

Neutral Citation: [2016] NICC 12

Ref: 2016NICC12

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:19/09/16

THE CROWN COURT IN NORTHERN IRELAND
SITTING IN ANTRIM

THE QUEEN

-v-

D

SENTENCE

HIS HONOUR JUDGE MARRINAN

Introduction

[1] The young Defendant is 17 years of age. The victim of the offences to which he has pleaded guilty is eight years of age. Nothing must be reported which would tend to identify either of these young people. The Defendant will be referred to as D and the victim will be called A. The victim is a nephew of D.

[2] Although the arraignment of the Defendant was listed for the 29th September 2015, it had to be postponed due to a general withdrawal of legal services until the 15th March 2016. On that date the Defendant pleaded guilty to two counts of rape of a child under 13, two counts of sexual assault on a child under 13 and two counts of causing or inciting a child under 13 to engage in sexual activity. He pleaded not guilty to seven other counts.

[3] On the 19th April 2016, prosecution counsel indicated that the pleas of guilty described above were acceptable and the Court directed that the outstanding charges to which not guilty pleas had been entered should be left on the books of the Court not to be proceeded with without the leave of the Court or the Court of Appeal.

[4] These offences are very serious. A rape of a child under 13 contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008 (the Order) carries a maximum sentence of life imprisonment. The lesser offences of sexual assault on a child under 13 contrary to Article 14 of the Order and causing or inciting a child under 13 to engage in sexual activity contrary to Article 15(1) of the Order carry maximum sentences of 14 years.

The background facts

[5] The offences took place between the 1st July 2013 and the 18th February 2014. The victim was between five and six years old during this period. The Defendant was 14 at all relevant times.

[6] The Defendant had an extremely difficult and troubled childhood. He never knew his father. He grew up in England with his mother and an older stepbrother, S, who is the father of A. His stepbrother moved to Northern Ireland because of his employment. The Defendant's mother's alcoholism exposed him to inconsistent care leaving him a damaged and vulnerable young person with no opportunity to develop normally within a stable and safe environment.

[7] From the age of six the Defendant became the subject of Care Orders as a result of abuse and neglect and had four foster placements within the next 12 months. He returned to his mother's care in August 2007 and although there was some improvement in her parenting and care, she relapsed into heavy drinking and the Defendant was placed on the Child Protection Register in May 2013 under the category 'negligent and emotional abuse'.

[8] His stepbrother, S, was anxious to help him and in the previous year D had spent some considerable time with his brother and his wife and their young sons in Northern Ireland between May 2012 and February 2013. After D was placed on the Child Protection Register in May 2013, S applied for a kinship placement and this led to D moving to Northern Ireland on a formal basis in July 2013. Effectively, he joined his brother's family and became one of them.

[9] Within a short time the Defendant abused his nephew by touching his penis and inciting him to touch his own penis (Counts 1 and 2). The family moved house and similar behaviour was repeated in the Defendant's bedroom at the new house (Counts 3 and 4). Matters then progressed to the point where the Defendant told A to put the Defendant's penis in his mouth and D did so (Count 12). This was repeated many times between December 2013 and February 2014 (Specimen Count 13).

[10] On the 17th February 2014 whilst S and his wife were attending hospital awaiting the birth of their first daughter, the child made revelations of sexual abuse to his

maternal grandmother. This was reported to S on his return from hospital. After questioning his son S confronted D several times and admissions were made piecemeal culminating in full admissions. D was removed from the house by social workers and was fostered from that date until the present with a new foster family.

[11] The child victim confirmed the abuse in an ABE interview with police on the 27th February 2014. The Defendant was interviewed by the police on the 24th July 2014 in the presence of a solicitor and an appropriate adult. He made some admissions to the police but always denied the oral rapes.

The framework and sentencing principles

[12] Article 2(2) of the Criminal Justice (Children) (*Northern Ireland) Order 1998 (the 1998 Order), as amended by the Justice (Northern Ireland) Order 2002 defines a child as a person under the age of 18 years. Article 39 of the 1998 Order limits the sentencing powers of the Court in respect of an offence falling outside the provisions of Article 45 of the said Order to a maximum sentence of two years in a Juvenile Justice Centre when dealing with a child.

[13] I am satisfied, however, that as regards the rapes at Counts 12 and 13, these offences constitute "grave crimes" within the meaning of Article 45 of the 1998 Order. Article 45(2) provides:

"Where -

(a) a child is convicted on indictment of any offence punishable in the case of an adult with imprisonment for 14 years or more not being an offence the sentence for which is fixed by law; and

(b) the Court is of the opinion that none of the other methods in which the case may be dealt with is suitable, the Court may sentence the child to be detained for such period as may be specified in the sentence; and where such a sentence has been passed the child shall, during that period, notwithstanding any other provisions of this Order, be liable to be detained in such place and under such conditions as the Secretary of State may direct".

[14] A conviction for rape can attract a sentence of more than 14 years in the case of an adult. The first condition in Article 45(2) is therefore satisfied, but before the power to

sentence under this Article can be invoked, the Court must be of the opinion that no other possible disposal is suitable.

[15] As Kerr LCJ said in the leading authority on the sentencing of children in this jurisdiction; R v. CK, 2009 NICA 17, paragraph 16:

"This precondition reflects the principle enshrined in Article 4 of the Order," and then cites (4):

'In any proceedings for an offence, the Court shall have regard to (a) the welfare of any child brought before it and (b) the general principle in any delay in dealing with a child is likely to prejudice his welfare'."

The Court continued:

17:

"The principle that the welfare of the child must be specifically taken into account also finds expression in Section 53 of the (Justice Northern Ireland) Act 2003, the relevant parts of which are:"53- aims of youth justice system

(1) The principal aim of the youth justice system is to protect the public by preventing offending by children.

(2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions with a view (in particular) to encouraging children to recognise the effects of crime and take responsibility for their actions.

(3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions and to the general principle that any delay in dealing with children is likely to prejudice their welfare, with a view (in particular) to furthering their personal, social and educational development."

18:

"The European Court of European Rights has regarded the United Nations Standard Minimum Rules for the

Administration of Juvenile Justice, 1985 (the Beijing Rules) and the United Nations Convention on the Rights of the Child(UNCRC) as providing guidance on how juvenile offenders should be dealt with.

Paragraph 5 of the Beijing Rules states that deprivation of liberty should only be imposed after careful consideration. It should be for a minimum period and should be reserved for serious offences."

However, the same Court in Newton, Doey and Doherty 2013 Appeal Cases 38 added at paragraph 15, "It is clear however that where children are convicted of serious offences, substantial periods of detention may be required and specific provision for this is contained in Article 45(2) of the 1998 Order."

In CK at paragraph 19 the Court continued:

"... Article 3.1 of UNCRC proclaims the paramountcy of importance of the welfare of the child in all public actions taken in relation to children. It stipulates that"... in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration".

(20) Article 37(b) of UNCRC echoes para 5 of the Beijing Rules:

"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resource and for the shortest appropriate period of time".

(21) The need to promote the re-integration of a child offender into society is dealt with in Article 40(1)of UNCRC as follows:

"State parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental

freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

And then finally at Paragraph 22:

"The theme common to all these provisions (the need to have particular regard to the welfare of a child offender) should inform the approach of the Court as to the application of Article 45(2)(b) of the 1998 Order. Examination of the suitability of alternative methods of dealing with the case other than by detention must take place against the backdrop of an imperative to do what is best for the child, while, of course, recognising the need to prevent offending by children. Moreover, where it is concluded that detention is required, there is a need to focus on what is the minimum period that will accommodate that requirement."

[16] In that case the child Defendants were 13 at the date of the commission of offences such as attempted rape, robbery and wounding with intent contrary to Section 18 of the Offences Against the Person Act 1861. The trial Judge described the incident as an horrific attack on a young woman by the Defendants using a knife in a park in Belfast. Noting the opinion that this heinous offence would have had a long lasting effect on the victim, the judge ordered that the Defendants be detained for a period of six years.

[17] A sobering counterpoise to these basic principles is provided by Gillen J in R v. AB [2008] NICC 37 where he notes:

"The youth and immaturity of an offender must always be a legitimate mitigating factor when passing sentence. On the other hand this must be tempered by the comments of the Northern Ireland Court of Appeal in Attorney General's Reference Number 3 of 2006 Gilbert 2006 NICA36."

In that case a youth of 15 at the date of the commission of the crimes pleaded guilty to offences including rape, grievous bodily harm and indecent assault. A sentence of five years' custody followed by three years' probation was substituted by a sentence of seven years' custody followed by three years' probation.

In considering the issue of age of an offender Gillen J observed, "It appears to us that the youth of an offender will

have a variable effect on a sentence according to the nature of the crime and the awareness of the individual Defendant of the nature of the offending behaviour."

[18] The observations in Gilbert's case were considered and followed in the case of McKenna and Quinn where the Defendants were each 16 years of age and four complainants were aged 15 at the relevant date of offending. One of the accused was convicted of rape and sentenced to eight years with concurrent sentences of five years for indecent assault and three years for false imprisonment. Counsel in this case also helpfully drew the Court's attention to R v. Akron [2005] EWCA Crim 154 where the Court of Appeal in England and Wales observed that, inter alia:

"In all such cases youth will always be a relevant consideration with the extent to which it calls for a reduction and specifically a significant reduction by comparison to a sentence which would otherwise have been passed on an adult nevertheless remains to be assessed by the sentencing Court by reference to the circumstances in that case."

[19] The approach to sentencing children in England and Wales is broadly similar to that taken by the Courts in Northern Ireland. The basic principles were set out in the Youth Sentencing Guidelines of 2009; (see Banks on Sentencing, 11th Edition 2016, paragraph 14.29 et seq.)

[20] More recently, draft guidelines setting out overarching principles for sentencing use have been published.

[21] At paragraph 1.2 of these draft guidelines (which are essentially a reworking of the 2009 guidelines), it is noted that:

"While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and offender focused, as opposed to offence focused. For an offender under 18 the sentence should focus on the rehabilitation of the offender where possible. A Court should also consider the effect the sentence is likely to have on the young person as well as any underlying factors contributing to the offending behaviour".

paragraph 14 continues:

"It is important to bear in mind any factors that may diminish the culpability of a young offender. Young people have not attained full maturity and as such may not fully

appreciate the effect their actions can have on other people. They may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Young people are also likely to be susceptible to peer pressure and other external influences. It is important to consider the extent to which the offender has been acting impulsively and the offender's conduct has been affected by inexperience, emotional volatility or negative influences."

[22] Having considered those general principles, I then turn to the aggravating and mitigating features in this particular case.

Aggravating features :

(a) The Defendant clearly abused a position of trust in that as a much older child he was trusted by the child's parents to be with the child and look after him.

(b) There were also grooming aspects in this case in that the Defendant told the child not to tell anyone and gave him sweets. This suggests to my mind that the Defendant knew that what he was doing was wrong, but as Kerr LCJ said in CK, "*One must, we believe, be careful, however, in imputing a well-developed sense of the gravity of his wrongful behaviour to the appellant.*

"He was 12 years old when most of these offences took place. The knowledge that what he was doing was wrong is very different in the mind of a 12-year-old from that which may be expected from a fully mature adult." (paragraph 10).

I appreciate of course that this particular Defendant was 14 but the point nevertheless is well made.

(c) Sadly, this is not a case of an individual isolated incident. It is clear that these offences represented repeat offending over a period of months and might well have continued if the matter had not been discovered.

(d) The effect on the child, victim, and his family.

[23] The child was examined in April of this year by Dr. Thompson, a clinical psychologist, who has specialised in child and adolescent mental health since 2008. The victim, now eight, was not experiencing flashbacks according to her or post-traumatic intrusions. He appeared to be developing emotionally and socially in an age appropriate way.

[24] She states her opinion on the child at paragraphs 10(2) and 10(3). At 10(2) she said:

"It is my professional opinion that [A] is not currently displaying any evidence of post-traumatic stress, however his lack of thinking about and lack of understanding about the meaning of the abuse being so young at the time has most likely protected him from much of the emotional impact to date. His understanding around what has happened to him will increase with age and it will be difficult to predict what impact this may have over time.

These experiences may increase [A's] vulnerability to developing behavioural or mental health difficulties in adolescence or adulthood and such problems can often be related back to experiencing trauma such as these in early childhood.

It is also my opinion that [A] may require the support of additional services in the future should symptoms relating to the trauma emerge at any sometime. Should this happen, he should seek referral via his GP to the local Child and Adolescent Mental Health Services."

[25] I have also read victim impact statements from the child's mother and father. These parents in a very dignified way present an account of how the victim and family suffered both at the time of the disclosure and thereafter including, of course, the police investigation.

[26] It is clear to me that the parents and the child, particularly the parents, have had a very difficult and painful time. Justifiably, the father of the abused child, the stepbrother of the Defendant, feels totally betrayed in that, in trying to help his stepbrother, he was cruelly rewarded by sexual abuse towards his son. Any parent can readily appreciate the pain and distress of this decent man and his wife who have had their kindness and love thrown back in their face.

[27] I was concerned that the original victim impact report had not explored fully the effect of these events particularly on the family as a whole and directed a further report. I was concerned also that the father's report of the effects on the victim seem somewhat at odds with the findings of that first report. I now have a second report on the influence on the family. This has been a particularly painful exercise for the family of the child who has been abused. What comes across in their very dignified statements to Dr. Thompson is, understandably, a wish to see punishment because their feeling is that,

without such a clear message, this young Defendant may continue to behave in a similar way.

[28] Dr. Thompson summaries the effect on the family as follows at paragraph 9.3:

"With regard to the impact of these events on the family, it appears this has been huge and wide-ranging. The very fabric of their family life has been altered, separated into a before and after way of being. Before these events the family were relatively care free and their parenting cushioned and protected their children from any negative influences from the outside world. After these events however a high level of distress entered the family shattering their sense of security, transforming their parenting into a style dominated by the attempt to prevent any exposure to events that might cause [A] to come to any harm either physically or psychological.

The parents continue to feel a high level of worry and concern about how [A] will react to his increased cognitive understanding and sexual maturity during puberty. The family have also experienced a chain of losses relating to these events including the loss of an entire side of the wider family."

Again, at paragraph 10(4) the doctor says:

"It is my opinion that the effect upon [A] and his family is still evolving and difficult to predict with certainty," and makes the point again that should the child need any further counselling, the CAMHS organisation is there to assist.

Mitigating features:

[29] These include the following:

- (a) The youth of the offender - he was 14 years at the time.
- (b) Secondly, he had no previous convictions of any kind and that is an important matter in assessing his culpability and his character.
- (c) Thirdly, his pleas of guilty. Although the Defendant made only partial admissions to the police and denied the oral rapes, he deserves very considerable credit for facing up to the full acceptance of his behaviour in pleading guilty. The Courts have said repeatedly that this is of special importance in cases of sexual abuse of young

children. The admissions to the probation officer and to Dr. Ashurst were unqualified and it was known from a relatively early stage in proceedings that the child would not have to give evidence. Any of us who routinely have to deal with these cases, whether from the Bar, the solicitors' profession or the Bench, week in week out, know the agony and pain faced by complainants, especially children, and the pain and distress caused to their parents in a case which has to be run to its conclusion. The pleas of guilty are a very important mitigating feature in this case.

(d) This is also a case where there was an element of delay. This delay was not attributable to the behaviour of the Defendant. It wasn't culpable delay on anyone's part as far as I can see but it is now two years since he was interviewed, just over two years since he was interviewed by the police. There is no breach of the reasonable time requirement under Article 6(1) of the European Convention of Human Rights, but some allowance should be made for the delay in this case.

One is reminded again specifically of the statutory enjoiner to the Court in the 1998 Order, Article 4 where it states:

"In any proceedings for an offence the Court shall have regard to (a) the welfare of any child brought before it; and (b) the general principle that any delay in dealing with a child is likely to prejudice his welfare."

In this case, ironically, the delay can be said to have worked somewhat to the Defendant's advantage, the Defendant's proper advantage, in that he has received a great deal of professional help and guidance in the intervening period.

(e) The next point of mitigation is the Defendant's highly damaged upbringing and background.

[30] I refer to the detailed and helpful report of May 2016 provided by Dr Elizabeth Ashurst, a forensic psychologist with great experience of working with adults, adolescents and children who display harmful sexual behaviour (HSB).

[31] I have also considered a report from June 2016 from Dr Cassidy, consultant child and adolescent psychiatrist, the presentence report and also a report from Ms Dick, a highly experienced therapist in this area.

[32] It is of note that following the disclosure of the offences, the Defendant was taken into foster care and has sustained the same foster placement since February 2014. Although delay is undesirable in any case involving a child, it has given the Court extremely valuable insights into the Defendant's progress over the last 30 months.

[33] It is quite shocking to hear that this young Defendant was exposed to adult pornography when he was about nine to ten years old when such material was shown to him in his mother's presence, in his mother's home and in the presence of a boyfriend or boyfriends. He has since then been able to access this kind of material online and continued to obtain this material on his mobile phone. It is clear that he experienced significant emotional abuse and neglect whilst in his mother's care.

[34] Ms Jane Dick, a psychotherapist who has worked with the Defendant for the last two years, reports the Defendant as presenting emotionally as much younger than his 17 years and I fully considered her report of the 15th September 2016. According to her, the defendant has expressed regret and empathy with his brother and his family.

[35] Although the parents of the abused child are sceptical of this, it is clear that the Defendant has been accepted by all the professionals who have looked at him, as having expressed to them genuine regret and empathy with his victim and with his stepbrother and his family.

[36] Dr Ashurst suggests that the foster placement has been extremely encouraging. The young Defendant has worked very hard and achieved a number of GCSEs and continues to function well academically. She says:

"Very encouraging is the Defendant's relationship with his foster carer who without doubt is supportive and has been instrumental in the young man adhering to and complying with his safety care plan. The foster carers and their families have successfully modelled for the Defendant positive emotional coping and problem solving strategies whilst providing him with a safe caring environment with on-hand emotional confidence.

The foster carer has been proactive in seeking out for the young man appropriate age activities to become involved in and encouraging him. Evidence that these impacts of these supportive factors for the child Defendant are demonstrated through his positive college reports regarding his attendance, behaviour and conformity to college rules and a safety plan, and moreover with the Defendant setting the goal for himself to work hard on his educational endeavours so he places himself in a position to attend university."

[37] Another strength for the Defendant is his relationship with his social worker. This is a Mr David Henry who attends approximately every six weeks coming from Leicester in England to support the Defendant in assessment reviews and the Defendant's relationship with psychotherapist, Jane Dick, who has carried out relational

work with the young man for at least 18 months. Ms Dick reports the Defendant's considerable capacity to make good use of his supportive environment exemplifying his progress in the foster home. She describes his achievements in foster care as considerable taking into account his early life handicaps.

[38] One of the more important conclusions arrived at by Dr Cassidy is stated at page 16. If we accept this report and use it as a lens to view the Defendant's past, there are potentially a number of key factors such as his fractious relationship with his mother who was a lone parent, her alcohol misuse, her periods of neglect and the Defendant's patterns of discontinuity of care. These patterns meant the Defendant had to leave home and enter the care system. Dr Ashurst's opinion is that if he does not remain in a placement as secure and supportive as the one he currently enjoys, he could be rendered vulnerable to exploitive adult or adolescent males and females through a need for acceptance and admiration.

[39] She also notes that it is her clinical opinion that the Defendant represents a significant risk of harmful sexual behaviour.

[40] Dr Cassidy also considers the child's upbringing and the negative influences that have worked on him throughout his life until he came for periods of time under the influence of his stepbrother. Clearly, the influence there was a loving and accepting one which in a sense makes this case all the sadder.

[41] Her conclusion is that the Defendant has experienced significant and emotional abuse and neglect while in his mother's care. This is cited as the reason for him coming into the care system.

[42] Suffice it to say that these early experiences and neglect severely damaged his own innocence.

[43] In relation to the question of his regret, the doctor says as follows:

"... he understands that he took his victim's innocence away and that the victim may in future need psychological therapy to help him understand what happened. He is also aware that he has hurt his brother, his brother's wife and other family members."

She continues:

"Children who have been neglected and abused tend to develop unhealthy survival and coping strategies including harmful sexual behaviour which can be damaging to

themselves and those around them. This Defendant fits the presentation of a child who has been exposed to developmental trauma associated with abuse and neglect leading to insecurity attachment and a distorted sense of self and his place in the world. It is my opinion that these early negative experiences have contributed to the Defendant acting out harmful sexual behaviour with his little nephew."

[44] The presentence report and the supplementary report recently provided largely reflect the findings of the medical professionals. The probation officer suggests that there is a medium risk of reoffending in the next two years but that the Defendant is not assessed as presenting a significant risk of causing serious harm. She also is strongly of the view that he is suitable to engage in a sex offender treatment programme which takes approximately two years.

Conclusion

[45] Standing back from all these opinions and legal authorities, this case throws into sharp relief the tension between the Court seeking to do justice to the innocent young victim and the statutory principle that in a criminal case the Court shall have regard to the welfare of the child Defendant. Before the Court proceeds to sentence a young Defendant to custody, the Court must be of the opinion that no other possible disposal is suitable. This is a very different approach from that undertaken routinely in the sentencing of an adult offender. In cases of this type, the starting point for adult offenders on a contest would be in a range of ten to 13 years. Even allowing for strong mitigating factors, an adult might well expect to receive a significant prison sentence in the order of six to ten years.

[46] In cases involving children, there may well be cases where detention for long periods of time is deemed necessary. I have given examples of those above.

[47] In CK for example, the Defendant was 12 at the time. He pleaded guilty to very serious sexual assaults, including attempted rape of two children, a boy of eight and a girl of five, his cousins, over a period of several months. The Court of Appeal said at paragraph 23:

"We do not consider that the decision to make an Order involving detention can be said to be wrong in principle. Despite the appellant's youth, the serious nature of the offences and the fact that they occurred over a protracted period make this one in which detention is at least a justifiable option."

The presentence report and the medical and other reports that have been provided, including the very helpful report from Barnardos, make it clear that the appellant requires some form of supervision and rehabilitation. A Reparation Order or Community Responsibility Order would be inadequate to meet the circumstances of this case. Observing that there was no role in the case for such a disposal, the Recorder expressly rejected the option of a Youth Conference Order. We consider that he was correct to do so."

[48] Then they considered the further option of a Juvenile Justice Centre Order.

The Court substituted a Juvenile Justice Centre Order of one year detention and one year supervision for the original Order of three years' detention in a juvenile justice centre.

[49] Looking at the particular circumstances of this present case and before proceeding to sentence the young offender to a custodial sentence, I remind myself again that before doing so I must be of the opinion that no other possible disposal is suitable. (my underlining).

[50] I find paragraph 1.16 of the Draft Guidelines for Sentencing Youths particularly apposite in this dilemma. It says:

"When considering a young offender who may be particularly vulnerable, sentencers should consider which available disposal is best able to support the young offender and which disposals could potentially exacerbate the underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on a vulnerable young offender of being in closed conditions with significant risks of self-harm including suicide."

[51] Dr Ashurst notes at page 20 of her report:

"It is my clinical opinion the Defendant is a vulnerable young male who is at significant risk of being sexually exploited and groomed and/or groomed for sexual activity by adult and adolescent males as well as adult and adolescent females and/or male, female peers. He requires an education element from professionals regarding placing himself in situations which place him at risk, to afford him the opportunity to use his learnings, to stay safe. He requires significant inputs, care, support, advice and guidance and

safeguarding protection by professionals."

[52] I heard evidence also from Mr Henry, the senior social worker, who returns periodically from England to give the Defendant support. He confirmed that the Defendant had received a very intense package of support since moving to his foster parents over two years ago and they have helped him secure a place on a B Tech business studies course. Ms Dick sees him weekly and has provided a detailed report on his development.

[53] Her conclusions largely mirror those found by Dr Cassidy and Dr Ashurst. She reports, and she has had now two years of dealing with him, his meaningful engagement and what she describes as a movement from an emotionally immature young person who had physically failed to thrive given the wretched environment in his mother's home to a more confident young man with a sense of belonging.

[54] Mr Henry's contribution has been very significant. He flies over to Northern Ireland every six weeks to assess progress in multi-disciplinary meetings on this young man, including professionals from Youth Justice Education, VOYPIC, (The Voice of Young People In Care), Ms Dick and the foster parents. It is very clear to me that the foster parents have hugely impressed Mr Henry. As first-time fosterers they have provided an extremely warm and welcoming yet strict environment for this young man.

[55] The Defendant is said to be adhering rigidly to the safe care plan and if he remains in the community his placement in this environment will continue until the point when and if he is fortunate enough to reach university. Mr Henry also confirmed that the Defendant has expressed to him on many occasions that he is very ashamed and remorseful and this chimes closely with what others have found.

[56] It is also notable, and may be a very small comfort to the parents of the abused child, that Ms Dick, who appears to have great expertise in this area, found the Defendant to be developmentally extremely immature.

[57] In the present case after considering all the evidence I cannot say that I am of the opinion that no other possible disposal other than custody is suitable.

Given the seriousness of the charges clearly one possible disposal would have been to sentence the Defendant to a determinate sentence of 30 months in the Young Offenders Centre and to apportion custody to licence as six months custody and 24 months on licence.

[58] That, arguably, would give proper weight to the acknowledged need for punishment and for the outworking of a sex offender treatment programme but also provide enough time for that programme to work within a community setting. In one

sense this might appear to satisfy the requirement of punishment and rehabilitation. That was my state of mind until I considered and reconsidered all the information that has been provided including the up-to-date report from Ms Dick.

[59] However, given the exceptional vulnerability of this young Defendant as expressed so starkly by Dr Ashurst, such a course would not only cause the Defendant to lose the foster placement and support which have been so important since he has started working with the people who have provided him with that support since early 2014, but also expose him to highly undesirable contact with peers who may have committed multiple crimes and leave him open to negative peer pressure and, probably, sexual exploitation.

[60] A suspended sentence can bring home the seriousness of the crime without the young Defendant losing his liberty immediately, but, unfortunately, in this jurisdiction it is impermissible as the law stands at present to combine a suspended sentence with a probation order or a community service order. It is interesting to note that since the passing of the Criminal Justice Act 2003 in England and Wales, courts there can impose requirements broadly akin to those contained in a probation or community service order as part of a suspended sentence order. One ventures to suggest that sentencing powers on the English and Wales model would be of considerable use in cases of this type and others in this jurisdiction.

[61] Such an order would enable the court to mark the seriousness of the offence whilst ensuring that the young Defendant is required to engage in offence focused rehabilitative work.

[62] After much reflection on these issues, not least of which is the need for justice for the young victim, I have concluded that, given the highly exceptional and difficult background of this young offender and his vulnerability and immaturity both at the time of offending and now, the most appropriate sentence is the making of a Probation Order with the Defendant's consent. I hasten to add that such a sentence would be completely inappropriate for an adult or even for a different kind of notional young Defendant who did not suffer from the neglect, physical abuse and sexualisation visited on this young man when he was only a child.

[63] It is my firm view that immediate custody will most likely result in severe damage to the welfare and education of this young Defendant and undermine the dedicated hard work invested in him by many agencies since February 2014. It may lead also to his being sexually abused in a closely confined institutional setting.

[64] I draw some comfort in the correctness of this very difficult decision from the approach of the Court of Appeal in the R v ML [2013] NICA 27. In that case the Defendant appealed a custody probation order comprising 18 months custody followed

by three years on probation.

[65] The Defendant had been 13 or 14 at the time the offences were committed but faced trial in 2012 when he was 36 years of age. The victim, his sister, was aged 10 or 11 at the date of the offences which included buggery of a female child, indecent assault and gross indecency. The sentence was reduced to one of 12 months imprisonment.

[66] That case, however, was contested, the Defendant claiming to have no memory whatsoever of these events. The victim impact report noted that there had been a significant effect on the psychological welfare of the complainant. As in this present case the Defendant had no previous convictions. He was assessed to be at medium risk of reoffending as is this Defendant.

[67] At paragraph 16 of the Court's ruling Morgan LCJ says:

"It is important not to ignore the harm that has been caused by the appellant's behaviour, but in looking at the culpability of his conduct, the assessment needs to take into account that this was a 13 or 14-year-old boy with all the immaturity, particularly in relation to sexual matters, that one might expect. It is, in our view, appropriate to take into account how the circumstances would have been taken into account by a sentencing Court today if dealing with an offender of the age the appellant was shortly after he committed these offences.

In R v. CK a minor 2009 NICA 17 this Court recognised the domestic statutory provisions and the international conventions requiring the Court to consider non-custodial options for criminal conduct by persons of that age.

In this case the prosecution were inclined to accept that for a boy of the appellant's age as he was at the time of the commission of these offences, a non-custodial disposal might well have been appropriate if the offences had been committed recently.

We take into account, however, that the case was contested by the appellant and that he cannot therefore benefit from the very considerable discount that he might have expected if he had faced up to his responsibilities at an early stage..."

[68] The Court concluded by ruling that the youth and immaturity of the appellant at the time of the commission of those offences made that a case of low culpability but

significant harm. The fact that the appellant had made the complainant endure the rigours of a trial appeared critical in the disposal of the case, the Chief Justice pointing out at paragraph 21:

"If he had faced up to his responsibilities at an early stage a non-custodial outcome may have been possible."

[69] I find the present case to be one of low culpability but significant damage and potential damage.

[70] I have reflected on the victim's parents' concern that a non-custodial sentence will make it very difficult to explain to their child when he is older why his abuser was not sent to custody. When and if they feel ready, and when the child is ready to have this explained to him in circumstances which will, doubtless, be handled with great care and under medical advice, I believe they can tell their child when he is old enough to understand and when he is mentally strong enough to understand, that the Judge felt clearly that the harm done to him justified a custodial sentence, but, quite exceptionally, the Defendant was spared custody only because he himself was so damaged and vulnerable before he came to live in their family and that there was a real risk that detention would lead him to be sexually abused.

[71] I just want to say a few words to the defendant. What you did to this child and his family was truly dreadful. You abused the trust placed in you. You repaid kindness with harm. You robbed the child of the innocence of childhood, something that every child has a right to expect, and you have left the child and his family in as yet unknown circumstances. You have already destroyed your relationship with your kind-hearted stepbrother and his wife. Whatever your own problems are, you should be thoroughly ashamed of your behaviour. It is only because of your own extreme vulnerability, which has been expressed to me by a number of experts, and your age and your lack of maturity that you are not going to detention, detention you would otherwise have richly deserved.

[72] The Court's decision is that you will be placed on probation for a period of three years.

I understand that you agree to this.

This is a lot less onerous than detention, but, nevertheless, if you do not comply with the requirements of the probation order, you may be returned to Court for a suitably serious breach and the Court's powers of sentencing can arise again including custody, do you understand that?

DEFENDANT: I do.

JUDGE MARRINAN: You must participate in a sex offenders treatment programme which takes two years. There is also an additional requirement. You must actively participate in any programmes of work recommended by the supervising officer assigned to your case to reduce any risk you may present to, and you must cooperate in all assessments by the Probation Board as to your suitability for programmes and other offence focused work.