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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **31/5/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (Number 1 of 2018)
VINCENT LEWIS

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Before: Morgan LCJ, Stephens LJ and McBride J

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MORGAN LCJ

[1] The offender was sentenced to a total term of 10 years 6 months comprising 9 years and 6 months in custody and 1 year on probation pursuant to Article 24 of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") by His Honour Judge Marrinan at Antrim Crown Court on 9 February 2018 in respect of multiple offences of indecent assault, buggery and attempted buggery committed on three children over a period of 10 years from 1973 to 1983. In doing so the learned trial judge amended the sentence he had imposed on 18 January 2018 by decreasing the probation period by one year and correspondingly increasing the period in custody. The Director of Public Prosecutions now seeks leave to refer the sentences to the Court of Appeal pursuant to section 36 of the Criminal Justice Act 1988 on the grounds they are each unduly lenient. Mr McDowell QC appeared for the Director and Mr Gallagher QC with Mr Dillon for the offender. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The offender is now 91 years old. Until 1978 he was a monk at Portglenone Abbey. Since the late 1960s his principal responsibility was operating the printing press. The first victim ("V1") was 10 or 11 when in 1973 he got a job along with two other boys at the Abbey. One day when he was working in the printing press with the offender he was told to go into the dark room to help make a special film. The offender then locked the door, put him on the floor and got on top of him. He then took down his trousers and put his penis in the boy's mouth. He told the child that he had spoken to the boy's mother and father who said that he had been a really bad boy and that they had agreed that the child be punished in this way. That was the beginning of a campaign of indecent assault and buggery which persisted until 1978. On occasions he was buggered three or four times a day and ejaculation was usual. The offender took him to isolated woods along the river where he had prepared a private place to further attack the boy.

[3] The medical evidence shows that this campaign of horrendous abuse had enduring effects on the victim. He was not believed when he told other people including his parents. He performed badly at school and became angry and distrustful of people. He continues to have recurring distressing recollections of his experiences and flashbacks in response to certain smells. He was judged to meet the criteria for post-traumatic stress disorder. Dr Patterson concluded that a great deal of work needed to be done to try to give the victim his life back which he feared would be a terribly difficult task. He considered that this was a grim reminder of the incalculable damage done to innocent children by paedophiles such as the offender.

[4] After leaving the Monastery the offender moved to another village where he again opened a printing press. He was assisted by a local man and a priest to find accommodation. He married in 1979. The local man who had arranged for his accommodation had a son ("V2") aged 9 or 10. The offender began to attack this boy removing his trousers and underpants and making the boy masturbate him to ejaculation. When the child was 10 or 11 he started taking him to the darkroom of the printing press and locked the doors. He would have lubricated both of their penises and simulated sexual intercourse. This continued usually to ejaculation. He performed oral sex on the boy and had the boy perform oral sex on him. He unsuccessfully attempted to put his penis into the boy's anus. This campaign of abuse continued for approximately four years.

[5] The medical evidence indicates that this victim is suffering from trauma and stress related disorder. He will require significant assistance to try to put his life together. He reported the abuse at the age of 18 but it was "swept under the carpet" by the local priest. He suffers emotional numbness but his memory surging up from within his subconscious from time to time causes sleep problems and avoidance behaviours. He has suffered brutally and permanently from his experiences.

[6] The third victim was a brother of V2. He was subject to one incident when the boy was approximately 13 years old. It was a hot day and he and the offender went for a swim in the lough. The offender fondled at his genital area and the boy fended him off. The offender sought to encourage the boy to engage in sexual activity but he refused.

[7] In 2005 V1 complained to the Abbot of the Monastery about the offender's sexual abuse. Solicitors were instructed to commence civil proceedings against the Order and compensation was agreed. The offender made a small contribution to that compensation. V1 did not go to the police until 2012. He made an ABE interview at that time. In 2010 V2 made a complaint to a local priest and shortly afterwards the allegations against the offender were reported to police. Constable Quinn spoke to V2 who indicated that he did not wish to proceed with the allegations. The offender was advised of the allegations at that time, apologised to V2 and made some monetary donations to charities of the victim's choice. V2 did not make an ABE interview until 2015 at which stage the offender was interviewed by police for the first time.

[8] At interview the offender denied all of the offences and claimed that he did not even know who V1 was. On 20 March 2017 he was due to be arraigned but it was adjourned to have the offender psychiatrically examined. When arraigned on 30 June 2017 he pleaded guilty to the counts of indecent assault but not guilty to those of buggery. In September 2017 the trial was adjourned to again have the offender psychiatrically assessed and the trial date was fixed for 5 March 2018. On 5 December 2017 he applied to be re-arraigned and pleaded guilty to almost all of the buggery counts. The remainder were left on the books.

[9] He was interviewed by the probation service prior to sentencing. The presentence report indicates that he accepted that he sexually abused V1 but denied the buggery offences claiming that there was no penetration. He denied the offence in relation to the brother of V2. In relation to V2 he said that the victim came to him, to his house, and was "keen for the bit of sex for the money". He believed the sexual behaviour they engaged in was by way of mutual agreement. The presentence report indicated that the offender held justification and offence supporting beliefs in relation to children consenting to sexual behaviour and a lack of awareness or appreciation of the impact of his offences on the victims.

[10] There was no evidence that the offender had engaged in sexual offending for a period of 30 years prior to his conviction. He was assessed as a low likelihood of reoffending within two years reflecting the relative stability of his general lifestyle in circumstances related to his advanced years. Although the report identified clinically significant areas for development it concluded that the offender's circumstances related to his age and withdrawal from community life had created external controls to manage these issues without the requirement for further intervention. He was not assessed as meeting the threshold for significant risk of causing serious harm. The report noted that the composite assessment placed in the moderate priority category for supervision and intervention but given that he was then in his 90th year related life circumstances appeared to place appropriate external controls when released from custody. The report also discussed the imposition of a Custody Probation Order or an Article 26 licence but acknowledged that there would be little focus for intervention given his age although this would ensure his compliance with external controls.

The sentencing remarks

[11] The learned trial judge carefully examined the aggravating factors in this case:

(i) the offender was placed in a position of trust by the parents;

(ii) in the case of two of the victims their father had gone out of his way to assist the offender to get settled in the community after he left the Abbey;

(iii) a significant degree of planning went into the offender's attempts to attack these boys;

(iv) there were three victims;

(v) the offending stretched over a period of about 10 years;

(vi) the children were all under 14;

(vii) there was frequent ejaculation;

(viii) the offender took steps to prevent V1 in particular from reporting the matter telling him that his parents knew what was happening and approved of it;

(ix) on occasions money and alcohol was used to facilitate the attack;

(x) the presentence report indicated a stark lack of victim empathy;

(xi) the effect on the victims was horrendous.

[12] In light of the offender's considerable age the learned trial judge noted the helpful decision of the English Court of Appeal in R v Clarke [2017] EWCA Crim 393 which reaffirmed the principle established in a number of cases that the court is always entitled to show a limited degree of mercy to an offender of advanced years because of the impact that a sentence of imprisonment can have on an offender of that age. Secondly, the learned trial judge noted that although V1 had made his ABE interview in 2012 the offender was not interviewed in respect of it until 2015. There is no suggestion that the delay in interview caused actual prejudice to the offender but it was submitted that this unexplained delay should be recognised in some way. Thirdly, the offender did eventually plead guilty to the offences and was entitled to credit for that.

[13] The learned trial judge noted that the starting point for a campaign of buggery and other serious sexual offences attracted a starting point of the order of 15 years. In light of the aggravating factors he considered that apart from the issues of old age and delay before applying credit for the plea the appropriate sentence was one of 18 years imprisonment. He decided to reduce that sentence for three years in respect of the offender's age and one year for delay. He then gave a discount of 25% credit for his plea resulting in an overall sentence of 10 ½ years.

[14] The learned trial judge then turned to the question of a custody probation order under Article 24 (2) of the 1996 Order. Under that provision the custodial sentence shall be for such term as the court would pass on the offender less such period as the court thinks appropriate to take account of the fact 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.

[15] The learned trial judge noted that the assessment that he was at low likelihood of reoffending after his release and in light of his age there were external controls to manage any issues argued against a licence under Article 26 of the 1996 Order. Having identified the purposes of an Order under Article 26 as being the need to protect the public from serious harm and the desirability of preventing the commission of further offences and securing rehabilitation the judge, on 18 January

2018, imposed a custody period of 8 ½ years and a probation period of two years. He then relisted the case on 9 February 2018. He noted that the purpose of a custody probation order was not designed to enable the court to soften the sentence that would otherwise be entirely appropriate but took the view that some rehabilitation and some probation supervision would be of benefit. He increased the custodial element to 9 ½ years and reduced the probation period to one year.

Consideration

[16] In his consideration of the starting point before taking account of age and delay in the plea the learned trial judge correctly noted that the starting point for a campaign of rape or buggery or other serious sexual offences was 15 years before taking into account any specific aggravating circumstances. There clearly were significant aggravating circumstances in respect of V1. He was very young, the offender was in a position of trust, the offender undermined the boy's confidence in the protection to be expected from his parents and the attacks were persistent and planned. This offending on its own would easily have justified the 18 year starting point identified by the learned trial judge.

[17] We are satisfied that when one then takes into account the further campaign of sexual offending against V2 and a further attack on V3 the appropriate starting point in this case before considering the mitigating factors was in excess of 20 years. We accept the submission by the prosecution that the offender was not charged for the purposes of Article 6 of the Convention until he was interviewed in 2015. The learned trial judge noted that if he had been charged in 2012 his old age might not have been taken into account in the same way but whether he was 87 or 90 at the time of sentencing would in our view have made little difference to the approach to age.

[18] The reduction of one year for delay allowed by the learned trial judge relates to a 3 year period where the lack of action by the prosecution is unexplained but since the offender was during that period at liberty and not under charge it is difficult to see how he had suffered such prejudice as to justify a material reduction in sentence. The learned trial judge may have taken into account that the offender was aware from 2005 about the allegations of V1 and from 2010 those of V2. It may be that he concluded that between 2012 and 2015 the offender justifiably feared criminal proceedings.

[19] We are satisfied that the learned trial judge approached the question of discount for age in a very limited way as suggested in R v Clarke. The practical outcome of that assessment must depend upon the circumstances of the individual case. For that reason we sought further information from the Northern Ireland Prison Service ("NIPS") in order to assist the judgment in this particular case. That information established that the total number of prisoners aged 70 or more in April 2018 was 26 of whom 25 were in the bracket aged 70 to 79. The offender was the only person aged 90 or over.

[20] The NIPS policy for Older and Disabled Prisoners provides for an initial health assessment and interview in order to assess a suitable cell location for the

prisoner. Arrangements are in place to establish those who require support to be provided for daily living. Specific arrangements have been made for access to the gymnasium for older prisoners. In respect of this offender the NIPS stated that he caused staff no concerns and followed landing routine. He attended the exercise yard in the morning and interacted with other inmates. He played cards on the landing in the evening, regularly attended church services, attended the "Man Shed" for prisoners aged over 55 and received regular visits. Rule 27 of the Prison and Young Offenders Centre Rules (NI) 1995 provides the NIPS with the power to temporarily release a prisoner for special purposes such as healthcare and the Department of Justice may release on compassionate grounds in exceptional circumstances. Given the offender's age and circumstances we consider that no criticism can be made of the decision of the learned trial judge to allow a reduction in the sentence of three years.

[21] The last issue concerned the discount for the plea. The learned trial judge allowed a discount of 25% and was told that the plea was welcome. For an offender who denied the offences at interview and pleaded not guilty to the most serious offences until some months before his trial that was a very generous discount. The prosecution indicated, however, that the plea was welcome and took no issue with the extent of the discount.

[22] We have already indicated that a starting point in excess of 20 years was appropriate in this case before looking at the mitigating factors. We accept that the three-year reduction for age and the 25% discount for the plea were in the circumstances appropriate. Even if one took a very generous starting point of 20 years and made allowance for age, delay and discount for the plea the resulting sentence would still be one of 12 years. Accordingly we are satisfied that the sentence imposed was unduly lenient and we substitute for the commensurate sentence of 10 years 6 months a sentence of 12 years.

[23] There remains the issue of the application of Article 24 of the 1996 Order. The provision of a custody probation order is designed to ensure that the public are protected and offending reduced because of the rehabilitative effect of the probation period. It is clear from the presentence report that because of this man's age and his withdrawal from community activity no rehabilitative programme directed to his offending was either required or likely to be put in place. We consider that the learned trial judge was correct to bring this case back on 9 February 2018 to review the custody probation order that he made but we consider that there was no basis for such an order in this case in light of the conclusion of the presentence report that his age and withdrawal from community life had created external controls to manage his issues without the requirement for further intervention.

Conclusion

[24] For the reasons given we give leave to the Director to refer the sentences imposed and we conclude that they were unduly lenient. The buggery sentences will be increased to concurrent custodial sentences in each case of 12 years. There will be

substituted for the custody probation orders in the other cases sentences of imprisonment for the commensurate term in each case.