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BELFAST CROWN COURT

R

v

JASON SHAW

17/067517

SENTENCING REMARKS

His Honour Judge McFarland

[1] Jason Shaw was born on the 28th April 1970 and is now 47 years old. He pleaded guilty to a count of exposing his genitals. The offence occurred at approximately 8.20 a.m. on the 20th February 2017. A lady was sitting in her parked car on Wellesley Avenue in Belfast when the defendant approached the car and stood beside it, at her window, for about 30 seconds before running off. About 5 minutes later he returned, exposed his penis and when beside her window handled it in the view of the lady. She blasted her horn on a number of occasions and after a period which the lady described as "a long time" he ran off. The lady described herself as being "shaken up by the incident."

[2] The defendant who is well known to the police was subsequently arrested and under caution gave a 'no comment' interview. He was then identified by the lady on the 7th April 2017 after a VIPER identification procedure. He was

arraigned on the 4th September 2017 and pleaded not guilty, and on the 24th October 2017 (two days before his trial) he was re-arraigned and pleaded guilty.

[3] The first issue is whether I am obliged to consider whether the defendant is 'dangerous'. Article 15 (1)(a) of the Criminal Justice (NI) Order 2008 ("the 2008 CJ Order") states that Article 15 will apply if the offender has been convicted of a specified offence. Specified offences are set out in Schedule 2 and in that schedule Part 2 paragraph 14A states that an offence under "Article 71 (exposure)" of the Sexual Offences (NI) Order 2008 ("the 2008 SO Order") is a specified offence. It also states that the offences under "Article 72 (voyeurism)", under "Article 74 (intercourse with an animal)" and "Article 75 (sexual penetration of a corpse)" are other specified offences. The difficulty is that the offence of exposure is under Article 70, and not Article 71, of the 2008 SO Order. Article 71 is the offence of voyeurism with Article 72 an interpretive provision in respect of voyeurism. Article 74 is the offence of sexual penetration of a corpse and Article 75 is sexual activity in a public lavatory.

[4] Lord Nicholls in **Inco Europe Limited –v- First Choice Distribution [2000] 1 WLR 596** had to deal with an obvious drafting error relating to the right of appeal against a decision under the Arbitration Act 1996. Lord Nicholls described the drafting error as an undoubted 'slip up'. He then gave some guidance to courts as to how issues such as this should be dealt with –

"*It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words*" and later

"*This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is*

expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation"

[5] The caution that Lord Nicholls refers to is all the more engaged in cases involving interpretation of a criminal law statute. However, I am satisfied that this is a case with a clear ambiguity with the offence correctly described as "exposure" but with the incorrect legislative provision. A similar ambiguity relates to the offences of voyeurism, intercourse with an animal and sexual penetration of a corpse.

[6] In considering the interpretation of this provision I have considered both internal and external matters. The purpose of this part of the 2008 CJ Order is to enact provisions relating to the sentencing of offenders who may pose a risk to the public. Article 15 provides that if an offender commits one of a number of specified offences then the court should consider whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. At this stage a brief review of the history of sexual offences legislation in Northern Ireland is required. The offences of exposure, voyeurism, intercourse with an animal and sexual penetration of a corpse were created in their current form by sections 66, 67, 69 and 70 of the Sexual Offences Act 2003. The provisions applied to England, Wales and Northern Ireland. The 2008 SO Order was a major reform and it repealed a significant number of existing sexual offences contained in various pieces of legislation and at common law, and then

replaced them by new offences which are now all codified within this Order. Sections 66, 67, 69 and 70 of the Sexual Offences Act 2003 were repealed insofar as they applied to Northern Ireland, and were then re-enacted in identical form in Articles 70, 71, 73 and 74 of the 2008 SO Order. Schedule 2 to the 2008 CJ Order sets out a long list of specified offences and it includes the offences of exposure, voyeurism, intercourse with an animal and sexual penetration of a corpse under sections 66, 67, 69 and 70 of the Sexual Offences Act 2003 and then purports to include the identical offences under the 2008 SO Order.

[7] It is also appropriate to consider the provisions of the Criminal Justice Act 2003. The sentencing provisions of that Act, which applied only to England and Wales, could be regarded as a significant source for the 2008 CJ Order. The 'dangerousness' provisions contained in Article 15 of the 2008 CJ Order are drawn directly from section 224 of the Criminal Justice Act 2003 as is the list of trigger specified offences in Schedule 15. Schedule 15 refers to offences of exposure, voyeurism, intercourse with an animal and sexual penetration of a corpse under sections 66, 67, 69 and 70 of the Sexual Offences Act 2003 as being specified offences.

[8] I consider that the intentions of the draftsman and legislature were clear and that these four offences were to be included as trigger offences for the purposes of Article 15 of the 2008 CJ Order, but when the 2008 SO Order was enacted repealing the old offences and creating the new identical offences there was an error in the misquoting of the correct Article when the 2008 CJ Order was amended to include the new offences. There was no error in describing the nature of the offence.

[9] Applying the three part test of Lord Nicholls in the **Inco Europe** case I am, to use his phraseology, abundantly clear that the purpose of Article 15(1)(a) and Schedule 2 of the 2008 CJ Order was to create a list of trigger offences which would require the court to consider the issue of whether an offender was

dangerous, that the draftsman has inadvertently failed to give effect to that purpose due to what can only be described as a typing to transcription error, and finally that had this error been noticed at the time, that Schedule 2 would have contained the words "Article 70 (exposure)" and with corresponding correcting alterations to cover the offences of voyeurism, intercourse with an animal and sexual penetration of a corpse.

[10] I therefore interpret the 2008 CJ Order as requiring me to consider whether or not the defendant is dangerous, he having been convicted on his plea of the offence of exposure.

[11] The major issue of concern is the defendant's criminal record. He has 25 previous offences of indecent behaviour and exposure over the last 30 years from 1987. All appear to involve similar conduct to his conduct in February 2017 although in March 2009 he was guilty of the more serious offence of engaging in sexual activity in the presence of children. He has received sentences which have included fines, suspended prison sentences, probation (and was on probation in February 2017) and terms of imprisonment of up to 18 months (in 2011). The test is whether there is a significant risk to members of the public of serious harm occasioned by the commission by the defendant of further specified offences. The offences need not be offences of exposure but can be any specified offences as set out in Schedule 2 to the 2008 CJ Order. At one level the act of exposing himself to females is clearly an unpleasant experience for the victim and could be shocking as it was in this case, but it is unlikely to create a significant risk of serious harm, unless it could be regarded as a trigger crime that would suggest a propensity to commit more serious criminal acts in the future. The general pattern of the defendant's offending would suggest that his conduct is unlikely to escalate, although there was the incident in 2009 which did involve children. Taking into account the guidance of the Court of Appeal in the cases of **R –v- EB [2010] NICA 40** and particularly **R –v- Owens [2011] NICA 48** I am satisfied that although there is a significant risk of the defendant reoffending, I am not

satisfied that serious harm would flow from his future conduct. I therefore find him not to be dangerous.

[12] An aggravating factor in this case is the defendant's criminal record. A further aggravating factor is that he was on bail at the time waiting for this court to deal with him for a similar offence.

[13] There is very little that can be said for the defendant in mitigation. There was the plea of guilty to which I shall return. He appears to express remorse to the author of the pre-sentence report but it rings a little hollow given his conduct. I acknowledge that there would appear to be issues in his background which may explain his conduct both in relation to his childhood and his decline into alcoholism. He is estranged from his former wife and from his two children. A recent relationship has ended in the death of his partner. Unfortunately all attempts to provide support for him within the community have failed.

[14] I have considered Mr Lannon's submission that I should take into account the suspended sentence imposed by his Honour Judge Miller QC on 23rd May 2017 for an offence committed on 25th September 2016. He suggests that Judge Miller was aware of this pending case and that if he had been dealing with the defendant at the same time for both matters the sentence is unlikely to have been different. I do not accept that submission. Judge Miller was dealing with the defendant for the offence then before him, and could not have taken into account any pending matters. If the defendant had taken a more remorseful approach and accepted his guilt at an earlier stage he could very well have asked Judge Miller to have taken the offending into consideration or could have facilitated the fast-tracking of this case so the matters could have been dealt with together. The fact is that they were not, and it now falls for me to sentence the defendant for the offending of 20th February 2017, when he was on bail for the 25th September 2016 matter. I am in no way bound by the approach taken by Judge Miller.

[15] There is no real option for this court but to impose an immediate custodial sentence. All other non-custodial options have been exhausted. The criminal record indicates that deterrence has little influence on the defendant's conduct. Rehabilitation has been tried and has failed.

[16] There are no guideline cases for the Crown Court. The guidance for the Magistrates' Court indicates that with one or more aggravating factors the sentencing range is from a community order to 6 months in custody, 6 months being the maximum available in that court. The English Guidelines, insofar as they have any relevance, suggest a sentencing range of up to 12 months in the Crown Court. The maximum sentence available to this court is one of 2 years.

[17] Taking into account the aggravating and mitigating factors the appropriate sentence after a contest would be 15 months in custody. The plea was late, two days before the date fixed for trial and followed a "no comment" interview. Although the victim was not required to attend court and give evidence, she was still required to prepare herself to give evidence. I do not accept Mr Lannon's suggestion that this was a weak prosecution case that should somehow warrant greater discount for the plea. I will allow 2 month's discount for the plea. The defendant will serve a sentence of 13 months, with the licence period being 50%. There will be an Offender Levy of £25. The notification requirements of the Sexual Offences Act 2003 already apply to the defendant, and they will continue to apply to the defendant for a period of 10 years from today.