Neutral Citation no. [2009] NICA 17 | *Ref:* **KER7441**

Judgment: approved by the Court for handing down | *Delivered:* **06/03/2009**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

CK, a minor

_____

Before Kerr LCJ, Girvan LJ and Coghlin LJ

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KERR LCJ

Introduction

[1] The young man who is the appellant in this case is fourteen years old. The victims of the offences to which he has pleaded guilty are even younger. Nothing must be reported which would tend to identify either the appellant or the victims. The appellant will be referred to in this judgment as 'CK' or 'the appellant'. The first victim (a young boy aged eight years at the time of the offences) will be called 'A' and the second victim (a young girl aged five years when the offences occurred) will be referred to as 'B'. The victims are cousins of CK.

[2] Leave having been granted by the single judge, this is now an appeal against sentences imposed by the Recorder of Belfast, His Honour Judge Burgess, at Belfast Crown Court on 15 December 2008. On 14 May 2008 the appellant had been committed to the Crown Court for trial on thirteen counts which included indecent assaults, acts of gross indecency and rape. At his arraignment on 26 June 2008 he pleaded guilty to three counts of indecently assaulting 'A', two counts of gross indecency with or towards 'A' and one count of gross indecency with or towards 'B'. He pleaded not guilty to the other counts.

[3] CK was arraigned again on a count of raping A on 8 October 2008. On this occasion he pleaded not guilty to the rape of 'A' but guilty to attempting to rape him. This plea was accepted by the prosecution and a count of attempted rape was added to the indictment. The remaining counts on the indictment were left on the books, not to be proceeded with without the leave of the court.

[3] The sentences passed were as set out in the following table: -

Count	**Offence**	**Sentence**
Count 1	Gross indecency with or towards 'A', a child, on a date unknown between 1/7/07 and 8/12/07:	18 months detention
Count 2	Indecently assaulting 'A', a male, on a date unknown between 1/7/07 and 8/12/07.	18 months detention (Consecutive)
Count 3	Indecently assaulting 'A', a male, on a date unknown between 1/7/07 and 8/12/07.	18 months detention (Concurrent)
Count 5	Gross indecency with or towards 'A', a child, on a date unknown between 1/7/07 and 8/12/07.	18 months detention (Concurrent)
Count 6	Gross indecency with or towards 'B', a child, on a date unknown between 1/7/07 and 8/12/07.	9 months detention (Concurrent)
Count 9	Indecently assaulted 'A', a male, on a date unknown 1/7/07 and 8/12/07.	18 months detention (Concurrent)
Count 14	Attempted rape of 'A' on a date unknown between 1/7/07 and 8/12/07.	18 months detention (Concurrent)

[4] The total period of detention ordered by the trial judge was, therefore, three years in a Juvenile Justice Centre. This sentence was passed pursuant

to article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998. The trial judge also imposed a sexual offences prevention order prohibiting the appellant from:

> (a) residing at any address unless approved by Social Services and/or the 'designated risk manager';
>
> (b) having contact whatsoever with the victims 'A' and 'B';
>
> (c) having or seeking to have any unsupervised contact with any child under the age of 18 years unless approved by Social Services; and
>
> (d) from entering the area of North Belfast as delineated on a map [to be attached to the order] except for any circumstances approved in advance by Social Services.

The appellant was also, as a consequence of the sentences imposed, subject to the notification requirements of the Sex Offenders register for life.

Background facts

[5] The offences took place between 1 July 2007 and 8 December 2007. The appellant was twelve years old for most of the time that the offending occurred. As we have said, both victims are cousins of the appellant and they stayed from time to time at his home. The offences happened when they were staying overnight and the children were upstairs alone.

[6] In relation to A, the appellant's behaviour involved licking and biting his penis, masturbation and on one occasion attempting anal intercourse. A alleged that the appellant had used threats to induce him not to tell anyone. He claimed that on one occasion, CK had raised his fist in a threatening manner in order to reinforce the warning not to reveal what was happening. In relation to the offence against the second victim, she said that CK had exposed his penis to her and asked her to touch it. He also asked her to show him her private parts.

[7] It is a significant feature of this case that when the appellant's mother discovered what had been happening she, wholly commendably, informed her sister, the mother of A. She also brought the appellant to the police and required him to admit to police officers what he had done. Notably, although he made extensive admissions, CK denied that he had threatened A. This is important because clearly the judge was influenced to the choice of a more severe penalty by his view that threats had been made, since, while sentencing CK, he said: -

> "… I'm satisfied in the case of victim A, given the nature of the assaults and the attempted rape, given the period over which they took place, given the age of the victim, *given the circumstances where threats were made in an attempt to prevent [him] telling about his ordeal* the offences against that young [boy] do constitute grave crimes within the meaning of article 45 of the 1998 Order …" (emphasis added)

[8] This is a significant passage because the appellant has always maintained that he did not coerce or threaten A. He admitted to a therapist that he had told A that, if he revealed what had happened, CK would get into trouble. The appellant even acknowledged when it was put to him that this might have put A under stress but at no time did he agree that he had threatened A. One can readily understand that if coercion was established, a much more serious view of the offences would be warranted. But the victim impact report on A does not explicitly support the case for coercion. According to this, A said that CK had told him not to tell about the abuse "but there [was] no indication any violence was used". Although the immediate psychological and physical impact on the child was deemed to be profound, the overall prognosis was good, in light of the support and understanding that he has received from his family and other agencies.

The judge's sentencing remarks

[9] The Recorder referred to the fact that the offences were specimen counts and reflected "a substantial number of assaults over the relevant six month period". He observed that the impact on A "has been profound already and has as yet unforeseen or [uncharted] effects into the future". We feel that this rather overstates the import of the victim impact report. As we

have observed above, there was an *immediate* impact that was profound but the prospects for recovery were good.

[10] The judge also stated that it was clear that the appellant knew that what he was doing was wrong. It is true that, after initially claiming that he did not know that what he had done was wrong, CK accepted in conversations with a senior practitioner in Barnardo's young people's therapeutic service that he did. One must, we believe, be careful, however, in imputing a well developed sense of the gravity of his wrongful behaviour to the appellant. He was twelve years old when most of these offences took place. The knowledge that what he was doing was wrong is very different in the mind of a twelve year old from that which is expected of a fully mature adult. In her report on CK, Dr Catherine Mangan, a consultant child and adolescent psychiatrist, has said that he "retrospectively … had insight that his behaviours were wrong. However, at the time he did not understand that this was the case as he thought that if a minor gave consent that he was doing nothing wrong." In a later passage of her report, Dr Mangan stated: -

> "Although [CK] is aware of the biological nature of sexual activity and how children are made, he displayed limited understanding in relation to informed consent, the role of sexualised behaviour within a relationship, and he was unaware of the impact of his behaviour on his cousins and the wider family circle until his mother spoke to him. These factors may have been causative in relation to his behaviour."

[11] On the question of the proper approach to the sentencing of young people, the Recorder referred to the decision in *R v A & B* [2008] NICC 37 where the principles enshrined in the legislation and "universal conventions" relating to the sentencing of children are discussed. He then set out the "aims of youth justice" as contained in section 53 of the Justice (Northern Ireland) Act 2002. He had regard to the fact that the period on remand would not be deducted from any sentence and that a person sentenced under article 45 was not entitled to remission. We shall say something about these issues presently.

[12] A number of mitigating factors were identified. The judge found that the appellant had shown a reasonable amount of victim empathy;

his youth and immaturity were acknowledged; he was considered to be entitled to full credit for his pleas of guilty and acceptance during police interview that he had committed the offences; and he himself had been the victim of a sexual assault at the age of three years which, the Recorder considered, might have had a bearing on his subsequent offending.

The appeal

[13] Mr Ramsey QC on behalf of the appellant advanced the following arguments in support of the claim that the sentence imposed was wrong in principle:-

(a) The offence was not one for which only a custodial sentence could be justified under article 45(2)(b) of the 1998 Order;

(b) The trial judge failed to consider other methods of disposal especially a custody probation order;

(c) The decision to impose a custodial sentence for the protection of the public and rehabilitation of the appellant was against the weight of the expert evidence;

(d) The issue of alleged threats to 'A' was never accepted by the appellant and, in the absence of a Newton hearing, should have been resolved in the appellant's favour;

(e) The terms of the sexual offences prevention order were unnecessary and disproportionate as the trial judge misunderstood the term "serious sexual harm". Furthermore, the prohibition on him from having contact with any child under the age of 18 breaches the appellant's rights under article 8 of the European Convention of Human Rights.

[14] The following submissions were made that the sentences imposed were manifestly excessive. It was suggested that the judge had failed: -

(a) to address his mind to the United Nations Convention on the Rights of the Child which provides that arrest, detention and imprisonment shall only be used as a measure of last resort and for the shortest appropriate period of time;

(b) to take account of the fact that the appellant is a young child with a completely clear record, had himself been abused, and the work he had completed with the Barnados Young People's Therapeutic Service;

(c) to take account of the fact that the appellant was in custody between 8 December 2007 and 15 January 2008 and, once bailed, was placed with a foster family for eleven months. This separation from his family, friends and school caused him anguish.

Should the judge have imposed a sentence which did not involve detention?

[15] Article 2 (2) of the 1998 Order defines a child as a person under the age of seventeen years. This was amended by the Justice (Northern Ireland) Act 2002 so that a "child" is now defined as a person under the age of 18. Article 45 (2) of the 1998 Order provides: -

> "(2) Where-
>
> (a) a child is convicted on indictment of any offence punishable in the case of an adult with imprisonment for 14 years or more, not being an offence the sentence for which is fixed by law; and
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> (b) the court is of the opinion that none of the other methods in which the case may be dealt with is suitable,
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> the court may sentence the child to be detained for such period as may be specified in the sentence; and where such a sentence has been passed the child shall, during that period, notwithstanding any other provisions of this Order, be liable to be detained in such place and under such conditions as the Secretary of State may direct."

[16] A conviction for attempted rape can attract a sentence of more than 14 years in the case of an adult. The first condition in the article 45 (2) is therefore satisfied. But before the power to sentence under this article can

be invoked, the court must be of the opinion that no other possible disposal is suitable. This pre-condition reflects the principle enshrined in article 4 of the Order: -

> "4. In any proceedings for an offence, the court shall have regard to –
>
> (a) the welfare of any child brought before it; and
>
> (b) the general principle that any delay in dealing with a child is likely to prejudice his welfare."

[17] The principle that the welfare of the child must be specifically taken into account also finds expression in section 53 of the Justice (Northern Ireland) Act 2002, the relevant parts of which are: -

> "53 Aims of youth justice system
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> (1) The principal aim of the youth justice system is to protect the public by preventing offending by children.
>
> (2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.
>
> (3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

[18] The European Court of Human Rights has regarded the United Nations Standard Minimum Rules for the Administration of Juvenile

Justice, 1985 (the Beijing Rules) and the United Nations Convention on the Rights of the Child (UNCRC) as providing guidance on how juvenile offenders should be dealt with. Paragraph 5 of the Beijing Rules states that deprivation of liberty should only be imposed after careful consideration. It should be for a minimum period and should be reserved for serious offences.

[19] Article 3.1 of UNCRC proclaims the paramountcy of importance of the welfare of the child in all public actions taken in relation to children. It stipulates that: -

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[20] Article 37 (b) of UNCRC echoes paragraph 5 of the Beijing Rules: -

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

[21] The need to promote the re-integration of a child offender into society is dealt with in article 40 (1) of UNCRC as follows: -

> "State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

[22] The theme common to all these provisions (the need to have particular regard to the welfare of the child offender) should inform the approach of the court to the application of article 45 (2) (b) of the 1988 Order. Examination of the suitability of alternative methods of dealing with the case other than by detention must take place against the backdrop of an imperative to do what is best for the child, while, of course, recognising the need to prevent offending by children. Moreover, where it is concluded that detention is required, there is a need to focus on what is the minimum period that will accommodate that requirement.

[23] We do not consider that the decision to make an order involving detention can be said to be wrong in principle. Despite the appellant's youth, the serious nature of the offences and the fact that they occurred over a protracted period make this case one in which detention is at least a justifiable option. The pre-sentence report and the medical and other reports that have been provided (including the very helpful report from Barnardo's young people's therapeutic service) make it clear that the appellant requires some form of supervision and rehabilitation. A reparation order or a community responsibility order would be inadequate to meet the circumstances of the case. Observing that there was no role in the case for such a disposal the Recorder expressly rejected the option of a youth conference order. We consider that he was correct to do so.

[24] One possible alternative about which we will have more to say in due course is a juvenile justice centre order, (under article 39 of the 1998 Order). By virtue of section 18 of the Treatment of Offenders (Northern Ireland) Act 1968, such an order cannot be suspended. The only non-detention option open to the judge, therefore, would have been a probation order and for the reasons that we have given, this plainly would not have been appropriate. It would not have sufficiently marked the gravity of the appellant's offending.

[25] Whether the period chosen by the Recorder is one which was manifestly excessive is the real issue of substance in this case and we will turn presently to focus on that question. Before doing so, however, something should be said about the nature of a penalty imposed under article 45 and its effect in relation to possible remission.

[26] The concept of remission derives from rule 30 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995. This invests the governor of the prison or the young offenders' centre, as the case may be, with a

discretion to release the prisoner early on the grounds of good behaviour. Arguably, a prisoner has a legitimate expectation that his prison term will be reduced by one half by remission –see *In re Malcolmson* [2003] NIQB 4, at paragraph 15.

[27] The 1995 Rules do not govern detention in the juvenile justice centre which is where the appellant is currently detained on foot of a direction by the Secretary of State under article 45 (4) of the 1998 Order. Rather the Juvenile Justice Centre Rules (Northern Ireland) 2008 (which came into operation on 12 November 2008) apply. These rules do not contain a provision allowing the Director of the juvenile justice centre to release detainees early. Therefore, 'remission' in its commonly held sense does not exist for persons such as the appellant who are detained under article 45.

[28] As a consequence, the appellant would be detained for the full term of three years on foot of the judge's order, subject only to the Secretary of State's discretion to release the appellant on licence "at any time" during his detention - article 46 (1). The possibility of such a release should not unduly influence the sentence selection, in our view. Plainly, it would be wrong to impose a more severe penalty in the expectation that it could be mitigated by a subsequent release under article 46 (1). A sentencer should, we believe, proceed on the assumption that the sentence imposed will be served in full.

[29] As we have said, the judge was clearly influenced to the choice of a more severe penalty than he might otherwise have imposed by his conclusion that the appellant had threatened A and coerced him into silence. As we have pointed out, this was never accepted by the appellant. In *R v Newton* [1983] 77 Cr App R 13 it was held that where there is a plea of guilty but a conflict between the prosecution and defence as to relevant facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue; the judge himself may hear evidence and come to his own conclusions; or the judge may hear no evidence and listen to the submissions of counsel. If the last of these options is chosen and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted.

[30] Plainly, it would not have been appropriate to enter a plea of not guilty in this case because of the dispute as to whether A had been coerced or threatened. We also consider that it would not have been desirable to put

the young victim through the ordeal of giving evidence on the issue. In those circumstances, however, it appears to us to be clear that the judge was obliged to accept the appellant's account on this question.

Article 39 of the 1998 Order

[31] Article 39 deals with juvenile justice centre orders. Paragraph (1) provides: -

> "Where a child is found guilty by or before any court of an offence punishable in the case of an adult with imprisonment (other than an offence the sentence for which is, in the case of an adult, fixed by law as imprisonment for life), the court … shall have power to make a juvenile justice centre order, that is to say, an order that the child shall be sent to a juvenile justice centre and be subject to a period of detention in a juvenile justice centre followed by a period of supervision."

[32] This option was not chosen by the Recorder. It would appear that his reason for not doing so was the restriction on the maximum period that the appellant could have been detained there. The maximum duration of such an order is two years under paragraph (2) of the article: -

> "(2) A juvenile justice centre order shall be for a period of six months unless the court specifies in the order a longer period not exceeding two years."

[33] Paragraph (5) of article 39 provides that the period of detention which the child is liable to serve under a juvenile justice centre order shall be one half of the period of the order. In effect, therefore, the maximum period of detention that can be ordered under a juvenile justice centre order is twelve months. On the hearing of this appeal it was suggested that this paragraph might be of relevance in relation to remission but we do not consider that this proposition is tenable. The provision does not relate to any concept of remission, but rather provides the ratio of the component parts which make up the juvenile justice centre order. Article 39 (5) merely stipulates that in any given order, the first half comprises detention while the second

half consists of supervision. The detention part of the order is not subject to remission.

[34] We have said that the appellant requires some form of supervision and rehabilitation. He had begun to receive a course of therapy from Barnardo's before he was sentenced and he continues to receive treatment in the juvenile justice centre. Ms Irene Ooi, a senior forensic psychologist in the centre, has reported that she has met CK several times with his key worker since his committal there. The sessions that have been undertaken with him so far have focused on assessment of family relationships, his self-image, his experiences of school and his friendship patterns. The centre is equipped to provide young people convicted of sexual offences with the same programme as is used by Barnardo's. It is intended that liaison with Barnardo's be established as his release date approaches so that it can be gauged how much work has been covered and what remains to be done.

[35] It was submitted that the appellant would be more effectively treated in a non-detention setting where re-integration with his family could take place and the probation officer, in his pre-sentence report, stated that CK would benefit from a period of community supervision. He considered that the chances of successfully addressing the risk of re-offending would be best carried out in the community where the appellant could eventually re-integrate with his family. Ms Ooi has reported, however, that the centre's family therapist has been in contact with those who over the past year have been working with the family in order to establish what has already been done and what the next step in relation to the family should be. If there is further work to be done, the family therapist will link in to the therapeutic work undertaken with CK and will organise family work/parent work in conjunction with this.

[36] We have concluded that a juvenile justice centre order is the proper disposal in this case. For the reasons that we have given, the offences call for a period of detention but, consistent with our obligation to give prominence to the welfare of the appellant in our choice of sentence, we consider that a sentence which involves detention of one year and supervision of one year meets the need to mark the gravity of the offences while observing the injunction in Article 37 (b) of UNCRC that the detention should be for the shortest appropriate period of time.

[37] We are required by article 39 (4) of the 1998 Order to state in open court our reasons for making a juvenile justice centre order for a period longer than six months. Those reasons are twofold. In the first place, we consider that a period of detention of sufficient length to reflect the seriousness of the offences is required. Secondly, we consider that if the treatment already begun in the juvenile justice centre is to stand a chance of success, no lesser period would suffice.

The sexual offences prevention order

[38] The first issue to be addressed under this heading is whether the sexual offences prevention order should have an expiry date. Section 104 of the Sexual Offences Act 2003 allows the court to make such an order and section 107 (1) (b) provides that it is to have "effect for a fixed period (not less than 5 years) specified in the order or until further order". The Recorder did not stipulate that the order was for a fixed period and the order issued by the Crown Court states that it has effect "until further order".

[39] There are two possible interpretations to section 107 (1) (b). The first of these is that the court *must* specify the period during which the order is to have effect or, alternatively, state that it is to be until further order. The second possible interpretation is that where the court does not specify a fixed term, the default position is that the order will continue to have effect until a further order. We consider that the first of these is to be preferred. A term for the duration of the order should be specified unless the judge imposing it considers that it should be for an indefinite period or that it should be subject to review after the elapse of a particular period. The court should therefore stipulate the length of time that the order is to endure or declare that it is to remain in force until further order.

[40] In the present case, we do not consider that a sexual offences prevention order should be for an unlimited period. We think it likely that part of the rehabilitation process will involve the appellant being gradually reintroduced to all normal occasions and experiences of life. To impose a sexual offences prevention order of indefinite duration is, we believe, likely to be counterproductive to that aim. We consider that an appropriate period is one of five years.

[41] The second principal issue to be considered under this subject is the content of the order. At present the order prohibits the appellant from (a)

residing at any address unless approved by Social Services and/or the 'designated risk manager'; (b) having contact whatsoever with the victims 'A' and 'B'; (c) having or seeking to have any unsupervised contact with any child under the age of 18 years unless approved by Social Services; and (d) from entering the area of North Belfast as delineated on a map [to be attached to the order] except for any circumstances approved in advance by Social Services.

[42] We have reflected particularly on the third of these conditions. We believe that it would be extremely difficult to enforce and, for the reasons earlier given, might well prove to be an inhibition to progress while not affording a great deal in the way of practical and effective elimination of risk. We will therefore remove that condition from the sexual offences prevention order. Similar considerations arise in relation to the final condition. For essentially the same reasons, we direct that this condition should also be deleted from the order.

[43] The most difficult part of the order on which to arrive at a confident view is the condition which forbids all contact with the victims. It is to be remembered that these are his cousins and that, according to the reports, the appellant's mother continues to enjoy a close relationship not only with him but also with her siblings who are parents of the victims. One can wholly understand and sympathise with any desire on the part of the parents of the victims to keep the appellant entirely away from them but it is difficult to prescribe for the future in terms of intra-familial relationships and we are conscious that nothing should be done that might imperil the prospects of repair not only of the appellant's life but also of those relationships. After anxious thought, we have concluded that the same proviso as applies to the first condition should be added to the second condition. In its amended form it shall read that the appellant should be prohibited from 'having contact with the victims 'A' and 'B' unless this has been approved in advance by Social Services and/or the 'designated risk manager'.

Notification requirements under section 82 of the Sexual Offences Act 2003

[44] The Sexual Offences Act 2003 provides that persons who have been convicted of certain sexual offences shall be subject to certain 'notification requirements' (*e.g.* informing local police of their current address or any change of address). Section 82 (1) sets out in tabular form the various periods of notification requirements following conviction. A juvenile

justice centre order of two years (which we intend to substitute for the sentence imposed by the judge) is the equivalent for this purpose of a sentence of imprisonment for two years. Section 131 (d) and (h) provide that sentences of detention under articles 39 or 45 of the 1998 Order are equivalent sentences of imprisonment for the purposes of the provisions regarding the notification requirements.

[45] Section 82 (1) stipulates a reporting period of ten years for a person who has been sentenced to imprisonment for a term of more than 6 months but less than 30 months. Section 82 (2) provides that where a person is under 18 on the relevant date, subsection (1) has effect as if for any reference to a period of 10 years there were substituted a reference to one-half of that period. The notification period for the appellant will therefore be five years. It should be noted, however, that the notification requirements under section 82 are not part of the court order but rather a statutory obligation placed upon the appellant as a consequence of his being a person convicted and sentenced for one of the specified sexual offences.

Summary of disposal

[46] For the periods of detention imposed on all of the counts, we substitute a juvenile justice centre order comprising one year's detention and one year's supervision. We direct that the third and fourth conditions of the sexual offences prevention order be deleted. The second condition in the order will be amended in the terms set out in paragraph [43] of this judgment. The sexual offences prevention order shall remain in force for the period of five years from today's date. To that extent the appeal is allowed.