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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **21/01/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

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S McKenna BL (instructed by Reavey & Co Solicitors) for the Appellant
J Johnston BL (instructed by the PPS) for the Crown

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Before: Treacy LJ and Horner LJ

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TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] This is an appeal against an extended custodial sentence of four years custody and three years licence imposed for an assault occasioning actual bodily harm. A Violent Offences Prevention Order (VOPO) of five years was also imposed. We dismissed this appeal at the conclusion of the hearing written reasons to follow.

Anonymity

[2] We have anonymised the parties.

Factual background

[3] On 21 January 2022, the appellant returned to Belfast from Scotland where he had been working. He had arranged to be picked up from the train station by the complainant, his ex-partner and the injured party in this case. Their relationship had ended some time previously and on the date in question each of the two had new partners. However, the appellant had contacted the complainant to say he no longer wanted to be with his new partner, and to ask if she would pick him up from the train. She agreed.

[4] She collected him and brought him back to her own home - a house she did not share with the appellant. The two had dinner and then went upstairs to have sex. An argument broke out during which a strangulation attack took place against her. She reports:

> "He grabbed me by the throat with both hands and squeezed. I could feel pressure under my throat in the middle. I couldn't breathe. I remember falling to the ground. I couldn't get a breath. I felt as though I was having a panic attack. I remember crawling on the ground. That's the last thing I remember."

[5] The injured party called police at 8:21pm. The attending officer noted that the victim looked 'visibly upset' and 'shaken.' She noted:

> "Slight bruising to (the Complainant's) inner arms and light swelling and darkness to her right eye I took pictures of those injuries and to (the Complainant's) neck, although I did not note any distinctive markings on it."

[6] The appellant was arrested the following day. He provided a 'no comment' interview to police and pleaded not guilty at arraignment. A trial date was set. The appellant lodged a defence statement claiming self-defence and asserting that he was the victim of an attack by the injured party. Until 12 days before the trial, the victim believed she would have to give evidence at the trial to contradict his version of events.

[7] Twelve days before the trial was set to start, he changed his plea to guilty. He accepted that he was guilty of an assault occasioning actual bodily harm. He was sentenced for that offence on 16 June 2023 at Belfast Crown Court (sitting in Coleraine) by the trial judge, HHJ Irvine KC. The appellant lodged an appeal against that sentence and that appeal is the subject of these proceedings.

The grounds of appeal

[8] The main grounds of appeal may be summarised as follows:

(1) The sentence is manifestly excessive and wrong in principle. The appellant claims that the trial judge misdirected himself in the following ways:

   (a) He erred in selecting a starting point of five years custody after trial for this offence and this starting point was excessive having regard to previous case law.

(b) He said he would discount the sentence by 25% because of the guilty plea, but in fact only reduced it by 20%.

(c) He erred in finding that the level of harm in this case was high when the 'height of the injury was bruising and redness with no evidence of psychiatric injury.' The appellant claims that the trial judge used the aggravating feature of strangulation to justify the finding of high harm when this feature had already been taken into consideration when deciding there was a high level of culpability in the case. It had also been counted as 'an aggravating feature in the case as a whole.'

(d) He erred in deciding that the defendant presents 'a serious risk of significant harm' for the purposes of Article 15 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). The Probation Service did not make that assessment of him and neither did the psychologist who submitted a report in the case. The appellant claims the judge gave insufficient weight to these two assessments.

(e) He erred by placing too much weight on the appellant's antecedents 'none of which involve a serious injury nor does the present case.'

[9] Various other minor grounds are asserted which may be referred to if necessary.

The sentencing process

[10] In Northern Ireland the offence of assault occasioning actual bodily harm carries a maximum penalty of seven years' imprisonment, that maximum having been raised from five years to seven years in 2004 by the Criminal Justice (No. 2) (Northern Ireland) Order 2004. A person convicted of this offence may, therefore, have to serve anything up to seven years in prison for it. To decide where in this range the sentence should fall, the sentencing judge must assess the culpability of the defendant and the level of harm he has caused to the injured party, and he must arrive at a sentence which fairly reflects each of these two factors.

Culpability

[11] 'Culpability' looks at how badly the offender behaved when he committed the crime in question. Some assaults occasioning actual bodily harm may be the result of longstanding malice against the victim. They may be carefully pre-planned. They may involve elements of deceit, for example where an offender lures his victim into a trap only to assault them.

[12] Other assaults in this category may consist of unplanned reactions to unfolding events. In such cases the offender still does wrong because he fails to restrain his negative impulses, but he is less culpable than the offender who

meticulously plans his attack in advance. Still other assaults in the category may result from a lazy resort to ingrained negative behaviour patterns which the offender has never learnt to correct. Such offenders may cause criminal harm repeatedly without ever recognising just how offensive, dangerous and harmful their behaviour is and without ever trying to change that conduct.

[13] As we can see, many different layers and levels of 'bad behaviour' can be evaluated through the idea of 'culpability' and the judge must decide where on that scale the current offence lies.

[14] When considering culpability, the judge must evaluate the offender's behaviour based on the known facts of the case. Evaluating culpability involves close consideration of what the offender does to the victim and why he does it. For example in the case of *R v Campbell Allen* [2020] NICA 25 Stephens LJ had a close look at the act of non-fatal strangulation and the reason why offenders use that technique on their victims. He said:

> "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."

[15] The law helps sentencing judges to get the evaluation of culpability and harm right by providing a structured approach for this exercise. Using this approach, the judge applies a well-recognised range of 'aggravators' and 'mitigators' to arrive at what is called the 'starting point' for each sentence. The starting point is the sentence that would be appropriate for the offence if the case had been fought in the Crown Court and if no plea of guilty had been entered in respect of it.

[16] The prosecution took the view that the culpability of this appellant was high because the facts disclosed the following five aggravators:

- It was an offence of domestic violence;

- It involved a strangulation incident, the third such incident against this victim;

- There was a long history of physical assault of this victim which had resulted in eight previous convictions and several previous prison sentences; the record also included violent attacks on other people.

- This assault occurred in the injured party's own home;

- It occurred while the offender was on police bail.

[17] In his own evaluation of culpability the trial judge paid careful attention to the appellant's record which he said, "gives this court considerable concern to say the very least." He noted that on 9 December 2018 he was convicted of a common assault on this victim during which he had 'pinned her against the wall by her throat' which he was squeezing. He was sentenced to five months in prison for that offence. About two weeks later on 26 December 2018 he was convicted of attempting to choke with intent and common assault. In that attack he choked the victim for so long that she wet herself, as can happen to anyone subjected to this type of violence for long enough. When she got free of him, he pulled her back down and resumed choking her. At the time of these attacks she was 17 weeks pregnant. He was sentenced to 18 months for that offence, nine months in custody and nine on licence.

[18] The year after that (2019), he was convicted of another common assault on this victim in the course of which he chased her downstairs and caused her to fall down the last three or four steps. When police arrived, the victim was out on the street. When they tried to arrest the appellant he bit a police officer, and when taken to the police custody suite he tried to bite a member of staff there too.

[19] The year after that (November 2020), there was another conviction for common assault and another prison sentence of five months.

[20] The trial judge noted that the victim had tried to protect herself from the appellant by legal means. She sought and obtained a non-molestation order against him which should have prevented further attacks, but in January 2021 he was convicted of breaching that order and committing another assault on this victim. He received a further prison sentence for that assault.

[21] Having reviewed all these facts the judge concluded that the appellant's culpability for this offence was 'indeed very high.'

[22] Next, he considered the harm done to the victim. The prosecution view was that harm in this case was 'at the lower end' but the judge did not agree. He refers to several guideline cases including *R v Campbell Allen* in which Stephens LJ stated:

> "It is a feature of non-fatal strangulation that it leaves few marks immediately afterwards and this paucity in some cases causes lack of observable physical injuries to

> the victim and leads to its seriousness not being correctly assessed."

[23] He also had regard to *R v BN* [2023] NICC 5 where the judge said:

> "Non-fatal strangulation must be understood as a very serious offence in its own right ... It is a terrifying experience for any victim and deterrent sentences are required."

[24] He noted, "it is a statistical red flag for femicide" and that 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."

[25] Finally, the trial judge referred to the case of *R v Christopher Hughes* [2022] NICA 12 in which the Lady Chief Justice stated that:

> "Future perpetrators of sustained domestic violence such as this can expect to obtain higher sentences for this type of offending. Such sentences are a reflection of the growing appreciation of the seriousness of this type of offending and the effects on victims."

[26] As a result of his review of the facts and the case law the trial judge decided that:

> "The actual harm in this case must be viewed at a high level even though the injuries sustained do not as such reflect this …"

[27] Finally, in the process of fixing the starting point, the trial judge took account of the pre-sentence report which covers the offenders' personal circumstances including his family situation, his living and working arrangements, his relationship with alcohol and his expressions of remorse for his actions towards this victim. After reviewing all relevant materials the judge decided the starting point, if this case had been contested, would be five years' imprisonment.

Relevant appeal points

[28] Several grounds of appeal focus on this starting point and the process by which it was reached.

[29] Ground l(a) says the starting point is excessive having regard to the guideline cases. Ground 1(c) says it was wrong to decide the level of harm was high since 'the height of the injury was bruising and redness with no evidence of

psychiatric injury.' This ground also asserts or implies some level of double counting by the trial judge of the 'same' aggravator for different purposes, which it suggests is a legal error. It says: the aggravating feature of strangulation was used as a means to justify high level harm when this had already been taken into consideration when placing the case at a high level in terms of culpability and as an aggravating feature in the case as a whole.

[30] Ground l(e) says too much weight was given to appellant's record which 'did not involve a serious injury.'

[31] It is clear to us that the trial judge had regard to the relevant case law and applied it accurately in this case. The case law emphasises the terrifying ordeal that victims of strangulation offences endure and the *inevitable* psychological trauma involved in such life threatening assaults. It specifically warns that the paucity of visible physical injuries to victims has in the past led to the seriousness of these offences 'not being correctly assessed', an indication that earlier cases have tended to underestimate the level of harm to victims. Indeed, ground l(e) above may itself involve just such an underestimation.

[32] Finally, in the *Hughes* case, the LCJ gives notice of a change in sentencing practice that will better reflect the harmful effects of strangulation assaults on victims. We consider that in this case the trial judge was correct to classify the harm suffered as high and that in doing so he was applying the guideline cases as intended.

[33] In relation to the implied 'double counting of the same aggravator', practitioners must understand that there is only one factual matrix involved in any given case. These are the only facts that a judge can scrutinise to decide where on the scales of culpability and of harm the offender's actions lie. Drawing evidence from the same factual matrix and finding high culpability does not prevent the judge from using the same facts to inform his assessment of the harm suffered. If, as here, that review leads to an assessment that the harm was also high, that does not involve double counting of the 'same aggravator.' It simply involves the interrogation of the same facts to inform placement on the two central scales: culpability and harm. How can any judge assess these elements if not by reference to the complete suite of available facts that make up the case? There is no double counting here – only anxious scrutiny of the available facts to reach fair and properly evidenced conclusions that will guide the sentencing process.

[34] We consider that the starting point of five years for this offence was justified by the trial judge's findings in relation to culpability and to harm and that such a sentence was properly available to him on the facts of this case. For all these reasons we dismiss all those grounds of appeal referred to in this section.

[35] Finally, in relation to the custodial element of the sentence, ground 1(b) complains that the judge made an error when applying the plea discount to the

starting point. It says the judge advised that he would apply a 25% reduction to the starting point to reflect the plea but then reduced the sentence by one year – a reduction of only 20%. The ground asserts that when 'clarification was sought by defence, the credit to be applied was then reduced to 20%.'

[36] This ground of appeal relates to an acknowledged error which the trial judge made during his sentencing remarks. He said:

> "I … am prepared to give you a discount of 25% on that five year term [t]herefore your sentence … will be one of four years' imprisonment …"

[37] The discrepancy was queried by defence counsel and the judge immediately said:

> "You are absolutely correct, and it is 20% that is being applied and that reduces the sentence from one of five years to one of four years. I apologise that the percentage figure is not accurate but it is 20%.

[38] It is clear from this response that the judge is apologising here for the mathematical error he made in calling a one year reduction on a five year sentence a '25% reduction' when it is in fact a 20% reduction. However, the response also makes it quite clear that his intention throughout was to reduce the prison term by one year, and this is what he did. The only error he made was a mathematical one, not a legal one and, accordingly, we dismiss this ground of appeal.

Assessment of dangerousness - Article 14(1)(b)(i), 2008 Order

[39] Assault occasioning actual bodily harm is a specified violent offence under Part 1 of Schedule 2 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Where a person is convicted on indictment of this offence the court must impose an extended custodial sentence ("ECS") if certain conditions are met. The condition which applied in the present case was that in Article 14(1)(b)(i) of the 2008 Order:

> "(b) the court is of the opinion -
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences."

[40] To decide if this condition is fulfilled or not the court must make an assessment of dangerousness as described in Article 15 of the Order. It provides that the court:

> "(a) shall take into account all such information as is available to it about the nature and circumstances of the offence; may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and may take into account any information about the offender which is before it."

[41] The appellant says the trial judge erred in two ways when making this determination:

> (i) first, he did not give sufficient weight to the views of the Probation Board and of the psychologist who provided a report for the court, neither of whom assessed the appellant as 'dangerous' for the purpose of Article 15;
>
> (ii) secondly, he put too much weight on 'the defendant's antecedents none of which resulted in a finding of dangerousness previously.' The defence again claims that none of this defendant's previous offences involved serious injury and asserts 'nor does the present case.'

[42] It is clear from the sentencing remarks that the trial judge had regard to the probation report insofar as it was helpful to him in discharging his task. He did not find the report helpful, partly because there are acknowledged differences in the type of assessment made by the Probation Service and the assessment required by the sentencing judge. As the trial judge expressed it:

> "it is clear, however, that the assessment as made by probation relates to the current situation regarding dangerousness and it is accepted both by your own counsel and by prosecution that the requirement that is placed upon me is to consider the future assessment in relation to this aspect of dangerousness as well as the current position …"

[43] In making his own broader assessment the trial judge noted that he was guided by the case of *R v EB* quoted above, and that he had particular regard to whether the offending behaviour demonstrated any pattern. On the facts of this case he found that it did. He said:

> "You have accumulated a deplorable record for domestic violence and in particular the highly aggravating feature present in this case and on at least

> two other occasions of non-fatal strangulation type assaults. Your record indicates a violent man in a domestic setting with highly relevant convictions and with a clear propensity for violence against partners."

[44] Elsewhere he says:

> "your offending, … does clearly demonstrate a pattern of behaviour towards female partners."

Conclusion

[45] For all these reasons the trial judge departs from the view expressed by the Probation Service and the psychologist and decides that there is a risk of serious harm to members of the public, such members including of course, any current or future female partners he might have.

[46] On the facts of this case these conclusions were clearly available for him to draw and, accordingly, we dismiss these grounds of appeal. Any remaining grounds were insignificant 'make-weight' points, and these are also dismissed.

[47] For the above reasons, the appeal is dismissed.