Neutral Citation No: [2024] NICA 13 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12436** *ICOS No:* **22/92328/A01** *Delivered:* **16/02/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

TF

Mr McConkey (instructed by McConnell Kelly Solicitors) for the Appellant
Mr McAleer (instructed by the PPS) for the Crown

Before: Keegan LCJ, Treacy LJ and McBride J

Ex Tempore

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

We have anonymised the appellant's name to protect the identity of the complainants and so this will appear as the cypher TF.

[1] The court can give a ruling in this appeal today. I will summarise the ruling of the court.

[2] The appellant was sentenced to a total determinate sentence of 18 months' imprisonment split equally between custody and licence by Her Honour Judge Bagnall ("the judge") on 12 September 2023 for 10 offences against his four children. These were eight common assaults and two specimen offences of cruelty to children.

[3] I will not describe all of the circumstances of this offending save to say it presents a sorry and very concerning picture of abuse of children over a period spanning nearly 10 years. It includes punching, kicking, stamping on children, throwing implements at them, humiliating them and use of a belt.

[4] The sentence imposed was a six month determinate custodial sentence on each of the common assault charges and 18 months' determinate custodial sentence

on the cruelty charges, all to be served concurrently. Leave was granted by the single judge on a net point relating to totality because the appellant had been sentenced to an 18-month probation order in June 2021 for older offences and a three-year suspended sentence was also live.

[5] The prosecution has helpfully explained that the sentencing exercise in June 2021 was for offending that post-dated the sentences we are dealing with. It related to other concerning offences of a domestic nature including threats to kill (three offences) common assault, harassment, improper use of electronic communications and possession of an extreme pornographic image. The victim in that case was the estranged wife of the appellant, also mother of the children at issue in the sentencing we are dealing with.

This appeal

[6] The appeal in this case really boils down to an alleged failure in sentencing on the part of the judge given that there was a successful completion of probation by the appellant for the June 2021 offences and some evidence in terms of medical circumstances and, as I have said, a totality point is now raised.

[7] The appellant's skeleton argument defines the point crisply as follows - "Insufficient weight was given by the judge to the appellant's post offence rehabilitation evidence by probation completion."

[8] In support of the appeal reliance is placed upon two cases, *R v Duporte* (1980) 11 Cr App R (S) 116 and *R v Crowe* [2003] NICA 38. However, the principle found in those cases is if a first sentencing court granted probation and a second court was faced with a person on probation, a sentencer should not ordinarily intervene to upset the course of a probation order. This line of authority is not directly applicable as the probation order had completed, although we accept, as Mr McConkey has urged us to, that the fact of a successful completion of probation may be taken into account. Much, of course, will depend upon how the pre-sentence report reads and what it appears, if any, the appellant has learned from the completion of a probation order.

[9] In our view, the case therefore really comes down to a question of the weight to be given to mitigation, given successful completion of probation and other personal circumstances. The case of *R v Dunlop* [2019] NICA 72 is drawn in aid in this court. In that case the Court of Appeal found compelling evidence favouring a constructive non-custodial option. The question is whether that principle should apply here.

[10] The evidence in this case which the appellant wishes to raise is found in a pre-sentence report and neuropsychology report from a Dr Johnson. We ask the question, what do these sources tell us?

[11] The pre-sentence report points out that the appellant does not pose a risk of serious harm. It also points out that the appellant has said that he is sorry for the offending and wants to make amends. However, of high significance is that the appellant also denies his involvement in a number of the offences and, in fact, blames the victims, the children, for some of the offences, particularly one of the young boys. To quote he said to the probation officer that "he had never laid a finger on those weans." He also blames his misuse of alcohol. The report is quite clear that he has not taken full responsibility for the offending.

[12] Dr Johnson's report refers to domestic violence in his background which was self-reported by the appellant. However, as Lord Justice Treacy has pointed out in this court, that is inconsistent with the pre-sentence report which refers to a happy childhood. We cannot take this into account. There is a complex medical history including brain injury and strokes, some mental health difficulties, alcohol and drug issues which the sentencing judge did take into account and which we also consider of relevance. It is also of note to us though that the appellant did not accept his index offending to the neuropsychologist either. The expert recommends psychological work and that the appellant remains abstinent from alcohol.

[13] We were told that the appellant can function in the community, has a new partner and can engage in some work which is loosely described as selling cars.

The sentence

[14] `The sentencing principles in this area have not really changed since the Court of Appeal dealt with cruelty to children cases in the case of *R v Mitchell* [2005] NICA 30. There is a serious need to punish and deter in these types of cases. As a matter of principle immediate custody is almost always inevitable absent exceptional circumstances. As another Court of Appeal case, *R v W* [2014] NICA 71, stated, sentencing in cases of child neglect necessitate a careful consideration of the entire factual context and no two cases are the same.

[15] Turning then to the sentencing remarks of the judge which we have read, it is clear that the judge considered all the factors in this case including the aggravating and mitigating factors. She also rightly, in our view, described this case as one of high culpability and of high harm.

[16] We pause to observe the issue of harm in this case is stark. This is amply evidenced in the reports from Dr Curran on three of the children. Without reciting the entire narrative in those reports it is clear that these children have suffered greatly, they have missed school, some of them have serious mental health issues, they have had exacerbation of their asthma. They are also terrified of their father, the house has had to be alarmed where they live, they have had difficulty sleeping and one particular incident which is striking is that the female child victim was so terrified of coming across her father in the community that she suffered a panic attack and had to be hospitalised.

[17] The lasting impact of this child abuse on all of the children is at a very high end. It is indicative of a catalogue of abuse perpetrated against children over years. There is, understandably, and inevitably as a result of this, no contact with the children and that seems to us to reflect their views and is something that should be taken into account. The appellant's insight in relation to this will need to be examined.

[18] The judge was asked to consider the probation report and the arguments about a non-custodial option and the arguments about rehabilitation within this framework. The crux of her decision is found in a passage in her ruling which reads:

> "While I recognise the positive steps taken by the defendant, I am also mindful of his reluctance to accept his offending behaviour when interviewed by probation for the pre-sentence report. This indicates to me that the defendant has limited, if any, insight into the suffering he has caused to his children and the import of his behaviour on their emotional development."

[19] In our view, the judge was absolutely correct on this and in her overall assessment of the case which we find irreproachable. In all of the circumstances of this case, we could not contemplate interfering with the sentencing decision that was reached. In summary, this was a high harm, high culpability case. Secondly, if the appellant had been sentenced for all offences together, that is the offences against his wife and children, he would clearly have faced a long sentence of imprisonment. The totality argument is therefore not an argument that can succeed in this case. Thirdly, the need for proper punishment and deterrence in this case clearly outweighs any potential for rehabilitation. The personal mitigation argument is, therefore, not one that is persuasive to us in the overall circumstances of this case.

[20] Finally, we wish to say that offences of this nature are extremely serious, perpetrated as they are in family homes against children. Perpetrators cannot think that this behaviour is normal or tolerated in our society. In addition, we now have an appreciation of the long-lasting effects of childhood abuse as this case demonstrates. We only hope that with the help of professional input which all of the complainants will need and should get for some time, they may be able to reconstruct their lives. It is to their credit that they have bravely spoken out against their father's cruelty. They can also seek independent legal advice about adequate recompense.

Conclusion

[21] Neither totality nor rehabilitation arguments prevail in this case. The sentence was neither manifestly excessive nor wrong in principle. Dr Curran has, in one of the victim impact statements, aptly summed up what has happened in this

case in terms that "the children have been traumatised by the systemic and recurrent dysfunction over many years that has been at the hands of their father."

[22] As a result the judge was quite entitled to impose the prison sentence that she did and so we affirm that sentence and dismiss the appeal.