Neutral Citation No. [2013] NICA 27 | *Ref:* **MOR8878**

Judgment: approved by the Court for handing down | *Delivered:* **17/05/2013**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ML

Defendant/Appellant.

SENTENCING

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against a 4½ year custody probation order comprising one and a half years custody followed by three years' probation imposed on the appellant at Belfast Crown Court on 23 October 2012 following his conviction on nine counts of indecent assault, two counts of gross indecency and one count of buggery of a female child. The offences occurred between August 1990 and December 1991 when the appellant, who was born in November 1976, was aged 13 or 14. The complainant, his sister, was born in March 1980 and was aged 10 or 11 at the time of the offences. The appellant appealed his conviction raising the issue of *doli incapax* but we have dismissed that appeal ([2013] NICA 23). Following the oral hearing of the sentence appeal we reduced the sentence on two indecent assault charges and the buggery charge to 12 months imprisonment and made all sentences concurrent. The effective sentence is, therefore, one of 12 months imprisonment. These are our reasons for that decision.

Background

[2] We have set out the detailed background to the offences in our decision on the appeal against conviction. In summary the offending started when the appellant persuaded his sister to practise kissing on him when he was 13. Around his 14th birthday he masturbated in front of the sister. After that he persuaded his sister to perform oral sex on him and performed oral sex on her. He rubbed his penis between her buttocks and momentarily and marginally penetrated her anus as a result of which he was charged with buggery.

[3] There clearly was an escalation in the behaviour and some degree of planning. The offences occurred when the children were off school and the parents were absent. The appellant pulled the curtains and encouraged the complainant not to tell the parents. She first disclosed the offences around 2002 to a university friend. She raised the issue with her brother 12 years later and he denied having any memory of it. In 2009 the complainant received counselling associated with the birth of her first child as a result of which these matters became prominent. A complaint to the police was made in early 2010.

[4] The victim impact report notes that the disclosure of these offences has had a significant effect upon the psychological welfare of the complainant. There has been disruption within the family and a psychologist has diagnosed chronic adjustment disorder with mixed anxiety and depression. Although the victim has gone on to have a second child and has been able to study at university she continues to have concerns about the safety of her daughters with people whom she knows she should be able to trust.

[5] The pre-sentence report stated that the appellant was a 35-year-old man who had been in a relationship with his partner for 14 years. They have two daughters aged eight and nine years old. He has no previous convictions and there is no suggestion that he has any abnormal interest in children or that he has been engaged in any inappropriate behaviour in the last 20 years. The case was contested on the basis that he asserted that he had no recollection of committing the offences and this factor seems to have been the principal reason for the conclusion by the probation service that he represented a medium risk of reoffending.

The sentencing remarks

[6] The learned trial judge recognised that the appellant and the complainant enjoyed a superficially very good relationship prior to the disclosures in 2009. She noted that the appellant was 13 years old when the offending began and the claimant was 10 years old. She recognised the relatively limited age difference between them. She also recognised that this was an age at which sexual curiosity was a characteristic of males and females.

[7] In relation to the offending she rejected the use of the word "grooming" as indicative of the appellant's behaviour having regard to his age at the time. She did, however, accept that there was a degree of planning and an escalation in the conduct. She further correctly identified that in terms of culpability there was an abuse of trust although again that has to be placed in the context of the age of the offender at the time. She noted the harmful effect upon the complainant but also took into account that the appellant had a clear record, that he had subsequently led a blameless life and that he had a very good bond with his daughters and his partner.

[8] She was referred to some but not all of the relevant cases and concluded that the principle that an offender's culpability should be judged by reference to his age at the time of the offence is only a starting point. She noted the need for deterrence in offences of this kind. She concluded that a custodial sentence of 12 months or more was justified by reason of the serious nature of the offending. She recognised that the primary purpose of a custody/probation order was to protect the public from harm and to prevent the occurrence of further offences. Although she identified correctly that the court must consider whether the public need protection from the offender by way of supervision, she concluded that she should impose the probation element of the sentence because the recommendation of the probation officer appeared sensible to her. She declined to make a sexual offences prevention order given that probation supervision would be in place and taking into account the subsequent blameless life of the appellant over a period of 22 years.

Discussion

[9] This was a difficult sentencing exercise although unfortunately not by any means unusual. In order to identify the factors which should be taken into account and the manner in which they should be applied, it is

necessary to review some of the relevant case law. R v Cuddington [1995] 16 Cr App R (S) 246 was a case in which the appellant was convicted of four counts of gross indecency and one count of indecent assault. The offences occurred when the appellant was 15 or 16 years old. He was 22 when sentenced. The victims were his nieces who were aged between 8 and 12. The children did not disclose the offences until six years later. The appellant was sentenced to a period of two years' imprisonment on each count of gross indecency and three years' imprisonment concurrent for indecent assault. He appealed on the basis that the sentence was excessive on the basis that if he had been dealt with shortly after the offences were committed he would have been a juvenile under the age of 17 and subject to a maximum sentence of 12 months' detention. The court took the view that whilst not in itself definitive of any sentence which would later be imposed that was a powerful factor to be taken into account. The sentence was reduced to one of 12 months concurrent on each count.

[10] The next case to examine this issue was R v Dashwood [1995] 16 Cr App R (S) 733. The appellant was a 29-year-old who was convicted of two counts of indecent assault, two counts of attempted rape and three counts of gross indecency with a child. The counts reflected conduct towards two girls over a period of about a year and one incident with a third girl. The appellant was aged 14 or 15 at the time of the offences and the girls were aged between 10 and 12 in one case and seven and nine in the other. The offences did not come to light for 13 years. He was sentenced to a total of 3½ years' imprisonment.

[11] The appellant invited the court to consider that if the appellant had been dealt with shortly after the commission of the offences the maximum sentence available would have been three months in a detention centre. If, however, a 14 or 15-year-old had come before the court at the time that the offender was dealt with the court could have imposed a period of detention of two years or more. The court noted that the appellant had contested the charges, a decision he made not at the age of 14 or 15 but at the age of 29. In reducing the sentence to one of 18 months' imprisonment the court concluded:

> "We take the view that there is no axiomatic approach to a problem of this kind which would entitle the Court to say that the right sentencing approach is to look at the matter as at a particular date. We consider that the matter

> has to be looked at in the round. The fact that the series of offences was committed when the offender was 14 to 15 is, as was said in Cuddington, a powerful factor in affecting the appropriate sentence to pass as at today. On the other hand, it is not the sole and determinative factor. We also have to look at how a 14-to 15-year-old might be dealt with today, and we have to look at all the circumstances of the case, including the way in which the appellant chose to conduct his defence."

[12] This issue was next considered in the guideline case of R v Millberry and others [2003] 1 WLR 546. The court indicated that in historic cases the starting points should be the same as those in other cases. The fact that the offences were stale could be taken into account but only to a limited extent. The court noted that it was always open to an offender to admit the offences and that in some circumstances the failure to report is a consequence of the relationship between the victim and the offender. Although these remarks are entirely apposite in relation to offenders of full age it is clear that the court was not asked to consider the position of those who committed offences when very young.

[13] In so far as the decision in Cuddington suggested that the sentence that the appellant would have been given if he had been detected shortly after the commission of the offences represented the guiding principle in an historic case of this nature it is clear that Dashwood represented a considerable retreat from that. In particular there was an emphasis upon the materiality of the sentence that would have been imposed upon a young person if they had been before the court at the time of sentencing and the relevance of subsequent conduct, including conduct in relation to the defence of the charges. The drift from Cuddington was if anything exacerbated by the approach in Milberry.

[14] The only reported case in this jurisdiction which has considered this issue is R v Bateson [2005] NICA 37. That was a case in which a series of violent sexual assaults were committed over a period of eight years. When the offending commenced the appellant was 13 years of age and the victim was six years old. The last offence occurred when the victim was 14 years old and the appellant was 21 years old. Although the court accepted that it

was an appropriate starting point to ask what the appropriate sentence would have been if the appellant had been sentenced at the time when the offences were committed, it then went on to apply Millberry and sentence in accordance with the applicable guidelines at the time of sentencing.

[15] The retreat from Cuddington became complete in England and Wales in R v Hall and others [2011] EWCA Crim 2753. This important case does not seem to have been drawn to the attention of the learned trial judge. The court concluded that it was wholly unrealistic to attempt an assessment of sentence by seeking to identify what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. The understanding of the reasons for such offences and the harm done by them may have changed significantly and had a corresponding impact upon the appropriate sentencing regime. The court noted, however, that the date of the offence may have a considerable bearing on the offender's culpability. Where the offender was very young and immature at the time when the offence was committed that remained a continuing feature of the sentencing decision.

[16] It is important not to ignore the harm that has been caused by the appellant's behaviour but in looking at the culpability of his conduct the assessment needs to take into account that this was a 13 or 14-year-old boy with all of the immaturity, particularly in relation to sexual matters, that one might expect. It is, in our view, appropriate to take into account how those circumstances would have been taken into account by a sentencing court dealing today if dealing with an offender of the age the appellant was shortly after he committed these offences. In R v CK a minor [2009] NICA 17 this court recognised the domestic statutory provisions and the international conventions requiring the court to consider non-custodial options for criminal conduct by persons of that age. In this case the prosecution were inclined to accept that for a boy of the appellant's age as he was at the time of the commission of these offences a non-custodial disposal might well have been appropriate if the offences had been committed recently.

[17] We take into account, however, that this case was contested by the appellant and that he cannot therefore benefit from the very considerable discount that he might have expected if he had faced up to his responsibilities at an early stage. As was noted in Dashwood, however, it is

important not to translate that factor into penalisation of the appellant for contesting the charges.

[18] One of the matters to which the learned trial judge paid particular attention was the question of the risk of further offending by the appellant. She recognised that the offender had committed these offences at a time of considerable immaturity and that there had been nothing in the intervening 22 years to suggest any inappropriate interest in sexual matters or offending of any kind. Indeed the evidence before the court indicated that the appellant had a stable and loving family relationship with his partner and children. The learned trial judge specifically commented that in her view there was no question of any risk to those children.

[19] Although those factors were sufficient to persuade the learned trial judge that she should not impose a sexual offences prevention order, she considered that it was necessary to require the appellant to undergo the community sex offenders' programme under a probation order. That had been promoted in the pre-sentence report on the basis that the appellant constituted a medium risk of reoffending as a result of his failure to face up to his responsibilities. We accept that the refusal of an offender to face up to his responsibilities requires careful consideration in relation to the question of risk but it must be balanced with other factors. Everything else in the appellant's life pointed markedly away from a risk of reoffending of any kind and nothing suggested any risk to children. We do not accept that this was a case in which a probation order was necessary.

Conclusion

[20] When assessing the appropriate sentence in an historic sex case for an offender who was a child at the time of the commission of the offence we suggest that the following factors should be taken into account:

(i) The statutory framework applicable at the time of the commission of the offence governs the scope of the sentence which may be imposed;

(ii) The sentence should reflect the sentencing guidelines and principles applicable at the time at which the sentence is imposed;

(iii) The primary considerations are the culpability of the offender, the harm to the victim and the risk of harm from the offender in the future;

(iv) Where the offender was young and/or immature at the time of the commission of the offences that will be material to the issue of culpability. It is appropriate in considering that issue to consider what sentence would be imposed today on a child who was slightly older than the offender was at the time that he committed the offences;

(v) Despite the observations of this court in Bateson on the case of Cuddington the court should not seek to establish what sentence might have been imposed on the offender if he had been detected shortly after the commission of the offence. Those remarks were not material to the outcome in Bateson and were, therefore, obiter. Such an exercise is of no benefit in fixing the appropriate sentence as sentencing policy and principles may well have altered considerably in the interim;

(vi) The passage of time may often assist in understanding the long term effects of the offences on the victim;

(vii) The passage of time may also be relevant to the assessment of the risk of harm. If the court is satisfied that the offender has led a blameless life after the commission of the offences that will be relevant in assessing future harm;

(viii) The attitude of the offender at the time of disclosure or interview by police is significant. The offender at this stage will be of full age. In these cases the immediate acknowledgement of wrongdoing by the offender provides vindication for the victim and relief at being spared the experience of giving evidence at a criminal trial. Such an acknowledgement will attract considerable discount in the sentence.

[21] For the reasons set out we considered that the youth and immaturity of the appellant at the time of the commission of the offences made this a case of low culpability but the harm was significant and the appellant made the complainant endure the rigours of a trial. The evidence indicated

that the appellant did not present a risk of harm to children or others in the future and the remarks of the learned trial judge in relation to his resuming his relationship with his children were entirely apposite. If he had faced up to his responsibilities at an early stage a non-custodial outcome may have been possible but in all the circumstances we considered that a sentence of 12 months imprisonment was appropriate.