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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **10/08/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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v

TC

Applicant

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Before: Morgan LCJ, Treacy LJ and Rooney J

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Bobbie-Leigh Herdman BL (instructed by John J Rice & Co Solicitors) for the Applicant
Rosemary Walsh BL (instructed by the PPS Solicitors) for the Respondent

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Reporting restriction: Nothing is to be published which could lead to the identification of the child who we have anonymised as OB.

TREACY LJ ***(delivering the Judgment of the Court)***

Introduction

[1] The applicant ('TC') pleaded guilty to one count of causing or allowing a child, her son OB, to suffer serious physical harm, contrary to section 5(1) of the Domestic Violence, Crime and Victims Act 2004. The applicant pleaded guilty to the offence at an early opportunity. She was charged jointly with NX, the biological father. Her son was born in August 2017. The offence occurred on 26/27 November 2017 when he was just around 3 months old.

[2] TC was sentenced to 16 months' imprisonment. She sought leave to appeal the sentence of 16 months' imprisonment. The Single Judge refused leave to appeal and the applicant renews her application for leave to appeal before the full court. At the conclusion of the appeal on Friday 11 June we announced our decision granting leave, substituting a sentence of 18 months' probation to which the applicant TC consented, giving outline reasons for allowing the appeal and indicating that because of the importance of the case we would give more detailed written reasons

later which we now do.

Background

[3] NX had also been charged with the offence of causing grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 and the matter was set down for trial in relation to both counts that he faced. He ultimately pleaded guilty to the section 5(1) offence and the section 20 offence was 'left on the books'.

[4] OB had been placed on the Child Protection Register at birth and was subject to a Child Protection Plan agreed with Social Services that prohibited the applicant and NX from having any contact with each other and from being together with OB on their own. All of NX's contact with the child was to be supervised by his mother at her home. OB was permitted to reside with the applicant. She was initially to be fully supervised by an approved member of her family when looking after him. This was eventually reduced to a requirement to have a family member stay overnight with her. The applicant's family members who had agreed to stay overnight with her had loosened this arrangement by the 26/27 November 2017, without the knowledge or consent of Social Services.

[5] OB had been noted to be well while staying overnight with a family friend on the evening of 24 November 2017. On Sunday 26 November 2017 a sister of the applicant, AG, collected her and the child from their home to go and visit their mother in Lagan Valley Hospital. AG noted that NX was in the house. At this point the applicant showed her a small bruise to the child's face, just above his lip. At the time, she thought the child could have caused it by having his hands in his mouth and it was apparent that it did not cause her concern.

[6] On the morning of Monday 27 November 2017, the applicant noted that the child's face was covered in bruises. NX had been staying overnight at the applicant's home on the evenings of 25 and 26 November 2017 in breach of the Child Protection Plan and had, on the applicant's account at interview, unsupervised care of him for short periods while the applicant was asleep. In interview the applicant stated that she had woken up at around 6.30am on the 27th to hear NX screaming 'fuck up' at the child, who was crying while his nappy was being changed. The applicant stated that she made NX leave her home at that time.

[7] On noting the bruising the applicant immediately contacted family members and arrangements were made for the child to attend the applicant's GP. Arrangements were then made for the child to be brought immediately to the Royal Belfast Hospital for Sick Children.

[8] The child was the subject of a joint examination by consultant pediatricians Dr. Andrew Thompson and Dr. Claire Loughran on 27 November 2017 at 15.30 hours. The applicant was present and she stated that both she and NX were unable

to account for the bruises. It was noted that there was significant bruising to the child's face. These were described as:

(i) 1 x 0.7 cm brownish red bruise on the left temple;

(ii) A 0.7 x 0.5 cm brown bruise on the left cheek;

(iii) A 2.5 x 1 cm brown bruise on the right cheek with a smaller 0.5 x 0.3 cm bruise just above this;

(iv) A 1 x 1.5 cm brown bruise on the forehead;

(v) A 1 .5 cm x 1.5 cm brown/red bruise on the neck on the left side;

(vi) A small bruise on the nape of the neck;

(vii) A couple of bruises 2 x 1.2 cm, brownish in colour, on the back running down the spine;

(viii) A 1.5 x 0.5 cm pale blue bruise on the right buttock with another 1.7 x 0.7 cm bruise just below this;

(ix) A 0.5 x 0.3 cm light brown bruise on the left arm with another similar sized bruise below this.

[9] The consultants noted that this was a significant number of bruises on a non-mobile 3-month-old baby and it was of great concern. The child was not yet rolling. Aside from the bruising, he appeared to be thriving and he was clean. Dr. Loughran stated that the two bruises on either side of his mouth would be in keeping with fingertip bruising. She described that there were multiple bruises to the child's forehead and one on his left jaw. She also noted 2 small bruises to the inner aspect of his right knee.

[10] Skeletal surveys confirmed fractures to the lateral aspects of the left 6th, 7th and 8th ribs. The skeletal surveys and other available material were examined by Consultant Paediatrician Dr. Stephen Rose. Dr. Rose indicated that there was no explanation for the fractures and that the child had normal bone morphology. Significant pressure would have had to be applied to cause these fractures. Dr. Rose stated that the child could not have caused the bruising and a third party must have caused them.

[11] Dr. Diane Choo, a forensic medical officer, examined the child on 28 November 2017. She noted the bruises and that they were in keeping with fingertip bruising. She did notice that the applicant had very long nails/nail extensions and considered that forceful gripping and restraint by her would probably have resulted in some finger scratches being present. It was her opinion that the finger bruising was:

> "unlikely to have been caused by mum… Suspicion would fall on [NX] with his domestic violence

> history towards mum and the suspicious history of the baby crying when handed to him as well as the recent illegal overnight stays by his father."

The course of the trial

[12] The Crown opening in the case indicated that on the morning of the trial, NX offered to plead guilty to causing or allowing serious physical harm to the child, contrary to section 5(1) of the Domestic Violence, Crime and Victims Act 2004. The prosecution made a decision to accept this plea and to not proceed with the section 20 offence which was 'left on the books'. The prosecution submitted that "the net result is that both defendants fall to be sentenced for the same offence and on the same factual basis, namely, knowingly placing [OB] at risk of serious physical harm."

[13] The prosecution opening also clarified that the prosecution case is premised on this being a single episode of violence being perpetrated upon the child over the weekend in question. They said "this is not, therefore, a case where there has been prolonged or multiple incidents of child cruelty. Both offenders were aware of the Care Plan that was put in place specifically to protect [OB] and both had disregarded this for a matter of weeks leading up to the incident in question."

[14] In respect of the level of injuries, the prosecution accepted that whilst this would have been a distressing incident:

> "… in the context of serious harm, these injuries fall at the lower end of that scale. [His] physical recovery from these injuries would have been quick and this is demonstrated by his reported presentation on the morning of 27th November when he was described as smiling and happy. Medical assistance was sought relatively promptly and he did not require any specific treatment for the injuries sustained."

Sentencing

[15] In the absence of sentencing authorities in this jurisdiction in respect of offences under section 5(1) of the Domestic Violence, Crime and Victims Act 2004 the Judge was referred to R v Nemet & Repasi [2018] EWCA Crim 2195 in which a starting point of 36 months following trial was not interfered with by the Court of Appeal. However, as the judge noted the injuries sustained by the victim in that case were much more serious than those sustained by OB and involved four different applications of force on at least two separate occasions. Medical assistance had been delayed and had only been sought following the final in the series of injuries. The judge was also referred to the Sentencing Council Guidelines. He

stated that while there may have been one factor which pointed to the high culpability range, that others point to the medium or low culpability ranges. Overall, the judge said he found them of limited assistance. He stated that he had taken into account all matters raised by counsel and the psychiatric/psychological evaluations in determining the appropriate sentence.

[16] When sentencing the applicant the judge said he would have applied a starting point of 30 months following a contest. This was reduced by 6 months to 24 months due to the applicant's immediate reaction to the injuries and due to the delay in concluding the case which was not the fault of the applicant. This was further reduced by 8 months to allow full credit for her guilty plea, resulting in a sentence of 16 months' imprisonment

Grounds of Appeal

[17] The applicant submitted that the starting point of 30 months selected by the judge was manifestly excessive and wrong in principle having regard to all the circumstances of the case. Further, the applicant submitted that the judge made inadequate allowance for the personal mitigation of the applicant and the delay in concluding the case against her.

Personal mitigation and other factors advanced on behalf of the applicant

[18] The applicant made full admissions to breaching the Care Plan and expressed remorse at police interview. She stated that she felt sick at the thought of her child being injured and that she did not anticipate that NX would have injured him. She entered an early guilty plea.

[19] It is clear from the reports that the applicant is a vulnerable person who has been deeply affected by being excluded from her family home by her family at the age of 15, moving from hostel to hostel until she secured permanent Housing Executive accommodation. The applicant first met NX at the age of 16. The initial relationship with him ended when she was 18 but they reunited in 2016 and OB was born in 2017. NX is almost six years her senior. Domestic violence was a feature throughout the relationship and we have been furnished with the PSNI Domestic Violence Register which sets out incidents of domestic violence reported to them. The applicant has a Full Scale IQ score of 71, placing her in the borderline learning disability range. Her IQ is such that any probation work would have to be undertaken with her on a one to one basis.

[20] The applicant has a history of drug and alcohol use and poor mental health, which led to Trust intervention during her pregnancy and during her child's early life. He has been made the subject of a full care order and is the subject of an application to the High Court to free him for adoption. The applicant is therefore now at risk of her parental responsibility being permanently terminated by way of a freeing order and her contact with him being reduced to a handful of times per year.

Counsel for the applicant submits that she has paid a grave price for breaching the Care Plan and allowing NX into her home. The applicant we are told has been committed to her contact arrangements with her son since he was removed into foster care and her commitment continued after this contact was required to move to Zoom due to the pandemic. We do not doubt counsel's contention that the applicant is a lady who loves her son very much and is struggling to come to terms with the fact that her poor choices have led to her son's injury and his separation from her on a permanent basis.

[21] It was accepted by the Crown that on noting the bruising to her son, the applicant immediately drew it to the attention of her family and sought urgent medical assistance for him. Having made admissions and expressed remorse in interview she pleaded guilty to the offence in March 2019 and waited almost 2 years for sentencing due to the delay of the resolution of NX's case.

[22] The pre-sentence report highlighted a number of non-custodial sentencing options for which the applicant was assessed as being suitable and also highlighted the high level of engagement she had with services in the community on an ongoing basis and noted the possibility of such a disposal as a means of holding her accountable for her future actions.

[23] Ms Herdman submitted in light of the significant delay between entering a guilty plea and sentencing, the personal circumstances and background of the applicant and her own vulnerabilities within the relationship with NX, the decision to impose a sentence of immediate custody at the level selected was manifestly excessive and wrong in principle.

[24] She reminded the court that numerous non-custodial sentencing options were outlined in the pre-sentence report which would have recognised the need for punishment of the applicant whilst also fostering rehabilitation and allowing her to deal with the root causes of the behaviour. The adoption of such a course, Ms Herdman contended, would also have properly reflected the significant delay in which sentencing was left hanging over her for a period of almost two years. Furthermore, it is submitted there were exceptional circumstances on the particular facts of the case which would have justified suspension of the custodial sentence if a non-custodial sentence was considered to be inappropriate in all the circumstances.

Discussion

[25] We acknowledge that this was a very difficult sentencing exercise. The offence of causing or allowing a child to suffer serious harm contrary to section 5(1) of the Domestic Violence, Crime and Victims Act 2004 carries a maximum sentence on indictment of 10 years' imprisonment. Deliberate and persistent flouting of child protection plans, put in place to protect vulnerable children, where serious harm to the child follows will generally require a sentence of immediate imprisonment. As the sentencing judge observed, Social Services have a difficult job in balancing the

rights of parents and the safety of children in potential danger. Accordingly, the courts must make it clear that where the safety of the most vulnerable in our society are concerned the personal problems of the accused will frequently carry little weight.

[26] The present case was premised by the prosecution as being a single episode of violence perpetrated upon the child over the weekend in question in circumstances where both the applicant and her co-accused disregarded the Care Plan put in place to protect OB. The applicant was never charged with inflicting injuries on her child. Only her co-accused was charged with inflicting injuries but in the circumstances earlier set out the prosecution accepted his plea to the section 5 count and agreed that the section 20 offence should be 'left on the books'.

[27] In respect of the level of injuries, the prosecution accepted that in the context of serious harm, these injuries fall at the lower end of that scale. As the sentencing judge in the present case correctly observed, the injuries sustained by the victim in R v Nemet & Repasi were much more serious than those suffered by the applicant's son. Unlike that case, the applicant here sought medical assistance promptly and fortunately the child did not require any specific treatment for the injuries sustained.

[28] It is important to observe that in the present case there are clear indications that this applicant was not responsible for the ill-treatment of her son. This includes the fact that she was the person who, in discharge of her parental responsibility with the help of a family member, brought the child for examination to her own GP.

[29] Her co-accused (but not the applicant) had also been charged with the offence of causing grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 but that offence was 'left on the books' following the acceptance by the Crown of his belated guilty plea to the section 5(1) offence.

[30] Furthermore, the prosecution accepted before this court that the applicant was not considered a perpetrator of the injuries.

[31] Dr. Diane Choo, a forensic medical officer, examined the child on 28 November 2017. She noted the bruises and that they were in keeping with fingertip bruising. She did notice that Ms Dunlop had very long nails/nail extensions and considered that forceful gripping and restraint by her would probably have resulted in some finger scratches being present. It was her opinion that the finger bruising was:

> "unlikely to have been caused by mum… Suspicion would fall on [NX] with his domestic violence history towards mum and the suspicious history of the baby crying when handed to him as well as the recent illegal overnight stays by his father."

[32] In assessing the amount of credit due to the applicant it is highly material that on noting the bruising to her son, she quickly drew it to the attention of her family and sought urgent medical assistance for him. The applicant brought him to her GP who referred the child to the RVH. This crucial and timely intervention led to a sequence of events beginning with the identification of non-accidental injuries inflicted by a third party, the institution of further protection for the child, a police investigation during which the applicant made full admissions, and the successful prosecution of the offenders. She is in our view, for the reasons set out below, entitled to substantial credit for intervening in this way to protect her child.

[33] Notwithstanding her vulnerabilities and the potential risks involved to her she intervened to protect her young son's well-being. She did it notwithstanding that:

(i) she could expect pressure and possibly physical retribution from her dominant and abusive partner;

(ii) she must have realised that it would almost certainly lead to a police investigation if non-accidental injuries were found;

(iii) she must have realised it would reveal her breaches of the Child Protection Plan; and

(iv) that it carried the risk of the child's separation from her on a permanent basis.

[34] Since she reported the matter she has turned her life around. She swiftly ended her relationship with her co-accused as is evident from the reports noted below.

Pre-sentence report

[35] The pre-sentence report records that Social Services confirmed that she has addressed her alcohol and drug abuse and at the time of the report:

- she was attending Women's Aid
- she had completed the 'Journey to Freedom' Programme
- she was attending a women's centre for a support programme
- she was engaging with Social Services and had completed phase one of the Parenting course.

[36] The report highlights that the applicant's IQ is 71, only two points higher than the level at which she would have met the criteria for a diagnosis of learning disability. Her history of being excluded from her family home at the age of 15 and living in care and in hostels was also outlined. She was assessed as suitable for a probation order, which would have required a one-to-one approach to offence-focused work due to her IQ. She was also assessed as being suitable for Community Service. As noted above, the report referenced her continued engagement with Social Services, Women's Aid and the Women's Centre and that, in light of this:

> "the Court may wish to impose a community based disposal which holds [her] accountable for her future behaviour."

[37] The pre-sentence report before the judge had been requested at the time of her plea in March 2019 and was completed on 18 May 2019. At the date of sentencing, almost two years later on 12 March 2021, no updated report was sought or obtained. Importantly, there is no suggestion that her progress was not maintained in the 2 years that intervened before sentence and it appears that her life has been structured around the contact arrangements regarding her son.

Report from Hydebank

[38] We are very grateful to Hydebank for the swift and illuminating report which was provided to this court. In a report dated 10 June 2021, a Probation Officer at Hydebank Wood confirms that the applicant, since her committal to Hydebank, has demonstrated positive behaviour and engagement with the Probation Officer and other professionals allocated to her.

[39] She goes on to say:

> "[TC] presents as a quiet, polite and respectful young women, and is currently working her way up to enhanced status via the prison's regime, this usually takes about four months and [she] has demonstrated her ability and capacity to achieve the same having no adjudications or warnings against her.
>
> [She] has not yet been tested for any illegal substance abuse, however, there are no current issues or concerns regarding this matter.
>
> [She] is making good constructive use of her time as a cleaner for her landing and has equally found employment within the female gardens; a job she carries out to the best of her ability."

Delay

[40] The applicant through absolutely no fault of hers, was left in a limbo of anxiety for 2 years between her plea in March 2019 and her sentence in March 2021. Given her personal vulnerabilities it is most unfortunate that no steps were taken to mitigate that delay.

Conclusion

[41] The applicant has now been in custody since March 2021. The prison report referred to above indicates that the structure of the prison regime has been helpful, supportive and rehabilitative. The report demonstrates a continuum of the efforts that the applicant has sustained in an effort to turn her life around since these matters came to light as a result of her reporting the injuries as set out earlier. In the exceptional circumstances of this case we consider that it is clear from everything that we have read that the applicant needs support. A suspended sentence would not offer such support. Her family appears to have rallied around her and are very supportive. We noted earlier that she has terminated her relationship with her co-accused. This appears to have occurred in the immediate aftermath of the discovery of the ill-treatment of her child. This is a very welcome development. The court would however be concerned that NX, when he is released, may attempt to renew his acquaintance. Were this to occur, this would be a very retrograde development which is likely to amount to an enormous setback for the applicant. We earnestly hope that, if there is any attempt by her co-accused to renew the relationship that she has the good sense, fortified by the comments of this court, to reject any such approach.

[42] In light of the circumstances described above, the substantial mitigation in the applicant's case and the progress that she has made over a number of years together with the fact that she has now been in custody since March of this year, we consider that she will benefit from the supervision that probation will offer and that the appropriate sentence is one of 18 months' probation subject to the additional conditions set out in the pre-sentence report. The court satisfied itself that the applicant, upon release, will have access to suitable accommodation which is indispensable to her rehabilitation and appropriate supervision. We were pleased to note that her Housing Association flat was kept available for her pending the outcome of her appeal.