Neutral Citation No: [2010] NICA 40 | *Ref:* **MOR8028**

Judgment: approved by the Court for handing down | *Delivered:* **03/12/10**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

-v-

E B

Defendant/Respondent

_____

Before: Morgan LCJ and Higgins LJ

_____

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant pleaded guilty to 3 counts of indecent assault on a child, 4 counts of sexual assault of a child and one count of sexual assault by penetration of a child. On 14 April 2010 he was sentenced under the Criminal Justice (NI) Order 2008 to an extended custodial sentence of 4 ½ years custody and an extended period of 2 years. He was granted leave to appeal against sentence on the single ground that the learned trial judge had failed to warn of her intention to depart from the assessment in the pre-sentence report that the offender did not constitute a significant risk of serious harm.

Background

[2] The complainant is the step-grand-daughter of the appellant. Since 2004, the appellant had been engaged in babysitting his grandson (the child of his son from a previous relationship) and transporting him to the home which the applicant's son shared with his partner, her daughter from a previous relationship (the complainant) and the children the couple had together. At the start of the relevant period (summer 2008 to spring 2009), one of the younger children had been in hospital and the appellant also

babysat the complainant in his own home. The complainant was aged between ten and eleven during the relevant period.

[3] The offending behaviour was initiated by the appellant feeling the complainant's thigh over her jeans. On 6 April 2009 this behaviour escalated to include touching the complainant under her clothing, in the presence of a sibling, on the sofa of the family home. The family was disrupted on that date by a funeral which was taking place. The complainant moved away to the bathroom but the appellant followed her, perpetrating the most serious assault involving digital penetration, on the stairs. The complainant was able to push the appellant away and he then followed her into her bedroom where he hugged her and then attempted to kiss her on the lips. The complainant immediately reported the matter to her mother and stepfather (the appellant's son). The appellant's son confronted him but he denied the allegation. The appellant's wife then told him to accompany his son directly to the police station. He was interviewed and made partial admissions. The appellant accepted touching the child directly on the skin in the vaginal area and ultimately the possibility of slight digital penetration.

[4] He entered guilty pleas to count 1 which involved feeling the genitalia of the complainant over her jeans, counts 2, 3, 4 and 5 which were specimen counts involving feeling the thigh over clothing, count 6 which involved feeling the genital area beneath the clothing, count 7 of digital penetration on the stairs and count 8 of the attempt to kiss the child in her bedroom.

Antecedents

[5] The appellant was convicted of manslaughter in 1979 and sentenced to 2 ½ years imprisonment. He was convicted of 4 offences of indecent assault on a male child in 1993 and sentenced to a total of 12 months imprisonment, reduced to a 2 year probation order on appeal. In respect of the conviction for the manslaughter of his son, a contemporaneous social services report described the child as grossly undernourished, neglected and physically ill treated over a period of time. In interview the appellant maintained that he did not injure the child but decided to plead guilty. The social services report referred to the appellant's admission of shaking and slapping the baby. The 1993 offences of indecent assault were reported to have occurred over a period of time. The victims were aged 11 and 8. The appellant exposed himself to them, rubbed his penis against them and

touched their genitalia. The probation officer noted that he completed a programme with regard to sexual offending. The appellant stated that he gained an understanding of situations he needed to avoid from the course but not an understanding of his motivation to offend. The appellant did not inform the mothers of his grandchildren of his record.

[6] A consultant psychiatrist, Dr Harbinson, found the appellant was depressed and impotent at the time of the offences and that he did express remorse for his behaviour. She concluded he would benefit from energetic treatment for his depression and investigation of his impotence. He would also benefit from participation in a sex offender programme. The pre-sentence report referred to the sexual abuse experienced by the appellant when he was aged nine and was inappropriately touched by an adult male over an 18 month period. He left school at fifteen without qualifications. He had a consistent work record apart from his period of imprisonment in 1978. Around five years ago he became depressed and started to receive incapacity benefit. The appellant had been involved in the care of his five year old grandson from his birth.

[7] In the pre-sentence report the applicant was assessed as at a high likelihood of reoffending due to

1) Sexual offending against male and female children
2) Distorted reasoning and thinking skills
3) Limited interpersonal skills
4) Mental health problems
5) Limited personal responsibility for offending
6) Limited victim empathy
7) Preparedness to engage in risk taking behaviour.

He was not assessed as meeting the PBNI criteria for risk of serious harm because

1) He recognises harm he caused
2) He is motivated to engage in work to reduce risk of reoffending
3) He accepts monitoring and supervision
4) He is prepared to reside in a hostel on release
5) He accepts he will not have unsupervised contact with children on release
6) The Court may impose a SOPO.

The Judge requested that the probation officer should be furnished with the police reports in respect of the appellant's previous convictions and for those to be considered in the assessment of risk. In her report of 1 April 2010 the probation officer stated that she had had sight of the previous probation and social services reports at the time of writing the original report and that whilst the police reports did highlight some more detail and inconsistencies in the appellant's reporting of the events, the information did not change the assessment.

The sentencing remarks

[8] The Judge stated that over the relevant time, between summer 2008 and spring 2009, the appellant had become more daring in his offending behaviour. She noted the specific count of sexual assault on 6 April 2009 occurred in front of another sibling. The offence of digital penetration on the same date was restricted in its duration due to the complainant's clothing, the circumstances and her effectiveness in pushing the appellant away. The Judge considered the appellant's previous convictions for the manslaughter of his own son, the indecent assault of two young boys and the fact that his son was unaware of this record. She stated that the appellant had given an inaccurate account of his involvement in the death of his son to both the probation officer and Dr Harbinson. In his favour he had reported the offending in 1992 to the police although the childrens' parents had requested no police action. The Judge also stated that the appellant had tested the complainant in the instant case by entering not guilty pleas at the first instance. She identified a number of aggravating and mitigating factors. She was particularly concerned about the manner in which the appellant had groomed the victim over a period of time.

[9] The learned trial judge then went on to consider whether there was a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. On this issue she was assisted by the report from Dr Harbinson but principally took into account the detailed and helpful pre-sentence report prepared by Kathleen O'Loughlin, a specialist probation officer attached to Alderwood. Having noted the conclusion that the applicant was assessed as presenting a high risk of reoffending the learned trial judge correctly identified that the risk in this case related to the commission of specified offences which could give rise to serious harm particularly by way of psychological trauma. Despite the previous probation disposal in 1993 the appellant had groomed this victim over a prolonged period. He had not disclosed his history of

offending to those whose children he was caring for and had not sought the help that would have been available to him from Alderwood. Although the probation service did not *currently* (our emphasis) assess the appellant as a significant risk to members of the public of serious harm the learned trial judge concluded that the factors identified by her led her to conclude that the statutory test was satisfied and she imposed an extended sentence as set out above.

Consideration

[10] It is common case that the learned trial judge did not give any warning of her intention to depart from the assessment in the pre-sentence report. In R v Lang [2005] EWCA Crim 2864 the English Court of Appeal considered how the assessment of significant risk of serious harm should be made in respect of identical provisions in the Criminal Justice Act 2003 in particular at paragraph

"• (i) The risk identified must be significant. This was a higher threshold than mere possibility of occurrence and could be taken to mean "noteworthy, of considerable amount or importance" .
• (ii) In assessing the risk of further offences being committed, the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed, details of which the prosecution must have available, and, whether the offending demonstrated any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships and drug or alcohol abuse; and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters would most readily, though not exclusively come from antecedents and presentence probation and medical reports. The sentencer would be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplated differing from the assessment in such a report should give both counsel the opportunity of addressing the point.
• (iii) If the foreseen specified offence was serious, there would clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example, robbery was a serious offence. But it could be committed in a wide variety of ways, many of which did not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there was a significant risk of

serious harm merely because the foreseen specified offence was serious. A pre-sentence report should usually be obtained before any sentence was passed which was based on significant risk of serious harm. In a small number of cases, where the circumstances of the current offence or the history of the offender suggested mental abnormality on his part, a medical report might be necessary before risk can properly be assessed.

• (iv) If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to significant risk of serious harm."

We consider that this passage constitutes helpful guidance to judges making assessments of dangerousness. There is considerable emphasis on the role of the pre-sentence report and we will have a little to say about that later in this judgment.

[11] The importance of the pre-sentence report was also recognised in R v Pluck [2007] 1 Cr App R (S) 43. In Pluck, the appellant had been sentenced to imprisonment for public protection with a specified period of four years. The probation officer had assessed the appellant as not posing an immediate or likely risk of harm to others. The Judge disagreed and found the appellant did pose a significant risk of serious harm. The Court of Appeal held;

> '…in evaluating the risk of further offences, the reports before the court will probably constitute a key source of information, although the assessments set out therein are clearly not binding. However, if a court is minded to proceed on a different basis than the conclusions set out in the reports, counsel should be warned in advance.'

The Court substituted the sentence for a determinate term of 8 years imprisonment.

[12] The imposition of an extended sentence which was not anticipated by counsel will not necessarily facilitate a successful appeal against sentence in the absence of other factors. In R v Cuthbertson [2003] EWCA Crim 3915, the appellant had been convicted of attempting to take indecent photographs of a child and outraging public decency and had been given

an extended sentence of 9 years consisting of 6 years custody and an extended licence period of three years. He complained that the Judge had failed to warn counsel that he intended to impose a longer than normal sentence. The court concluded, however, on the basis of the appellant's previous convictions that the public needed to be protected and confirmed the extended sentence while reducing the commensurate term.

[13] In this case there was some suggestion on behalf of the prosecution that there was a tension between the finding that the applicant was a person in respect of whom there was a high likelihood of reoffending but an assessment that he did not present a significant risk to the public of serious harm. In order to explore that we invited Ms O'Loughlin to explain the process of assessment and her evidence was extremely helpful.

[14] The assessment of the likelihood of reoffending is carried out using the ACE case management system. The outcome indicates either a low, medium or high likelihood. The seven categories set out in paragraph 7 above were those that affected the assessment of the likelihood of reoffending in this case. In making that assessment no account was taken of any safeguards that it was proposed should be put in place or programmes that the offender may take up.

[15] The assessment of whether there is a significant risk of serious harm depends upon three dimensions. The first is that the impact of the act must be *serious harm*. The second is that the act must be *likely* to occur. The third dimension involves assessing the *imminence* of the event causing serious harm. Imminence requires an assessment in this case of whether the offender will do the act as soon as the opportunity arises, whether the offender is actively grooming, whether the offender will commit the harmful act as soon as the control or limits are lifted or breakdown and whether the circumstances in which the offender has committed harmful acts in the past are now repeating themselves. The assessment of imminence is dynamic and this issue is reassessed every 16 weeks in respect of an offender such as the applicant. When, therefore, the pre-sentence report indicated that the applicant had not been assessed as presenting a significant risk to the public of serious harm that assessment reflected the judgment made at the time of the report. It did not preclude the possibility of a different judgment being arrived at during a later assessment.

[16] In making her judgment Ms O'Loughlin recognised that there were both internal and external controls which were material to the question of risk as set out at paragraph 7 above. The external controls included the availability of a SOPO, the provision of hostel accommodation, putting in place of monitoring and supervision and the prohibition on unsupervised contact with children. The internal controls included the applicant's recognition of the harm caused, his motivation to engage and his acceptance of monitoring, supervision, accommodation and other controls.

[17] It is readily apparent, therefore, that there is no tension between the assessment that an offender presents as a high risk of reoffending but is not assessed as representing a significant risk to the public of serious harm. It is also clear, however, that the assessment of risk carried out by the probation service is inevitably limited to a discrete period of time whereas the statutory task upon which the learned trial judge was engaged required a judgment of significant risk of serious harm over a much more prolonged period. It is unsurprising, therefore, that the sentencer may be guided by the pre-sentence report but certainly not bound by it.

[18] Applying that approach to this case the learned trial Judge clearly took into account that the assessment of the significant risk of serious harm was the current view of the probation service. She noted, however, that the nature of the offending in this case had involved grooming over a prolonged period and that the offender had not disclosed to the parents of the children involved his previous offending. As a result of his previous probation work he was aware of the availability of assistance once he realised he was getting into difficulties but did not take advantage of it. That was a significant factor in making a judgment as to the extent to which it was likely that the offender would sustain his motivation and commitment. No factor has been drawn to our attention which represents any error in the substantive assessment made by the learned trial Judge and we agree that this was an appropriate case in which to make the extended sentence imposed. In those circumstances despite the failure of the learned trial judge to give notice to the appellant of her intention to depart from the assessment in the pre-sentence report and taking into account the additional material which was explored before this court we do not consider that we should interfere with the sentence and dismiss the appeal.