Neutral Citation no. [2003] NICA 41 | *Ref:* **CARC4019**

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 9 OF 2003)

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Before: Carswell LCJ, Campbell LJ and Weir J

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CARSWELL LCJ

[1] The offender, a man now aged 54 years, was convicted after a trial before Mr Justice Girvan on two counts of rape and six of indecent assault committed on one girl, and on four counts of indecent assault on another. On 16 May 2003 at Downpatrick Crown Court the judge sentenced him to nine years' imprisonment on each of the rape charges and three years on each of the indecent assault charges, to run concurrently, the effective sentence therefore being one of nine years. The Attorney General sought leave to refer the sentence to this court under section 36 of the Criminal Justice Act 1988, on the ground that it was unduly lenient. We gave leave at the hearing before us on 26 September 2003 and the hearing proceeded.

[2] The offender was charged on three counts with the rape of J, who was then between 17 and 18 years of age, and on six counts with indecent assault against her during the same period. He was found guilty on two of these rape charges and on all six counts of indecent assault. He was charged on one count with the rape of C in the summer of 2001, when she was aged 17 years, and on four counts with indecent assault against her in 2000 and 2001. He was found guilty of the indecent assault charges but not guilty of the rape of C.

[3] The material facts were set out in paragraph 4 of the reference:

> "(a) `Families Matters' is an organisation which acts as a broker for residential institutions finding homes for young persons with

special needs, often during holiday periods. The offender's wife became registered as a care worker with this company in 1999;

(b) Both J and C, the victims, were teenage children each of whom suffered from severe learning difficulties and each of whom was placed with the offender and his wife for fostering during holiday periods;

(c) J was born on 25th April 1993 and C on 11th February 1984;

(d) J started spending time at the offender's home from October 1999 and thereafter spent all her school holidays with the offender's family at their house in Donaghadee;

(e) The offender first started to abuse J during the Easter holidays in 2000. He took her to her bedroom, closed the curtains, told her to take her clothes off, took his own clothes off, touched her around the vagina and rubbed his penis against her vagina;

(f) This happened on a number of occasions during those Easter holidays;

(g) The pattern was repeated during the summer holidays of 2000 but on this occasion there was partial penetration which formed the basis for the conviction on the first count of rape. The victim described how the offender tried to put his penis inside her but when he got in a bit it hurt her and she cried out and pushed him away. He said to her that one day he would get it into her and that scared her. He told her to keep quiet about what was happening and not to tell his wife because, if she did, J would not get to see her again;

(h) Partial penetration was achieved on approximately three other occasions during

those holidays which formed the basis of the second rape conviction;

(i) Each time the offender touched the victim's vagina he put his finger inside her and moved it in and out;

(j) This activity in respect of J continued during the holidays until August 2001;

(k) C went to live with the offender's family in 7 June 2001;

(l) Some weeks after her arrival the offender touched her on the breasts and on another occasion sucked her breasts;

(m) On another occasion he put his finger inside her vagina and on other occasions touched her legs and her private parts;

(n) He threatened her that she would be returned to Muckamore if she told anyone;

(o) The offender denied the allegations and has continued his denial following conviction."

[4] The aggravating factors were set out in paragraph 5 of the reference:

" a. the offender was in a position of trust in respect of the victims and in a position of power over them;

b. there were two victims;

c. both victims were particularly vulnerable because of the mental impairment and both were young at the time of the offences;

d. the rapes and indecent assaults were part of a deliberate practice of abuse carried out systematically over a period of years;

e. the victims were targeted, groomed and exploited by the accused;

f. the nature of the indecent assaults was serious involving direct contact between the genital area of the offender and the genital area of the victims and digital penetration;

g. each of the victims was threatened with unpleasant consequences if they disclosed the abuse;

h. each of these victims had particular difficulty in giving evidence in light of their mental impairment.

i. the victims were distressed by their experience both at the time and in giving evidence at trial.

j. The offender has shown no remorse."

The sole mitigating factor as set out in paragraph 6, was the fact that the offender had no criminal record.

[5] The probation officer who prepared the pre-sentence report expressed the opinion that the offender must be regarded as presenting a high risk of harm to the public. Since he continued to deny his guilt, his propensity to reoffend could not be measured. He was unsuitable to be considered for a custody probation order, but would need monitoring and surveillance on release from prison to ensure that he has no future contact with vulnerable persons.

[6] In his sentencing remarks the judge stated that the offences against the two victims, who suffered from significant mental impairment and had been placed in the offender's house for respite care, constituted a grave abuse of trust and power on his part, as he targeted, groomed and sexually exploited the two girls in an entirely corrupt way. He discussed the cases of *R v Millberry* [2003] 2 All ER 939 and *R v Billam* [1986] 1 All ER 985 and referred to the fact that the Northern Ireland generally start from a higher base in sentencing for sexual offences. He concluded by imposing a sentence of nine years' imprisonment on each rape count and three years on each indecent assault count, to run concurrently. He also ordered that the offender when released from prison should be subject to the licence and supervision provisions of Article 26 of the Criminal Justice (Northern Ireland) Order 1996.

[7] It was submitted on behalf of the Attorney General that the sentence was unduly lenient. Having regard to the aggravating features it failed to reflect adequately the gravity of these offences, the need to deter others, the

obligation to protect the most vulnerable members of society, the grave public concern and revulsion aroused by this type of offence and the importance of maintaining public confidence in the sentencing system.

[8] Mr PT McDonald QC submitted on behalf of the offender that the offences were opportunistic and the offender posed no threat to society or to women in society as a whole. The sentences were not unduly lenient in the sense set out by Lord Lane CJ in *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41 at 45-6:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature."

[9] In *R v Millberry* [2003] 2 All ER 939 the Court of Appeal reviewed the levels of sentencing for rape cases and accepted the advice of the Sentencing Advisory Panel contained in its document published in May 2002. In its advice the Panel suggested that –

> "there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the *degree of harm to the victim;* the second is *the level of culpability of the offender;* and the third is *the level of risk posed by the offender to society*."

The Panel proposed a starting point of five years in a contested case where there were no aggravating or mitigating features. It suggested that it should be eight years where there were present one or more of a number of aggravating features which it set out. Those material to the present case included in the list are (a) the position of responsibility of the offender to the victim (b) the rape of a child or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability (c) a history of sexual assaults by the offender against his victim. In relation to

repeated rapes, in particular those involving more than one victim, the Panel said at paragraph 36:

> "36. The factors identified above as aggravating the seriousness of an offence, including those which indicate a starting point of 8 years, reflect either the *impact of the offence on the victim,* or the *level of the offender's culpability*, or both. Factors reflecting a high level of *risk to society*, in particular evidence of repeat offending, will indicate a substantially longer sentence. The Panel endorses the 15 year starting point in *Billam* for a campaign of rape, and proposes that it should apply to cases where the offender has repeatedly raped the same victim over a course of time, as well as to those involving multiple victims."

[10] These starting points were specifically approved by the Court of Appeal in *R v Milliberry* (see paragraphs 22 to 26 and 32 of its judgment). Mr Morgan also drew to our attention the recent case of *Attorney General's References (Nos 120, 91 and 119 of 2002)* [2003] 2 All ER 955, in which the court observed in paragraph 19 of its judgment that where a court imposes concurrent sentences for separate offences which could justifiably be made consecutive, it may properly increase the level of the overall sentence to take account of the principle of totality. Totality, in other words, is not merely a reducing factor when considering the effect of consecutive sentences; it may increase the length of sentences made to run concurrently in order to bring the total to a level proper to reflect the gravity of the offences.

[11] One should also bear in mind that in *R v McDonald* [1989] NI 37 this court confirmed the trend visible in the sentencing patterns in this jurisdiction that the level tended to be higher than in England and laid down a starting point of seven rather than five years for a contested case where there were no aggravating or mitigating features. While this differential is not to be applied rigidly or in a mathematical fashion throughout the range of sentencing, it should be present to the minds of sentencers when considering the appropriate sentences in cases in the higher brackets.

[12] We have to agree with the submission presented on behalf of the Attorney General that this case presented a number of very disturbing features. They are cogently set out in the list of aggravating factors listed in the reference and we need not repeat them. Suffice it to say that we are perturbed that this offender took advantage in a systematic way of two such vulnerable young members of society entrusted to the care of himself and his wife, in contesting the case subjected them to a degree of strain and distress which must have borne very hardly on these girls and has shown no remorse

for his acts. The need for deterrence as well as retribution must be substantial.

[13] The sentences of nine years for the rapes were not very far above the level appropriate to a single rape with no aggravating features and no concurrent sentences for indecent assaults. We cannot escape the conclusion that they are unduly lenient and should be increased. When sentences for indecent assaults are made concurrent with sentences for rape, there may be a tendency to fail to place them at the level which they would attract if they stood on their own, and this appears to have been the case here. Since they may be relied on as precedents in submissions placed before sentencers in other cases, we think that they should always be fully realistic sentences in their own right. We do not consider that sentences of three years are adequate to reflect the gravity of these continued indecent assaults and we shall quash them as unduly lenient.

[14] We gave some consideration to the question whether a life sentence would be the proper disposition to protect others against the offender, but concluded that the risk fell short of the level required for an indeterminate sentence: see *R v McDonald* [1989] NI 37 at 45-6, per Hutton LCJ. We consider, however, that the case merited a substantial determinate sentence. In our judgment the appropriate sentences on the rape counts would have been of the order of fourteen or fifteen years, when the indecent assault sentences were made to run concurrently. We consider that proper sentences for the indecent assaults, if taken on their own, would have been seven years. Taking into account the element of double jeopardy, we shall quash the sentences imposed and substitute terms of imprisonment of twelve years on the rape counts and five years on the indecent assault counts, all sentences to run concurrently. We do not consider that a custody probation order would be appropriate in a case of this type and confirm the order made by the judge under Article 26 of the 1996 Order.