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<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	ICOS No:
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JASON ROBERT WILLIAM STEWART

Mr Halleron BL (instructed by JPH Law Solicitors) for the Appellant
Ms McKay BL (instructed by PPS) for the Respondent

Before: Morgan LCJ, McCloskey LJ and Maguire J

MORGAN LCJ (delivering the judgment of the court)

[1] This is a renewed application for leave to appeal a determinate custodial sentence of 37 months (18.5 months custodial, 18.5 months on licence) imposed by HHJ Lynch QC at Dungannon Crown Court on 17 August 2020 in respect of one count of Assault Occasioning Actual Bodily Harm ("AOABH") contrary to section 47 of the Offences against the Person Act 1861. The applicant pleaded guilty at arraignment on 12 November 2019.

[2] The prosecution opened the case on the following basis:

"The injured party and defendant were in a volatile on-off relationship that involved a history of calls to police made by both parties alleging assaults by the other.

On Monday 20 May 2019 they were at the injured party's house. She had a glass of wine and he had a few beers. Around half 7 or 8 o'clock a verbal argument took place between them. When the injured party brought up the topic of the defendant's children this provoked a reaction.

She went to go upstairs and he grabbed her back. When she moved her arm to escape his grasp he pushed her.

Her head and shoulder connected with a glass panel in the hallway, causing it to smash. She screamed at him repeatedly to get out. He pushed her onto the stairs, grabbed her by the hair and dragged her upstairs into the front bedroom. He put something around her neck which was made of fabric. He was sitting on top of her, strangling her and restricting her breathing. She fell unconscious for a period of time.

The next thing she recalls is coming round. She was coughing and heard the defendant say "what have I done? I've killed my baby." She then realised she had wet herself during the incident. She told him she needed to get washed and got up, went into her own room and had a bath. The defendant said he wanted to keep an eye on her so he slept on a mattress in the bedroom. The next morning she asked him to leave and he did. She describes being left devastated, sore, annoyed and ashamed as a result of the incident.

She attended work that morning and her employer noted she was shaking, her eyes were bloodshot, she had dried blood in her ears and red marks around her neck. Later in the morning he became so concerned about her welfare he gave her the option of phoning police or going to the hospital. She agreed to go to hospital and he brought her there.

She was attended to in A&E and the doctor noted (1) bleeding from blood vessels on the surface of her eyes, (2) bleeding behind both eardrums and ruptured ear drums, (3) bruising to the neck and (4) a small bruise to her left arm. She was discharged with analgesia.

That evening she reported the incident to police who duly attended, recorded a statement and photographed her injuries. The defendant was arrested and interviewed. Cuts were noted to both of his hands and were photographed. During interview he described their relationship as quite volatile. He said they would argue with each other when they consumed Buckfast. He claimed she had a drink problem but he didn't.

In relation to the events of Monday 20th he stated the injured party had tried to obtain cannabis and when she wasn't able to she flipped and provoked an argument

with him. During this he was trying to get upstairs. He pushed past her and she went up against the wall and her elbow went through the window pane in the hallway, causing it to smash.

He then went up to a bedroom and went to sleep. About 20 minutes later he woke to find her standing over him with a knife threatening to kill him. He tried to defend himself by grabbing her arms and slapping her but this was ineffective. He then grabbed something and wrapped it around her neck to get her to drop the knife. He said the only injuries she received was a bit of bruising around the neck."

[3] The applicant has a total of 8 previous convictions, including a conviction for common assault against the victim in February 2018. The pre-sentence report noted that he is a 41 year old man. He reported bullying at school, physical abuse from his father at home and sexual abuse from the age of seven by an adult male. He left school aged 15. The abuse he suffered as a child had a negative impact on his mental health and he misused drugs. He overdosed on two occasions, most recently in 2015. Following further self-harm in December 2016, he was referred to the Community Mental Health Team. He has four children from three previous relationships but has limited contact with his children.

[4] The report noted that the applicant took limited responsibility for the index offence, attributing his actions to the effects of medication. He was unwilling to discuss the triggers for his violent behaviour towards his partner and minimised his responsibility for his actions. However, he accepted that he needed help to change his patterns of behaviour. His insight into the long-term impact his behaviour had on his partner was limited. This is his second conviction for the use of violence on her.

[5] The applicant was assessed as posing a high likelihood of re-offending. He was assessed as meeting the criteria for posing a significant risk of serious harm to others at present. The learned trial judge heard submissions on whether he could be satisfied that the dangerousness provisions applied and accepted that they did not. He imposed a 3 year restraint order to protect the victim.

[6] The judge rejected the applicant's account of the incident. He identified the following aggravating factors:

- (i) the offence was one of domestic violence;
- (ii) the applicant had a criminal record for violence, specifically directed towards the victim;

- (iii) the victim was assaulted in her own home;
- (iv) the issue of strangulation.

[7] The only mitigating factor was the plea of guilty but he did not give full credit given the injuries sustained and the unlikelihood of the defence put forward at interview. The judge noted that the maximum sentence for AOABH was seven years' imprisonment. He took a starting point of 55 months on the facts of the present case, due to the strangulation and force used. He reduced that to 40 months for the plea and allowed a further 3 months relying on R v Manning [2020] EWCA Crim 592 and R v Beggs [2020] NICC 9.

Consideration

[8] The first issue is the criticism of the starting point. This court has recently examined the nature of strangulation as an aggravating factor in domestic cases such as this in R v Campbell Allen [2020] NICA 25. The relevant passage is from [47] to [52]:

“[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. For instance it can result in damage to anatomical structures within the neck, such as the muscles, blood vessels, vocal cords, hyoid bone or thyroid gland.

[50] Non-fatal strangulation may be a predictor of the future use of lethal force. Studies in both Australia and New Zealand found that strangulation is a significant factor in risk assessment for homicide of women in the domestic context.

[51] We note that the seriousness of strangulation has led to the introduction of legislation in other jurisdictions criminalising the act of strangulation as a stand-alone offence and increased sentencing where it is a feature. For instance a new offence came into operation in New Zealand on 3 December 2018 and there are 44 states in the USA which have such an offence. In this jurisdiction there is no stand-alone offence but rather section 21 of the Offences against the Person Act 1861 criminalises attempting “to choke, suffocate or strangle ... with intent ... to commit, ... any indictable offence.”

[52] Both those representing the prosecution and the appellant in this case recognised that strangulation should be an aggravating feature to be taken into account by courts when imposing sentence. We agree and consider it to be a substantial aggravating factor. We consider that the use of body force to strangle is not less heinous than the use of a weapon. We also emphasise the need to give consideration to that feature when forming a view as to future risks.”

[9] This was a very bad case of its type. The victim lost consciousness. She wet herself. She had visible blood injuries to her eyes and ears, rupture of the eardrum and bruising to the neck and left arm. The applicant could easily have unintentionally killed the victim. We consider that the starting point of 55 months properly reflected those features. We also take the view that there is much to be said for consideration of a specific offence dealing with this conduct.

[10] We do not consider that there is much assistance to be gained from the other examples of the many ways in which this offence can be committed. We also consider in a case of strangulation it is entirely inappropriate to judge the harm caused by looking at the residual injuries. The more important issue is consideration

of the potential arising from an attack of this nature. That potential was considerable in this case.

[11] The second issue concerns the discount for the plea. The applicant did not admit his involvement at interview. He made up a story that he was attacked with a knife. Although he pleaded at arraignment he was not entitled to full discount. The judge allowed 27% which is well within range. The judge appeared to suggest that the discount should be reduced because of the victim's injuries. We do not understand why that should be so. The starting point should have taken that into account as a relevant factor.

[12] The other issue is the submission that he should have received a discount because of the COVID-19 pandemic. The applicant relied on the decision of the English Court of Appeal in R v Manning [2020] EWCA Crim 592. That was an Attorney General's Reference in respect of a suspended sentence of 12 months for pleas to 4 counts of sexual activity with a child and one count of causing or inciting a child to engage in sexual activity.

[13] The decision was handed down on 30 April 2020. The argument advanced on behalf of the Attorney General was that an immediate sentence of imprisonment was appropriate. Lord Burnett stated:

“We would mention one other factor of relevance. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well known.

We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgement should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their

families are likely to be anxious about the risk of the transmission of Covid-19.”

[14] The impact of COVID-19 on the appropriate sentence of imprisonment has also been considered in Scotland. HM Advocate v Lindsay [2020] HCJAC 26 was another prosecution appeal in this case against a sentence of four months imprisonment imposed upon a man with a bad record who had coughed at police. The judgment was given by the Lord Justice Clerk, Lady Dorrian. She rejected the argument that there should be additional discount for those who pleaded guilty because it helped the court to deal with backlogs. She considered that such incentives might create an inducement to cause people to plead guilty when they had not committed the crime. She considered the usual discounts for pleas of guilty generous.

[15] In respect of the argument that there should be a discount for the conditions within the prison she said:

“The conditions which arise as a consequence of COVID-19 are unlikely to be permanent, and one can expect that in the short to medium term prisons will find better ways of adapting to the conditions dictated by the virus. There are already signs that this may be happening.”

She concluded: “It is reasonable to anticipate that in the short to medium term the Scottish Prison Service will find ways of adapting to the requirements imposed by the prevalence of COVID-19 and find reasonable ways of improving the situation for those in their care. To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now.”

The sentence was increased to one of 10 months’ imprisonment.

[16] In this jurisdiction this issue was addressed by the then Recorder Judge McFarland. R v Beggs [2020] NICC 9 was delivered on 15 April 2020 and concerned a plea to offences of affray, possession of an offensive weapon and criminal damage. In imposing a sentence of 12 months the Recorder gave a reduction for the plea over and above that normally allowed to take into account the assistance provided by the defendant in making a positive request to have his case listed for the purposes of a guilty plea and early sentence during the medical emergency. In the current circumstances the Recorder concluded that this evidenced additional remorse on his

part and the willingness on his part to cooperate with the authorities. He allowed a discount of 40%.

[17] We accept that the pandemic has affected the prison regime and that in particular prisoners have been deprived of face-to-face meetings with family. The Northern Ireland Prison Service has, however, worked hard to minimise the impact upon the prison population. The present position was set out by Colton J in *R v Morgan* [2020] NICC 14:

“[94] In relation to the situation in Northern Ireland prisons I am informed by the prison authorities that any adult male who is sentenced will be transported to Maghaberry Prison where they will be interviewed and undergo a medical assessment. In line with PHA guidance a prisoner will be placed in an isolation unit for 14 days to mitigate against the risk of Covid-19 entering the prison. During this time they will be seen daily by healthcare staff, engaged multiple times daily by prison staff, will have access to telephones, showers, tuckshop and virtual visits.

[95] Every prisoner will be given free phone credit to enhance family contact. Pastoral support is available. In-cell activity packs and in-cell distraction packs are also supplied.

[96] Where there is a particular vulnerability through age or health there are two shielding units which can be utilised if necessary.

[97] Newly sentenced prisoners will be screened by healthcare through Covid testing. Any positive cases will be transferred to the area identified for positive cases. To date as I understand it only one incident of Covid has been detected in the prison. Within the isolation unit all staff wear PPE at all times and within the shielding unit staff wear masks when having face to face dealings with individual prisoners.

[98] Extensive hand sanitising and infection control measures are provided within the prison environment.

[99] I understand that with the exception of those in isolation units, all prisoners are unlocked as normal during the day and for evening association but are confined to their landing. On 7 April NIPS introduced an

extensive programme of virtual visits which have been widely used and have allowed prisoners to keep in contact with families. NIPS in person visits, under new guidelines, began on 27 July. The NIPS will continue to keep arrangements for visits and other elements of dealing with the pandemic under review.”

[18] Given the steps taken by the Prison Service to deal with the issues arising from the pandemic we consider that there is much to be said for the approach espoused by Lady Dorrian. We do not, therefore, accept that there should be any automatic increase in the discount allowed for a plea of guilty by reason of prison conditions. We recognise, however, the force of the approach taken by McFarland J as he now is in respect of those who plead guilty and face up to their responsibilities during the pandemic.

[19] That, of course, was not this case. The applicant pleaded guilty prior to the pandemic. The discount allowed by the learned trial judge was generous.

Conclusion

[20] For the reasons given we grant leave to appeal as we called upon the prosecution but dismiss the appeal against sentence.