IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

J M

MacDERMOTT LJ

At Belfast Crown Court on 27 March 1995 the appellant was found guilty on 3 counts of rape and various other counts charging him with unlawful carnal knowledge, indecent assault and indecent conduct with a child. On the next day His Honour Judge Burgess imposed a sentence of 16 years' imprisonment on each of the rape counts (to be served concurrently) and short concurrent sentences on the other counts. The total effective sentence was, accordingly, one of 16 years' imprisonment. The appellant appealed against both his convictions and against the 16 year sentences. His appeal against conviction was dismissed by this court on 20 July 1996. This judgment therefore relates to his appeal against sentence which has recently been heard.

BACKGROUND FACTS

The appellant is a man of 45 - he was born on 2 December 1951. About 1977 the appellant moved in to live with H. She had a daughter V who had been born on 6 November 1973. It appears to be the understanding of H and V that the appellant is the father of V but in the course of his evidence (page 195) he said "I don't know whether she's my daughter or not".

The Crown case was that the appellant had sexual intercourse with V during the period 5 November 1985 to 1 November 1991 and the first 6 counts break this period up into 6 segments of one year and the charges were of rape. The jury found the appellant guilty in respect of Counts 1, 2 and 3 which cover the period to 6 November 1988. The appellant was found not guilty of rape on Counts 4, 5 and 6. To appreciate such verdicts it is necessary to remember that the appellant's case was that he did not have sexual intercourse with V until just before her 16th birthday and thereafter all his actions were with her consent. On the other hand V's evidence was that the appellant had been having sex with her and otherwise abusing her since the time of her transfer to secondary school when she was 11 or 12. The jury accepted V's evidence and hence found the appellant guilty on the first 3 counts of rape. They

also accepted that by the time she was 16 she was consenting to sexual intercourse which, correctly, led to the appellant's acquittal on Counts 4, 5 and 6 but consent was not an answer to the other counts on which he was found guilty.

The counts for rape and for the other offences were specimen counts and so the case is one of persistent sexual abuse by the appellant of his daughter or a girl to whom he stood "in loco parentis" from the time she was 12 through until she was 17. It was not casual abuse it was sustained and persistent. At times he was having sex with the child 3 times a week. He was engaging her in oral sex, masturbation and other indignities.

For the appellant Mr McDonald QC (who appeared with Mr Taylor Campbell) submitted that appalling though this persistent abuse over a 6 year period was it had to be looked at in the context of the bizarre attitude to normal moral behaviour which prevailed in this home. The attitude of the appellant and H to sexual matters appears to have been loose in the extreme: promiscuity prevailed. At times other women were present in the house. D and G were mentioned. They became sexual partners of the appellant but, and this is a grave feature of the case, he encouraged V to become sexually involved with these women. The appellant and H are clearly intelligent people and it is an immense tragedy that he saw fit to bring up V in this atmosphere of sexual abuse and licence. Such an abnormal and unnatural upbringing must have had an adverse impact on the child V as she grew up through adolescence towards womanhood.

THE SENTENCE

The judge delayed sentence until the day following conviction. It is obvious from his remarks on sentencing that he had considered the matter with great care. He reminded himself that the starting point in a case of contested rape was one of 7 years' imprisonment. That was established by this court in R v McDonald and others [1989] NI 37 and it will be remembered that the court considered that 7 was a more appropriate starting point than the 5 indicted by the English Court of Appeal in R v Billam and others [1986] 8 CAR(S) +48. We have no doubt that the judge sought to, and did, apply these guideline principles set out in those 2 cases in a very fair manner.

The judge, who had heard all the evidence as it was revealed before him (an advantage which we do not enjoy having only the cold transcript to guide us) paraphrased it in this way:

"The picture which unfolded itself before this court was a household in which promiscuity was the order of the day and in which through your persuasion and persuasive ways you exercised a powerful grip on this girl. V was brought up in that environment. She was drawn into it and was manipulated and controlled for your own sexual and selfish ends.

By your own admissions you started masturbating this girl from the age of 12 years and you did so for 6 years. Oral sex was demanded and received. You had sexual intercourse with her on the verdict of the jury against her will for approximately 3 years and continued intercourse after that time.

All of the rights and expectations of this young girl were subjugated to your sexually exhaustible demands."

Later after emphasising the relationship between the appellant and V, her young age, the nature of the appellant's abuse of her and the prolonged period of such abuse he summarised his view in this way:

"The offences with which this court is dealing represent a continuing chapter of sexual assault, rape and indecency on a regular basis over a long period of time. It involved a young girl. You were in a position of trust and protection, a position which you betrayed frequently. It is an appalling case. It is a case of the subjugation of a child in revolting circumstances.

In the opinion of this court without mitigating circumstances this case lies at the very least extremely close to the top of the scales of rape and matters of indecency. This court has looked at the question of mitigation. This is a case where no plea of guilt was made, accepting, of course, for a moment that in respect of certain of the acts you accepted your responsibilities."

As already stated the judge concluded that a sentence of 16 years' imprisonment was appropriate.

THE APPEAL

Mr McDonald realistically recognised from the outset of his commendably relevant submissions that this was an extremely serious case of rape which demanded a lengthy custodial sentence especially as he could not claim any discount for a plea of guilty. We note however that the appellant apparently expressed remorse before being sentenced: but such expression was made after a trial in which he had stigmatised the child as a liar.

Mr McDonald submitted that the sentence was both wrong in principle and manifestly excessive. In our judgment there is no substance in the suggestion that the sentence was wrong in principle - a lengthy custodial sentence was inevitable and appropriate. He made a number of particular points:

Firstly, he emphasised that these offences occurred within a home in which a totally lax attitude to sex and morality prevailed: it was not a case of a man seeking sexual gratification outside the comparative privacy of the home. That may be so but the

appellant must have been well aware that he was doing wrong to this child both physically and emotionally. This was behaviour which must have destroyed her childhood and distorted her sexual values.

Secondly, no unnecessary violence was used towards the victim. In a sense that may be so but the appellant's remark to Dr Brown shows insight as to the reality of the situation. He said "Talking someone into something they are not ready for is an act of violence". We also note the portions of V's evidence when she was asked if sex was easy in the early stages. At page 6 of the transcript we read how the appellant threatened to cut a fold of skin to facilitate intercourse.

The appellant did not need to be violent to use the child as he wished: it is clear beyond dispute that she was cowed and compliant, falsely believing that what she was engaged in was normal and proper. Though the jury accepted that she consented to intercourse from 16 on it was a consent arising out of this totally unnatural situation in which she was being brought up.

Thirdly, insufficient regard was paid by the judge to the medical evidence relating to the appellant's mental health. As we have mentioned it was claimed that the appellant came within the terms of the statutory definition of insanity as set out at Section 1 of the Criminal Justice Act (Northern Ireland) 1966.

The jury declined to accept the submission that the appellant suffered from a mental abnormality which prevented him controlling his own conduct. This conclusion is entirely understandable. Much of the evidence centred on the effect of, and treatment for, manic depression. Very little related to the general behaviour of the appellant during this period. And it will also be remembered that during the period in question the appellant saw fit to discontinue the treatment preferred by the many doctors he was consulting.

Mr McDonald drew our attention to R v Doran (1996 unreported) in which this court affirmed that in sentencing the court will have regard to the mental state of the offender and added (page 9):

"Where the argument is advanced on behalf of an accused person that the sentence which is to be imposed upon him, or which has been imposed upon him, should be reduced because he suffers from a mental illness, the court, whether the trial court or the Court of Appeal, must, of course, keep its feet on the ground and exercise common sense, and look at all the circumstances of the offence and the nature of the medical evidence."

In this case the judge clearly had regard to this factor. At page 7 he said:

"It is true, and it is accepted by the Crown, that you suffered from a mental abnormality. It is quite clear from all of the evidence which came before the court

and which I attempted to deal with in detail before the jury yesterday, that the jury found that that mental abnormality did not affect your ability to control your conduct. That was their task in this case and that is what they have decided at the end of the day by their verdicts".

For our part we share the view that the appellant's conduct was not uncontrolled but deliberate and that little or any weight should be given to the appellant's mental condition. Understandably Mr McDonald made the submission regarding the appellant's condition with restraint because as Dr Potter pointed out manic depression is a lifelong disorder (page 396) so any sentencer is bound to have regard to the risk of re-offending in the future. Mr McDonald met this suggestion by making 2 points: firstly, there was no evidence of the appellant acting unlawfully outside the family situation and secondly, when taking lithium or other appropriate drugs the appellant should be able to control his abnormal sexual urges. All this may be so but it assumes that the appellant will continue with his medication and will not seek sexual gratification on his release from prison.

Fourthly in describing the appellant's conduct as a campaign of rape the judge was misapplying the aggravating feature highlighted by Lord Lane in Billam. In other words it was wrong to equate the appellant with a predator rapist who seeks his victims far and wide. As the appellant's offences occurred within his own home he was not a roaming predator. But it is not an abuse of language to describe his 6 year abuse of V as a campaign of abuse.

Mr McDonald realistically accepted that no purpose would be achieved by a detailed analysis of the sentences imposed in other cases. We agree and repeat the observation of Carswell LJ (as he then was) in R v Williamson (unreported, October 1995):

"Previous decisions, and particularly those in which the courts have attempted to provide guidelines for sentencers, give an indication of the range of sentences which may ordinarily be expected to follow from conviction of a class of offences, and constitute a reminder of the factors to which a sentencing court should have regard in approaching the case before it. They do not provide a tariff to be applied in a mechanistic manner like logarithm tables. They are rather an avenue along which the sentencer may proceed in his consideration of the case with which he is dealing. He then has to reach a conclusion appropriate in all the circumstances of the case, and it need hardly be said that these will vary infinitely."

It is worth noting however that in the case of Taggart (one of the defendants in McDonald and others) this court substituted a sentence of 14 years' imprisonment for a life sentence. In that case there had been a plea of guilty and the facts were of much the same nature as in the present case.

In R v Angol [1994] 15 CAR(S) 727 the facts were:

"The appellant pleaded guilty to 3 counts of rape, one of indecent assault, and 3 of unlawful sexual intercourse with a girl between the ages of 13 and 16. The victim was the daughter of a woman who was the appellant's girlfriend and who later cohabited with him. Over a period of about 7 years the appellant committed various sexual acts, and when the girl was between the ages of 9 and 15 had sexual intercourse with her on average 3 times a week. The behaviour ended when the girl became pregnant and had an abortion. Sentenced to 12 years' imprisonment."

We observe that in that case the child became pregnant whereas that would not have occurred in the present case as the appellant had had a vasectomy. That condition however was no excuse for or mitigation of his sexual activity with this child.

In R v Angol the trial judge had considered 16 years to be the appropriate starting point having regard to the many aggravating features. Ebsworth J expressed the conclusion of the Court of Appeal in this way:

"The antecedent history neither mitigated nor aggravated these offences. What the trial judge had to ask himself was: what was the appropriate sentence, given that great number of aggravating features and the specific mitigation of a guilty plea for this totality of conduct? He took the view that 16 years was commensurate with the overall gravity of this case, and he granted to this appellant a discount for pleading guilty at an early stage of some 4 years, fixing the total sentence at 12 years.

We have to ask ourselves not simply was the starting point too high, but was the end result too high? We have come to the conclusion that whilst many might take the view that a starting point of 16 years was too high, a discount for a plea of guilty in a case of this kind of as much as 4 years from that starting point was over generous.

Looking at these matters as a whole, we have concluded that whilst a sentence of 12 years, which was imposed upon a specimen rape of a child of 12, is a severe sentence, it is not outside the proper level of sentencing for offending of this kind."

For our part we would not share the doubts expressed in that passage that a starting point of 16 years was too high. 16 years in this case is clearly a severe sentence but as we have already indicated the aggravating features in this case were grave and very little can be said by way of mitigation.

Before expressing our final conclusion it is right to consider the effect of the appellant's conduct on his victim. Dr McEwan, consultant psychiatrist, reported on 18 February 1993 and 2 years after the abuse ended Dr McEwan was led to observe "I was left in no doubt that she was severely emotionally disordered". His conclusion was "The high level of neurotic symptomatology shown by her is indicative of her struggles to control and contain destructive and frightening memories from her past and she has fears which threaten to overwhelm her".

Mr McMahon QC for the Crown told us that it seemed that V was responding to continued therapy. Hopefully improvement will continue but nothing can gainsay the appalling harm that this appellant has done to this child.

8 years ago Lord Hutton observed in Attorney-General's Reference (No 1 of 1989) [1989] NI 245 at 251:

"The threat of sexual abuse to children in modern society has become so grave and the duty resting on the courts to deter those who may be tempted to harm little children sexually has become so important that severe sentences must be passed on those who commit rape against little children even if before the offence they had had good records and good reputations."

It is a most regrettable fact that such grave abuse of young children continues. Some cases occurred some time ago but that does not diminish their harmful nature. Current statistics reveal a sad state of affairs. Complaints of rape and trials for rape have been steadily increasing over the past 5 years. In respect of rapes within the family separate statistics have only been kept since 1994 when there were 43 complaints and in 1995 there were 55. Figures for 1996 are not presently available.

The courts cannot directly prevent such offences but they can make it clear by the imposition of severe but appropriate sentences that offences of rape, especially those involving young children, will attract very lengthy custodial sentences so that offenders may be duly punished and others may be deterred from doing likewise. The message which emerges from the statistics to which we have just referred is that the starting point of 7 years in cases of rape may no longer be appropriate and in many cases, including those involving children, a higher figure may be more appropriate.