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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DOUGLAS FREDRICK AYTON

Before: Morgan LCJ, Weir LJ and McBride J

WEIR LJ (delivering the judgment of the court)

[1] The appellant seeks leave to appeal against the cumulative term of imprisonment resulting from the individual consecutive sentences imposed upon him by Her Honour Judge McColgan QC at Londonderry Crown Court on 25 June 2015 and appeals with leave of the Single Judge against the imposition by the learned judge of an order under Article 26 of the Criminal Justice (NI) Order 1996 imposing a licence period rather than the making of a custody probation order under Article 24 of that order.

[2] The appellant had pleaded guilty at arraignment to 15 of 36 counts involving sexual offences against three girls during the period of six years between 1981 and 1987. He pleaded not guilty at arraignment to the remaining 21 counts including the two most serious against girls A and B as we will call them and including a denial of the single offence charged in relation to the third girl whom we will call C. However, just before his trial was due to commence he altered his plea to 18 of the remaining 21 counts including the three just mentioned. The three counts then remaining were left on the books, not to be proceeded with without leave and the matter was adjourned for reports.

[3] We do not propose to describe in detail the revolting catalogue of offending committed by the appellant against these three girls. During the six year period he was aged between his late 20s and his early 30s and was married with children. His victims were in their early teens when the abuse began. The nature of the offending is described in detail by the judge in her sentencing remarks. The appellant had become friendly with the parents of one of the girls, A, and at the age of 13 she began to babysit for the appellant and his wife at weekends. She was subjected to

repeated indecent assaults and induced to commit sexual acts upon the appellant while babysitting and while being brought to and from his home by car. Most of the counts involving A are specimen counts which represent examples of the types of repeated indecencies. In addition there is a count of attempted rape relating to an incident in 1985 or 1986 when he was driving her home in his car. B also babysat for the appellant and had done so since her primary school years because again the appellant was friendly with her father. In her case the abuse began when she was 11 or 12 and followed a not dissimilar pattern to that involving A with repeated indecency both to B and, induced by the appellant, by her to him. Ten specimen counts reflect what the judge rightly described as "a persistent course of abusive and manipulative conduct over the years". The most serious charge involving B to which the appellant ultimately pleaded guilty was her attempted buggery which failed during the attempt when B screamed as she says "in agony" and the appellant then desisted.

[4] The two principal attacks upon the sentence imposed are that the total of fourteen and a half years was manifestly excessive in the circumstances and that an Article 26 Order ought not have been imposed. We deal with each in turn.

[5] Mr Rodgers QC in the course of his moderately- expressed and well-focused submissions on behalf of the appellant did not dispute that the sentences imposed in respect of the appellant's offending were in line with what a court would consider appropriate when taken individually. Nor did he dispute that the imposition of the consecutive and concurrent one year sentences and the consecutive three years sentences imposed in the cases of A and B were warranted. Further, he did not criticise the sentence of six months imposed in respect of the single count concerning C. His criticism was rather that the making of the three sets of sentences consecutive to each other had resulted in a cumulative sentence of fourteen and a half years after allowing some discount for the admissions of guilt by the appellant at various stages between police interview and the date fixed for trial. He estimated that this had approximated to a sentence of 17 years before any discount for the pleas of guilty from which it seems to follow that he considered the allowance given for the pleas, taking the matter all in all, was one of about 15%.

[6] In Mr Rodgers' submission, although the judge had said before proceeding to pass the individual sentences that the court must consider the totality principle, she could not in the event have done so as the resulting cumulative sentence was too high to reflect any totality adjustment.

[7] The judge has not spelt out in her remarks what her starting point was and what allowance she made for the guilty pleas. This court has repeatedly stressed that if the appellate process is to work satisfactorily the sentencing remarks must be such as to enable the appellate court to understand how the judge reached the ultimate sentence. As Weatherup LJ recently reminded and re-emphasised in R v MH [2015] NICA 67, the Court of Appeal said in R v McKeown, R v Han Lin (DPP's Reference No. 2 of 2013) [2013] NICA 28 at para [27]:

> "In the interest of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the sentence. Sentencing should be transparent to both the parties and the public."

[8] Unfortunately that was not done in this case and whatever discount the judge allowed for the pleas must be taken to have been rolled up in the figure of fourteen and a half years. This court has therefore been left to attempt a deconstruction of that figure so that, using Mr Rodgers' posited discount percentage of 15%, a starting point of seventeen years emerges. If the discount was in fact 20% then the starting point was eighteen years. This court considers that while this was a serious course of criminality with many aggravating features and little by way of mitigation, application of the totality principle means that such a starting point was too high. We consider that a starting point of fifteen years would meet the justice of the case to which a figure of 20% for the pleas entered at the various stages should be applied, producing a sentence of 12 years imprisonment.

[9] We then turn to Mr Rodgers' second principal submission, that the Article 26 Order was inappropriate in the circumstances. Article 24 of the Order by its terms requires a court contemplating passing a custodial sentence of twelve months or more to consider whether it would be appropriate to make a custody probation order requiring the defendant to serve a custodial sentence and on release to be under the supervision of a probation officer for a specified period of between twelve months and three years. The purpose of the supervision is to take account of the effect of the probation officer's supervision "in protecting the public from harm from him or for preventing the commission by him of further offences".

[10] There is no indication in the sentencing remarks that the judge did consider the appropriateness of a custody probation order. Nor, beyond saying that she was imposing an order under Article 26 which relates to the release on licence of sexual offenders, does she explain why she considered the imposition of such an order appropriate and, in particular, that she had considered the factors specified in that Article to which regard is to be had before ordering that the Article is to apply namely:

(i) The need to protect the public from serious harm from him.

(ii) The desirability of preventing the commission by him of further offences and of securing his rehabilitation.

[11] When passing sentence the judge had available to her a pre-sentence report prepared by a probation officer. The material passage in the report's conclusions states:

> "The defendant presents with no significant previous convictions and he has been assessed as posing a medium likelihood of further general offending within the next two years. He has not been assessed as posing a significant risk of serious harm at this juncture.
>
> Poor victim awareness, consequential thinking and risk management would appear to be key factors which led to the defendant's offending. The defendant has taken some responsibility for his offending and shows some evidence of victim empathy presently however he would benefit from developing this further. If the court is mindful of imposing a period of supervision either immediately or following a period of custody the following additional requirement would be recommended:
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> > 'Defendant shall present himself in accordance with the instructions given by the Probation Officer to participate in any programme as directed by the Supervising Probation Officer'."

[12] It may be seen from these conclusions that the appellant was not assessed as posing a significant risk of serious harm and that he was assessed as posing a medium likelihood of further general offending within the following two years. Further the probation officer considered that a programme directed towards rehabilitation could be made part of any supervision order.

[13] In AG's Reference No. 2 of 2004 (Daniel John O'Connell) [2004] NICA 15, Kerr LCJ said at para [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 courts 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."

Approaching the matter in that way this court does not consider that the making of an Article 26 Order was justified by the material available to the judge but, on the contrary, is of the view that the assessed risks of further offending and of harm to the public are not of such a nature or magnitude as to be incapable of being addressed by the making of an order under Article 24 with the additional condition suggested by the probation report. Accordingly, provided that the appellant consents, we propose to substitute an order under Article 24 for the order under Article 26.

[14] The appellant further contended by his Notice of Appeal that insufficient allowance had been made for his admissions during his police interviews, his pleas of guilty, his minor criminal record, the consequent loss upon conviction of his business and his standing within the community and the effect of same upon his wife and his now adult children. We are satisfied that there is no substance in any of these points. His admissions and pleas of guilty, as and when they came, have been fully reflected in the discount allowed as was his clear record for any offence other than one minor motoring matter. His loss of business and social standing and the embarrassment caused to his wife and family are inevitable concomitants of conviction and sentence for these serious offences and are the common experience of all those who find themselves in such a position. They cannot attract a reduction in the appropriate sentence.

[15] As Mr Rodgers has indicated that his client does consent to the making of a custody probation order we allow the appeal on the ground of totality and on the Article 24/26 ground. We firstly substitute for the sentences of three years on Count 2 and Count 5 sentences of two years consecutive on each count and for the sentences of one year consecutive on Count 6 and Count 9 one of nine months consecutive on each of those counts, thereby reducing the total period imposed to one of twelve years. We secondly quash the order made under Article 26 and impose a custody probation order under Article 24 in its place consisting of ten years custody to be followed upon release by three years' probation with an additional condition added to the probation order in the terms suggested by the probation officer. Lastly, we affirm the orders made by the judge in relation to the signing of the Sex Offenders' Register for life and the entries on the Children's Barring List and the Vulnerable Adult List.