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Judgment: approved by the Court for handing down | *Delivered:* **17/06/05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND (CRIMINAL DIVISION)

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THE QUEEN

-v-

JOANNE ELIZABETH MITCHELL

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Before Kerr LCJ and Morgan J

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KERR LCJ

[1]On 11 April 2005 the applicant, having originally faced a count of causing grievous bodily harm with intent, pleaded guilty to causing grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 and wilful neglect of a child contrary to section 20 of the Children and Young Persons Act (NI) 1968. The plea was entered as soon as the reduced charge became available. She came before His Honour Judge Burgess, the Recorder of Belfast, on 20 May 2005 and was sentenced to a custody probation order consisting of 8 months' custody and 12 months' probation. The Recorder indicated that if the applicant had not consented to probation the custodial sentence would have been 15 months.

[2] This case encapsulates and exemplifies many of the problems faced by sentencers. On the one hand the applicant has pleaded guilty to most serious charges, the neglect and ill-treatment of a young, defenceless child. The courts must recognise the need to protect such vulnerable members of our society and will invariably take a severe view of those who ill treat

them. Condign punishment must be imposed in appropriate cases, not only to deter others from committing such offences but also to reflect society's abhorrence of such behaviour. On the other hand much of the applicant's life has been, by contemporary standards, one of utter wretchedness. Abused as a child, raised in care and suffering from a personality disorder, the applicant, who is pregnant, has had no fewer than six children taken into care by Social Services. She appears to be totally incapable of coping with modern life's vicissitudes rather than criminal in the conventional sense.

[3] This case therefore presents an acute dilemma for the sentencer, one that must be painstakingly considered and understood before a disposal that achieves justice can be reached. Yet, too often one has the experience of cases such as the present being reported in the media in the shallowest fashion, leaving the impression with the reader that the court has arbitrarily chosen the most lenient course, indifferent to the reaction of society to that disposal. Such reports fail to do justice either to the exercise that the court must engage in or to their readership. Courts have a responsibility to explain in as plain a language as possible the reasons that they have chosen a particular sentence. Those who report on those decisions likewise have a solemn responsibility to ensure that they do so in a way that will not mislead but will reflect the factors that have influenced the particular outcome. I should acknowledge of course that not all media reports fail to achieve the high standard of reporting that cases such as this deserve. There are many examples in this jurisdiction of superlative reports that carefully reproduce the issues that arise in the case. One may only hope that all journalists will aspire to emulate that standard.

[4] Let me turn then to the facts of this case. The applicant's son, J, was born (prematurely at 27 weeks gestation) on 11 February 2003. He was admitted, with chest problems, to the Ulster Hospital, Dundonald, on 7 January 2004, having only been released the previous day after a three week stay due to bout of pneumonia. On 8 January 2004 x-rays that had been taken revealed baby J to have eight posterior rib fractures, all of the same vintage, noticeable due to the healing process. This prompted a re-examination of x-rays taken earlier on 19 December and on these also the fractures could be detected. The injuries were thought to have been sustained at the start of December. Three further rib fractures of either the same age or older were noted on 9 January.

[5] A consultant paediatrician spoke to the applicant and her husband on 8 January, explained her concerns and asked if they knew of any incident that could have caused the injuries. The applicant said that on 4 December baby J had rolled off a sofa onto a carpeted floor. Later she told the doctor that an older sibling had fallen on the child. The explanations were thought unconvincing and a police investigation ensued. The applicant was interviewed on 21 January 2004 and told the investigating officers that on 11 December 2003 she had taken baby J to the hospital as he had been unwell but they had been sent home. That evening he cried continually and would not feed. The applicant said that she tried to soothe him but to no avail. Her account continued: -

> "…he wouldn't sooth[e] and I just lost control at that point and I shook Jason maybe three times just backwards and forwards but not with an awful lot of force. He didn't hit off anything at all….he screamed…and his crying changed then from like a wee pitiful cry to a real wee cry like a pain cry…and tears then was coming down his face…that's when I strapped him back in at that point and took myself away from the situation to calm myself down to get my head cleared and I thought Christ what have I done and when Michael [the husband] come down I just couldn't tell Michael what I'd done. I wasn't a scared that he'd do anything. I was just scared what his reaction would be….I didn't think I'd hurt Jason…he was easy to console afterwards…I didn't think … Jason could have been hurt by what had happened cause he was smiling afterwards…I thought that I should have told Michael but I knew what Michael would do so I did he would have rung the police and social services and the hospital and I thought well if I don't say anything to anyone it's only one mistake it won't happen again no one will ever know what really happened cause I didn't realise Jason could have been as badly hurt as he's supposed to have been hurt. And I thought well if I keep quiet Michael won't know and I was ascared Michael would leave walk out and leave me with the kids take the kids away from me…"

[6] Asked about the version of events offered to the paediatrician the applicant maintained that it was true that baby J had rolled off a sofa. She estimated that the shaking would have continued for around 20 seconds but maintained that she did not intend to harm the child. She said that she chose not to reveal the shaking incident as she was afraid that her husband and children would leave her: "I'd be left on my own with nothing again. Basically I was just scared of just being completely dumped." Later in the interview the applicant stated that she was not feeling well on the night of the incident and that she had started to hear voices in her head. She said that she had not been following her regime of medication.

[7] A psychiatric report by Dr Graeme McDonald dated 8 November 2004 records that the applicant was brought up in the north of England. A victim of physical abuse, she was placed in care from the age of 2½. On weekend visits to the family home she was sexually abused by a brother. Behavioural problems precipitated a move from a children's home to an assessment centre at the age of 13, and then to a residential special school where she stayed until 17, afterwards returning to the family home. She abused solvents, amphetamines and alcohol as a teenager. She had three children in England, two with special needs, all since adopted. She later became aware that her partner had sexually abused children in the area. While living with her mother she again became the victim of sexual abuse. The applicant moved to Northern Ireland to live with her aunt's husband with whom she started a relationship and who is the father of her three children born in Northern Ireland, including the victim of the present offences. All the applicant's children are now in care.

[8] Dr McDonald outlined a history of psychiatric interventions since 1992 when the applicant was first diagnosed with a "personality disorder". She has a history of self harm and has been under the care of Windsor House Psychiatric Unit at Belfast City Hospital since 1995. Having been prescribed both chlorpromaxine and fluoxetine the applicant had gone off her medication approximately six weeks before assaulting her son.

[9]Dr McDonald gave the following opinion on the applicant: -

> "[She] is a 31 year old woman who has been the victim of a complex set of circumstances that has adversely affected her emotional well being. These circumstances arose in her early childhood and have persisted throughout most of her life. She has become

> a victim of the so called cycle of abuse. This describes the situation where victims of emotional neglect or abuse in childhood have reduced capacity to parent in later life. As a result of the combination of genetic and environmental issues, she has developed an emotionally unstable personality disorder…
>
> I believe that it is likely that her abnormal mental state at the time was the main cause of her losing self-control. If that was indeed the cause, it is likely that her state of emotional arousal would have been so severe as to have prevented her from realising the nature, extent or gravity of her actions. I believe that it is likely that she would have been unable to form specific intent to harm the child….She withheld the information about the shaking…[due to] her very real fear that she might lose the care of her child….It is clear that the borderline personality disorder carries a lifetime risk of harm both to herself and to others and that that risk would be minimised by regular taking of medication…people with such disorder by their very nature can be unreliable in terms of keeping appointments and of giving a reliable history."

[10] In a follow up report dated 7 December 2004 Dr McDonald referred to a note made by the applicant's GP to the effect that the applicant reported having taken 14 fluoxetine and 7 chlorpromazine on the day of the assault. Dr McDonald said this about that level of ingestion: -

> "My impression would be that the best explanation for her having taken large doses of medication on that day, if she did, was that this represented an attempt to control overwhelming feelings of emotional distress. I believe there fore that the taking of medication was a consequence of the emotional state that may have led to the alleged offence, rather than having been a direct cause of such behaviour."

[11] A pre-sentence probation report was prepared by Patricia Bartlett. It is dated 18 May 2005. The report details the applicant's disrupted education. She has never worked. She is on benefits. Her first three children were

adopted while she was living in England. She married nine years ago and has three further children with her husband. These children are now in care. There has been a history of emotional and physical neglect of the children. She is no longer in contact with her family in England as it has a detrimental effect on her mental health. The applicant is considered to present a high risk of harm in relation to her children but that risk is minimised by Social Service intervention. She is not thought likely to offend in other ways. The report concluded that statutory supervision was unnecessary as the applicant's children are in care and the applicant, who is monitored by mental health services, is complying with her medication.

[12] The applicant has three prior convictions from the Magistrates' Court. Two were for criminal damage (both dating from 1994) and resulted in conditional discharge, compensation and costs. The third, dating from June 1997, was for common assault on another of her children and resulted in a conditional discharge for 2 years. The child was aged 11 months at the time of commission.

[13] The judge referred to the fact that, on the applicant's account, the shaking lasted for 20 seconds. He considered that it would have been obvious that a serious result would follow. In this context the judge found it significant that the applicant had failed to give an accurate version of events to doctors and that therefore a speedy diagnosis was not possible. He also found it significant that the applicant had it in her power to control her mental health problems with medication. He said: -

> "I believe that she had the capacity to understand the importance of adhering to that routine but that she failed from time to time over that period to keep to that routine. I regard that as an important factor in sentencing…"

[14] The judge saw a role for supervision apparently "to ensure that routines are followed in the discharge of my duties as the sentencing Judge in respect of any future child." He gave credit for the plea as soon as the section 20 charge was offered by the prosecution and for the applicant having admitted her role before the police became involved. He had no doubts as to the applicant's remorse. He acknowledged that she had already paid a high price in the loss of her family. Her previous conviction for an assault on another of her children reinforced the judge's concern. As to sentence the judge said: -

> "The extent and nature of these injuries – 9 fractured ribs – together with her failure to make immediate disclosure to doctors, her failure to take proper levels of medication and breach of duty of care to such a young child dictate that a prison sentence is necessary……..I cannot suspend the sentence. There can be no compromise in the physical well-being of a child as vulnerable…""

The judge took account of the applicant's pregnancy in fixing the term. He considered that a sharp sentence would impact on her attitude and sense of responsibility.

[15] In *R v Orr* [1990] N1 287 the 18 year old appellant was found guilty of a section 20 offence against his six week old child who he was babysitting. The baby sustained a non-depressed fracture of the left parietal bone and fracture of her right clavicle. She was given emergency treatment in hospital. There was a chance that the baby would suffer from brain damage. The appellant told hospital staff that the child had fallen from his knee. He told police that she had fallen while he had been carrying her. The appellant had a previous criminal record which included a number of convictions for shop-lifting and burglary, three convictions for possessing an offensive weapon in public and two assaults occasioning actual bodily harm. The Court of Appeal, in reducing the sentence from 4 years' detention to 3 years, gave the following advice to sentencers: -

> "In this case we think it would be helpful to state our views as to the factors which a judge seeking to determine the appropriate sentence in a case of this kind should bear in mind.
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> 1. Cases of serious injury to a young child giving rise to a conviction under section 20 must always be classified as serious cases and those under section 18 will be treated as even more serious as a conviction under the latter section presupposes an intention to injure. In nearly all cases an immediate custodial sentence will be inevitable.

2. One very important feature of cases of this nature is the need for the courts to protect little children and to deter those parents and others who might cause them serious physical injury. This Court agrees with the principle stated by the Court of Appeal in England in *R v Boswell* [1982] 4 CAR(S) 317 at 318:

> 'But where one has a helpless child, only a few weeks old, the only protection which can be given to such a helpless infant is that the law steps in and makes it quite plain that such cases like this have to be met with severe sentences.'

3. A plea of guilty will always be a most significant factor because it will indicate remorse on the part of the accused. In this case the attitude of the applicant to the offence remains, we are told, that it was an accident. This attitude on the part of the applicant concerns us, as no doubt it did the trial judge.

4. Subject to one qualification we consider that the guideline observations of Lord Lane in *R v Durkin* [1989] 11 CAR(S) 313 at 315 are most helpful:

> 'It is perhaps worthwhile to pause for a moment to consider the basis upon which the Court must try to arrive at the proper sentence in cases such as these, which are amongst the most difficult which a judge has to deal with so far as sentencing is concerned.
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> First of all it is necessary of course to punish someone who has committed this sort of offence. Secondly, it is necessary to provide some sort of expiation of the offence for the defendant. Thirdly; it is necessary to satisfy the public conscience. Fourthly, there is the necessity to deter others from committing this sort of

> offence, by making it clear that this sort of behaviour will result in condign punishment.
>
> So far as the last matter is concerned, a sudden loss of temper case like this, deterrence of others does not come into it. Certainly so far as this man is concerned, we are quite satisfied that he will never do anything like this again. So there is left the question of punishment and the question of the public conscience. What is the least sentence which in those circumstances is required?'
>
> We have some difficulty, with respect, in understanding how the deterrent element in a sentence does not come into a sudden loss of temper case - in our opinion little children do require to be protected from ill-tempered adults and the public should be made aware of this and should realise that ill-temper will not be accepted as an exculpatory explanation."

[16] We agree with the comments made by this court in the case of *Orr* and commend them to sentencers and to the careful study of those who report on cases such as the present. We agree in particular with the observation that even in cases where there has been a sudden loss of temper and control the deterrent dimension must still be taken into account. As the court said, ill tempered adults or those who are prone to loss of control should clearly understand that this will not be accepted as an excuse for attacking defenceless children.

[17] In deciding which sentence is appropriate one must therefore start, as a matter of principle, from the position that an immediate custodial sentence will nearly always be inevitable. The Recorder was therefore quite right in concluding that only where there are exceptional circumstances could such a disposal be avoided. Are there such exceptional circumstances in this case? We consider that there are. The applicant suffered from a borderline personality disorder. We are satisfied that there is no warrant for concluding that she was aware that withdrawal

of her medication would make her more prone to behaviour of this type and we do not believe that her failure to obtain medication during the period leading up to the assault should be held against her. In the view of Dr McDonald her borderline personality disorder played a large part in the occurrence of this incident. We consider that this constitutes an exceptional circumstance. As a result of her actions, the applicant must also face the virtually certain prospect that her children will remain in care. This is a heavy burden for any mother to bear, particularly one as vulnerable as the applicant. It has added an extra dimension to the suffering that she has had to endure as a consequence of her conviction for these offences.

[18] Although the Recorder's choice of sentence could not be said to be in any way wrong in principle; indeed on one view it is entirely consonant with the guidance given in *Orr*, we take into account that the applicant has spent some time in custody already and we have been told that this has borne heavily on her. This consideration, allied to the matters outlined in the previous paragraph, lead us to the conclusion that in this case justice can be met by bringing the applicant's incarceration to an end.

[19] We have considered the question of probation. This was not recommended in the pre-sentence report and we believe that this is a case for supervision by the medical health authorities rather than the probation service. We have decided therefore that a probation element to the sentence to be imposed on the applicant is not appropriate. We will grant leave to appeal, allow the appeal and quash the sentence imposed by the Recorder. In substitution for that sentence we impose a sentence of fifteen months imprisonment suspended for two years.