Neutral Citation no. [2004] NICA 15 | *Ref:* **KERF4146**

Judgment: approved by the Court for handing down | *Delivered:* **30/4/04**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE NUMBER 2 OF 2004
(DANIEL JOHN O'CONNELL)
(AG REF 1 of 2004)

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] The offender, a 51-year-old married man, was arraigned on 17 September 2003 on eight counts of rape, one count of attempted rape and two counts of indecent assault at Londonderry Crown Court and pleaded not guilty to all counts. On 20 November 2003 he was further arraigned on another five counts of indecent assault to which he pleaded guilty. His trial proceeded on that day in respect of the remaining eleven counts and on 1 December he was convicted of eight counts of rape, one count of attempted rape and one count of indecent assault. On 29 January 2004 His Honour Judge Lockie sentenced the offender to a custody probation order under article 24 of the Criminal Justice (Northern Ireland) Order 1996 consisting of 10 years' custody and 2 years' probation in respect of each of the eight rape counts, 5 years imprisonment in respect of the attempted rape and 18 months imprisonment in respect of the indecent assaults, all sentences to run concurrently. 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 and the application proceeded.

Background facts

[2] The sexual abuse that grounded the charges against the offender began in 1979, when he was aged about 26 and his principal victim, was 11 years old. We shall refer to this victim as 'the first victim'. The abuse took place when she came to the offender's house to baby-sit and on other normal social occasions. The offender bought her things that her mother could not afford to buy such as clothes, roller skates and a bicycle. He gave her money. He also offered her the use of a sun lamp that was kept in the back bedroom of his house.

[3] Over a period of 3 years from June 1979 until June 1982 the offender repeatedly raped the first victim. On the first occasion, when she was 11, he talked to her about taking her on holiday to Spain where she would meet boys. He told her that she would need to know about boys and what she was to do with them. He then removed his and her lower clothing and penetrated her. She recalled that it was very painful. It is clear that he ejaculated in her as she noticed this when she later went to the lavatory. Given her age, she had little idea of what had happened to her. A second rape took place in a hallway whilst his wife was upstairs bathing his own two young children. When his wife came downstairs the offender blocked the door with his foot and gave his wife a story about a bird having escaped from a cage. This near detection did not deter the offender from continuing his campaign of rape. On another occasion he asked his victim to roll a condom onto him. She refused and he raped her. The first four counts related to specific incidents of rape and the fifth and sixth counts were specimen charges reflecting the course of repeated sexual assault.

[4] A friend of the first victim, who was approximately the same age as she, used to visit the offender's house with her. The seventh count represents an attempted rape upon this girl. The eight and ninth counts represent specific incidents of rape of this victim. The eleventh count was a specimen count in respect of indecent assaults of an older sister of the first victim that occurred when she was between 11 and 14 years of age between August 1972 and August 1975. The twelfth, thirteenth and fourteenth counts to which the offender pleaded guilty related to admissions in his defence statement where he admitted that he had fondled the first victim's breasts and placed his hands inside her pants and felt her bottom on three occasions when she was 11 and the fifteenth and sixteenth counts related to similar admissions made by him in respect of her friend when she was the same age.

Victim impact

[5] The Nexus Institute produced reports on the first victim and her friend. The latter is said to have been deeply affected by the sexual abuse, which has interrupted her development. "She feels shame, lacks self-esteem and feels grief and anger for what she has lost and how she might otherwise be happier today. [She] feels overwhelmed at times by this loss and will need continuing help to overcome the trauma she has experienced."

[6] The first victim is said to be "deeply disturbed by the sexual abuse, more so than she is able to admit to herself and others. She feels extremely isolated and fearful, her self confidence and natural optimism undermined – this robs her of her established coping strategy … [She] has made every reasonable attempt to seek professional support and restore some sense of control in her personal life. Despite this, however, she remains fearful and will yet have to face some distress in her adult life…"

Personal background of the offender

[7] A pre-sentence probation report prepared by Ms Nicola Barr, probation officer, records that the offender accepted the finding of guilt but only took limited responsibility for the offences. Even after conviction he continued to deny that he had had sexual intercourse with his victims. He also denied grooming them or creating opportunities to abuse them. The reporting officer concluded that the offender could present a risk of re-offending and a risk of harm to underage females if left unsupervised in their company. This risk could be addressed, however, by a suitable period of probation.

[8] The offender has no relevant previous convictions and there is no evidence that he engaged in similar misconduct from the time that the offences involved in these proceedings ended.

Aggravating features

[9] The following aggravating features are present: (i) the victims were young when the offences began; (ii) multiple rapes were committed on two victims; (iii) the abuse was deliberate and determined, and continued over a period of 2 to 3 years; (iv) the victims were groomed with presents and money (v) the offender was in a position of trust; the offences occurred in a house in which the victims had every reason to expect to be safe and, on occasions occurred with the offender's wife and

children being in the house at the same time; (vi) as a result of the offences two of the victims suffered significant psychological damage which may well have been exacerbated by having to give evidence.

Mitigating features

[10] The only mitigating factors are that the offender has no relevant record; that he has expressed remorse, albeit to a limited extent, and that he made admissions in relation to five indecent assaults.

Recent sexual abuse cases in Northern Ireland

[11] *In AG's Reference (No 9 of 2003) (Thompson)* [2003] NICA 41 the offender, a 54 year old man of previous good character, was convicted after a trial on two counts of rape and six of indecent assault committed on one girl, and on four counts of indecent assault on another. The trial judge had 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 offender was found guilty on two charges of rape and on six counts of indecent assault of J who was then between 17 and 18 years of age. He was found guilty of four indecent assault charges against C when she would have been aged 16/17. Both victims suffered from severe learning difficulties and were placed into the foster care of the offender and his wife during holidays. The Court of Appeal increased the sentence to 12 years saying:

> "[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.
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> [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."

[12] In *AG's Reference (No 12 of 2003) (Sloan)* [2003] NICA 35 the 39-year-old offender pleaded guilty on the morning of trial to multiple counts of rape and indecent assault committed on two teenage girls. He was charged with six specimen counts and one specific count of indecent assault against C and fourteen specimen counts of rape against her. He was charged with five specimen counts of indecent assault and nine specimen counts of rape against E. He denied all the charges at interview and maintained a plea of not guilty up to the time when the jury was sworn for his trial, when he changed his plea to guilty of all charges. The victims were half sisters. There was evidence that they suffered serious effects. The offender had no relevant record. He was sentenced to 7 years' imprisonment. The Court of Appeal increased the sentence to one of ten years after making allowance for the effect of double jeopardy. At paragraph 17 of its judgment the court said: -

> "We have no hesitation in holding that on the facts of this case the proper sentence on a contest would have been a heavy one. We even gave consideration to the possibility that the circumstances justified the imposition of an indeterminate life sentence with a specified minimum term, because of the continuing risk presented by the offender. We eventually decided against this course, on the ground that the risk fell short of the level required (see the discussion in the judgment of Hutton LCJ in *R v McDonald* [1989] NI 37 at 45-6). It is clear, however, that the case requires a lengthy determinate sentence, together with the protection to the public afforded by the licence provisions of art 26 of the Criminal Justice (Northern Ireland) Order 1996. In our judgment the proper sentence on the rape counts on a contest would have been of the order of fifteen years, while the indecent assault counts should have attracted a sentence of seven years."

[13] Discussing the discount that should be allowed for a plea of guilty the court said at paragraph 18: -

> "We are conscious of the importance of giving a significant discount in the case of sexual offences in order to recognise the relief from strain and distress if the victims do not have to face the ordeal of giving evidence. Where, as here, the plea of guilty is entered at the last minute, for whatever reason, the victims will be spared some of that strain and distress, but by no means to the same extent as they should. It is universally accepted that the discount should be materially less in such cases. We consider that the proper sentences on the facts of the present case would have been of the order of twelve years and five years respectively for the rapes and indecent assaults."

[14] In the present case, of course, the victims were not relieved of the ordeal of giving evidence because the offender pleaded not guilty to a number of the charges. He is not therefore entitled to the discount that would have been appropriate had a plea of guilty been entered.

The advice of the Sentencing Advisory Panel to the Court of Appeal

[15] In its latest advice to the Court of Appeal on sentencing in rape cases (24 May 2002) the Sentencing Advisory Panel suggested that the seriousness of the offence should be assessed by adopting the following approach: -

> "The panel suggests 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.* … three more general features … might be considered relevant: the gender of the victim, the relationship (if any) between the victim and the offender, and the nature of the rape itself (whether vaginal or anal)."

[16] The panel proposed a starting point of 8 years, after a contested trial, for a case with any of a number of enumerated features. These included the situation where the offender is in a position of responsibility towards the victim and the rape of a child. Factors reflecting a high level of risk to society, in particular evidence of repeat offending, should attract a substantially longer sentence and the panel endorsed the 15 year starting point in *Billam* (1986) 8 Cr App R (S) 48 for a campaign of rape, and proposed that it should apply to cases where the offender had repeatedly raped the same victim over a course of time, as well as to those involving multiple victims.

[17] In *R v Milberry & others* [2002] EWCA Crim 2891, the Court of Appeal in England accepted the panel's recommendations as to starting points (see paragraph [26] of the judgment). The Court of Appeal in this jurisdiction referred to this in the *Thompson* and *Sloan* cases cited above and, while not expressly adopting a similar approach, in the same context remarked that the levels of sentencing in rape cases have historically been higher in Northern Ireland than in England.

Disposal

[18] It is opportune for this court now to confirm that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel. We have therefore concluded that the sentences imposed in this case were unduly lenient. Since the offender had engaged in a campaign of rape the starting point ought to have been 15 years, but clearly a greater sentence was required not only because of the aggravating features such as the grooming of the victims and abuse of trust but also because there was more than one victim. In our judgment a sentence of 17 years or even higher would have been appropriate.

[19] Making the necessary allowance for the effect of double jeopardy, we concluded that the proper sentence was one of 15 years. We therefore quashed the order of the learned trial judge. For reasons that will appear below we considered that a custody/probation order was appropriate and the offender having signified his consent to such an order we substituted a sentence of fourteen years' custody and one year's probation.

Article 24 or article 26?

[20] In so far as is material article 24 of the 1996 Order provides: -

> "**Custody probation orders**
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> **24. —**(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence other than one fixed by law, a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both—
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> (a) to serve a custodial sentence; and
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> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.

(2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences."

[21] The relevant parts of article 26 are: -

"**Release on licence of sexual offenders**

26.—(1) Where, in the case of an offender who has been sentenced to imprisonment or ordered to be detained in a young offenders centre—

(a) the whole or any part of his sentence or order for detention was imposed for a sexual offence, and

(b) the court by which he was sentenced or ordered to be detained for that offence, having regard to—

(i) the need to protect the public from serious harm from him, and

(ii) the desirability of preventing the commission by him of further offences and of securing his re-habilitation,

ordered that this Article shall apply,

instead of being granted remission of his sentence or order for detention under prison rules, the offender shall, on the day on which he might have been discharged if the remission had been granted, be released on licence under the provisions of this Article.

> (3) An offender released on licence under this Article shall comply with such conditions determined by the Secretary of State as may be specified in the licence."

[22] Both articles contemplate that the non-custodial element of the sentence should cater for the risk that the offender might commit further offences and for the need to protect the public from harm (in the case of article 26 'serious harm'). Mr Morgan QC for the Attorney General informed us that if an order under article 26 is made, as a matter of virtually invariable practice, the Secretary of State will require the offender to undertake a period of probation. For the offender Mr McCrory QC asserted that he would also be required to submit to other conditions such as notifying the authorities of any change of address. Mr McCrory contended that such requirements clearly distinguish an article 26 order as a penalty and that such an order should not be made in the offender's case because it would both infringe his rights under article 7 of the European Convention on Human Rights and would be applied retrospectively to offences that had been committed before the coming into force of the 1996 Order. We shall consider both these arguments presently.

[23] Before the court makes an order under article 26 it must have regard to the need to protect the public from serious harm and the desirability of preventing the commission of further offences and securing the offender's rehabilitation. It is implicit in the legislation that the court should conclude that these objectives could not be achieved by the making of an order under article 24. While, therefore, the text of article 26 does not characterise these as essential prerequisites, the long-term risk of re-offending and the need to protect the public indefinitely will normally be present before this provision is invoked.

[24] Whether an article 24 order is suitable or an article 26 order is to be preferred will often be a matter of fine judgment, calling for the careful weighing of competing factors. The trial judge will usually be best placed to make this judgment and his conclusion as to whether an article 24 order is appropriate should not be set aside lightly. In the present case there was ample material on which to conclude that the circumstances in which these offences took place were unlikely to be replicated; that the offender had not engaged in similar behaviour for over twenty years; and that if he undertook a period of probation as recommended in the pre-sentence

report, such risk as existed would at least be substantially diminished, if not indeed eliminated. We do not consider therefore that the decision of the trial judge to impose a custody probation order can be faulted. Having regard to the nature of the programme that the probation officer has recommended, however, we have concluded that this should be comfortably accommodated within the year's probation that we have ordered.

Would an article 26 order be retrospective?

[25] It is not strictly necessary for us to deal with this argument but, since it is likely to arise in other cases, it may be helpful if we give our views on it. We can do so shortly. Article 26 is triggered by the imposition of a sentence of imprisonment for a sexual offence. It may not be invoked until there has been a conviction and a sentence of imprisonment consequent on that conviction. It is designed to cater for future risks. These features distinguish the provision as one which is prospective rather than retrospective in its operation. Moreover, the application of the article reflects a state of affairs that is current (*viz* the sentence and the risk) rather than a punishment for what has passed (the commission of the offences).

Article 7 of ECHR

[26] Article 7 of the Convention provides: -

> "**Article 7 – No punishment without law**
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> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[27] Mr McCrory argued that the use of an article 26 order would involve the imposition of a heavier penalty than could have been imposed at the time that the offences were committed and that this infringed article 7. Since we have decided that we should not make an order under article 26, it is again not strictly necessary to deal with this argument but again this point is likely to arise in future cases and we have therefore decided that we should say something about it. We should observe, however, that we may wish to return to this question in future because it is likely that the Appellate Committee of the House of Lords will consider a similar question arising under the equivalent legislation in England.

[28] In *Welch v United Kingdom* [1995] ECHR 17440/90 the applicant was convicted, in 1988, of a number of drug offences in respect of activities which occurred in 1986. The trial judge also imposed a confiscation order pursuant to the Drug Trafficking Offences Act 1986 the operative provisions of which had come into force on 12 January 1987. The applicant complained to the ECtHR that the confiscation order amounted to the imposition of a retrospective criminal penalty, in that it constituted a heavier penalty than one applicable at the time the offence was committed, contrary to article 7. It was held that the confiscation order constituted a penalty within the meaning of article 7. In its judgment ECtHR discussed the concept of a penalty within article 7 in the following passage: -

> "27. The concept of a "penalty" in this provision is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6(1), an autonomous Convention concept (see, inter alia, – as regards "civil rights" – the *X v France* judgment of 31 March 1992, Series A no 234-C, page 98, para 28, and – as regards "criminal charge" – the *Demicoli v Malta* judgment of 27 August 1991, Series A no. 210, pages 15-16, para 31). To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see, mutatis mutandis, the *Van Droogenbroeck v Belgium* judgment of 24 June 1982, Series A no. 50, page 20, para 38, and the *Duinhof and Duijf v the Netherlands* judgment of 22 May 1984, Series A no 79, page 15, para 34).

> 28. The wording of Article 7(1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity."

[29] The avowed purpose of article 26 is preventative in that it is precipitated by the court concluding that it is necessary to prevent further offending and to protect the public. But it equally clearly has a penal element in that the offender must observe the terms of the licence which will almost invariably have a restrictive effect on his lifestyle and which will expose him to the risk of further imprisonment if he breaches the terms of the licence.

[30] A similar provision was considered in *R v T* [2003] EWCA Crim 1011 where the defendant was sentenced for sexual offences committed before the implementation, on 1 October 1992, of section 44 of the Criminal Justice Act 1991 which had given the court power, when sentencing for a sexual offence, to make an order extending to the whole of the sentence the period spent by the offender on licence following his release. Before the coming into force of section 44, there had been no provisions available for ordering supervision and recall throughout the whole of the sentence. In respect of sexual offences committed before 30 September 1998, section 44 had been replaced by section 86 of the Powers of Criminal Courts (Sentencing) Act 2000, a provision that was in essentially the same terms as section 44. When sentencing the defendant, the judge purported to make an order under section 86 of the 2000 Act. The offender appealed contending that a section 86 order, made in respect of an offence committed before 1 October 1992, would violate article 7. It was held that the section was punitive and could properly be contrasted with purely preventative measures that did not invoke any principle against retrospective penalty.

[31] This decision was considered in *R v R* [2003] EWCA Crim 2199. In that case it was held that the imposition, under s 86 of the 2000 Act, of an order for an extended licence in respect of offences committed before 1 October 1992 did not violate article 7 of the Convention. Such an order was preventative, not punitive. Its operation related to the execution of the sentence and was part of the machinery of carrying out the penalty. Adding such an order to a sentence of imprisonment for an offence committed before 1 October 1992 did not constitute the imposition of a heavier penalty than was available when the offence was committed. Pitchers J (delivering the judgment of the court) referred with approval to the judgment of Moses J in *R* (*on the application of Uttley*) *v Secretary of State for the Home Dept* [2003] EWHC 950 (Admin), where he said: -

> "[14] It is plain that the purpose of a licence is to enable the long-term prisoner to stay out of trouble, both for his own benefit and for the benefit of the community, and so that thereby he does not lose his liberty. True it is that, if he breaches his licence, he is at risk of recall, but the licence itself is designed to avoid the risk of further offences and a return to prison. Nor in any real sense can it be said that the imposition of the licence follows conviction. The judge makes no order. The licence follows by virtue of the operation of s 33 on release and is plainly part of the rehabilitation process.
>
> [15] I conclude that the nature and purpose of the licence are such that they dominate the factors which go to the conclusion as to whether the imposition of the licence is a penalty or not. The imposition of the licence is designed to protect the public once a prisoner is released, and assist in preventing the prisoner from committing further offences."

[32] In *R v R* the court considered the factors outlined in paragraph 28 of *Welch* and, applying them to the case before them, concluded that they favoured the conclusion that the measure was preventative rather than a penalty and that *R v T* had been decided *per incuriam*.

[33] Five days after the decision in *R v R* was given, the Court of Appeal delivered judgment in the appeal against the decision of Moses J in *Uttley* ([2003] EWCA Civ 1130). The appeal was allowed. The court held that a sentence which included a period of licence, inevitably extending beyond the normal remission period, was a heavier penalty than a sentence without that requirement. While conditions on licence varied, conditions would inevitably be imposed which were impediments upon the offender's freedom of action. Moreover, the conditions created a potential liability to serve a further substantial period in custody, as did the provisions dealing with the effects of re-conviction. Arguments that the purpose of the licence procedures was rehabilitative and preventative, as undoubtedly they were in part, did not detract from their onerous nature viewed as part of the sentence.

[34] It is, we believe, necessary to keep in mind that the expression 'penalty' in article 7 connotes an autonomous Convention concept. It does not follow that because a measure has a penal element it will automatically qualify as a penalty for the purposes of article 7. Thus, for instance, the restriction on the lifestyle of a person who is the subject of an article 26 order will not of itself make the order an article 7 penalty. The nature of the measure is of critical importance. An example of the application of that principle is *Ibbotson v UK* (1999) 27 EHRR CD 332, where an application to the Court of Human Rights in respect of the registration requirement under the Sex Offenders Act 1997 was refused on the grounds that the measure was preventative rather than punitive and hence did not violate article 7. In that case, of course, a restriction on the applicant's lifestyle was involved but the predominant purpose of the measure was deemed to deter further offending rather than to penalise the offender.

[35] An article 26 order involves a penal element but we conceive this to be the means by which the essential purpose of the provision is achieved. That essential purpose is the protection of the public and the deterrence of the offender from committing further offences. While it is necessary to impose restrictions on the offender in order to secure that result, the imposition of restrictions is not a goal in itself. We have therefore concluded that the making of an order under article 26 would not have violated article 7 of ECHR.