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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

RYAN McGREECHAN

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is a purported appeal with the leave of the single judge from a decision of His Honour Judge Miller QC on 5 July 2012 where he decided that he should lift a reporting restriction preventing the reporting of the identity of the appellant subsequent to his conviction on two counts of rape and one count of indecent assault.

Background

[2] The appellant was born on 25 June 1995. The victim was a 76-year-old woman who was physically fragile and frail and had various physical medical problems. She is sadly now deceased. On 13 March 2011 the victim had left her front door open in anticipation of a pending visit from her care worker. The appellant noted that the door was open, came into her house, took her clothes off and engaged in forced penile and oral penetration. In addition he indecently assaulted the victim by grabbing her breasts. He then made his exit through her bedroom window. The victim was understandably visibly upset and crying when interviewed by police.

[3] The appellant offered no explanation for his behaviour. He said that he was returning home having consumed a half bottle of vodka when he noticed the front door of the victim's home open. He was unwilling to discuss in detail what happened within the house when interviewed for the pre-sentence report. On 16 May 2011 he was detected driving a forklift truck while consuming alcohol. As a

result of that arrest he was connected to this incident. He was subsequently remanded in custody to the Juvenile Justice Centre on 16 June 2011.

[4] On 10 January 2012 he appeared at the Youth Court in Newtownards for a Preliminary Enquiry. As a result of that appearance an Order was drawn up providing that pursuant to section 1 of the Sexual Offences (Amendment) Act 1992 "the 1992 Act") no details pertaining to the identification of the defendant and complainant be published in any publication of any sort or released to the media. It is common case although section 1 of the 1992 Act provides for anonymity in relation to complainants it does not do so in relation to defendants.

[5] Although the Order drawn up on 10 January 2012 was not in accordance with the statute the appellant, who was then 16, was a child for the purposes of the Criminal Justice (Children) (Northern Ireland) Order 1998 ("the 1998 Order"). By virtue of Article 22 (2) of the 1998 Order where a child is concerned in proceedings in the Youth Court no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child and no pictures shall be published as being or including a picture of any child so concerned unless the court is satisfied that it is in the interests of justice to do so and makes an order a dispensing with those prohibitions. No order was made dispensing with those prohibitions so the 1998 Order on its own provided a statutory basis for the appellant's anonymity in respect of those proceedings.

[6] As a result of the Preliminary Enquiry the case was transferred to the Crown Court. No further reporting restriction order was made in the Crown Court. The statutory prohibition on disclosure of the identity of the appellant applied only to the proceedings in the Youth Court. The position was, therefore, that the only reporting restriction preventing publication by the media of the hearings in the Crown Court was the Order of 10 January 2012 which purported to rely on section 1 of the 1992 Act.

[7] On 3 May 2012 the appellant pleaded guilty to the three counts on the indictment. A pre-sentence report was prepared and a psychiatric report obtained from Dr East on behalf of the appellant. Both the probation officer and Dr East concluded that the appellant presented a significant risk of serious harm to others. On 5 July 2012 His Honour Judge Miller QC sentenced the appellant on the rape counts to an extended custodial sentence of 11 years comprising eight years in custody and three years on licence and a concurrent extended custodial sentence of five years comprising two years in custody and three years on licence in respect of the indecent assault.

[8] On 4 July 2012 Claire Savage, a reporter from the BBC, wrote to the learned trial judge requesting the lifting of the reporting restrictions on the case. She relied on the principle of open justice, the seriousness of the criminal activity and the fact that naming the offender would be a deterrent to other teenagers. It does not appear

that she was aware at that time that the Order of 10 January 2012 was not authorised by the 1992 Act. The learned trial judge appears also to have been unaware of the dubious standing of the Order of 10 January 2012 and he proceeded to deal with the application on the basis that there was a properly made reporting restrictions order preventing reporting of the proceedings in the Crown Court.

[9] The appellant was 17 years and 10 days old at the time of sentencing. The learned trial judge correctly identified the source of the law governing the issue of reporting restrictions in relation to children as Article 22 of the 1998 Order.

> "22. - (1) Where a child is concerned in any criminal proceedings (other than proceedings to which paragraph (2) applies) the court may direct that-
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> (a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and
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> (b) no picture shall be published as being or including a picture of the child, except in so far (if at all) as may be permitted by the direction of the court.
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> (2) Where a child is concerned in any proceedings in a youth court or on appeal from a youth court (including proceedings by way of case stated)-
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> (a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and
>
> (b) no picture shall be published as being or including a picture of any child so concerned,
>
> except where the court or the Department of Justice, if satisfied that it is in the interests of justice to do so, makes an order dispensing with these prohibitions to such extent as may be specified in the order.
>
> (3) If a court is satisfied that it is in the public interest to do so, it may, in relation to a child who has been found guilty of an offence, make an order

dispensing with the prohibitions in paragraph (2) to such extent as may be specified in the order."

[10] The structure of the section respects the premise that in the Youth Court the identification of any child involved in court proceedings should normally be protected. That protection applies to witnesses as well as defendants. That starting point may be departed from in accordance with Article 22 (2) of the 1998 Order where it is in the interests of justice to do so. Article 22 (3) deals specifically with the position of those convicted in the Youth Court and does not govern proceedings in the Crown Court. It invites the Youth Court, where there has been a conviction, to revisit the maintenance of the protection where it is in the public interest to do so. The public interest includes an interest in open justice and the identification of offenders and clearly this subsection places more emphasis on the weight to be given to that consideration.

[11] Article 22(1) of the 1998 Order applies to courts other than the Youth Court and was the applicable subsection governing these Crown Court proceedings. The starting point for that subsection is the principle of open justice subject to the consideration that there are particular reasons why children involved in the criminal justice system may have to be treated differently. We will discuss those reasons later in this judgment. The statutory discretion is wide and the provision applies to witnesses and defendants whether convicted or not.

[12] The learned trial judge recognised that the statute gave particular protection to those who are facing criminal charges but have yet to be convicted. He considered that the interests of the child prior to conviction almost always outweighed the public interest in knowing the child's identity. Once the child was convicted the position changed. There is a public interest in the press reporting the identity of those convicted of great crimes. He noted the correspondence from the defendant's mother indicating the difficulties which the family had endured as a result of the charges and their concerns about the reaction of the community if the child's name was published. He also took into account the interests of the child in rehabilitation. He stated that if the child had been a year older the press would have been free to publish his name regardless of the impact on the family. He also concluded that there was a likelihood of deterrence to other offenders if the reporting restriction was lifted. He concluded that the balance came down in favour of lifting the restriction. He made an interim reporting restriction order, presumably under Article 22(1) of the 1998 Order, pending the issue by the appellant of judicial review proceedings seeking to challenge the learned trial judge's decision.

[13] The judicial review proceedings were duly issued shortly thereafter but have not progressed further. Section 29(3) of the Senior Courts Act 1981 in England and Wales enables the High Court to entertain applications for judicial review from decisions of the Crown Court, other than in matters relating to trial on indictment. The Divisional Court in England and Wales has considered whether an order by the

Crown Court removing reporting restrictions is a matter relating to trial on indictment, thus precluding a challenge to the Divisional Court under section 29 of the Senior Courts Act. In Reg v Leicester Crown Court, Ex Part S (a Minor)(Note) [1993] 1 WLR 111, the applicant, aged 12, had pleaded guilty to a charge of arson. The Crown Court made an order lifting reporting restrictions but stayed it for 48 hours to enable an application to be made to the Divisional Court for judicial review. The Divisional Court held that the granting or withholding of an order under section 39 of the 1933 Act is not a matter relating to trial on indictment therefore it had jurisdiction to deal with the application.

[14] The decision in Leicester was affirmed by the Court of Appeal in England in R v Lee [1993] 2 All E.R. 170, in which the Court held that it did not have jurisdiction to hear an appeal against an order of the Crown Court removing reporting restrictions but that a challenge by way of judicial review was available to an aggrieved defendant. In Lee, a reporting restrictions order was made by the Crown Court during the trial of the 14 year old applicant for robbery and possession of an imitation firearm. Upon sentencing the applicant, the judge lifted the reporting restriction. The applicant applied to the Court of Appeal in respect of the reporting restrictions order but not in respect of any other aspect of the sentence. The court held that it did not have jurisdiction but that the matter should be dealt with by the Divisional Court.

[15] In Northern Ireland there is no equivalent to section 29(3) of the Senior Courts Act 1981. By virtue of section 1 of the Judicature (Northern Ireland) Act 1978 the Crown Court is part of the Court of Judicature. In the absence of any enabling statutory provision we accept that it is not possible for the High Court to review decisions of the Crown Court since both are of equal standing. The judicial review proceedings were, therefore, doomed to fail because of want of jurisdiction.

The jurisdiction of the Court of Appeal

[16] This application is lodged under the Criminal Appeal (NI) Act 1980 ("the 1980 Act"). Section 8 of the 1980 Act provides for an appeal against sentence following conviction on indictment. Section 30 defines sentence as any order of the court made on conviction with reference to the person convicted:

> "30. – (1) In this Part of this Act, unless the context otherwise requires-
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> 'sentence' includes any order of the court of trial made on conviction with reference to the person convicted or his wife or children, and any recommendation of that court as to the making of a deportation order in the case of a person convicted; and a power of the Court of Appeal to pass sentence

> includes power to make any such order or recommendation which could lawfully have been made by the court of trial."

[17] The meaning of the term "order…made on conviction" was considered in R v Hayden [1975] 1 WLR 852. In that case, an applicant who had been convicted of unlawful possession of cannabis, was ordered inter alia to pay prosecution costs. He appealed against the order for the payment of costs and the Court considered the issue of jurisdiction as a preliminary point. Considering the meaning of 'sentence' under the identical terms of section 50 of the Criminal Appeal Act 1968, the Court stated:

> "In this Act, 'sentence,' in relation to an offence, includes any order made by a court when dealing with an offender … and also includes a recommendation for deportation….
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> The essential key to the meaning of 'sentence' in this context in our opinion is that it is an order, and it is an order made by a court when dealing with an offender, and we think that means when dealing with someone who has offended in respect of this offence. Those then are the features to which one must look in deciding whether a particular direction, to use a neutral word, made by a court is a sentence for the purposes of the Act of 1968."

[18] The Court held that the power of the trial court to award payment of the costs of prosecution was a power which fell within the definition of sentence in the Act. First of all it was an order, not a recommendation, and furthermore it was an order which was contingent upon there having been a conviction and upon the person by whom the payment was to be made having been convicted in that way. By contrast the Court proceeded to consider whether an order that a defendant should contribute to his legal aid costs was a sentence. It noted that the power to order a contribution to be made by an accused person towards his own legal aid costs was not an order which was contingent on conviction. It was a power enjoyed by the court whether the accused was convicted or acquitted and consequently did not come within the definition of sentence.

[19] That reasoning has proved authoritative and should be followed in this jurisdiction. As we have indicated at paragraphs 11 and 12 above the only lawful basis for the maintenance of a reporting restrictions order in this case was Article 22(1) of the 1998 Order. The imposition of such an order was not consequent on the conviction of the accused and could be made at any stage of the proceedings. The interim order made by the learned trial judge in this case was made subsequent to

the conviction but that does not make it an "order made on conviction". The decision to "remove" the reporting restriction was made shortly before the giving of sentence. We do not accept, therefore, that the determination made by the learned trial judge is a sentence and it follows that section 8 of the 1980 Act does not give the Court of Appeal jurisdiction to deal with this application.

[20] This outcome is anomalous. If the case had remained in the Youth Court and the court had removed the restriction after conviction under Article 22(3) of the 1998 Order the decision probably would have fallen within the definition of sentence adopted in Hayden. In any event the decision of the Youth Court would have been judicially reviewable by the accused or the media.

[21] If the judge had refused to lift any reporting restrictions, the media would have had a right of appeal to the Court of Appeal by virtue of section 159(1)(c) of the Criminal Justice Act 1988 (the 1988 Act).

> "159 (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against—
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> ..(c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;
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> and the decision of the Court of Appeal shall be final."

The applicant asserts therefore that he should have a similar right of appeal to the Court of Appeal arising from a decision of the Judge lifting reporting restrictions in the same proceedings.

[22] In Sommerfeld v Germany (11 October 2001) the ECHR dealt with variable appeal rights. The application concerned a natural father's access to a child born out of wedlock. The general right of further appeal was excluded by operation of law to a person in the applicant's position. The court noted that the Convention did not require the establishment of appeal courts but that where such rights were established effective access to ensure the determination of civil rights and obligations had to be provided. The Court accordingly found a violation of the access to justice guaranteed by Article 6 by reason of the exclusion of a right of appeal for the father.
[23] In this case section 159 of the 1988 Act provides the media with a right of appeal to the Court of Appeal where an order is made restricting reporting of matters relating to a child. No equivalent right is available to the child in the Crown Court. The child would, of course, have protection by way of judicial review if the decision was made in the lower courts. We can well understand why the media should be entitled to pursue the principle of open justice by way of an appeal to the Court of

Appeal but there is no reason why the affected child should not have a similar entitlement in relation to his rights.

[24] We consider that the exclusion of the child from any appeal process in Crown Court proceedings in this jurisdiction constitutes a restraint on the child's access to justice which violates the child's Article 6 rights. By virtue of section 3 of the Human Rights Act 1998 so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights. That may involve reading words into a statute in order to make the provision convention compatible. We consider that section 159(1)(c) of the 1988 Act should be read in this jurisdiction with the following italicised words read in:

> "159 (1) a person aggrieved may appeal to the Court of Appeal, if that court grants leave, against:
> …
>
> (c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings *or any discharge of such order or refusal by the Court to make such order;*
>
> and the decision of the Court of appeal shall be final."

Children and the criminal justice system

[25] The Divisional Court examined the domestic and international provisions dealing with the position of children in the criminal justice system in JR 38 [2013] NIQB 44. It is apparent from section 53 of the Justice (Northern Ireland) Act 2002 that there is a focus on welfare and rehabilitation.

> "53 Aims of youth justice system
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> (1) The principal aim of the youth justice system is to protect the public by preventing offending by children.
>
> (2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.

> (3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

Article 22 of the 1998 Order now has to be read in the context of these general objectives.

[26] There are also relevant international standards. Neither the UNCRC nor the Beijing Rules are justiciable as a matter of domestic law but both inform the rights and values protected by Article 8 ECHR. Article 3 UNCRC provides that in all actions concerning children the best interests of the child shall be the primary consideration. Article 40 UNCRC recognises the desirability of reintegrating into society every child alleged to have infringed the criminal law and specifically guarantees the right to have the child's privacy fully respected at all stages of the proceedings.

[27] Paragraph 8 of the Beijing Rules deals with the protection of privacy.

> "8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.
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> Commentary
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> Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of

> the individual should be protected and upheld, at least in principle."

[28] In McKerry v Teesdale and Wear Valley Justices [2001] EMLR 5 (Div Ct) Lord Bingham noted the tension that these principles created with the hallowed principle that justice is administered in public, open to full and fair reporting of the proceedings in court, so that the public may be informed about the justice administered in their name. Where, as here, the interest at stake is the Article 8 right of the child to which the international instruments set out above are material that tension should be resolved in the manner suggested by Baroness Hale in H (H) and others v Deputy Prosecutor of the Italian Republic of Genoa and others [2010] UKSC 25 at paragraph 30.

> "….the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is 'necessary in a democratic society' in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale."

[29] We accept that having regard to the international recognition of the contribution of privacy to the welfare and rehabilitation of the child the publication of the identity of this child would have constituted an interference with his private life. We also accept that the interference is in accordance with law as an aspect of freedom of speech and that it pursues the legitimate aim of securing open justice. The issue is whether the interference is proportionate.

[30] The applicant points to the progress he has made in the Juvenile Justice Centre which might be jeopardised if his identity was disclosed. Publication may also interfere with his prospects of recovering his relationship with his family and thereby damage his prospects of rehabilitation. On the other hand he was convicted of a serious offence of sexual violence. The public interest in the disclosure of the identity of those who have committed such crimes is high. The learned trial judge assessed him as being a dangerous offender. That is also a significant factor in the

weight to be given to open justice and the public interest. His sentence means that he will no longer be a child at the time of his release from custody and he was 17 years old at the time of sentencing. Publication of his name may act as a deterrent to others.

Conclusion

[31] In our view the balancing exercise in this case came down firmly in favour of open justice. The nature of the crime and the assessment that the offender was dangerous were particularly significant. We have explained why we had no jurisdiction to hear the appeal but if we had been asked to interfere with the decision under section 159(1)(c) of the 1988 Act as interpreted in this jurisdiction we would have refused to do so for the reasons given.