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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

RICHARD GEORGE BYRNE

DEFENDANT

_____

THE QUEEN

v

SIMON CASH

DEFENDANT

DIRECTOR OF PUBLIC PROSECUTION'S APPEAL

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Before: Morgan LCJ, Treacy LJ and Sir Richard McLaughlin

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MORGAN LCJ (delivering the judgment of the court)

[1] These references arise as a result of the imposition of an Enhanced Combination Order ("ECO") for offences of sexual assault by penetration contrary to Article 6(1) of the Sexual Offences (Northern Ireland) Order 2008 ("the 2008 Order"). In each case the offender committed the offence by digital penetration of the victim's vagina. The Director of Public Prosecutions submits that the sentences are unduly lenient and should be increased. The court now has an opportunity to give guidance as to how sentencing in such cases should be approached. By virtue of section 1 of the Sexual Offences (Amendment) Act 1992 no matter may be published which would lead to the identification of either victim.

[2] Mr McCollum QC appeared for the Director, Mr Berry QC appeared with Mr Taggart for Mr Byrne and Mr McDowell QC appeared with Mr Holmes for Mr Cash. We are grateful to all counsel for their helpful written and oral submissions.

Background

Byrne

[3] The 25-year-old victim went out for the evening with four friends and relations. She drank between five and seven alcoholic drinks. The offender joined the company at the end of the evening and all went back to a house. After a few minutes the victim decided to go to bed and went to sleep. She woke up to find what she believed was a man's penis going in and out of her vagina and could hear a man's heavy breathing beside her. This motion happened about five or six times and she sat up and turned round. The offender was lying on his back on the bed. He got out of bed and left the room. He came back 15 minutes later and said something like, "I thought that's what you wanted". She questioned how she could have wanted it when she had been sleeping. The matter was reported to police later that morning. The victim was examined and no injuries were noted.

[4] The offender was arrested later that day. He denied the allegation of rape that was put to him. He said he was told that there were three spare rooms and two of them were empty. He alleged that he went up to a bed but another girl came in and got into bed beside him so he got up and went to the other free room. He was there for about two minutes when he felt the victim moving in the bed beside him. He claimed he did not touch her in any way and said that he was sober and remembered what was going on. He specifically said that there had been no intercourse, digital penetration or anything like that. The offender was charged with rape.

[5] There was some delay in obtaining DNA evidence. The first report was obtained on 4 November 2015 but a report on other swabs was not obtained until 28 November 2016. The committal papers were not served until July 2018. It is common case that there was some culpable delay during this period by the prosecution in the period leading up to committal. Further DNA evidence was obtained after committal and the trial date was adjourned on a number of occasions to facilitate expert evidence on behalf of the defence. On 4 November 2019 a second count alleging assault by penetration contrary to Article 6 (1) of the 2008 Order was added to the indictment and the offender pleaded guilty to that count. That reflected the concession of the victim that she could not be sure that penetration was effected by the penis.

[6] A victim impact statement prepared after the plea of guilty indicated that for weeks and months following the incident the victim felt physically sick and was off work for about five weeks. She felt ashamed as if she was somehow to blame. The pre-sentence report indicated that the offender's partner gave birth in October 2019. He is employed in full-time work. He had increased anxiety and had been admitted to hospital due to a stress/panic attack. He was assessed as posing a low risk of sexual recidivism.

[7] Prosecution counsel presented the case on the basis that this was a digital penetration case with no aggravating factors. The learned trial judge noted that the offender had taken advantage of a vulnerable woman who was sleeping at the time and decided to interfere with her quite improperly but sentenced on the basis of no aggravating factors. He accepted a submission that the "starting point" was between 18 months and two years. He acknowledged the offender's low risk of reoffending, his good work record and lack of previous convictions and took into account to some extent the delay issue, agreeing that it was not a particularly significant issue. He considered that the appropriate sentence was one of 12 months and in accordance with the ECO pilot imposed a sentence of 80 hours community service with two years' probation.

Cash

[8] The victim was 20 years old. She was on a night out for her friend's birthday. The offender was one of six people in the party. She had not met him before that evening. The group met up at a friend's house and had a few drinks. They got a taxi to a bar where they joined other people. The victim left the bar at about 1 AM to get some food. Along with some of the group she went to a car park where they were due to be picked up by a pre-booked taxi at 1:30 AM to return to her friend's house. She sat on a path feeling tired and did not want to talk to anyone. As she was sitting with her eyes closed and her head down the offender sat down next to her, started to rub her back and then her thigh. She did not respond in any way. The offender started to play with her underwear and then put his fingers inside her vagina. She was in shock.

[9] When the taxi arrived the offender and another companion roused her and she got into the back of the taxi. She put her head against the window, put a foot up and crossed her legs pretending to be asleep. The offender got into the taxi beside her. He tried to move her head closer to him but she kept her eyes shut and sought to maintain her position. He started touching her legs and then forced them apart so that he could digitally penetrate her again. She was scared and could not do anything. The offender then undid his trousers. He lifted her hand which was lying limply by her side and put it on his penis. He then manipulated her hand so as to masturbate himself to ejaculation. He then wiped his hand on her back. The taxi driver told police that the victim appeared to be asleep for the entire journey with her head against the armrest.

[10] When the taxi arrived at the friend's house the victim told two of her friends what had happened. Police were contacted early that morning and on medical examination bruising was noted to the right side of the urethral opening together with further injuries which were consistent with digital penetration. The taxi was located and two areas of the back seat tested positive for semen. A DNA profile matching the offender was obtained.

[11] When arrested at home he said that he was sober and knew exactly what happened. He explained that by saying that his mother was present and he did not want to alarm her. He was later interviewed in May 2019 and confirmed that he digitally penetrated the victim and that the victim had put her hand on his penis but maintained that the victim had been talking to him during this and was not sleeping. The taxi foot footage was later shown to him which demonstrated that this was not correct.

[12] The victim impact statement indicated that the victim required antidepressants, diazepam and sleeping tablets. She started counselling shortly afterwards. She felt huge relief when the offender pleaded guilty approximately one year after the incident. The pre-sentence report indicated that the offender accepted responsibility for his offending behaviour and said that he must have lost self-control. He was assessed as a low likelihood of reoffending but a moderate risk in respect of sexual offending. He had been pursuing a degree course in nursing which was now lost to him. There were a number of references suggesting that his actions were entirely out of character.

[13] The trial judge selected a starting point of two years which it appears was intended to take into account all of the aggravating factors. Taking into account his previous good character, the impact on his career and his employment obtained subsequent to the incident he considered that a sentence of 17 months would have been imposed if the matter had been contested. In light of the early guilty plea he considered that a sentence of 12 months was appropriate and in those circumstances imposed an ECO comprising 100 hours community service and three years' probation.

Sentencing principles

[14] It was common case that where the offence of digital penetration contrary to Article 6(1) of the 2008 Order is committed without aggravating or mitigating factors the appropriate sentence is 2 years. We agree and that conclusion is amply supported by the relevant case law. Of course the starting point before making any allowance for a plea of guilty, has to take into account the aggravating and mitigating factors which could vary considerably in any such case. Where there were no aggravating factors and the mitigation was very strong the appropriate sentence for this offence could be a determinate custodial sentence of 12 months.

[15] The Probation Service of Northern Ireland ("PBNI") developed a proposal for an ECO pilot in three areas of Northern Ireland in June 2015. The pilot proposed that the ECO would be available where the court was considering a sentence of 12 months or less and the offender had an unstructured lifestyle, a range of needs and a motivation to change. The ECO requirement was a compulsory community service element with a focus on unpaid work of a restorative nature. The victim would have

the opportunity to be consulted on the type of work which the perpetrator should carry out.

[16] The second compulsory element was supervision for between 12 months and three years. The approach was restorative including a letter of apology, mediation or face to face meetings with victims. There were further discretionary elements including participation in accredited programmes and addressing social relationships with the aid of a mentor. ECOs focus on rehabilitation, victim issues, restorative practice and desistance. A significant preponderance of those subject to ECOs are repeat offenders, many with addiction issues and others with chaotic lifestyles.

[17] The prosecution submission in this case was that an ECO was not a suitable disposal in cases of this sort even if the appropriate determinate sentence was one of 12 months or less. The particular focus of the ECO was on changing the lives of repeat offenders with an emphasis on restorative practice within the community. In cases such as those with which this appeal is concerned victims are highly unlikely to wish to have anything to do with their abuser and if the sentencing range falls within the ECO range the offenders are unlikely to have any previous relevant convictions or live chaotic lifestyles.

[18] In each of these cases the pre-sentence report indicated that if a sentence of 12 months or less was considered appropriate the offenders were suitable for an ECO. In the course of the completion of the ECO it was indicated in the case of Cash that the supervision would focus on discussion and exploration of sexual attitudes including respect and entitlement, discussion and exploration of boundaries and understanding consent and completion of sex offending group work. Restorative elements would be undertaken in 1:1 work with a probation officer. The report in Byrne focused on the involvement in programmes and assessments.

[19] We accept that an ECO does not necessarily follow where a sentence of 12 months or less is considered appropriate for this offence. We also recognise that the rehabilitation of such offenders involves different strategies from those with chaotic lifestyles. We do not, however, accept that as a matter of principle the benefits of an ECO in promoting public safety through rehabilitation even in this sort of case should be underestimated. That accords with the statutory objectives of combination orders in Article 15(2) of the Criminal Justice (Northern Ireland) Order 1996. We do not, therefore, accept that in the right case an ECO for this offence would be wrong in principle.

[20] The next matter we wish to consider is the use of the Sentencing Council Guidelines. This court has made clear that assistance can be derived from the aggravating and mitigating factors identified in the guidance but sentencers are discouraged from being constrained by the brackets of sentences set out within the

guidelines. These cases raise an issue about the use of some of the aggravating factors.

[21] In each of these cases the trial judges recognised the vulnerability of each of the victims. In Byrne the victim was asleep when she was attacked. We accept that the offence of digital penetration is aggravated by the vulnerability of the victim if she is a woman asleep alone in a friend's bed at the time of the assault. We consider that R v Bunyan [2017] EWCA Crim 872 strongly supports the conclusion. The submission made to the contrary is unarguable.

[22] The only reference to vulnerability as an aspect of aggravation in the Sentencing Council Guidelines for this offence is "Victim is particularly vulnerable due to personal circumstances". That is a factor which alone brings a case from category 3 to category 2. It is important to understand the effect of such a finding under the scheme of the guideline. Where there is no additional culpability the starting point is six years custody where the factor is present and two years custody where it is not. The trial judge in Byrne properly recognised that the victim was vulnerable. It appears that he was persuaded that the vulnerability did not reach the level required to bring the case into the second category under the English and Welsh guidelines and did not consider the vulnerability he found as an aggravating factor.

[23] This example makes clear that one needs to be cautious about the way in which aggravating and mitigating factors are used under the Sentencing Council Guidelines. Where their impact is designed to establish the brackets within which the sentence is supposed to operate the aggravating factor may be set at a significant level. That does not mean that vulnerability at a lower level ought not to be taken into account as an aggravating circumstance in passing sentence in this jurisdiction.

[24] The same issue arises in relation to the question of persistence. In Cash the offender digitally penetrated the victim while she sat waiting for the taxi, digitally penetrated her again when she was in the taxi slumped across the seat and then committed a further offence using her hand to masturbate himself. In order to fall into category 2 within the Sentencing Council Guidelines one of the factors is the occurrence of a sustained incident. The presence of that factor would alter the starting point from 2 years to 6 years under the guidelines. This attack might well not fall within the description of a sustained incident but persistence is plainly an aggravating factor in this case.

[25] It is in the nature of every sentence that there is an element of retribution and deterrence. In some cases the deterrent element of the sentence is an overriding consideration and previous good character and circumstances of individual personal mitigation are of comparatively little weight. That is true in particular of offences of serious violence and of offences against public justice such as perjury or perverting the course of justice.

[26] In this offence there is a strong deterrent element but it is not overriding. Personal mitigation will carry some benefit but is likely to be limited. In many of these cases one of the issues the court will have to deal with is the question of whether there should be a specific discount for remorse in addition to that which is incorporated within the discount for the plea.

[27] We accept that there are cases where a discount for remorse as an additional factor is appropriate. In order to avail of that discount, however, it would be expected that the offender would acknowledge his remorse at the earliest possible stage. Part of the reason for giving the discount is the vindication it provides for the victim at an early stage. Where the indication of a plea only comes at arraignment or later it is unlikely that the court would be persuaded to give significant weight to an expression of remorse at that time.

Conclusion

[28] Applying these principles to the case of Byrne we consider that the vulnerability of the victim was a serious aggravating factor. In both Byrne and Cash it was obvious to the offender that the victim was vulnerable and that vulnerability provided the opportunity to commit the offences. The decision to take advantage of the victim shows a predatory disposition and a degree of calculation that the offender might get away with the offence because the victim was vulnerable. That justified an increase in the sentence in the case of Byrne by 6 months. The fact that he desisted when asked was to his advantage.

[29] It is said on behalf of the offender that there was delay in the prosecution of the case but throughout that period the offender continued to deny his guilt having explicitly maintained that he had not digitally penetrated the victim. For the same reason he cannot gain much discount from the fact that the digital penetration count was added at a late stage. His personal circumstances are more examples of lack of aggravating factors. He is entitled to discount for his plea but it came at a late stage. A discount of 20% would be generous. In our view the appropriate sentence was a determinate custodial sentence of between 21 months and 2 years.

[30] In the case of Cash the victim was vulnerable and tired as a result of the quantity of alcohol consumed. There was persistence in attacking her both at the kerbside and in the taxi. The offender committed a separate offence contrary to Article 7(1) of the 2008 Order. That justified an increase of 12 months on the 2 year commencement point. He had some examples of positive good character and had lost his place at university and his chosen career. He denied the offences at interview but pleaded guilty at arraignment. His expression of remorse came late and is not deserving of any further discount beyond that appropriate for the plea. Taking into account the mitigating factors the starting point before applying the discount for the plea was 30 months. The appropriate sentence was at least 21 months or a few months higher.

[31] A sentence is unduly lenient where it falls outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate. We are satisfied that the sentences in this case were unduly lenient. We note that each of the offenders has completed a significant portion of the community service element. The principle of double jeopardy should apply as this case raises the issue of a return to prison for offenders who have been released into the community. We consider that the principle is observed by substituting for the sentences imposed a determinate custodial sentence in each case of 18 months comprising 9 months in custody and 9 months on licence.