) the contents of the pre-sentence report;
> (f) the Appellant's willingness to engage with the Probation programme;
> (g) the contents of Mr Hanley's report;
> (h) the fact that the Appellant elected for trial in Crown Court and the failure of the trial Judge to have any or adequate regard to the maximum sentence available to a Magistrate on summary trial;
> (i) the failure to make a sufficient and appreciable reduction in the sentence in order to accommodate a suitable probation element."

[16] Mr Turkington, who appeared on behalf of the appellant, accepted a number of matters from the outset, namely –

> "that this was a nasty assault involving the use of the appellant's teeth, that there is an unacceptable level of violence on the city centre streets and that the appellant has a relevant criminal record."

[17] He also accepted that these were aggravating circumstances that the trial judge was entitled to take into account in this case. Nonetheless Mr Turkington submitted that the sentence of four years imprisonment was manifestly excessive and wrong in principle and that the trial judge was wrong to reject custody probation as a proper disposal of the case. Relying on his helpful skeleton argument he concentrated on four main submissions. These were –

1. that the sentence was outside the range normally imposed for assault occasioning the type of harm caused on this occasion;

2. that the trial judge gave insufficient weight to the reports of Dr Hanley and the appellant's unfortunate background;
3. that the trial judge erred in failing to take into account that the maximum penalty which could have been in imposed in the Magistrate's Court, which was the prosecution's choice of venue for the case, was twelve months imprisonment;
4. that the trial judge erred in not imposing a custody probation order which was recommended in the probation report.

[18] Mr Valentine who appeared on behalf of the Crown accepted that this was not the most serious case of assault occasioning actual bodily harm. However he submitted that there were aggravating features that justified the sentence imposed. He listed these as – the manner of the assault namely biting; that the injured party was a barman who at the time was attempting to enforce the licensing laws; and the fact that the appellant has a previous conviction for a very similar offence. Article 37 of the Criminal Justice (NI) Order 1996 permits a court to take into account any previous convictions of the offender. It is in these terms –

> "Article 37(1). In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his respond to previous sentence."

[19] In submitting that the Crown Court was restricted in its powers of sentence as the Director of Public Prosecutions had made representations that the case was fit for summary trial, counsel on behalf of the appellant relied on a passage in the judgment of Lowry LCJ ( as he then was ) in *R v Finkle* [1988] 7 NIJB 78. At page 81-2 he stated –

> "In our opinion the fact of the appellant's unemployment is a point that ought to receive consideration. We also bear in mind what was likely to have happened to him if he had elected for trial by the Magistrate's Court. It is not a principle that accused persons must be especially heavily sentenced if they avail of their right of going to the Crown court in certain cases, such as accusations of theft, which could have been tried by a magistrate. If Parliament sees fit to keep open that kind of option for accused persons,

the exercise of that option should not be discouraged by the implied sanction of not only a heavier sentence that the magistrate might have inflicted, but a sentence which would really be out of all proportion to what the magistrate would have done. We have the opportunity of considering this man's previous behaviour and it would be an entirely different matter if he had previous convictions for dishonesty and in particular for this form of dishonesty."

[20] Article 45 and 46 of the Magistrate's Courts (NI) Order 1981 ( the 1981 Order ) make provision for summary trial of indictable offences. Article 45 of the 1981 Order provides –

"45.-(1) Where –

(*a*)an adult is charged before a resident magistrate (whether sitting as a court of summary jurisdiction or out of petty sessions under Article 18 (2)) with an indictable offence specified in Schedule 2, and

(*b*)the magistrate, at any time, having regard to –

(i)any statement or representation in the presence of the accused by or on behalf of the prosecution or the accused;

(ii)the nature of the offence;

(iii)the absence of circumstances which would render the offence one of a serious character; and

(iv)all the other circumstances of the case (including the adequacy of the punishment which the court has power to impose);

thinks it expedient to deal summarily with the charge; and

(*c*)the accused, subject to paragraph (2) having been given at least twenty-four hours' notice in writing of his right to be tried by a jury, consents to be dealt with summarily;

the magistrate may, subject to the provisions of this Article and Article 46, deal summarily with the charge and convict and sentence the accused whether upon the charge being read to him he pleads guilty or not guilty to the charge.

(2)The requirement of the notice mentioned in paragraph (1)(*c*) may be waived in writing by the accused.

(3)A resident magistrate shall not deal summarily under this Article with any offence without the consent of the prosecution.

(4)For the purposes of this Article and Article 46 'adult' means a person who is, in the opinion of the court, of the age of seventeen years or upwards."

[21] Schedule 2 to the 1981 Order lists the indictable offences that may be tried summarily. Paragraph 2(1) of Schedule 2 includes offences under sections 20, 27 or 47 of the Offences against the Person Act 1861 in the list of indictable offences that may be tried summarily. Assault occasioning actual bodily harm is an offence contrary to Section 47 of the Offences against the Person Act 1861. Thus a magistrate has power to deal with such an offence summarily, provided the accused consents. If the appellant does not consent then the case proceeds on indictment. The accused in those circumstances does not elect for trial by jury, he declines to consent to summary trial and thus the case proceeds on indictment in the normal way. If the accused consents to the offence being dealt with summarily, then Article 46 applies. This Article details the powers of the magistrate in dealing with indictable offences summarily. Paragraphs (4) and (5) of Article 46 set out the powers of the magistrate upon conviction and the effect of acquittal -

> "(4)Upon convicting the accused the magistrate may sentence him to be imprisoned for a term not exceeding twelve months or to a fine not exceeding £1,000 or to both, so, however, that the accused shall not be sentenced to imprisonment for any greater term or to a fine of any greater amount than the term or fine to which he would be liable if tried on indictment.
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> (5)If the magistrate dismisses a charge with which he has dealt summarily under the provisions of Article 45 and of this Article, the dismissal shall in all cases have effect as though it were an acquittal on a trial of the charge upon indictment."

[22] Where the prosecution make a statement or representation of the type envisaged in Article 45(1)(b) ( that is, that the case is fit for summary trial ) but the accused declines to consent to summary trial, there is no rule of law or principle that restricts the powers of the Crown Court in sentencing the offender, other than the maximum sentence permissible in this case five years' imprisonment under Section 47 of the Offences against the Person Act 1861. Article 46 restricts the Magistrate's Court to a maximum of twelve months' imprisonment but does not impose any restriction on the Crown Court. The fact that the prosecution make the type of statement envisaged by Article 45(1)(b) is not a relevant consideration for the Crown Court in determining the appropriate sentence. However the circumstances relating to the offence, which may have prompted the prosecution to decide that the case was fit for summary trial, would probably be relevant considerations for the Crown Court in determining the appropriate level of sentence. Thus a sentence imposed in the Crown Court that was out of all proportion to the sentence that the Magistrate could have imposed, would probably not reflect the circumstances relating to the offence that prompted the prosecution to suggest that the case was fit for summary trial.

[23] Assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861 is an offence that can be committed in numerous ways with many different consequences. The circumstances that justify the accusation of assault are many and varied, and the harm that may be caused can be any bodily harm short of grievous bodily harm. Thus the Crown Court has to look not just at the type of

assault committed, but also at the nature of the harm caused and determine where in the permitted range the appropriate sentence lies. In some cases the type of assault may be the predominating factor, in others the nature of the bodily harm, though more often it will be a combination of the two. Thus it is difficult to compare sentences in two cases of assault occasioning bodily harm. An appellate court has to perform a similar exercise and determine whether the sentence imposed falls within the range for the type of offence committed bearing in mind the other and perhaps more serious types of assault and harm that may be caused, yet fall within the same offence. In this instance the assault was a single but prolonged bite accompanied by an unnerving growl. The injury was not the most serious. It was a reprehensible act committed against a man who was simply doing his duty and it was not the first time the appellant had committed such an offence. The trial judge was entitled to take these matters into account as aggravating circumstances along with the appellant's previous conviction. He was equally entitled to take into account the prevalence of violent offences in Londonderry City centre. Nonetheless a consideration of the various types of assault and types of injury that fall within the section 47 offence suggests that this was not the most serious type of assault occasioning actual bodily harm, reprehensible though it was. We have concluded that the sentence of four years' imprisonment was above the range for the type of offence committed on this occasion. We consider that the offence warranted an immediate sentence of imprisonment, but that a term of two and a half years' imprisonment would be sufficient to meet the circumstances of the case.

[24] Counsel on behalf of the appellant submitted that the trial judge erred in not imposing a custody probation order in this case. The Probation Officer in her report stated –

> "Although Mr Ritchie has been the subject of a Custody Probation Order in the past there are clearly outstanding issues that need to be addressed with him in order to reduce the risk he present. That being the case I believe Mr Ritchie should be monitored upon release by the Probation Service which could help protect the public and endeavour to rehabilitate him."

[25] In his interview with the Probation Officer the appellant was willing to undergo a further period of probation during which his problem with alcohol and re-offending would be addressed. He was also prepared

to attend with the Community Mental Health Team and engage in a course of cognitive behavioural therapy. As required by the Criminal justice (NI) Order 1996 the trial judge stated his reason for not imposing a custody probation order. This was because the appellant did not appear to have benefited from the period of probation that had been imposed for the earlier offence, to which I have already referred. On this issue the Probation Officer stated –

> "The defendant has had the benefit of Probation supervision in the past which, to his credit, he stringently adhered to, taking advantage of all opportunities offered to him. It is, therefore, unfortunate and worrying that he again finds himself before the Court for a similar offence. While Mr Ritchie has consented to undertake a further period of supervision, the fact that he has had the benefit of this disposal in the past and has since re-offended does not inspire confidence with regard to the defendant's commitment to change. However, Mr Ritchie may benefit from relapse prevention work to ensure that he does not lapse into lifestyle choices that could increase his risk in the future."

[26] It is correct that the appellant, in committing a similar offence so soon after the completion of the probation element of the custody probation order, may not have demonstrated that he benefited from that period of probation. However there were some very positive indications from that period of probation that established some benefit to the appellant, albeit not total success. In making her specific recommendations the Probation Officer did not think this was a lost cause, rather that there were some aspects of the appellant's behaviour and background that merited further probation intervention. One period of probation that is not completely successful, does not exclude a further attempt. Each case requires an individual approach. In *R v Benson*, supra, the Lord Chief Justice observed –

> "Having said that, we do not consider that this an appropriate case for a custody probation order. We would regard those as an admirable method of dealing with people where there is some prospect that the probation element will be fruitful in redemption

> of the offender and protection of the public. Regrettably the facts contained in the report we have before us do not seem to us to establish such a prospect."

[27] We have had the benefit of a further report from Dr Hanley that was not before the trial judge as well as two references. In that report Dr Hanley stated that he remained of the view that the appellant "is a well intentioned young man who has worked hard to overcome his difficulties. He is a complex young man and not typical in my view of the violent thugs who regularly cause trouble in Derry City Centre". He commented that providing he remains abstinent from alcohol the risk of the appellant re-offending was low. The appellant remained abstinent from alcohol from October 2002 until the date of sentence. While recognising the force of the opinion that the earlier probation order was not successful in deterring the appellant from the commission of a further and similar criminal offence, we are of the view that it could not be said that there was not some prospect that a probation element in the sentence, with the specific recommendation made in this instance, would be successful in preventing the appellant from re-offending. We consider that the recommendation of the Probation Officer should be accepted and a custody probation order should be made. We therefore allow the appeal against sentence.

[28] If the appellant consents we shall substitute a custody probation order requiring the appellant to serve a custodial sentence of 18 months imprisonment and on his release from custody, to be under the supervision of a probation officer for a period of twelve months, during which period he shall attend the Alcohol and Drug Service and undertake relapse prevention work, attend the Community Mental Health Team and engage in a course of cognitive behavioural therapy, and also undertake offence focused work to enhance victim insight and reinforce the consequences of offending. In the absence of the appellant's consent we would have substituted a sentence of two and a half years' imprisonment.