IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (No.1 of 1989)

HUTTON LCJ

This is a reference by the Attorney General to the Court of Appeal under section 36 of the Criminal Justice Act 1988 of a sentence which he considers to be unduly lenient.

Section 36(1) provides:

"36.-(1) If it appears to the Attorney General -

(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and

(b) that the case is one to which this Part of this Act applies,

he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may -

(i) quash any sentence passed on him in the proceeding; and

(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him".

The reference arises in this way. At Belfast Crown Court on 12 September 1989 the offender pleaded guilty to one count of rape and to 5 counts of gross indecency with or towards a child. He was sentenced to 5 years' imprisonment on the count of rape and to 2 years' imprisonment on each of the 5 counts of gross indecency and all the sentences were ordered to run concurrently. The reference by the Attorney General relates only to the sentence of 5 years' imprisonment for the offence of rape.

The facts giving rise to the case were as follows. The offence of rape and the offences of gross indecency were committed against a little girl L who was born in 1982 and she was aged about 6½ years at the time of the offences. The offender was an unmarried man of 27 years who had been a friend of L's parents for about 10 years'. He often visited L's parents in their house and on occasions L visited the house of the offender's mother which was the offender's home and which was in the same street as her house.

The first act of indecency was committed in November 1988 when L was alone with the offender in his mother's house and the offender exposed his penis to her. The second, third and fourth acts of indecency were committed in December 1988 in the house of the offender's mother when the offender requested L to pull his penis to masturbate him and she did so.

The fifth offence, which was the offence of rape, took place in L's house at the start of January 1985. L's parents were out of the house and the offender was alone in the house with L. In his written statement to the police the offender described the rape as follows:

"I went upstairs to the toilet. When I had finished I heard L in the next room which was her father's bedroom. I went into the room and asked L what she was doing. She was standing on the bed. I went over to her and pulled her elasticated trousers and pants down to her knees. I then took out my penis and with L facing me on the bed I put my penis between the top of her legs at the vagina and pushed my penis in and out between her legs until I felt myself coming. I did not at any time intend having sexual intercourse with L but with the medical evidence you have told me I suppose my penis could had slightly entered the vagina as I made these thrusting movements. As I said when I felt myself coming I pulled away from L. I can't really remember what L reactions were when I had my penis between her legs. At no time did I wish to harm her in any way. When I had finished with L she pulled up her own pants and trousers and went downstairs".

The final act of indecent conduct took place on 10 February 1989. The offender was again in L's house and was downstairs with L's mother about 9.00 pm. He went upstairs to the lavatory and then went into L's bedroom. He then pulled out his penis and showed it to L. L told him to put it away, which he did, and she pulled up the zip of his trousers. When he came downstairs L's mother asked him why he had been in L's room. The mother went up to L's room and then came down after a couple of minutes and accused the offender of exposing himself to L and ordered him out of the house.

On 12 February 1989 L was examined by Dr Janet Jefferson. On examination Dr Jefferson could see no sign of the hymen and there was a clear view of the vaginal entrance. In Dr Jefferson's opinion these findings were consistent with trauma from sexual intercourse as related to her by L.

L was seen by Dr McAuley, a consultant child psychiatrist, about 17 April 1989. In his report Dr McAuley states that L's mother had told him that L had exhibited a number of symptoms since the discovery of the sexual abuse in February 1989. These symptoms were 3 or 4 nightmares in the weeks immediately after the discovery in which she dreamt that people were coming to take her away. Secondly, L had had several episodes of bedwetting and, finally, L had been more moody and sulky than usual. The nightmares and bedwetting had ended after a few weeks

although the moodiness and sulkiness, which did not constitute a severe problem, had persisted. In his conclusion Dr McAuley stated:

"On balance at this stage in view of the child's reasonable adjustment prior to the event and the family's sensible handling of the events I do suspect that she will develop normally and will not suffer any marked psychiatric or psychological future consequences".

The offender was arrested by the police on 13 February 1989 at 8.30 pm and was taken to a police station in Belfast, where he arrived at 9.20 pm. He was interviewed between 10.40 pm and 1.20 am on 13/14 February 1989. At the commencement of this interview it was explained to him that allegations had been made to the police in relation to advances of a sexual nature which he had made towards L, and that the results of a medical examination tended to support the allegation that the child had been sexually interfered with. The offender was then cautioned. When asked if he had any comment to make in relation to having made a sexual advance to L in her bedroom on the evening of 10 February 1989 the offender said:

"I will refute your allegations in front of a solicitor".

Throughout the remainder of the interview the offender made no admission of sexual misconduct in relation to L.

The offender was interviewed for a second time between 10.00 am and 11.00 am on 14 February 1989. In that interview he made no admissions and he said to the police:

"I have already told you I'll say what I have to say in front of a solicitor".

The offender saw his mother in the police station at about 11.00 am. After he had seen his mother he had a further interview with the police in the course of which he admitted indecent conduct towards L.

Following further interviews with the police the appellant made a written statement which commenced at 9.35 pm on 14 February 1989 in which he admitted the 6 offences charged in the indictment. He ended his written statement with these words:

"I don't know why I did these disgusting things to L a little girl who I am really fond of and I really am sorry I let myself and my mother and (L's father and mother) down. I am glad I could speak to you about all this because I know I need some sort of help".

The judgment of the Court of Appeal in England in the Attorney General's Reference (No.4 of 1989) is not yet reported in the law reports but this court has been furnished

with the report in The Times of 11 November 1989. In that report Lord Lane CJ states with reference to the correct approach to section 36:

"The first thing to be observed was that it was implicit in the section that the Court of Appeal could only increase sentences which is concluded were unduly lenient.

It could not, their Lordships were confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased - with all the anxiety that that naturally gave rise to - merely because in the opinion of the Court of Appeal the sentence was less than their Lordships would have imposed.

A sentence was unduly lenient, their Lordships would hold, where it fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

In that connection, regard had of course to be had to reported cases and in particular to the guidance given by the Court of Appeal from time to time in the so-called guideline cases.

However, it had always to be remembered that sentencing was an art rather than a science; that the trial judge was particularly well placed to assess the weight to be given to various competing considerations; and that leniency was not in itself a vice. That mercy should season justice was a proposition as soundly based in law as it was in literature.

The second thing to be observed about section 36 was that, even when the Court of Appeal considered that the sentence was unduly lenient, the court had a discretion as to whether to exercise its powers".

We respectfully agree with that statement and we would propose to adopt that approach in this jurisdiction where the Attorney General is given leave to refer a sentence for consideration by this court.

In November 1988 this court laid down guidelines for sentencing in rape in its judgment in R -v- McDonald, R -v- Taggart and R -v- Farquhar (not yet reported). In its judgment on those appeals, this court agreed with Lord Lane's summary of aggravating or mitigating features in a case of rape set out in R -v- Billam [1986] 8 CAR (S) 48 at 50 and 51. Then this court stated at 4:

"We ... consider that in this jurisdiction for rape committed by an adult without any aggravating or mitigating features, a sentence of 7 years' and not 5 years' should be taken as a starting point in a contested case".

In its judgment the court considered the proper level of sentencing where rape was committed against a little girl and this court said at 20:

"Rape against a little girl is a very grave offence in any circumstances and must carry a severe sentence. In law the slightest penetration by the penis of the accused constitutes rape".

No case is exactly similar to another case, but nevertheless the circumstances of the case against Farquhar bear a considerable similarity to the circumstances of the present case, because Farquhar, who was a man with a clear record, pleaded guilty to one count of rape, 4 counts of indecent assault and one count of indecent conduct against a little girl aged between 8 and 9, who was the niece of his wife, and the offences appeared to have been committed within a period of a few weeks.

In relation to Farquhar's appeal this court stated at 21:

"The total sentence of 20 years' passed on Farquhar was clearly manifestly excessive and far exceeds any sentence in any comparable case in the many authorities helpfully cited to us by counsel. Taking account of the appellant's plea of guilty and the particular facts relating to the one offence of rape which he committed we would have thought that the appropriate total sentence on the appellant would have been a little less than 10 years' if it had not been for the factors to which we now refer. But taking account of the indications found on examination of the little girl by the police doctor to which we have referred earlier in this judgment and which appear to be attributable to the acts committed by the appellant, and taking account also of his perverted offence committed with the screw driver, we consider that the appropriate total sentence on the appellant should be 10 years'. Therefore we reduce the sentence imposed by the learned trial judge for the offence of rape on the first count from 12 years' to 10 years' and we direct that all the sentences should be concurrent, so that the total sentence will be 10 years'".

We consider that Mr Kerr QC, counsel for the Attorney General, was correct in submitting that there were a number of aggravating features in this case which would have operated to raise the starting point for sentencing above 7 years if the case had been a contested one. We agree with Lord Lane when he stated in Billam's case that where any one or more aggravating features are present, the sentence should be substantially higher than the figure suggested as a starting point. In this case the aggravating features were that:

(1) The victim was very young.

(2) The offender was in a position of trust in relation to L and her parents in the sense that he was a family friend whom the parents were entitled to trust in relation to their little daughter. Mr Donaldson QC, for the offender, pointed out that the offender was not in the same position of trust or responsibility towards the child as would be a step-parent or a guardian or a school teacher. This is correct. But nevertheless the court considers that it is fair and reasonable to regard the offender as having been in a position of trust in respect of L, and indeed it was because her parents trusted him and thought that L was safe with him that he had the opportunities to commit the criminal acts against her.

(3) The act of rape which the offender committed against L was not one isolated act of sexual abuse in which he succumbed to temptation. He engaged in a number of disgusting acts of sexual indecency towards the little girl prior to the act of rape, and after he had committed the act of rape against the little girl in January 1989 he committed a further act of sexual indecency against her in February 1989 which led to the discovery of his criminal conduct.

Therefore if the offender had contested the case against him we consider that in accordance with the guidelines laid down in R -v- McDonald and others the appropriate range of sentences must have been considerably in excess of 7 years.

Mr Donaldson submitted that there were a very considerable number of mitigating factors in the case which provided adequate reasons for the judge to impose the sentence of 5 years' for the offence of rape. Mr Donaldson helpfully enumerated these factors as follows although, as not infrequently is the case, there is a degree of overlapping between some of the factors:

(1) The offender's clear criminal record; (2) The offender's good work record; (3) The offender's general good conduct, (4) The relative youthfulness of the offender, (5) The fact that the offender made an early confession to the police and thereafter made it clear at all times that he would plead guilty and did plead guilty, (6) The fact that he made a full and frank confession to the police, (7) The fact that he showed sincere remorse, (8) The fact that he used no force against L and that she was not physically injured apart from the rupture of her hymen, (9) The fact that it appears that L has suffered no real psychological harm, (10) The fact of his own unhappy childhood when he himself was a victim of sexual abuse, (11) The consideration that there appears to be no risk that he will repeat sexual crimes against any other child.

We consider that with the exception of his early indication that he would plead guilty and his plea of guilty at the Crown Court none of these factors relied on by his counsel can be termed mitigating factors in the sense that they should operate positively to cause the court passing sentence to impose a sentence less than the normal range. We consider that it is more accurate to describe these factors as being

factors which the offender can rely on as being non-aggravating factors rather than as mitigating factors. For example, as Lord Lane stated in R -v- Billam at 51:

"Previous good character is of only minor relevance".

The threat of sexual abuse to children in modern society has become so grave and the duty resting on the courts to deter those who may be tempted to harm little children sexually has become so important that severe sentences must be passed on those who commit rape against little children even if before the offence they had had good records and good reputations.

However a plea of guilty should properly result in credit being given to an offender. As Lord Lane stated in R -v- Billam at 51:

"The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested".

There will be exceptional cases, where because of very special circumstances, a judge in passing sentence will be justified in departing from established guidelines and where the Court of Appeal would accordingly not take the view that the sentence was unduly lenient. We think that the facts in the case considered in England in Attorney General's Reference [No.4 of 1989] made it such a case. But we consider that there were no exceptional circumstances in the present case and there was nothing in the judge's remarks in passing sentence to suggest that he considered that there were exceptional circumstances. In imposing a sentence of 5 years' imprisonment the Judge appears to have been persuaded that mitigating factors outweighed the aggravating factors. We do not share that view.

Having regard to the starting point of 7 years' stated in R -v- McDonald and others, to the aggravating features which we have described, and to the absence of real mitigating factors (apart from the plea of guilty) this court considers that the sentence of 5 years' did fall outside the range of sentences which the judge could reasonably have considered appropriate. We would respectfully adopt the words of Lord Lane in Attorney General's Reference [No.1 of 1989] 3 WLR 1117 at 1124 and say "the disparity between the sentence imposed by the judge and that which we consider to be an appropriate sentence is sufficiently great for this court to intervene". Accordingly we grant the application of the Attorney General, quash the sentence of 5 years' imprisonment on the first count for rape and substitute therefore a sentence of 8 years' imprisonment to run concurrently with the sentences of 2 years' imprisonment imposed for the offences of indecent conduct on the other counts.