Judicial Communications Office

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COURT FINDS SENTENCE UNDULY LENIENT

Summary of Judgment

The Court of Appeal[1] today found that a sentence imposed on a father for the sexual assault of his son was unduly lenient.

Background

QD ("the respondent") is the father of a young boy anonymised as "Jack". MC is Jack's mother. The parents separated in 2008 and Jack lives with his mother. When Jack was 2½ years old, an arrangement was made that the respondent would babysit for a few hours when MC was at work. One night when she returned, the respondent left quickly and appeared to be very nervous. MC found Jack bouncing on his bed saying he'd had a good time. He told MC that he and the respondent had been playing with their penises and that "milk" had come out of his father's penis and onto him. MC phoned the respondent who initially denied it had happened but then replied saying that she knew he was not going to change and that if she accepted that they could be together as a family. MC explained this statement as a reference to events in 2008 when he had shown her pornographic images. She said he told her that normal sex did nothing for him. After the incident the respondent told MC that if she told anyone he would get her "cut into little pieces" and that he "knew the right people".

On 28 September 2018, the respondent was convicted on one count of sexual assault on a child under 13. On 28 November 2018, the trial judge imposed a sentence of five months imprisonment to which the respondent was entitled to 50% remission, but given the length of sentence, he was not subject to licence on release. The prosecution sought a sexual offences prevention order ("SOPO") but this was declined by the trial judge. The respondent was released from custody six months ago and is currently living in England. The Director of Public Prosecutions ("DPP") referred the sentence and the failure to impose a SOPO to the Court of Appeal as being unduly lenient.

Pre-sentence reports

The sentencing exercise was informed by an initial pre-sentence report ("the initial report") and a further probation report ("the further report") directed by the Court of Appeal. The initial report assessed the respondent as a medium likelihood of future general reoffending and not as presenting a significant risk of causing serious harm. It also assessed the respondent as being in the "high priority category for supervision and intervention" and said that some additional requirements should be incorporated into any probation order or post release supervision. There was no challenge by the prosecution to these assessments before the trial judge.

It was suggested in the Court of Appeal that in arriving at this composite assessment the probation officer may have taken into account matters which ought to have been excluded on the basis that they were not proved at trial or were matters which the judge directed the jury should not be taken

[1] The Court of Appeal panel was the Lord Chief Justice, Lord Justice Stephens and Lord Justice Treacy. Lord Justice Stephens delivered the judgment of the Court.

into account. The Court of Appeal emphasised that if there was to be a challenge on this ground or any other ground to the probation officer's assessment it should have been made before the trial judge:

> "If the [trial] judge was persuaded to depart from any of [the probation officer's] assessments, then there would have been an obligation to identify the reasons for doing so. The sentencing exercise is the main event and this court will not speculate as to what evidence [the probation officer] did or did not rely upon in forming his composite assessment. In this case in the absence of any challenge during the sentencing exercise and subject to anything contained in the further report we proceed on the basis of the composite assessment which placed the respondent in the high priority category for supervision and intervention with a suggested intervention being participation in a Community Sex Offender Group Work Programme over a three year period."

The further report revealed that the respondent's account to the probation officer about his alcohol consumption was incorrect commenting that he has "a concerning present level of consumption". The further report, however, assessed the respondent as being at a low risk of analogous re-offending behaviour. The Court said that on this basis the respondent does not currently fulfil the criteria to undertake an accredited group sexual offending behaviour programme but, given his long-standing unhealthy relationship with alcohol, he was assessed as posing a medium risk. The further report assessed the respondent as being suitable to undertake a 10 month Community Order and that the respondent had consented to the imposition of these requirements.

The Trial Judge's Sentencing Remarks

The trial judge was satisfied that the custody threshold had been passed on the basis of the extreme youth of the victim and the twofold breach of trust in that Jack was the respondent's son and the offence was committed in Jack's home whilst the respondent was babysitting. The trial judge then stated that the case attracted a low level of sentence because it was a single incident, the assault itself was ejaculating over the child as opposed to "touching", and at the time the child told his mother there was no evidence he was distressed by what had occurred and later had no recollection of the incident having taken place. The trial judge considered the proper starting point was six months imprisonment. He reduced this to five months after taking into account a number of factors including the respondent's "good background and childhood" and his health problems. The trial judge declined to make a SOPO considering that it had not been established to be necessary.

The Grounds of the Reference

Counsel on behalf of the DPP submitted that the starting point should have been a custodial term of four years. He felt the sentence could not be described as "severe punishment" and therefore did not comply with the approach previously set out by the Court of Appeal. Counsel for the DPP also submitted that the trial judge incorrectly considered the relevant test in relation to the SOPO to be whether the respondent was dangerous within the meaning of Article 15 of the Criminal Justice (Northern Ireland) Order 2008 rather than applying the test of the SOPO being necessary as explained in case law.

Sentencing Guidelines

The maximum sentence on indictment for the offence of sexual assault on a child under 13 contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008 is 14 years imprisonment. The Court of Appeal referred to the previous approach to sentencing in such cases where the court has "repeatedly warned that sexual offences against young children will be met with severe punishment" and confirmed that this remains the approach. It said that in such cases it is necessary to assess the degree of harm to the victim, the level of culpability of the offender and the level of risk proposed by the offender to society. The Court of Appeal further commented that the decision whether to impose a SOPO is not a discretion but rather a decision involving an evaluative judgment by the sentencing judge. It recognised that in forming that evaluative judgment there is an area which must be left to the sentencing judge so that on a reference or on an appeal against sentence the Court of Appeal will not readily interfere unless the trial judge was clearly wrong or failed to give adequate consideration to a significant factor.

Aggravating and Mitigating Features

The Court of Appeal considered the following aggravating features to be present in this case:

- The particular vulnerability of Jack due to his extreme youth;
- Breach of a paternal relationship of close family trust and also breach of the trust involved in the respondent's engagement to babysit Jack;
- Threats to the mother to dissuade her from reporting the incident;
- Ejaculation. The Court of Appeal accepted that Jack did not know and does not presently know that he was assaulted or that the substance with which he was touched was ejaculate. It considered, however, that it was inevitable that at some stage he will be told and that this will lead him to feel particularly bitter;
- The offence was premeditated and planned;
- The offence occurred in the victim's home.

The Court of Appeal noted that there was no discount for a guilty plea as the conviction was at trial. It also noted that there was no remorse for the offence. The Court did consider the following points in mitigation:

- The respondent's background, work record, conduct in prison and references all of which have to be evaluated in the context of his previous convictions and on the basis that personal circumstances are of limited effect in the choice of sentence;
- The respondent's medical condition which the Court considered to be an aspect of his personal circumstances rather than a serious illness warranting separate mitigation.

Consideration

The prosecution relied on a number of cases seeking to establish that the starting point should be four years custody but the Court of Appeal concluded that none of them was comparable to the facts of the present case. It rejected the submission that the starting point in this case ought to have been four years custody but considered there were a number of other aspects of this case which could lead to a determination that the sentence was unduly lenient:

- The trial judge did not identify any harm to Jack nor did he identify any victim other than Jack. It was submitted on behalf of the respondent that there was "no evidence that the victim suffered any harm from the offence". The Court of Appeal did not agree that there was only one victim. It said it was not appropriate to ignore the family setting by limiting the victims to the person assaulted: "It is inevitable that other family members will have feelings of betrayal, shock and disgust together with feelings of loss of trust and confidence in others. In this case family life between Jack's parents had been disrupted prior to the incident but was destroyed by it. The position of Jack's mother as a victim and the harm that has been and will be caused to her is ignored in the submission that there was only one victim and was not taken into account by the judge. "

- The Court added that even if one concentrates on the harm to Jack it did not agree that there is or will be no harm to him. While it accepted there was no physical harm the Court considered that there is real long term emotional harm as the incident has affected relationships between Jack's parents, Jack's relationship with his father and may well affect his relationship with his mother. The incident has prevented Jack from having any relationship with his father and this may continue throughout his formative years. There will be a substantial risk to the relationship between Jack and his mother: "All of this amounts to significant harm to Jack. The lack of any physical injuries, Jack's young age when this offence occurred and Jack's lack of memory of it should not obscure the serious psychological harm which is being and will be caused to Jack."

- The trial judge considered and again it was submitted to the Court of Appeal that the "single incident" nature of the assault was relevant to the assessment of the respondent's culpability. The Court heard that the respondent was prosecuted for but acquitted of the offences of rape of a child and possessing indecent photographs of a child. The evidence in relation to those charges, however, must be ignored in the sentencing exercise and in that respect the Court accepted that this was a single incident in the sense that this offence was not part of a sequence of offending and this is relevant to an assessment of the respondent's culpability. The Court of Appeal commented, however, that culpability is determined by the extent to which the offender intends to cause harm – the worse the harm intended, the greater the offender's culpability. If this offence had been part of a sequence then the respondent's culpability would have increased. The Court said that where, as in this case, the activities are in any way exploitative, the offence is inherently harmful and therefore the offender's culpability is high. Furthermore the offence in this case was planned and this makes the offender more highly culpable. In summary the fact that this was a single incident should not obscure the respondent's degree of culpability.

- In considering the level of risk posed by the offender to society, the Court of Appeal commented that evidence of that risk can be taken from the nature of the offence itself which demonstrates an interest in sexual acts involving young children; MC's evidence that the respondent intended the assault on Jack to be part of a future sequence in that normal sex did nothing for him and if she accepted him for what he was they could be together as a family; the initial report which contained the assessment that the respondent was in *the high priority category for supervision and intervention*; and the further report which reduced the level of risk but reveals ongoing abuse of alcohol. The Court of Appeal considered that a SOPO was clearly necessary in this case given the evidence set out above and that its necessity was enhanced because, given the short custodial sentence imposed, the respondent would be released back into the community without any licence conditions.

The Court of Appeal concluded that the sentence imposed in this case was unduly lenient both in relation to the length of the term of imprisonment and in relation to the failure to impose a SOPO. It considered that taking into account the aggravating features together with the modest impact of mitigation the sentence ought to have been 18 months imprisonment and a SOPO ought to have been imposed.

The Court, however, said it had to take account of the effect of double jeopardy. It noted that the respondent has had to face the ordeal of a second sentencing exercise after he has been released from prison and returned to England, and the uncertainty that he may have to return to prison. It considered that, subject to the question of probation and taking into account double jeopardy, the effective sentence should be one of 15 months imprisonment together with a SOPO[2]. The Court said it was desirable that the respondent should be supervised by a probation officer in order to secure his rehabilitation, to protect the public from harm from him, and to prevent the commission by him of further offences. It noted that QD had been in prison for 2½ months. It also noted that a probation order can be carried out in England and considered that it could substitute for the trial judge's sentence of five months' imprisonment a sentence of three years' probation directing that it should commence from the date of the order of the Court of Appeal. This would enable the respondent to complete the recommended programmes and would satisfy the need for supervision and intervention so that a SOPO was no longer necessary.

Conclusion

The Court of Appeal considered that the sentence imposed was unduly lenient. It said it would have imposed a sentence of 18 months imprisonment and a SOPO but taking into account double jeopardy it would have sought to achieve an effective sentence of 15 months imprisonment and a SOPO. However given that the respondent consents to probation, the Court substituted for the original trial judge's sentence of five months imprisonment a three year probation order containing a number of specified requirements to commence on 16 May 2019.

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 (www.judiciary-ni.gov.uk).

ENDS

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

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[2] The question arises as to whether by virtue of paragraph 10 of Schedule 3 to the Criminal Justice 1988 Act the respondent will be credited by the Prison Service with the period of time when he was at liberty between the Crown Court sentence and the order of the Court of Appeal. Given he has been at liberty for approximately 6 months, a sentence of 18 months imprisonment will already have been reduced to 12 months. The Court of Appeal said it would send a copy of the judgment to the Prison Service so it can consider this point in conjunction with the PPS with a view to its determination in a future reference.

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