

<p>Neutral Citation No: [2023] NICA 16</p> <p><i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i></p>	<p>Ref: KEE12103</p> <p>ICOS No: 22/015426 & 21/045783</p> <p>Delivered: 14/03/2023</p>
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IN HIS MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

XY

**Ms McDermott KC with Mr Mooney (instructed by MMP Solicitors) for the Applicant
Ms Chasemore and Mr McCarthy (instructed by the Public Prosecution Service) for the
Respondent**

Before: Keegan LCJ, Horner LJ and Fowler J

KEEGAN LCJ (*delivering the judgment of the court ex-tempore*)

Anonymity

[1] We have anonymised the applicant’s name to protect the identity of the complainants and so this will appear as the cypher above. The complainants are entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[2] This is an appeal against a sentence passed on 3 March 2023. We have heard this appeal on an expedited basis given the applicant’s circumstances and the case made that a non-custodial option is appropriate.

[3] The offending covers two indictments, for separate offences to which the applicant pleaded guilty before His Honour Judge Irvine KC (“the judge”). The first indictment was resolved two weeks before the trial was due to be heard. The second indictment was listed for trial on 21 November 2022 in Coleraine Crown Court. The

jury were sworn, and the trial began, with the prosecution opening the case and playing the Achieving Best Evidence (“ABE”) evidence to the jury.

[4] On the first indictment the judge passed sentence as follows:

Count 1 - indecent assault - nine months’ imprisonment.

Count 2 - assault occasioning actual bodily harm – six months’ imprisonment to be served concurrently.

Count 3 - attempted indecent assault - six months’ imprisonment to be served concurrently.

[5] On the second indictment the applicant was sentenced for one count of sexual touching on an unknown date between 1 May 2010 and the 14 July 2010. He received six months’ imprisonment to be served consecutively to the other indictment.

[6] The total sentence was, therefore, one of 15 months’ imprisonment split equally between custody and licence. A Sexual Offences Prevention Order (“SOPO”) was also passed, for a period five years. The latter order is not under appeal. Consequential orders were made as regards notification and disqualification from working with children/vulnerable adults.

Factual background

[7] The complainant on the first indictment is the sister of the applicant and is referred to as EV. She is five and a half years younger than the applicant. On 20 July 2020 EV completed an ABE interview where she disclosed that the defendant, her brother, had committed offences against her as a child. The offences occurred at the family home. She described an incident when she was 11 or 12 years old when the defendant came into her bedroom in the night and sat upon her bed. He put his hands inside her underpants and penetrated her vagina. She ran into her mother’s room and reported it to her mother at the time. It seems her mother had questioned whether she had dreamt this. As a result, EV put a lock on her bedroom door. This is count one on the indictment. On the dates in the indictment, EV was between 11 years 10 months and 14 years and nine months. The applicant was between 17 years and three months and 20 years and three months.

[8] EV described a second incident when she was about 13 or 14 years old. She states that she woke up to find the defendant sat on her bed with his hand under the blanket, but she stopped him from touching her by screaming for her mother. This caused the defendant to run out of the room. This is count three on the indictment. EV was between 12 years 10 months and 15 years and nine months. The applicant was between 18 years three months and 21 years and three months.

[9] EV also told police that the defendant had assaulted her as a child. She stated that as she grew up and started to go out, the defendant accused her of taking drugs. She described an incident where she was sat with her mother and the defendant accused her of taking ecstasy and she says he 'battered her around the room.' She said he punched her several times and she fell against a glass ashtray which shattered. When she tried to phone the police, he dragged her to the floor and kicked her. The resulting injuries were a broken nose, two black eyes, a split lip and glass in her feet. She states that after that incident she moved out of the house. EV was between 14 years 10 months and 16 years and nine months. The applicant was between 20 years three months and 22 years and three months.

[10] The incidents were reported by EV to her mother. Subsequently, she states that there was a family meeting about it, and the defendant agreed to get help for his behaviour.

[11] There was an agreed basis of the plea for the second indictment which sets out the details of the offence. The complainant is referred to as SD. We repeat the detail here with some adjustments on the basis of preserving anonymity.

"XY and SD are cousins. In mid-2010 AV was aged 32 years and SD was aged 39 years. They were both guests at a party given by XY's sister L in her house. XY and SD both consumed alcohol to excess. SD slept on a sofa in the living room. She was awoken at about 8am by XY opening the button of her trousers. L came downstairs shortly afterwards but was not made aware of what had taken place. SD reported to police approximately a year later that she had been sexually assaulted by XY but that she did not wish to go to court. She gave an ABE interview in July 2014 but did not wish to proceed with her complaint at that time."

Victim impact

[12] There are impressive statements filed from both victims which we have read. Without repeating all of the detail it is clear that the applicant's behaviour has clearly had a profound effect upon their lives and relationships. EV also points to the fact that she always wanted her brother to get help.

Circumstances in relation to the applicant

[13] A pre-sentence report is dated 9 February 2023. This assessed the applicant as posing a high likelihood of re-offending, however, he was not assessed as presenting a significant risk of serious harm to others. The applicant was reported to be willing to engage/comply in multi-agency monitoring and restrictions and complete any

programmes of work assessed as required to manage his risk. In respect of this, probation recorded that a psychology assessment would be needed. He was also assessed as in the medium category in relation to the level of supervision and intervention he requires.

[14] The defendant is now 44 years of age. He has a history of drug and alcohol abuse and depression. In relation to this he said to the probation officer "I need help, I am fed up living the way I am living." He is described as an isolated individual who has also suffered the bereavement of his parents and brother who he had, previously, had caring responsibilities for. He has limited social contact. He is not in a relationship. He has 11 previous convictions, between 1990 and 2009. None of those offences were for sexual offending.

[15] The pre-sentence report notes that the applicant was aware of the serious nature of the offences. It also contains the following sentence which we find of particular resonance:

"It should be noted that a period of custody without any form of community based supervision may fail to enable the defendant to address the issues and behaviours associated with the commission of the index offences."

[16] In addition, a report was filed by Mr Joe Dwyer, educational psychologist of 7 February 2022. This report states that the applicant has a full-scale IQ of 73, therefore he "has limited cognitive ability and missed a lot of school. While not learning disabled he functions cognitively at a level very close to that. He has low levels of literacy and numeracy. He has low self-confidence and self-esteem. He requires support in learning to gain insight into his circumstances so that he can learn to see himself more positively." In keeping with the contents of this report, we also note that the applicant, has from the date of sentence on 3 March 2023, been placed in a special unit for vulnerable prisoners.

Grounds of appeal

[17] Two grounds are raised which amount to one core point that the judge failed to consider alternatives to imprisonment and specifically a suspension of sentence.

Consideration

[18] We note that it was agreed that the 'headline' offence was count one of the indictment relating to EV. The earliest age of the defendant when he committed this offence was 17 years and three months and, therefore, the case of *R v ML* [2013] NICA 27 applied as the bracket of this offending encompassed a time when the applicant was a child in age and functioning at a low level.

[19] The prosecution accept that the relevant considerations outlined in *ML* are correctly set out on behalf of the applicant. These flow from para [20] of *ML* as follows:

“[20] When assessing the appropriate sentence in an historic sex case for an offender who was a child at the time of the commission of the offence, we suggest that the following factors should be taken into account:

- (i) The statutory framework applicable at the time of the commission of the offence governs the scope of the sentence which may be imposed;
- (ii) The sentence should reflect the sentencing guidelines and principles applicable at the time at which the sentence is imposed;
- (iii) The primary considerations are the culpability of the offender, the harm to the victim and the risk of harm from the offender in the future;
- (iv) Where the offender was young and/or immature at the time of the commission of the offences that will be material to the issue of culpability. It is appropriate in considering that issue to consider what sentence would be imposed today on a child who was slightly older than the offender was at the time that he committed the offences;
- (v) Despite the observations of this court in *Bateson* on the case of *Cuddington* the court should not seek to establish what sentence might have been imposed on the offender if he had been detected shortly after the commission of the offence. Those remarks were not material to the outcome in *Bateson* and were, therefore, obiter. Such an exercise is of no benefit in fixing the appropriate sentence as sentencing policy and principles may well have altered considerably in the interim;
- (vi) The passage of time may often assist in understanding the long term effects of the offences on the victim;
- (vii) The passage of time may also be relevant to the assessment of the risk of harm. If the court is

satisfied that the offender has led a blameless life after the commission of the offences that will be relevant in assessing future harm;

- (viii) The attitude of the offender at the time of disclosure or interview by police is significant. The offender at this stage will be of full age. In these cases the immediate acknowledgement of wrongdoing by the offender provides vindication for the victim and relief at being spared the experience of giving evidence at a criminal trial. Such an acknowledgement will attract considerable discount in the sentence."

[20] In relation to the headline offence the judge stated that the applicant fell to be sentenced under the Criminal Justice (NI) Order 1996. The judge accepted that in relation to headline historic sex offence the applicant's culpability was low because of his age and intellectual deficiencies. He did not suggest that the harm was high, particularly, as the victim referred to family action and the applicant's need for help. In relation to risk the judge recorded that in 12 years since the offence the applicant committed no offences. However, he said that to ensure that members of the public are reassured and protected from further sexual offending he would impose a SOPO.

[21] In respect of the second indictment the judge said that this was at the lower end of the scale and as to risk there have been no other offences for the last 12 years. The judge gave 25% credit in each case for the guilty pleas. It is apparent from the exchange between counsel at the end of sentencing that because the judge imposed a total sentence of 15 months, he did not specifically consider other disposals required by either the Criminal Justice (NI) Order 1996 or the Criminal Justice (NI) Order 2008.

[22] In our view the nine-month sentence on the first indictment is neither manifestly excessive nor wrong in principle. We think that the six-month sentence on the second indictment is arguably high. Overall, this case merited a sentence of 12 months. That means that under either legislative provision in play the court should have considered non-custodial options.

[23] A court may suspend a sentence if there are exceptional circumstances. Here the applicant has a learning difficulty which might establish that category. However, of more interest to us is the fact that the applicant agreed to probation and clearly is a person who requires assistance. His sister said this in her victim impact statement. We commend her for that. To our mind the public would be better served by the applicant being educated by specialists on his behaviour in order to prevent a repetition of sexual offending.

[24] A suspended sentence does nothing concrete to ameliorate the risks. However, a probation order would. This is not an easy option by any means as it requires engagement over a period of time with specialist services to deal with the index offending. Both prosecuting counsel accept that this disposal was open to the judge on the facts of this case. We do not think that a suspended sentence offers sufficient reassurance to the public in this area of offending. Therefore, we think that a probation order was the appropriate order in this case. Such an order also entirely vindicates the two female victims in this case who are to be commended for coming forward and highlighting the applicant's criminal behaviour. The judge failed to consider this option in sentencing and, therefore, has erred in principle.

Conclusion

[25] Leave to appeal is granted and the appeal is allowed. With the consent of the applicant which has been provided by Ms McDermott, we substitute a three-year probation order for the sentence imposed by the judge and direct that the applicant undertake a suitable course to deal with sexual offending. Should the applicant fail to engage with probation he will face breach proceedings and the prospect of further imprisonment. The SOPO will remain in place.

[26] As we have substituted a probation order some of the consequential orders will be altered as follows. Pursuant to section 82 of the Sexual Offences Act 2003 the notification period will be five years. The disqualification order is removed however by virtue of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 the applicant may be barred by virtue of his conviction. The Independent Safeguarding Board may include him on the barred list relating to children/adults and should be notified accordingly.