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Judgment: approved by the Court for handing down | *Delivered:* **26/09/12**
(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

FN

_____

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (ex tempore)

[1] The appellant appeals against conviction. On 15 October 2010, he was found guilty at Dungannon Crown Court, following a contested trial, before His Honour Judge Lockie sitting with a jury of 1 count of rape and 7 counts of common assault. He was also found guilty of 1 count of criminal damage. On 21 December 2010, His Honour Judge Lockie imposed an extended custodial sentence of 8 years custody with a 3 year extension period upon the applicant, pursuant to Article 14 of the Criminal Justice (NI) Order 2008.

Background

[2] The appellant is 39 year old and at the time of his convictions was unemployed. The complainant is 25 years old and is the mother of two children, aged 4 and 9 months. The appellant is the father of both children. He and the complainant had been in an "on-off" relationship since 2005, and had lived together for a substantial period of time. What follows is the injured party's account of the charges in respect of which he was convicted.

[3] On 31 December 2008, the appellant and the complainant had been in the Foresters' Club in Cookstown. Both parties had a considerable amount to drink. On the way home, the appellant "lost his head" and pushed the complainant into the bottom of a hedge.

[4] On 9 March 2009, the appellant and the complainant were in bed watching TV at his mother's house in Cookstown. The appellant became upset as a result of a text

message, dragged the complainant from bed by the hair and threw her against the wall.

[5] On 15 May 2009, the appellant found out that the complainant had sent a text to and received a reply from a friend. The appellant pulled the complainant's hair. He was wearing thick solid gold rings on his fingers. He punched the complainant around her head, scalp and arms. The appellant was under the influence of drink on this occasion.

[6] On 8 June 2009, the appellant and the complainant had been drinking in the Conway Bar in Cookstown. On the way home, he pushed the complainant into a hedge. When they got home, he punched the complainant and pulled her hair, then dragged her across the floor and banged her head off the glass of the back door.

[7] On 9 July 2009, the appellant had been drinking in the kitchen with three friends throughout the night. The complainant had gone to bed on her own as she had an appointment with her doctor in Dungannon the following day, to undergo a pregnancy test. On the morning of 10 July 2009, the appellant entered the bedroom and wakened the complainant. The appellant's friends then left the house. He got into bed beside the complainant and put his arms around her. The complainant told him to take his hands off her as they were cold. He jumped out of bed and told the complainant to "get the fuck out of the house". The complainant got out of bed and got dressed.

[8] As the complainant was sitting on the edge of the bed putting her shoes on, the appellant grabbed the complainant's handbag from her lap and proceeded to rip the bag apart, before throwing it into the corner of the room. He then grabbed the complainant by the hair and pulled her head into his chest and said "do you tell me what you meant?" The complainant had no idea what he was talking about. The appellant accused the complainant of saying the night before that she did not want the baby. The complainant told the appellant that she had not said this. He said "you're going fucking nowhere until you tell me what you are on about". The appellant told the complainant to go into the bathroom which she did. The appellant who was naked followed her. He attacked the complainant in the bathroom, kneeing her between the legs and trailing her across the bathroom floor by the hair.

[9] The complainant reached out and grabbed him by the testicles, inflicting great pain. When the complainant let go of his testicles, the appellant attacked her again, pushing her against a mirror and headbutted her on the forehead. The appellant then told the complainant to return to the bedroom and to take off her clothes. The appellant made the complainant stand in the corner of the room with her arms outstretched on each side of her body. The complainant remained in that position, naked, with her arms out in a horizontal position for 20 minutes. When her arms slipped, the appellant pushed them up again. He then ordered the complainant to kneel on the bed in front of him. In that position, the appellant put his penis into the complainant's vagina and told her "this is all you're good for, you dirty slut. You're

cheaper than a prostitute". He ejaculated after a few minutes, pushed the complainant away from him and told her to sleep.

Bad character evidence

[10] The appellant has a substantial criminal record. In support of the prosecution case the learned trial judge admitted bad character evidence in relation to previous offences committed against women. On 7 October 2005 the appellant pleaded guilty to an offence of common assault on a previous partner called B. The facts in relation to the assault were that on 26 December 2004 the defendant punched B on her face and around the head. She was on the ground and the defendant kneed her on her left eye causing a cut to the eyelid.

[11] On 8 November 2007 at Fermanagh and Tyrone Crown Court the appellant pleaded guilty to six counts of common assault, one count of false imprisonment and one count of criminal damage in respect of a previous partner called H. The offences occurred on various dates between 1 August 2006 and 27 August 2006.

[12] The appellant had been going out with H who was 19 years old for about four weeks. She was not getting on with her mother at that time so moved in with the defendant to his house at the end of June 2006. She described that the relationship was fine until August 2006 when the appellant's behaviour started to change. He wouldn't let people into the house and if they went out he would tell her to watch who was pouring their drinks in case they tried to spike them.

[13] At the beginning of August he started to accuse her of going out with other men. One day in early August she and the appellant were having a drink in the house. The appellant was drinking heavily. She had had one drink and had gone to bed. In the early hours of the morning the appellant pulled the covers off the bed and demanded she go downstairs. He then accused her of going out with other men and pushed her outside into a flowerbed. He then brought her back into the house and told her to go and sleep in the living room and told her to lock herself in the living room. He then started to kick the locked living room door and she then opened the door. The appellant pushed her and grabbed her wrist and shouted that she was going out with other men. He bent her fingers back on her hand so that the skin on her right hand split. H managed to get out of the house and drove to a friend's house.

[14] The appellant then arrived half an hour later and was calm and apologised and said that he loved her. She came back to the house with him. Once at home the appellant immediately changed and grabbed her by the throat and shouted into her face saying "why do you keep doing it for". She fell to the floor and the appellant straddled her and pushed his hand onto her chest making it difficult for her to breathe. H got up and the appellant said "if you want to leave just leave" She made for the front door about ten times but each time the appellant grabbed her by the throat and pushed her into the worktops in the kitchen and told her to be quiet or the neighbours would hear.

[15] H then pushed him back and ran out of the house and drove away in her car. About a week later they were both in the house having a drink with another couple. They had a row and the appellant put the other couple out of the house. The appellant then grabbed her by the hair and lifted her off the ground by her hair and pulled her hair and accused her of waiting until people were in the house to start a row. Clumps of her hair was pulled out due to this assault.

[16] On 18 August 2006, they were in a car coming from ASDA and arrived home. H told him she was leaving. There was another couple outside the house who they knew. They all went into the house. The other couple went into the living room and the appellant and H were in the kitchen. The appellant grabbed her wrist and twisted it breaking her metal watch strap. He then threw the watch to the ground and stood on it. He accused her of always having a row when other people were there. H spoke to the other female of the couple who asked her if she was alright. She was in the living room when the appellant grabbed her by the right wrist and trailed her into the kitchen. He threw a plastic tub of butter at her and butter went over the fridge door. The appellant then smeared butter over her face and hair with his hands. He then told her to wash her hair and they left with the other couple.

[17] They went to a friend's house where the appellant had a few drinks. She drove him home at 5.00am. The appellant was abusive and then broke the ignition key to her car. They got out of the car and were walking up the Burn Road to get cigarettes. The appellant pushed her to the ground and she fell banging her head on the ground. She tried to get up and he pushed her down about four times. When she did get up they went to the garage and the appellant hugged her and told her not to ring the police. She did ring the police but only reported that he had broken her car key at that time and did not complain of any assault at that time. H stayed with her mother for two nights but then saw the defendant in Cookstown on 20th August 2006 and they went for a drink.

[18] On 25 August she stayed over at his house. On 26 August they went to the Gaslight for a drink in the evening. The defendant was drinking heavily and became argumentative. He then threw a drink around her and called her a bitch. They then left and were walking on Chapel Street when the appellant took her down a footpath leading to the High School. She tried to pull away and he grabbed her in a bear hug pinning her arms to her chest and lifting her off the ground. H bit his chest to make him let her go. He then grabbed her again and trailed her down the path and grabbed her by the throat and pushed her onto the ground. H fell hitting her head on the kerb.

Interview

[19] At interview the appellant denied the allegations against him. He asserted that he had an argument with the injured party when he disclosed to her that he believed that he was suffering from an STD and that she had been responsible for infecting him as a result of her sexual behaviour with another man. He concluded that she was aggrieved at being rejected by him and took her revenge by making up

these allegations. In the course of his interviews he also advised police that the injured party had been treated at St Luke's Hospital for what he believed was manic depression. The appellant asserted at interview that as a result of her illness she reacted more unpredictably when she consumed alcohol.

[20] The appellant did not give evidence and the learned trial judge gave the jury the usual direction as to how they should take that into account.

Disclosure

[21] The appellant made a number of third party disclosure applications. In particular on 9 February 2010 an application was made to obtain records from St Luke's Hospital for documents created on or about 31 December 2008 to 17 July 2009 relating to the offences charged and any other records created by the hospital in relation to injuries sustained as a result of the offences. The object was to challenge the consistency of the account of the injured party. It is clear to us that the records were obtained and that no disclosure was ordered.

[22] Another judge dealt with a disclosure application in relation to GP records. An order was made disclosing an entry in July 2009 in which the GP noted a "h/o ? bipolar disorder". We have not seen the application in relation to those records and do not know the precise basis upon which it was pursued.

[23] On 4 October 2010 the jury was sworn and the case was fixed to start on 6 October. On the morning fixed for the hearing senior counsel for the appellant applied for further disclosure from St Luke's on the basis that the appellant in interview had referred to the fact that the injured party had been in hospital receiving treatment for what he believed was manic depression and the GP note raised the possibility that the injured party had been diagnosed as suffering from bipolar disorder. It is clear that this could not have fallen within the ambit of the previous disclosure application.

[24] The learned trial judge rejected this application apparently on the basis that he did not feel that he should go behind the Order of another experienced judge who had looked at this material.

Discussion

[25] In rape cases the usual practice is to swear the jury in advance of the date fixed for the hearing so that the injured party can be confident that she will not be kept hanging about the court with all of the anxiety that such delay can bring. The object is to ensure that the alleged victim can give her best evidence. It is, therefore, quite extraordinary that in this case no application for the records from St Luke's was made until the morning fixed for the commencement of the trial. It is clear that the learned trial judge was unsympathetic to the application and we can well understand why that was so.

[26] What is even more extraordinary is the casual way in which the application was pursued. The defence statement contained no hint of any issue about a bipolar condition and neither had the previous written application. In the course of his oral submissions on the morning fixed for the trial senior counsel for the applicant asserted that he had spoken to a forensic medical officer who indicated that the diagnosis was highly relevant to the issues. In fact his written report furnished later that day suggested that the condition could account for the injured party leaving suddenly and inexplicably from the applicant's home. That was not the case that the applicant was making at interview and it is difficult to see its relevance to the issues at trial.

[27] We accept however that there is a continuing obligation on a trial judge to review disclosure as a trial progresses and new issues emerge. That may sometimes mean recovering records that have already been examined to see whether more material should be provided in light of any change of circumstances. Despite the late stage at which this application was made and the manner in which it was made we consider that the learned trial judge ought to have availed of the other options open to him.

[28] The first was to require the appellant to furnish an amended defence statement and a proper written application so that the precise scope of the request could be identified. The second was to immediately retrieve the St Luke's records so that they would be available if needed by him. If those steps had been taken we are confident that these issues could have been addressed by the morning of 7 October at the latest. It would have been a matter of judgment for the learned trial judge as to whether it would have been appropriate for the injured party to give her evidence in chief on 6 October as in the event she did. Cross examination did not start until the following day.

[29] We decided that we should inspect the St Luke's files and having done so disclosed a note by a staff grade doctor on 3 September 2009 recording that the injured party gave a history that at the age of 18 she got involved with drugs and alcohol and spent 3 weeks in St Luke's Hospital. The injured party stated that she was diagnosed with bipolar. In fact there is no medical diagnosis in the St Luke's notes of such a diagnosis. The note referred to a period 5 years before the offences and did not suggest any contemporaneous medical condition. Mr Magee SC submitted that the diagnosis may have been made elsewhere but we are satisfied from the note that the reference is to the period at St Luke's.

[30] We conclude, therefore, that the evidence of Dr Farnam, the forensic medical officer, was irrelevant and in the absence of any diagnosis of bipolar disorder any cross examination in relation to the complainant having that illness would similarly have been irrelevant.

[31] In our view the only assistance which the note provided was in relation to whether the complainant may have misled the doctor about her medical circumstances. She had been carefully cross-examined about the fact that she had

given evidence in court on a previous occasion in which she denied that she had been assaulted by the applicant. She stated that the evidence was untrue and given by her only because she was scared of the appellant. She accepted that she had lied to Social Services by telling them that she had parted from the appellant in order to retrieve her child from care. By comparison an inaccuracy relating to a diagnosis would have been of little or no weight in the scales of this injured party's credibility.

[32] The issue for us is whether the conviction is safe. We do not consider that the failure to disclose the letter of 3 September 2009 at the trial had any material impact on the issues which the jury had to consider. We do not consider that there is any merit in the argument that the evidence was insufficient to support the conviction.

[33] Accordingly we dismiss the appeal.