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*(subject to editorial corrections)**

IN THE CROWN COURT FOR THE DIVISION OF ARMAGH AND SOUTH DOWN

SITTING AT NEWRY

R v John Graham

Her Honour Judge Smyth

Introduction

1. This is an application to vacate the defendant's plea of guilty to 23 counts of historic sexual abuse in respect of two complainants.

2. The defendant, who is now 74 years old, was arraigned on 26th May 2014 and pleaded not guilty to all counts.

3. On 2nd February 2015 a jury was sworn, and following an application by senior defence counsel, the trial was adjourned until 3rd February when the defendant pleaded guilty to all counts.

4. The issue for the court is whether the defendant had capacity to give informed consent to the plea of guilty.

5. Medical evidence obtained in September 2014 on behalf of the defence confirmed that the defendant was fit to plead at that time although he had cognitive difficulties.

6. There is medical evidence that the defendant is now unfit to plead and in December 2015 a diagnosis of irreversible dementia was made.

7. Since dementia is a progressive cognitive disease, the medical experts cannot say whether the defendant had capacity to enter a plea on 3rd February 2015.

The background to the defendant's plea of guilty

8. The defendant had been interviewed by police in the absence of a solicitor, at his own request. His daughter X told the court in the course of this application that he had maintained that he did not need a solicitor because he was innocent of any wrongdoing. The defendant did not admit his guilt to the police, although he did admit putting his hand on one of the complainant's legs whilst preparing her verbally "*for what men would want*". He later told the probation officer who prepared a pre-sentence report that when he made this admission he was referring to "*sex*".

9. In advance of the trial, defence counsel had obtained a report from Dr Best Consultant Psychiatrist dated 19th September 2014, and a report from Dr B Pilkington, Consultant Clinical Psychologist dated 18th September 2014. Dr Best's instructions were to comment on whether the defendant was reliable at police interviews and whether he should have had a solicitor present regardless of whether he requested one or not.

10. His report was based on an interview with the defendant and a conversation with his daughter X on 25th July 2014. He described the defendant as a "clear *historian*" and found "no *evidence of thought disorder, delusional thinking or perceptual disturbance*". His impression was that the defendant was "*of low intelligence but within normal limits*".

11. Dr Best opined that "[*the defendant] is of limited intelligence but …he knows the difference between right and wrong and.. he was fit to be interviewed by the police and …he was fit to choose whether he would be interviewed in the presence of his solicitor or not. [The defendant] did not during the police interview admit to the charges of gross indecency, indecent assault, assault and rape.*

12. *There was no evidence of serious mental illness. There is no evidence of depression other than an adjustment reaction, a stress reaction as [the defendant] realises that these charges are serious and liable to result in a period of imprisonment. He denies any suicidal thinking. I did not see evidence of any major depressive disorder. There is no evidence of any delusional thinking or any psychotic processes*". Best confirmed that "*[the defendant] denied any wrongdoing …. that he was fit to plead and stand trial*". He saw no evidence of significant cognitive deficit at interview that would indicate that he was not fit to stand trial. He considered the possibility of dementia due to his age, but concluded that "the *cognitive deficit…was mild and*

would not interfere with his ability to recall significant events back when the alleged offences were meant to have taken place".

13. Dr Pilkington examined the defendant on 15th September 2014. He denied the sexual allegations but agreed that he had "*teased* [one of the complainants] *about sex…*and "*talked about what men might have been looking for".* He said it was "*just talk, never anything else". Dr Pilkington said it was "difficult eliciting a history from [the defendant]. His answers were vague, short, often monosyllabic and he seemed at times to struggle to understand and reliably answer some questions."*

14. Dr Pilkington found no evidence of a global learning disability, however his full scale IQ is within the extremely low/borderline range. She assessed each aspect of the defendant's cognitive ability and working memory and indicated how information should be presented to him. The assessment of his verbal ability is such that Dr Pilkington recommended that information should be presented using straightforward simple language. His working memory is such that information should be presented using short, unambiguous sentences, giving him the opportunity to process the meaning of the material, with opportunities for reinforcement of messages, as required.

15. In conclusion, Dr Pilkington advised that the defendant's extremely low/borderline full scale score is relevant to how professionals should engage with him. She recommended that "*in such interactions, in order to maximise his level of understanding, information should be presented in a manner that can be easily understood, mindful of his relative weakness in verbal comprehension. If the conditions relevant to his working memory and verbal comprehension indices are applied, his relative strength in working memory would assist his capacity to make sense of and retain that information. However, his slow processing speed indicates that information should be presented slowly, with opportunities for repetition to assist his level of understanding. His engagement with professionals who are not aware of his extremely low/borderline level of functioning and who do not apply these techniques, is likely to be adversely affected as a consequence."*

16. Dr Pilkington was asked to consider the defendant's suggestibility and compliance during the police interviews. She opined that his assessment scores suggest that he is susceptible to suggestive influence. She also opined that he is a highly compliant individual. She considered that this raised questions about the reliability of his police interviews.

<u>The Pre-Sentence Report</u>

17. A pre-sentence report was lodged on 3rd March. The report noted that despite his guilty plea the defendant wholly denied the offences. When asked to explain

the plea of guilty he said *"he did it to get the truth… the [complainants] had a conscience, same as him and that they were telling lies …".*

18. On 6th March 2015, the court was informed that a new solicitor was coming on record for the defendant because he wished to vacate his plea although the basis for the application was not outlined. It was indicated that further medical evidence may be necessary. A timetable was set for the exchange of skeleton arguments by 19th March.

<u>The chronology of the application to vacate the plea</u>

19. On 13th March 2015, the court was told that Dr Pilkington was preparing an updated report and wished to obtain a report from Dr O'Kane, Consultant Psychiatrist.

20. On 13th May 2015, the court was told that Dr O'Kane had provided an opinion that the defendant was not currently fit to plead. It was confirmed that no criticism was made of the previous legal team, who had acted on the basis of the medical evidence available at that time. The prosecution sought time to instruct its own medical expert.

21. On 9th June 2015, the court was told that Dr O'Kane had been asked to provide an opinion on the defendant's fitness to plead on 3rd February 2015 when the plea was entered. She had requested an MRI scan of the defendant's brain to consider the issue of potential degenerative change.

22. On 22nd June 2015, the court was told that Dr O'Kane's opinion was that the defendant was not fit to plead in February 2015 although she had not provided any reasons for that opinion. The court directed a rolled up hearing to deal with the fitness to plead issue in the context of the application to vacate the plea.

23. On 1st July 2015, the court was told that the MRI scan directed by Dr O'Kane could not proceed until an x ray had taken place. The MRI scan did not take place until August 2015.

24. The rolled up hearing was listed on 18th September 2015 and the court directed an experts meeting to take place in advance of the hearing to clarify the issues in dispute. A list of contested issues was directed to be lodged not later than 15th September.

25. On 9th September 2015, the court was told that Dr O Kane had not yet commented on the results of the MRI scan and that she was unable to attend the hearing on 18th September. The court was also told that the defence had obtained a report from Dr Bunn which it did not intend to rely upon and a

further expert was sought on the issue of the defendant's fitness to plead in February 2015.

26. On 23rd September 2015, the court was told that Dr East, Consultant Psychiatrist, had been instructed on behalf of the defence. The hearing date was confirmed for 23rd November.

27. On 19th November 2015, the court was told that senior defence counsel Mr Kearney Q.C. was unable to continue to act on behalf of the defendant for "*personal professional reasons*" and that Mr Lyttle Q.C. had agreed to act for the defendant, but he was unavailable on 23rd November. The court was also told that Dr East's report had been received and the defence was unlikely to rely upon it. In the absence of two Consultant Psychiatrists attesting to the defendant's fitness to plead in February 2015, the application to vacate the plea was likely to be based on new grounds. The court reluctantly agreed to adjourn the hearing to enable the defendant to be represented by senior counsel.

28. Senior prosecuting counsel submitted that if the defence intended to rely solely on a capacity issue, the prosecution intended to rely upon negotiations between counsel prior to the plea being entered in order to refute any such suggestion. It was submitted that the conduct of the negotiations, and the circumstances in which the defendant eventually agreed to plead guilty to all charges demonstrated that the prior legal team must have been acting on the defendant's instructions.

29. A transcript of the proceedings on the 3rd February was prepared which confirmed the chronology as follows:

02/02/15 *Jury sworn*

<u>03/02/15</u>

First proposal made by Defence : To plead to all indecent assault charges, only. Not accepted by Prosecution.

In court:

11:14 R Weir indicated that a little time was required.

G Berry formally asked for a little time

Second proposal made by Defence: To plead to all indecent assaults plus 2 x attempted rapes. Not accepted by Prosecution.

In Court:

12:06 Defence wanted further time.

12:26 Defendant re-arraigned and pleaded guilty to all offences including the rapes as charged.

30. On 4th December 2015, Mr Lyttle Q.C. appeared for the defendant. He submitted that the application was based on three grounds:

    1. that the defendant could not give fully informed consent by reason of his intellectual and cognitive difficulties

    2. that the defendant ought to have had an appropriate adult and/or a professional when being spoken to or advised in relation to his case

    3. that the defendant could not have understood the terms of the forms of authority he signed prior to entering his plea.

31. In light of the new grounds for the application, it became clear that affidavits from the defendant's former legal team would be necessary. Mr Lyttle Q.C. submitted that he would require a medical opinion confirming that the defendant was able to understand the issue of legal professional privilege and give informed consent to waiver before affidavits could be sought. Mr Lyttle also submitted that Dr O'Kane was of the opinion that the MRI scan may indicate a form of dementia and a neuropsychological expert should be asked to provide an opinion for the court.

32. On 29th January the court was told that Dr Anderson Consultant (Old Age) Psychiatrist had provided an opinion that the defendant is suffering from a progressive neurodegenerative dementia, similar to Alzheimer's Disease. In his view, the defendant is unfit to stand trial or give meaningful instructions regarding waiver of privilege. The defence continued to seek an opinion from a neuropsychologist regarding the MRI scan.

<u>The Final Hearing 11th March 2016</u>

33. The court heard evidence from the following witnesses:

    X, the defendant's daughter

    Dr Bridie Pilkington (Consultant Clinical Psychologist)

Dr James Anderson (Consultant (Old Age) Psychiatrist)

Dr Roger Hamill (Neuropsychologist)

Dr Christine Kennedy (Consultant Forensic Psychiatrist)

Dr Best (Consultant Psychiatrist) and Dr O'Kane (Consultant Psychiatrist) did not give evidence. Counsel agreed that I should accept Dr Best's assessment of the defendant in September 2014 and Dr O Kane's assessment of the defendant in May 2015. Counsel also agreed that I should proceed on the basis that neither Dr Best nor Dr O Kane can say what the position was on 3rd February 2015 when the plea of guilty was entered.

The evidence of X

34. X is the defendant's daughter and she is close to her father. X described how her father told her he didn't need a solicitor when he was served with papers and asked to attend the police station, because there was no truth in the allegations. She said he understood the situation after he had been interviewed and whilst she couldn't say what his understanding was, she agreed that he knew what was being said about him, right up until after his trial.

35. X was present at all legal meetings which took place up to and including the trial date of 2nd February, and the plea of guilty on 3rd February, and was privy to all legal advices given to the defendant.

36. X explained that her father had always needed things explained to him, and that her mother generally would have done so when she was growing up. He also had a hearing difficulty and wore bilateral hearing aids. In the two year period leading up to the plea of guilty she was aware of deterioration in her father's functioning, in the sense that he was more forgetful, required more explanations and his hearing was atrocious.

37. X agreed that her father transferred property into her name. This had been planned for some time, but the decision to proceed with the transaction was taken by her father on a date after he had been charged with the subject offences. The property had been in X parents' joint names. It was her father who made the appointment with the solicitor and whilst her mother was reluctant to attend her father told her "*well I'm going down. We've to be there at such a time. If you're going to be there be there sort of thing.*"

38. Although X was directed not to reveal the content of legal advices given, she was asked to describe the circumstances in which her father received advices and reached his decision to plead guilty. She said her father was nervous, and

whilst he gave no indication in the presence of the lawyers that he misunderstood their advices, he asked her repeatedly after they had left the room to explain "*what was that all about*?"

39. X said the lawyers were in and out of the room discussing matters, and she tried to be strong for her father. She said that she did not advise her father at any time whether to plead guilty or not guilty. She and her father travelled together to and from court on 2nd and 3rd February, and discussed the advices given, particularly on the way home on 2nd. She did not form any impression that her father had misunderstood those advices.

40. On the morning of 3rd February, her father told her he was going to plead guilty. He mentioned the fact that he would get less of a prison sentence, which was a factor the lawyers had mentioned "*quite a few times*". He also said that he hoped that if he pleaded guilty the complainants would "*renege and change their mind and they would feel guilty*". He had mentioned this the evening before, also. She said the events were a bit of a blur.

41. Later that week, after her father had pleaded guilty, X visited her father in Maghaberry prison. She said her father was tearful and repeatedly talked about the complainants "*reneging, and hopefully now they would change their minds"*, saying that they had told lies. He said "*maybe now I am just as bad because I said guilty in courts and now I've told lies too."*

42. X saw her father again the following week. Her father continued to say that the complainants had told lies. It was during that week that X first became aware that her father wished to change his plea. She explained that in the course of a telephone call her father said "*it's not right, I shouldn't have pleaded guilty. What am I going to do?*" and her reply was "*Well I don't know what you're going to do*". X said she thought her father understood the predicament that he was in. She thought "*maybe he just had a good think about things*". When asked about the time her father had to think about things on 2nd and 3rd February, when he decided to plead guilty, X said she thought her father was more confused because "*there was so much happening and everyone was in and out you know".*

<u>The evidence of Dr Pilkington (Consultant Clinical Psychologist)</u>

43. Dr Pilkington provided an addendum report on 2nd December 2015, more than a year after her initial assessment. She was asked to advise whether the defendant ought to have had an appropriate adult present during police interviews and a registered intermediary or appropriate adult present during the court process and consultations. She was also asked to comment on the

defendant's ability to understand indemnities he signed regarding legal advice prior to his plea of guilty.

44. She referred to her initial report and opined that it was reasonable to conclude that the defendant would have required an appropriate adult present during police interviews. She repeated the safeguards contained in her initial report which would have been required to ensure his understanding during the court process and consultations.

45. Dr Pilkington said that X's presence throughout legal consultations did not change her opinion about the defendant's ability to understand the issues since it appeared she was only present in a supportive capacity.

46. Since Dr Pilkington had no information about the way in which advices were communicated to the defendant, her opinion regarding the defendant's ability to understand the signed indemnities was based on the form of the documents. She said the vocabulary was legal and complex and the construction of the sentences was such that the defendant would have difficulty understanding it.

47. When discussing the indemnities with the defendant, Dr Pilkington said that although he understood that he shouldn't plead guilty to something he didn't do, he didn't appear to understand that pleading guilty was final, and irrevocable.

48. Although Dr Pilkington conceded that she did not know how the defendant had reached the decision to plead guilty, she concluded on the basis of her clinical assessment that the defendant's rationale for pleading guilty, namely that he thought the complainants would admit to telling lies, was genuine. In her opinion, since the defendant did not understand that a plea was final, she did not have confidence that he had given informed consent.

49. Dr Pilkington was asked whether her opinion depended on the manner in which advices were given by the defendant's legal team and in particular, whether or not the communication safeguards contained in her initial report had been in place. She confirmed that she would require evidence that the correct process had been followed including simple language, repetition and feedback at each stage in order to have confidence that the plea was voluntary. She commented that although her initial report "*captured*" the steps that needed to be followed, perhaps she had not explained the importance of the process, or detailed it sufficiently.

50. Dr Pilkington confirmed that she had not received Dr Best's report which was contrary to normal practice. Since she was unaware of the content of his report

she could not comment on whether it would have changed her opinion in any respect.

The evidence of Dr Anderson (Consultant Old Age Psychiatrist)

51. Dr Anderson assessed the defendant on 30th December 2015 and formed the conclusion that the defendant is suffering from dementia. He explained that dementia is a progressive condition, and may be present for many years before the symptoms become apparent.

52. Dr Anderson conceded that he could not comment on the defendant's condition in February 2015, and was unable to say what his level of understanding was at that time. However, in his opinion, the defendant was in the early stages of dementia at that time and is currently unfit to plead.

53. He agreed that the sudden shock of imprisonment may have had an impact on the defendant's cognition because the removal of familiar supports and routines can reveal the true extent of a person's deficits.

The evidence of Dr Hamill (Neuropsychologist)

54. Dr Hamill is a Consultant psychologist specializing in brain injury. He examined the defendant on two occasions in February and March 2016. He confirmed that the defendant is currently not fit to plead and that he was satisfied the assessments accurately measured the defendant's current cognitive ability. He is unable to comment on the defendant's condition in February 2015.

The evidence of Dr Kennedy (Consultant Forensic Psychiatrist)

55. Dr Kennedy examined the defendant in June 2015. Whilst she was permitted to examine the defendant, she was not permitted to inquire about the details of the offences in case the defendant incriminated himself. She was asked to provide an opinion on the defendant's fitness to plead in February 2015, since the prosecution understood that this was the basis of the application to vacate the plea at that time.

56. Dr Kennedy approached her task on the basis that Dr Pilkington had assessed the defendant in September 2014 as being capable of understanding the court process provided careful communication safeguards were put in place. With the defendant's consent, she also spoke to the probation officer who had provided a pre-sentence report within weeks of the defendant's plea of guilty who confirmed that she had "*no massive problems*" communicating with him, although he appeared to have difficulty understanding sexual matters. She did not pick up on any memory problems.

57. On the basis of her assessment, Dr Kennedy concluded that there had been a significant deterioration in the defendant's presentation since Dr Pilkington's examination in 2014. Despite the use of simple language, he appeared to really struggle and she was unclear what his current understanding was of his legal situation. In evidence, she said she would wish to carry out a further examination before confirming whether the defendant is currently fit to plead.

58. In relation to the defendant's condition in February 2015, she relied on Dr Pilkington and Dr Best's assessments, the opinion of the probation officer and the evidence available to her in reaching the conclusion that the defendant was fit to plead on a balance of probabilities. Dr Kennedy conceded that the situation in February was a matter of speculation in terms of expert opinion, and she took no issue with the views expressed by the other doctors.

The report from Dr O'Kane (Consultant Psychiatrist - Psychotherapy and Adult Psychiatry)

59. Dr O'Kane, Consultant Psychiatrist (Psychotherapy and Adult Psychiatry), assessed the defendant on the 17th April and the 22nd May 2015 and opined that the defendant was mentally well although she had concerns about his IQ and memory.

60. She recorded a detailed history from the defendant including an alleged motive for the complaints. The defendant told her he was not thinking properly on the day he was arrested and in court because he was extremely agitated and anxious.

61. An assessment of his cognitive ability confirmed Dr Pilkington's original assessment and she descried the results as '*in keeping with a picture of continuing cognitive decline typical of dementia. It is not reversible*'. She concluded that the defendant could hear with difficulty but that he was unfit to plead or stand trial because of his limited intellect and processing speed and ability.

The report from Dr Best (Consultant Old Age Psychiatrist)

62. The contents of Dr Best's report are summarized at paragraphs 8-11 above.

The Law

63. The judge has discretion to allow the accused to withdraw a plea of guilty at any stage before sentence is passed. This was confirmed in *Plummer* [1902] 2 KB 339. Similarly, Bruce J held that the first-instance court clearly had a discretion to allow the change of plea; that, if it had exercised its discretion against the appellant, the appellate court might have had no power to interfere; but, in fact,

the discretion was never exercised one way or the other and that had deprived the appellant of a chance of an acquittal, with the consequence that the conviction could not stand (at p. 349).

64. The existence of the discretion was indirectly confirmed by the House of Lords in *S v Recorder of Manchester* [1971] AC 481, when it held that, in the context of change of plea, there is no conviction until sentence has been passed. In *Dodd* (1981) 74 Cr App R 50, the Court of Appeal unhesitatingly accepted the three following propositions from counsel for D, namely that:

    (a) the court has a discretion to allow a defendant to change a plea of guilty to one of not guilty at any time before sentence;
    (b) the discretion exists even where the plea of guilty is unequivocal; and
    (c) the discretion must be exercised judicially (see p. 57).

65. The authorities make clear that the discretion should be sparingly exercised in favour of the accused and while there would seem to be no absolute bar to him applying to withdraw the plea where he has been represented by counsel, it will obviously be very difficult to succeed.

66. In *R v White*, [2001] NI 172 the Court of Appeal held that when a Judge was invested with a discretion which had to be exercised judicially, such as his undoubted discretion to permit a defendant to change his plea from guilty to not guilty, he had as a minimum to address his mind to the considerations relevant to his decision….With regard to the discretion to permit such a change of plea, the judge had to satisfy himself that he had not overlooked a possible ground on which the defendant might rely.

Discussion

67. In order to determine whether I should exercise my discretion to permit the defendant to change his plea from guilty to not guilty, all of the evidence which touches upon his capacity to enter a voluntary plea on 3rd February 2015 must be considered.

68. In September 2014, Dr Best and Dr Pilkington both formed the view that the defendant understood the charges he faced and the meaning of a guilty plea. Whilst his cognitive limitations were apparent, Dr Best was satisfied that the defendant was fit to plead and instruct his lawyers, and Dr Pilkington was satisfied that the defendant could participate in the proceedings provided information was presented and explained appropriately. No evidence of learning disability was diagnosed.

69. Although Dr Pilkington considered that her report may not have explained the necessary communication process with sufficient clarity or its importance, it is difficult to conclude that the information was anything other than comprehensive. Whilst the purpose of the report was to advise on the defendant's suggestibility and compliance during police interviews, I am satisfied that it enabled the experienced defence legal team to understand the defendant's difficulties and to communicate effectively with him.

70. The medical opinion is confirmed by the evidence of the defendant's daughter X that in late 2014, the defendant took steps to transfer property into her name. It is apparent that although the defendant had always needed help with everyday matters such as the writing of cheques, he took the initiative in arranging the appointment with the solicitor and intended to deal with the transaction whether or not his wife co-operated. Clearly he was capable of managing his affairs. It is also significant that the defendant's low cognitive ability had not previously prevented him carrying out a skilled manual job.

71. Although X said that in the year or so before the charges were brought her father's hearing had deteriorated, he had become more forgetful and needed information repeated more frequently, she had not sought to interfere with his decision to attend for police interview without a solicitor. That is perhaps not surprising because Dr Best confirmed that the defendant was fit to decide whether he wanted a solicitor present or not, and whilst he did make some admissions, he did not admit to any sexual offence in the course of the interviews.

72. The trial was listed on 2nd February 2015, four months after the reports from Dr Best and Dr Pilkington were received. Although Mr Lyttle Q.C. criticised the absence of an appropriate adult and a professional to assist with communication during legal consultations, X was present throughout the process. In fact, she had been present at all legal consultations prior to the trial and clearly was an appropriate adult. Dr Pilkington did not recommend the presence of a professional in her September 2014 report and indeed, since there is evidence that the defendant was capable of managing his own affairs at that time, such a recommendation was unnecessary.

73. Although the court does not have the benefit of evidence from the defendant's former legal team because current medical opinion is to the effect that the defendant is now unable to understand the concept of legal professional privilege, the chronology of events provided by the prosecution is highly significant.

74. It is apparent that the defence first approached the prosecution on Tuesday 3rd February with an offer to plead guilty to the indecent assault charges only. It is reasonable to infer from the chronology and from X's evidence that she and her father had remained at court until "*Monday night*", that the defence team did ensure that the defendant had appropriate time to consider the advices given before making a decision.

75. The prosecution declined the defence offer, and a further offer later that morning to plead to all indecent assaults in addition to two attempted rapes. After further time was allowed, the application to re-arraign the defendant was made at 12.26 and the defendant pleaded guilty to all charges. The chronology suggests that defence counsel were acting on instructions, and that those instructions were rational and considered. The signed authority, to which I will turn in a moment, also confirms that defence counsel had sought and had been given authority to make the approaches to the prosecution.

76. Dr Pilkington considered the terms of the written authorities and concluded that the defendant could not have understood either the vocabulary or the form in which they were expressed. However, in the absence of evidence from the former legal team about this issue and in particular how the information was explained to the defendant, it is reasonable to infer that the communication process recommended by Dr Pilkington was followed by the very experienced legal team.

77. The probation officer who interviewed the defendant shortly after the plea of guilty recorded an account of his history, and raised no issue about capacity. She set out the defendant's explanation for pleading guilty verbatim, presumably to demonstrate its implausibility. She also noted that it is not unusual for sexual offenders to deny their behaviour despite conviction due to fear of social stigma, family breakdown, punishment or the need to maintain a favourable self-image. The mere fact that the defendant's rationale for pleading guilty is not sensible does not necessarily mean that he did not make an informed decision to plead guilty.

78. It is apparent from the probation report that the defendant was able to make pertinent points in his defence, such as the historic delay in the complaints being made which he suggested demonstrated that they were untrue and behaviour of the complainants which he contended undermined the allegations against him. These are arguments often deployed on behalf of defendants charged with historic sexual offences.

79. The central issue in this application is how the evidence regarding the defendant's capacity should be re-evaluated against the backdrop of undiagnosed dementia. Dr O'Kane suspected dementia in May 2015, three months after the plea was entered, when she assessed the defendant as unfit to plead. Dr Anderson confirmed that suspicion in December 15 and also Dr O'Kane's assessment regarding the defendant's current fitness to plead.

80. Dr Anderson explained that dementia is a progressive illness and that the defendant is likely to have had the condition for some time before the symptoms manifested themselves. The defendant's sudden incarceration may have had the effect of revealing the true extent of his difficulties. Whilst the defendant's presentation on 3rd February 2015 may have given no cause for concern to the experienced legal team who had sought all appropriate medical evidence, the signs of dementia may have become apparent soon afterwards.

81. On its face, there appears to be cogent evidence that the defendant understood his legal advice and that he made an informed choice to plead guilty on 3rd February 2015. However, the medical opinion that the defendant had capacity a number of months prior to the plea, supported by evidence that he was fit to manage his affairs at that time has to be seen in the context of progressive cognitive decline.

82. Whilst it might be said that X's presence throughout the process acted as a safeguard, I cannot rule out the possibility that the subtle progression of the dementia was undetectable even to those closest to the defendant. X described her father as appearing to understand what the lawyers were saying, yet he would convey a lack of comprehension when they left the room. It is reasonable to infer that X would have repeated and explained matters to him, but that does not necessarily mean that the defendant had capacity to understand.

83. The chronology of events leading to the application to re-arraign the defendant suggests that there was no pressure of time on the defendant to make a decision, no doubt because of the reports which had been obtained. It is also absolutely clear that the incremental approach adopted by the defence team in terms of offers to plead guilty to lesser offences was in the defendant's best interests, particularly given the damaging admissions made during police interviews.

84. However, whilst the defence team sought and obtained instructions before approaching the prosecution, what appears to be voluntary consent in the signed authorities is equally consistent with a compliant individual whose mental condition had deteriorated and who was unable to make an informed

decision. Dr Pilkington had assessed the defendant as highly compliant in her initial report.

85. Whilst the defendant was able to give a detailed history to a probation officer and make pertinent points in his favour shortly after his plea, that does not necessarily mean that he had capacity to understand the legal advice, retain it, weigh up the pros and cons of various options and make an informed decision.

86. It is clear that the defendant has progressively declined since he was first examined in September 2014. The medical experts are unable to say when the defendant ceased to be capable of making informed decisions. While the defendant may have had the capacity to plead guilty on 3rd February 2015, I cannot be sure. In circumstances where I have a reasonable doubt about the defendant's capacity to give informed consent, I am satisfied that my discretion to vacate the plea must be exercised in his favour.

87. I therefore order that the plea is vacated.