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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

CAMPBELL ALLEN

Before: MORGAN LCJ and STEPHENS LJ

STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] In this appeal we emphasise the feature of strangulation as a separate and distinct aggravating feature in sentencing for domestic violence.

[2] On 5 March 2020 HHJ McFarland ("the Recorder") imposed an effective sentence of one year's imprisonment on Campbell Allen ("the appellant") for the offences of (a) common assault, contrary to Section 47 of the Offences Against the Persons Act 1861 committed on 11 July 2019; and (b) assault and false imprisonment, contrary to common law committed on 12 July 2019. The appellant, who has described shame and regret for these offences committed against his then partner, contends that an appropriate sentence ought to have been two years' probation to facilitate targeted intervention in the form of a "Respectful Relationships Programme" which rehabilitation it was suggested would serve the public interest by reducing the risk of re-offending whilst a prison sentence would not resolve the underlying attitudes that caused the offending. The appeal on that ground is brought with the leave of the single judge Keegan J. Mr McConkey appeared for the appellant and Ms McCullough for the Public Prosecution Service. We are grateful to counsel for their helpful oral and written submissions.

Factual background to the offending

[3] Prior to sentencing the prosecution provided the Recorder with a document entitled "Agreed Crown Facts" setting out the factual background in relation to

these offences. That document had been prepared by prosecuting counsel and sent to defence counsel prior to the appellant pleading guilty to the offences. The purport of the document was that it excluded an aspect of the assault which occurred on 12 July 2019 and made no reference to what the appellant was alleged to have said to his partner after the assault on 11 July 2019. The document was a summary of the rest of the evidence. We describe the factual background to the offending relying on that document supplemented by other details contained in the witness's statements, the probation report and the medical report of Dr Curran.

[4] For some 3 months prior to July 2019 the appellant and his partner had been living in her home ("her home"), which she shared with her 2 children both of whom were under the age of 6.

[5] On 11 July 2019 whilst in her home an argument ensued between the appellant and his partner. It is not clear as to the cause of this or the subsequent argument except that they were related to issues of jealousy. In any event the appellant grabbed her by the throat with both hands, squeezing hard and pushing her back towards the kitchen where she hit her head off the corner of the wall and then tripped and fell backwards. These facts constituted the first offence of common assault, contrary to Section 47. Fortunately the children were not in the home when this first assault occurred but rather they were with their maternal grandmother.

[6] After the first assault the appellant's partner collected her two children from her mother's home taking them out for a few hours to the eleventh night bonfire. She returned to her home at about 10 pm and put her children to bed. The appellant was also present and they began to argue again. There were periods of calm and arguing which continued throughout the night and into the early hours of the morning. The appellant would not let his partner go to sleep so that she had to keep moving between the sofa in the living room and their bedroom upstairs. At around 4am the appellant's partner tried to leave the bedroom, but the appellant held onto the door handle and would not let her leave. She kept trying to leave and he punched her in the face, pushed her on to the bed and began to strangle her with both hands to the point where she felt that she could hardly breathe. She again tried to leave, but was prevented from doing so. At one stage she threatened to phone the police, but the defendant grabbed the phone from her hands. The false imprisonment element to the second offence lasted around one hour. The incident ended with the appellant leaving the house through the back door, at which point his partner phoned the police. These facts constituted the second assault and the false imprisonment.

[7] The police attended at her home at approximately 5.45 am on 12 July 2019 finding her to be "crying and shaking" and to be "extremely upset and frightened." There is nothing on the Police log as to the Police seeing the children so we proceed on the basis that the police did not observe what impact these events had on the two children who had been present in the home throughout this second incident. Shortly after the police arrived Constable Louisa Garrett took two photographs showing the bruising that the appellant's partner had sustained to her neck and to her arm. We

have seen those photographs. In particular the bruise to her neck which is a strangulation mark causes considerable concern. It is not possible to say whether this bruise was sustained in the first or the second assault or as a result of both assaults. There is no information as to whether anyone looked for or observed petechial haemorrhaging. The appellant's partner did attend hospital but considering the length of time she had to wait and her obligations to her children she left without being seen. She was subsequently examined by her GP but we do not have the notes in relation to that examination.

The appellant's responses at interview

[8] The appellant was arrested at approximately 12 noon on 12 July 2019. During interview he stated that he had not been drinking and had not taken any drugs or prescribed medication. He made admissions to having assaulted his partner on 11 and 12 July 2019 and to falsely imprisoning her. He stated that both he and his partner had been shouting at each other. He stated that he punched his partner in the face in order to scare her. He admitted that he had his hands on her neck but he said "you can check her throat there was not even a mark from that." He was not asked about nor did he state what his intention was during that part of the assault. He was asked what the arguments had been about and he said "(it) was just stupid so it was, it's been building up for ages. We always accuse each other of cheating …." He stated that the relationship between him and his partner was now over. He apologised for his actions and stated he was not proud of what he had done. At one stage during the interview he was very upset breaking down emotionally.

Further incidents involving the appellant and his partner and the non-molestation proceedings

[9] The appellant and his partner resumed their relationship in August 2019 but separated in early October 2019.

[10] The appellant has admitted to one assault during this period when he punched her to the area of her bottom.

[11] In addition there was another incident a few days after they separated in early October 2019. Either late at night or in the early hours of 11 - 12 October 2019 the appellant entered her home and then her bedroom where he saw her having intercourse with a new boyfriend. The appellant denies an allegation that he assaulted her, but he accepts that he kicked her television and broke a fish tank, which housed turtles and he damaged some ornaments. He also accepted that he was engaged in a scuffle with the new boyfriend.

[12] The appellant is to be prosecuted summarily for common assault and criminal damage in relation to the incident on 11 - 12 October 2019.

[13] In this court Mr McConkey made available a final non-molestation order which the appellant's ex-partner obtained and which was made on consent on 11 March 2020. The purpose was to demonstrate that if a probation order was made that the ex-partner had the protection that order. However, provision of it also revealed that at an earlier stage she had successfully applied for an ex-parte non molestation order which upon enquiry was obtained on 31 January 2020. It also transpired that the appellant's ex-partner had made numerous additional allegations of physical, emotional and financial abuse in her statement supporting her application and that the appellant was aware of those allegations when he was interviewed by Dr Curran on 28 February 2020.

The arraignment of the appellant and the proceedings at first instance

[14] On 5 December 2019 the appellant was committed to Belfast Crown Court on an indictment containing three counts. Count one was for common assault contrary to section 47 committed on 11 July 2019; count two was for false imprisonment contrary to common law committed on 12 July 2019; and count three was for common assault contrary to section 47 committed on 12 July 2019.

[15] On 8 January 2020 the appellant was arraigned and pleaded not guilty to all counts.

[16] On 30 January 2020 count two was amended so as to include an assault on 12 July 2019 in addition to false imprisonment. The desired impact of that amendment was that the assault now included in count two omitted some of the allegations which formed count three. Also on 30 January 2020 the appellant was re-arraigned and pleaded guilty to counts one and two with count three being left on the books not to proceed without the leave of the crown court or this court. The Recorder adjourned imposing sentence on the appellant.

[17] On 31 January 2020 the appellant's ex-partner obtained an ex parte non molestation order.

[18] On 20 February 2020 Genny Rooke probation officer completed the PBNI pre-sentence report. The PBNI report was shared with the appellant in advance of the court hearing on 5 March 2020 and he concurred with its factual accuracy despite no information having been provided by him as to his ex-partner's application for a non-molestation order or as to the additional allegations supporting that application.

[19] On 28 February 2020 the appellant was examined by Dr Michael Curran, Consultant Psychiatrist. The letter of instructions from the appellant's solicitors stated that they "were not aware of any previous criminal record …." That was incorrect as the appellant has two previous convictions. Dr Curran relied on that incorrect history as he stated in his report that "it is relevant that (the appellant) has no past history of delinquency." The appellant informed Dr Curran that the offending took place in mid-July 2019 and that there had been "no further

association between the ex-partner … and himself." In fact the appellant had maintained a relationship with her between August and October 2019. Also, Dr Curran was informed by the appellant that "there has been no further offending of any nature or involvement with the PSNI." Again that was not correct given the further incident that occurred in October 2019. Furthermore, the appellant did not inform Dr Curran of the allegations contained in his ex-partner's application for a non-molestation order nor did he inform Dr Curran that his ex-partner considered that "if (she) did not seek the protection of the Court (the appellant) may try to harm (her) further."

[20] Prior to sentence being imposed the appellant's partner did not make a victim impact statement. We were informed as to a degree of confusion in relation to obtaining such a statement. As far as she was concerned she was in contact with both Victim Support and Women's Aid and neither organisation asked for a victim impact statement. She states that she would have been willing to make victim impact statement if she had been asked.

[21] On 5 March 2020 the appellant was sentenced by the Recorder.

[22] On 11 March 2020 the appellant's ex-partner obtained a final non-molestation order on consent which will remain in place until 11 March 2021.

Antecedents

[23] The appellant has two previous convictions. One in respect of common assault on his mother in 2014 for which he received a Youth Conference Order which he completed satisfactorily. The second in respect of assault on police in 2018. The appellant states this was committed when police were transporting him to the station following a dispute at a party. He received a £200 fine.

The pre-sentence report

[24] The pre-sentence report addressed the appellant's background, an offence analysis, the risk of re-offending, the risk of serious harm and the PBNI conclusion.

[25] In July 2019 the appellant was 21 and his partner was 22 years old.

[26] The appellant described an unsettled childhood disrupted by his parents' separation when he was 3 years old. He stated that his father behaved violently towards his mother which led to her leaving the marriage. He considered that his father has continued to behave violently towards subsequent partners. The appellant expressed the fear that he has absorbed and normalised the attitudes and violent behaviour his father demonstrated and he stated that he wants to learn to change these. He recognised that he was struggling with emotional issues and that he could benefit from intervention in the form of appropriate counselling to try to address the issues.

[27] The appellant left school at 16 years old. He was forced to leave technical college moving to Liverpool for a year due to negative attention from local paramilitaries. He has been largely unemployed since leaving school though he states that he is actively looking for employment. He accepted that his current lifestyle lacked direction and purposeful activity. He informed PBNI that he wished to make positive changes though he was assessed as lacking in confidence in his ability to achieve this.

[28] The appellant described to the probation officer shame and regret for his offending and he did not seek to attribute blame to her. He accepted without minimisation that his behaviour will have caused her considerable fear and distress in addition to the physical bruising. He also acknowledged that he was aware the children of the victim were asleep in the house during the evening and it was possible they heard sounds of the confrontation and would have been frightened. The defendant stated that he was aware of the fear this can cause from his own childhood experiences which has heightened his feelings of remorse.

[29] PBNI assessed the appellant as medium likelihood of re-offending based on his acknowledged difficulties with emotional regulation and self-management, his previous offending and his current unstructured lifestyle.

[30] PBNI assesses an offender to present a significant Risk of Serious Harm when there is a *high likelihood* that an offender will commit a further offence causing serious harm (death or serious injury, whether physical or psychological). On that basis the appellant was assessed by PBNI as not currently reaching the threshold to be assessed as a significant risk of serious harm to others.

[31] In conclusion PBNI assessed the appellant as suitable for supervision in the community under a probation order requiring him to undertake either the "Respectful Relationships Programme" or the "Building Better Relationships Programme." PBNI also suggested that there should be a requirement on the appellant "not to develop any personal relationships with other adults without first notifying his probation officer who will take appropriate steps to ensure that verifiable disclosure has been made and liaise with social services in respect of child protection concerns, if appropriate." A period of 18 months supervision was assessed by PBNI as necessary to complete whichever programme was appropriate. PBNI continue to facilitate both programmes through the use of video/telephone call on an individual basis despite the present coronavirus public health emergency.

[32] The essential basis of the PBNI assessment was that the appellant had endured an abusive father, was fearful that he had absorbed and normalised his father's attitudes, had insight into and genuine remorse for the offences which he had committed and that these were all indicators that he would be assisted by targeted intervention in the community.

The psychiatric evidence

[33] Dr Curran provided a report dated 3 March 2020 in which he concluded that "there is a need for (the appellant) to receive instruction on anger management and how to maintain and establish personal relationships especially with females." Dr Curran also submitted that "the risk of further similar offending perhaps lies towards the lower end of the spectrum of outcomes." As we have indicated the information provided to Dr Curran was incorrect which we consider undermines the submission in relation to risk and adds nothing to the conclusion of the PBNI that the appellant would benefit from targeted intervention. A particular aspect of the incorrect information was the appellant's statement that "there has been no further offending of any nature or involvement with the PSNI." That was patently false given the incident in October 2019. In those circumstances we do not consider that Dr Curran's report adds anything to the assessment provided by PBNI in the pre-sentence report.

The Recorder's sentencing remarks

[34] The Recorder considered that there was a binary choice between custody and probation which led him to pose the question "should someone who has assaulted a woman in these circumstances be placed on probation by the Crown Court?" The Recorder answered that question in the negative "because it is so serious that it merits and will receive an immediate custodial sentence." The Recorder did not state that probation would not be of use to the appellant or by extension to the community but rather that probation was not appropriate due to the seriousness of the offending.

[35] The Recorder arrived at the length of the prison sentence by taking into account two aggravating features which were (a) this was a domestic incident in her home where she should have been protected within that home and within that relationship, but she was assaulted on two occasions; and (b) she was vulnerable being the mother of two young children. The Recorder referred to the appellant's criminal record which he considered to be reasonably modest. Thereafter, the Recorder selected a starting point on a contest of 18 months in custody. The mitigating factor was the appellant's plea of guilty which given the admissions at interview together with consideration of the appellant's turbulent upbringing reduced the appropriate sentence by one third to 12 months custody.

Grounds of appeal

[36] In summary there were two grounds of appeal though Mr McConkey correctly recognised the difficulties with the first ground concentrating on the second.

[37] The first ground was based on the proposition that the starting point of 18 months was manifestly excessive and wrong in principle. Mr McConkey relied

on the unreported decision of this court in *R v McKeown and Others* delivered on 18 December 1997 which in turn relied on what Lord Lane said in 1983 in *R v Spence and Thomas* [1983] 5 Cr App R (S) 413 at 416. *McKeown* involved sentencing for a tiger kidnapping and in the course of that case MacDermott LJ referred to the following passage from *Spence*:

> "It seems to this Court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than 8 years' imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. *At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arise as a sequel to family tiffs or lovers' disputes, and they seldom require anything more than 18 months' imprisonment, sometimes a great deal less*" (emphasis added).

Mr McConkey relying on that part of the passage to which we have added emphasis submitted that this case fell within the bracket of "family tiffs or lovers' disputes" meriting a sentence which was a "great deal less" than 18 months. On this basis it was suggested that a starting point of 18 months was manifestly excessive.

[38] The second ground of appeal was based on the proposition that both Dr Curran and PBNI supported a probation order to enable the rehabilitation of the appellant through the Building Better Relationships Programme. In that context relying on *R v Dunlop* [2019] NICA 72 it was submitted that the Recorder should have imposed a probation order as it would have been more appropriate in the public interest than a short custodial sentence.

Maximum sentences for common assault and for false imprisonment

[39] Section 47 of the Offences against the Persons Act 1861 as amended by the Criminal Justice (No. 2) (Northern Ireland) Order 2004 provides that "(whosoever) shall be convicted upon an indictment of any assault *occasioning actual bodily harm* shall be liable to imprisonment for a term not exceeding *7 years*; and whosoever shall be convicted upon an indictment for a *common assault* shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding *two years*" (emphasis added). We note that minor bruises may be actual bodily harm but that the prosecutorial decision in this case was that the appellant was charged with common assault so that the maximum sentence for count one is two years imprisonment. We

assume that the prosecutorial decision was informed by the view that the injuries in this case were insufficiently serious. However, an aspect of strangulation unlike other forms of physical violence such as punching or kicking, is that it frequently leaves little in the way of observable injury so that the seriousness of the assault can be underestimated.

[40] The maximum penalty for the common law offence of false imprisonment is at large. In *A-G's Ref (Nos. 92 and 93 of 2014)* [2014] EWCA Crim 2713, Treacy LJ said at paragraph [19] that relevant sentencing factors "will include the length of detention; the circumstances of detention, including location and any method of restraint; the extent of any violence used; the involvement of weapons; whether demands were made of others; whether threats were made to others; the effect on the victim and others; the extent of planning; the number of offenders involved; the use of torture or humiliation; whether what was done arose from or was in furtherance of previous criminal behaviour, and any particular vulnerability of the victim whether by reason of age or otherwise." The circumstances in this case include the admitted elements of the assault that occurred on 12 July 2019.

The dangerousness provisions in the Criminal Justice (Northern Ireland) Order 2008

[41] The offence of false imprisonment comes within the provisions of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). It is both a serious offence within Schedule 1, paragraph 6 and a specified violent offence within Schedule 2, paragraph 5. Accordingly under Article 13(1)(b) of the 2008 Order consideration has to be given to the predictive risk that is whether there is a significant risk to members of the public of serious harm occasioned by the commission by the appellant of further *specified offences* (that is either specified violent offences or specified sexual offences). Common assault contrary to section 47 of the Offences Against the Persons Act 1861 is neither a serious offence nor a specified violent offence. However an offence under section 47 of assault occasioning actual bodily harm is a specified violent offence. So the predictive risk would include a prediction as to the commission of a section 47 assault occasioning actual bodily harm but not the commission of a section 47 common assault. The predictive risk would obviously include the commission of more serious offences such as manslaughter.

[42] The Recorder did not proceed on the basis that there was a significant risk to members of the public of serious harm occasioned by the commission by the appellant of further specified offences. It was not suggested on behalf of the prosecution that he ought to have done so. That issue did not arise in this appeal. However in our view the Recorder was correct not to do so. There are risk factors in this case particularly the appellant's use of strangulation however in our view the balance comes down against an assessment of dangerousness. The appellant made admissions at interview expressing regret and shame and emotionally breaking down. This demonstrated insight which is a protective factor for the future. In

addition PBNI assessed the appellant as genuinely remorseful with insight. Again that is a protective factor for the future. Finally the appellant was assessed by PBNI as not currently reaching the threshold to be assessed as a significant risk of serious harm to others (though we have observations to make about the test applied by PBNI).

[43] Before leaving this issue we make two observations. The first is to repeat the previous observations of this court that the test of dangerousness used by the PBNI is not the statutory test, see *Director of Public Prosecution's Reference (Number 6 of 2019) - Ian David Price* [2020] NICA 8 at paragraph [68]. It is not sufficient to simply rely on the PBNI assessment but rather consideration should be given to the statutory test. The second is to emphasise that sentencing courts should consider carefully the feature of strangulation when considering dangerousness if necessary returning to the PBNI to concentrate on that particular feature.

The absence of a victim impact statement and the injuries sustained by the victim

[44] Generally we consider that the absence of a victim impact statement should not be taken to indicate the absence of harm. There can be many reasons in a domestic setting why the injured party does not make a victim impact statement. Indeed cases in which the victim has withdrawn from the prosecution do not indicate a lack of seriousness and no *inference* should be made regarding the lack of involvement of the victim in a case of domestic violence.

[45] In this case there is the evidence of the police officers that the victim was extremely upset and there is the photographic evidence of bruising including bruising to the neck from strangulation. Even if that evidence was absent and even if there was no victim impact statement it is obvious that to be imprisoned, shouted at, struck in the face and strangled to the extent that victim found it hard to breathe would have an immediate serious adverse effect on the victim. Furthermore, such an incident will undoubtedly have ongoing effects. We also consider that there has been an adverse effect on the children in the manner which we have set out at [53] (d).

General observations as to domestic violence and as to strangulation

[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. 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 that the use of a weapon. We also emphasise the need to give consideration to that feature when forming a view as to future risks.

Aggravating and mitigating features

[53] We consider the following aggravating features are present:

(a) *Domestic abuse*. To be assaulted, imprisoned and intimidated by someone close with whom the victim should be most secure represents an appalling violation of the trust and security that should normally exist between people in an intimate or family relationship. This court in *R v Raymond Brownlee (Sentencing)* [2015] NICA 58 at paragraph [14] stated that "(the) use of violence in such a setting is always a significant aggravating factor" and that "invariably the starting point for the sentence should be appropriately increased."

(b) *The offences occurred in her home*. These assaults, the imprisonment and the intimidation occurred in her own home, where she should feel most safe. We consider this also to be a significant aggravating feature.

(c) *Strangulation*. Both assaults involved strangulation and in relation to both counts one and two this is a substantial aggravating feature.

(d) *Adverse impact on two children*. There is some equivocation as to whether either child heard the incident on 12 July 2019 but we consider that it is highly likely that they did given that there was considerable shouting over a prolonged period of time together with the sounds of violence in close proximity to them. In any event an adverse impact on the children's mother adversely impacts on the care that she can provide to her children which is to be seen in the context that she is their primary carer. If the primary carer is degraded then so also is the care that she can provide. Also we would emphasise that abusive conduct can lead to children accepting it as a norm in adulthood.

(e) *The number of offences*. As concurrent sentences are being imposed and the primary offence is count two of assault and false imprisonment then the common assault in count one is an aggravating feature. Furthermore, it has to be recognised that count two involved two offences.

(f) *Relevant criminal record*. The appellant has previous relevant convictions but we agree with the Recorder's assessment that the record is "reasonably modest."

(g) *Vulnerability*. We consider that some caution has to be exercised in considering the factor of vulnerability so that it is limited to some *particular* vulnerability. The reason being that all victims of domestic abuse are potentially vulnerable due to the nature of the abuse, but some victims of domestic abuse may be more vulnerable than others. It is that additional vulnerability that is an aggravating feature but we emphasise that a court in imposing sentence has an obligation to consider that not all vulnerabilities are immediately apparent. In this case we consider that there was no particular vulnerability so that this additional aggravating feature is not present.

(h) *Weapon*. In the first assault the appellant's partner's head hit the corner of a wall. We emphasise that a wall or even more so the corner of a wall can be used as a weapon. Striking a person's head against a wall can be the exact equivalent of picking up a hard object and striking a person's head with that object. The object would be a weapon as would be the wall if the perpetrator chose to use the wall as a method of increasing the physical impact of the assault. On the facts of this case whilst it is possible this aggravating feature is present we do not consider that there is sufficient to establish it to the criminal standard.

[54] We have given consideration to the following points in mitigation:

(a) *Plea of guilty*. The offender pleaded guilty and made substantial admissions at interview.

(b) *Recognition of the need for change*. There is evidence that the appellant recognises the need for change but for that to be a significant mitigating feature it would have to be genuine. Despite the lack of candour to Dr Curran we accept that it is genuine. However, there is another aspect which has to be taken into account before we consider that this is a significant mitigating feature which is that there has to be evidence of obtaining help or treatment to effect that change. There is no such evidence. Generally, it is not sufficient for an offender to assert that they recognise that they should change if they fail to do anything about effecting that change.

(b) *Personal circumstances*. We take into account the appellant's personal circumstances though these are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 at paragraph [15]; *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 at paragraph [37] and *R v Keith McConnan* [2017] NICA 40 at paragraph [49].

[55] The most significant mitigating feature which should be taken into account is the plea of guilty.

Discussion

[56] The single judge refused leave in relation to the first ground of appeal and Mr McConkey though raising that ground before this court correctly recognised that there were difficulties in relation to it. The sentencing range referred to in the cases of *R v McKeown and Others* and *R v Spence and Thomas* envisage on occasions

sentences in excess of 18 months imprisonment whilst also recognising that sometimes a great deal less would be appropriate. The sentencing exercise in this case involved not only false imprisonment but also two assaults with all the aggravating features which we have enumerated. The starting point most certainly does not fall into the category of a great deal less or indeed any less than 18 months. We dismiss this ground of appeal.

[57] The substantial ground of appeal upon which the single judge granted leave related to the issue as to whether a 12 month prison sentence was wrong in principle or manifestly excessive as opposed to two years' probation. This was an area of discretionary judgment for the Recorder as to the competing interests of punishment, deterrence and rehabilitation. The Recorder exercised that discretion on the basis of the seriousness of the offences. We accept, as apparently so also did the Recorder that probation would assist the appellant and also would be of benefit to the public. However, there is no doubt that the Recorder was correct in assessing these offences as serious and that there would be a public benefit through retribution and deterrence involved in a prison sentence. We have set out all the aggravating and mitigating features on which basis we consider that the Recorder was not only entitled to but was correct to exercise his discretion on the basis of the seriousness of the offending and to impose a 12 month sentence of imprisonment. We dismiss this ground of appeal.

Conclusion

[58] We dismiss the appeal.