Neutral Citation No. [2011] NICA 42 | *Ref:* **MOR8265**

Judgment: approved by the Court for handing down | *Delivered:* **7/9/2011**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

MARK FRANCIS KENNEDY

AND

STEPHEN KENNEDY

Appellants

_____

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] Each applicant applied for leave to appeal sentences of imprisonment for common assault contrary to section 47 of the Offences against the Person Act 1861. The first named applicant was sentenced to a period of nine months detention. The second applicant was sentenced to a period of nine months imprisonment and 2 suspended sentences each of four months imprisonment were ordered to run consecutively to that sentence. At the hearing we announced that we were granting leave and allowed the appeals. We indicated that we would give our reasons later.

Background

[2] The Bill of Indictment in relation to these applicants originally contained three counts. On the first count the first named applicant was charged along with a co-accused of attempted robbery of a female on 11 November 2008. On the second count the second named applicant was

charged with common assault of the same female contrary to section 47 of the OAPA 1861. On the third count the first named applicant was similarly charged in relation to the same female.

[3] The applicants pleaded not guilty to all counts at arraignment. The trial commenced on 7 December 2009 and continued until 9 December 2009. The injured party gave evidence on 8 December 2009 and in the course of her cross-examination the prosecution indicated that it would not pursue the attempted robbery charge in the event that each defendant pleaded guilty to the common assault counts. Each defendant was re-arraigned on 9 December 2009 and entered pleas in relation to those counts.

[4] Sentencing was adjourned until 28 January 2010 at which stage an agreed statement of facts was put before the court.

> "Jelena Rosadskova was returning from work to her home in Magherafelt shortly after 6 pm on 11 November 2008. She was walking in the area of the Regional College on the Moneymore Road when she was hailed by two men, one of whom was Mark Kennedy.
>
> A situation developed which resulted in Mark Kennedy telephoning his brother Stephen. Stephen Kennedy and a fourth man arrived on the scene.
>
> The two defendants and the two other men were now in close proximity to Mrs Rosadskova. Stephen Kennedy assaulted her by brushing the peak of his cap against her forehead as she described when giving evidence during the trial. Mark Kennedy assaulted her by pushing her.
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> Mrs Rosadskova was extremely frightened by the whole incident. She has recovered from the incident save for some residual anxiety. "

It was agreed that there were no racial aspects to the assaults.

[5] Both applicants accept that the maximum sentence on indictment for these offences is two years imprisonment or detention. Each submits, however, that if the prosecution had not pursued the attempted robbery charge these cases would have been dealt with as common assault cases at the Magistrates' Court contrary to section 43 of the OAPA 1861. The maximum sentence in that court for such offences is six months imprisonment or detention. In those circumstances it is submitted that the sentences of nine months imprisonment were manifestly excessive. The prosecution did not take issue with the proposition that the offences would have been so prosecuted but pointed out that offences contrary to section 47 carried a maximum penalty of 12 months imprisonment or detention in the Magistrates' Court.

Consideration

[6] The appellants placed considerable reliance on the decision of this Court in R v Finkle [1988] 7 NIJB 78. That was a theft case in which the appellant had elected for trial before a jury. The court indicated that it should bear in mind what was likely to have happened to the appellant if he had elected for trial by the Magistrates' Court when considering the sentence that should be imposed. It concluded that an accused person should not be especially heavily sentenced because of exercising their right to go to the Crown Court. The issue in each case is whether the sentence was out of all proportion to what the magistrate would have done.

[7] We accept that in a case of this kind the same general principles apply. The applicants did not elect to go to the Crown Court but were dealt with there because of a charge no longer pursued by the prosecution. That does not mean that the sentence cannot exceed the maximum which the Magistrates' Court can impose but it is relevant to examine the sentence to see whether it is out of all proportion to what the magistrate might have done.

[8] In each case the level of physical violence used in relation to the assaults by each of the applicants was modest. That has to be balanced, however, by the fact that this vulnerable lady was faced by a number of young men who had been drinking and it is agreed that the circumstances were such that she was extremely frightened. Each of these applicants has a criminal record and in the case of the second named applicant it is an aggravating factor that his record for violence is recent. The applicants point to the fact that it was only after the trial started that the Crown

accepted that there was no racial element to this attack and that the degree of physical contact was as set out in the agreed statement of facts. Neither applicant is assessed as posing a risk of serious harm to the public but it seems clear that neither has responded positively to previous community-based disposals.

[9] We consider that each applicant is entitled to some credit for their pleas but not to the same extent as if those pleas had been entered at arraignment. Taking into account the difficult family circumstances of each applicant and the circumstances of the assault to which they pleaded guilty we consider that sentences of nine months imprisonment and detention were manifestly excessive. In relation to the first named applicant we reduced the period to one of four months detention and in relation to the second applicant reduced the period to one of five months imprisonment. The implementation of the suspended sentences for the second applicant remained.