Neutral Citation No. [2012] NICC 2 | *Ref:*

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/01/12**

IN THE CROWN COURT FOR THE DIVISION OF ARDS

QUEEN

V

YP

Sentencing Remarks and Court Orders delivered 18th January 2012.

His Honour Judge Smyth

History:

[1] YP is aged 18. He was born on 10th November 1993. He was returned for trial by the District Judge on 19th October 2010 on a charge of Rape of a child under 13, in December 2009, contrary to Article 12(1) of the Sexual Offences (NI) Order 2008. On 14th April 2011 I determined that he was unfit to plead and a jury was empanelled to consider whether he had committed the act alleged. They found that he had on 14th April 2011. There were a number of adjournments explained by a combination of factors.

[2] These are: the requirement to involve the Health Authorities to advise the court about the appropriate disposal of the case and to ensure that whatever arrangements were required were in place, the need to ensure that the Trust was represented (Miss Lindsay appears for the Trust) and I also, at the request of the Trust, directed a report be provided by Dr Milliken of Muckamore Hospital, and, finally the need to ensure that all doctors involved in this case had either the opportunity to attend or to express their views once they had considered the views of the other clinicians involved.

[3] This was listed for plea and sentence on 11th November 2011. Mr Weir QC and Miss McColgan QC appeared for the PPS. Mr Grant QC and Mr McAlinden appeared for YP.

[4] By then the following reports were available to the court: Dr Davies, whose psychological report was provided on 27th October 2010, Dr Bownes, whose first report was provided dated 1st February 2011 and whose second was provided on 14th April 2011, Dr Browne who reported to the PPS on 2nd

September 2011, and Dr East who reported to the Trust in July 2011. The last 4 are all psychiatrists and appointed for the purpose of the powers exercisable under the Mental Health (NI) Order 1986.

[5] In addition, at the request of the Trust and also because of my concerns about this case, I directed, as I have said, a further report from Dr Milliken, also so appointed, and who is responsible for the Sixmile Assessment and Treatment Service for Learning Disability. This is a 19 bed unit located at Muckamore Hospital and is the sole dedicated inpatient assessment and treatment service within Northern Ireland. It is an adult service. There are no beds available within Northern Ireland for children who are under the age of 18. I directed this report on 11th November 2011 and it is dated 14th December 2011. Although there was a hearing scheduled in December this report had not been fully distributed and the matter was adjourned to 6th January 2012 for all Doctors to be fully apprised of the contents of Dr Milliken's report.

[6] On 6th January Dr Milliken strongly urged the Court to impose a Restriction Order under Article 47 of the Order. Although the final paragraph of the recommendations (paragraph 7) in his report of 14th December 2011 did refer the court to this power it was not expressed as a formal recommendation. In view of this and also having regard to the serious nature of such an Order I adjourned the case until yesterday, 17th January 2012. Dr Milliken provided an expanded report dated 13th January 2012.The court also has the report of Dr J McPherson dated 6th January 2012 and I refer to this report and that of Dr Milliken later in these reasons.

[7] The court also has a number of reports from Social Services. This is not an exhaustive list. There is one that is undated but reports on a professional discussion held on 27th May 2011. It contemplates the transfer of YP to the above unit when he attains 18 and otherwise makes recommendations to the court that the Trust would recommend a Supervision and Treatment Order together with a Sexual Offences Prevention Order, that this would be managed by the Children's Disability Team and that a suitable abode would be provided in North Down with a high level of supervision. The making of a Hospital Order later was mooted once YP became an adult.

[8] There are also three other social service matters that the court has considered. I do not recite their contents here but have given all of these reports careful consideration for two reasons. The first is that there is a change of recommendation. The second is that YP has now become an adult and there is now a place available for him at the unit at Muckamore. These reports were only available on 6th January 2012. One is from Lisa Anderson and is dated 5th January 2012. The second is the minute of meetings held on 4th January 2012 and the third is a comprehensive report from Roisin O'Neill of the Community Learning Disability team.

[9] In addition the court had the benefit of a further short report from Dr Bownes received this morning after submissions. Dr Bownes believes that this case could be suitably dealt with by a hospital order without restrictions.

The Offence:

[10] CT was born on 17th January 1997 and aged 12 on 23rd December 2009 when she made an ABE video at Garnerville Care Centre. She alleged an attempt by YP to kiss her and she said that he was following her about. These are not the subject of any charge. There was no contact with CT's lips. She said she pushed YP away on this occasion.

[11] The account she gave about the rape was that she was visiting a cousin, WS, on 19th December 2009 and was there with her mother's permission. She said she went into WS's brother YP's bedroom which he shared with another family member (not present). WS initially was present and all appear to have been in night attire. He started to "feel her up" and she was pushing him away. This included vaginal contact but she was not sure of any digital penetration. Her friend WS then went to the toilet and YP attempted several times to pull down her pyjama trousers, succeeded and then got on top of her. She alleges that he penetrated her with his penis. She said it was sore and he kept going up and down.

[12] She describes ejaculate being on the bedclothes. WS came in and he jumped off. She told WS and was told to tell her mother. Rape is a violent offence in that the complainant was not consenting, too young to consent and also objected. The degree of force was not considerable and it is difficult to estimate the time scale. The complainant was asked about this and said about 10 to 15 minutes. WS appears to have been ordered by her father to go to her room when she was outside YP's room. The YP household is however a very full one and adults were in the house. CT told her sister on her return home.

[13] YP was interviewed on 23rd December 2009 and 24th May 2010 with an appropriate adult present and a solicitor in attendance. The presence of his DNA inside CT was mentioned but he denied any sexual assault or penetration. He maintains these denials and the reports and evidence indicates this approach is bolstered by some of his family.

The Approach of the Court:

[14] This has been informed by the authority of R v Birch. ((1989) Cr App R (S) 202.

[15] I have considered all the above reports. I have also considered the oral evidence of Dr Milliken and the report of Dr McPherson. I have concluded that there is a severe mental impairment within the definition of Article 3(1)

of the Order bearing in mind Dr Milliken's evidence and reports and the report of Dr McPherson. The combination of severe impairment of intellect, severe impairment of social functioning and some evidence of abnormally expressive aggression make this an appropriate finding. I have adopted the approach of Weatherup J and Campbell LJ and regarded severe impairment of intelligence and severe impairment of social functioning as conjunctive requirements (R v McDonagh delivered 5th February 2008 and unreported).

[16] I also find that in the light of the reports that a hospital order is the most suitable means of dealing with this case.

[17] The original suggestion that a supervision order be made was in my view not suitable. Such an order would involve the removal of YP from his home into a rather isolated, albeit community based, house where he would require constant supervision. It would have the disadvantages of a hospital order without its benefits.

Antecedents:

[18] YP has no criminal record. He has, partly because of the unusual circumstances of this case, been on bail for just over two years. During this time he no doubt has been under close supervision by a close family relative, his uncle, with whom he lives. There no doubt also has been much closer contact with the social services over this time. I take this into account (and I also accept that "antecedents of the person" has a broad connotation). These are factors that I must and do have regard to.

Risk

[19] Article 47 of the Order requires the court to have regard to three matters after (and if) it has made a hospital order. These include the nature of the offence, the antecedents of YP and the risk of him committing further offences if at freedom

[20] The test however to be applied finally by the court under Article 47 is whether such an order is **necessary** to protect the public from **serious** harm. A non-serious offence or offences would not suffice. An offence of rape clearly could. The antecedents speak against there being such a necessity but the offence of rape that occurred is one of innate violence. It also involved a 12 year old child and a cousin of his sister. The location was YP's bedroom.

[21] One of the factors that clearly have exercised the minds of all the doctors who have reported, and of Dr Milliken and Dr McPherson in particular, is the non-acceptance of responsibility for this offence by YP. It is clear that he has some understanding of what is right and what is wrong and also would have some memory of what occurred that night.

[22] He is unfit to be tried and, as Mr Grant says, there has not been a trial of these matters. A jury has however been satisfied that the act was done and the DNA evidence appears incontrovertible. It also is a concern that this stance has been reinforced by some of YP's family. That does not in itself so increase the risk of similar offences that a restriction order is necessary to protect the public from serious harm but it still is a factor. It has to be set against the "protective elements" of the SOPOS that the court is going on to consider.

[23] Dr Milliken has now trenchantly advocated that the court consider making an indeterminate restriction order under Article 47. This closely involves the Minister of Justice in the process. Amongst other matters that it provides, such as restrictions upon leave of absence, transfer and recourse to the Medical Review Tribunal, there is an important restriction placed upon the patient. He is subject to recall by the Minister. It therefore closely involves the Minister of Justice and also, without such an order, I have been told that there is no power to impose conditions upon release.

Necessity:

[24] I have had regard to the three considerations in Article 47. I have also taken into account the points made by Mr Grant about the circumstances of the act and where it was committed, the age of YP and his lack of any criminal antecedents. I have paid close attention to the comments of Lord Mustill in R v Birch (at Page 2113, (1989) 11 Cr App R (s) 202) and also had regard to the comments by Mr Valentine (at page 243) about serious harm and the provision being aimed primarily at offenders for whom a discretionary life sentence may seem appropriate. This is not referred to in the Article. There is no indication given that the provisions of Article 47 are primarily directed at such persons or that orders for specific times are only aimed at those who have time limited mental conditions.

[25] After giving all these matters careful consideration I do believe such an order to be necessary to protect the public from serious harm. This is so even after having regard to the protective assistance provided by SOPOs made.

[26] I now come to the term for which such an order should be made. Dr McPherson refers to a hospital order being proportionate. She does not expressly refer to article 47. I also am of the view that a restriction order is such a restriction on the rights of the individual that it must only be made for so long as it is strictly necessary. The period I have determined is I believe the "necessary" period to allow assessment, initial in-patient treatment and then release upon conditions so that YP's re-integration into the community can be assured and supervised. I believe that the assessment and treatment of YP, possibly with the assistance of his concerned family, will mean he will be able

to be released well within the timescale set by the order of the court. If I am wrong in this assessment the doctors have power to extend a hospital order by the usual means after any restricted period has ended.

[27] I therefore have determined that five years is the appropriate period and make a restriction order for that period.

[28] I appreciate that the effect of a hospital order is to remove YP from his environment and close family. There may be reasons why that may benefit him but neither he nor his close family will appreciate that, certainly at this stage. He will be going into a hospital environment, albeit a closed one, and one also with an age range of young adult to middle years. I have borne this in mind in assessing the proportionality of this order.

Consequent Orders and SOPOS:

[29] In relation to disqualification from working with children and vulnerable adults and the inclusion of YP on the barred list I order that these orders be made.

[30] I also impose 5 of the SOPOs sought by Constable Dickson with the exception of number three. These will considerably restrict his future. Since a restriction order is being imposed these are imposed for an indeterminate period.