Neutral Citation No: [2018] NICA 2 *Judgment: approved by the Court for handing down* *(subject to editorial corrections)**	*Ref:* **MOR10534** *Delivered:* **12 /01/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

DARREN FEGAN

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Before: Morgan LCJ, Stephens LJ and Sir Paul Girvan

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MORGAN, LCJ (delivering the judgment of the Court)

[1] This is an appeal with the leave of the single judge against a determinate sentence of 13 years and 6 months with an extended licence of 3 years, imposed upon the appellant following his plea of guilty to grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861 ("OAPA"). On 4 January 2016 the appellant was committed for trial in the Crown Court for the offences of:

> Count 1 - attempted murder contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common law; and
>
> Count 2 - causing grievous bodily injury with intent contrary to section 18 of the OAPA.

At his arraignment on 12 January 2017 the appellant pleaded not guilty to counts 1 and 2. The appellant was re-arraigned on 10 March 2017 and pleaded guilty to count 2. On 10 March 2017 His Honour Judge Miller QC ordered that count 1 was to be left on the books and not to be proceeded with without leave of the Court of Appeal. Mr O'Donoghue QC and Mr O'Kane appeared for the appellant and Mr Murphy QC and Mr Chambers for the prosecution. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The victim of this offence was ED who was born in 2012. She is the child of KH and CD. The couple had separated and ED lived during the week with her mother. Most of the weekend including Saturday night was spent with her father. Sometime around the beginning of October 2014 KH began a relationship with the appellant. He stayed at KH's house on the Saturday/Sunday night of 18/19 October 2014. Around 1:30pm on Sunday he began drinking cider and around 4pm he received a phone call to say that a friend would collect him about 9:30pm.

[3] ED's father returned the child to KH's house shortly after 5pm that day. She played for a while and was then fed. At approximately 7pm KH took her upstairs to bed, settled her and then returned downstairs. The appellant then said that he was going to go up to get his clothes but KH asked him to wait until the child was asleep. She told him that she would make coffee and would then go with him to make sure that the child was asleep.

[4] When KH returned to the living room from the kitchen she discovered that the appellant was not there. She called up the stairs for him to come down. She heard ED crying and went upstairs. The child was in bed in her own room with the gate at the door closed. KH lifted her daughter whose face was red and sweating, nursed her, gave her ibuprofen and put her down again. Both KH and the appellant returned to the living room.

[5] When she came back downstairs KH phoned the child's father to check whether she had been well earlier. While speaking to CD she heard ED start to cry again. She returned to the living room but the appellant was not there. She made her way back upstairs. Before she reached the top of the stairs she heard a sudden noise and the child stopped crying. She heard what she described as a single thud. She noticed that the gate to the child's bedroom was open and the light was on. The appellant was standing crouched over the child's bed. The child appeared lifeless.

[6] KH lifted ED and ran downstairs for help. The appellant sought to prevent her leaving the house but she managed to open the door and push past him. There was evidence that the appellant's knuckles were raw and there was blood between his fingers immediately after the incident. He made himself known to police around 7:45pm that evening.

[7] The appellant was interviewed on 4 occasions on the following day. Throughout the interviews he maintained that he had not caused any injury to the child. He alleged that KH had been drinking in the course of the day. He said that she had come across a text to him from another girl and "cracked up". He alleged that she started screaming and shouting and smashed his phone. He said that when

she was taking the child to bed she was slamming doors and as she was walking up the stairs she fell once with a big thump. The child was screaming. He alleged that KH dropped the child on a couple of stairs and banged her head off the wall as she was falling down. He maintained his position until at least late 2016.

[8] None of this was true. KH had not been drinking because she was pregnant. She had not seen any text messages or "cracked up". She had not smashed his phone. Most important of all she had not caused any injury to her child but had cared for her and protected her as her mother. In the pre-sentence report the appellant admitted that he was upstairs when he heard the child crying. He went into her bedroom. He admitted that he punched the child who was in bed as she would not stop crying. He demonstrated how he hit the victim and it is clear that he violently assaulted the child with extreme force.

The consequences for the child

[9] On admission to Daisy Hill Hospital it was noted that there was a large bulky haematoma over the left side of the head. A CT scan was carried out and this showed an acute left-sided subdural haemorrhage in addition to a subgaleal haematoma and left frontal intraparietal haemorrhage with no significant midline shift. She was transferred to the Royal Victoria Children's Hospital. The child was noted to have a grossly abnormal skull with multiple fractures and abnormal positioning. She underwent cranial reconstruction on 17 November 2014.

[10] ED has sustained a significant brain injury primarily affecting her left frontal and parietal bones. She has right-sided hemiplegia with visual difficulties. She requires equipment such as a wheelchair and supporting seating and has limits to her mobility. She has visual neglect to the left side which is likely to be a longer-term issue. She will require intervention with community disability services for the foreseeable future and reassessment of needs throughout childhood. Her cognitive ability is significantly limited. She has speech and physical impairment and is at significant risk of developing epilepsy.

The appellant's circumstances

[11] The appellant had a difficult upbringing. His father was an alcoholic and his mother was addicted to drugs and alcohol. He was taken into care and was sexually assaulted at the age of 13 by an elderly neighbour. At the age of 15 he was diagnosed as having severe conduct disorder, a condition characterised by severe aggression and nonconformity behaviours. At 18 he had a diagnosis of Attention Deficit Hyperactivity Disorder. He informed the probation officer that these conditions were no longer a problem in his life.

[12] The pre-sentence report indicates that he accepted that alcohol and substance misuse had continually brought him to the attention of police and the courts. He had a total of 19 assault related convictions and an extensive domestic abuse history. On 4 January 2013 at Craigavon Magistrates Court he was convicted of 6 common assaults, one assault occasioning actual bodily harm and 4 offences of criminal damage arising in a domestic context between 1 November 2011 and 22 January 2012.

[13] Of particular concern was the incident on 22 January 2012. At around 5:30am the injured party was holding her 20-month-old son in her arms when the appellant punched her to the left eye and mouth causing bruising to her eye and a cut to her lower lip. The injured party was knocked to the ground along with her son. The appellant stamped on her leg when she was on the ground and punched the son, hitting him on the side of the head. This resulted in bruising to the child's left ear and left temple. The injured party was in her son's bedroom and the appellant stood at the door blocking her way. She hid with her son behind the cot, pushing it out to give her some room. The appellant pushed the cot in against both injured parties with force preventing them from escaping. The defendant left the room and then returned punching the injured party on the nose knocking it out to the right.

[14] The pre-sentence report concluded that the appellant was assessed as presenting a high likelihood of re-offending. He was also assessed as posing a significant risk of serious harm. This was informed among other matters by the severity of the injury sustained by the child victim, the level of impulsiveness and aggression displayed by the appellant when intoxicated, the fact that this was a second conviction for a serious assault on a young child and his repeated violent assaults on 3 previous partners whilst pregnant and 2 children. These conclusions were correctly not challenged in the course of the appeal.

The trial judge's conclusion

[15] The Judge noted as an aggravating factor the appellant's "cowardly, shameful and vindictive" denial of responsibility for the offence and his claim that the victim's mother had inflicted the injuries on the victim. He took into account the appellant's "harrowing and tragic" childhood, including his diagnosis of ADHD and severe conduct disorder, his alcohol and drug abuse and his lately expressed remorse. He readily accepted the conclusions of the pre-sentence report on the appellant's high risk of re-offending and his significant risk of serious harm, particularly having regard to the incident described at paragraph [13] above. He noted the appellant's expressed desire to maintain a positive lifestyle but also the absence of evidence to support a conclusion that he can achieve this aim.

[16] The Judge relied on the guideline judgment in DPP References Numbers 2 and 3 of 2010 (McAuley and Seaward) [2010] NICA 36 which drew on the earlier decisions of R v Magee [2007] NICA 21 and R v McArdle [2008] NICA 29. He decided that the appellant's culpability was very high and the harm caused to the victim was very high. It was noted that there were no mitigating factors in relation to the offence but the appellant's late guilty plea and late expressions of remorse were recognised. The Judge found that the case fell within the uppermost end of the range of the first level as set out in *McArdle* and in the Sentencing Guidelines and endorsed by DPP References No 2 and 3 of 2010. The Judge set the starting point at 16 years imprisonment and a discount of 15% was applied for the late guilty plea resulting in a sentence of 13 years and 6 months. He then went on to deal with dangerousness in respect of which there is no issue in this appeal.

The appellant's submissions

[17] The appellant submitted that the guideline set out in DPP References Numbers 2 and 3 of 2010 (McAuley and Seaward) was not an appropriate starting point for a case of this nature. That line of authority was concerned with the problem of violence primarily among young men, often in the public street and generally fuelled by alcohol or drugs. Within that context issues of planning, premeditation and the use of weapons were important issues in respect of the level of culpability. Such issues did not generally arise in cases of this nature.

[18] The only authorities in this jurisdiction upon which the appellant relied were R v Orr [1990] NI 287 and R v Joanne Mitchell [2005] NICA 30. Both were cases in which the defendants were charged with offences contrary to section 20 OAPA 1861. The maximum sentence in Orr was 5 years and in Mitchell 7 years. In both cases an intent to cause grievous bodily harm was not part of the offence. These cases are, therefore, of limited assistance in respect of this appeal.

[19] Of greater relevance was the decision of the English Court of Appeal in R v RD [2005] EWCA Crim 159. That was a case with a background of domestic violence. The appellant admitted that he had squeezed his 2 to 3-month-old baby boy very hard causing 14 fractures to his ribs and then shaken him quite hard as a result of which the baby's head flopped about. He also punched him on the rear of the skull. As a result the child was profoundly handicapped and would never be able to live an independent life. The appellant had no previous convictions and appeared to show genuine remorse. The pre-sentence report indicated that it was unlikely that he would offend in this way again. The appeal was against a starting point of 12 years resulting in a sentence of 8 years imprisonment comprising 6 years in relation to the head injury and a consecutive 2 years in respect of the rib injuries.

[20] The court considered the assistance that could be gained from sentencing in manslaughter cases but recognised first, that such cases did not necessarily involve the specific intent which exists in the section 18 offence and secondly, that the range of sentences for the manslaughter of a small child is a wide one. The court approved the suggestion that an isolated incident involving a baby giving rise to a section 18 offence by a person of good character was of the order of 4 to 5 years. Where there was repeated ill-treatment a significantly increased sentence would follow. The court did not interfere with the sentence imposed.

[21] The other case on which the appellant relied was SD v HM Advocate [2015] HCJAC 83. That was also a case in which a catastrophic injury was caused to a six-week old child in respect of which the appellant pleaded late in the day. The report, however, indicates that the offence did not require an intent to cause grievous bodily harm and accordingly we consider that very little assistance can be taken from the fact that a starting point of nine years was adopted.

Consideration

[22] We accept that the background of alcohol fuelled violence by young men against which the guideline judgment in DPP References Numbers 2 and 3 of 2010 (McAuley and Seaward) was issued is different from the background against which this appeal has to be considered. In section 18 cases involving very young children the focus has to be on the vulnerability of the child. That vulnerability affects the victim in 2 ways. First, the child has absolutely no defence mechanism against the person who intends to inflict grievous bodily harm upon him. Secondly, because of the child's stage of development the harm likely to be caused by the application of severe force is greater than that which would be expected in relation to an adult.

[23] Sentencing policy must, therefore, reflect that vulnerability. Where significant force is applied to a young child with intent to cause that child grievous bodily harm, the increased likelihood of significant damage to the child renders the conduct itself highly culpable. In general, therefore, we consider that a range of 7 to 15 years for such conduct is appropriate. The place within the bracket will be heavily influenced by the extent of harm actually caused but we recognise that there will be cases where a person of good character has engaged in an isolated incident as a result of which a sentence below the range might be appropriate. That is not, however, this case.

[24] The circumstances of this case demonstrate that there was a significant blow to the toddler's head. The appellant had imposed himself upon the child despite the mother asking him to leave the welfare of the child to her. The appellant had consumed alcohol and drugs at the time of the offence. The victim has suffered

permanent life changing injuries. These are all factors pushing the case towards the upper end of the bracket. In addition he has a previous conviction for assaulting a toddler and a significant domestic violence criminal record upon which the prosecution relied.

[25] It is a particular feature of this case that the appellant at interview and thereafter sought to make a case that the mother had been responsible for the assault upon the child. In essence this was an attempt by him to pervert the course of justice. No such charge was properly levied against him but in dealing with this as an aggravating feature we must take into account that such conduct would normally require a consecutive sentence.

[26] Taking all of those factors into account we consider that this was a case which justified a starting point at the top end of the range. The judge adopted a starting point of 16 years which in our view was stiff but we cannot say that it was manifestly excessive. There is no issue with the discount allowed for the late plea and no other issues arising in the appeal.

Conclusion

[27] For the reasons given we do not consider that the sentence was manifestly excessive and the appeal is dismissed.