

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR
NORTHERN IRELAND (No 2 of 2001) (TREVOR WILLIAM HAMILTON)**

CARSWELL LCJ

In this reference, brought under section 36 of the Criminal Justice Act 1988, the Attorney General for Northern Ireland sought leave to refer to the court sentences imposed upon the offender Trevor William Hamilton, on the ground that they were unduly lenient. They were imposed at Enniskillen Crown Court on 19 September 2001 by His Honour Judge Foote QC, when the offender pleaded guilty to four offences committed against the victim, a woman in her late twenties. At the outset of the hearing we granted leave and proceeded with the reference.

The counts in the indictment in respect of which the offender was sentenced on 19 September 2001 were as follows:

- Count 1 – rape;
- Count 4 – attempted buggery, contrary to section 62 of the Offences Against the Person Act 1861;
- Count 5 – indecent assault, contrary to section 52 of the Offences Against the Person Act 1861;

- Count 6 – making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861.

The judge imposed the same concurrent sentence on each count, a custody probation order consisting of three years and eleven months' detention in the Young Offenders' Centre, followed by three years' supervision by a probation officer.

The offences all arose out of an incident which occurred in the vicinity of Sion Mills, Co Tyrone in the afternoon of 16 February 2000. Just before 2.30 pm the victim was waiting in Sion Mills for a bus to take her home to Newtownstewart when the offender stopped his car beside her and offered her a lift. She accepted the offer and got into the car. Instead of driving directly towards Newtownstewart the offender headed along a country road, on the pretext that he had to collect something from his mother's house. He stopped in the yard of a house in a rural area and left the victim in the car for a few minutes.

The offender then returned to the car, got in and jumped in on top of the victim, whom he pushed down on the seat. He leaned on her with his full weight, abused her and put his hand over her mouth. He squeezed her neck and then placed his hand on her private parts. She struggled and tried without success to fight him off. He said "I'm going to fuck you" and dragged her out of the car, pulling her by the wrist and the hair. He ignored her pleas to stop and to let her go and pulled her into a nearby caravan. He closed the caravan doors and pushed the victim down on to a seat, saying

repeatedly that he was going to fuck her. He sat on top of her, holding her wrist and squeezing her neck. He attempted to kiss her, placing his tongue in her mouth.

The victim tried very hard to fight him off, but the offender was too strong for her. He forcibly pulled off much of her clothing. As she struggled he made a threat to kill her, which she believed to be serious. He placed his finger inside her vagina, then proceeded to rape her. She told him several times that she was menstruating and he pulled a tampon out of her vagina, where the intercourse had driven it in deep. Hamilton then attempted to have anal intercourse, but was unsuccessful, as the victim was still struggling. He raped her again and then withdrew his penis and compelled her to suck it. He finally entered her vagina again before ejaculating over her pubic and abdominal areas. The episode went on, by her reckoning, for about an hour.

He then required the victim to swear on her son's life that she would not tell the police. He said that he was sorry for the marks on her neck and said that he could not believe what he had done. He drove her to Newtownstewart and dropped her off. The victim took the number of his car as he drove off, then ran to her sister's house and reported the incident to the police. She took police officers to the scene of the rape, where Hamilton was working at his car. The number plates had been removed and Hamilton claimed that he had not been out in the car and that he had taken the plates off a couple of days before. In the house there was evidence that clothing had

been recently washed and it appeared that Hamilton's hair had been cut in an attempt to alter his appearance.

The offender maintained during interview his denial that he had had anything to do with the offence. He was charged on the indictment with three counts of rape and the three other offences of attempted buggery, indecent assault and making a threat to kill. He pleaded not guilty on arraignment to all charges and only changed his plea when the trial was ready to commence on 26 March 2001. He then pleaded guilty on re-arraignment to one count of rape and to the other charges and was put back for sentence. The judge ordered that the other charges lie on the file, not to be proceeded with save by leave of the court.

The offender was aged 17 years and 8 months at the time of the offence and is now aged 19 years. He was convicted on 17 December 1999 of five offences of indecent behaviour, apparently consisting of exposing himself to women drivers on a country road. He was placed on probation for two years, with a condition that he attend the Barnardo's Therapeutic Project.

The pre-sentence report stated that it was evident from his offending that Hamilton has a major difficulty in controlling and channelling his sexual feelings, which gave rise to major concern. It was difficult to assess the full extent of this, given his ongoing failure to discuss and fully confront his behaviour. He admitted that the crimes were premeditated but professed not to have any clear memory of committing them. The probation officer expressed the view that while he expressed remorse he tended to lack

insight into the violent nature of his behaviour, which in turn might lead to underestimating the trauma suffered by his victim. The report went on to state:

“However he has now expressed a willingness to participate in a Sex Offenders Programme which would lead him to address victim awareness and distorted thinking. Nevertheless, he continues to minimise his responsibility for his offending by claiming he can’t remember committing the offences. His persistence in expressing such views could greatly undermine the impact that participation in a Sex Offenders Programme would hope to achieve.

Mr Hamilton accepts that given the gravity of his offences that he will probably receive a custodial sentence and that any treatment he receives will initially be in a prison setting. On his return to the community, I feel that the defendant should continue to confront these issues in a constructive manner through the auspices of Probation supervision in order to help protect the community from any further risk of such behaviour.

If subject to post release Probation supervision, the defendant would be seen at least weekly for the first 4 months, after which time a further assessment would be made to match future contact with perceived risk of offending. In addition he would receive unscheduled home visits on a monthly basis to monitor any child protection issues and any concerns regarding risk of re-offending.

He will be required to participate effectively in a programme of work. His participation will be measured by his willingness to be more open about his offending, and the attitudes and thought process that underlie his offending. He will be expected to help identify strategies to control his sexual feelings and to evidence that he is putting such strategies into effect.

His risk of re-offending will be assessed and managed on an on-going basis through the inter-agency process for managing the risk that sex offenders pose. Through this process control measures will be identified to ensure effective controls over his lifestyle thereby contributing to community safety."

We were furnished with an educational psychologist's report, which the judge had had before him. The conclusion reached by the psychologist was that the offender is an immature, somewhat naïve man, with fairly underdeveloped social skills. He described his level of intelligence as follows:

"Mr Hamilton is a person of limited intelligence, with a verbal IQ which places him in the 'extremely low' category, in the bottom 2% of the population. (It might be noted that the previous description of the IQ range of 60 and below was 'mentally retarded'). With an IQ of 68, however, I would expect Mr Hamilton to know the difference between right and wrong, at least in situations usually regarded as straightforward.

With such a low IQ, however, I would expect him to experience difficulty understanding the more subtle aspects of a situation, and to be less able than the majority of the population in providing appropriate responses in a challenging situation."

The immediate effects upon the victim's psychiatric health were serious. She had a history of previous depressive illness which left her vulnerable. When a consultant psychiatrist examined her in July 2000, over five months after the incident, he found that she was suffering from a moderately severe depressive episode, which had been precipitated by the assault. She had been severely traumatized and described fear of another assault, which restricted her social and personal activities. She related to him

recent weight loss related to poor appetite, panic attacks, regular diarrhoea and vomiting, anhedonia and reduced concentration. We did not have any more recent report on the effects on the victim.

In his sentencing remarks the judge described the case as very serious and stated that if the offender had been three or four years older he would have sent him to prison for a term “well in double figures”. He took the view that he needed help as well as punishment and expressed his conclusion that he should not be sent to prison at his age but should remain in the Young Offenders’ Centre. He assessed the appropriate sentence as six years and eleven months. He therefore imposed a sentence of three years and eleven months’ detention (the maximum being four years) in the Young Offenders’ Centre, to be followed by three years’ probation (again the maximum for a custody probation order under Article 24 of the Criminal Justice (Northern Ireland) Order 1996).

In his reference the Attorney General identified the following aggravating features:

- “(a) This is a serious and prolonged assault which included attempted buggery and forced oral sex as well as rape. During the course of the assault the offender threatened to strangle the victim.
- (b) The victim’s pain and distress would have been exacerbated by her menstrual condition.
- (c) The physical force used throughout a long period was considerable.

- (d) The serious psychiatric impact on the victim.
- (e) The offender was in breach of a probation order imposed on 17 December 1999 for five offences of indecent behaviour.”

He also identified the mitigating features:

- “(a) The age of the offender (17 years when the offences were committed) and the fact that he is of low intellectual ability.
- (b) His plea of guilty.”

We agree that these factors, which were not disputed by the offender’s counsel, are material to consideration of the case. We regard it as a bad case of its type, premeditated, violent, repeated rape, accompanied by other degrading treatment of the victim, which occasioned her severe and lasting distress. We agree with the judge’s statement that prima facie it would attract a sentence into double figures. The features in favour of the offender are his age and intellectual state, but the latter is less relevant in judging the quality of his acts than in some offences, given his knowledge of right and wrong. Where it is of potential significance is in the question of the way in which the criminal sanction to be applied should bear on him. The judge focused primarily on what might have the best prospect of effecting some improvement in him, which is a proper and important consideration, but the submission of the Attorney General is that he failed to give enough weight to the public interest of marking the obloquy of such sexual preying on vulnerable females and deterring those who might be tempted to follow such a course.

Mr CA Simpson QC for the offender stressed his need for treatment rather than retribution and submitted that imprisonment would be likely to prove counter-productive in effecting rehabilitation. While not minimising the seriousness of the case, he suggested that the first priority in a case such as the present should be treatment of the offender, as the judge had appreciated, and that his approach through detention in the Young Offenders' Centre and the Probation Service was justified.

We would repeat again what we have quoted in previous cases, a passage from the Wolfenden Committee's report, in which it summarised the function of the criminal law in the field of sexual offences:

"To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."

We would also refer to what we said in *R v Molloy* [1997] NIJB 241 at 245-6:

"The courts must be concerned to protect women against the predatory instinct of males who see them as vulnerable objects for the gratification of their baser desires. We would return to the point which the court adumbrated in *R v J M* (1997, unreported), that in view of the increasing frequency of cases of rape, the courts will have to give serious consideration to reviewing the starting or baseline figure of seven years for a contested rape. We consider that sentencers should in any event regard it as no more than a general guide, rather than a fixed tariff for rape cases. Certainly in cases where the offence is aggravated by violence, sexual indignities or perversions, the scale should rise steeply and

judges should not hesitate to visit such cases with penalties that they consider appropriate.”

It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from attempting to follow their example. In particular, the courts will bring the full weight of criminal sanctions down on those who prey on women and subject them to sexual assaults.

The judge was entirely right in his assessment of the normal range of sentence for such cases. If this case had been contested, it would in our judgment have merited a sentence of 12 years’ imprisonment. Because of the lateness of the offender’s plea of guilty, which meant that the victim had to endure right up to the time of trial the stress of facing the prospect of having to give evidence, and the limited degree of remorse shown by him, he is not entitled to a substantial discount. We would have regarded a sentence of ten years as fully justified if the judge had imposed it. In the circumstances of the case we cannot regard a commensurate sentence of six years and eleven months as adequate, still less a disposition which limits the custodial period to three years and eleven months. The judge was entitled to consider the offender’s youth and the possibility of rehabilitation through the regime which is available in the Young Offenders’ Centre and the supervision of the Probation Service. We consider, however, that he placed too much weight on these factors and too little on the need to pass severe deterrent sentences for crimes of this kind, which must take priority over considerations personal to the offender.

We therefore consider that the sentence was unduly lenient. We accede to the application of the Attorney General and quash the sentences imposed by the judge. Taking into account the factor of double jeopardy and also the fact that the offender has almost completed the period of detention ordered by the judge, we would regard a sentence of eight years' imprisonment on the rape charge as appropriate, with lesser terms on the other counts. We have, however, given consideration to the possibility of making a custody probation order under Article 24 of the Criminal Justice (Northern Ireland) Order 1996. The terms of the pre-sentence report are somewhat equivocal and to some extent inconsistent, and we have felt a degree of doubt whether the offender is really likely to benefit from probation, given his limited insight and his minimising of his responsibility for his actions. On balance, however, we feel that some opportunity should be afforded to the offender to benefit from the supervision of the Probation Service, in the hope that it will, as the pre-sentence report says, help to protect the community from any further risk of such behaviour.

We therefore shall substitute the following sentences for those passed by the judge:

- Count 1, rape: custody probation order, consisting of a custodial element of seven years, followed by one year's probation supervision;
- Count 4, attempted buggery: five years' imprisonment;
- Count 5, indecent assault: two years' imprisonment;
- Count 6, making a threat to kill: two years' imprisonment.

All sentences will be concurrent. The probation supervision will be subject to the condition imposed by the judge, that the offender must attend and participate in a sex offender treatment programme specified by the supervising probation officer and while there comply with the instructions given by the person or persons in charge.

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**J U D G M E N T O F
C A R S W E L L L C J**

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