Neutral Citation No: [2021] NICA 36 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **MOR11542** *ICOS No:* **18/126527/A02** *Delivered:* **07/06/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DH

REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NI) ACT 2002)

Mr McMahon QC with Ms McCullough (instructed by PPS) for the Prosecution
Mr P T McDonald QC with Mr Stephen Fitzpatrick (instructed by Elliot-Trainor Partnership Solicitors) for the Defendant

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Before: Morgan LCJ, Maguire LJ and McAlinden J

MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference under section 36 of the Criminal Justice Act 1988 by the DPP in respect of sentences imposed by His Honour Judge Kerr QC in November 2019 at Newry Crown Court.

[2] The offender was convicted of 10 counts of rape and 9 counts of indecent assault in respect of one complainant and one count of perverting the course of justice at Newry Crown Court in October 2019. He appealed his convictions on the sexual offences and this court allowed the appeal in respect of two counts of rape. He was sentenced to a total sentence of 15 years' imprisonment in respect of each of the counts of rape, four years' imprisonment on count 19 in respect of an indecent assault committed prior to October 1989, three years' imprisonment on 2 counts of indecent assault committed after October 1989, 15 months' imprisonment in respect of 6 counts of indecent assault committed before October 1989 and 2 years' imprisonment in respect of the perverting the course of justice count. All sentences were ordered to run concurrently.

Background

[3] The complainant was born in December 1977. The offender was her uncle and was 10 years older. She alleged that the abuse started when she was 5 or 6 years old and continued until she was 15. She became pregnant and gave birth to her son when she was 16. Her parents had alcohol addiction issues and her pregnancy was discovered by her aunt in Dundalk who took her to hospital and made arrangements for the birth.

[4] The aunt established that the offender was the father but the complainant's grandmother was adamant that this should not be made public. The identity of the father remained a secret. In his early 20s the child persisted in seeking to establish who his father was. The complainant decided to go to the police in 2017 but did not make a statement as she had not informed her son of his father's identity. She made a police statement in 2018.

[5] When interviewed by police the offender denied that there had been any sexual contact between himself and the complainant. DNA samples were taken as a result of which it was established that he was the father of the child. His case at trial was that there had been a single incident of sexual intercourse as a result of his being seduced by the complainant. Prior to his police interview the offender offered to pay the complainant £15,000 if she withdrew the complaint. She refused and at trial the offender maintained that this was an offer of money for the child. He was convicted of intending to pervert the course of public justice.

[6] The following were the counts on which the offender remained convicted of sexual assaults after appeal:

(i) Count 1 was the first incident that the complainant recollected when she was 5 or 6 years old. She was playing in the offender's bedroom and he told her to shut her eyes and pretend she was dead. He rubbed his hand on her vagina under her pants.

(ii) Counts 3, 4, and 5 comprised two specific counts of fondling her vagina on a mattress in the attic of the offender's home and one specimen count of the same behaviour at the same age. Some of the child's dolls had been placed in the attic which facilitated this activity.

(iii) Count 19 was a specimen count alleging 4 to 5 occasions on which the offender made her masturbate him in his car at a carpark when she was aged between 8 and 10.

(iv) Count 7 was a specific count of the offender pushing the complainant onto the sofa and gyrating his groin against her and Count 8 was a specific count of kissing her and putting his hand on her vagina. She was aged 10 at the time.

(v) Count 9 related to activity when she was 12. She was babysitting and the offender told her to get into his bed and he then put his hands on her vagina.

(vi) Count 11 was a specific count of kissing and putting his hands on her pants in the car at a carpark and Count 12 was the first rape on the same occasion when he asked could he try something different by putting his penis into her.

(vii) Count 13 was a specimen count in respect of many more rapes in the car aged 13 and 14.

(viii) Count 14 was a specific count in the car at a carpark when he put his hand in her knickers and Count 15 was a rape on the same occasion when she said no but he said he could not go home with an erection. The offender was 14 or 15 years old. Count 16 was another specific count of rape at a carpark when the complainant asked the offender not to do it anymore because she did not want to get pregnant.

(ix) Count 17 was a specific count of rape in a layby when he used a condom and Count 18 was a specimen count in respect of further rapes in the same circumstances. The offender was aged 14 or 15.

(x) Count 22 was a rape on a summer's afternoon when she was 15 at a building site against a wall and Count 24 was a further rape aged 15 in the offender's bedroom when she was kneeling in a chair and was raped from behind.

The victim

[7] In her victim impact statement the complainant described her embarrassment and humiliation at being pregnant at the age of 15. She expressed the shame she felt regarding who the father was and felt terrified and isolated as a result. The relationship with her parents broke down and has been almost non-existent ever since. She had to drop out of school.

[8] The victim impact report by Dr Michael Paterson records that she underwent 154 sessions of counselling over a five year period. She felt guilt that she did not have the same relationship with her son compared to that with her two children with her husband. She believed that the abuse was her fault for many years prior to starting counselling. She was diagnosed as suffering from trauma and stress related disorder with a prolonged duration.

The offender

[9] The offender is a 56-year-old man. Prior to being dealt with for these offences he had approximately 20 convictions for a range of road traffic offences, three convictions for disorderly behaviour and four convictions for burglary. Apart from

a conviction for permitting the use of a motor vehicle in a dangerous condition in October 2019 the last previous conviction had been in October 2005.

[10] The pre-sentence report indicated that he suffered from health problems including arthritis, COPD and a history of asthma and angina. He continued to deny the offences save for accepting the single offence which led to the pregnancy. He blamed the complainant for this and alleged that she made advances towards him. He failed to accept responsibility for the years of sexual abuse to which he subjected her and focused on his own needs. He said that she was motivated by financial gain. He claimed that he was sorry for the single offence that he accepted that he had committed.

[11] He was assessed as being in the moderate priority category for supervision and intervention but was not assessed as presenting a significant risk of serious harm. He was, however, assessed as presenting a high likelihood of reoffending. Specified licence conditions and a SOPO were recommended by the probation officer.

The LTJ's sentencing remarks

[12] The learned trial judge noted that he was dealing with multiple offences over a period of 10 years. They involved indecent assaults, rapes and perverting the course of justice as an aggravating feature. He noted that the court could decide the sentence on a consecutive basis or concurrently. Either was appropriate providing the court applied the principles of totality of sentencing being commensurate with the behaviour which has been proved. Where there are multiple victims the court considers consecutive sentences normally appropriate as it allows individual victims to know that the case was individually considered. We agree with this summary of the proper approach.

[13] The judge then looked at relevant authorities including in particular the decision of this court in R v Kubik [2016] NICA 3 where detailed guidance was given in respect of sentencing levels in rape cases. Where there has been a campaign of sexual violence against one or more victims a sentence of 15 years or more is appropriate. Such a sentence should not, however, be applied mechanistically. Other aggravating or mitigating factors need to be taken into account.

[14] There is no dispute that the trial judge identified the relevant aggravating factors as follows:

(a) this was abuse of a vulnerable child starting when she was five or six years of age;

(b) the defendant was in breach of trust as her uncle;

(c) the defendant groomed her from that age, took her out in the car and offered her a number of inducements;

(d) the indecent assaults were numerous and lasted over eight years;

(e) ejaculation occurred on a regular basis;

(f) the rape started at 13 years of age, there were more than 8 which the jury have found and they lasted over a period of two years within the context of 10 years total abuse;

(g) the victim became pregnant and had a child from the relationship;

(h) when the matter was reported the defendant tried to prevent the prosecution by offering money to get the victim to withdraw the complaint she had made.

He also correctly concluded that there were no features of the offending which were mitigatory. He adopted a starting point of 16 years.

[15] The judge correctly indicated that the offender was not entitled to any discount for remorse as he rejected the jury's finding. He noted that he was not a person of previous good character although he had no previous convictions of this nature. He found nothing in his personal circumstances to suggest any effective mitigation. Nevertheless, he allowed him a limited credit of one year for his previous character. We consider that excessively generous, particularly since his previous offending was occurring at the same time as the commission of these offences.

[16] The judge then imposed the sentences set out at paragraph [2] above. The offence of indecent assault on Count 19 was committed prior to October 1989. In those circumstances the maximum sentence was one of two years' imprisonment. Accordingly, we substitute for the sentence of four years' imprisonment one of 15 months' imprisonment on that count, the same as the sentence imposed on the other indecent assault counts committed prior to October 1989.

Consideration

[17] The correct approach to applications under section 36 of the Criminal Justice Act 1988 has been helpfully set out in the judgment of Lord Lane CJ in Attorney General's Reference (No 4 of 1989) (1989) 11 Cr App Reports (S) 517 when he said, at page 521:

> "The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject

> defendants to the risk of having their sentence increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, when 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 guidelines 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."

[18] We agree with the learned trial judge that the evidence indicates that there was a campaign of rape which was preceded by a grooming campaign involving indecent assault. The convictions establish a minimum of 8 rapes of this child when she was aged between 13 and 15. The grooming was facilitated by the offender being in a position of trust. The 15 year starting point for a campaign of rape takes into account the inevitable significant effect upon the victim and the likelihood of some grooming or similar process enabling the commission of the crime. It is important, therefore, that there should not be double counting in relation to those factors.

[19] Where, however, there are truly additional significant factors it is important that they are fed into the sentencing exercise and given appropriate weight. We consider that there were a number of such factors in this case. First, the abuse started when the complainant was a vulnerable child of five or six years of age. It continued for a period of 10 years during the entirety of which the victim was a child. The guidelines approved by this court indicate that the starting point for a single offence of rape is increased from 5 to 8 years where the victim is a child. That suggests a substantial uplift where the victim of a campaign of rape and indecent assault is a child.

[20] Secondly, the victim became pregnant and had a child from the relationship. That itself is of course an aggravating factor but that factor has to be seen in the context that the victim was 15 years old at the time of the pregnancy. Pregnancy as a result of rape for any woman is a horrendous outcome. A child cannot be expected to have the capacity to deal with such a situation and in this case that was aggravated further by the fact that the offender was the person who was protected in respect of his offending while the victim was humiliated and left to feel responsible for what had happened to her.

[21] Thirdly, the offender sought to buy his way out of trouble and denied the victim vindication by trying to get her to withdraw the complaint. This court made clear in R v Brannigan (DPP Ref No 7 of 2013) [2013] NICA 39 that almost invariably a conviction for perverting the course of justice will lead to a consecutive sentence. We see no reason why that should not follow in this case.

Conclusion

[22] We have already dealt with the sentence on Count 19. We granted leave to apply under section 36 at the hearing. We consider that the additional aggravating factors referred to above required a substantial uplift in the 15 year starting point. In our view the appropriate starting point for the sexual offences was 20 years. We do not accept that there was any mitigation. We are satisfied, therefore, that the sentences imposed were unduly lenient. We consider that the sentence for perverting the course of justice should be served consecutively making a total sentence of 22 years' imprisonment.

[23] The double jeopardy principle can be taken into account in those cases where the offender has already been released from custody and is engaging in rehabilitation or being prepared for such release through programmes which permit the offender to return to society (R v Loughlin (Michael) (DPP Reference No 5 of 2018) [2019] NICA 10). There is, however, no reason why an offender sentenced to a substantial term should be entitled to a lesser sentence than that which is appropriate. We will give effect to our conclusions by increasing the sentences on the rape counts to 20 years served concurrently with the other sexual offence sentences, imposing a consecutive sentence of 2 years on the perverting the course of justice count and substituting a concurrent sentence of 15 months' imprisonment on Count 19. The ancillary orders made by the trial judge remain in place.