

Neutral Citation No: [2023] NICC 5

Ref: RAF12067

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 21/016897

Delivered: 15/02/2023

IN THE CROWN COURT FOR THE DIVISION OF BELFAST

THE KING

v

BN

SENTENCING REMARKS

HHJ NEIL RAFFERTY KC

Facts/Background

[1] On 10 October 2022 the defendant pleaded guilty to the following offences:

Count 2 Assault Occasioning Actual Bodily Harm on 1 February 2020, contrary to section 47 of the Offences Against the Person Act 1861.

Count 3 Attempting to choke with intent to commit an indictable offence (rape) on 1 February 2020, contrary to section 21 of the Offences Against the Person Act 1861.

Count 5 Assault Occasioning Actual Bodily Harm on 19 April 2019, contrary to section 47 of the Offences Against the Person Act 1861.

Count 6 Attempting to choke with intent to commit an indictable offence (rape) on 19 April 2019, contrary to section 21 of the Offences Against the Person Act 1861.

Count 7 Attempted rape on the 19 of April 2019, contrary to Article 3 (1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and Article 5(1) of the Sexual Offences (NI) Order 2008.

[2] Before dealing with the sentencing exercise I wish to make clear that I have read and considered the Victim Impact Statement in this case. I will not incorporate

it into these remarks, as I sometimes do, but I would like the victim in this case, to be informed that I have read her statement and have considered it as part of this exercise.

Background/Facts

[3] The defendant is the husband of the victim, although the parties are no longer together. They met in 2010 and married in 2013. In 2014, the couple had a son who is now nine years of age. The complainant would say that after the birth of her son, she lost interest in having a physical relationship with the defendant and this caused problems in their relationship although they remained together and shared a home in Belfast. It would seem that alcohol consumption on both sides further exacerbated a deteriorating relationship.

[4] In the early hours of 1 February 2020, the victim contacted police to report that the defendant had been involved in a domestic incident at the family home. The complainant reported that they had been drinking at that location the previous evening and that she had gone to bed at 1:30 in the morning. It seems clear that a significant amount of alcohol had been consumed. The complainant stated that at approximately 3:50am she awoke to find the defendant having sex with her. She initially consented to this but then later withdrew her consent. At that point the complainant pushed the defendant away from her as she did not want to continue. At this stage, the defendant flipped the complainant onto her back, got on top of her and attempted to grab at her throat. In the process, she was struck in the face several times. She bit him on his finger in an effort to get him to stop and the defendant has bitten her twice on the arm in return. He then placed his hands on her neck and pushed her down into the bed. At this point the victim was unable to breathe. She stated that she attempted to stop him by scraping or hitting at his body, however he continued. She stated that her vision started to become black and she was seeing stars. At this point she lost control of her bowels by urinating and defecating. It was at this point that the defendant ceased his assault. These actions constitute the offences at Count 2 - assault occasioning actual bodily harm and Count 3 - attempting to choke with intent to commit an indictable offence, namely Rape.

[5] The victim cleaned herself up and disposed of her pyjama bottoms and wipes in a bin in the bedroom. She went downstairs and it was then that she phoned the police. The defendant had left the house but returned a short while later. Police arrived soon afterwards and arrested him on suspicion of the various offences. After his arrest it was discovered that the bin that the bottoms and wipes were disposed of in had disappeared. The bin was eventually located in the back yard of the property minus the bottoms and the wipes. The mattress which had been soiled had also been flipped over prior to police arrival. This all would tend to suggest an attempt to cover up some of the evidence of what had occurred.

[6] The victim attended the Rowan Centre later that day where she was medically examined and her injuries were photographed. It was noted that she had

sustained bruising to her body, neck, and face. The Forensic Medical Officer had noted that some of the marks on her were consistent with strangulation.

[7] The defendant was transported to Musgrave custody suite after his arrest and further arrested for the offence of choking with intent. He was interviewed and released on bail. He denied all the allegations and stated that he had been defending himself.

[8] On 6 February 2020, the victim took part in an Achieving Best Evidence interview and gave an account of what had taken place. During this interview she further disclosed two earlier incidents, one of which is represented by the remaining counts to which the defendant has pleaded and the other features now only as background material, count 8 having been withdrawn.

[9] The complainant stated that on 13 April 2019 she, and the defendant, had been at home having drinks. She had gone to bed before him and had fallen asleep. When she awoke the defendant was having sex with her. It is accepted that this was a practice which had evolved in their relationship. On this occasion, however the complainant told him to stop, which he did. An argument ensued, however, which resulted in a physical altercation between the parties.

[10] Just six days later on 19 April 2019 the couple were again drinking at home and again, the complainant had gone to bed first. On this occasion she again awoke to find the defendant having sex with her. After about 30 seconds she told the defendant to stop. The defendant did stop but pushed the complainant onto her back and got on top of her. He attempted to put his penis inside her again. But it was not erect at this time. He grabbed at her breast and started twisting it. She told him to stop and began to scream. His hand went around her throat to the point where she was unable to scream and was only able to breathe in shallow breaths. She attempted to get him off by kicking, scratching, and punching him. The defendant then got up and left the room after which the complainant went to the bathroom and cleaned herself up. She noticed some blood had been discharged from her vagina. But there had been no ejaculation. She believes the defendant would have sustained some facial injuries from her scratching at his face. This event is represented in Count 5 assault occasioning actual bodily harm, Count 6 attempting to choke with intent to commit an indictable offence, namely rape and Count 7 attempted rape.

[11] After this incident, the defendant slept downstairs for the rest of the night. Later that day the complainant went to her father's house and her injuries were photographed. The victim sustained bruising to her arms, body, and breast. Later the complainant and the defendant discussed matters on the telephone. The victim sent him photos of her injuries via WhatsApp. The victim states that the defendant in response took full responsibility for what had happened. He said he had informed his own family and they were supportive of her.

[12] The complainant would state that between then and the offence in February the next year, there had been no further incidents. She described the relationship in that time as having been good although there were still concerns on the part of the defendant about the lack of a physical relationship which they had tried to address. The complainant had got pregnant in August of 2019 and sadly had a miscarriage in September. The events of 1 February 2020 represented the practical end of the relationship. Whilst there had been some contact between the parties since that time there is no longer any relationship between them. In this context Miss McDermott KC who appears for the defendant has forwarded a significant number of WhatsApp messages between the defendant and the victim which assists the court in its assessment of this case.

[13] Effectively, there are two separate incidents of offending separated by approximately 10 months.

Defendant's Circumstances

[14] The defendant is a 38 year old male. Despite the tragic untimely death of his father, he was supported by his mother and family with whom he retains a close bond. He achieved academically and left Aquinas Grammar school with a number of GCSE's before entering the catering trade before moving into employment with call centres. He had a 21 year period of full employment in that regard before gaining employment as a postman. He lost this employment following the index offence and now works as a property manager for a number of Airbnb lets.

[15] He is currently in a relationship with a new partner and they have a one year old baby. In addition to this, the defendant regards his current partner's two year old as a child of the family. He has three children by three different partners - the eldest being a 13 year old son whom he co-parents with the child's mother who gave character evidence on his behalf. She attested to him being a good father and gave evidence that domestic violence had not been a feature of her relationship with the defendant.

[16] With respect to "offence analysis" he describes the victim and himself as heavy drinkers at the time of the offences, and although he reports their patterns of daily drinking was problematic, he felt powerless to change it. He sees the correlation between alcohol use and the offences committed, stating the alcohol exacerbated what he views as 'a toxic and difficult marriage.'

[17] It is noted that he "self-reports" no other instances of domestic violence and this is, to some extent, consistent with there being no domestic violence history retained by the PSNI. The defendant has no previous convictions.

[18] With respect to "risk assessment" the PBNI convened a Risk Management Meeting and concluded:

“In the absence of an on-going pattern of serious sexual and violent offending, his acceptance of some level of responsibility for the index offences, and his reported willingness to undertake appropriately assessed focussed work, he does not meet the threshold to be assessed as presenting a significant risk of serious harm to others under PBNI Policy at this time.”

[19] For the avoidance of doubt, I accept this assessment and will deal with the defendant under the Determinate Provisions of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order).

Domestic Violence

[20] The issue of domestic violence and abuse has always been regarded as a significant factor in sentencing. Almost one in five of all reported crimes to the PSNI involves domestic abuse or violence (18.6% of all recorded crime). In the crime figures available in the year ending 30 June 2021 (covering the start of Covid and “Lockdown 1”) a total of 32,127 domestic abuse incidents were recorded. It represents 88 incidents per day.

[21] In *R v Hutchison* [2022] NICA 55, a murder tariff appeal, the Lady Chief Justice properly sets out the approach of the courts to acts of domestic violence. She states:

“[52] In this jurisdiction we are now more alert to the scourge of domestic violence which has become all too prevalent in our society. It is particularly striking in this case that there is a repeat pattern of domestic violence which escalated to murder. This sentence reflects and recognises society’s utter condemnation of such behaviour and should be taken as a signal that offending of this nature will attract commensurate sentences.”

Non-Fatal Strangulation

[22] The gravity of non-fatal strangulation is increasingly becoming identified within the courts and broader society as a significant area of concern. In the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 section 28 creates a free-standing offence of non-fatal strangulation or asphyxiation. Whilst it is yet to be commenced, it is indicative of the broader societal concerns with respect to not only domestic violence but particularly non-fatal strangulation. The research and clinical evidence, of which this court takes judicial notice, is stark. The act of strangulation itself often, as Miss McDermott KC has called in aid, produces very limited direct physical injury. Subconjunctival haemorrhage; petechial haemorrhages; and faint bruising on the neck are often the only observable injuries

after what may be a terrifying ordeal. The significance of these injuries should not be underestimated by investigators, prosecutors, or indeed, the courts.

[23] Research has clearly shown that often very modest pressure exerted upon the structures of the neck – the carotid artery; the jugular vein; and the trachea – have a terrifyingly quick action. Indeed, the accepted timeline for strangulation is that at almost seven seconds the victim will lose consciousness. At 15 seconds bladder incontinence may occur. At 30 seconds bowel incontinence may occur. Cell death occurs between two and three minutes with brain death between four and five minutes. The significance, as occurred here, of bodily incontinence occurring in a case of non-fatal strangulation is that the act of strangulation continued beyond where the victim would have lost consciousness.

[24] The *R v Millberry* approach to sentencing involving an assessment of culpability, harm and future risk is potentially misunderstood in cases of non-fatal strangulation. As has been referenced, a focus merely on physical harm fails to fully reflect the full harm caused to victims. In *R v Campbell Allen* [2020] 25 NICA Stephens LJ stated:

“[46] The terminology and concepts of “family tiffs or lover’s disputes” relied on by Mr McConkey are simply not appropriate in the context of domestic violence. Those concepts diminish culpability by suggesting that it is “only a domestic incident” or by excusing the offender on the basis that he or she is “not normally violent.” We utterly reject such an approach to culpability. These are serious crimes physically and mentally damaging wives, husbands, partners, and children. We repeat again the consistent approach of this court that the domestic context is a significant aggravating feature. We emphasise that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the offender to have a public and a private face so that an offender’s good character in relation to conduct outside the offences should generally be of no relevance where there is a proven pattern of behaviour in the domestic context.

[47] Strangulation is a form of asphyxia (lack of oxygen) characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck. The neck is an unprotected and vulnerable part of the body. Relatively modest pressure is required over a short period of time to cause problems which can be fatal or non-fatal. On occasions when fatal the offender may not have had an intention to kill.

Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The intention of the offender may be to create a shared understanding that death, should the offender so choose, is only seconds away. The act of strangulation symbolizes an abuser's power and control over the victim, most of whom are female.

[48] It is a feature of non-fatal strangulation that it leaves few marks immediately afterwards and this paucity and in some cases lack of observable physical injuries to the victim leads to its seriousness not being correctly assessed. Furthermore, in general there is no inevitable commensurate relationship between signs of injury and the degree of force used.

[49] Non-fatal strangulation can lead to physical and psychological problems..."

[25] There is clear understanding within *R v Allen* and *R v Hutchison* that with regard to "Harm" it requires to be assessed with regard not only to physical harm but also with regard to the "mentally damaging" aspects of domestic violence and non-fatal strangulation.

Approach to Sentencing in this Case

[26] It has been submitted by both counsel for the prosecution and counsel for the defendant that I should approach this sentence upon the basis of totality and that the offence of attempted choking with intent to commit rape should be taken as the "headline" offence. I make it clear that in this court's view, the attempted rape at Count 7 is no less serious for having taken place in the circumstances which it did. Nevertheless, I do see some merit in that approach since it will fully allow the court to focus upon the totality of the criminal culpability. Accordingly, I make it clear that I will regard the attempted rape and other offending as aggravating features and sentence concurrently. I make it clear, if I am wrong in that approach, that I would have reached the same total figure by consecutive sentencing.

[27] I note that the new offence of non-fatal strangulation in England and Wales has a maximum sentence of five years. The same offence, when commenced in Northern Ireland, has a 14 year maximum. The offence of attempted choking with intent under the Offences Against the Person Act 1861 has a maximum sentence of life imprisonment. There is a paucity of sentencing authority in this area and it is important to consider the sentencing framework for the offence that the court is

sentencing. The elevated sentencing maximum for attempted choking “with intent” is clearly linked with the intention to commit a further indicatable offence. It is not non-fatal strangulation simpliciter. The intent is therefore a significant factor when considering the appropriate starting points and sentencing range. Within that context I remind myself of the dicta in *R v Kubik* [2016] NICA 3 where the court at paragraph 16 discussed the starting points of five and eight years before moving on to discuss the factors that may aggravate either starting point. The court stated:

“[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, eg 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 eight 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.”

[28] Were the court to assess the attempted choking and previous set of offences as aggravators to an attempted rape, I have no doubt, even allowing for good character and some positive mitigations, the starting point would be significantly elevated.

Conclusion

[29] I am satisfied that cases involving choking or non-fatal strangulation require to be considered on a case by case basis. However, I am satisfied that there are a number of principles or matters which require consideration in assessing cases of this type:

- (i) Non-fatal strangulation must be clearly understood as a very serious offence in its own right. It is a terrifying experience for any victim and deterrent sentences are required not just to punish the offender but to deter others.
- (ii) Non-fatal strangulation in a domestic violence setting must be carefully examined by the police; Public Prosecution Service; Probation Board for Northern Ireland and the courts. It is a statistical “red flag” for femicide and operates at all levels in the assessment of “future risk” which is one of the *Millberry* principles. It may also significantly impact upon the question of “dangerousness” under the 2008 Order.
- (iii) As noted in *R v Allen* [2020] NICA 25, non-fatal strangulation may often result in little or no observable physical injury. This does NOT equate to “low harm” under a *Millberry* assessment. The terrifying and potentially life-threatening nature of non-fatal strangulation requires to be properly understood. In addition, to any physical injury, “mentally damaging” trauma and harm can largely be assumed and accordingly “high harm” applies.
- (iv) The physiological sequelae from choking and non-fatal strangulation with respect to incontinence of urine, faeces, or both, must be understood, and, since it is connected with duration, can be regarded as a factor of significance.

[30] I am satisfied that the following matters or aggravating factors assist in assessing the appropriate starting point in this case:

- (i) There are two separate instances of offending separated by a period of almost one year. (If I am wrong to treat this as an aggravating factor, I make it clear that I do so intending to pass a concurrent sentence. I would have reached the same end point by consecutive sentencing subject to totality.)
- (ii) The attempted choking is “with intent” to commit rape. (The sentences applicable for rape/attempted rape must, in my view, factor into the sentencing exercise with respect, particularly, to culpability.)
- (iii) Recognition that Count 3 with respect to the attempted choking on 1 February 2020 was to the extent and duration that the victim lost consciousness and voided her bladder and bowels. For the reasons set out above, this is a factor of significance in such cases.

- (iv) The domestic setting of the incidents.

The following mitigating factors are present:

- (i) The defendant pleaded guilty. I am satisfied by the explanation of counsel that this was a “plea of value” and that there were significant ongoing and early discussions largely around legal issues connected with the sexual offending.
- (ii) The defendant presents with no criminal convictions. Indeed, he has a significant and positive work record. He has entered into a new relationship and there are no concerns with respect to that relationship.
- (iii) The defendant has parental responsibilities and I am urged to take these into account under *R v Petherick*. This case does not sit on the “cusp of custody” and whilst I do consider the article 8 rights of his children, the applicability of article 8 must necessarily be circumscribed.
- (iv) There is no known domestic violence record or history connected with the defendant. This is confirmed in the pre-sentence report with respect to a domestic violence register held by PSNI. In addition, a previous partner gave positive evidence that she had experienced no incidents of domestic violence.

[31] After considering the above factors I have come to the conclusion that the sentence, allowing for personal mitigation, that I would have imposed in totality had you been convicted by a jury is nine years immediate custody. I am satisfied that this was a plea of value where there were legal issues and background circumstances which required to be resolved. Not without some degree of hesitation, the reduction appropriate for your plea is one third. Accordingly, the sentences are as follows:

- Count 2 Assault Occasioning Actual Bodily Harm- there will be a sentence of two years split 12 months custody and 12 months statutory supervision.
- Count 3 Which I designate as the headline offence to reflect not only its gravity but also totality is six years to be served three years custody followed by three years statutory supervision. I endorse the recommendations in the Pre-Sentence Report as forming the basis for that supervision.
- Count 5 Assault Occasioning Actual Bodily Harm - there will be a sentence of two years split into 12 months custody and 12 months statutory supervision.
- Count 6 There will be a sentence of six years again split into three years custody and three years supervision.

Count 7 The attempted rape there will be a sentence of four years split into two years custody and two years statutory supervision.

[32] As a consequence of the sentences you are required to comply with the requirements of the Sexual Offences Registration scheme for an indefinite period.

[33] In addition, you may be barred and placed upon the disqualification register for working with Children and Vulnerable Adults.

[34] Lastly, I have considered whether or not a Sexual Offences Prevention Order (SOPO) is necessary and proportionate. Given the circumstances of the offending I am satisfied that a SOPO in the terms of the Pre-Sentence Report is both necessary and proportionate.

[35] Offender levy £50.