Neutral Citation No. [2009] NICA 44

Ref:	**HIG7572**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**30/6/09**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (Number 2 of 2009)

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THE QUEEN

-v-

JQ

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Before Higgins LJ, Coghlin LJ and Morgan J

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<u>HIGGINS LJ</u>

[1] On 21 October 2008 at Londonderry Crown Court the offender pleaded guilty to 14 offences of indecent assault which occurred between January 1974 and August 1984. The complainants were three sisters who were his full cousins. On 9 December 2008 he was sentenced by the Recorder of Londonderry to 18 months imprisonment on each count concurrent and the sentences were suspended for a period of three years. In addition ancillary orders relating to the Sex Offenders Register were imposed. The Attorney General has applied to this court under section 36 of the Criminal Justice Act 1988 to have the sentences imposed quashed on the ground that they were unduly lenient. We granted leave on 9 June 2009 and the application was heard on that date.

[2] The offender is now 51 years of age. At the time of the offences he was aged between 15 years and 7 months and 25 years and 3 months.

[3] The complainants are MD; AS and SM. They were aged 43 years, 42 years and 37 years respectively at the date of sentencing. AS disclosed the offences during counselling in 2005 and this was followed by disclosures by her sisters.

[4] The offences can be categorised in three groups.

1. Counts 1 to 5 and 11 to 14 relate to all three sisters and occurred when the offender was babysitting at their home between 1973 and 1978

when he was between 15 and 20 years of age. Counts 1 to 5 relate to AS and occurred between 1974 and 1977; counts 3, 4 and 5 are sample counts for that period. Counts 11 and 12 relate to SM and occurred between 1974 and 1978 and Counts 13 and 14 to MD and occurred between 1974 and 1975.

2. Counts 6 and 7 relate to AS and occurred in 1979 when she was 13 years of age and the offender was 21 years of age.

3. Counts 8, 9 and 10 relate to AS and occurred between August 1983 and August 1984 when she was 17 years of age and he was 25 or 26 years of age.

[5] Counts 13 and 14 were the first offences to occur and involved MD when she was 8 years old and the offender 15 years of age. The offender was babysitting and entered her bedroom and on the pretext that something had happened to her sister AS he insisted he needed to examine her with her nightdress off. Eventually she complied and after getting her to lie down on the bed commenced to stroke her thighs and tummy (Count 13). On another occasions he touched her genital area (Count 14). AS was in her bedroom and the offender was babysitting when Count 1 occurred. He used the same pretext with her as with MD, that is that he needed to examine her as something had happened to one of her sisters. Count 3, 4 and 5 are sample counts of further indecent assault which involved him rubbing his penis against her body for up to half an hour at a time. Count 2 relates to an occasion when he removed her nightdress and touched her body all over as well as rubbing her vagina. She recalls asking him to stop. On occasions he would throw her over his shoulder and state that he could "see development on top, is there any below" and then touch her vagina through her knickers (Counts 6 and 7). On another occasion she witnessed him waking SM, then 3 years of age, and touching her in the same way as he touched AS (Count 11). SM related an occasion when he got her to sit in the front seat of their car and he put his hand down her pants and rubbed her vagina telling her not to tell anyone that "it was their little secret" (Count 12). When AS was 17 years of age her parents arranged for the offender to give her driving lessons during which he touched and spoke to her indecently (Counts 8, 9 and 10). This occurred in 1983 – 84 when the offender was 25/6 years of age.

[6] The offender was interviewed by the police about these allegations on 20 April 2006 and denied emphatically that any such indecent assaults occurred.

[7] Reports on AS and MD were before the court as Victim Impact Reports. AS was referred to the NHS Mental Health Service in 2004 for treatment for depression and low self esteem. During this she disclosed that she had been abused as a child. It was the opinion of the psychiatrist that one

of the factors contributing to the presentation of her depressive illness and in particular her low self esteem, was the abuse she had suffered. It has affected her ability to have relationships with others. MD suffered a significant psychological reaction to the disclosure of the abuse after many years of suppressing it. She also suffers from depression brought on by the abuse as well as nightmares. Her psychiatrist considered she would need long term treatment but that the prognosis was good.

[8] It was submitted that the following aggravating features were present in this case –

- i) many of the offences were committed when the offender was entrusted with the care of young children and involved a breach of trust;
- ii) when the earlier offences were committed the victims were young and vulnerable children;
- iii) there were three victims who were the offender's cousins;
- iv) the offences occurred over a 10 year period;
- v) there were three periods when offences occurred against AS;
- vi) the fact that the offender returned again to offend against AS when she was 13 and 17 years of age;
- vii) the earlier offences occurred when the offender was babysitting and involved a degree of planning;
- viii) the impact of these offences on AS and MD.

[9] The following mitigating features were identified –

- i) the offender's plea of guilty, though not at the earliest opportunity, which brought great relief to the victims;
- ii) the nature of the offending did not involve penetration of the victims;
- iii) the offender was of good character and had no previous convictions;
- iv) the offender expressed shame and remorse;
- v) there was delay in processing the case between the original complaints and the first arraignment in February 2008.

[10] The offender was arraigned at Londonderry Crown Court on 14 February 2008 when he pleaded not guilty to all the counts on the indictment. The case was put adjourned for trial. On 21 October 2008 the defence requested the Recorder to consider in open court the maximum sentence he might impose should the offender plead guilty. At this hearing the circumstances of the offences were outlined and Prosecuting Counsel and Defence Counsel indicated to the Recorder the aggravating and mitigating factors relating to them. The Recorder acknowledged the seriousness of the offences though he considered they were at the lower end of the scale. He said

that it was a difficult matter for the court to be definitive about sentencing but noted the potential for consecutive sentences. He concluded that after a plea of guilty, which would spare the victims the necessity of giving evidence, the maximum sentence the court would consider imposing would be two years imprisonment. He then added that whether that sentence would be immediate imprisonment or a suspended term of imprisonment would depend on the contents of the victim impact reports. He said that if the reports were modest in their conclusions and if the pre-sentence report was helpful and if the psychiatric report on the offender was supportive of the proposition that the offender posed no risk to children then the court would consider suspending the sentence. The offender then pleaded guilty and sentencing was adjourned for reports.

[11] On 9 December 2008 the offender was sentenced to eighteen months imprisonment on each count currently but suspended for a period of three years. This followed a plea in mitigation by Mr Kennedy QC and the consideration of the pre-sentence report and two reports on the offender from a psychiatrist and a psychologist. In his sentencing remarks the Recorder noted the scope for consecutive sentences in a case of this nature and the very great relief expressed by the victims that they did not have to give evidence. He acknowledged the dates when the offences occurred and the age of the offender at the time of some of the offences and the absence of penetration in the acts of indecent assault. He accepted that the offender was ashamed of his conduct and that he was remorseful and noted the potential for serious harm to the offender's career with the Housing Executive. He referred to the victim impact reports and how the victims have been affected by the offences as well as the reports on the offender which indicated that the future risk to females was exceedingly low. He found some of the offender's comments to the probation officer to be self serving and not to his credit. He concluded that the offences were sufficiently serious to warrant a sentence of imprisonment. He referred to several cases and commented that the theme running through all of them was that, exceptional cases apart, those who abuse children should expect immediate imprisonment. He concluded that this case was an exceptional case and did so for several reasons which he stated –

- i) the relief felt by the victims on the plea of guilty;
- ii) the reports of the psychiatrist and psychologist on behalf of the offender;
- iii) the offender's youth and inexperience at the time of most of the offending;
- iv) the level of offending; and
- v) the length of time taken for the case to come to court.

The Recorder then added –

> "I am told that if you go to prison that may influence the chances that you will be dismissed from your post

> and you may lose your pension. That would indeed have very severe consequences for you and your family and indirectly will of course punish the innocent, as well as you the guilty.
>
> …….
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> In view of what I regard as exceptional circumstances set against the context of what I said to you in October at the pre-trial indication of maximum sentences stage it seems to me that the interests of justice to (sic) not require the sentences to be put into immediate effect, although I have not reached that decision without a great deal of heat(sic) searching, I can assure you "

[12] It was submitted by Mr Simpson QC who appeared on behalf of the Attorney General that the learned trial judge was wrong to describe the later offences against AS as adding "a certain amount of unfortunate colour" to the case. He submitted that it was of much greater significance than that accorded to it. Furthermore he submitted that more significant consideration should have been given by the learned trial judge to whether the circumstances justified the imposition of consecutive sentences and the judge should have been referred to the decision R v M [2002] NICA 49. He submitted that offences against three children over a period of ten years and repeated offences against one of them when she was 13 and 17 years demanded a consideration of immediate imprisonment and consecutive sentences. If consecutive sentences were not considered to be warranted then the reasons for that view should have been disclosed. The offender in this case was entitled only to limited credit for his plea of guilty which was not entered at the earliest opportunity. There was nothing exceptional about the circumstances of the case to justify the sentences imposed. The relief felt by the victims at not having to give evidence would apply in most cases of this nature. It was submitted that the learned trial judge fell into error in not imposing consecutive sentences of immediate imprisonment and that the sentences imposed were thereby unduly lenient.

[13] Mr Kennedy QC on behalf of the offender stressed the unique advantage that the learned trial judge in a criminal case has over an appellate court. He emphasised the requirement that the sentence required to be not just lenient but unduly so before this court could intervene and even then this court retains discretion whether to do so or not. He submitted that the Court of Appeal should not interfere with the sentence of the trial judge without good cause. The offender was immature at the time of the offences and this was a factor that the learned trial judge was entitled to take into consideration. He referred to the Sentencing Guidelines for England and Wales. He submitted that the learned trial judge was entitled to have regard to the offender's employment for many years in the public service and the

consequences of an immediate term of imprisonment on that employment. Furthermore he was entitled to take account of the fact that the plea of guilty was well received and to attach some weight to the reports on the offender as well as the level of culpability. He referred to Attorney General's Reference (No 77 of 1999) in which the offender was sentenced to probation for three years for three offences of indecent assault on his niece aged ten years on three separate occasions. The Court of Appeal determined that the sentence was lenient but not unduly lenient due to the exceptional circumstances involved. While acknowledging that the sentences in the instant reference might well be viewed as lenient, Mr Kennedy QC submitted that they were not unduly so. Furthermore he submitted that the imposition of consecutive sentences would not have altered the learned Recorder's view that a suspended sentence was justified. He referred to Attorney General's Reference (No 2 of 1993) in which the Court of Appeal endorsed the imposition of a suspended sentence where it was warranted by extenuating or special circumstances.

[14] This reference gives rise to three issues. First whether the sentences of imprisonment were unduly lenient, secondly whether some of the sentences should have been consecutive and thirdly whether the terms of imprisonment should have been suspended.

[15] Several cases were referred to in relation to the proper approach to sentencing in cases involving sexual abuse of young children. In Attorney General's Reference (No 4 of 2005; Martin Kerr) 2005 NICA 33 the offender pleaded guilty to five counts of indecent assault and was sentenced to three years probation. The offences occurred in the early 1990s when the complainant, a young boy, was between the ages of twelve and fourteen years. The offences involved indecent touching. The offender had been sentenced in 1998 to a custody probation order for similar offences against other boys that occurred during the same period but had not been disclosed during that investigation. It was submitted that if the offender had been convicted of the additional offences in 1998 he would not have received a more severe penalty. That submission was rejected by the Court of Appeal as there was evidence that the victim had suffered and continued to suffer as a result of the abuse. The court concluded that the sentence of three years probation was unduly lenient and that the sentence for the offences, if standing alone, should have been in the order of two years imprisonment. In determining the appropriate sentence the Court of Appeal took into account two matters. Firstly, that if sentenced in 1998 for these offences in combination with the other offences the extra sentence would not have been as long as two years imprisonment and secondly, the effect of double jeopardy. Having taken those two factors into account the Court considered the offender should serve a sentence of twelve months imprisonment. At paragraph 23 of the judgment under the heading "Sentencing Guidelines in

sexual offences against young children" the Lord Chief Justice (Sir Brian Kerr) said -

> "[23] This court has repeatedly warned that sexual offences against young children will be met with severe punishment – see, for instance, Attorney General's Reference (No. 1 of 1989). In R v Lemon [1996] NIJB 1, McCollum LJ, giving the judgment of the court said (at page 2):-
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>> 'This court reiterates all that has been said in previous similar cases about the serious view which the court takes of indecent assaults on young girls, especially by those who are placed by relationship or circumstances, in a position of trust and influence. Any abuse of such trust must be treated severely and when it results in a sexual assault upon the child it is virtually inevitable that an immediate custodial sentence will follow'."

[16] In Attorney General's Reference (No 2 of 2002) 2002 NICA 40 the offender pleaded guilty to one count of indecent assault on a male having previously pleaded not guilty on arraignment. The judge decided to defer sentence for six months on condition that the offender attended a voluntary programme for the prevention of sexual abuse. This was considered to be unduly lenient. Taking into account the effect of double jeopardy the Court of Appeal substituted a sentence of thirty months imprisonment. At paragraph 15 of its judgment the Lord Chief Justice (Sir Robert Carswell) said –

> "[15] Counsel for the Attorney General submitted that the course taken by the judge was excessively lenient and that it failed to reflect the gravity of the offence, 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. He pointed to the remarks of this court in Attorney General's Reference (No 3 of 2001) (2002, unreported) at page 8, where we placed renewed stress on the necessity for the courts to mark emphatically the abhorrence of acts of child abuse, which he submitted were, mutatis mutandis, entirely apposite to the present case and had not been taken into account by

the judge. In a similar vein were the court's remarks in Attorney General's Reference (No 2 of 2001) [2002] NIJB 117 at 122a:

> "It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from following their example'."

[17] In R v M 2002 NICA 49 the Court of Appeal considered the question of consecutive sentences in cases involving abuse of children over a period of time. This was an appeal against a total sentence of five years and three months imprisonment imposed when the offender pleaded guilty on arraignment to three counts of sexual abuse of children over a period of several months. The maximum sentence for the offences at that time was two years imprisonment. Three consecutive sentences of twenty-one months imprisonment were imposed. It was submitted on behalf of the appellant that the learned trial judge was not justified in imposing consecutive sentences. Rejecting that submission the Lord Chief Justice (Sir Robert Carswell) said at paragraph 12 –

> "[12] In the present case the offences occurred over a period of several months, on the appellant's version from February to July 2001 and on L's from at latest November 2000. Taking the appellant's accepted version, it is not in our judgment to be regarded as a relatively short space of time. By any standard this was a series of offences, and could not be described as coming within the concept of a single transaction. The learned judge based his imposition of consecutive sentences primarily on the inadequacy of his sentencing, which, as we held in R v Magill, does not constitute a sufficient reason, but he would in our view have been quite entitled to do so on the secondary ground to which he referred, that this was a course of conduct."

[18] In Attorney General's Reference (No 16 of 2003) 2003 NICA 48 the offender pleaded guilty in May 2003 to thirteen counts of indecent assault against female children in one indictment and one count of indecent assault on a female child. The offences occurred between 1976 and 2002. The victims were six female children. He was sentenced to five varying terms of imprisonment all concurrent, the maximum sentence being five years on the single count indictment. Some of the offences occurred when the maximum sentence for indecent assault was two years imprisonment and some after the

penalty had been increased. It was submitted on behalf of the Attorney General that while the individual offences might not have been regarded as unduly lenient they ought not to have been imposed concurrently as the effect was to produce a sentence that was unduly lenient. At paragraph 18 Weir J giving the judgment of the Court said –

> "[18] This court considers that the effective term of imprisonment imposed in this case was manifestly unduly lenient. These offences involved five different children against whom the offender waged a sustained campaign of repeated indecent assaults stretching over a period of more than twenty five years. Mr McCrory was plainly right to acknowledge that this is not a case comparable to R v Magill [1989] 4 NIJB 81 where the offences had involved one girl over a period of two to three weeks and in which this court therefore held that concurrent sentences were appropriate. In R v M where the offences concerned one child and occurred over a period of months we held that the sentencing judge would have been quite entitled to impose consecutive sentences on each of three counts as the appellant's behaviour amounted to a course of conduct. That principle clearly applies with much greater force to the facts of the present case."

[19] Mr Simpson QC submitted that indecent assault involving penetration would attract a sentence near the maximum for that type of offence. At the time of the commission of these offences the maximum penalty was two years imprisonment. Therefore he took no issue with a sentence of eighteen months for an individual offence. Rather he submitted that the learned trial judge was not justified in making all the sentences concurrent and should have made some of them consecutive. The imposition of consecutive sentences was justified by the number of children involved, the period of time over which the offences were committed and the fact that the offender returned to offend against AS not once, but twice.

[20] At the pre-trial hearing on 21 October 2008 the learned trial judge indicated that the maximum sentence he would impose was two years imprisonment, which was the maximum sentence for indecent assault at the time of the offences. It would not have been appropriate to have imposed the maximum given the nature of the offences and the fact the offender would have pleaded guilty. Therefore the only way the judge could have imposed properly a sentence of two years imprisonment would have been if he imposed some consecutive sentences. Therefore it is a reasonable inference that on 21 October 2008 the judge contemplated consecutive sentences. On

that occasion he acknowledged the potential for consecutive sentences. When he came to sentence the offender in December 2008 he reduced the maximum period he had indicated in October 2008 but did not impose any consecutive sentence. He referred again to the "scope " for consecutive offences "in cases of this type" but did not further mention why he considered concurrent sentencing was appropriate.

[21] It is clear from the comprehensive sentencing remarks of the learned trial that he gave considerable thought to the circumstances of this case and to the offender. He indicated that he had not reached his decision "without a great deal of heart searching", which we do not doubt. Nonetheless we consider a sentence of eighteen months imprisonment suspended for a period of three years to be unduly lenient. We are of that opinion because of the number of offences, the ten year period of time over which the offences were committed, the number of victims, their ages and relationship to the offender, the impact of the offences on two of them, the fact that the offender returned to one of the victims twice, when he and she were both older. For the same reasons we are satisfied that the offences merited at least some consecutive sentences. Therefore a sentence in the range between two and a half years and four years immediate imprisonment would not have been manifestly excessive or wrong in principle. The learned trial judge considered the circumstances exceptional which justified the sentence to be suspended. We do not consider there was anything exceptional about this case for the purposes of sentencing. We mention two matters. Firstly, the offender's plea of guilty - this did not come at the first opportunity; rather it came late in the proceedings and only after the judge's indication of the maximum sentence he would impose. Secondly, the learned trial judge was impressed by the great relief felt by the victims that they would not have to give evidence against their older cousin. It would be a very rare case indeed in which a victim of sexual abuse did not feel great relief on knowing that the offender would plead guilty and that he or she would not have to give evidence about such personal matters. While some credit may be afforded to an offender for a plea of guilty which spares a victim giving evidence in cases of this nature, it should not be over-emphasised.

[22] There are various permutations that a sentencing judge could adopt to arrive at the appropriate sentence in this case within the range referred to above. He could impose shorter but varied terms reflecting the nature of the indecent assaults, passing some consecutive sentences to take into account the number of victims, the period of time over which the offences occurred and the return to offend against AS when she was older. Consecutive sentencing in this case is justified. At the pre-trial hearing in October 2008 the judge indicated a maximum sentence of two years imprisonment. It might be said that such a sentence, which would require consecutive sentences, would be merciful and lenient but not unduly lenient, in view of the appropriate range indicated above.

[23] Taking account of the effect of double jeopardy as well as the age of the offender when some of the offences were committed and his pleas of guilty, we substitute for the order made by the trial judge a sentence of fifteen months immediate imprisonment for each offence to run concurrently. In those circumstances we do not need to consider making any of the sentences consecutive. We make no amendment to the ancillary orders relating to the Sexual Offenders Register and the Sexual Offences Prevention Order which will stand. We direct that the offender shall surrender to custody within 72 hours.