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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

COLIN VICTOR McDONALD

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CARSWELL LCJ

Colin Victor McDonald (the offender) was convicted on 5 March 1999 at Downpatrick Crown Court on three counts, the attempted murder of K, the rape of K and the destruction of her unborn child. He was sentenced by Girvan J on 7 May 1999 to concurrent terms of imprisonment of 22 years, 15 years and 22 years respectively.

As the offender was leaving the dock following sentence, he gestured to K in a manner which caused her distress. The judge returned to court and stated that he would review the sentences. On 11 May 1999 he ordered that two suspended sentences, four months' imprisonment imposed at Antrim Magistrates' Court on 9 August 1996 and six months imposed at North Down Magistrates' Court on 14 March 1997, should be activated and served consecutively to the aforementioned sentences. The effective sentence was accordingly increased to 22 years and 10 months.

By notice dated 2 June 1999 the offender sought leave to appeal against his conviction. Leave was refused by the single judge and he renewed his application to the full court. On 27 April 2001 the court in a reserved decision dismissed his application. On 2 June 1999 the Solicitor General had applied for leave to make an Attorney General's reference to this court on the ground that the sentences were unduly lenient. The matter came on for hearing on 5 October 2001, when we gave leave to make the reference and also gave the offender leave to amend his notice of appeal to include an application for leave to appeal against sentence. We proceeded to hear the reference and the offender's application at the one hearing.

K, then aged 17 years, commenced to work for the offender in August 1995 in his fish and chip shop in Bangor. After about a year she moved in to live with him above the shop. In the spring of 1997 she became pregnant, the baby being due in early 1998. In November 1997 K was living with her parents, after quarrelling with the offender. On 9 November he called at their house and asked K to accompany him to Holywood. They lunched together there and spent some time drinking (K confining herself to soft drinks), then went to Bangor, where they had dinner in a hotel and continued drinking there until about 1.30 or 1.45 am.

The offender appeared to harbour jealous suspicions about K and other men, but she described him as being in a good mood when they left the hotel. He let them into his flat above his shop by unlocking the security shutter and door, then relocked the shutter and possibly also the door, saying as he did so "This is just in case the police are called", a remark which K regarded as significantly menacing.

He turned on K and hit her in the face with his fist. She went upstairs to the flat and sat down, but he then attacked her with what is described in the indictment as a wooden stair spindle. He struck her

repeatedly about the head, hands and body with this implement, which appears to have been broken by the violence of the assault, while she tried to curl up to protect her unborn child. He made accusations to her about his "mates" and herself. Next he threw her down the stairs, after which he trailed her up the stairs again by the hair, threw her down and stabbed her in the hand with a screwdriver. He fetched a knife, described by K as a steak knife, and stabbed her numerous times, shouting that he wanted her to die. Subsequent medical examination revealed some 20 stab wounds on each leg, one of which caused deep vascular damage. She had wounds to the neck, back and shoulders and one on her abdomen, with defensive wounds on her hand and arms, a total of between 47 and 50 lacerations.

The offender then ordered her to go into the bedroom and had sexual intercourse with her against her will. At about 2.40 am the offender telephoned an acquaintance named Irwin Keating, asking him to call with him about a matter which was important and serious. Keating could not obtain admission, so telephoned the flat and the offender went to the door and admitted him. When they went upstairs Keating saw K lying on the bed, as he described her in a terrible state and covered in blood from top to toe. She pleaded with Keating not to let the offender hit her, but the offender picked up the hose end of a vacuum cleaner and hit her on the thigh with it. He followed this by stamping on her head, saying to her "This is for good measure." He then told Keating that he would have to get out of the country, took cash from the shop till and left the premises.

K telephoned for the police and was taken to hospital. The offender was still at the premises when the police arrived and was arrested. In hospital K was treated in intensive care for a time. She had lost a considerable amount of blood and had very extensive bruising in addition to the stab wounds. The next day her baby was born dead, and the evidence was that its death was directly attributable to the assault on K.

The offender contested the charges and was found guilty on the first three counts on the indictment. The judge did not require the jury to bring in verdicts on the remaining two counts. He adjourned the matter of sentence until a pre-sentence report was available. He sat again on 7 May 1999, when he had before him the pre-sentence report and a psychiatric report from Dr Ian Bownes obtained by the offender's solicitors.

The offender, who was born on 2 September 1965, is now aged 36 years and was 33 years at the time of sentence. He has a fairly considerable criminal record going back to 1983, which includes road traffic offences, drugs charges, robbery, assault and disorderly behaviour. Two suspended sentences, of four and six months' imprisonment respectively, were imposed by courts in 1996 and 1997.

He commenced to drink heavily in his early 20s and became involved in substance abuse. Many of his criminal convictions were drink-related. He is a sufferer from diabetes, a factor which entered into his application for leave to appeal against conviction. He was employed only sporadically until his release from a period of imprisonment in 1992, when he commenced a fish and chip business, which appears to have had some success. He returned, however, to heavy drinking and had consumed a fairly substantial amount at the time of the subject offences.

The pre-sentence report paints the picture of a violent man with poor control of his aggressive instincts. The probation officer states on page 3 of the report, after discussing the possible effect of his diabetes:

> "From the information the defendant has provided it seems more likely that his aggression is linked to an extremely low tolerance threshold which is aggravated by excessive alcohol and drug abuse."

At pages 4-5 he says:

> "Throughout our two interviews he expressed little insight into victim awareness but rather minimised

responsibility for violent behaviour because he was either intoxicated or justified in his response. From his involvement in the robbery it would appear that he was prepared to use violence or the threat of it to achieve his ends."

He set out his conclusions in the following terms:

"The defendant is clearly a very dangerous man who is capable of the most extreme violence. He is still denying features of his relationship with the victim which led up to the tragic attack upon her but it is clear that it was rooted in a background of ongoing violence against her within the context of their relationship. Until a further multi-disciplinary assessment is completed it is impossible to accurately assess the level of risk he poses or to consider which factors need to be addressed in the management of that risk. The defendant will need to engage fully in this process with Probation, Psychology and Psychiatric Services during his sentence before any consideration can be given to his release.

Currently however it is clear that he has a low tolerance level and a tendency to express frustration and anger through violent behaviour. His lifestyle and abuse of drugs and alcohol mitigated against good management of his diabetes and he needs to come to terms with the boundaries this places upon him. If he was to return to his previous lifestyle of substance abuse there is no doubt he would pose a serious danger to the public.

The origins of his violent behaviour may be located in his upbringing and the attitudes and values he learned when a young man. If so these also need to be addressed. Future involvement of his family in this would be beneficial.

> Given the gravity and nature of these offences it is my view that the defendant should not be released until it is felt safe to do so. His eventual release will presumably take place in the context of statutory supervision, the conditions of which would be best identified when the decision is taken. The factors which will likely require the strictest monitoring are:
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> 1. His management of his diabetes.
> 2. His use of alcohol and drugs.
> 3. His relationships with others, particularly females.
> 4. Any reoccurrence of aggressive or violent behaviour."

Dr Bownes set out the offender's history and his own assessment of him in some detail in his report dated 1 May 1999. He said of his mental health at page 12 of his report:

> "Review of the prison medical notes indicated that following his committal to prison Mr McDonald had presented with a range of symptoms of anxiety consistent with a psychological reaction to a stressful and unpleasant situation. The nature and level of Mr McDonald's symptoms had evidently been such that several short courses of sedative and anti-depressant medication had been prescribed during the three months following his committal to prison. It was evident at the present interview that Mr McDonald was continuing to find it difficult to adjust and come to terms with his situation and I feel that he is likely to continue to make considerable demands on those involved in his care and supervision. However I could find no objective evidence of any clinically significant symptoms of anxiety and depression, and in my opinion, Mr McDonald is not currently suffering from any mental health problems of a nature or severity that would fulfil the criteria for his

admission to a psychiatric hospital, as defined under the Mental Health (NI) Order (1986)."

He expressed his conclusions at pages 13-14 as follows:

"The clinical picture presented at interview and from review of the medical evidence in this case was of a young man with significant and longstanding personality and behavioural problems. Mr McDonald appears to have underachieved at school and to have persisted in a pattern of reckless, anti-social, and potentially self-destructive behaviour since early adolescence, including dangerous driving, gambling and psychoactive substance abuse, and a tendency to engage in impatient, demanding, confrontational, bad-tempered and aggressive behaviour without regard for the consequences for himself or for other people has repeatedly been evident during his committals to prison.

Individuals with a history of behavioural and personality problems of the nature displayed by Mr McDonald typically have difficulty in coping consistently, appropriately and effectively with everyday stresses, commitments and responsibilities and low self-esteem is frequently an associated finding. I feel that the nature of Mr McDonald's personality is such that his need to assert and reinforce his sense of powerfulness, dominance and control in his relationship with K in order to alleviate feelings of inadequacy and frustration is likely to have been a significant motivating factor in his behaviour in the index incident. Although some feelings of remorse were evident at the present interview, it was also clear that Mr McDonald had yet to fully face up to the nature of his behaviour in the index of offences and his need to address his problems and in my opinion, there is currently a significant risk of further violent outbursts in situations where Mr

> McDonald feels slighted, rejected or under pressure.
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> Sustained behavioural and attitudinal change is always difficult to achieve in individuals with personality-based problems. However I could find no categorical evidence from review of the evidence available to me in this case or from the information Mr McDonald disclosed of sadistic interests, an inherent tendency to paranoid ideas or an established history of predatory or abnormally impulsive behaviour suggesting that Mr McDonald would inevitably present an ongoing danger to the general community, and in my opinion, Mr McDonald has sufficient personal and intellectual resources to engage with professional support in confronting his problems and addressing behavioural patterns relevant to his offending behaviour, should he be motivated to do so."

The learned judge in his sentencing remarks placed some emphasis upon the heinousness of the offences and the jury's conclusion that McDonald carried out the assault with the intention of bringing about the death of the injured party and the child. He referred to the pre-sentence report and Dr Bownes' report and stated that his mind had fluctuated between a determinate sentence and a life sentence. Factors tending to point towards the latter were the risks of suicide and the effect on other potential victims of the offender. In the end the countervailing factor which weighed with him most was the availability of probation supervision under Article 26 of the Criminal Justice (Northern Ireland) Order 1996 (the 1996 Order) if a determinate sentence were imposed. He concluded that he should pass a determinate sentence, but that it should be one of a considerable length. He therefore sentenced the offender to 22 years' imprisonment on the counts relating to attempted murder and child

destruction and 15 years on the rape count. He applied Article 26 and also ordered that the offender's name be placed indefinitely on the sex offenders' register.

As the offender was subsequently leaving the dock, after the judge had gone out of court, he made an obscene gesture towards K, which upset her considerably. The matter was reported to the judge, who declared that he would sit again on 11 May and review the sentence which he had passed. On 11 May he received further submissions and was tendered a written apology from the offender. The judge then stated that the offender's behaviour demonstrated that he was devoid of any shame or remorse for his actions, contrary to the opinion expressed by Dr Bownes. He adverted again to the possibility of imposing a life sentence and then stated that he had previously omitted to deal with the suspended sentences imposed in 1996 and 1997. He put both into effect and ruled that they should be served consecutively to the sentences imposed for those of which he had been convicted, saying that if it were not for the offender's scandalous behaviour he might have been minded to make them run concurrently.

In the reference the Solicitor General set out the aggravating features of the case in paragraph 7:

> "It is submitted that the following aggravating features appear to be present:
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> (a) There was a sustained attack on a young lady with fists and feet and various implements including a knife;
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> (b) The victim sustained multiple injuries that were inflicted as the offender declared his intention to kill the victim;

(c) The assault was perpetrated on the victim knowing her to be pregnant and with the intention of destroying the unborn child;

(d) Having subjected the victim to battery and wounding, the offender then raped the victim;

(e) The victim sustained not only physical injuries but a severe post traumatic anxiety depression with uncertain prognosis;

(f) There was an absence of remorse save in relation to the death of the child;

(g) The offender had a criminal record for motoring offences, dishonesty, disorderly behaviour, robbery, drug offences and assault."

He referred to the mitigating factor that the offender is a diabetic with a diminished life expectancy. He referred also to his record, to the pre-sentence report and the medical report and submitted in paragraph 11:

> "It is submitted that in the circumstances of this case it was necessary to impose a protective sentence on the offender because of the risk to the public from serious harm from the offender and that the sentence imposed is wrong in principle.
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> It is further submitted that the appropriate protective sentence is one of life imprisonment. It appears from the nature of the offences, from the offender's history and from the medical evidence that he is a person of unstable character likely to commit such offences in the future.
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> The nature of the offences and the make up of the offender are of such a nature that the public requires protection for a considerable time unless there is a change in the offender's condition. The

> imposition of a life sentence will enable the appropriate authorities to ascertain from time to time whether the offender's condition has changed and it is safe for the offender to be released"

In his submissions on behalf of the Attorney General Mr Terence Mooney QC drew to our attention the fact that the judge had not stated that he was imposing a protective sentence, longer than the commensurate sentence, under the provisions of Article 20(2)(b) of the 1996 Order. Where a judge has not imposed such a sentence, although the criteria for one had been met, the Attorney General may challenge his decision on a reference brought under section 36 of the Criminal Justice Act 1988: *Attorney General's Reference (No 9 of 1994)* (1994) 16 Cr App R (S) 366. He further submitted that the criteria for life imprisonment, as set out by MacKenna J in *R v Hodgson* (1967) 52 Cr App R 113 at 114, had been met:

> "When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

Mr Mooney contended that the public ought to be protected from the offender and that as the judge was not in a position to decide about his probable fitness for release the proper course for him to adopt was to impose a life sentence.

Mr Donaldson QC on behalf of the offender submitted that the length of the sentence was such that the judge clearly intended that it

should contain a protective element. He went on to submit that it was materially too long on any basis and well above the tariff expected for attempted murder cases of this type, which he suggested was in the region of 15 years. In response to the submission advanced on behalf of the Attorney General he contended that the offender had not been shown to be a danger to the public in general and that the conditions for the imposition of a life sentence had not been satisfied.

There are certain features common to both protective sentences and discretionary life sentences. The conditions which require to be met in relation to the former appear in Article 2(8) of the Criminal Justice (Northern Ireland) Order 1996:

> "In this Order any reference, in relation to an offender convicted of a violent or sexual offence, to protecting the public from serious harm from him shall be construed as a reference to protecting members of the public from death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him."

In respect of discretionary life sentences the third criterion laid down in *R v Hodgson* was that the consequences to others may be specially injurious. It may be seen that in the reported cases in which appellate courts have upheld discretionary life sentences there was a danger to members of the public in general, not only to the particular victim: see the cases referred to in *Blackstone's Criminal Practice 2001,* paragraph E1.25 and in particular *Attorney General's Reference (No 32 of 1996)* [1997] 1 Cr App R (S) 261. Lord Lane CJ observed in *R v Wilkinson* (1983) 5 Cr App R (S) 105 at 108 that with a few exceptions such sentences are reserved for offenders who for one reason or another cannot be dealt with under the mental health legislation yet who are in a mental state which makes them

dangerous to the life or limb of members of the public. Accordingly the court will look for medical evidence showing that the mental state of the offender is such as to create such a danger before it imposes a discretionary life sentence.

Although he did not spell it out, we think it likely that the judge concluded that the criteria for a protective sentence had not been fulfilled. We ourselves doubt whether the conditions for the imposition of protective sentences have been satisfied, in that it is not clear that the offender presents a sufficient danger to members of the public in general. In any event, we do not consider that longer sentences than those passed would be required to protect the public.

The judge did give careful consideration to the possibility of imposing a life sentence and concluded eventually that he should not do so. We could not say on the evidence in the case that his decision was wrong. In the first place, we think that it is debatable whether the element of danger to members of the public in general, required for the imposition of life sentences, was satisfied. Secondly, Dr Bownes concluded that the offender has personality and behavioural problems, but that he was not suffering from any serious mental health problems. Thirdly, the availability of probation supervision under Article 26 of the 1996 Order is a factor in favour of a determinate sentence. Determining whether to impose a life sentence seems to us to have been a question of fine judgment, which the judge approached in the correct manner. He could have decided it either way, but concluded that the balance came down in favour of long determinate sentences. We see no sufficient reason to overrule his exercise of judgment.

We therefore are not prepared to hold that the sentences imposed by the judge were unduly lenient, and we dismiss the Attorney General's application. We also consider that they were proper sentences to meet this

very serious case and that they cannot be said to be manifestly excessive or wrong in principle in any respect. We accordingly dismiss the offender's application for leave to appeal against sentence.

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J U D G M E N T O F
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