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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

WILLIAM ROBB

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Before: Morgan LCJ, Gillen LJ and Stephens LJ

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GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal against sentence imposed by HH Judge Kerr QC at Belfast Crown Court following the applicant's conviction on 18 August 2016 in the wake of a contested jury trial.

Summary

[2] The applicant was convicted of multiple sexual offences including serious rapes against two sisters and common assaults against them and their brother. The victims in this case are entitled to automatic lifetime anonymity by virtue of the Sexual Offences (Amendment) Act 1992 as amended.

[3] On 23 September 2016 the applicant received a determinate custodial sentence of 20 years' imprisonment.

[4] An extension of time to seek leave to appeal against sentence was granted but leave to appeal was refused by the single judge.

[5] Mr Greene QC appeared on behalf of the applicant with Ms Cheshire. Mr Orr QC appeared on behalf of the prosecution with Ms Walsh. We are grateful to counsel for their helpful submissions.

Grounds of Appeal

[6] Mr Greene succinctly confined his appeal to two grounds:

- The sentences imposed on counts 14, 17, 20 and 51 dealing with indecent assaults exceeded the statutory limit then in force for such offences.

- The learned trial judge had failed to take into account in his sentencing of the applicant the concept of delay.

The offences against victim 1

[7] The offences against the first victim were committed over the period from 1 September 1979 to June 1985. The applicant engaged in a depraved series of offences against this child commencing when she was 10 years of age. The offences included 12 counts of indecent assault, 6 counts of gross indecency, 11 counts of incitement to commit an act of gross indecency, one count of attempted rape, 10 counts of rape and one count of common assault.

[8] This child was subjected to an escalating conduct of serious sexual attack commencing with sexual touching and escalating through to digital penetration, oral sex, inciting her to masturbate him, attempted rape and finally a protracted period which can only be described as a campaign of rape against this child.

[9] We do not find it surprising that the effect upon this child over the ensuing years during her adulthood has been devastating. A psychiatrist, Dr Brown, describes her now, in her late 40s, suffering from generalised anxiety and chronic depression together with chronic post-traumatic stress disorder. The abuse she suffered at the hands of this applicant has played a significant part in her overall condition. She will experience further symptoms throughout her life.

[10] It is unnecessary for this court to rehearse all the guidelines for sentencing in rape cases given the grave nature of the offences in this instance. Suffice to say there is ample authority for the proposition that, without adopting a mechanistic approach to sentencing, the starting figure for a campaign of rape is conventionally 15 years imprisonment (*see R v Milberry* [2003] 2 All ER 939 and *R v Kubik* [2016] NICA 3) and the convictions in this case fall within that genre of offending. That starting point can of course be raised or lowered depending on aggravating or mitigating features. In truth there are no mitigating factors in this case. Not only did he contest the case obliging this woman to give evidence (thus losing the benefit of a potentially important mitigating factor by pleading guilty) but he has previous convictions for attempted rape and an assault with intent to rape in 1971 for which he received a 7 year imprisonment sentence being released in 1975, 5 years before these present offences commenced (thus losing the benefit of a potential mitigating factor of never having committed a similar offence before). The offence with intent to rape had occurred during a burglary of a mature woman's house. Somewhat generously the learned trial judge did not seem to take this conviction into account.

[11] This case teems with aggravating factors which include:

- This victim, as well as the others, were vulnerable children. In the case of victim 1, these offences occurred during a period when she was aged between 10 and 14.

- His previous convictions for attempted rape.

- Of singular importance was the fact the applicant was in a position of trust as a carer for this child, and the other children, at a time when her mother was unable to protect her.

- As the learned trial judge pointed out, the atmosphere in the house was coercive and there was a fear of complaining.

- Sexual offences of this kind inevitably visit a degrading experience on such children, but in this case the offences were particularly fell including ejaculation and urination over the child and forced oral sex.

[12] The learned trial judge concluded that the starting point for the offences of rape in this case was one of 16 years' imprisonment which he later reduced to 15 years to meet the overall totality assessment of all the offences. We consider that in effect the learned trial judge must have commenced his deliberation with a lesser starting point (which, notwithstanding that a formulaic approach to sentencing is to be avoided, is unlikely to have been less than 15 years given the campaign of rape) and increased this to 16 years in light of the aggravating circumstances. We pause to observe that this modest increase erred very much on the side of leniency given the nature of these grave and fell acts of aggravation. We have no hesitation in declaring that the figure of 16 years was unassailable.

[13] In respect of the concurrent sentences on counts 14, 17 and 20 dealing with offences contrary to Section 52 of the Offences against the Person Act 1861 *i.e.* indecent assault, the learned trial judge did exceed the statutory maximum then applicable of two years and we shall revisit this matter when dealing with Victim 2.

The offences against Victim 2

[14] This was the younger sister of the first victim. She was 5 years of age when the applicant commenced his offences against her. As with victim 1 again the offences extended over a period of years. His depraved behaviour in the case of this child included wakening her in her bed, penetrating her digitally, inciting acts of gross indecency and assaulting her by hitting her around the head repeatedly.

[15] Unsurprisingly the impact on this child into her adulthood has been severe. She was found to be suffering from chronic depression and from post-traumatic stress disorder. Her history of abuse has placed her at an increased risk in the future of self-harm and depression.

[16] Once again there is a complete lack of mitigating factors and a number of aggravating matters including breach of trust, multiple offending and the extended period of the offending in the case of an extremely young child.

[17] It is of course correct to say that in asserting that the digital penetration of a vulnerable 5 year old girl in her own bed merited a starting point of 4 years' imprisonment, the learned trial judge had overlooked the fact that these offences were committed before 3 October 1989 when by virtue of Article 12 of the Treatment of Offenders (Northern Ireland) Order 1989 the maximum penalty for offences of this nature was increased from 2 years to 10 years' imprisonment. The longest period of imprisonment to which the appellant could therefore be sentenced on each individual offence was two years pursuant to Section 52 of the Offences against the Person Act 1861.

[18] Hence the sentences passed in respect of the first victim exceeded the statutory maximum for counts 14, 17 and 20 and in respect of this second victim exceeded the statutory maximum in respect of count 51.

[19] We pause to observe that is the duty of counsel to be aware of the minimum and maximum sentences to be passed on any offence and to draw this to the attention of the trial judge. It is highly regrettable that counsel failed to do that in this instance either at the time of sentencing or shortly thereafter.

[20] Turning to the appropriate sentences for the crimes committed against Victim 2, we observe that the learned trial judge, having erroneously fixed a starting point of 4 years' imprisonment for the digital penetration of this vulnerable 5 year old child, then went on to say that in this case:

> "The use of consecutive sentence to reflect the extended period of incitement to gross indecency would be appropriate. Had I been dealing with this case in isolation from the other victims, I consider that a proper starting point to reflect the totality of the behaviour involved would have been 7 years' imprisonment. I would have achieved this by the 4 years on count 51 and then have used 18 month sentences on the incitement charges. I would have made two sets of those charges at 18 months each consecutive making 3 years consecutive to the 4 years in count 51."

[21] Had he not been in error about the maximum permissible under the 1861 legislation, we consider that conceptually this approach was entirely appropriate and commendable. We are satisfied that this is a case that would clearly have merited the 2 year maximum for the count of digital penetration given the fact that the appellant had contested the case (thus losing an obvious ground for reduction by

way of mitigation) coupled with the circumstances of the depravity of the activity and our belief that it is difficult to envisage a worse case scenario than this. The 18 month sentences on the incitement charges are wholly appropriate and we see no reason why those two sets of charges should not have been made consecutive which would have made a total of 3 years consecutive to the 2 years in count 51.

[22] We have no doubt that applying the principle that the overriding and important consideration is that the global sentence should be just and appropriate (see *AG's Ref No: 1/1991* [1991] NI 218 at p 224G/H) a total of 5 years for these offences would have been appropriate had they been taken in isolation.

[23] Perfectly properly the learned trial judge at the end of his sentencing remarks reduced the period of 7 years which he would normally have imposed for this behaviour albeit erroneously in light of the mistake about the Offences against the Persons Act 1861 maximum. We consider that the period of 5 years to which we have adverted and which would have been completely justified for his behaviour, should be reduced to 4 years to satisfy the principle of totality arriving therefore at precisely the same figure that the learned trial judge imposed. A three year reduction, as made by the learned trial judge, would be far in excess of what would be condign punishment for these offences.

The offences against Victim 3

[24] Counts 70-76 inclusive were all instances of common assault which reflect samples of the behaviour which embraced verbal and physical abuse of this child which was at times a daily occurrence. Count 70 and 72 reflect behaviour that was repeated pushing his arm up his back, count 71 and 73 relate to general slapping and pushing, count 74 is a specific account when he was punched, stamped and kicked when he came home from school and counts 75 and 76 were sample counts of general punching.

[25] The victim's statement describes how for 5 years the appellant mentally and physically abused this child albeit there is no evidence of severe psychological harm.

[26] As in the other cases, we find no mitigation. As the learned trial judge pointed out, the serious features in this victim's case are the multiplicity of the offences and the victim's vulnerability. The learned trial judge went on to say that had he been dealing with this victim alone he would have made a number of the sentences consecutive leading to a total sentence of 18 months' imprisonment which would have properly reflected the brutality of the alleged behaviour.

[27] We find this approach completely unimpeachable. Whilst the harm physically visited on this child may not have been great, the lengthy period over which these assaults were imposed made the approach of the learned trial judge wholly proportionate to the lengthy nature of the offences.

[28] In passing we advert to *R v Kennedy and Kennedy* [2011] NICA 42 where Morgan LCJ in dealing with a case heard in the Crown Court which ordinarily would be dealt with in the Magistrates' Court declared that whilst it was relevant to consider whether the sentence was out of all proportion with that which a Magistrate could have imposed, this did not mean that "this sentence cannot exceed the maximum which the Magistrates' Court can impose".

[29] This is particularly relevant in this case where the aggravating factors included the fact that:

- victim 3 was a vulnerable child,
- the offending took place in his home which is normally a place of safety,
- the offending took place in the presence of other children and represented a breach of trust.

[30] There were thus seven counts of common assault for which the learned trial judge imposed sentences ranging from 3 months to 12 months. He reduced the sentence of 18 months which would have been imposed had he been dealing with the case in isolation so that in the event the 12 months sentence reflected the principle of totality.

[31] Consecutive sentences in the case of Victim 3 to the sentences imposed in the case of the other victims was an appropriate approach (see *AG's Reference No: 28 of 2013* [2013] EWCA Crim 1190).

[32] Consequently, we are of the view that it was appropriate to make the sentences in respect of the three victims consecutive and that the learned trial judge in arriving at a figure of 20 years, notwithstanding the error in relation to sentencing in the cases of indecent assault, had properly imposed a condign punishment for these outrageous offences.

Delay

[33] Finally, we turn to the question of delay. Mr Greene advanced the argument that there had been delay in bringing these proceedings. He contended that:

- there was no good reason why a prosecution was not pursued in 1992 when complaints broadly similar to those forming the basis of this prosecution were made.
- the trial judge had failed to take this delay – which he submitted amounted to 31 years – into account.

- the possibility of a reduced sentence in such circumstances is often the counterweight to failed abuse of process arguments based on delay.

- in cases involving substantial delay, it is the duty of a sentencing court, whether or not the matter has been raised on behalf of the defendant, to examine the possibility of a breach of the right to a fair trial within a reasonable time, in order to decide whether any such breach should have an effect on the disposal of the case.

- *Rummun v State of Mauritius* [2013] 1 WLR 598 PC was a guiding authority.

[34] In the instant case a decision was taken by the DPP not to prosecute this matter in 1992. At that time victims 1 and 2 were 18 and 22 years old respectively. Historic abuse cases involving children are always difficult and sensitive. The reasons given in the instant case for the lack of prompt prosecution were essentially that there were clear evidential difficulties because the children were young at the time, and police did not believe that either girl would make a good witness. The appellant had denied the offences and had put forward a reason why the allegations would be invented. Accordingly, it was considered there was no reasonable prospect of a conviction in the case.

[35] This decision was subsequently revisited and reversed in 2014 and the prosecution instituted. Thereafter there was no material delay.

[36] In passing we observe that we have not taken into account against the appellant in this matter the fact that he denied all the way through the interviews and trial that he was guilty. As indicated in *Rummun v State of Mauritius* [2013] 1 WLR 598 PC a defendant to any criminal charge is entitled to put the prosecuting authorities to proof of his guilt and, treating this factor with caution, we do not hold it against the appellant.

[37] The first matter to be considered is when does time begin for the purpose of calculating delay.

[38] *Attorney-General's Reference (No 2 of 2001)* [2004] 1 Cr. App. R. 25 informs this issue. That case arose out of a prison riot in April 1998. Inmates were interviewed in June/July 1998. Informations were laid against defendants in February 2000. At trial in January 2001 the judge stayed the indictment on grounds of a breach of the defendants' right to have the charges heard within a reasonable time contrary to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms under schedule 1 of the Human Rights Act 1998 ("the Convention"). Delay was calculated from the time date of interview until the defendants were summoned in February 2000.

[39] Lord Bingham of Cornhill summarised the position as follows at paragraphs [26] and [27] as follows:

"26. The requirement that a criminal charge be heard within a reasonable time poses the inevitable questions: when, for purposes of article 6(1), does a person become subject to a criminal charge? When, in other words, does the reasonable time begin? In seeking to give an autonomous definition of "criminal charge" for Convention purposes the European Court has had to confront the problem that procedural regimes vary widely in different member states and a specific rule appropriate in one might be quite inappropriate in another. Mindful of this problem, but doubtless seeking some uniformity of outcome in different member states, the Court has drawn on earlier authority to formulate a test in general terms. It is found in paragraph 73 of the Court's judgment in *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 27 (footnotes omitted):

> '1. *Commencement of the periods to be taken into account*
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> 73. In criminal matters, the 'reasonable time' referred to in Article 6(1) begins to run as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. 'Charge', for the purposes of Article 6(1), may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'. [Deweer v Belgium (1980) 2 EHRR 439 459, para 46].'

27. As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal

> proceedings against him. This formulation gives effect to the Strasbourg jurisprudence but may (it is hoped) prove easier to apply in this country. In applying it, regard must be had to the purposes of the reasonable time requirement: to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods. The Court of Appeal correctly held (at p 1872, para 10 of its judgment) that the period will ordinarily begin when a defendant is formally charged or served with a summons, but it wisely forbore (pp 1872-1873, paras 11-13) to lay down any inflexible rule."

[40] The concept of "the moment of being charged" received similar illuminative consideration in *Ambrose v Harris* [2011] UKSC 2435. This case essentially centred on the issue of the right to legal advice under article 6 of the Convention but the concept of the moment of charging did arise in the judgment of Lord Hope at paragraphs [61] and [62] as follows:

> "61. I return to the Lord Advocate's submission that three features determine whether an individual has a right to legal advice under article 6 in accordance with the principle in *Salduz*. First, he must be a "suspect". Second, he must be "in police custody". Third, he must be the subject of "police interrogation". The submission is that, unless all three features are present, he has no right of access to legal advice under article 6.
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> 62. The correct starting point, when one is considering whether the person's Convention rights have been breached, is to identify the moment as from which he was charged for the purposes of article 6(1). The guidance as to when this occurs is well known. The test is whether the situation of the individual was substantially affected: *Deweer v Belgium* (1980) 2 EHRR 439, para 46; *Eckle v Germany* (1982) 5 EHRR 1, para 73. His position will have been substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled: *Shabelnik v Ukraine* (application no 16404/03) (unreported, BAILII: [2009] ECHR 302) given on 19 February 2009, para 57. In *Corigliano v Italy* (1982) 5 EHRR 334, para 34 the court said that, whilst 'charge' for the purposes of article 6(1) might

in general be defined as the official notification given to the individual by the competent authority of an allegation that he has committed an criminal offence, as it was put in *Eckle*, para 73, it may in some instances take the form of other measures which carry the implication of such an allegation. In *Šubinski v Slovenia* (application no 19611/04) (unreported) given on 18 January 2007, paras 62-63 the court said that a substantive approach, rather than a formal approach, should be adopted. It should look behind the appearances and investigate the realities of the procedure in question. This suggests that the words 'official notification' should not be taken literally, and that events that happened after the moment when the test is to be taken to have been satisfied may inform the answer to the question whether the position of the individual has been substantially affected.

63. It is obvious that the test will have been satisfied when the individual has been detained and taken into custody. It must be taken to have been satisfied too where he is subjected to what *Salduz*, para 52 refers to as the initial stages of police interrogation. This is because an initial failure to comply with the provisions of article 6 at that stage may seriously prejudice his right to a fair trial. The moment at which article 6 is engaged when the individual is questioned by the police requires very sensitive handling if protection is to be given to the right not to incriminate oneself. The mere fact that the individual has been cautioned will not carry the necessary implication. But, when the surrounding circumstances or the actions that follow immediately afterwards are taken into account, it may well do so. The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of article 6(1): *Shabelnik v Ukraine*, para 57. The Lord Advocate submitted that the protection of article 6(3)(c) was not engaged until the individual was actually taken into custody. But this cannot withstand the emphasis that the Strasbourg court puts on the consequences of an initial failure to comply with its provisions, as in *Salduz*, para 50; see also *Zaichenko v Russia*, para 42."

[41] In the instant case there can be little doubt but that the appellant can plausibly argue that his position will have been substantially affected in 1992. At that time suspicion against him for these offences was being seriously investigated and a prosecution case was being compiled in the wake of the allegations by the victims. Official notification had been given to him by the competent authority of an allegation that he has committed criminal offences.

[42] On the other hand we should adopt a substantive approach, rather than a formal approach and look behind the appearances and investigate the realities of the procedure in question. The fact of the matter is that the applicant was informed in 1992 after the interviews that proceedings were not to be instituted against him for the reasons to which we have adverted earlier in this judgment. This serves to inform the answer to the question whether his position has been substantially affected. We are entitled to take into account the events that occurred after the official notification was given to him. Within a reasonably short time he was informed he was not to be prosecuted. He did not suffer the anguish and stress that someone who remains "charged" almost invariably suffers in conventional delay cases when the element of prosecutorial procrastination keeps the matter hanging over his head. Any stress should have disappeared immediately thereafter and he was thus only substantially affected, if at all, for a very short time.

[43] This was a complex case relying as it did upon recollections from childhood. There was nothing irresponsible or inefficient about the decision in 1992 not to proceed with the prosecution and no blame can rest with the conduct of the administrative or judicial authorities in this instance. The various special measures and protections that now are available for vulnerable witnesses were not in being at that time. There was nothing that could be classed as excessive procedural delay in the conduct of the prosecution in these circumstances. Moreover in the context of delay considerations, it is important not to lose sight of the public interest in ensuring that criminals are unflinchingly prosecuted and condign punishment imposed.

[44] Thereafter when the matter was revisited in 2014 and a fresh decision was taken to charge him, there was no evidence of further procedural delay between the date of his charge and the trial.

[45] Accordingly, notwithstanding the fact that the learned trial judge did not address the issue of delay, we do not consider that this is a case where delay should be a factor in the sentencing approach. Thus we find no basis for further reducing the sentence.

Conclusion

[46] With reference to Victim 1 we affirm all the sentences imposed by the learned trial judge save that we reduce the sentence imposed on counts 14, 17 and 20 from 3 years to 2 years. We agree with the learned trial judge that the appropriate

sentence for the counts on rape were rightly assessed at 16 years, that all the other counts against the appellant in relation to Victim 1 should be made concurrent, and that it was proper to allow for the subsequent consecutive sentences in relation to Victims 2 and 3 by reducing that starting point of 16 years by one year namely to 15 years.

[47] We affirm all the sentences imposed on the counts arising out of the crimes against Victim 2 save that we reduce the sentence on count 51 from 4 years to 2 years. For the reasons set out above we consider that the learned trial judge was correct in principle to say that if he had been dealing with these offences in isolation he would have considered making all the offences consecutive (leading, on his calculation, to a sentence of 7 years). Allowing for the reduction in count 51, we consider that it is appropriate that consecutive sentences should have been imposed in the case of Victim 2. That would have led to a sentence of 5 years but we are satisfied that we should reduce that to 4 years to satisfy the principal of totality. That should be consecutive to the period of 15 years imposed in relation to the counts against Victim 1.

[48] We affirm all of the sentences imposed in relation to Victim 3. We agree with the learned trial judge that had he been dealing with the case alone, 18 months would have been a proper sentence but it was appropriate to reduce it to 12 months given the principle of totality. That period of 12 months should be made consecutive to the sentences imposed on Victims 1 and 2.

[49] In short we affirm the sentence of 20 years' imprisonment imposed on this appellant. We also confirm the levy.