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| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered: 06/09/2017* |

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**SS**

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**Before: Morgan LCJ, Weir LJ and Stephens J**

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**MORGAN LCJ (giving the judgment of the court)**

[1] On 18 February 2014 the applicant was convicted after a trial at Antrim Crown Court before His Honour Judge Fowler QC and a jury of 14 counts of indecent assault, three counts of gross indecency, five counts of rape, one count of cruelty to children and one count of attempted indecent assault on a female committed in respect of his younger sister and two counts of indecent assault on his older sister. He was sentenced to 20 years imprisonment in respect of the rapes with concurrent sentences in respect of the other convictions concerning his younger sister and had an indeterminate custodial sentence with a minimum term of two years custody imposed in respect of the attempted indecent assault and concurrent sentences in relation to the indecent assault on his older sister. He now renews his application for leave to appeal against conviction and if unsuccessful appeals with leave against his sentence.

**Background**

[2] The first 23 offences were committed against the applicant's younger sister, when she was between the ages of 5 and 16, from 1992, when the applicant was 12, to 2003, with count 24 relating to a later incident of attempted indecent assault on her when she was aged 20. Counts 25 and 26 were committed against his older sister

in or around 1998/99 when she was 15 and the applicant was aged between 19 and 20.

[3] The prosecution case was that the first incident of indecent assault on the 5 year old sister occurred when the applicant took her into the bathroom of the family home and began showing her pictures of naked women in the course of which he started to touch her in the vagina with his fingers. This rapidly progressed to a regular campaign of sexual abuse with the applicant touching her vagina with his fingers, exposing his penis to her and making her masturbate him. He also touched her on the chest under her clothing. During these early stages of the grooming and sexualisation process of his victim, the applicant was threatening her and telling her not to tell anyone or she would be blamed. The behaviour subsequently progressed to the applicant holding her down on the bathroom floor and raping her. She was still only five when this happened to her. She described being in pain and crying and the applicant compounding this by pulling her hair and laughing at her after the rape. This repeated sexual abuse and rape, with associated manipulation and threats, became a regular feature of her childhood.

[4] As she grew older he continued the abuse and forced her to fellate him from the age of 7. There was almost weekly sexual degradation inflicted on her. As she got older and more aware that this was wrong, she tried to avoid and resist him which made him more violent and intimidating. On occasions he kicked and punched her and threatened more serious violence with knives or baseball bats. He raped her at knifepoint on a number of occasions and once with a baseball bat held close to her face. She became suicidal. There was a brief lull in the offending after her father died suddenly from a brain haemorrhage. When it started again she resisted and told him to stop. He threatened her by telling her to keep quiet or her mother would end up dead like her father. He continued to rape and sexually abuse her. The pattern of abuse stopped when he left the family home when she was about 16 and he 23, some 11 years after it had started.

[5] A further incident occurred in the summer of 2008 when the younger sister was 20 years old and was living at her own home with her partner. The applicant called at her house and entered her bedroom while she was changing and attempted to touch her breasts. The sentencing judge observed that taken in the context of the sexual abuse that had occurred over the years this was a very serious invasion of the victim's home, her bedroom and the one place where she felt safe. It was an attack on her personal autonomy and it demonstrated the applicant's continued desire to dominate and abuse her.

[6] The two counts in respect of which the applicant was convicted concerning the older sister related to allegations that, on two different occasions, the applicant touched her breasts over her clothing in her bedroom when she was 15 years old and the applicant was aged between 19 and 20.

[7] The applicant gave evidence denying all of the allegations. He maintained that these were made up as a result of a dispute over the inheritance of property. There had been considerable delay before the allegation was made and it was suggested that such a delay was inexplicable having regard to the close family relationships within the complainant's home. The complainant's explanation for the delay was her fear of what would happen to her and her mother because of the applicant's violent disposition. The applicant also maintained that the subsequent conduct of the sisters engaging in social activities within the family were inconsistent with the allegations now made.

**The conviction appeal**

[8] In the course of the trial the prosecution applied to introduce evidence of bad character consisting of previous convictions for violent offences. The application as originally formulated was based on the proposition that these convictions showed a propensity to commit offences of the kind with which he was charged. In the course of the submissions, however, the submission was made that the convictions were relevant to an important matter in issue between the defendant and prosecution and consequently were admissible pursuant to Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order").

[9] The previous convictions consisted of two convictions for assault occasioning actual bodily harm when he was 17, a grievous bodily harm conviction when he was 22, an assault occasioning actual bodily harm when he was 24 and a further GBH when he was 25. The offences were committed between 1997 and 2006. None of the offences were committed against any family member and he had no convictions of a sexual nature or of offences relating to children.

[10] The prosecution submitted, however, that these convictions were relevant to important matters in issue in the trial in three respects. First, the younger sister maintained that she had not disclosed the sexual abuse to which she was subjected because she was fearful of the applicant whom she described as being of a violent disposition. Secondly, the convictions were clearly relevant to the charge of cruelty. Thirdly, the younger sister's allegation was that the offences committed against her included the infliction of violence on a regular basis and the convictions were, therefore, material to whether such violence was used on the complainant in the course of the sexual offending.

[11] The applicant resisted the admission of the convictions on the basis that the convictions did not support the prosecution's original submission that they demonstrated a propensity to commit offences of the kind with which he was charged. We accept that submission. These convictions arose from alcohol fuelled incidents of violence which did not involve family members and were not of a sexual nature.

[12] The learned trial judge gave an ex tempore ruling in the course of the trial. He correctly identified the application as being whether the convictions were relevant to an important matter in issue between the defence and prosecution. He purported to admit the convictions on the basis of "(a) propensity and (b) the overarching issue in relation to the credit of the witness in terms of whether or not she was terrified, petrified as were her words". The reference to propensity was misleading because it is clear from the discussion that the issue had crystallised into consideration of how the convictions were relevant to an important matter in issue which included the use of violence when committing the sexual offences.

[13] The judge then went on to consider whether he should exclude the evidence pursuant to Article 6(3) of the 2004 Order but in the exercise of discretion did not consider that it would "so overwhelm and swamp the jury that it would be such that I should withdraw this from the jury". This formulation was criticised by the applicant but it is absolutely clear that the judge was considering whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[14] In his charge to the jury the learned trial judge warned that the convictions were only background and what really mattered was the evidence they had heard in relation to the offences from the complainants. They had to be careful not to be unduly prejudiced against the applicant by what they had heard about his previous convictions. The judge then went on to explain how the convictions were relevant:

> "Firstly, they are relevant to the question of whether he has a tendency to commit acts of violence and in the charges that you are dealing with it is alleged that he committed violent rape, using both violence and the threat of violence, that he used a baseball bat and knives and threatened [the complainant] and members of her family. It is also relevant to the issue of child cruelty and assault.
>
> Secondly, his record is relevant to the issue of fear when the complainant was terrified, petrified, that he was a

> scary person. The prosecution, therefore, say it is more likely that he behaved in the way described by [the complainant] and it is more likely that she was indeed afraid of him and you may well find it goes some way to explaining why she said nothing to anyone about the abuse that she suffered."

The judge then went on to tell the jury that none of the offences were committed against any of his family and showed no tendency of violence towards anyone close to him. He had no convictions for offences of a sexual nature or relating to children. The jury were told that the applicant's previous convictions were, therefore, a very small part of the evidence in the case.

[15] We accept that the issue of whether the complainant delayed in reporting because of fear was an important matter in the context of the case. On balance we are inclined to the view that the issue of the use of violence in the course of the commission of the offences was probably also an important matter in issue. There was a serious issue about whether these convictions should be excluded under Article 6(3) of the 2004 Order. That provision is designed to ensure the fairness of the trial. These convictions arose in circumstances entirely different from the circumstances with which this case was concerned and their relevance to the issues in the case had to be balanced against the adverse effect on the fairness of the proceedings from the introduction of somewhat extraneous matters. We consider, however, that this was a matter lying within the discretion of the learned trial judge and we cannot say that his exercise of discretion was either plainly wrong or exercised unreasonably.

[16] In his charge to the jury the learned trial judge was careful to identify the basis upon which the convictions could be considered and to remind the jury that the convictions were a very small part of the evidence in the case. In those circumstances we have no concerns about the safety of the conviction. The application for leave to appeal the conviction is refused.

**The sentence appeal**

[17] Because of the timing of the offences all of them fell to be dealt with under the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") with the exception of count 24 relating to the attempted indecent assault on the younger sister in 2008 which fell to be dealt with under the Criminal Justice (Northern Ireland) Order 2008.

[18] Dealing first with the offences subject to the 1996 Order the learned trial judge in his careful and comprehensive sentencing remarks identified the relevant factors as harm, culpability and risk. He took into account the victim impact report prepared by Dr Patterson and accepted that this was a case where there was violence within the family home which contributed to the Post-Traumatic Stress Disorder from which the younger sister was suffering but Dr Patterson concluded that a large proportion of the impact was attributable to the offences alone.

[19] This was plainly a case of high culpability. It represented a campaign of violent sexual abuse over a period of approximately 11 years. On any view that gave rise to very high culpability. This was also a case where more than one victim was involved and the learned trial judge correctly took into account that there was an element of breach of trust in that the perpetrator took over the role of father figure and continued his offending after the victim's father died. In mitigation the judge noted that the applicant suffered from a significant learning difficulty and took into account that he had no previous record for sexual offences. He also noted that the offences had commenced when the applicant was only 12 years old but continued into his twenties.

[20] The learned trial judge was also entitled to take into account the assessment by Dr Pollock which indicated that the applicant warranted designation as a high risk of sexual reoffending and there was evidence suggesting a continuation of persistence of attitudes supportive of sexual assault against a female. That was also the view of the Probation Service who invited the court to consider an Article 26 licence which would allow the monitoring of the applicant's behaviour upon release and the opportunity to seek to engage in the managing of the risk associated with his offending behaviour.

[21] In light of these factors the learned trial judge concluded that the appropriate commensurate term was one of 16 years imprisonment. He was then required to consider pursuant to Article 20(2)(b) of the 1996 Order whether any longer term was necessary to protect the public from serious harm from the offender. He concluded that a further period was required and imposed a sentence of 20 years imprisonment in respect of the rapes and corresponding shorter terms on the other counts. We consider that his approach was meticulous and careful and that no criticism of any sort could be made in relation to it.

[22] The learned trial judge then turned to the question of whether he should impose an Article 26 licence. Such a licence can be imposed where the whole or any part of the sentence is imposed for a sexual offence and the court, having regard to the need to protect the public from serious harm and the desirability of preventing

the commission of further offences and securing rehabilitation, decides to impose a licence as a result of which the offender is subject to the licence until he has served the whole of the sentence. The pre-sentence report suggested a range of conditions in relation to prohibition on his contact with children and notification of any relationship with females, his involvement in the Community Sex Offender Programme and various monitoring requirements.

[23] The judge was satisfied that this was an appropriate case for an Article 26 licence because of the continuing risk. In addition to these orders he also imposed a Sexual Offences Prevention Order and a Disqualification Order under the Children and Vulnerable Adults (Northern Ireland) Order 2003 and notified the applicant that the Independent Safeguarding Authority would include him on the barred list relating to children. This constituted, therefore, a range of protective and rehabilitative measures put in place to provide protection to the public.

[24] He then turned to the appropriate sentence for the offence of attempted indecent assault on the younger sister. The offence occurred approximately 5 years after the offender had left the family home and at a time when the younger sister was living elsewhere with her partner. The applicant came into the younger sister's bedroom and attempted to touch her breast. He did not succeed and there was no element of violence involved in the incident. It was, however, as Dr Pollock indicated, evidence supportive of a persistence of attitudes supporting sexual assault of females.

[25] The pre-sentence report concluded that the applicant represented a significant risk of serious harm and in this appeal there was no dispute about that. The learned trial judge concluded that an extended custodial sentence would not be adequate in light of the persistence of the offending and the recent attempt to engage in sexual abuse in 2008. He showed no insight into his abusive nature or empathy for his victims. He considered that this was supported by the observations of Dr Pollock in particular that any currently present or likely present protective factors were of limited weight.

[26] It is important to recognise that the reference to protective factors was in the context of examining the extent to which he himself demonstrated factors tending to protect the public from further offending. The decision in this case was given some four days before the decision of this court in R v Pollins [2014] NICA 62. In that case we noted that an indeterminate custodial sentence is the most draconian sentence the court can impose apart from a discretionary life sentence. It should not be imposed without full consideration of whether alternative and cumulative methods

might provide the necessary public protection against the risk posed by the individual offender.

[27] Although it is certainly entirely appropriate to consider the extent to which the offender may demonstrate protective factors in his personality it is also necessary to have careful regard to the other protective factors imposed as a result of the sentencing exercise. In this case that includes the sentence of 20 years imprisonment, the Article 26 licence, the SOPO, the Disqualification Order and the role of the Independent Safeguarding Authority. These provide a range of intrusive measures designed primarily to secure the protection of the public. They can be adjusted to reflect the requirement of effective protection and in some cases can endure for as long as is necessary.

[28] Without in any way failing to recognise the importance of the incident in 2008 it is noteworthy that it differed significantly from the earlier episodes in that there was no persistence or use of violence. It is also noteworthy that Dr Pollock considered the risk of a violent offence to be in the low to medium range. Taking all these factors into account we do not consider that this was a case for such a draconian sentence. An extended custodial sentence was adequate to deal with the risk having regard to the suite of protections to which the applicant is subject. Accordingly, we substitute for the indeterminate custodial sentence with a minimum tariff of 2 years an extended custodial sentence comprising a commensurate term of 4 years and an extended term of 4 years. To that extent the appeal is allowed.