Neutral Citation: [2016] NICA 49

Ref: **COL10130**

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

Delivered: **25/11/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

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Before: Morgan LCJ, Weir LJ and Colton J

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COLTON J (delivering the judgment of the court)

[1] This judgment was given ex tempore immediately following upon the hearing of the appeal and is now published with minor editorial amendments.

[2] The appellant in this appeal is now aged 63, having been born on 21 September 1953.

[3] On 31 August 2016 at Antrim Crown Court he was sentenced to twelve months' imprisonment, six months in custody and six months on licence, for an offence of sexual assault contrary to Section 7(1) of the Sexual Offenders (Northern Ireland) Order 2008.

[4] The offence occurred in the early hours of the morning of 10 May 2015 when the appellant sexually assaulted his 20 year old nephew by attempting to perform oral sex on him while he slept.

[5] The facts are that about 6.00pm on the evening beforehand the appellant's brother and nephew went to the appellant's home where they chatted and played cards until around 9.00pm. During this time they consumed alcohol. The appellant's brother then went home. He and his nephew then went to a bar to meet his nephew's brother. The three of them had a number of further alcoholic drinks and stayed at the bar until around 11.00pm. The appellant and his nephew then returned to the appellant's home where they had some take away food. They chatted further, continuing to drink and play cards.

[6] The appellant's nephew describes in his statement how he wanted to sleep on the sofa because he was staying for the night, but his uncle, the appellant, persisted that he should sleep in his double bed. He thought that he was sleeping on his own in a double bed and he fell asleep very quickly. He woke up during the night to find his uncle was performing oral sex on him. His reaction was to punch the appellant several times. He telephoned his mother who collected him and took him home.

[7] The matter was reported immediately to the police who attended at the nephew's home. They then went to the appellant's house. He was interviewed by the police and he, in effect, admitted the offences during the course of his interview.

[8] Because of a Legal Aid dispute between the legal profession and the DoJ, he was not actually arraigned until 8 March 2016 when he pleaded not guilty. It appears from the defence statement submitted on his behalf that he admitted the act. He accepted that his nephew did not, in fact, consent to the act. He made the case that he reasonably believed his nephew was consenting to the sexual act that he performed. The case was then fixed for trial on 8 June 2016. On the day of the trial, after a jury was sworn, the appellant applied to be re-arraigned and pleaded guilty to the offence.

[9] A Pre-Sentence Report was directed and the matter was adjourned for plea and sentence on 31 August 2016 when the sentence was imposed. On that date the trial judge was provided with a Pre-Sentence Probation Report on the appellant, a victim impact statement in the form of a medical report from Dr Michael Patterson, Consultant Clinical Psychologist in respect of the victim, and also a medical report from Dr Aidan Devine, Clinical Psychologist, in respect of the appellant.

[10] The Pre-Sentence Report describes the appellant as a hardworking man from a stable and happy background. He had a strong work ethic, as was exemplified by the reference which we have seen from his employer. Of relevance to these offences, however, he confirms that he identified himself as a homosexual man, something he concealed for many years because of his socially conservative background and societal attitude to homosexuality. He actually married when he was aged around 27 and went on to have three children who are now in their 30s.

[11] Because of coming to terms with his sexuality he divorced from his wife approximately 15 years ago but, until the disclosure of this offence, he remained on good terms with his wife and children. He has no relevant criminal convictions.

[12] The report did express concern that he failed to see that the fact that the victim was his nephew was a reason not to have sexual contact with him. He was described as demonstrating a lack of consequential thinking and risk taking behaviour. He was assessed as presenting a medium risk of re-offending, but was not regarded as someone who presented as a significant risk of serious harm. It was

the probation board's assessment that a period of probation would be of benefit to this particular appellant.

[13] Turning to the actual recommendation contained in the probation report, it states as follows:

> "With regards to the defendant's suitability for community based penalties, it is PBNI's assessment that a period of probation supervision may be of merit. [H] reports that he would consent to such a disposal being made. While he expresses remorse about his actions, there is an undoubted need for exploration into his reasoning and thinking behind his offending behaviour, especially due to some of the concerns that have been raised in this report about his understanding of boundaries, consent and attitude towards appropriate sexual partners. This could be met through the medium of some form of offence focused programme work."

[14] It was for that reason the probation service recommended that if this undoubted need was met by way of a probation order, the appellant should actively participate in any programme of work recommended by his supervision officer designed to reduce any risk he presents and to cooperate in assessments by PBNI as to his suitability for programmes and other focused work.

[15] The report from Dr Devine in respect of the appellant reinforced the views of the probation service and doesn't really add anything to the contents of that report.

[16] The victim impact report in this case set out in detail the effect the offence had on the injured party. The report is dated 7 July 2016 and describes the symptoms reported as re-experiencing the event through intrusive thoughts. He had some nightmares which had resolved and he became somewhat socially isolated, avoiding certain people and certain places. Dr Patterson diagnosed post-traumatic stress disorder, although he indicated that it was improving to the extent that it might actually become non-symptomatic in the next few months and, at the very worst, he might have some adjustment like disorder. He also pointed out that there were other relevant factors in the injured party's background which contributed to his anxiety and to his condition. He wasn't really able to attribute or put any particular percentage in relation to which factors contributed to the condition he diagnosed.

[17] In passing, we would point out that it is very regrettable that this report contained clearly inadmissible and prejudicial material. In our view, it should not have been in the report and most certainly should not have been provided to the trial judge. When victim impact reports are obtained it is important that they are looked

at carefully by the prosecution and any inappropriate material should be removed before the document is submitted to the judge and, of course, the defence should also have an opportunity to examine that material.

[18] In terms of the sentencing exercise embarked upon by the judge, he had regard to the Sentencing Guidelines in England and Wales on sexual offending. We repeat the observation that had been made throughout this appeal, and indeed in other cases that whilst these guidelines can be useful in identifying mitigating and aggravating factors, we discourage their use for the purposes of identifying sentencing tariffs. They have become increasingly prescriptive and, in effect, inhibit judges in the proper exercise of their discretion in relation to the sentencing exercise. It looks as if, from what the trial judge said, he took the view that the starting point for sentence was one year's imprisonment. We say that because he said that this case fell into category 2(b) of the guidelines which suggest a starting point of one year's imprisonment. Referring again to the guidelines, the range that was suggested was between a high level community order and two years custody. These of course apply to sentences after a contested trial.

[19] In determining what sentence to impose, the main feature that seems to have influenced him was the effect on the victim. That was what he described as the aggravating feature in this case, relying on the victim impact report to which we have referred. He does give credit to the appellant for his personal circumstances, his commitment to his work, the fact that he has now become socially isolated because of the breakdown in his family relationships, his expression of remorse and lack of convictions. He took the view nonetheless, that this was a case which crossed the custody threshold, particularly having regard to the impact on the victim. He went then on to impose a sentence of twelve months' imprisonment.

[20] Having looked at the matter, it is difficult to ascertain how the judge reached his ultimate sentence. In this regard we would endorse the comments of Treacy J who granted leave in this matter where he referred to the case of R v Douglas Ayton [2015] NICA which provides that:

> "In that case the judge has not spelt out in her remarks what her starting point was and what allowance she made for the guilty pleas. This court has repeatedly stressed that if the appellate process is to work satisfactorily the sentencing remarks must be such as to enable the appellate court to understand how the judge reached the ultimate sentence. As Weatherup LJ recently reminded and re-emphasised in R v MH [2015] NICA 67 the Court of Appeal said in R v McKeown [2013] NICA 28 at para [77]:

> 'In the interests of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the sentence. Sentencing should be transparent to both the parties and the public'."

[21] In this case it is not clear what the starting point was. It may have been twelve months since he relied on the sentencing guidelines, but at a later stage in his judgment he said that his initial reaction was that a longer sentence to the one he imposed would be appropriate. It is not clear what adjustments he made for aggravating and mitigating factors. It is not clear what credit, if any, he allowed for the fact that the appellant pleaded guilty. Although late the appellant is clearly entitled to some credit for his plea, particularly so in a case such as this where an injured party is spared the ordeal of giving evidence and perhaps, most importantly, is vindicated. That is amply demonstrated in the contents of the victim impact report where the victim is recorded as saying he felt a sense of relief at the plea. There is also a reference in his general practitioner notes and records to the effect that when the appellant pleaded guilty in this case, he described an enormous weight coming off his shoulders "as everything is now out in the open and he has been vindicated". It is also relevant to note that he indicated that his symptoms have improved since the guilty plea. The appellant's plea supports the remorse expressed in the probation report.

[22] We accept, however, that he is not entitled to full credit given the lateness of the plea.

[23] The sentencing exercise in a case such as this is by no means straightforward. Apart from the concerns we have about how the judge came to a figure of twelve months, we have a concern that he did not pay sufficient regard to the contents of the probation report. Indeed he does not expressly address the merits or the recommendation contained in the probation report other than to say he felt it was necessary to impose an immediate custodial sentence.

[24] The appellant in this case is a man in his 60s. He is in full employment. An excellent reference has been provided by his employer of the last 13 years. He is described as "a complete model member of staff, never any issues with his work or attitude, he is an absolute pleasure to work with, he works long hours, frequently works weekends". So clearly he is someone who is a useful member of society.

[25] As a result of this offence, he now is socially isolated from his family. There has been a break down in his relationship with people to whom he was previously

very close. He has now been in custody for two and a half months, so he clearly has been significantly punished already, and rightly so, for this offence.

[26] In coming to an appropriate sentence the court must have regard and is always mindful of the public interest. This is a man who clearly does have some issues and we do have a concern echoed in the probation report about his attitude to boundaries and the fact that he felt there might have been some argument that the victim in this case may have been consenting, something which was clearly not the case. He has never had the benefit of any direction or guidance in relation to these issues. It was clear that the probation service was of the view that there was an undoubted need for the type of guidance, direction and assistance that it can provide.

[27] In those circumstances, we feel that a probation order would be more appropriate in the public interest than requiring this appellant to serve a short prison sentence. For that reason we allow this appeal and we substitute the prison sentence which was imposed with a probation order.

[28] We will impose a probation order for two years and we will make it a requirement of that order that the appellant must actively participate in any programme of work recommended by a supervision officer designated to reduce any risk he presents and to cooperate in assessments by PBNI as to his suitability for programmes and other offence focused work.