

Neutral Citation No: [2023] NICC 14

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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 21/04/2023

**IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT LONDONDERRY**

THE KING

v

XX

JUDGE BABINGTON

Introduction

[1] As these proceedings concern a sexual offence, automatic reporting restrictions apply, and the complainant is entitled to lifelong anonymity by virtue of Section 1 of the Sexual Offences (Amendment) Act 1992. So as to give effect to this, both the complainant and the defendant are described in anonymized terms throughout these remarks. The complainant will be known as ST and the defendant will be known as XX.

[2] XX was convicted after a trial, which lasted five days, of all eight counts on the indictment by unanimous verdicts. All of the offending consisted of offences contrary to the Sexual Offences (Northern Ireland) Order 2008 and all related to times when ST was a child and under 13 years of age. At the time of the offending ST was aged between five and seven years old and XX was aged between 33 and 35 years old. XX and ST's mother were in a relationship for a period of time. This relationship was fractured and there came a time when ST's mother left the home that they lived in and effectively set up home with someone else some distance away. This meant that ST was being effectively looked after by XX alone. Although XX was not her natural father he held himself out to her as her natural father at the time of offending. ST, who was born in July 2005 made her ABE interview in September 2019 when she was aged 14. She said that the abuse occurred when she returned from school and had changed her clothes.

[3] The facts in relation to each of the counts are as follows:

- Count 1 Sexual Assault by penetration contrary to Article 13. This was a specific count relating to the first time XX digitally penetrated ST's vagina which on this first occasion caused her pain. At this time, she was in either P1 or P2 at school.
- Count 2 Causing or Inciting a child to engage in sexual activity contrary to Article 15. This was a specific count relating to an occasion when XX was digitally penetrating ST's vagina. He also asked her to put her hand on his erect penis over his clothing which she did. At this time, she was in P2 at school.
- Count 3 Sexual Assault by penetration contrary to Article 13. This was a specimen count relating to the occasions when XX intentionally penetrated ST's vagina with a finger or fingers. It is said that this occurred after school on a few other occasions and caused her some pain. At this time, she was in either P1 or P2 at school.
- Count 4 Causing or Inciting a child to engage in sexual activity contrary to Article 15. This was a specimen count relating to the occasions when XX was digitally penetrating her vagina and also asked her to put her hand on his erect penis over his clothing. This occurred on a few occasions and at this time she was in P1 or P2 at school.
- Count 5 Rape contrary to Article 12. This was a specific count and the first occasion on which XX penetrated her vagina with his penis causing both pain and bleeding. On this occasion he then took her out to a shop and bought her a DVD. At this time, she was in either P1 or P2 at school.
- Count 6 Rape contrary to Article 12. This was a specimen count.
- Count 7 Rape contrary to Article 12. This was also a specimen count. Both counts 6 and 7 relate to ST's evidence that XX regularly raped her until she was taken into care. This was between 1 August 2010 and 28 February 2013 - a period of some two and a half years.
- Count 8 Rape contrary to Article 12. This is a specimen count relating to ST's evidence that on occasions XX raped her orally after raping her vaginally and that this occurred until she was taken into foster care and stopped all contact with XX. This cessation of contact occurred when ST was in P3 at school.

[4] ST said that the abuse happened on a regular basis and said it just did not stop once it had started. She said that she did not know that it was wrong and indeed thought it was normal thinking that this is what happened to everyone. In her video she described the progression of the abuse as can be seen from the factual basis set out in relation to each of the counts above. She remembered that some of the abuse was sore and also said that when she complained about what he was doing she was, on

occasions, taken to a shop and DVD's were bought for her. She also said that generally XX would say nothing whilst abusing her although on occasions he would say "I love you and stuff like that."

[5] When asked how often he put "his dick in her thing" she replied "a lot" but she went on to say that her memory was particularly of the first occasion because of the blood that appeared. She also spoke about the oral rapes and on asking him about white stuff that had appeared. She said that XX said that "it was a milkshake." She said that the oral rapes occurred on a number of occasions although describing it as not very many. She also said that what amounted to vaginal rape occurred on the same occasion as oral rape. The abuse continued until ST was in P3 and at that stage she was taken into care and initially went to be fostered. The first person that she told about the abuse was her adoptive father and that occurred some 10 years later in May 2019.

[6] He, her adoptive father, gave evidence at the trial and told the jury of the frustration and anger suffered by ST at times. He said that she would draw while sitting at the kitchen table and these drawings included naked bodies, glass and blood. When asked by him about these ST would become very upset. Later pictures were of people drinking and doing stuff to each other. He said she was visibly upset and all he could do was hug and comfort her. This anger and frustration first appeared in 2013 and social services were informed but it was not until May 2019 that she made full and detailed disclosures to her adoptive father.

[7] In addition, the jury heard evidence from Dr Fair who is a well-known specialist in sexual abuse matters. She told the jury of an injury to ST's private parts which was in effect a healed laceration or tear which ran from the edge of her hymen to her vaginal wall. She told the jury that this finding was highly significant and was due to penetration. She said that the injury would probably have bled at the time that this was caused.

[8] XX gave evidence at his trial. He told the jury that the evidence given by ST was "all lies." He said that although he was, in effect, her carer, he was never alone with her. He said that the reason for her lies was perhaps because he was not able to look after her properly. He also suggested that ST and "her wee friends", as he put it, had made up the story about the abuse. It was perhaps not without significance that when cross-examined he agreed that he had lied in his evidence at trial, and also to the police when interviewed. When XX was interviewed for the purposes of a pre-sentence report he told the author that he had no recollection of committing the offences. As far as the jury verdicts were concerned, he said "I throw my hands up to it and accept that I am guilty." He went further and said that if he did commit the offences, it must have happened when he was under the influence of alcohol and/or illegal substances. His version of events is very confusing as he also says that if he did do it, he apologised for any pain that he had caused and deeply regretted his offending.

[9] Mr McCartney KC, who together with Mr McStay appeared for him, said that his view now of the allegations against him was one of a qualified acceptance. To put it another way Mr McCartney said that he accepted that the jury had got it right but blamed it on his own lifestyle issues. The defence had sought an opinion from Dr Pollock, a consultant forensic clinical psychologist, who put it this way:

“Therefore, it was assessed that the client is providing an unsophisticated defence to account for his offending conduct, he citing that, if the offending did occur, he did so because of the obscuring effects of substance dependence which he alleges affected him at the time. He showed a general lack of insight into his conduct and denial is serving to interfere with the development of such insight.

It was detected that his pseudo-admission of responsibility and guilt was a variant of denial as a process which functions to avoid and disavow the shame and stigma associated with sexual offending. In this regard, he is offering an admission of a kind, but he is sustaining his self-worth and esteem in a ‘me, not me’ form of admission.

He is acknowledging that he, most probably, did commit the index offences, but he is applying a defence of substance induced amnesia to distance himself psychologically from the label and identity of a sexual offender against a child. The use of substance intoxication as an explanation to account for his actions minimises and excuses his deviant behaviour in his eyes and from his perspective.”

[10] XX did not accept responsibility at trial and although his acceptance of the allegations is qualified, as per Mr McCartney, he told the author of the pre-sentence report of his remorse and regret. It is quite frankly difficult to know what to make of that although it is clear that he has moved on considerably from the stance taken at trial and if that is so, it is possible that he does have some regret and also remorse for what he has done.

[11] XX is now aged 45 and has a criminal record comprising 102 convictions. Of these, 50 can be considered as road traffic related matters. The author of the pre-sentence report describes XX as having a long history of engaging in aggressive and antisocial behaviour. He has six convictions for common assault including one on a former partner and in addition a conviction for assault occasioning actual bodily harm. He also has six convictions for assaulting police as well as 10 convictions for disorderly behaviour and two for robbery. It is said that his involvement in these offences demonstrates his propensity to engage in premeditated and impulsive aggression as well as dishonesty, especially when under the influence of alcohol

and/or illegal substances. In 2013 he was convicted of causing grievous bodily injury by dangerous driving when under the influence of alcohol and was sentenced to a determinate sentence of 2½ years custody followed by three years on licence. It is noteworthy that he had to be recalled to custody on two occasions during his licence period.

[12] Perhaps not surprisingly he has been assessed as presenting as a high likelihood of reoffending due to various risk factors set out in the report. As he has been convicted of a sexual offence, he has been further assessed using the Stable 2007 assessment tool combined with the Risk Matrix 2000 to provide a composite assessment of risk/needs and an estimate of sexual recidivism. His composite assessment for recidivism is in the high category for supervision and intervention which is of course concerning.

[13] PBNI gave consideration as to whether XX posed a significant risk of serious harm and came to the conclusion that he did not. The reasoning for that decision is set out at page 6 of the pre-sentence report. There is no doubt that this offending is very serious and very concerning and the court gave careful consideration as to whether XX should be considered as a dangerous offender under the 2008 Order. On balance however the court does not intend to disagree with the conclusions of PBNI largely because of the lack, thankfully, of previous sexual offending. This however does not take away from the seriousness of the offending in this case.

[14] This case concerns consideration of the principles concerning that most serious sexual offence – rape of a vulnerable victim in this case a child, here aged between five and seven. In *Attorney General's Ref (No. 2 of 2002)* [2002] NICA 40 Carswell LCJ said this:

“It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from following their example.”

[15] In much the same vein Kerr LCJ stated in *Attorney General's Ref (No. 4 of 2005)* [2005] NICA 33:

“This court has repeatedly warned that sexual offences against young children will be met with severe punishment.”

[16] Against that background, the offence of rape was considered in *Kubik* [2016] NICA 3 when Morgan LCJ said:

“where, however there has been a campaign of sexual violence against one or more victims a sentence of 15 years

or more is appropriate as the recent decision in *R v Ayton* demonstrates.”

[17] However, it is important that the court sentences a defendant on the particular facts of the case and does not view starting points as fixed as this can in circumstances produce inappropriate sentences. There is no doubt that guideline judgements do assist a court to arrive at the appropriate sentence, but they do not dictate it. To arrive at the correct sentence, the court must consider the degree of harm to the victim, the level of culpability of the offender and the risk posed by the offender to society. Furthermore, it is clear that sentences must deter others, reflect public concern and revulsion and preserve public confidence in the sentencing process.

[18] This case contains a number of aggravating factors the majority of which have been accepted by the defence, in particular, the first factor:

- (1) This was a campaign of sexual violence including multiple offences of rape, oral rape, digital penetration and inciting a child to engage in sexual activity.
- (2) All the offending represented a gross breach of trust as XX was the sole carer for ST at the time. She considered him to be her natural father and considered the contact between them as normal for someone in her position.
- (3) ST was vulnerable by reason of her age which was between five and seven at the time of offending.
- (4) ST was also vulnerable because of difficulties in her upbringing as evidenced by being present at parties organised and participated in by her mother.
- (5) The offending continued for a period of two to three years.
- (6) The offending clearly involved a level of premeditation and planning as demonstrated by the evidence that the offending started by touching and graduated to both vaginal and oral rape.
- (7) The offending included a further sexual indignity or perversion of oral sex in which ejaculation occurred
- (8) Actual injury was caused to the complainant as evidenced by the evidence given by Dr Fair at trial.

[19] I am satisfied that the sexual offending in this matter amounted to a sexual campaign against ST and in particular a campaign of rape. It was carried out systematically for his own gratuitous reasons and without any regard for the welfare and upbringing of a child who was ostensibly in his care. I have noted in particular what Morgan LCJ said in *Kubik*. This is undoubtedly a high culpability case, which had a profound effect on ST. Her difficulties in life are well set out in Dr Curran’s

report and evidence of the effects of what must have been XX's offending were narrated to the jury by her adoptive father in relation to the drawing of various pictures and her demeanour at the time. It has been particularly difficult for her to settle, and one can only hope that as time passes matters continue to improve for her. Although XX has not been assessed as a dangerous sexual offender it is clear that both probation and the police have concerns, and he will have to be carefully monitored upon release from custody. As XX contested these matters ST had to be cross-examined about a number of personal and intimate matters which at times were quite obviously upsetting for her. His instructions to his legal advisers to contest these matters were obviously completely untrue and only added to the hurt suffered by ST. He will be sentenced as follows for the reasons already set out:

- Count 1 Sexual Assault by penetration (specific count) - three years' imprisonment.
- Count 2 Causing or Inciting a child to engage in sexual activity (specific count) - two years' imprisonment.
- Count 3 Sexual Assault by penetration (specimen count) - five years' imprisonment.
- Count 4 Causing or Inciting a child to engage in sexual activity (specimen count) - three years' imprisonment.
- Count 5 Rape - the first time- (specific count) - nine years' imprisonment.
- Count 6 Rape (specimen count) - 16 years' imprisonment.
- Count 7 Rape (specimen count) - 16 years' imprisonment.
- Count 8 Rape (specimen count) - 16 years' imprisonment.

[20] I have considered the concept of totality and in particular the necessity to impose a total global sentence in respect of the offending that is just and appropriate. This also requires consideration of whether particular sentences should be concurrent or consecutive. These matters were all discussed by the Court of Appeal in *Attorney General's Ref (No.6 of 2006)* [2007], noting in particular para 27 of the judgment. Accordingly, I have come to the view that all these sentences should be concurrent with one another making a total determinate sentence of 16 years imprisonment. This means that XX will spend half that sentence in custody and the remaining half on licence in the community. I am recommending that the following three matters be imposed as licence conditions at that time:

- (1) XX is to present himself in accordance with instructions given by his supervising officer to attend the PBNI Intensive Supervision Unit at Hydebank Wood, Belfast or another venue as specified to actively participate in a

programme designed to address sexually abusive behaviour and to comply with instructions given by or under the authority of the person in charge.

- (2) XX is to permanently reside only at an approved address and not to leave to reside elsewhere without obtaining the prior approval of his supervising officer and thereafter to reside as directed by his supervising officer.
- (3) XX is not to develop any personal relationships with other females without first notifying his supervising officer who will take appropriate steps to ensure that verifiable disclosure has been made.

[21] As a consequence of the sentences that I have imposed XX will be subject to the notification provisions of the Sexual Offences Act 2003 for an indefinite period.

[22] By virtue of his convictions the Independent Safeguarding Authority will include him on the barred list relating to children and may include him on the barred list relating to vulnerable adults.

[23] I made a Disqualification Order under the Protection of Children and Vulnerable Adults (NI) Order 2003 disqualifying him from working with children.

[24] Due to the nature of the offending by XX in this matter he will be referred into the Public Protection Arrangements for Northern Ireland. This is a multiagency forum which will determine his category of risk and dictate an individual risk management plan to assist with all areas pertaining to public protection in relation to XX.

[25] Mr Connell, who together with Mr Weir, appeared for the prosecution has made an application that a Sexual Offences Protection Order (SOPO) be put in place following instructions from the PSNI and the PBNI. That is not opposed in principle by Mr McCartney, nor are any of the proposed terms themselves objected to.

[26] However, before the court makes a SOPO it must be satisfied that it is necessary to do so for the purpose of protecting the public or any particular members of the public from serious sexual harm from XX. The court is aware of all the circumstances giving rise to XX's offending before this court, the contents of the pre-sentence report, the contents of the report from Dr Curran, the contents of the report from Dr Ferguson and the court also takes note of the various assessments of risk and the referral to the Public Protection Arrangements for Northern Ireland. In doing so, the court is satisfied that a SOPO should be imposed.

[27] The court has also considered the proposed prohibitions and the potential rationale behind each of them. The court is satisfied that each prohibition is both necessary, reasonable, and proportionate in all the circumstances.

[28] The exact terms of the SOPO are attached to the sentencing remarks and will be read out to XX after these sentencing remarks. The SOPO is made until further

order, although it will not begin until the date of completion of the custodial term to be served pursuant to the order of this court. XX should be aware that if he is found to be in breach of any part of the SOPO he could be subject to imprisonment to a maximum term of five years.

[29] There will be an offender levy of £50.