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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

LUKASZ ARTUR KUBIK

Before: Morgan LCJ, Gillen LJ and Keegan J

MORGAN LCJ (giving the judgment of the court)

[1] The applicant was convicted on 11 December 2013 by majority verdict at Belfast Crown Court of one count of rape contrary to Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008 and one count of sexual assault contrary to Article 7(1) of the same Order. We dismissed his renewed application for leave to appeal the conviction on 11 June 2015. He now seeks leave to appeal against the extended custodial sentence of 9 years comprising 4½ years in prison and 4½ years on licence followed by an extended licence period of 3 years imposed on 11 April 2014. Mr O'Donoghue QC and Mr Sherrard appeared for the applicant and Mr McCollum QC and Ms Kitson for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The victim is a 52 year old woman. Her evidence was that on the evening of 30 January 2013, she went to the home of her sister, who was there with her husband and two other men. They had drinks during which the victim consumed five beers. She left at about 3 a.m. on 31 January 2013 and went to a local cab company where she had planned to take a taxi home. When she arrived there she found the premises closed. The applicant was there with a number of females. The victim spoke to them all and the applicant told her that he was French and that his name was Chris.

[3] The victim looked at her mobile phone and found that there was no credit on it. She did not know what to do at that point and she said that the applicant asked her if she wanted to go to their house and she agreed to do that. She said that she

thought she was going there to use a phone to get her home. She said that as they walked they chatted and it was getting darker and darker. She said that the applicant then shouted something to the females in a foreign language and they then disappeared. The applicant asked her if she wanted to work for him and then said, "*I'll show you*".

[4] The victim's evidence was that he then started to molest her against a parked car. She had a plastic bag in one hand containing her remaining cans of beer and she had her handbag in the other hand. She was unable to move. She described that she was wearing slip-on type shoes and that it was very dark. She said that the applicant exposed his penis, took her hand and put it onto his penis. The victim repeatedly told the applicant she was a grandmother but he persisted, pulled her trousers down and attempted to penetrate her vagina with his penis. She said he managed to penetrate her by about an inch, as she tried to push him off her. Her evidence was that when she managed to push the applicant away, he masturbated and ejaculated before running off.

[5] The applicant was interviewed by police on 16 February 2013. Over a period of almost five hours he denied any sexual contact whatsoever. In the final interview forensic evidence connecting him sexually to the victim was put to him but he continued to deny the offences. Shortly before the trial he filed an amended defence statement alleging consensual sexual contact.

Pre-sentence report

[6] The applicant has 28 previous convictions, 26 of which occurred in Northern Ireland and 16 of which are road traffic offences including driving while using a mobile phone, driving while disqualified, driving with no insurance and driving while under the influence of alcohol or narcotic drugs. In 2010 he was convicted for possession of class B drugs and in 2011 he was convicted of offences relating to illicit trafficking of narcotic drugs in Poland. He also had convictions for theft, going equipped for theft, criminal damage, criminal damage and obstructing police. He has no previous convictions for violent or sexual offences.

[7] The applicant had a stable and happy upbringing. He completed his education and training in Poland and had a good employment record in Poland and Northern Ireland having come here in 2006. In interview he appeared emotional and ashamed of his behaviour. He said he was in good health and denied any addiction difficulties although he had convictions arising from alcohol and drugs. Before being remanded in custody he lived with his partner but the relationship ended as a result of his offending. He said he had three sexual partners in his life and denied having casual sexual relationships or any interest in sexually violent behaviour.

[8] The applicant told the Probation Officer that he could not admit any sexual contact with the victim in police interview as he did not want to jeopardise his relationship with his partner but that he changed his account at the beginning of the

trial because he was ashamed of his behaviour. He gave an account of the incident similar to the account he gave during the trial but conceded that he did not gain the victim's consent to put her hand on his penis. It was the view of the Probation Officer that the applicant was not willing to take full responsibility for his offending. He was unable to offer an explanation but stated he would not have behaved as he did had he not been under the influence of alcohol. He demonstrated limited victim empathy.

[9] The report identified the presence of a number of factors indicative of a high likelihood of reoffending. The following factors were identified as supporting that conclusion:

-Lack of constructive use of time
-Alcohol use
-Poor reasoning and thinking
-Boredom
-Impulsive risk taking behaviour
-Sexual violence
-Negative lifestyle and associates
-Poor attitudes towards offending

Some of those factors need to be put in context. Since arriving in Northern Ireland in 2006 it appears that he had a good work record until October 2012 and during that period had a 5 year stable relationship parenting a child with whom he still has contact. He had thereafter been out of work until his arrest in February 2013. He had displayed poor attitudes towards offending in respect of driving and drug related matters and the reference to a negative lifestyle and associates appears to be connected to that.

[10] The applicant was assessed as presenting a significant risk of serious harm, the factors supporting this assessment being:

-Opportunistic and impulsive nature of the offences
-Level of force/violence used during the assault
-Limited responsibility taken
-Risk-taking behaviour
-Limited insight into the antecedents of his behaviour
-Limited victim empathy

There are really three themes identified here. The first is the opportunistic nature of the offence which implicitly includes risk taking and impulse. The second is the failure to take responsibility which in this case includes limited insight and empathy and the third is the level of force or violence used.

Victim Impact

[11] The degree of harm to the victim was assessed in a report from Dr Michael Patterson, Consultant Clinical Psychologist, who said that she was suffering from post-traumatic stress disorder and he made suggestions regarding her future treatment. Dr Patterson's report disclosed that the victim had a history of pre-existing depression from which she had suffered since 1980 and in respect of which she had a further episode as a result of events in 2003 which was still affecting her at the time of the assault in this case. Dr Patterson did not have access to the medical notes and records relating to that history nor did he have access to the record of the counselling of the victim that she indicated she had after this incident. Although we recognise the distress that this attack would undoubtedly have caused even in the absence of access to those materials, it is difficult to accept the reliability of the diagnosis of post traumatic stress disorder. There was a previous relevant history in this case and its significance remains unknown. If a finding of harm is to lead to an increased sentence of imprisonment it must be convincingly established. We have previously referred to the importance of the PPS ensuring that relevant medical records in support of victim impact assessments are provided to those carrying out assessments of medical conditions in order to ensure that the court can give full voice to the harm suffered as a result of offences of this nature.

Sentencing Remarks

[12] The learned judge considered that the applicant was a dangerous offender within the meaning of Article 15 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). In reaching this finding the judge took into account the findings in the pre-sentence report, noting the applicant's minimisation of his behaviour, his unwillingness to take responsibility for his sexual offending, and his limited victim empathy, as well as his previous convictions. She considered that an extended custodial sentence would be adequate to protect the public from serious harm.

[13] She then referred to the guidelines for sentencing in rape cases set out by the Court of Appeal in Northern Ireland in the cases of O'Connell and Gilbert. She identified three relevant aggravating factors that were applicable in the current case, namely use of gratuitous violence; significant mental consequences for the victim; and further degradation of the victim in that after the rape the applicant masturbated and ejaculated over the victim. The learned judge considered that there were no mitigating factors. She sentenced the applicant to an extended custodial sentence on the first count of nine years with an extension of licence for a further three years. Taking into account the totality principle the judge imposed a concurrent sentence of 2 years for count 2.

Consideration

[14] Sentencing levels in rape cases in this jurisdiction were specifically addressed in Attorney General's Reference (No 2 of 2004) (O'Connell) [2004] NICA 15 where it was stated that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel in England and Wales ("the Panel") in its 2002 guidelines – these are 5 years with no aggravating or mitigating factors and 8 years where a number of enumerated features are present. That approach was reaffirmed by this court in Attorney General's Reference (No.3 of 2006)(Martin John Gilbert) [2006] NICA 36. Where, however, there has been a campaign of sexual violence against one or more victims a sentence of 15 years or more is appropriate as the recent decision in R v Ayton demonstrates.

[15] It is important to remember, however, the advice in R v Molloy [1997] NIJB 241 that sentencers should not view starting points as fixed tariffs for rape cases. In R v Millberry and others [2002] 2 All ER 939 the English Court of Appeal approved the recommendations of the Panel but emphasised that guidelines can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach. It is important to stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Guideline judgments are intended to assist the judge in arriving at the current sentence but they do not purport to identify the correct sentence. Doing so is the task of the trial judge.

[16] With that health warning in mind, since the recommendations of the Panel in 2002 remain the principal guidance on sentencing in rape cases in this jurisdiction, we consider it appropriate to set out a little more fully the content of the recommendations. The previous guidance had identified a number of different starting points for cases with particular features and the Panel concluded that its recommendation should follow that approach. It recommended a starting point of five years on a contest for a single offence of rape of an adult victim with no aggravating or mitigating factors. A starting point of eight years is appropriate where the following factors are present:

(i) the rape is committed by two or more offenders acting together;

(ii) the offender is in a position of responsibility towards the victim (e.g. in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (e.g. a clergyman, an emergency services patrolman, a taxi driver, or a police officer);

(iii) the offender abducts the victim and holds him or her captive;

(iv) rape of a child, or of a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability;

(v) racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (e.g. homophobic rape);

(vi) repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped);

(vii) rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

[17] In either case a number of aggravating factors were identified which would result in a sentence above either starting point:

(i) the use of violence over and above the force necessary to commit the rape;

(ii) use of a weapon to frighten or injure the victim;

(iii) the offence was planned;

(iv) an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in the transmission of a life-threatening or serious disease;

(v) further degradation of the victim, e.g. by forced oral sex or urination on the victim (referred to in *Billam* as 'further sexual indignities or perversions');

(vi) the offender has broken into or otherwise gained access to the place where the victim is living (mentioned in *Billam* as a factor attracting the 8 year starting point);

(vii) the presence of children when the offence is committed (cf. *Collier* (1992) 13 Cr App R (S) 33);

(viii) the covert use of a drug to overcome the victim's resistance and / or obliterate his or her memory of the offence;

(ix) a history of sexual assaults or violence by the offender against the victim.

The Panel recommended a starting point of 15 years in relation to offences amounting to a campaign of rape and recognised that in such cases the issue of risk

to society arose. Those are cases that inevitably are going to give rise to issues of dangerousness under the 2008 Order.

[18] We would emphasise that neither the factors indicating an increased starting point nor those setting out aggravating circumstances should be applied mechanistically. Secondly, they are not comprehensive. Where other aggravating or mitigating factors are in play they need to be taken into account. Thirdly, the court in Gilbert summarised the aggravating factors at paragraph 21. We have set out the factors as contained in the Panel's recommendations as these help to explain more fully the Panel's approach. We do not consider that the summary in Gilbert was intended to indicate any difference of approach. Fourthly, the purpose of sentencing guidelines is to ensure consistency of sentencing. The proper discretion of the judge should be exercised with that in mind. Members of the public are entitled to feel aggrieved or confused if like cases are dealt with differently.

[19] This court noted the assistance to be derived from the aggravating and mitigating factors identified by the Sentencing Council in its various guidelines at paragraph [22] of R v McCaughey and Smyth [2014] NICA 61 but discouraged judges and practitioners from being constrained by the brackets of sentencing set out in the guidance. The court noted the rationale for that approach at paragraph [25] of R v McKeown, R v Han Lin (DDP's Reference Nos 2 and 3 of 2013):

> "The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of consideration depending on the precise circumstances of the individual case."

[20] As the guidance produced by the Sentencing Council has developed over the years it has tended to become more prescriptive and instead of the broad starting points given in the 2002 recommendations of the Panel, the Sexual Offences Definitive Guidelines, produced by the Sentencing Council in 2014, now contain

ranges of sentencing dependent upon an ever more precise categorisation of the circumstances of the offence. We would discourage sentencers from attempting to categorise each case in that way and consequently the ranges suggested in the Guidelines will constitute assistance by way of general background only.

[21] In arriving at the appropriate sentence in this case the learned trial judge identified the presence of three of the aggravating factors to which O'Connell and Gilbert referred. The first was the use of gratuitous violence. We accept, of course, that the applicant used violence in taking the victim's hand and placing it on his penis and in pinning the victim to the side of the car while committing the rape. We consider that regrettably this is the kind of violence which is often implicit in the commission of this serious offence. Gratuitous violence suggests a use of violence over and above that necessary to commit the rape as stated in the Panel's recommendations. No such feature was present in this case.

[22] The second factor was the significant mental consequence for the victim. We have already commented on the unsatisfactory nature of the medical evidence introduced in the victim impact report. We wish to make it clear that this is no reflection on the victim but if such matters are to affect the level of sentence they must be established to a rigorous standard. The recommendations of the Panel refer to life threatening or serious diseases as examples of such aggravating factors. In the absence of a satisfactory report based on the relevant notes and records we cannot find such a factor present. We acknowledge, however, that an attack of this nature inevitably has a profound effect on the victim. That was no doubt apparent to the learned trial judge and she was entitled to give it some weight although the weight is tempered by the absence of medical corroboration.

[23] The third factor was the degradation of the victim. The learned trial judge suggested that the applicant masturbated and ejaculated over the victim. On the hearing of the appeal it was accepted that although the applicant masturbated and ejaculated, which is in itself an aspect of degradation, there was no sufficient evidential base for the suggestion that he ejaculated over her. We again accept that the learned trial judge was entitled to give some weight to this factor even though it is outside the precise terms of the Panel's recommendations.

[24] We have accepted that there were material aggravating factors in this case. The applicant had taken advantage of this victim by manoeuvring her away from the company of others thereby rendering her vulnerable. In light of her consumption of alcohol she would have been less capable of recognising the developing circumstances. Having raped the victim he then masturbated and ejaculated which is an aggravating factor even if he did not do so over her. We have, however, differed from the trial judge on the presence of gratuitous violence. We do not know what if any starting point the learned trial judge considered appropriate. This was clearly a case with a number of aggravating factors justifying a sentence beyond the 5 year starting point. We consider that the appropriate determinate sentence was one of seven years.

[25] The 2008 Order provides for the assessment of dangerousness. By virtue of Article 15(2) the court is required to take into account the nature and circumstances of the offence and may take into account any pattern of behaviour of which it forms part and any information about the offender which is before it. The question for the court is whether it is satisfied that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences. It was common case that a further attack of this nature would give rise to serious harm. The issue, therefore, was whether there was a significant risk of such an offence

[26] The nature and circumstances of this offence indicated that it was an opportunistic and impulsive act contributed to in part by the consumption of alcohol. The only element of planning was the separation of the victim from the remainder of the party. There was no premeditation. There was no material to indicate that this was other than a single impulsive act.

[27] In terms of the pattern of behaviour of which the offence formed a part there was no relevant pattern of behaviour. This applicant was in his late 20s, had a good work record although he was unemployed at the time, and had sustained a long-term relationship for five years in the recent past. He had no criminal record for violent or sexual offences nor was there any suggestion of previous difficulty in his relationships.

[28] It is apparent, therefore, that neither the nature nor the circumstances of the offence nor the pattern of the applicant's behaviour provided a basis for the conclusion that there was a significant risk of serious harm to members of the public from the commission of similar offences. The issue, therefore, is whether the material contained in the pre-sentence report gave rise to such a risk.

[29] At paragraph [10] above we identified the three themes of the pre-sentence report supporting the assessment that the applicant was dangerous. One of those was the level of force or violence used. We have already commented on this in our consideration of aggravating factors. We accept, of course, that violence was used in the attack but the issue is whether there is a significant risk of repetition of such violence. The second theme concerns the opportunistic and impulsive nature of the offence. That has to be seen against the background of a man in his late 20s in respect of whom there was no evidence that he had behaved in a similar fashion nor any suggestion that he had a propensity to do so. The third theme concerns the limited responsibility taken for his behaviour. The concern, of course, is that his failure to recognise his responsibility may be an indicator that he does not consider that such an attack is a serious offence. That again has to be set against a pre-existing background of a good work record, a previous stable relationship and an absence of any similar activity in a mature man.

[30] Rape is a very serious offence. It rightly invariably carries a significant sentence of imprisonment for the perpetrator. It does not follow, however, that every perpetrator represents a significant risk of serious harm by the commission of similar offences. Each case must be assessed robustly on its own merits. We have been referred to the cases of R v Xhelollari [2007] EWCA Crim 2052 and R v Nouri and Ibrahim [2012] EWCA Crim 1379 where the Court of Appeal in England and Wales set aside findings of dangerousness in those rape cases. We do not know sufficient about the background of those cases to enable us to conclude whether such a course would have been taken in this jurisdiction but the cases lend support to the proposition that an isolated sexual offence on its own may not form a basis for a finding of dangerousness. We consider that it has not been demonstrated in this case that there is a significant risk of serious harm from similar offending. We wish to make it clear that we have had the benefit of extended submissions on the question of dangerousness and been referred to case law which was not opened before the learned trial judge. Our decision should not be seen as any criticism of her careful approach.

Conclusion

[31] For the reasons given we grant leave and allow the appeal, substituting a determinate custodial sentence of seven years comprising 3 ½ years in custody and the same on licence and removing the extended sentence. The ancillary orders and recommendations will remain in place.