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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

CD

Mr Joel Lindsay (instructed by Thompson Crooks Solicitors) for the Appellant
Mr David Russell QC (instructed by the PPS)

Before: Treacy LJ, Maguire LJ, Keegan J

KEEGAN J (giving the judgment of the court)

In this judgment, the appellant and her co-accused have been anonymised to protect the identity of their children. Nothing must be disclosed or published without the permission of the court which might lead to the identification of the children or their family. The initials used are not the real initials.

Introduction

[1] The appellant, CD, appeals with leave on one ground from the single judge Scoffield J from a sentence of 2 years and 4 months' imprisonment (comprised of 1 year and 2 months' custody and 1 year and 2 months' on licence) imposed by His Honour Judge Fowler QC (the trial judge) on 25 January 2021 following pleas of guilty in respect of two counts of cruelty to a child, contrary to section 20(1) of the Children and Young Persons Act 1968. The appellant is the mother of the two children involved in this case, namely A who was born in 2011 and B born in 2010. There is one count in respect of each child. The co-accused in the case, EF, is the father of the children.

[2] Both CD and EF were committed to Belfast Crown Court on 21 February 2020. They were arraigned and pleaded not guilty to both counts on 15 July 2020. CD was

re-arraigned on 5 October 2020 and pleaded guilty to both counts. EF took the same course on 6 October 2020.

Factual Background

[3] We gratefully adopt the articulation of the factual background from the decision of the single judge which reads as follows:

> "[5] The neglect of which the applicants have been convicted on their pleas occurred over a two year period between 31 December 2015 and 14 November 2017. The victims are two of the appellants' four children. Full care orders have now been made and A and B are in foster care together.
>
> [6] The applicant has been in a 15 year relationship although she is now separated from EF. It is clear from the papers that this was a relationship characterised by domestic violence, controlling behaviour, alcohol and drug abuse. As a result, there has been ongoing Social Services involvement with the family. However, matters came to a head on 13 November 2017 when the father EF was admitted to the Mater Hospital as a result of a drug overdose. The hospital social worker became aware that there was ongoing Social Services involvement with EF and his family and contacted Social Services to alert them to the developing situation. Social Services in turn contacted the police, who were already attending EF's address where another person, GH, a friend of EF's who was staying with him, was also suffering from a drugs overdose and tragically died.
>
> [7] When police were at the scene they found that CD and her four children were sharing a bed in a two-bedroom flat with EF and GH's family. CD contacted the children's school and asked that both A and B be sent by a private taxi back to the flat. The school principal refused to allow this and advised CD to collect them in person. Social Services personnel were present at the school when the children's mother arrived and were of the opinion that she was under the influence of drugs. The children were then placed with her sister.
>
> [8] The following day the social worker collected both A and B to bring them to school and A showed the social worker a bruise on her back. B also disclosed a mark on

his arm consistent with a dog bite. CD refused to give consent for the children to access medical treatment and, as a result, Social Services applied to the court for an Emergency Protection Order.

[9] Both children were medically examined on 16 November 2017 by Dr Julie Manley. She found B had 14 primary teeth which required removal under general anaesthetic due to decay. He was also found to have gross faecal loading with faecal matter in his underpants and ingrained soiling at the top of his thighs upon abdominal examination. This was due to a poor diet devoid of fibre, fruit and vegetables. Dr Manley was of the opinion that this level of faecal loading would have been present for months, if not years. Again, no medical attention had been sought and the smell and embarrassing nature of the faecal soiling for the child was psychologically damaging. B also had a 50mm x 50mm area of linear and stellate abrasions, which had the shape and appearance of a healing dog bite on his left forearm. The child also had ingrained dirt on his knees, shins and tops of his thighs. He was clinically anaemic, malnourished and small due to a poor diet and cumulative neglect.

[10] A was examined on the same date, presenting as pale and clinically anaemic. Her primary teeth were in extremely poor condition, also with gross dental decay. They also had to be removed. She had a large yellow/brown bruise over her left lower back (65mm x 10 mm), in keeping with having been hit by a shoe. She stated during examination that she had no books or toys at home. This was all deemed to be evidence of neglect. A also suffered emotional abuse, witnessing domestic violence, drug and alcohol abuse. She described her father assaulting her mother and that she too was struck by him.

[11] Both applicants were arrested and interviewed. EF, whilst confirming his drug addiction issues, denied allegations of neglect, suggesting that his co-accused was responsible for those aspects of the children's care. Their mother advised that they had been residing with GH's family in a two bed flat for the week prior to GH's death. She denied any issues with drugs, alcohol or domestic

> abuse and was unable to account for the children's presentation."

Matters of relevance before the court

[4] The father, EF, now 51 years of age has 44 previous convictions in respect of burglary, robbery, theft, criminal damage, drug related offences, fraud, obstructing and resisting police, disorderly behaviour, driving related offences in breach of court orders. He has no previous convictions in respect of cruelty to children or any other offences against children. The mother, CD, who is now 43 years of age has 6 previous convictions in respect of benefit fraud and driving related offences. Again, with her there are no previous convictions in respect of children.

[5] A pre-sentence report was prepared in respect of CD and is dated 5 November 2020. In this it is reported that CD accepted that she had neglected her children, but she presented with limited understanding of her offence and felt that her actions/inactions did not constitute child abuse. She was assessed as presenting a medium likelihood of re-offending but did not meet the threshold for posing a significant risk of serious harm.

[6] Dr Helen Harbinson provided a psychiatric report in respect of CD dated 11 December 2020. In this report Dr Harbinson sets out the long social services history of this family. She also sets out the appellant's GP notes and records outlining a long history of mental health issues. Dr Harbinson comments that she is surprised that the appellant was permitted to care for her children until 2017 as significant concerns were expressed by a number of individuals and agencies long before that, including local shopkeepers and an anonymous caller to police who witnessed the children roaming the street on their own when as young as four years old. It is reported that the children had also at different times asked neighbours for food.

[7] In reaching her conclusion Dr Harbinson opined that she has seldom met anyone with such a high level of denial as CD and that she struggles to appreciate the impact of her behaviour on her children despite expressing considerable affection for them. Dr Harbinson stated that she has no doubt that her denial originates from the appellant's own early life experiences in that her mother had mental health issues and died by suicide in Purdysburn Hospital when the appellant was 8 years old and that she only found out about it when she was 18. Dr Harbinson said that this lady has coped with a difficult childhood by denial and continues to take that approach to the present day. She described CD as a vulnerable woman who requires long term psychotherapy to help her understand the adverse consequences of her childhood experience and their impact on her personality, mental health and ability to care for her children.

[8] Dr Jennifer Galbraith, a Consultant Clinical Psychologist, prepared a report in related family proceedings on the instruction of all parties and this is dated 10 May

2018. Dr Galbraith is a well-known expert in family proceedings who deals largely with issues of incapacity due to learning difficulty. In CD's case she was clear that there was no learning difficulty apparent. However, she did find a striking lack of insight and an inability to accept responsibility on the part of CD. She said that CD minimised EF's behaviour, denying that any violence took place save for an incident following his return from hospital when he pushed her into a radiator after his overdose in November 2017 which resulted in the children being removed from their care. This report also highlights that CD did not want EF to know the contents of what she was saying. As a result of the appellant's denial of Trust concerns and her ongoing defence of EF, Dr Galbraith did not believe that the appellant could work openly and honestly with the Trust. Dr Galbraith noted that individual therapeutic work to address the appellant's own emotional health and vulnerability was recommended, however, it was noted that she may resist this.

[9] Some victim impact reports were compiled in respect of each child now 11 and 9 years old. These set out that the children have thrived in foster care but they remained guarded when talking about their past family life. A referred to feelings of being scared and frightened when in the care of her parents and relayed distressing experiences to her foster carers regarding particular incidents which have impacted on her emotionally.

[10] A letter was provided by the appellant's sister, which outlines her support for her sister and her progress to date. This states that CD has left EF and has been drug free for over two years and is focussing on getting the children home. It also referred to the fact that an elder child of the family who is 14 would be at significant disadvantage if CD were imprisoned due to their relationship.

[11] A further handwritten letter was provided by CD which has been considered by this court. In this she confirms that she understood why she was before the court and the seriousness of the case. In that letter she apologises to her children for what they have been through and says that she regrets her actions. She refers to her history of domestic abuse and her mental health issues and she expresses her thanks to the foster carers.

[12] During this appeal two additional pieces of material were presented on behalf of the appellant, namely a letter dated 23 June 2021 from the Probation Board for Northern Ireland which is a summary of CD's presentation since her committal to custody. This states that CD has settled into Hydebank Wood College and was promoted to enhanced regime within custody. There are no guilty adjudications or charges and no adverse incidents. The report notes that she has not taken any drugs since being in custody and is adhering to the behavioural regime. A further report was provided which states that CD has attended 11 sessions of parenting work provided by Barnardo's Parenting Matters.

Issues on Appeal

[13] In mounting this appeal Mr Lindsay raised four issues in his written argument, namely:

(i) that the judge was wrong to follow the sentencing guidelines in England and Wales;

(ii) that the judge erred in selecting the same starting point for both accused;

(iii) that the judge failed to properly consider the alternative to an immediate custodial sentence for this accused; and

(iv) that the judge erred in failing to make an apportionment of sentencing which allowed for greater probation involvement to target the work needed to address the various issues identified in the relevant reports.

[14] Before this court Mr Lindsay focussed on the one point which the single judge gave leave on, namely whether or not the judge had chosen the right starting point for this appellant and whether or not he should have distinguished this appellant from EF, the co-accused. We consider that Mr Lindsay was entirely right to focus on this point alone and for completeness sake we are quite clear that the other points of appeal were rightly dismissed by the single judge and are not arguable. We do not consider that this is an exceptional situation as was the case in *Joanne Elizabeth Mitchell* [2005] NICA 30 where the Court of Appeal decided that a suspension of imprisonment should be applied. This case focuses on whether the correct starting point was found by the judge and whether a distinction should be made between the two co-accused. We therefore turn to our conclusion having considered that core point on appeal.

Consideration

[15] In *R v W* [2014] NICA 71 the Court of Appeal summarised the principles in applying sentencing in cases of child neglect and child cruelty at paragraph [19] and we repeat these:

> "[19] The sentencing authorities stress that sentencing in cases of child neglect and child cruelty necessitates a careful consideration of the entire factual context. In *R v Orr* [1990] NI 287 the Court of Appeal stressed that it is necessary for the courts to protect children and to deter those who might cause them injury. Cases of repeated actions are more serious than a simple incident. The English Court of Appeal in *R v Bereton* [2002] 1 Crim App Reports (S) 63 pointed out that the sentencing authorities in child cruelty cases are distinctly limited as each case of

> this type turns on its own facts. The courts must ensure punishment and deterrence (*R v Durkin* [1989] 11 Crim App Reports (S) 313). There can be an immense variety of facts in such cases and the degree of seriousness with which they will be regarded (*Attorney General's Reference* (No 105 of 204) [2005] 2 Crim App Reports (S) 42). It is thus clear that no two cases in this field will be the same and the precedent value of other sentencing decisions in different factual context will be limited."

[16] In this case the trial judge did consider the entire factual background and it is clear that he considered, in particular, the aggravating factors in this case. We agree that they may be summarised as follows:

(i) This was sustained neglect over a considerable period of time.

(ii) The very young age of the children involved at the time, namely 6 and 7 years.

(iii) The extent of the neglect which was severe and chronic and the commensurate suffering caused to the children.

(iv) The vulnerability of the victims.

(v) The use of alcohol and drugs as the backdrop of the offending.

(vi) The fact that two children were involved.

[17] In terms of mitigation the trial judge referred to the plea of guilty as a mitigating factor and he also noted that there was a delay in bringing the case to hearing.

[18] The trial judge also considered this a case of high culpability and high harm on the part of both parents. There is no doubt that there was sustained abuse over a two year period of a psychological and emotional nature and in the case of A physical abuse. The effect of this cannot be underestimated on the children given the social stigma of attending school and living in the community when unclean and suffering neglect. The corollary of this is that the children are thriving in foster care where it is likely they will remain for the foreseeable future. There can be no argument that this is a case of high harm.

[19] The only issue is whether or not the culpability of both accused is the same or whether or not there should have been further mitigation of CD. There are other points raised about the fact that EF had a criminal record. However, it is important to note that neither party has any convictions in relation to child cruelty. We also

note that the trial judge applied a discount in this case for delay and for the plea. There is no argument as to the discounts that he applied.

[20] So the appeal really comes to whether or not a distinction should be made in favour of CD given her circumstances. As we have said these can be categorised as different from EF due to her own vulnerability, the fact that she suffered domestic violence at his hands and the fact that she expressed greater remorse and understanding of the issues and in the period between charge and trial she did extricate herself from the relationship with EF and from drugs. It is important to note that unlike other family scenarios CD does not suffer from any learning disability or impediment that would compromise her parenting role. We accept the prosecution's submission that she has a clear understanding of her parental role and responsibilities. In that sense the question is whether or not there is any error in this sentence given that the trial judge decided that both parents had high culpability albeit for different reasons.

[21] In reaching our conclusion we note that the Sentencing Guidelines in England and Wales categorise lesser culpability when the offender is a victim of domestic abuse, including coercion and/or intimidation (where linked to the commission of the offence). From that it is clear that being a victim of domestic violence is relevant, however there must be some linkage or causal connection to the commission of the offence. This argument we hasten to add was not vigorously made at the lower court perhaps because the two co-accused were sentenced together. But in any event it is now rightly being raised by Mr Lindsay and we deal with it as follows.

[22] There was clearly a high level of culpability for EF. The position of CD is different because of some difficulties in her life. We note that CD lost her mother at age 8 in tragic circumstances which she discovered later on. However, we also note that her father made great efforts to raise her and that she attended school and did not come to the attention of social services or the police as a child. In relation to domestic violence we note that CD has sought protection in the past. She has availed of non-molestation orders on numerous occasions. She also had her father and sister available to her. She has obtained employment at one stage in her life.

[23] In our view CD has had the opportunity to provide a better environment for her children but unfortunately she prioritised the relationship with EF and notwithstanding supports and services she continually returned to EF. She has not been hindered by her own mental health or any learning disability and there is no evidence to say her will was so overborne that she could not attend to the children's basic needs. By way of illustration we point to the fact that when asked about the children's chronic tooth decay she said that they ate too many sweets. Also, CD had no comprehension of B's serious bowel problems which must have been very obvious. Sadly, it is apparent from the social services records that there has also been a pattern in CD's case of bad parenting over a very long period of time. Therefore, whilst we recognise that CD has been a victim of domestic violence we do

not consider that this is truly a case of lesser culpability because of the actual harm caused to these young children.

[24] However, we do consider there is some mitigation in CD's case which should be reflected in the sentence. First, there is the fact that she has been prepared to recognise some deficits in how the children have been looked after unlike EF who simply blamed CD. Second, she has tried to deal with her addiction and remained drug free for a period. Third, she is not alleged to have engaged in physical abuse unlike EF. Fourth, EF has a more substantial record of criminal behaviour.

[25] Therefore, we consider that the trial judge was perfectly entitled to consider a range of 3-7 years and to reach a sentence in the case of EF of 4 years prior to applying the discounts he did. However, given the mitigation that is available to CD we consider that the sentence after consideration of aggravating and mitigating factors for her should have been adjusted to 3 years. If further time is taken off for delay that leads to a sentence of 2½ years prior to reduction for a plea. If a discount of a third is applied that leads to a sentence of 20 months which we consider is appropriate and meets the justice of this case.

[26] In reaching our conclusion we reiterate the fact that the courts will be driven to impose custodial sentences in these types of cases of persistent and serious neglect to deter such behaviour towards children. The message should be clear from this case that these are serious offences and that offences of psychological and emotional abuse should be treated in just as robust a manner as crimes of physical abuse and injury to children. These two children were left in a desperate state at a very young age and both parents bear responsibility for that. We also note that social services have been involved for many years in this case and we agree with Dr Harbinson's observation that it is surprising that it took until 2017 for social services to finally remove the children.

Conclusion

[27] In this case the criminal behaviour towards two children has persisted over a considerable period of time and so a custodial sentence is entirely merited. That will be adjusted to a sentence of one of 20 months comprised of 10 months imprisonment and 10 months on licence for the reasons we have given.