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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:* **21/086338**
	Delivered: **02/12/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REX

v

CHRISTOPHER WATSON

Mr M Forde BL (instructed by John J Roche & Co, Solicitors) for the Appellant
Mr J Connolly (instructed by the Public Prosecution Service) for the Public Prosecution Service

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Before: Treacy LJ, Horner LJ and McFarland J

McFARLAND J (*delivering the judgment of the court*)

[1] On the 25 November 2022 we gave brief reasons for granting leave to appeal and then allowing this appeal by suspending the sentence of 12 months for a period of 12 months. We indicated that we would give full reasons later in a written judgment.

Introduction

[2] The appellant is nearly 63 years of age. Two years ago, he was involved in an internet conversation with a Facebook profile. The profile was of a 13 year old girl and was the invention of a group dedicated to exposing perpetrators of the sexual exploitation of children. The relevant features of the conversation were:

- It lasted four weeks;
- The appellant was told that she had an age of 13 years;
- The appellant said that he was 18 years;
- The appellant explained to her how to have sexual intercourse;
- The appellant explained to her how to masturbate;
- The appellant requested that she send him photographs of her naked body;
- The appellant expressed interest in having sexual intercourse with her.

[3] The appellant was arrested on 6 November 2020 and two mobile telephones were seized. He co-operated fully with police and made full and frank admissions.

[4] At the first opportunity he pleaded guilty to five offences – attempted sexual communication with a child, attempted inciting a child to engage in sexual activity, attempted causing a child to watch sexual activity, attempted inciting the taking of an indecent image of a child and attempted inciting the distribution of an indecent image of a child.

[5] On 8 September 2022 His Honour Judge Irvine KC ("Judge Irvine") imposed a concurrent sentence of 12 months, six months custodial term and six months on licence. The appellant has now served 78 days in custody in the Moyola wing of HMP Maghaberry.

[6] In his sentencing remarks, Judge Irvine referred to a high culpability given the number of messages, the period of time, the disparity of age and the planning. He noted that the offences were attempts because the child was fictitious and therefore there was no actual harm. He further noted that the assessment in the pre-sentence report was that there was a medium risk of re-offending.

[7] Mitigating factors included the appellant's physical and mental health (which we will deal with in more detail later), his lack of a recent or a relevant criminal record, his age, and his plea of guilty.

[8] A one third discount was identified as appropriate, so we infer that the appropriate sentence had the case gone to trial was one of 18 months.

[9] Judge Irvine also imposed a sexual offences prevention order (SOPO) for seven years including the requirement to obtain permission from his designated risk manager to own internet access devices, to register all such devices, and for all such devices to have a facility to retain the history of usage. There were further restrictions concerning contact with children. He was also disqualified from working with children. Neither of these orders is under appeal. He is also obliged to comply with the notifications requirements under the Sexual Offences Act 2003 (commonly and erroneously referred to as "signing the sex offenders' register" although there is no such register and no requirement to sign anything).

The appeal

[10] Essentially there are three limbs to the appeal:

- The sentence was wrong in principle because the custody threshold was not passed;

- Even if the custody threshold was passed, the sentence of 12 months was manifestly excessive and/or

- There were exceptional circumstances relating to the appellant's mental and/or physical health that would justify suspending the sentence, and therefore it was wrong in principle.

[11] Leave to appeal was refused by Fowler J and the appellant renews his application for leave before us.

Consideration

Custody threshold

[12] We consider that all offences which involve the sexual exploitation, or attempted sexual exploitation, of children are serious offences and must be met with appropriate sentences which will include elements of retribution and protection for the public, particular the younger members of the public.

[13] The full circumstances of this offending clearly justify the imposition of a custodial sentence.

[14] Given the seriousness of the offending, we reject the argument that a community-based penalty would have been appropriate. We note that, in any event, the appellant would not have been able to undertake such a penalty given his physical debility.

Length of the sentence

[15] As for the length of the sentence, we have heard argument concerning the relevance of the English guidelines. We would again reiterate this court's previous advice that those guidelines provide some assistance in identifying factors relating to culpability, harm, aggravation and mitigation, but that sentencers should avoid using the grid system set out in those guidelines (see, for example *McCaughey and Smyth* [2014] NICA 61 at [19]–[24]). This case is a prime example of why that advice applies. There was no harm in this case as the child was fictitious and we are dealing with attempts to commit offences. However, the appellant's intentions were that there would be harm and at a level that would have escalated the case within the English grid.

[16] In any event, even using the English grid, the case fell to be dealt with by a starting point of 26 weeks and with a range of up to three years. The English Court of Appeal have recently upheld a sentence of eight months custody in similar circumstances with a fictitious Facebook profile which did not include the most

serious offence of inciting a child to engage in sexual activity faced by the appellant (see *Charles* [2022] EWCA Crim 132).

[17] We acknowledge that 12 months was a severe sentence, but in our view taking into account all the circumstances in this case and leaving to one side at this stage his medical condition, it could not have been regarded as manifestly excessive. We say this bearing in mind the potential relevance of several mitigating factors. There will always be debate about the presence of remorse, and whether it is genuine and victim orientated as opposed to self-pity. The pre-sentence report suggested that it may have been more of the latter, although we note the appellant's full confession to the police when arrested and his comments to the police may suggest the former. Given our general assessment of the length of the final sentence we feel it is not worthwhile entering into a discussion on the point.

[18] Delay is also a factor with this hanging over the appellant's head until he was finally sentenced. The appellant was caught 'red-handed', the evidence of the internet conversation was copied and available, and there was a full confession. The delay between the arrest and charge and then the sentence was 22 months. This was not mentioned by Judge Irvine, but we acknowledge that it would have been in his mind at the time.

[19] The final, and perhaps the most relevant mitigating factor was the appellant's medical condition. Judge Irvine had the benefit of medical evidence, the issue was opened before him in detail, and he made reference to it in his sentencing remarks.

[20] A defendant's medical condition may be a relevant factor which may require a sentencer to consider reducing the length of the sentence and/or using it as an exceptional circumstance to consider suspending the sentence. We have decided that it was an exceptional circumstance for the reasons set out below. We consider that it is justified suspending the sentence so do not think it is appropriate to consider it in the context of a reduction in sentence. Had we not done so, then it would certainly have been a very relevant matter to consider when fixing the length of the sentence.

Suspended sentence

[21] That brings us finally to whether the sentence should be suspended.

[22] Article 23 of the Criminal Justice (NI) Order 1996 has never been commenced, however this court has identified categories of cases which would normally require evidence of exceptional circumstances before a sentencer would consider suspending a sentence. Sexual offending against children is one of those categories.

[23] The appellant suffers from both physical and mental health difficulties. Reports were submitted to Judge Irvine from his GP, from Prof Farnan and from a community mental health worker.

[24] Dealing first with his mental health. There is no formal mental health diagnosis, but reference is made of his anxiety and depression. Prof Farnan refers to a heightened risk of suicide which he categorises as a "serious suicide risk." This appears to be based on certain risk factors which he has based on an American website of the American Foundation for Suicide Prevention. These factors were mental illness (the anxiety and depression), social isolation within the prison community, a family history of suicide (reference being made to this without detail), his physical condition with severe illness and pain, and the criminal/legal difficulties.

[25] We accept the evidence that there is a heightened risk of suicide, although we note the GP's comment that although there had been suicidal thoughts there was no intention on the appellant's part to carry them out.

[26] Some assistance can be derived from extradition case-law involving a risk of suicide should a person be surrendered under an extradition warrant. Jackson LJ in *Mazurkiewicz* [2011] EWHC 659 at [45] stated that:

> "A person who is otherwise fit to serve a sentence of imprisonment does not escape such a sentence in this country by pointing to the high risk that he will commit suicide."

Aitken LJ in *Wolkowicz* [2013] 1 WLR 2402 said that the court should rely on the executive branch of the state to implement measures to care for a prisoner (by arrangements explained in *Qazi* [2011] Cr App R (s) 32).

[27] Detailed psychiatric evidence should normally be provided to the sentencing judge. Aitkin LJ in *Turner* [2012] EWHC 2426 explained why this was important. The mental condition of the defendant must be such that it removes his capacity to resist the impulse to commit suicide. Otherwise, the decision to commit suicide remains a voluntary act, and ultimately it is for executive branch of the state (through the Prison Service) to put in place whatever steps are necessary to manage that risk.

[28] We respect the expertise of Prof Farnan in respect of his speciality in forensic medicine, but his opinion is no substitute for a detailed psychiatric analysis. In any event, even taking Prof Farnan's opinion at its height, we consider that it does not create an exceptional circumstance.

[29] This leaves us with the final matter which concerns the appellant's physical health. There is clear evidence that the appellant suffers from rheumatoid arthritis and COPD (chronic obstructive pulmonary disease). Further difficulties include hypertension and hypercholesterolaemia. This has a significant impact on his mobility. He is not only housebound but is restricted in his movement between bedroom and kitchen. He needs assistance with his bodily functions and there can be unfortunate consequences when the assistance is not immediately available. We accept the accuracy of Mr Forde's description that he is a "prisoner within his own

home." Prof Farnan carried out an assessment of his home conditions and has given a helpful summary of the appellant's living conditions. He has also given a list of suggested problems which he believed may arise in a prison environment.

[30] Since his admission into HMP Maghaberry he has been housed within the Moyola wing, a specialist wing for the detention of older or severely disabled prisoners. We have no real evidence as to what his actual care requirements are within that wing, but it would appear that they are being catered for. Prof Farnan, although commenting on the prison environment does not make any reference to, or assessment of, the facilities within the Moyola wing.

[31] As with suicide risk, again it will normally be the obligation of the executive branch of the state to house sentenced prisoners by making adequate provision for their daily needs.

[32] Kerr LCJ in *McDonald* [2006] NICA 4 at [39] set out some principles as to how cases of this type should be dealt with. The emphasis is not on the disabilities themselves, but rather on any unusual degree of hardship that an offender would encounter –

> "[39] It is permissible to have regard to any physical disability or illness which will subject the offender to an unusual degree of a hardship if he is imprisoned – see, for instance, *R v Leatherbarrow* (1992) 13 Cr App R (S) 632; *R v Green* (1992) 13 Cr App R (S) 613. It is less clear that the illness of a relative can be taken into account for the same purpose. The effect that personal circumstances may have on the selection of a sentence was discussed by this court in *R v Sloan* (Neutral Citation No.(2000) 2132). In that case Carswell LCJ said:
>
> > 'There is a well settled line of authority that in certain cases the court can impose a lighter sentence than that which would normally be appropriate for the type of offence where the offender suffers from some physical or mental disability: see, *e.g.*, the discussion in *R v Bernard* [1997] 1 Cr App R (S) 135 and the principles deduced from the previous reported cases by Rose LJ at pages 138-9:
> >
> > (i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of

> release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this Court to interfere with an otherwise appropriate sentence (*Archibald Moore*);
>
> (ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence (*Archibald Moore* and *Richard Moore*);
>
> (iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate (*Wynne*);
>
> (iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.'

We respectfully agree with the approach of the court in that case, but would emphasise that it is important to bear in mind the passage which Rose LJ earlier cited from *R v Wynne* (1994, unreported):

> 'It is always to be borne in mind that a person who has committed a criminal offence, especially one who has committed a serious criminal offence, cannot expect this or any other court automatically to show such sympathy so as to reduce, or to do away with altogether, a prison sentence purely on the basis of a medical reason. It is only in an exceptional case that an exceptional view can be taken of a sentence properly passed. In this case a proper sentence was passed for a serious offence.'"

[33] We entirely agree with the authors of *Archbold* 2022 at 5A-78 where they state:

> "This issue appears to be intensely fact-specific; it is suggested that in order to justify a reduction, it is necessary to demonstrate the effect the age/ill health will have on the experience in custody such that it is necessary to reduce the

> custodial term to preserve some parity with sentences for offences of similar gravity."

We consider that the same principle applies to any justification to suspend a prison sentence rather than reduce it.

[34] The appellant's ill-health, and his ability to manage his symptoms, has already, and will continue to have a significant effect when in detention. He is virtually immobile and bed- or chair-ridden. As such he will not be able to experience the normal social interaction within the prison environment, or to avail of the opportunities of any educational or recreational nature which are specifically catered for in Moyola, and are available to all prisoners wherever they are housed.

[35] In all the circumstances we do consider that the appellant's personal physical disabilities do create what are exceptional circumstances. We also take into account the fact that he has now served 78 days in the Moyola wing (the equivalent of a five and a half month sentence) and is already nearly one half of the way through his custodial term.

[36] We now have the benefit of the appellant's experience in custody about which Judge Irvine could only speculate about based on the limited information available to him. We therefore consider that the failure to impose a suspended sentence was wrong in principle and on this basis, we will grant leave, allow the appeal, and maintain the 12 month sentence, but suspend it in operation for a period of 12 months.

[37] Whilst the medical opinion of Prof Farnan has been of assistance, of greater assistance would have been a report from a care expert, such as an occupational therapist, who could assist the court with regard to a person's actual requirements and how these can be provided for, if at all, within the prison establishment. The key issue is the person's likely experience in custody and a medical diagnosis, whilst relevant, is of less importance, unless there is a dispute concerning the extent of any disability.