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Judgment: approved by the Court for handing down | *Delivered:* **31/10/03**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 16 OF 2003) (JOHN ANTHONY DEERY)

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Before: Carswell LCJ, Campbell LJ and Weir J

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WEIR J

[1] The offender, born on 18 August 1959 and therefore now aged 44 years, pleaded guilty on 12 May 2003 before Her Honour Judge Philpott QC sitting at Londonderry Crown Court in a first Indictment to thirteen counts of indecent assault against females and in a second Indictment to one count of indecent assault against a female. The offences relate to five separate victims, all of whom were children at the time of the offences. The matter was adjourned for sentence and on 2 July the Judge sentenced him to the following terms of imprisonment: 18 months on each of counts 1 to 3, 15 months on each of counts 4 to 9, 2 years and six months on each of counts 10 to 13 in the first indictment and to 5 years on a single count in the second indictment. All sentences were ordered to run concurrently, the effective sentence of imprisonment therefore being one of five years. In addition the offender was made subject to licence under Article 26 of the Criminal Justice (Northern Ireland) Order 1996 and ordered to be placed upon the Sex Offenders' Register for an indefinite period.

[2] By reason of the dates when they occurred the maximum sentence that could by law have been imposed in respect of each of counts 1 to 9 in the first Indictment is one of 2 years' imprisonment and on the remaining counts in both indictments one of 10 years' imprisonment.

[3] The Attorney General sought leave to refer the sentences to this court under section 36 of the Criminal Justice Act 1988 on the ground that they were

unduly lenient. We gave leave at the hearing before us on 26 September 2003 and the hearing proceeded.

[4] Counts 1 to 3 relate to J who was born in 1967. They cover the period between June 1975 when she was 8 and June 1984 when she became 17. The offender began by indecently assaulting J when she was asleep at home in bed by touching her on and inside her vagina. His subsequent frequent assaults included pulling down her pants or trousers and touching her vagina, putting her hand on his penis while he masturbated, putting his penis both in and outside her mouth and putting his tongue around her vagina and bottom.

[5] Counts 4 to 8 relate to B who was born in 1971 and the youngest child of her family. They relate to the period between May 1976 when she was 5 and May 1983 when she became 12. The first offence consisted of the offender touching B on the vagina while she was sitting on his knee watching television in the darkened living room of the family home. On subsequent occasions when B was in bed the offender came to her room and reached under the bedclothes to touch her private parts. On one occasion he accosted B in the hallway of the house, put her hand on his penis and forced her to masturbate him and on another, while she was babysitting for the offender and his girlfriend, he returned home alone, removed B's skirt and pants, touched her around her vagina with his hand and his penis and only desisted when he was disturbed by a caller at the door.

[6] Count 9 concerns CM who was born in 1980. She was indecently assaulted on one occasion when, aged 6 or 7, she was staying at her grandmother's home. CM had dressed for bed and was alone with the offender. As she left the bathroom the offender brought her back in where he touched her vagina for some minutes before he dropped or removed his trousers, lifted CM and swung her to and fro for a period touching her vagina against his penis.

[7] Counts 10 and 11 relate to E who is the younger sister of a then girlfriend of the offender born in 1978. They relate to the period between February 1990 when she was 12 and 1993 when she was 15. On various occasions the offender kissed E and grabbed her bottom and on one occasion when she was babysitting for her sister came to the room where she was lying down and rubbed his penis against her and touched her breasts and bottom.

[8] Counts 12 and 13 concern A who is a niece of the offender born in 1990 and the victim most recently assaulted. The counts cover the period from April 1998 when A was 8 to April 2002 when she was 11. The offender made a practice of giving A chocolate for running errands and on two occasions while A was visiting his home he told her to lie face down and to remove her trousers and pants whereupon he lay on top of her moving his penis against her. On one of these occasions the offender removed his trousers.

[9] The final count, that on the separate indictment, relates to CD, a daughter of a cousin of the offender. She was born in 1983. The assault took place when CD was 6 or 7 on an occasion when she called for her friend, the offender's daughter, at his home. The friend was not at home but the offender invited her in. Under the pretext of playing a game the offender invited CD upstairs where he brought her to a bedroom and made her lie face down on a bed. He then pulled her trousers and pants down and pulling her legs apart sat astride her. She felt something hard being pushed inside her vagina and then pushed in and out and remembers that the pain was awful. At the pre-sentence hearing Miss Orr, Counsel for the Prosecution, that the Crown had accepted a plea of guilty to indecent assault rather than rape because CD was unable to say that it was the offender's penis that had been inserted into her vagina.

[10] The offender denied the charges at interview and pleaded not guilty to all the counts in the first indictment when arraigned on 19 December 2002. He applied to be re-arraigned on 12 May 2003 when he pleaded guilty to the counts in the first indictment and to the count in the second indictment which had been presented for the first time on that date.

[11] Victim Impact Reports have been prepared on each of the victims from which it is clear that they have all been seriously affected by the assaults and most have had counselling for their effects. In some cases this treatment continues and the prognosis for all of them is guarded. They were relieved that the offender's ultimate acceptance of guilt relieved them of the strain of giving evidence in court.

[12] In relation to the offender, pre–sentence reports were obtained from the Probation Service and from a Consultant Psychiatrist. His criminal record began in 1970 and he has a history of violence with convictions for assault, possession of an offensive weapon, issuing threats to kill, causing a bomb hoax and other criminal damage and public order offences. There is also a considerable record of road traffic offences. There are no previous convictions for sexual offences. The offender is a man of limited intellectual capacity who suffers from Alcohol Dependence Syndrome and what the psychiatrist, Dr Robertson, describes as a Dyssocial Personality Disorder. He made a suicide attempt while on remand in prison and Dr Robertson considers that he will continue to be a suicide risk while serving his sentence.

[13] The Probation Officer concludes that the persistency of the defendant's offending, his failure to address many of his offending related factors to date and his need for treatment in relation to his sexual offending mean that he presents a significant risk of re-offending and that he could present a risk of harm to female children if left unsupervised in his company. She states that he has consistently failed in the past to avail of support from agencies such as

Probation, Community Mental Health Services and Northlands and questions his present motivation to change.

[14] In paragraph 4 of the reference the Attorney General set out what he contends are the aggravating factors:

> "(a) The youth, innocence and vulnerability of the victims.
>
> (b) The number of victims.
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> (c) The protracted period over which the offences were committed.
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> (d) The abuse of trust and responsibility.
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> (e) The serious nature of the indecency involving oral sex, masturbation and digital penetration.
>
> (f) The impact of the offences on the victims."

[15] In paragraph 5 the Attorney General conceded that the offender's pleas of guilty were a mitigating factor.

[16] Mr Morgan QC submitted on behalf of the Attorney General that while the individual sentences on each count might not be unduly lenient they ought not to have been imposed concurrently as the effect had been to produce an effective term that was unduly lenient. Equally to have imposed them all consecutively would have produced too long a term. He submitted that the sentencing court ought to have made some of the sentences concurrent and others consecutive in order to achieve an effective term of imprisonment appropriate to the circumstances of the case as a whole. He acknowledged that the fact of the offender's pleas of guilty had had a very beneficial consequence for the victims but allowing for that while having regard to all the aggravating factors the effective sentence was plainly unduly lenient.

[17] McCrory QC on behalf of the offender submitted that while the sentence imposed was lenient it was not unduly so. He drew attention to a passage at page 15 of the transcript of the Trial Judge's sentencing remarks from which it appeared that she was influenced by the evidence of the offender's mental state, the problems that custody would pose for him and the risk of suicide. Mr McCrory acknowledged that the decision of this court in *R v M* delivered on 13 December 2002 made it difficult for him to resist the

proposition that in a case of this nature sentences might be made consecutive. His submission however was that in this particular case, having regard to all the circumstances both of the offences and of the offender, the effective sentence of five years imprisonment was not unduly lenient and should not be disturbed. He did not challenge any of the aggravating factors put forward on behalf of the Attorney General and set out above.

[18] This court considers that the effective term of imprisonment imposed in this case was manifestly unduly lenient. These offences involved five different children against whom the offender waged a sustained campaign of repeated indecent assaults stretching over a period of more than twenty five years. Mr McCrory was plainly right to acknowledge that this is not a case comparable to *R v Magill* [1989] 4 NIJB 81 where the offences had involved one girl over a period of two to three weeks and in which this court therefore held that concurrent sentences were appropriate. In *R v M* where the offences concerned one child and occurred over a period of months we held that the sentencing judge would have been quite entitled to impose consecutive sentences on each of three counts as the appellant's behaviour amounted to a course of conduct. That principle clearly applies with much greater force to the facts of the present case.

[19] The gravity of this case is such that we consider that the appropriate sentence, even on a plea of guilty, would have come very near the maximum. Taking into account the element of double jeopardy, we propose to make the sentence on the second indictment run consecutively to those imposed on the first indictment, the latter sentences being concurrent with each other. The effective sentence will therefore be seven and a half years. We quash the sentences imposed by the judge and substitute those which we have specified.