Neutral Citation No: [2017] NICA 36 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McB10318** *Delivered:* **14/06/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

WL

Applicant

_____

Morgan LCJ, Weir LJ and McBride J

_____

McBRIDE J (delivering the judgment of the court)

Introduction

[1] The applicant seeks leave to appeal against conviction and sentence. This is a case in which the complainant is entitled to anonymity, arising from the nature of the offences. Accordingly, no matter relating to the complainant shall be included in any publication, if it is likely to lead members of the public to identify her. Further given the risk of jigsaw identification arising from the familial relationship the applicant's name must also not be published. As a consequence we have not only anonymised the name of the complainant but we have also anonymised the name of the appellant and all familial witnesses.

[2] On 18 November 2015 the applicant was convicted of 8 counts of indecent assault on a female contrary to Section 52 of the Offences against the Person Act 1861 and 8 counts of rape, contrary to common law. The applicant was arraigned on 5 November 2015 and pleaded not guilty to all counts. After a trial running from 5 November to 18 November 2015, the jury found the applicant guilty of all the offences. All the verdicts were unanimous, save for two of the indecent assault charges which were majority verdicts of 10-2 and 11-1.

[3] The applicant was sentenced on 29 April 2016. Her Honour Judge Smyth imposed a mixture of concurrent and consecutive sentences for the indecent assault charges totalling 6½ years. She imposed life imprisonment with a minimum tariff of

10 years for the rape charges, which was to run concurrently with the sentences for the indecent assaults.

[4] The applicant was represented by Mr Greene QC and Mr Barlow of counsel. The Crown was represented by Mr Rick Weir QC and Ms Fiona O'Kane of counsel. We are grateful to all counsel for their detailed skeleton arguments and submissions which were of assistance to the court.

Background

[5] The applicant was the eldest sibling in the family. The complainant, his sister, was the youngest. The offences allegedly occurred in the family home when the complainant was aged from 5-18 years and the applicant was aged 13½ - 26½ years.

[6] The offences relate to a litany of sexual assaults said to have been committed by the applicant between 1978 and 1991. The indictment comprises 16 counts which includes 10 specific counts and 6 specimen counts. The allegations involved digital penetration of the vagina, penetration by a doll, oral sex and a series of rapes. The assaults were accompanied by threats and violence.

[7] At the trial, B, a brother closest in age to the complainant and a sister, T, gave evidence in support of the prosecution. Another sister, M, gave evidence on behalf of the applicant. The applicant also gave evidence.

[8] The complaint was not made to the police until 2012. The complainant gave evidence in chief that she informed her mother about the abuse in 1992/93 when she was aged 19/20 and informed her gynaecologist about the abuse in 1999, after the death of one of the twins she was expecting. Under cross-examination it was put to her and she accepted that she had told her GP, family members and a social worker about the abuse. The applicant accepted he had received a phone call from his mother informing him that the complainant had made allegations of abuse against him.

[9] B gave evidence that he had witnessed a specific incident of indecent assault and T gave evidence about an incident in or about 1996 when a brown envelope came from the Royal Victoria Hospital informing the applicant he had a sexually transmitted disease.

[10] During cross-examination of the complainant, B and T a number of inconsistencies were drawn out which were then referred to by the learned trial judge in her charge to the jury.

[11] The applicant gave evidence and denied the charges. He alleged that the complainant, B and T were acting in collusion and were motivated by the hope of financial gain.

[12] A key issue in the trial was the admission of bad character evidence. This related to three convictions the applicant had, namely:

(a) Rape on 17 October 1992 of an adult female which involved twisting her arm up her back, punching her and forcibly removing her underwear.

(b) Indecent assault on 19 November 1992 when he told a woman at gunpoint to remove her clothes and then directed her to perform oral sex on him and swallow the ejaculate.

(c) Rape on 21 March 1993 when the victim was punched, threatened, her clothes pulled down and raped.

In all three cases there was DNA evidence to link the applicant to the offending. Although the applicant pleaded guilty to all these offences, he stated in evidence in the present trial that he was innocent of those charges and only pleaded to obtain a lesser sentence.

[13] The learned trial judge, in a detailed ruling, admitted the bad character evidence under Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 on the basis that these were relevant to show propensity to commit sexual offences using the threat of and actual violence. She further stated that had she been required to rule on it she would also have admitted the evidence under gateway (g).

Grounds of Appeal against Conviction

[14] The applicant applied for leave to appeal against conviction and sentence. Originally 7 grounds of appeal against conviction and 13 grounds of appeal against sentence were pleaded. The single judge on 8 December 2016 refused leave to appeal against conviction and sentence on all grounds.

[15] By notice dated 4 May 2017 the applicant sought leave to amend the grounds of appeal against conviction and sentence as set out in the Amended Grounds of Appeal against Conviction and the Amended Grounds of Appeal against Sentence and he also sought to abandon all grounds of appeal previously lodged with the court.

[16] The Amended Grounds of Appeal against Conviction are:

(i) The learned trial judge erred by inviting the jury to take the applicant's bad character into account in deciding whether or not his evidence before them was the truth. This direction significantly impacted on the fairness of the trial as it unfairly undermined the evidence of the applicant far beyond that permitted in any proper evaluation of his credibility. ('Truthfulness' ground)

(ii) The learned trial judge erred in the manner in which the jury were directed with respect to evidence of "recent complaint" in that she invited them to use such evidence to support the truth of the complaints when there was no evidential basis for so doing. The limits of what could be properly said to the jury about this evidence were greatly exceeded. ('Complaint' ground.)

Consideration

[17] The two grounds relied on by the applicant relate to truthfulness and complaint. The court agreed to hear the application *de bene esse*.

Ground 1: Truthfulness

[18] In the course of her summing up to the jury in relation to bad character the learned trial judge stated:

> "You may use the evidence of the defendant's bad character in the following ways: firstly, if you think it is right to do so, you may take it into account when deciding whether or not the defendant's evidence to you was the truth. The person with a bad character may be less likely to tell the truth but it does not follow that he is incapable of doing so, so you have to decide to what extent, if at all, his character helps you when judging his evidence."

[19] The applicant submits that this was a mis-direction in law as the learned trial judge invited the jury to take the applicant's bad character into account for a purpose other than that for which it was introduced. Mr Greene QC submitted that as the evidence was admitted under gateway (g) the court was only entitled to give the classic direction set out in R v Cooke [1959] 2 QB 340, that is to invite the jury to take the applicant's bad character into account when considering whether the allegations made by him against the prosecution witness are true. The court was therefore not entitled to invite the jury to use the applicant's bad character to disbelieve the entirety of his evidence. He further submitted that as this was a case where credibility was central this mis-direction potentially affected the verdict.

[20] The learned trial judge admitted bad character evidence under gateways (d) and (g). In R v Campbell [2007] Cr App R 28 CA the court held that once evidence was admitted through one of the gateways it may be used by the jury for any relevant purpose without limit as to the gateway through which the evidence was admitted. The court held that to direct the jury only to have regard to the evidence for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory practices that prevailed under the old law.

[21] The approach taken in Campbell was rejected in R v D, R v P and R v U [2012] 1 Cr App R 8 CA which held that the correct view is that the jury needs to be directed as to the gateway or gateways through which evidence is being admitted and the judge should then identify the way or ways in which the evidence can be legitimately used.

[22] We consider that the learned trial judge's summing up is one that represents the old law under R v Campbell. Looking at the matter in the round however we do not consider that the defendant suffered any prejudice or that the verdict was rendered unsafe by reason of the learned trial judge's direction. Counsel for the appellant conceded that the admission of the previous convictions, without more, would have had an indirect and unavoidable bearing on the applicant's credibility in any event. We therefore refuse leave on this ground.

Ground 2 – Complaint

[23] The learned trial judge directed the jury in respect of the complainant's complaint as follows:

> "If you do accept that [the complainant] made a complaint of sexual abuse to her mother, to her gynaecologist, to her GP, to her social worker, to other family members, well do bear in mind that is not independent evidence supporting her allegations because the complaints came from [the complainant] herself. But if you are satisfied that those complaints were made and that in all the circumstances they were made as soon as could reasonably be expected after the alleged offences were committed, then you can take that evidence into account as evidence that the complaint [the complainant] has made to you is true and not just that she has consistently since 1992 complained that she was sexually abused by the defendant."

[24] The applicant submits that the learned trial judge erred in inviting the jury to use evidence of recent complaints to support the truth of the complaints.

[25] Whilst under Article 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 it is technically open to a judge to give the direction given by the learned trial judge, this court accepts that in most cases a judge would be unlikely to charge a jury in this way because the evidence is not independent. It is therefore of no weight and hence adds nothing to the cogency of the complainant's complaint.

[26] The learned trial judge in her charge did however warn the jury that it was "not independent evidence supporting the allegations because the complaints came from [the complainant] herself". In light of this and taking the totality of the charge

given into account, we consider that the safety of the verdict is not called into question. We further note the learned trial judge was not requisitioned in respect of this matter. If this matter was one of real concern we would have expected it to have been the subject of a requisition. Accordingly, we refuse leave on this ground.

Grounds of appeal against sentence

[27] The Amended Grounds of Appeal against Sentence were:

(i) The learned trial judge erred in imposing discretionary life sentences in respect of counts 9-16 in that:

(a) While individually and collectively grave and serious offences they did not exhibit the features sufficient to mark them as "extremely grave" or the most serious type of offences of that sort. The risk of further offending of grave character was not sufficiently established in the material before the learned trial judge so as to justify a life sentence.

(b) The tariff of 10 years set by the learned trial judge was manifestly excessive for the following reasons:

- The minimum term failed to take into account the mitigation available to the applicant which consisted of the following:
- His age at the time of committing most of the offences
- At the time of offending he had a clear record.
- This minimum term equated to a commensurate sentence of 20 years.

(ii) There is an element of double counting of factors used to impose the life sentence as well as [was used] to set the tariff.

(iii) The learned trial judge failed to have any regard to the sentence passed at Woolwich Crown Court for offences committed within a broadly similar timeframe. The totality of sentence was not considered when setting the tariff for the following reasons. The total sentenced passed equated to a commensurate one of 32 years. The minimum term ought to have been adjusted significantly to take into account the de facto consecutive nature of the two different sentences.

(iv) If a discretionary life sentence was not appropriate the sentence under Article 20(2) (a) or (b) equally had to be adjusted to take account of totality.

Consideration

[28] In advance of sentencing the learned trial judge alerted counsel that a discretionary life sentence was being considered and she invited them to make submissions. In her sentencing remarks Her Honour Judge Smyth referred to R v McDonald [2016] NICA 21 and correctly identified the two limb test for the imposition of discretionary life sentence, namely:

(i) Stage 1 – The offence for which the sentence is being imposed should be an extremely grave offence.

(ii) Stage 2 – It is likely there will be further offending of a grave character.

[29] The learned trial judge was satisfied the series of rape counts could be categorised as 'extremely grave' as the applicant subjected the complainant to "gross and vile sexual acts from when she was a very young child". The rapes represented a breach of trust, they were repeated until the complainant was aged around 16 years and caused her significant harm. The learned trial judge was further satisfied that it was likely that there would be further offending of a grave character as the applicant had already committed further offences of a grave character since the index offences and she set out details of these offences. She then referred to the report of Dr Pollock which expressed a clear view that the applicant was "more likely than not to commit a further sexual offence in the future". Thereafter, she referred to the Northern Ireland Probation Board report which also stated, in terms, that the applicant continued to pose a risk of serious harm if he returned to the community without addressing the factors identified in their report. Before imposing a discretionary life sentence the court considered whether other methods of disposal were sufficient to deal adequately with the case and the court concluded that there was no alternative option which was suitable given the applicant's criminal record, his denial of guilt of all the offences including those he was forensically linked to and his refusal to engage in offence focussed work. In view of all the circumstances the court considered that it was unable to estimate the period of time during which the applicant would remain a danger to the public.

[30] McDonald sets out a two stage test for the imposition of a life sentence. Before considering the requirements of each limb it is important to remember that both limbs are inter-linked. Stage 1 acts as a filter to ensure that concern about public safety, whilst important in all cases, can only lead to the imposition of a life sentence when the offences are "extremely grave". At stage 2 the court then considers whether a life sentence should be imposed. A life sentence is a sentence of last resort and will only be imposed when no other sentencing regime is sufficient to adequately protect the public. As a result of having this 2 stage test, the stage 1 filter does not have to be set so high that it only includes exceptional cases. Therefore, an offence, which may not exhibit all the features of an exceptionally grave case, will nonetheless still pass the stage 1 threshold if it can be categorised as an extremely grave cases.

Stage 1 – Gravity of the offences

[31] The applicant submitted that whilst the counts were individually and collectively serious they did not exhibit any features sufficient to mark them as "extremely grave". It was submitted that although the offending involved prolonged periods of serious abuse with elements of coercion and threats these are common features of familial sexual abuse. The applicant further contended that the offences were not extremely grave as he was a young man when some of the rapes were committed; the offending whilst violent did not exhibit the more serious violence associated with such offences; there was no physical injury caused to the complainant and there was no use of a weapon to cause fear or injury as was present in the case of McDonald.

[32] In the present case the complainant was subjected to a campaign of rape which commenced when she was a very young child and continued for a prolonged period. It was accompanied by elements of coercion and threat. Whilst it is accepted that no physical harm was caused to the complainant, she did suffer significant psychological harm. We consider that such offending, whilst not exhibiting all of the features of many extremely grave cases, nonetheless meets the threshold of an 'extremely grave' offence. We therefore consider that Stage 1 of the test has been passed.

Stage 2 – Likelihood of future offending of a grave character

[33] Counsel for the applicant submitted that there was insufficient material from which the learned trial judge could conclude that the period of time the applicant would be a risk to the public could not be reliably estimated. He submitted that the medical evidence was not conclusive as to the gravity or duration of risk and he further submitted that the court failed to have regard to the objective assessment of future risk which was the absence of sexual offending between 1993 to 2007 which was a relevant factor in assessing future harm.

[34] In all the circumstances the applicant submitted an Article 26 disposal would have catered for the risk of further future offending after the imposition of a determinate custodial sentence and a protective sentence.

[35] As noted in McCandless [2004] 1 NICA 1 at paragraph 50 in assessing the grounds for belief that the offender may remain a serious danger to the public for a period which cannot be estimated, the court will look for specific medical evidence in support, but it may be inferred from the evidence before the court.

[36] Dr Pollock, Consultant Forensic Clinical Psychologist, in his report dated 7 March 2016, which was obtained on behalf of the defendant stated as follows:

> "Risk assessment:

> Category 2 was agreed because WL had been residing in the community until detection with no reports of further sexual offending. He would also be subject to community supervision."

Under the heading 'Identification of Protective factors and Capacity for Change', he noted as follows:

> "In summary, the findings of the SAPROF identify that WL's case shows the presence/likely presence of 4/5 internal factors; 5/6 motivational factors; and 3/5 external factors. Therefore, there is evidence for the likely presence of several relevant protective factors in WL's case … WL did not show any intrinsic motivation or press towards reducing risk or changing his sexually deviant conduct. He presented with an absence of intrinsic interest in assuming ownership of the change process. This observation is affected by the level of denial exhibited."

Under "Specific Issues and Opinions" he concluded as follows:

> "7.3 A number of negative observations are made in WL's case relevant to prediction of sexual recidivism; … the predatory nature of the offending means that WL's decision to initiate future sexual offending is difficult to predict and only subject to his choice and internal motivation; WL shows extreme, unyielding blanket denial regarding any sexual misconduct. This position impedes the motivation to engage with professionals to undertake risk reduction work and limits the development of insight and self-management.
>
> 7.4 A number of positive observations are made in WL's case; (i) the client sustained a lengthy period of time without any sexual offending since 1993 whilst an "untreated" sexual offender …
>
> 7.5 The primary matters of most salience in WL's case when considering risk management and the risk of future offending could be articulated to be (i) whether focus and significance is given to the serious, aggressive, predatory offending for which

> he assumes no responsibility; or (ii) whether focus and significance is given to WL's survival without sexual recidivism as an untreated sexual offender over an approximately 14 year period before the arrest for the 1992/93 offences.
>
> Taking all observations and information available into account, the summary opinion of it is that WL is designated as more likely than not to commit a further sexual offence in the future. This risk estimate exceeds mere possibility. WL's case would require a level of external monitoring and supervision to prevent future sexual re-offending. However, the evidence would suggest that a sexual offence would be an imminent event is minimal. The client sustained 14 years without sexual recidivism or supervision whilst in the community."

[37] The pre-sentence report notes that:

> "WL is assessed as someone who overall presents with a medium likelihood of general re-offending behaviour in the future. He is assessed at this juncture as presenting a significant risk of serious harm to the public … It is felt that in order to address offending related issues and management of the defendant some additional requirements should be incorporated into any post-release supervision, specifically via any custody probation order or Article 26 licence under the court's consideration … The defendant has however indicated he will not complete any programmes of work."

[38] We are satisfied that the report of Dr Pollock together with the pre-sentence report support the conclusion that the applicant remains a serious danger to the public for a period which cannot be estimated. Dr Pollock specifically addressed the gap in the applicant's offending and notwithstanding this concluded that he would commit a future sexual offence.

[39] The learned trial judge in this case was faced with an extraordinarily difficult sentencing exercise. The applicant was convicted of two sets of serious offences and issues of public protection were raised both in the pre-sentence report and in Dr Pollock's report, arising from the applicant's denial of responsibility for the offences and his disinclination to undergo any sex offending treatment programmes.

[40] As a life sentence is a sentence of last resort the court should before imposing such a sentence ascertain whether there are any other suitable sentences which can be imposed which will still sufficiently protect the public. The learned trial judge before imposing a life sentence carefully considered whether any other suitable means of disposal existed and in our view correctly concluded that no such other method of disposal would adequately meet the concern about protection of the public. In this case the only other possibilities open to the court under the 1996 regime were determinate sentences and protective sentences. In practical terms if such sentences were imposed the applicant could be released when he had served 50% of the term imposed even though he may still remain a danger to the public. Although licence conditions would be imposed we consider they would not be sufficient to meet the risk as the applicant would only be recalled after commission of a further offence.

[45] Counsel for the applicant recognised the obvious difficulties in this case and the limitations in the other sentencing options available to the court.

[46] Given that it is not possible to put a timeline on how long the applicant would remain a danger to the public we consider that this is one of those rare cases where no other disposal could provide for the safety of the public. We therefore refuse leave on this ground.

Tariff and Totality

[47] The minimum term fixed by the learned trial judge was 10 years which equates to a determinate custodial sentence of 20 years. Counsel for the applicant submits that this is manifestly excessive when one takes into account the applicant's young age and his clear record at the time of offending.

[48] Counsel further submits that in setting the tariff the learned trial judge failed to take into account the totality principle. Examining this the court effectively imposed a commensurate sentence of life imprisonment with a tariff of 16 years. This is calculated by adding the determinate custodial sentence imposed at Woolwich Crown Court and the minimum term of 10 years imposed by the learned trial judge in the present case. This equates to a determinate custodial sentence of 32 years which counsel submitted was manifestly excessive and wrong in principle.

[49] Counsel for the prosecution accepted that the issue of totality arose in this case. He accepted that the imposition of a life sentence acted to protect the public. When pressed he accepted that a tariff of 6½ years (which equates to 25 year determinate custodial sentence) would be appropriate to satisfy the elements of retribution and deterrence.

[50] We are satisfied that the issue of totality arises in this case given the fact the applicant served a prison sentence for offences which were close in time to and after the index offending. Notwithstanding the fact the learned trial judge drew counsel's

attention to the fact she was considering the imposition of a life sentence and asked for submissions and notwithstanding the fact the applicant had served a prison sentence for offending which was subsequent to and close in time to the index offending neither counsel for the prosecution nor counsel for the defence raised the issue of totality. As a result the learned trial judge received no assistance on this important aspect of sentencing and she therefore unfortunately did not address the issue in her sentencing remarks.

[51] The minimum term fixed by the learned trial judge of 10 years equates to a determinate sentence of 20 years. When this is added to the determinate custodial sentence of 12 years imposed at Woolwich Crown Court this equates to a total sentence of 32 years. We are satisfied that when totality is taken into account the tariff of 10 years was manifestly excessive.

[52] The tariff imposed should reflect the elements of retribution and deterrence. We consider that a tariff of six years which equates to a determinate custodial sentence of 24 years for the totality of the applicant's offending is sufficient for this purpose. After the minimum period of six years has elapsed it will fall to the parole commissioners to assess whether the applicant presents a risk to the public and in this consideration they may well be informed by the extent to which the applicant has participated in remedial programmes within the prison.

[53] Accordingly, we grant leave to appeal sentence on the ground of totality and substitute the tariff of 10 years with a tariff of 6 years.

[54] For the avoidance of doubt we make it clear that this means the applicant will serve six years before he is eligible to be considered for release by the Parole Commissioners. Then he will only be released if and when the Parole Commissioners are satisfied that it is appropriate to release him having regard to the need to ensure the safety of the public.