IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ALISTER JAMES HARKNESS

CARSWELL J:

This is an appeal against a sentence imposed upon the appellant at Ballymena Crown Court by Judge Hart on 4 June 1993. Leave to appeal to this Court was granted to the appellant on 30 July 1993. The appellant pleaded guilty on re-arraignment to 5 counts out of the 6 in the indictment. The sentences imposed were: on Count 1 for assault with intent to rape - 9 years'; Count 3, assault on the injured party - 6 months'; Count 4, Criminal Damage - 6 months'; Count 5, assault on a constable - 6 months'; and Count 6, resisting a constable in the execution of his duty - 6 months', all concurrent.

The incident out of which the charges arose occurred on 9 November 1992 about 12.30 am. Mrs Karen Spence, a divorcee and the mother of daughters aged 11 and 8, was asleep in bed in her house when she heard thumping at her front door. She asked the person hammering on the door to identify himself, told him that she did not open the door late at night and indicated that he was frightening her daughters. The would-be caller said that he was hurt and needed help. Mrs Spence's statement then goes on:

"The man had been constantly banging the front door, the next thing was like something out of the TV screen, he just came in through my front window and the glass was flying everywhere... He grabbed me by my nightshirt and pulled it open, tearing most of the buttons off. The children were standing at the bottom of the stairs hysterical. He told me to shut up or he would hurt me. He shoved me to the ground and dragged me into the kitchen. The girls were kicking at him and using their fists, banging him round the head shouting 'Leave my mummy alone'. I was also shouting and screaming at him to leave me alone. His face, his eyes were so evil looking I thought he was going to really hurt me or even kill me and attack my girls. He was just so evil looking ... The next thing was he started to take down his trousers, I knew then that he was going to rape me."

The appellant was identified by Mrs Spence because he had worked in her house doing decoration to the livingroom on an ACE scheme. When he was apprehended by the police shortly afterwards he gave a false name and address, then assaulted one of the police officers.

Mrs Spence in her statement described the steps that she took to frustrate her assailant, how she managed to knee him in the groin and how her daughters kept kicking and punching him, and then she describes his departure:

"Then all of a sudden, as quick as anything, he just got up and lifted the diningroom chair, I don't know exactly what happened then but he went through the front window again and away."

This has been described by counsel for the appellant as irrational behaviour on a par with other behaviour of an irrational type on his part.

The injured party was examined by Dr Russell, who confirmed that she was extremely distressed and shocked. She had marks and bruises on her neck, back, right upper arm and right lower leg which were consistent with the type of assault which she described. She was examined by a psychiatrist to determine the effect upon her and he stated in his report:

"As a consequence of this attack Mrs Spence experienced a significant post-traumatic neurosis characterised in the main by emotional disturbance with intense anxiety as the main symptom and accompanied by sleep disturbance, irritability, loss of interest and energy, and generally a very significant impairment in the quality of her life over the past 6 months. There has, however, been a good improvement with time, apart from the acute exacerbation recently which has been precipitated by the impending court case and which I expect to be transient. In the longer term because of her very robust pre-morbid personality she is likely to continue to improve and ultimately to recover."

Dr Fleming also concluded that both daughters of the injured party had suffered emotional disturbance as a result of these events.

The consequences of the acts of the appellant are accordingly significant and serious and one can hardly be surprised that both Mrs Spence and her daughters suffered as a result of his actions in the way that has been set out.

In interview by the police and also when seen by a psychiatrist the appellant consistently denied any intention to rape, but his plea before Judge Hart has acknowledged the existence of that intention.

Mr McMahon QC, on behalf of the appellant, relied on a number of factors which were advanced by way of mitigation. First, it was not a rape, it was a lesser offence of assault with intent to rape. This has always been regarded as a lower offence, and, indeed, for many years carried a materially lower maximum penalty, although we would observe that it was put up by statute to a maximum penalty of life, as is also the penalty for rape or attempted rape. He added that although it was a horrifying and frightening experience, it was less traumatic to the victim than the bodily violation of a completed rape. We would simply observe that the learned judge was fully aware of the distinction, but the issue before this Court is whether he made sufficient allowance for that distinction. Secondly, it was urged upon us that the appellant pleaded guilty and spared the injured party from having to give evidence. Again, the judge took that into account, although he took the view which he was entitled to take, that the lateness of the plea was something less of a help to the injured party than to have known quite categorically well in advance that she would not have to go back over the matter or relive it. Thirdly, the personal circumstances of the appellant, his UDR service, the fact that he was caught in a landmine explosion and had other distressing experiences on active service, the fact that he was targeted by terrorists and had to move house in December 1989 and the medical evidence of his general practitioner and Dr Kerr, the psychiatrist, the fact that he had a serious alcohol problem and although he had been referred to an addiction unit, had drunk a large amount on the day of the offence. He had previous violent episodes when he was drunk and Dr Kerr thought that he should be encouraged to work towards total abstinence.

The judge had these factors before him, although he does not advert to them with any great emphasis in his consideration of sentence. The learned judge's reasoning started with the tariff for a completed rape, against the background of the aggravating circumstances of breaking into the house at night, doing violence to the injured party and doing that in front of the children, a factor which he regarded as significantly increasing the aggravation - in fact he relied on this factor as justifying an increase in the notional rape tariff from 10 to 12 years'. He then reduced this notional full offence tariff to take account of the lesser offence and the plea of guilty and perhaps the personal circumstances, and he came to a figure in the end of 9 years'.

We have to say that we feel some reservations about accepting the figure of 12 years' for a completed rape taking into account the aggravating circumstances, bearing in mind that this was a first-time sexual offender. For the purposes of consideration of the learned judge's approach to the case, we shall, for the moment, assume that it was correct. If he started from that figure of 12 years the learned judge was bound to make proper allowance for the fact that it was a lesser offence, the plea of guilty and the personal circumstances of the accused. The total which he allowed was 3 years', or 1/4 of the tariff from which he worked. Making sufficient allowance for his plea, which we would observe is always a significant factor in rape cases, and cases of a like nature, that can only mean that he elevated the offence of assault with intent to rape to one which was very close to a full and completed rape in terms of penalty.

We regret that we do not find it possible to agree with this approach, and we consider accordingly that the learned judge's approach cannot be sustained. What we consider that we should do is to look at the sentence afresh, either by reduction from a tariff figure for a completed rape, whatever that tariff figure we should find might be, or by an assessment from the ground up, as it were, from the culpability of the act itself, or, preferably, a combination of both approaches, cross-checking one against the other. We think it is necessary to start by looking at the quality and consequences of the act. Comparison with other offences may form a guide, but that is not foolproof and it needs to be approached with a degree of circumspection. Against the appellant the Court needs to have regard to the violence of the act, the invasion of the house and the frightening and alarming way in which he did so, and we have no hesitation in saying that it was an outrageous escapade. The frightening circumstances for Mrs Spence the injured party, and her real and serious apprehension of rape, the distress caused to the children and to the injured party on behalf of her children, all of these are serious, significant and relevant factors. They are very potent and they make it a far worse case than a serious assault.

In favour of the appellant are the plea - and it is a matter of judgment how much one allows in all the circumstances for that - his personal circumstances - again, that is a matter of judgment and we put those on the scale - and a factor which we think must be regarded with greater weight than the learned judge did, that the offence to which he pleaded guilty was not a rape and it must be regarded as one of lesser import, though perhaps not drastically lesser than a completed rape. Rape cases do afford an analogy and we obtain some assistance from them. Attempted rape cases also form an analogy and it is worth noting that a study of the reported cases shows a clear pattern of a materially lower range of sentences than a completed rape.

This Court has in a number of reported cases in recent years taken a strong view of offences of a sexual nature especially where the victim is violently attacked, frightened and humiliated and also where a house is invaded in a forcible and frightening fashion. We repeat that such acts cannot be tolerated and that the penalties must be severe. We regard the judge as having approached it quite rightly in taking the view that it was a bad case of its kind. We in summary have taken into account all the factors, both adverse and favourable, and we consider having done so that the proper sentence should be one of 7 years'. We accordingly will allow the appeal and substitute a sentence of 7 years'.