Neutral Citation No: [2021] NICA 38	*Ref:*	TRE11530
	ICOS No:	
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	07/06/2021

Formatted Table

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

SHANA WILSON

_____

Before: Treacy LJ, Maguire LJ and Horner J

_____

Richard McConkey (instructed by McConnell Kelly & Solicitors) for the Applicant
David McNeill (instructed by the PPS) for the Prosecution

_____

TREACY LJ (delivering the judgment of the Court)

Introduction

[1] On 20 April 2021 at the Crown Court sitting at Laganside the applicant Shana Wilson was sentenced to 18 months' imprisonment on one count of unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861.

Factual Background

[2] On 7 September 2019 the injured party Ms M was socialising with friends at the Rusty Saddle nightclub in Belfast. At approximately 1 to 1:30am she was in the toilets on the first floor with her friend AL. The applicant was in the same toilets. When Ms M was in a cubicle, the applicant was banging on cubicle doors shouting, "*Hurry up.*" Ms L responded with words to the effect of, "*If you have something to say, come out and say it*" and left the toilets before the other two.

[3] Ms M came out of her cubicle and started fixing her make up at the mirror. The applicant came out of another cubicle and shouted at Ms M "*Where is your mate.*" Ms M responded, "*Come on out and see my mate if you want*" and left the toilets. The applicant followed her.

[4] Outside the toilet there was another confrontation between Ms M and the applicant. According to an independent witness, Ms G, the applicant pushed Ms M and Ms M responded with something like, "*Don't put your hands on me.*" The applicant then pushed a pint glass which had been in her hand into Ms M's face.

[5] The applicant ran away into the men's toilets but was later apprehended by security staff who took her down to the front entrance of the club to await the arrival of the police.

[6] Police took Ms M to the Royal Victoria Hospital. She was waiting there for 2-3 hours before she decided to take the taxi to the Ulster Hospital to see if she could be seen more quickly. She was treated at the Ulster Hospital with five stitches to a wound below her right eye which was 1-2 cm in length. She also sustained several flap wounds to her forehead which were secured with paper stitches, and several cuts on her arm from glass splinters. Fortunately the facial nerves on her face were intact and a CT scan of her head was normal.

[7] At 2.50 am the applicant was arrested, cautioned and made no reply.

[8] At 11.50 am the following day the applicant was interviewed under caution. She admitted being involved in a verbal altercation in the toilets but denied hitting Ms M with a pint glass, claiming to have gone into the male toilets because she was scared and had not seen what happened.

[9] The applicant was arraigned on 5th February 2021 and pleaded not guilty to the sole count on the indictment of wounding with intent contrary to section 18 of the Offences Against the Persons Act 1861 ("the 1861 Act"). No trial date was set, and the case was adjourned to 19th February 2021 to allow time for defence counsel to contact counsel for the prosecution. Following consultations between both counsel, the applicant was arraigned in respect of a new count of wounding contrary to section 20 of the 1861 Act and the section 18 wounding with intent was "left on the books" by the prosecution.

Judge's sentencing remarks

[10] The judge correctly identified the following aggravating features:

- Use of a glass as a weapon;
- Consumption of a significant amount of alcohol; and
- The impact on the victim.

In relation to the impact on the victim the judge had received the statement of the injured party, up-to-date photographs of the injuries together with a report from a Mr Gerard Donaghy, who is the victim's mental health social worker. The judge said that "all of those make for very distressing reading." Referencing the five stitches below her right eye and the other injuries treated the judge observed that the

victim says in her statement that even now, 18 months after the incident, she still has to take sleeping tablets, which are prescribed by her doctor. The judge further noted that the up-to-date photograph shows that the injury is still apparent and that the report from the mental health social worker indicates that the victim is in ongoing care of the Antrim Community Health Team and is experiencing problematic anxiety symptoms.

[11] The sentencing judge took into account the defence submissions which referred to the following:

- Defendant now 24, having been 22 at date of offence;
- No criminal record and nothing pending;
- She is in full-time employment doing two different jobs;
- Genuine remorse;
- Assessed by PBNI as posing a low likelihood of re-offending; and
- The defendant suffers from a history of anxiety and panic attacks, having herself been a victim of a glassing incident in 2017.

[12] The judge accepted the defence identification of <u>mitigating factors:</u>

(i) No previous convictions;

(ii) Single blow; and

(iii) Has exhibited remorse.

[13] In her sentencing remarks the judge noted that, in terms of sentencing guidelines, the case of *R v Goodwin* [2011] EWCA Crim 2518, "has been treated for some years as something of an authority in cases such as this." She then observed that the court's view is that section 20 offences, using a weapon, will "*generally*" require deterrent sentences and that the same should only be suspended in exceptional circumstances. "Sadly", the judge said, "I can find no such exceptional circumstances …and have concluded that had the defendant contested the charge and been convicted …the minimum term of imprisonment she would have imposed would have been …two and a half years. Allowing appropriate discount for the plea and the other issues raised by the defence, I am prepared to reduce that sentence to one of 18 months imprisonment, but it is an immediate custodial sentence."

Grounds of Appeal

[14] The principal issues that arise in this appeal are identified below:

(i) Was the judge wrong in principle to find that a deterrent sentence was required on the facts of this case?

(ii) Was the starting point selected of two and a half years on a contested trial or the actual sentence manifestly excessive?

(iii) Should the judge have found that the circumstances of the case were exceptional so that the sentence could be suspended?

(iv) Was the judge wrong in principle in declining to give effect to the rehabilitative interest by imposing a Probation Order?

(v) Was the judge wrong in principle not to have taken into account the effect of the pandemic on the sentence?

Was the judge wrong in principle in finding that the offence called for a deterrent sentence?

[15] Article 23 of the Criminal Justice (Northern Ireland) Order 1996 inserted subsections (1C) and (1D) into section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 thereby creating a requirement that the judge find exceptional circumstances before imposing a suspended sentence upon a defendant.

[16] Although Article 23 has never been brought into force the Court of Appeal has nevertheless held that where a court would normally be required to pass an immediate custodial sentence (for example, because of the need for deterrence, or to mark society's condemnation of certain behaviour) then it should carefully enquire into the circumstances of the offence to see whether a suspended sentence could be justified on the basis of exceptional circumstances. As Morgan LCJ held in *DPP's Ref (Nos 13, 14, and 15 of 2013) (R v McKeown and others)* [2013] NICA 63 at paragraph [11]:

> "Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight. Secondly, although in this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment, where a deterrent sentence is imposed it should only be suspended in highly exceptional circumstances as a matter of good sentencing policy."

[17] The use of gratuitous violence by offenders is a persistent feature of many of the cases that come before the criminal courts. Those who injure others by glassing them in the face will suffer condign punishment. The fact that offenders are young or female is no reason why they should not be punished severely when they behave in such a vicious and abhorrent manner. The need for deterrent sentences to stop or powerfully discourage such violence is obvious. In *R v Wright and Hall*, 10th June 1994, Carswell LJ held that a section 20 offence committed by the deliberate kicking of a victim is "an offence requiring custodial penalties and one which requires a clear approach by the courts to deter other people." See also the observations, albeit in a section 18 context, on the approach of the court to the use of gratuitous violence, summarised in *DPP's Ref (Nos 8, 9 and 10 of 2013) (R v Newton, Doey and Todd)* [2013] NICA 38 at para 6 *et seq*. In the view of this court it is simply unrealistic to contend that a deterrent sentence was not justified and the court should have imposed a suspended sentence or probation. This Court wishes to make it unmistakably clear that offences of section 20 wounding by glassing in the face will generally require deterrent custodial sentences. Such sentences should only be suspended where the court finds exceptional circumstances. The judge was correct to conclude that there were no such circumstances in this case. The culpability of the applicant is high, the degree of harm suffered by the victim is significant and since a deterrent sentence is required the applicant's previous good character and personal mitigation whilst relevant are of comparatively little weight.

[18] This Court was informed that there are no reported authorities in Northern Ireland on unlawful wounding with a glass. Our attention was however drawn to a number of reported decisions from the Court of Appeal of England and Wales on section 20 wounding offences committed using a glass or bottle (*R v Goodwin (Hannah*) [2011] EWCA Crim 2518; *R v Robinson (Hannah)* [2013] EWCA Crim 1644; *R v Robinson (Jodie)* [2016] EWCA Crim 140; *R v James (Hakeem)* [2017] EWCA Crim 827; *R v Hickford (Steven James)* [2017] EWCA Crim 1680). All of the English decisions are based on the Definitive Guidelines issued by the Sentencing Council for England and Wales and therefore the precise sentencing starting point and ranges that flow from them will not, the prosecution acknowledge, assist the courts in this jurisdiction. What however is noteworthy about these cases is that all of them resulted in sentences of immediate custody of varying length. The decisions are consistent with the approach of this court set out in the previous paragraph about the need for deterrence/punishment in offences of this kind. A feature of many of these English decisions was that they involved a single blow using a glass or bottle, by offenders who have no previous convictions, were in employment and where the action caused physical and psychological injuries of varying degrees of severity, often committed in the course of a drunken argument in a public place. In terms of mitigating and aggravating features we discern little if any difference of approach.

Whether the sentence manifestly excessive

[19] It is not suggested that the trial judge erred in the identification of the aggravating or mitigating factors. The trial judge was plainly influenced in the selection of the starting point by the short sentencing decision of the Court of Appeal Criminal Division in *Goodwin*. However, that case has to be approached with a degree of caution not least because the prosecution expressly disavowed reliance on the English Court of Appeal decisions which were based on the Definitive Guidelines to contend for prescribed starting points or sentencing ranges in this jurisdiction. Moreover, in *Goodwin* the appellant had pleaded guilty to grievous bodily harm where the injured party was permanently blinded in one eye. Whilst the injury in the present case was fortuitously much less severe it was nonetheless significant. It is obvious that *the use of a pint glass as a weapon*, as well as having a bearing on whether a deterrent sentence was required in principle, was also clearly an aggravating factor to be taken into account in setting the appropriate starting point. The second aggravating factor was *the impact on the injured party* Ms M. Ms M suffered a degree of permanent facial scarring from this assault. Both the scarring and the psychological impact of the assault continue to have an impact on her everyday life. Photographs taken 19 months after the incident show an enduring red scar under her right eye, as well as minor permanent marks to her forehead and arm. In her victim impact statement she recounts her injuries and sets out the ongoing effects on her life, she expresses fear that the applicant will make contact with her in the future, describes suffering from recurring nightmares and insomnia and requires sleeping tablets prescribed by her doctor, was taking medication for mental health problems before the assault and has had to increase them since. A statement from the victim's mental health social worker, Gerard Donaghy, gave further details about Ms M's ongoing anxiety, flash backs and sleep disturbance. The prosecution correctly accept that his evidence cannot carry the same weight as a full medical assessment. A third aggravating factor was *the alcohol consumed* by the applicant, described by the probation pre-sentence report ("PSR") writer as a "significant amount" and in Dr Curran's report as "drinking heavily.

[20] As noted by the trial judge this young female applicant was 22 at date of offence, she has no criminal record and nothing pending. At the time of the offending she was in full-time employment holding down 2 different jobs. She has expressed remorse, pleaded guilty very shortly after her first arraignment when the prosecution accepted a plea to section 20 wounding, she has been assessed by PBNI as posing a low likelihood of re-offending, and has a history of anxiety and panic attacks, having herself been a victim of a glassing incident in 2017. As previously noted the judge accepted the defence identification of mitigating factors:

(iv) No previous convictions;
(v) Single blow; and
(vi) Has exhibited remorse.

[21] We note the applicant's remorse as expressed by her guilty plea and in the reports from Probation and Dr Curran. This must however be set against the background that in interview on the following day she positively denied having assaulted anyone with a glass and claimed she went into the men's toilets because she thought 'they' were going to attack her. Having denied any assault during interview she was asked if there was anything she would like to add to which she responded "No, just if possible can you see any CCTV" whereupon she was advised that CCTV was not yet available. The applicant's yellow top had been seized by police and was subject to DNA analysis which confirmed that several blood samples were obtained from it which matched Ms M's DNA profile. That positive DNA analysis did not become available until 25 August 2020. This report formed part of the PE papers that were served on 18 December 2020 and she was returned for trial following a PE hearing on 8 January 2021. On arraignment on 5 February 2021 she pleaded not guilty to wounding with intent. The case was adjourned to allow the parties to consult. At the review hearing on 19 February 2021 the applicant was re-arraigned and pleaded guilty to unlawfully and maliciously wounding Ms M.

[22] The applicant also sought to pray in aid the fact that she herself had been the victim of a different "glassing" incident only two years previously as a reason for extending sympathy towards her, and which might explain why she lashed out as she did. We agree with the prosecution that it could also be said that someone who had been subject to this kind of attack in the past would have had more reason than the average person to appreciate how dangerous striking another person with a glass could be.

[23] We have already explained above why neither a suspended sentence nor probation can be regarded as realistic in the circumstances of this case given the strong considerations of deterrence and punishment that require a custodial sentence. Further, the applicant did not have a particular personal problem or problems which led to the commission of this offence and would have called for rehabilitation for the future protection of the public. Her likelihood of reoffending was low. There were, as the PSR records "*no indications that she would be someone who is more likely than not to be involved in further serious violence in the future*" and "*Probation supervision is not felt necessary to address any ongoing risk related issues.*"

[24] We turn to the effect of the Covid-19 pandemic on sentence. The judge accorded more than a one third reduction from her starting point of 30 months to the final sentence of 18 months. The judge did not explicitly mention the effect of the pandemic on her sentence. It was not specifically raised in defence counsel's written submissions. However, as the Court of Appeal in *R v Stewart* [2020] NICA 62 established no automatic discount applies simply because of prison conditions. The trial judge is a very experienced criminal judge and was well aware of the effect of the pandemic.

[25] We however consider that the starting point of two and a half years after a contest in this case is too high having regard to the aggravating and mitigating

factors. We say this bearing in mind that in cases requiring a deterrent sentence personal mitigation carries comparatively little weight. But having for reasons of deterrence and condign punishment settled on a custodial option as the only appropriate outcome the judge still has to arrive at a just and proportionate custodial term that reflects all the relevant elements of the case. It is important to remember that the fact that immediate imprisonment will follow from behaviour of this kind is in itself part of the deterrence the court seeks to impose. The court should avoid the risk of imposing unduly long sentences where they have already directed immediate custody to reflect the seriousness of the conduct they wish to deter. We consider that in the circumstances of this case an appropriate starting point after a contest taking account of the aggravating and mitigating factors, save for the plea, would have been around 18 months. The judge allowed more than a one third reduction from her starting point. On balance we will allow a one third reduction to take account of her early plea. This results in an overall sentence of one year's imprisonment divided equally between custody and licence. On the facts of this case we do not consider that the need for deterrence or condign punishment are compromised. Both objectives will be served by such a term which is undoubtedly very significant for a young woman with a clear record.

[26] Offenders who use gratuitous violence by injuring others by glassing them in the face must expect stiff prison terms. Drink is no excuse. On the contrary it is, as these courts have repeatedly said, an aggravating feature. The fact that offenders are young or female is no reason why they should not be punished severely for such conduct. As we said earlier in this judgment the need for deterrent sentences to discourage such violence is obvious. Part of the function of the court is to protect the public and one of the means by which we attempt to achieve that goal is by imposing deterrent periods of imprisonment particularly for offences of the kind committed in this case. It is unrealistic to contend that a deterrent sentence was not justified and that the court should have instead imposed a suspended sentence or probation. We emphasise that offences of section 20 wounding by glassing in the face will generally require deterrent custodial sentences. Such sentences should only be suspended where the court finds exceptional circumstances. Being young of whatever sex, having a clear record, holding down a job, striking only one blow or being drunk are not exceptional circumstances. As earlier noted the culpability of the applicant is high, the degree of harm suffered by the victim is significant and since a deterrent sentence is required the applicant's previous good character and personal mitigation whilst relevant are of comparatively little weight. Not only has she lost her liberty, she can no longer be heard to say that she has a clear and unblemished record. She has also jeopardised her employment and must now live with the consequences of her actions.