Judicial Communications Office

5 December 2022

COURT DELIVERS GUIDANCE ON SENTENCING FOR TWO EQUALLY SERIOUS OFFENCES ON A CONCURRENT BASIS

Summary of Judgment

The Court of Appeal[1] today confirmed a sentence of 19 years imprisonment and a five year extended licence period of an appellant referred to as ZB following an appeal against sentence in respect of one count of grievous bodily harm with intent and one count of sexual assault of a child under 13 by penetration.

Factual Background

The appellant was sentenced by the Crown Court on 10 December 2021 following pleas of guilty in respect of both offences. The appeal was brought with leave of the single judge on three grounds.

The victim in this case was the appellant's 12 day old son. He was in a relationship with the child's mother and lived with her and her 2½ year old son from a previous relationship when the offences occurred. Nothing of any significance in respect of the child's health had been noted up to that point.

On the evening of 29 September 2018, the appellant told his partner that he would look after the child so she could rest. He took the baby upstairs to a bedroom and assumed sole care of him from around 10:30pm. The mother fell asleep at around 11:30pm and did not hear anything during the night. When she awoke at around 8:25am she heard the child crying from upstairs. Shortly thereafter the appellant took the baby down to his mother at which point he said that he did not think the baby was breathing properly. The mother noticed a wheeze from the child who was pale and blue around his lips with dry blood around his nose.

The child was taken to Daisy Hill Hospital in Newry where doctors were extremely concerned for the child who went into cardiac arrest at that point and was resuscitated. At 11.40pm the child was transferred to the paediatric intensive care unit at the Royal Victoria Hospital for Sick Children in Belfast where he spent 13 days in intensive care, of which he was ventilated for 9 days. He was transferred

[1] The panel was Keegan LCJ, Horner LJ and McBride J. Keegan LCJ delivered the judgment of the court.

back to Daisy Hill Hospital on 8 November 2018 and discharged into foster care on 22 November 2018.

Medical reports confirmed the child suffered a constellation of injuries including a brain injury most likely as a result of shaking, rib fractures, an arm fracture, substantial bruising and a sexual injury involving forceful penetration of the baby's anus by a dangerous object.

The appellant told hospital staff and subsequently police during interview that he did not know what had happened to the child but that he was unsettled, having trouble with bowel movements. He admitted during a further interview with police that he may have been too rough with the baby and that he may have caused the injuries but he could not say whether he did or did not. The appellant categorically denied sexual assault on his son.

Grounds of Appeal

Whilst the appeal notice contained seven grounds of appeal the court summarised these into the four following main grounds:

(i) The ultimate sentence did not take into account the principle of totality and resulted in a manifestly excessive global sentence. This was due to the fact that the starting point in relation to both offences was too high.

(ii) The court incorrectly identified premeditation and lack of remorse as aggravating factors.

(iii) The adjustment provided by the trial judge of 15% for a guilty plea was inadequate in all the circumstances.

(iv) The appellant should not have been assessed as a significant risk to members of the public of serious harm.

The Court of Appeal was of the view that the only real point in this appeal was whether, applying the principle of totality, 19 years' imprisonment was a manifestly excessive sentence for these two offences.

Ground 1 – The sentence did not take into account the principle of totality

The Court of Appeal was of the view that neither offence represented a headline offence with each being equally as serious as the other. Each offence attracted a maximum sentence of life imprisonment. In these circumstances, a court must therefore consider each offence in its own right and then make a reduction for totality to reach a just and proportionate sentence.

In relation to the GBH with intent count, the Court of Appeal referred to *R v Darren Fegan* [2018] NICA 2 which is authority for a sentencing range of 7 – 15 years' imprisonment for this offence. The Court of Appeal stated that, whilst that case discusses a sentence being imposed outside of the range in the case of an isolated incident or where there is a clear record, in the appellant's case, the trial judge had to consider the particular facts specific to this case. The court found that the trial judge was entitled to find that this was a case of both high culpability and harm as well as being especially serious because it involved a 12 day old baby. The court held there was no reason to think that the sentencing judge in his discretion could not have settled on a sentence of 13-15 years for this offence prior to considering reduction for the guilty plea.

The Court of Appeal noted the complication in this case of the further count of sexual assault by penetration for which there is no direct sentencing guideline in Northern Ireland. The court found this to be unsurprising given the range of circumstances in which this type of offence can arise and the need for sentencers to have flexibility rather than be bound by a mechanical formula (see *R v GM* [2020] NICA 49, para [49]).

It was submitted on behalf of the appellant that the trial judge erred in selecting a starting point at the highest end of the English Sentencing Guidelines for the offence of rape of a child under 13 in the circumstances where it was a single incident from a defendant with no relevant convictions. The Court of Appeal stated that in Northern Ireland a large measure of discretion is left with the trial judge to tailor a sentence to the facts of the particular case. The sentencing range should be kept wide given that this type of offending can arise in a variety of different circumstances. The court stated that the culpability and harm for this offence were high as it involved penetration of a new-born baby. On that basis, the court found that, in the circumstances of this case, this offence could attract a sentence of at least 15 years on its own before reduction is made for a guilty plea.

The Court of Appeal found that the trial judge had taken the correct approach in passing concurrent, as opposed to consecutive, sentences in this case. This was the correct approach to sentencing in a case where the offences are related in time. The court stated that, in a case such as this, the judge cannot simply add the two sentences which he would have reached for the offences if separate. Rather, he should decide what is an appropriate overall sentence having considered both offences, which in this case are equally serious.

The sentencing judge in the Crown Court decided that the sentence before adjustment for the plea of guilty should be 22½ years. It was submitted on behalf of the appellant that a range of 15-18 years would be appropriate, however this was rejected by the court as it was not enough to reflect both heinous crimes at issue and to take account of the need for deterrence. The court found that, considering the case as a whole, a judge could justifiably get to 22½ years before reduction for a plea.

Whilst this is a stiff sentence outside of the usual range, the court found it was just and proportionate on the exceptional facts of the case.

The Court of Appeal noted that a striking feature of this case which distinguished it from any other cases which the court had seen in this area was that there was no mitigation except for the guilty pleas. The court held that, unlike other cases in this area, the appellant had shown no remorse and was concerned only for himself and his own family rather than with the effect of his behaviour on the mother of two children and on the two children going forward. In addition, the appellant did nothing to assist medical professionals, police or social services when the offences occurred with the result that both of the mother's children were removed into care for a time.

Ground 2 – Incorrect identification of premeditation and lack of remorse as aggravating factors.

The Court of Appeal found that the sentencing judge's assessment of premeditation was incorrect due to the fact that the bulk of the evidence was directed towards the assaults having occurred on the morning after the appellant volunteered to care for the child. Such a chronology did not square with a person deliberately taking a child into his care to assault it. Despite this, the court did not accept that anal penetration of a 12 day old baby was a spontaneous act and considered the intention required for a sexual assault of this nature to speak for itself. The court emphasised that, whilst the judge's assessment of premeditation was not correct, it did not absolve the appellant in the manner contended for by the defence.

The Court of Appeal found that the sentencing judge erred in including a lack of remorse as an aggravating factor. A lack of remorse may provide mitigation in a given case but is not an aggravating factor (see *R v Walker* [2019] EWCA Crim 1825 para [33]).

The Court of Appeal found that the sentencing judge failed to factor in the appellant's attitude at the hospital and the fact that the appellant, by not accepting the position early on, led to the mother losing care of both of her children for a period of time until July 2019.

Ground 3 – 15% adjustment applied in respect of the plea was inadequate

The Court of Appeal did not interfere with the adjustment applied in this case by the sentencing judge. The extent of reduction for a plea as set out in *R v Maughan* [2022] UKSC 13 is a discretionary matter. Under Article 33 of the Criminal Justice (Northern Ireland) Order 1996, the court must take into account the stage in the proceedings at which the offender has indicated his intention to plead guilty, and the circumstances in which this indication was given, when deciding what reduction, if any, to give in sentence to reflect a guilty plea. The full reduction of one

third was not argued for on behalf of the appellant and it was accepted that the pleas were at the date of trial and so the reduction is lower.

The Court of Appeal did not accept that a greater reduction should have been applied on the basis of admissions made at interview in this case. It was found that limited concessions were made which related only to the GBH with intent and which did not result in a plea at arraignment. Instead, the prosecution had to assemble considerable medical evidence, as did the defence, and the plea was entered at the last moment. The court was not of the view that this was an appropriate case for additional credit by virtue of the Covid 19 pandemic.

Ground 4 – The appellant should not have been assessed as a significant risk of serious harm to members of the public

The Court of Appeal did not interfere with the assessment of dangerousness of the appellant in this case which was not disputed in any great detail. This is a discretionary decision made by the sentencing judge on the basis of the evidence before him (see *R v Hegarty* [2022] NICA 20). Having established that this defendant was dangerous, the judge was entitled to apply an extended custodial sentence. While five years is at the high end for a person of clear record, against that an obvious issue of dangerousness arose in the particular circumstances of this offending.

Conclusion

The Court of Appeal concluded that, whilst the sentence imposed in this case was undoubtedly high, after careful consideration it was not manifestly excessive in the exceptional circumstances of this case. Accordingly, the Court of Appeal dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

   ENDS

   If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lady Chief Justice's Office

Royal Courts of Justice
6 Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk