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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**16/06/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

JAMIE DEVLIN

Mr O'Rourke KC with Mr Forde (instructed by Toal Heron Donnelly Solicitors) for the Applicant
Ms Chasemore (instructed by the Public Prosecution Service) for the Respondent

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SENTENCING FOR TRESPASS WITH INTENT TO COMMIT A SEXUAL OFFENCE

Before: Treacy LJ, Horner LJ and Huddleston J

Ex tempore

TREACY LJ (*delivering the judgment of the court*)

The complainant is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[1] The applicant in this case was refused leave to appeal against sentence in a very detailed ruling from the single judge, Mr Justice Kinney. He has renewed his application for leave before the full court. By this application he seeks to appeal against an effective sentence of three years' imprisonment imposed by the Recorder of Londonderry, His Honour Judge Babington, on count 1 which was an offence of trespass with intent to commit a sexual offence, contrary to Article 67 of the Sexual Offences (Northern Ireland) Order 2008. That offence carries a maximum sentence of 10 years' imprisonment. On count 2 sexual assault, contrary to Article 7 of the 2008 Order he was given a sentence of 18 months which was made concurrent to the

sentence imposed under count 1. That offence also carries a maximum sentence of 10 years.

Factual summary

[2] The offences occurred in the early hours of 27 December 2019. The complainant C was 13 years of age at the time. The family were all asleep upstairs in the family home in the early hours of the morning, but a window had been left insecure in the living room. C was in a single bed in a bedroom with her two younger sisters (who were in a bunk bed). Her brother was in another bedroom, and her mother and stepfather were in another bedroom. The girls' bedroom had decorations on the bedroom door which would be indicative that the room belonged to young girls. At between 4am and 5am C woke to find the defendant in her bed. He was a complete stranger to her. He was under the duvet and naked from the waist down and was touching her breasts, her inner thighs and her vagina. He put his fingers to his lips and made the sound 'shush.' C was very frightened and ran out of the room. Her mother heard her and came to the landing where she shouted for C's stepfather. The applicant shoved her stepfather and C's stepfather dragged the applicant downstairs and restrained him until police arrived. The applicant was intoxicated, however, he had entered the house through a window in the living room, had removed his trousers and underpants at the bottom of the stairs folded them in a pile before climbing the stairs and entering C's bedroom. He did not attempt to enter any other bedroom.

[3] The applicant, when interviewed, stated that he had no recollection of the incident and was intoxicated. In his Defence statement he denied that he trespassed at C's house, denied that he had trespassed with the intention of committing any sexual offence and denied sexually assaulting C. At trial he did not deny that he had entered the house but maintained that he did not enter the house with the intention of committing a sexual offence or that he sexually assaulted her. He also maintained at trial that he had no recollection of the incident due to his level of intoxication. Counsel contended at trial that by reason of the level of his intoxication he was incapable of forming the necessary intent. The jury unanimously convicted him on both counts.

Previous convictions

[4] The defendant had 12 previous convictions including one offence of burglary. There were no previous sexual offences.

Victim Impact

[5] Victim statements were provided by C and her mother. Her mother described the family having to move home due to the offences and the fact that the family were very affected by it. She stated that the family did not feel comfortable returning to the relevant area.

[6] C described that she no longer felt safe being alone and had to cut off her previous life when they left the area. She stated that she was having nightmares and was angrier than any child should be.

Grounds of appeal

[7] The applicant argued that he should be granted leave and that the appeal be allowed on the basis that the sentence was wrong in principle on the basis that:

- It was wrong in principle to impose disparate sentences for Counts 1 and 2, given that the 'principal and more significant offending' was at Count 2.

- The sentence on Count 1 was manifestly excessive given that the sexual assault was "at the lower end" of offences usually seen in the Crown Court.

- The Court wrongly penalised the applicant on account that he had contested the case and cross-examined in such a way that it was suggested C was not telling the truth.

- It was wrong in principle to take into account culpability and harm but not take into account the level of risk posed by the applicant to society.

Consideration

[8] We consider that the judge was entitled to view count 1 as the headline offence. One must bear in mind the gravity of the nature of that offence. This was a conviction which was reached after a four day trial in which the jury having heard all the evidence plainly rejected the applicant's account that nothing sexual had happened and that it was simply a drunk man getting into bed and fumbling about. The jury convicted him of trespassing with intent to commit a sexual offence, in other words, he deliberately entered that house with that wicked intent, did so in the very early hours of the morning, having gained access through an insecure window in the downstairs living room. Before he went upstairs, he deliberately removed his clothing, left the clothing neatly at the bottom of the stairs, then went up the stairs and entered the bedroom which contained three young girls, one of whom was the complainant. The applicant got into her bed, effectively naked, put his fingers to his lips to shush her and then proceeded to sexually assault a 13-year-old girl in her own bed, in her own house, in the early hours of the morning. She interrupted him by escaping from the bedroom and alerting her mother.

[9] This was a terrifying ordeal for this young girl and indeed, for her family. The trial judge said:

> "The offending in this case is aggravated in several ways. It took place within the home of the complainant and, indeed, in her bedroom. She was sleeping in bed at the

> time and, therefore, quite clearly in a position of vulnerability. It is also concerning that the complainant could have been deliberately chosen as the defendant went into a bedroom in which quite clearly children slept due to the childlike things being on the outside of the bedroom door and he did not attempt to enter any other room."

[10] The applicant was intoxicated, he says to such an extent that he professed absolutely no recollection of the incident. It is plain that the trial judge entertained some scepticism about his complete inability to recall anything of the incident. Indeed, set against some of the deliberate actions that we have outlined above such total absence of recollection seems curious. The professed lack of recall, however, had the effect of preventing any scrutiny of his actions through him by the professionals engaged in this case or through probing cross-examination by prosecuting counsel as to his motivation and intention.

[11] The violation of this young girl's life and her home has had a devastating impact on her and her family, forcing them to move home and out of the area where this girl had established connections. This was a grave offence, the culpability of the applicant was high and the harm to the complainant and her family has been severe.

[12] We agree with the prosecution that there is no proposition of law that a sentence for a preparatory offence must not exceed the sentence for a substantive offence. We have been referred to no authority in support of such a proposition. As the prosecution observed, in a case where the substantive offence is stopped or interrupted by the complainant running away, it may often be the case that the intention of the preparatory offence may be more serious than the act which actually took place.

[13] The judge who conducted the trial, heard all the evidence and submissions and prepared his charge for the jury, was particularly well placed as the sentencing judge to select the mechanism by which he could arrive at a just and proportionate sentence. The facts of the two cases are inextricably linked and the judge was entitled to pass concurrent sentences but reflect count 2 in the sentence for count 1. Given the gravity of the offence, the high culpability, the serious harm and that he fought the case thereby disentitling him to any discount for a plea, it is unrealistic and unsustainable to castigate the sentence as manifestly excessive or wrong in principle.

[14] Grounds 3 and 4 were not pursued with any particular vigour and we can deal with these quite shortly. It is plain to us on a fair reading of the transcript that the trial judge did not penalise the applicant for contesting the case. As to ground 4, the contention that the trial judge took no account of risk to the public, we consider this unsustainable as well. He made reference to the pre-sentence report and its conclusion on the risk of reoffending. He also mentioned the report of Dr Curran and the fact that the applicant had a settled family life and the fact that he was receiving

professional support. The trial judge plainly considered the risk of harm and, therefore, this ground must also fail.

[15] Accordingly, the decision of the court is that none of the grounds are arguable, leave is refused and, accordingly, we dismiss the application and affirm the sentence imposed.