IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DESMOND MARTIN McCAFFERTY

KELLY LJ

The appellant is aged 32 years' of age. He is a chef and part-time taxi driver. He pleaded guilty before His Honour Judge Higgins at Londonderry Crown Court to an indecent assault on a girl of 15 which took place on 25 April 1991. He was sentenced to a term of imprisonment of 3 years'. Leave to appeal was granted by McCollum J on the 1st October 1991.

Mr Lavery, his counsel, submitted that this sentence was manifestly excessive and well outside the range for offences of this kind.

The facts may be summarised as follows: A young girl aged 15 years', the daughter of a neighbour, was baby-sitting for the appellant and his wife in their home in Londonderry on the evening in question. The appellant arrived back at the house before his wife, about 11.10 pm. Both had gone out earlier, but to different places. On his return he joined the girl in the sitting-room and asked her to draw the curtains in order to show her a video film. She did this. It turned out however that the video film was pornographic. The girl watched this in revulsion and great distress while the appellant sat on the sofa beside her. During the course of it he put his hand on the outside of her skirt in the region of her vagina and rubbed that area up and down. Then he pulled her down on to the sofa and lay on top of her and tried to kiss her. He unzipped his trousers and pulled them partly down and his underpants. He took out his penis and exposed it to her. He put his hand up her skirt and grabbed for her pants. At this stage fortunately she was able to free herself of him, and at this stage, fortunately for him, he desisted from further misconduct and apologised. The girl went home very distraught. She did not tell her parents about it, and in particular, her father, for she feared he would manifest his anger. She spent a sleepless night and the next day at school it was obvious to her school mates from her subdued and worried manner that something was seriously wrong. Reluctantly she disclosed to them and later to her school mistress what had happened. The police were sent for and they arrested the appellant.

We need hardly say that this was obviously a terrifying experience for an innocent young school girl of impressionable years. It was a disgusting, quite revolting performance by a man of mature years, and a friend of the girl's father.

This court is concerned naturally not only with the inexcusable conduct of this appellant on the night in question, but also with the possible after effects on the girl herself. On this, regrettably, we have not any evidence from a specialist source. True, Dr Devlin has furnished a report, in which after setting out that she remained nervous, sleepless, had nightmares and depression, for some time afterwards, he added:

> "I have no doubt that this child has been permanently affected."

We are reluctant to act on this, having regard to the fact that it does not come from a psychiatrist or psychologist. Dr Devlin no doubt is an experienced general practitioner, but he is not a psychiatrist, and we would think that at this early stage, it would be bold for a non-specialist to assert the prognosis he did. Nevertheless, we consider it proper to act on the fact that the girl at the impressionable age she has suffered for a significant period distress, nervousness, sleeplessness and depression and that this may continue for a period in the future. That is a considerable aggravating factor. Another aggravating matter is that there was some degree of trust given to this appellant by the girl's parents. They were neighbours who lived opposite each other. It is implicit in allowing their daughter to baby-sit for the appellant and his wife, that the parents of the girl assumed that she would be properly and decently treated in their household.

Mr Lavery for the appellant, who presented the appellant's case with skill acknowledged these aggravating factors. He did not seek to dismiss them. However he submitted there were strong mitigating factors, not only as to the offence itself, but also to the offender. As to the offence itself, no physical hurt was done to the girl. The appellant desisted at a stage where other men might not have. He pleaded guilty and intimated that course at a very early stage. Accordingly, the girl did not have to give evidence, or experience the apprehension that she might have to give evidence. The plea in mitigation accepted all that the girl said and there was not the slightest hint that anything the girl said or did that evening could have given the impression that the appellant might do as he did.

As to the offender himself, Mr Lavery underlined that he was a man with no previous convictions. That of course is always a mitigating factor and we accept that he genuinely suffered remorse, and that he will bear the shame of what he did in the eyes of his wife and family and acquaintances for many years to come. Indeed one of the mitigating considerations that impressed itself on this court was the quite devastating effect that this crime has had on the appellant's personal life. For quite some time he and his wife were estranged as a consequence but happily they are

together again. He felt compelled to move house and the locality where he lived. His employers and neighbours were informed of the offence by the father of the girl.

Mr Lavery went on to cite a number of English cases which suggest that in England for this type of offence with circumstances as close as is possible to find to the present case, the range is 9 months' to 2 years' imprisonment.

Our own view of cases of this kind, without purporting to lay down any guidelines, or any appropriate range of sentencing is not far removed from such a range. The prosecution appeared to take no particular view neither seeking to uphold the sentence nor otherwise. Indeed when pressed, counsel for the prosecution appeared to accept the range of 9 months' to 2 years' as the normal range for this kind of offence.

We have come to the conclusion that though serious and repulsive the circumstances of this offence were, that the trial judge did not give sufficient weight to the mitigating factors we have set out which touched on the offence and the offender. We consider that the sentence of 3 years was manifestly excessive and we substitute for it, one of 15 months' imprisonment.