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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-

RAYMOND BROWNLEE (SENTENCING)

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Before: Morgan LCJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] The applicant seeks leave to appeal an extended custodial sentence of 6 years' imprisonment and 4 years' extension period imposed after he was found guilty by a jury on two counts of wounding with intent to cause grievous bodily harm, two counts of common assault and one count of false imprisonment. This was an attack which was carried out in the context of a relationship and this case gives us the opportunity to remind sentencers that the use of violence in a domestic setting is a significant aggravating factor. Mr Greene QC and Mr Toal appeared for the applicant and Mr Tannahill for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

The trial

[2] The evidence at trial was that on Sunday 3 October 2010 the victim was drinking outside the British Home Stores in the city centre in the company of other homeless people. At some point the applicant passed by and invited her to join him at his flat. She agreed after some initial reluctance in order to make up and chat as they had previously had a falling out. Both the applicant and the victim consumed large amounts of alcohol over the next three to four days during which the applicant subjected the injured party to verbal and physical abuse which included the applicant slapping her once in the face; punching and head-butting her; throwing a bottle at her which hit her on the right temple but did not break; biting her left ear; not allowing the injured party to leave the bedroom to use the bathroom, so she soiled herself; telling her "you're not leaving this place alive" and pulling her hair.

The injured party escaped by running out of the back door of the apartment only wearing a jumper. The applicant ran after her, assaulted her again and only stopped when a bystander intervened. He pleaded guilty to that assault but contested all the other charges.

[3] The applicant was convicted on counts 2 and 3 of wounding with intent to cause grievous bodily harm and sentenced to concurrent extended custodial sentences of 6 years with a 4 year extension. He was also convicted of common assault on count 5 for which he received a 10 month sentence of imprisonment and false imprisonment on count 9 for which he received an extended custodial sentence of 2 years with a 4 year extension. In respect of the common assault to which he pleaded guilty he was sentenced to 6 months' imprisonment. All of the sentences were concurrent. He was acquitted by direction of one common assault and the jury found him not guilty on two others. The jury were unable to agree on a further count of common assault which was left on the books.

[4] The background to this attack was described by the applicant in the pre-sentence report. He said that he had been involved in a casual relationship with the victim since August 2009. The relationship was fraught with difficulty and conflict to the extent that the PSNI made numerous callouts during the course of the relationship to de-escalate domestic related altercations between him and his former partner. As a result of the on-going tension between them the applicant and the victim fell into a cycle of separation and reconciliation.

[5] The applicant described to the probation officer what happened after the victim agreed to go with him to his property on the evening in question:

> "Later that evening, Mr Brownlee reports that he became involved in a verbal altercation with the victim having been accused of stealing alcohol belonging to her. He discloses that he became angry at this accusation and proceeded to pull the victim from a bed by the ankles before perpetrating a physical assault on her.
>
> The defendant alleges that the following day, he and the victim went to a local retail outlet to purchase more alcohol. Having returned home, Mr Brownlee reports that he became involved in a verbal altercation with his former partner regarding allegations that she previously made to police in relation to him. The defendant indicates that during this argument, he 'exploded with anger' and subsequently went on to inflict significant physical

> and psychological harm on the victim during the course of a serious assault."

The author of the pre-sentence report described this as a painful, degrading and humiliating experience for the victim in which the applicant inflicted sustained gratuitous violence over a two-day period until she was able to flee from the property.

[6] The trial judge described the injuries to the victim as follows:

> "A small cut to her left eyebrow approximately half an inch long, bruising and swelling to both eyes and also chin, swelling and bruising to cheekbone just below the right eye and generalised complaints of pain to right wrist, lower back and neck."

Personal background

[7] The applicant has a total of 136 previous convictions dating back to 1989. The majority relate to motoring offences however there are four previous convictions for serious assault. In May 1990, the applicant committed two offences of AOABH arising from an incident that occurred in a public place, when the applicant allegedly asked a member of the public for £1 to enable him to purchase alcohol. The member of the public then supposedly became physically aggressive towards him, so he responded by physically assaulting the victim and his wife. In June 1998, the applicant committed another offence of AOABH for which he was convicted but was unable to recall this incident. His most recent conviction for such an offence was in July 2009. This incident related to the assault of an acquaintance. The applicant alleged that the victim attempted to sexually abuse him while they were drinking alcohol together.

[8] The pre-sentence report established that at the age of sixteen he began drinking heavily. Prior to his remand in custody, the applicant suffered from chronic alcohol management problems with a history of alcoholism. He attributed his alcohol abuse to issues from his childhood and said that he used it as a form of self-medication. He had not previously engaged with any service to reduce his capacity to abuse alcohol. The applicant was assessed as presenting a high likelihood of re-offending. Furthermore, given his lifestyle, attitude of victimisation and previous convictions, the applicant was also assessed as presenting a significant risk of serious harm by the commission of further serious or specified offences.

[9] Dr Bownes examined the applicant in August 2012 and found that his mental health difficulties were of a personality-based nature to which damaging developmental influences such as poor parenting had contributed. This had been compounded significantly by the adverse effects of psychoactive substance misuse

on his well-being, judgement and social functioning. He found no evidence from his medical records or the personal information disclosed by the applicant of a pervasive pattern of volatile, predatory or gratuitously damaging behaviour of a psychopathic nature indicating that further violent behaviour was inevitable. He concluded, however, that the applicant was an individual with a significant history of personality-based mental health problems and maladaptive behaviour of a nature such that he would expect the applicant to continue to display egocentric and persecutory thinking, low frustration tolerance, a relative lack of appropriate strategies for coping with and containing negative feelings such as unhappiness and anxiety, and difficulty in recognising and relating to the needs and feelings of other people in a range of situations. Dr Weir, who reported in January 2014, found that his mental outlook and other inadequacies were deeply entrenched and he remained resentful towards a number of people and felt persecuted by them. She concluded that his psychological problems did not seem to have been altered in any respect and he presented today as he seems to have been over many years.

Sentencing Remarks

[10] The learned trial judge noted that the guiding principles on the assessment of dangerousness under the Criminal Justice (NI) Order 2008 were set out in R v Lang [2005] EWCA Crim 2864. In applying R v EB [2010] NICA 40 he considered, first, that the consequence of the act must be serious harm; secondly, the act must be likely to occur; and, thirdly, an assessment of the imminence of the offence causing serious harm. In order to assist in the assessment of imminence the learned trial judge had required reviews of the risk posed by the applicant in April 2013 and November 2013. He expressed himself satisfied that the impact of any act committed by the applicant was likely to be serious, that the underlying causes of those offending behaviours were not diminished by the fact that he had been abstinent from alcohol during his time in custody, and that the commission by him of such a further offence was likely. He concluded, therefore, that the applicant was a dangerous offender within the meaning of the 2008 Order.

[11] There was no significant debate in this case about the legal principles. The reference by the learned trial judge to imminence reflects the assessment carried out using the ACE case management system by the probation service. This court noted at paragraph [17] of R v EB that, whereas the assessment of risk carried out by the probation service was inevitably limited to a discrete period of time, the statutory task upon which the learned trial judge was engaged required a judgement of significant risk of serious harm over a much more prolonged period. Imminence is not a requirement for a finding that an offender is dangerous.

[12] The learned trial judge then referred to the leading cases in this jurisdiction on the approach to be taken to sentencing in cases of grievous bodily harm with intent including DPP Reference (Nos 2 and 3 of 2010) [2010] NICA 36 which reviews the

earlier case law. He considered the following were aggravating features in the present offending:

(i) The use of a weapon, in this case a bottle and the defendant's teeth.
(ii) The fact that several blows were inflicted.
(iii) The sustained nature of attacks over a period of several days.
(iv) that the defendant was clearly under the influence of drink, drugs or both (although the learned judge noted that perhaps this is a lesser factor given his overall addiction status and that indeed of the complainant).

The learned judge further considered there to be no mitigating factors present.

[13] He concluded that the defendant's level of culpability was high but the degree of harm was relatively low. He determined that the minimum appropriate custodial term was six years with an extended licence period of four years for each of the counts of wounding with intent to cause GBH, to run concurrently.

The appeal

[14] Before turning to the issues in the appeal we note that the learned trial judge did not identify the domestic setting and the conduct of the relationship as aggravating factors. The use of violence in such a setting is always a significant aggravating factor. It represents a serious breach of the trust and confidence which the other party to the relationship invests in the assailant. It also exploits the vulnerability of that person. Where violence is used in such a context, invariably the starting point for the sentence should be appropriately increased. We note that this is expressly recognised in the Magistrates' Courts guidelines for assault and a similar consequence should follow in the Crown Court.

[15] The first issue raised by the appellant was whether the applicant constituted a significant risk of serious harm in circumstances where no serious harm had been occasioned in the commission of the offence. Mr Greene submitted that the offences in the 1990s were now very old and in any event none of the offences disclosed the type of serious harm contemplated by the 2008 Order. He relied upon the passage in R v Terrell [2007] EWCA Crim 3079 at paragraph [23] where Ouseley J stated that serious harm in this context is coloured by the use of the word "death" in the same phrase. In the offences the subject of the appeal the learned trial judge correctly recognised that this was a case of low harm.

[16] As this court accepted in R v EB the risk of multiple superficial injuries is highly unlikely to constitute a significant risk of serious personal injury within the meaning of this legislation. It does not follow, however, that because serious injury has not been caused in the past that there is no significant risk of such harm in the future. The court's task is to carefully analyse all of the materials to assess the risk.

[17] The applicant accepted that this offence represented an escalation in offending both because of both the use of a weapon and the intent to cause grievous bodily harm. It was further accepted that the applicant had the means to carry out his intent and that it was, therefore, a matter of good fortune that no such injury was caused in the course of this attack. In addition to that, the medical reports and pre-sentence report both indicated that this applicant had a chaotic alcoholic lifestyle which gave rise to a strong likelihood of repetition. Although the unfortunate victim in this case is now deceased there remains a significant risk of repetition of such behaviour in respect of some other woman.

[18] Taking all of these factors into account Mr Greene accepted that it was open to the court to make a finding of dangerousness. In reaching his conclusion the learned trial judge placed considerable emphasis on the findings of the risk management meeting that the applicant's lifestyle, attitude of victimisation and relevant record gave rise to significant risk of serious harm by the commission of further serious or specified offences. We can find no error in the approach by the learned trial judge, with which we agree.

[19] The second issue in the appeal was the failure of the learned trial judge to reduce the sentence having regard to the very long period between conviction and sentence. The applicant was charged at the time of the commission of the offences and was convicted at Belfast Crown Court on 2 June 2012. His counsel and solicitor had come off record after all the evidence had been heard. There was then litigation concerning the legal aid arrangements for alternative counsel and solicitors which eventually resulted in a judgement in the Supreme Court on 29 January 2014. The sentencing hearing did not take place until 14 February 2014. That was over three years after he had been charged and over 20 months after his conviction.

[20] Mr Tannahill accepted that the delays between conviction and sentence were the result of the failure to put in place appropriate legal aid arrangements for alternative counsel and solicitors and that those were failures for which the state was responsible. We accept that the delay of 20 months between conviction and sentence failed the reasonable time guarantee in Article 6 of the Convention and that the learned trial judge should have taken this into account in determining the appropriate sentence.

[21] We recognise that a breach of this nature might well have justified a reduction in sentence of the order of six months. We consider, however, that such a reduction is materially outweighed by the aggravating factor that this was an incident of domestic violence. Mr Greene submitted that the learned trial judge would have been aware that such was the background but his sentencing remarks plainly have not reflected that background in the selection of the appropriate starting point. Accordingly we do not consider that we should interfere with the sentence.

Conclusion

[22] For the reasons given we dismiss the application.