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Judgment: approved by the Court for handing down | *Delivered:* **9/2/2007**

(subject to editorial corrections)

IN THE CROWN COURT FOR THE DIVISION OF ANTRIM

(SITTING AT BELFAST)

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THE QUEEN

-v-

N

_____

HART J

[1] The defendant, to whom I shall refer only as N to protect his identity, is charged with eight offences of indecent assault and four of rape allegedly committed against his younger sister, whom I shall refer to as L for the same reason, on various occasions between 1 December 2002 and 10 February 2004. N was born on 28 November 1990 and is therefore now 16. L was born on 28 December 1995 and so is now just 11.

[2] These allegations came to light when L was questioned by her cousin, who overheard a suspicious exchange between N and L, and as a result the matter was reported to the authorities. N was questioned by the police on 10 February 2004, at which point he was 13 and 2 months of age. He was accompanied by a solicitor, and a social worker was also present to perform the role of an appropriate adult. In a short interview lasting some 25 minutes he denied the allegations of indecent assault, which included allegations that he had engaged in oral sex and had kissed L's vagina, but admitted that he had inserted his penis into her vagina on four occasions.

[3] Although this interview took place on 10 February 2004 he did not appear before the court until 27 January 2005. He was thereafter remanded on bail until the committal proceedings took place on 26 January 2006. He was arraigned on 10 March 2006, the matter was expedited and the trial was listed before Mr Justice McLaughlin on 5 June 2006. On that occasion the matter was adjourned because L was unfit to give evidence. The matter then came before me again for review on 8 September when Mr Weir QC (who appears for the prosecution with Mrs Kitson) told me that L had been

examined by a child adolescent psychotherapist but there were some ambiguities in the report and Mr Weir wished to have the opportunity to clarify these. On 22 September Mr Weir indicated that the prosecution did not intend to proceed with the case, and would in due course be applying for an order that the counts be left to lay on the books, not to be proceeded with without leave of the Crown Court or the Court of Appeal. He informed me that Mr Laurence McCrudden QC (who appears for the defendant with Mr Moore), who was not able to be present that day, wished to object to this course and the matter was subsequently listed for argument. Having heard counsel I reserved my decision.

[4] It is appropriate that I should say something about the background of both N and L. L was examined by Dr Beirne, and in her report Dr Beirne states that L had been fostered by her aunt for some time prior to these matters coming to light, and was living in her aunt's house at all material times. L's father is described as an alcoholic, and her mother as suffering from severe mental illness. Her two brothers, N and J, are also in care. Dr Beirne, having recounted the nature of the allegations, said in her witness statement dated 19 February 2004:

> "Over the past six years L has been in eleven different foster homes. Foster parents were unable to cope with L's behaviour. L can be very aggressive with hitting, biting, swearing. She bangs herself against the wall and on occasion recently jumped from the top of a wardrobe. A behaviour nurse presently offers support both at home and at school."

[5] Dr Beirne referred to L's medical history and said that she has

> "Type 1 Diabetes from age 2 years. She attends RBHSC and her diabetes is well controlled. L has been recently commenced on Tegretol for ? Epilepsy. She is still under investigation."

[6] In order to explain why the prosecution did not seek to proceed with the case Mr Weir handed in a report from a principal officer of the relevant health and social services trust dated 19 September 2006. This relates that L has been subject to a care order since 15 August 2002, that she was residing at that time in a residential unit, and attending psychotherapy sessions three times a week. The Trust's position is stated in the following paragraphs:

> "I understand the prosecution feels strongly that L should give evidence to the court concerning the alleged abuse.

> The Trust has given careful consideration to this matter, in particular weighing the benefits of 'closure' and of justice being seen to be done, against the anticipated trauma of the experience of giving evidence. We are confident that it would not be in L's best interest to give evidence, as she is likely to be further traumatised by the experience and would perceive this as additionally abusive. It is also unlikely that L would have made sufficient progress in the short to medium term future to delay matters in the anticipation she would be in a position to give evidence.
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> It is planned that L will require intensive psychotherapy *for several years to come*." (Emphasis added)

[7] In support of the application by the prosecution Mr Weir relied upon my decision in R v H [2006] NICC 5 in which I reviewed the relevant authorities in relation to the power to order that a count be left to lie on the file, and concluded:

> "The authorities therefore indicate that where an order is made that a count or counts, or indeed an entire indictment, should lie on the file, not to be proceeded with without leave of the Crown Court or the Court of Appeal, it is intended that whilst in the majority of cases there would be no trial, it is still open to the prosecution to reactivate the charges provided it obtains the permission of the court to do so."

[8] Mr McCrudden sought to argue that the present case could be distinguished from H by saying that in the cases of Thatcher, Riebold and Michael there had been a conviction, and that the order to leave counts on the indictment was purely an administrative device avoiding public expense and inconvenience in future, whereas an order that an entire indictment be left on the books was a different matter. I do not consider that this is a valid distinction. Each count on an indictment is a separate matter and whether there is a single count or more than one count is irrelevant. Mr McCrudden analysed the facts of the various cases referred to in my judgment in R v H , but I adhere to the conclusion I reached on the power of the court to order a case lie on the file.

[9] Mr McCrudden then turned to the circumstances of the present case and advanced a number of submissions. I will take these in a somewhat

different order to his. He dissected the various statements and sought to argue that the case against the defendant was a weak one because, although the accused had admitted to some of these offences, the forensic evidence and the admissions were insufficient to show that the offences had been committed.

[10] Mr Weir QC pointed out that the adequacy of the evidence to support the charges was not challenged prior to arraignment, and the court must proceed on the basis that there is a prima facie case against the defendant. I consider this is correct. I do not consider it is appropriate for the court to parse and weigh the allegations and admissions in the way Mr McCrudden suggested. The defendant's admissions amount to a clear prima facie case against him on the four charges of rape.

[11] Mr McCrudden submitted that the interview was carried out in an unsatisfactory way, and that it was clear from listening to the tape that there were grounds for arguing that the interview should be excluded. As the transcript of the interview records, the defendant was crying at one stage, and Mr McCrudden argued that the interview should not have been allowed to continue, saying that the solicitor was inexperienced and implying that the appropriate adult did not intervene either in order to protect the defendant from being further questioned when he was clearly distressed. These are matters that can only be decided after the entire conduct of the interview has been investigated in a voir dire at which the relevant witnesses can give evidence and be cross-examined.

[12] Mr McCrudden accepted that it was a matter for the discretion of the court whether the counts should be ordered to lie on the file, and he stated that the defence were not seeking a not guilty verdict, but wished to have the matter proceed to trial and be decided by a jury. He characterised the application as a new and alarming development where the prosecution were seeking to leave the matter until the complainant was ready to give evidence, and the defendant might be required to wait for a long time, perhaps for many years, before the matter could be determined. Not only might he have to wait for many years with this burden hanging over him, but were he to be tried and convicted as an adult then, depending on his age, he might have to serve a sentence in prison, whereas at the present time if convicted he would serve a sentence in the Young Offenders Centre. He concluded by asking the court to set its face against a departure from the traditional practice whereby an indictment is brought and the matter brought to trial as soon as possible, resulting in the finality of a verdict.

[13] This is an unusual and difficult set of circumstances. On the one hand the defendant faces very serious charges, some of which he has apparently admitted. On the other hand, the prosecution, for what I consider to be perfectly proper reasons in the light of all that has been said about L's history,

does not feel able to proceed with the prosecution because they believe that L is unable to give evidence at the present time, and, it seems from the extract from letter from the Trust I have already quoted that it may be several years before L is able to give evidence. Whilst I accept that the court has a discretion as to whether or not to permit the counts to lie on the file in these circumstances, the exercise of that discretion must be informed by a balancing of the relevant considerations on each side. In favour of the prosecution application is that the defendant has allegedly admitted the most serious of the charges against him. In those circumstances there is clearly a strong public interest in the guilt or innocence of N being established by appropriate criminal proceedings. Where a defendant has admitted his guilt it is manifestly unjust that he should not be dealt with for the offence, *R v Derby* Crown Court, ex p. Brooks (1985) 80 Cr App R at 169, although in that case the court's view was that the accused would inevitably plead guilty at his trial, whereas in this case Mr McCrudden has strongly attacked the admissibility of the admissions. Nevertheless, I consider that the defendant's admission of the rape allegations is a weighty consideration in favour of granting the application made by the prosecution in the present case.

[14] The interests of the defendant have also to be placed in the balance. As I have pointed out, the accused was 13 when he was first interviewed and is now just 16. He has therefore had this matter hanging over him for three years during his adolescent years. I consider it appropriate to take into account the delay that has already occurred in bringing this matter to trial because it took two years from the first interview to return the accused for trial. The matter was then brought to trial expeditiously, and it was not through any fault of the defendant that the trial was unable to proceed in June last year. The Criminal Justice (Children) (Northern Ireland) Order 1998, Article 4(b) provided that:

> "In any proceedings for an offence, the court shall have regard to –
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> (b) the general principle that any delay in dealing with a child is likely to prejudice his welfare."

Somewhat surprisingly in view of the emphasis which the courts and the Government have placed in recent years of bringing cases rapidly to trial, this provision has been repealed by the Justice (Northern Ireland) Act, Section 86 and Schedule 13.

[15] Nevertheless, though counsel did not refer to it, there is the well known line of authority under Article 6(1) of the European Convention on Human Rights which states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law."

In Stogmuller v Austria [1969] 1 EHRR 155 the European Court pointed out that the reasonable time requirement in Article 6(1) had as its aim the protection of the parties against excessive procedural delays; in criminal matters especially it is designed to avoid that a person charged should remain "too long in a state of uncertainty about his fate."

[16] In HM Advocate v DP and SM [2001] ScotHC 115 Lord Reed examined the reasons why it was desirable that a young child accused of a serious criminal offence should be brought to trial as soon as possible.

> "[11] So far as proceedings against children are concerned, it is recognised by Crown Office, as the Advocate Depute explained, that such proceedings call for particular expedition, whether the child is an accused or a complainer or, as in this case, both. That approach is in my opinion in accordance with the requirements imposed in this particular context by Article 6(1). Such an approach is also in accordance with the requirements of the UN Convention on the Rights of the Child and the Beijing Rules, each of which the European Court of Human Rights has used as a source of guidance as to the requirements imposed by the European Convention in relation to proceedings involving juvenile offenders: see in particular *V* v *The United Kingdom* (2000) 30 EHRR 121, para. 72-73, 76-77 and 97. Article 40(2)b of the UN Convention provides:
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> > 'Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
> >
> > …
> >
> > (ii) to have the matter determined without delay… .'
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> Rule 20 of the Beijing Rules provides: 'Each case shall form the outset be handled expeditiously, without any unnecessary delay.'

These requirements reflect the general approach adopted in the UN Convention and the Beijing Rules, that children accused of committing crimes should be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[12] Where a child of 13 is accused of committing a serious offence, it is plainly desirable that the child should be brought to trial (if criminal proceedings are considered appropriate) as quickly as is consistent with the proper preparation and consideration of the case. For a period of two years to elapse between the child's being charged with the offence and the child's being placed on trial has a number of undesirable consequences. Without attempting to list them exhaustively, the following may be mentioned. A child of 13 may be very different from the same child when he or she is 15 years old, both in terms of physical development and in terms of maturity and understanding. If the trial is to be held before a jury, as in the present case, the jury may have a very different impression if a 15 year old boy is in the dock, from the impression which they would have had if they had seen the same individual when he was 13. It may be much more difficult to assess the state of a child's understanding, when he was 13, of sexual matters and sexual relationships, if the child is not placed on trial, and is not able to give evidence, until he is two years older. For the child himself (or herself), a period of two years awaiting trial will form a significant part of childhood, and more particularly of the period of secondary schooling, which cannot be compared with the significance of a two year period to an adult. If the 13 year old child is in fact guilty of an offence, and requires the sort of reformative measures which disposals in respect of child offenders are intended to include, then again it is undesirable that the initiation of such measures should be delayed by a period of years. Reverting to the aims of the "reasonable time" requirements, for a period of two years to elapse before justice is rendered in a case involving a child of 13 is for these reasons liable to jeopardise its effectiveness and

> credibility; and for the child to remain for that period in a state of uncertainty about his fate may have especially harmful consequences. I have mentioned matters which relate to the child accused, because such matters are particularly relevant in the context of Article 6(1); it is scarcely necessary to add that prolonged delay in bringing a case to trial may also have seriously harmful effects upon a child complainer, especially (as in the present case) in a case of alleged rape."

[17] In Procurator Fiscal v Watson [2002] 4 AER 1 Lord Bingham, Lord Hope and Lord Rodger all referred to these remarks, Lord Bingham observing at [62] that they explained "why delay is particularly undesirable in the case of child accused and child victims", saying that

> "But prejudice to the fairness of the trial altogether apart, delay has the highly undesirable result of prolonging the stress to which a vulnerable accused is invariably subject and retarding the date at which his problems (if he has such) can be addressed and full counselling given to young victims without the risk of tainting their evidence."

[18] The observations in these cases are not directly in point because they were made in respect of circumstances in which the issue was whether the charges had been determined within a reasonable time, whereas here the issue is the possibility, perhaps slight, of these charges being reactivated at some unknown point in the future. It is also the case that if the charges were allowed to lie on the file, and the prosecution attempt at some future time to reactivate the charges, that the court could refuse its permission if it considered that it would be oppressive for the trial to take place. Nevertheless the principles contained therein are highly material because they emphasise the special need for an expeditious hearing and complete finality where the defendant is a young person.

[19] N has had these allegations hanging over him for three years, and has been subject to formal charges for two years. Although there is a prima facie case against him in view of his admissions in interview, it remains the case that he is subject to the protection of the law like any other defendant and entitled to assert his innocence. For reasons which are entirely understandable in view of the very troubled background of L, the prosecution do not feel able to require her to undergo the undoubted stress of giving evidence, notwithstanding the various procedural steps, such as giving evidence by way of live television link, that could be adopted in order

to lessen that burden. It is particularly important that it is likely to be several years before L might be able to give evidence.

[20] The balance to be struck between the conflicting considerations in this particular case is a difficult one, and one to which I have given much thought. I have come to the conclusion that, notwithstanding the strong public interest in keeping open the option to reactivate these charges at some stage in the future when L is able to give evidence, the youth of the defendant is also a matter of great importance, as is his entitlement to argue that he should have the benefit of a conclusive verdict one way or the other on these charges. He is someone who is still very young, he has had these matters hanging over him for three years, and for two years has been subject to formal and very serious charges. He is entitled to the same protection under the law as any other defendant, that is to assert his innocent and have the proceedings against him determined within a reasonable time. It appears that such is L's condition that it may be several years before there can be any question of her giving evidence, were she ever prepared to do so. Were I to grant the prosecution's application that would mean that the possibility, and it may be no more than that, that these charges may be reactivated would be held over the defendant. If he were an adult, that might be a proper outcome to the application. Given the need for expedition in determining criminal matters for defendants of N's age I consider that the balancing exercise comes down in favour of the defendant and I therefore refuse the prosecution request.

[21] The case will accordingly be listed as soon as arrangements can be conveniently made for a jury to be empanelled for the prosecution to offer no evidence and not guilty verdicts directed.