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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/01/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

WD

Mr Boyd (instructed by Donnelly & Wall Solicitors) for the Appellant
Ms Pinkerton (instructed by the Public Prosecution Service) for the Crown

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Before: Treacy LJ, Horner LJ and O'Hara J

TREACY LJ

Introduction

[1] This is an appeal against sentence which was dismissed on the date it was heard with reasons to follow. This judgment now supplies those reasons.

Factual background

[2] The appellant and the victim, JG, had been in a relationship for some two and a half years but, at the date of the events giving rise to this appeal, that relationship was over.

[3] Around midnight on the night of 12/13 July 2022 the appellant called at the home of JG demanding that she give him £50. While there he kicked and broke the oven door and on his way out he took her phone, her handbag and other personal items with him. JG reported this incident to police who attended and recorded the loss and damage.

[4] Around 3:40am on the morning of 13 July the appellant returned to the victim's home where she was in bed. She heard noise at her front door and saw through her doorbell camera that the appellant was at her door again. She called the police.

Shortly afterwards she heard a noise at the back of her home followed by shouting and smashing in the downstairs areas of her house. She locked herself in a bathroom.

[5] Police arrived and apprehended the appellant at the scene. They noted that extensive damage had been done throughout the house. After police had left the victim noticed three knives lying close to the bathroom door which had not been there before. She advised police of this find. During police interview the appellant initially denied moving these knives. Later he said he did not know why he had taken the knives upstairs. Finally, he said he had brought them upstairs to unlock the bathroom door.

[6] The final question put to him by police was:

> "If you got the door open what was the plan?"

He replied:

> "I just wanted to see if there was another man there. If they're had of been, then I don't know."

[7] In her statement to police the injured party stated that this incident:

> "left me terrified as I did not know what extent of harm he would have caused me if he had got to me."

Prosecution and plea

[8] The appellant initially denied all charges arising from the above facts but on 7 September 2023 he pleaded guilty to three charges. These were:

(i) Burglary with intent to commit criminal damage on 13 July 2022 with the statutory domestic abuse aggravator.

(ii) Domestic abuse on 13 July 2022.

(iii) Theft on 13 July 2022 with the statutory domestic abuse aggravator.

Sentence

[9] He was sentenced on 15 November 2023 at Newry Crown Court by His Honour Judge Irvine KC, (hereafter "the judge").

[10] The sentences imposed where 18 months imprisonment in respect of the burglary; 27 months imprisonment in respect of the domestic abuse; 9 months imprisonment in respect of the theft. The judge also activated a suspended sentence in respect of earlier unrelated offending. He directed that all sentences should run

concurrently and that all sentences be split 50/50 between time in custody and time on licence.

This appeal

[11] The appellant challenges the sentence on the grounds that it is manifestly excessive and wrong in principle for the following reasons:

(1) the judge was wrong to select the domestic abuse offence as the headline offence and did not give reasons for this selection;

(2) the judge ought to have selected the burglary offence as the headline offence as it was already aggravated by the domestic abuse and more accurately encompassed the facts of this case.

(3) The judge selected a starting point for the domestic abuse offence that was arbitrary, manifestly excessive and not justified in the circumstances of this case. He failed to take into account that the domestic abuse element of the case was limited to this incident and was not reflective of a sustained pattern of behaviour towards the victim.

(4) The judge failed to take into account that he had already considered the fact that this case was aggravated by domestic abuse when he imposed a lengthier sentence for domestic abuse. We will refer to this ground as the 'double counting' ground.

Relevant statutory provisions

[12] Section 1 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 provides:

> "**The domestic abuse offence**
>
> 1.—(1) A person ("A") commits an offence if—
>
> (a) A engages in a course of behaviour that is abusive of another person ("B"),
>
> (b) A and B are personally connected to each other at the time, and
>
> (c) both of the further conditions are met.
>
> (2) The further conditions are—

(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm, and

(b) that A—

(i) intends the course of behaviour to cause B to suffer physical or psychological harm, or

(ii) is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.

(3) The references in this section to psychological harm include fear, alarm and distress.

(4) The offence under this section is to be known as the domestic abuse offence."

Section 5(4):

"(4) One person is in a relevant relationship with someone else if—

(a) they are married to, or are civil partners of, each other, or

(b) they are living together as if spouses of each other."

Section 15 provides:

"**Aggravation as to domestic abuse**

15.—(1) It may be specified as an allegation alongside a charge of an offence against a person ("A") that the offence is aggravated by reason of involving domestic abuse.

(2) An offence as mentioned in subsection (1) does not include the domestic abuse offence (see section 1).

(3) Subsection (4) applies where—

(a) an allegation of aggravation is specified as mentioned in subsection (1), and

(b) the aggravation as well as the charge is proved.

(4) The court must—

(a) state on conviction that the offence is aggravated by reason of involving domestic abuse,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence, and

(d) in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.

(5) However, if—

(a) the charge is proved, but

(b) the aggravation is not proved,

A's conviction is as if there were no reference to the aggravation alongside the charge."

Sentencing remarks of the judge

[13] In his sentencing remarks the judge reminds the appellant that he has pleaded guilty to three counts namely, burglary, domestic abuse and theft. He notes that the burglary and theft counts are each aggravated by reason of domestic abuse. He notes that although the appellant did plead guilty, he did not do so at the earliest opportunity and therefore the discount available to him for his plea would be reduced. He recites the facts and notes that the appellant had paid £1,000 in compensation to the victim in relation to the damage he had caused in her home.

Selecting the headline offence

[14] His review of the facts make it clear that the judge regards the events of the evening in question as containing two incidents of domestic abuse. He says:

> "It is of *considerable note* that the appellant initially went to the house at approximately midnight that evening, that he caused damage in the home at that time, and that when leaving he stole personal items belonging to the victim."

He notes that the victim had called the police in response to this initial incident and that police had attended the scene and noted the damage caused in this incident.

[15] His sentencing remarks review what the appellant told police about the reasons for his behaviour. He reminds the appellant:

> "You told police that, as far as you were concerned, you believed that [JG] had another male person in the house, and that was the reason, effectively, why you entered it.'

[16] Clearly, the underlying domestic abuse agenda of the appellant as taken into account by the judge in relation to his determination of what the headline offence ought to be in this case.

[17] Later in his remarks he notes again that "this is a case of repeated offending" and that "all offences have been committed in a domestic context, in the victim's home, somewhere where she is entitled to feel safe."

[18] It is well understood in this jurisdiction that the selection of the headline offence is a matter for the judge's discretion, see *R v Hughes* [2022]NICA 12, and *R v Hutchinson* [2023] NICA 3. We consider that selecting domestic abuse as the headline offence was a proper course of action for the judge to take because of his view that the offending in this case was done in pursuance of an underlying domestic abuse agenda. The elements of the case which led him to this conclusion are set out in his sentencing remarks and are summarised above, and we are satisfied that this was a proper conclusion for him to reach on the facts of this case. Indeed, we agree with the judge that the domestic abuse offence is the one that best captures the flavour of this course of offending, motivated as it was by the appellant's desire to 'check out' whether his ex-partner had entered a new relationship with another man. For all these reasons we dismiss grounds 1 and 2 of this appeal.

[19] Ground 3 of the appeal asserts that the starting point chosen for the domestic abuse offence was 'arbitrary, manifestly excessive and not justified in the circumstances of this case', and that he 'failed to take into account that the domestic abuse element of the case was limited to this incident and was not reflective of a sustained pattern of behaviour towards the victim.'

[20] The Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 ('the 2021 Act) does not require "a sustained pattern of behaviour" as ground 3 suggests. The statute says the offence is committed if a person "engages in a course of behaviour that is abusive of another person" with whom he is "personally connected." Section 5(4) states that:

> "a course of behaviour involves behaviour on at least two occasions."

[21] It is clear from the facts that this appellant did engage in abusive behaviour on two occasions on the night in question, the first episode happening around midnight and the second commencing around 3.40am. These were the facts that the judge found. Accordingly we consider that this element of ground 3 to be misconceived and we are satisfied that the facts of the case meet the statutory criteria for the commission of the domestic abuse offence.

Is the sentence "manifestly excessive?"

[22] Ground 3 further alleges that the starting point chosen by the judge for the domestic abuse offence was "arbitrary, manifestly excessive and not justified in the circumstances of this case."

[23] The starting point selected for this offence was three years. We note that in Northern Ireland the maximum available sentence for domestic abuse when charged at Crown Court level is 14 years, so the judge appears to have placed this case at the lower end of the severity range.

[24] Within that less severe range, he selected the starting point after reviewing the appellant's relevant history. His criminal record included 54 previous convictions, one of which related to an earlier domestic incident with a different previous partner. He noted that at the time of the current offending the appellant was on probation in relation to some of the earlier offences and was also in breach of two suspended sentences for earlier unrelated drugs offences. He noted that it fell to him to activate those suspended sentences, and he did so, ordering that they should run concurrently with the sentences to be imposed in the present case having regard to the totality principle.

[25] In summary, at the time of this sentencing the judge was aware that the appellant had been treated leniently by several courts in the past and had had several opportunities to mend his ways. By committing the current offences he showed that he was unable to take advantage of those opportunities, and these factors clearly warranted less leniency on this occasion.

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[26] When reaching the starting point he had regard to mitigating factors other than the plea. For example he took account of the probation report which noted that the appellant had expressed remorse for his behaviour towards the victim. The probation service had assessed him as posing a medium risk of reoffending but no significant risk of causing serious harm, and the judge had regard to these assessments.

[27] Finally, when reaching this starting point he had regard to the relevant case law. He referred in particular to the decision of the LCJ in *R v Hughes* [2022] NICA 12 in which she said that:

> "Perpetrators of repeated domestic violence... can expect to obtain higher sentences for this type of offending."

[28] Having regard to all the above, it is our view that the starting point in this case was reached using the correct process, that it was neither arbitrary nor manifestly excessive and that it was well within the range of sentences properly available to the judge. We dismiss ground 3 of this appeal.

The double counting point

[29] Ground 4 states that the judge failed to take account of the fact that:

> "This case was aggravated by domestic abuse when he proceeded to impose a much lengthier sentence for the domestic abuse offence."

[30] That is not quite accurate. This 'case' is not aggravated by domestic abuse as a whole. Two of the charges to which the appellant pleaded guilty are each separately and individually aggravated by the statutory provision in relation to sentence aggravation contained in section 15(1) of the 2021 Act. These are the burglary charge and the theft charge. The statutory aggravator was applied to these two charges because prosecutors felt that this burglary and these thefts were something 'other than' the average burglary or theft. By pleading guilty to these aggravated charges, the appellant accepts that this understanding of what he did was correct.

[31] In most burglary and theft cases the objective of the perpetrator is to take the property of the victim and use it as his own. A personal connection between the victim and the perpetrator is not ordinarily a relevant factor in the decision to burgle or to thieve. In cases to which the statutory aggravator is correctly applied, the act of burglary or theft is aggravated *because* the perpetrator and the victim are personally connected to each other, and the identity of the victim is a motivator for the selection of that person as the target of whatever criminal actions follow. Typically, the perpetrator intends to cause physical or psychological harm to that victim ***via*** the commission of the criminal offences, or at least he is reckless as to whether such harm will be suffered by that victim.

[32] So, in cases where the aggravator is correctly applied, there is an additional layer of malice in the formation of the intention to burgle or to thieve and an additional element of harm to be secured by the commission of those wrongful acts. That additional element arises because of the personal connection between perpetrator and victim, and it is this which distinguishes the aggravated offence from any other burglary or theft offence.

[33] In the present case the domestic aggravation was woven into the perpetrator's intentions and his actions when he went about burgling this house and stealing from it. That domestic aggravator is a matter inherent within the behaviour which is the subject of each aggravated charge. It is the vindictive motive and the ancillary purpose of the criminal action under consideration which makes it "extra bad" and,

therefore, deserving of a higher level of punishment. That "extra bad" element should be present in each charge to which the aggravator is attached, so the imposition of a higher sentence for *each* charge is not double counting for the 'same' thing. It is imposing condign punishment for the additional malevolent element inherent in each of the subject charges. In the example of the present case, the higher sentences for the burglary and the theft charges are condign punishment for the appellant's decision to use burglary and to use theft respectively as mechanisms for inflicting or potentially inflicting damage and harm on his ex-partner. They are each separately "earned" punishments for the aggravated nature of this burglary and this theft in the context of the personal connection which existed between this perpetrator and his victim.

Was there any double counting?

[34] Ground 4 of this appeal states that the judge:

> "failed to take into account that he had already considered the fact that this case was aggravated by domestic abuse when he proceeded to impose a much lengthier sentence for the domestic abuse offence."

[35] As earlier noted it was the charges of burglary and of theft which were aggravated by their domestic context so attracting the statutory aggravator. The section 15 aggravator cannot be attached to the section 1 offence of domestic abuse because this is prohibited by section 15(2). Section 15(2) requires any actual domestic abuse which arises during the course of conduct under consideration, and which is charged as the Section 1 offence of domestic abuse to be evaluated and punished without any additional aggravation being attributed to it.

[36] S15(2) prevents the domestic context from being treated as a **further** aggravator in domestic abuse cases, but it does not prevent that context from being taken into account as an *inherent* aggravator within the nature of cases charged as section 1 domestic abuse offences.

[37] We are satisfied that the judge in the present case give proper weight to the domestic context when reaching his sentencing decision for that offence, and that he did not add any impermissible punishment using the section 15 aggravator in relation to the domestic abuse offence. He did appropriately add time to the sentences for the burglary and for the thefts because those offences were perpetrated *as a means of* advancing a domestic abuse agenda, and this is what the 2021 act permits and expects. We are satisfied that the principle of totality was properly observed in this case, and that the sentence imposed was within the permissible range of sentences that could be imposed in a case involving all the elements that were present here.

[38] For all these reasons, we dismiss this appeal.