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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 2 OF 2002)

Before: Carswell LCJ, McCollum LJ and Weatherup J

CARSWELL LCJ

[1] On 4 March 2002 the offender pleaded guilty at Antrim Crown Court (having pleaded not guilty on arraignment) to one count of indecent assault on a male, contrary to section 62 of the Offences Against the Person Act 1861. The judge adjourned the matter for a pre-sentence report and adjourned the matter again on 9 May 2002 to consider sentence. On 13 May 2002 he decided to defer sentence for six months, under Article 3 of the Criminal Justice (Northern Ireland) Order 1996 (the 1996 Order), on condition that the offender attended a voluntary programme for the prevention of sexual abuse. The Attorney General sought leave to refer the matter to the court under section 36 of the Criminal Justice Act 1988, on the ground that the sentence was unduly lenient. Counsel for the offender submitted that it was not an appropriate case for leave to be given and argued in the alternative that the sentence was not unduly lenient. In this judgment we shall express our conclusions on both issues.

[2] In the afternoon of 5 October 2001 the offender stopped his car in the main street of a country village and asked the victim, a young male aged 13 years, if he wanted a lift. The victim refused and walked on, but the offender caught up with him and repeated his offer, at which the victim got into the car.

[3] The offender asked the victim his age and whether he had any girl friends. He then took a pornographic magazine from the glove compartment and tried to get the victim to look at it. The victim wanted to get out of the car and asked the offender to stop, but the offender refused and said that he would take the victim home.

[4] A short time later the offender drove up a laneway in remote rural area and got out of the car, purportedly to relieve himself where he could not be seen. He returned to the car and lowered the passenger seat in which the victim was sitting. He tried to place his hand down the front of the victim's tracksuit bottoms. The victim resisted, but the offender succeeded in pulling down his tracksuit bottoms and boxer shorts. He put his hand under the victim's buttocks, lifting him up, and began to suck his penis. The victim attempted to push the offender away, but the offender was too strong for him and persisted with the assault. He then took out his own penis and tried to compel the victim to place his hand on it and pulled his head down towards it. The victim successfully resisted, but the offender was meanwhile pulling at the victim's penis, with such force that he caused a laceration to the foreskin.

[5] The offender then desisted and took the victim to a point along the lane, where he left him off. He was there found in a distressed state by a tractor driver and made a complaint to him. The tractor driver had met the offender's car in the lane and spoken to the offender. He was suspicious of him and took the number of his car, which enabled the police to trace him.

[6] When he was interviewed by the police the offender admitted some of the matters alleged by the victim, though he attempted to throw some blame on to him, but he later withdrew these suggestions and did not deny any of the acts alleged against him when he eventually pleaded guilty. He did not plead guilty on arraignment, but his counsel stated that the prosecution were informed from an early stage that the victim would not be required to give evidence.

[7] The victim had a very strong reaction to what Dr Alice Swann described as "this traumatic introduction to sexual matters in an inappropriate way". He had a very strong sense of betrayal, leading to anger and aggressive behaviour, and of powerlessness, leading to anxiety and fear. He had major behavioural problems in school. With good family support he has made favourable progress and Dr Swann expressed the opinion in February 2002 that the long-term prognosis for him eventually would be good and that he would continue to make a slow recovery. He could, however, have some problems in time about sexual relationships.

[8] The offender is now aged 62 years. He has some previous convictions, but all were a long time ago and none was material to the issues in the present reference. He has been married twice and has five children. He has a history of steady employment. When interviewed by the probation officer preparing the pre-sentence report he claimed that the offence was one of impulse, but the probation officer did not accept that and the facts point to premeditation and preparation.

[9] He was examined on 6 November 2001 by Dr Ian T Bownes, a consultant forensic psychiatrist, at the request of his solicitors. He admitted to sexual thoughts involving young boys, which he attributed to his childhood sexual experiences. His account of the incident was characterised by "a marked tendency to attribute his actions to circumstances and influences outside his own control, that included initially blaming the injured party for inviting and encouraging his behaviour." Dr Bownes expressed the view at page 7 of his report:

> "His answers were patently inconsistent and self-serving at times, and [he] repeatedly displayed a tendency to rationalise and excuse his actions in a manner that allowed him to avoid fully recognising and confronting the deviant and damaging nature of his behaviour."

He repeatedly expressed shame and remorse and emphasised his intent to engage with whatever treatment or counselling he was offered.

[10] In his conclusions at page 10 of his report Dr Bownes stated his opinion as follows:

> "[He] described his actions in the index incident as having been impulsive and opportunistic in nature rather than representing the `acting out' of recurrent thoughts or fantasies or related themes. However [he] did admit to having experienced pleasurable sexual feelings at the time of the index incident and to having previously experienced thoughts and mental imagery on sexual themes involving young boys. Although [he] described such thoughts and mental imagery as involuntary in nature and as related to his own inappropriate sexual experiences when he was growing up, in my opinion, [his] account of sexual thoughts, mental imagery and feelings related to his behaviour in the index incident was consistent with an established sexual attraction to young boys.
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> [He] displayed a range of inappropriate attitudes and ideas regarding the index incident during the present interview that would have represented a considerable investment in justifying and rationalising his behaviour in his own mind.

> These included a tendency to attribute his actions to circumstances and influences outside his own control that allowed him to avoid fully confronting and taking responsibility for the deviant nature of his actions and their harmful effects, and that in my opinion, could conceivably facilitate further similar offences in the future if not effectively addressed.
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> I have not had access to any corroborative information on [his] personal history. However there was no objective evidence from his presentation at the current interview or from the information [he] disclosed of maladaptive attitudes and pattern of behaviour typical of clinically significant disorders of personality associated with a constitutional tendency to callous and antisocial behaviour or an inherent incapacity to experience remorse or guilt. In my opinion, [he] has sufficient personal skills and resources to elucidate and address inappropriate attitudes, beliefs and patterns of behaviour that would have facilitated his behaviour in the index offence, and to develop and apply appropriate `relapse prevention' strategies through participating in a sex offender programme of the nature available under the auspices of the Probation Service, should he be motivated to do. However I would also emphasise that no method of treatment or punishment has been developed to date that will permanently extinguish a deviant sexual arousal pattern once this has been established, and hence avoiding further offences will inevitably require ongoing commitment and effort on [his] part."

[11] In the pre-sentence report dated 15 April 2002 the probation officer states that the staff of the Programme for the Prevention of Sexual Abuse situated at the Tyrone and Fermanagh Hospital, Omagh regarded the offender as an appropriate candidate for inclusion in their programme. He accordingly recommended that a custody probation order could be supported by the imposition of a condition that the offender attend that programme for a minimum of one year as and when directed to by his probation officer.

[12] The judge in his sentencing remarks correctly set out the serious aspects of the case. He then stated that the offence was not towards the minor

or trivial scale of indecent assaults, but was still towards the lower end of the custodial scale. He referred to the cases in this court of *R v Lemon* [1996] NIJB 1 and *Attorney General's Reference (No 3 of 2001)* (2002, unreported), both of which he regarded as somewhat different cases. He set out the options which he considered open to him as –

> "a straight sentence of imprisonment; a mixture of custody/probation; a probation order with a condition of treatment; and possibly a deferral allowing you the option of starting treatment voluntarily."

[13] The judge went on to express the opinion that punishment was not needed from the offender's point of view and that deterrence "is possibly better served by seeking treatment", while deterrence of others "is more likely to be effected by detection." He considered the several options which he had set out and went on:

> "The circumstances of your offence present a sentencing dilemma to the court. In my view treatment is important but probation in itself is too lenient. I cannot impose both a probation order and a suspended sentence. This makes a somewhat stark choice. Custody with a probation element is just possible but only just. Custody pure and simple is the least beneficial, I am satisfied, to the community and to you.
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> I have, subject to your consent, decided to defer passing sentence. To my mind the commensurate sentence, a sentence appropriate to the offence taking into account to all the matters that I have referred to is 18 months. I will either pass that sentence in early November or I will suspend it for three years, or just possibly I will take another lesser course depending on the situation and reports at the time."

He therefore deferred passing sentence, as permitted by Article 3 of the 1996 Order, for a period of six months, on the offender's undertaking to attend the course at Tyrone and Fermanagh Hospital. He made a confiscation order in respect of the offender's car. The offender was placed on the sex offenders' register.

[14] In his reference the Attorney General referred to the following aggravating and mitigating factors, which are in our view a fair summary of the case:

> "4 It is submitted that the following aggravating factors appear to be present:-
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> (a) The victim was 13 and vulnerable because of his youth.
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> (b) There was a predatory element to the attack in that the victim was an isolated young boy in a broadly rural area, the production of the pornographic magazine was clearly to assist in the commission of the offence, the lie about the reason for having to bring the car into the remote laneway and the utilisation of the car for the commission of the offence in all the circumstances.
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> (c) The nature of the conduct was abhorrent involving contact between the offender's mouth and the victim's genital area.
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> (d) The assault was protracted in that there was clear evidence of persistence and some evidence of modest injury.
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> (e) The victim was distressed and it is clear from the victim impact report that the assault has had marked consequences on him and is likely to have some longer term consequences for the future.
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> (f) Initially there was an attempt to point the finger of blame at the victim although by the time of the plea this had been completely and absolutely withdrawn.
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> 5. It is submitted that the following mitigating factors appear to be present:-
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> (a) The offender pleaded guilty to the offences albeit not at the first opportunity.

(b) He has shown remorse.

(c) He admitted the elements of the offence at the first interview although he accused the boy of being a willing participant.

(d) He has had a clear record for the last 30 years and has no relevant record.

(e) He is apparently suitable for participation in a sexual offenders programme."

Counsel for the offender also drew to our attention articles from a newspaper in which extensive unpleasant publicity was given to the case, and stated that the offender and his family had received abusive telephone calls.

[15] Counsel for the Attorney General submitted that the course taken by the judge was excessively lenient and that it failed to reflect the gravity of the offence, the need to deter others, the obligation to protect the most vulnerable members of society, the grave public concern and revulsion aroused by this type of offence and the importance of maintaining public confidence in the sentencing system. He pointed to the remarks of this court in *Attorney General's Reference (No 3 of 2001)* (2002, unreported) at page 8, where we placed renewed stress on the necessity for the courts to mark emphatically the abhorrence of acts of child abuse, which he submitted were, *mutatis mutandis,* entirely apposite to the present case and had not been taken into account by the judge. In a similar vein were the court's remarks in *Attorney General's Reference (No 2 of 2001)* [2002] NIJB 117 at 122a:

> "It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from following their example."

[16] Counsel for the offender submitted that the application for a reference was premature, in that the judge did not commit himself to suspending the sentence and kept open the option of an immediate custodial sentence. Such a sentence of 18 months' imprisonment, if imposed by the judge, would not be unduly lenient. He accordingly contended that leave should be refused and that the judge should be permitted to complete the sentencing of the offender. He also pointed to some features of the case which, while not constituting mitigating factors in the proper sense, could be taken into account, the sexual abuse of the offender in his youth, the lack of evidence of

any other similar offences, the absence of violence or threats and the offender's stable life and steady gainful employment.

[17] It is in our opinion clear that an order under Article 3 of the 1996 Order deferring passing sentence on an offender may be the subject of an Attorney General's reference, and counsel for the offender did not attempt to argue to the contrary. Article 3(1) sets out the object of the conferment of this power:

> "3.-(1) Subject to the provisions of this Article, the Crown Court or a magistrates' court may defer passing sentence on an offender for the purpose of enabling the court to have regard, in determining his sentence, to his conduct after conviction (including, where appropriate, the making by him of reparation for his offence) or to any change in his circumstances."

[18] The circumstances in which the Attorney General may refer a sentence to the court are defined in section 36(1) of the Criminal Justice Act 1988 (the 1988 Act):

> "36.-(1) If it appears to the Attorney General –
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> (a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and
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> (b) that the case is one to which this Part of this Act applies,
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> he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may –
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> (i) quash any sentence passed on him in the proceeding; and
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> (ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him."

Section 35(6) defines "sentence" as follows:

> "(6) In this Part of this Act "sentence" has the same meaning as in the Criminal Appeal Act 1968, except that it does not include an interim hospital order under Part III of the Mental Health Act 1983, and "sentencing" shall be construed accordingly."

The word "sentence" is defined by section 50(1) of the Criminal Appeal Act 1968:

> "In this Act, `sentence' in relation to an offence, includes any order made by a court when dealing with an offender (including a hospital order under Part III of the Mental Health Act 1983, with or without a restriction order, and an interim hospital order under that Part) and also includes a recommendation for deportation and a declaration of relevance under the Football Spectators Act 1989."

In *Attorney General's Reference (No 22 of 1992)* [1994] 1 All ER 105 the Court of Appeal held that on its proper construction the deferment of sentence constituted a "sentence" for the purposes of section 50(1) of the Criminal Appeal Act 1968, since it was an order dealing with an offender, which did not require to be a final order. It concluded accordingly that a deferment could in England be the subject of an Attorney General's reference. This decision was subsequently questioned, but its correctness was confirmed by the court after further argument in *R v L* [1999] 1 WLR 479.

[19] In its application to Northern Ireland, section 35(6) of the 1988 Act is, by virtue of subsections (7) and (11), subject to the modification that the reference in subsection (6) to the Criminal Appeal Act 1968 is to be construed as a reference to Part I of the Criminal Appeal (Northern Ireland) Act 1980. The definition of "sentence" in section 30(1) of the latter Act is not in the same terms as in the 1968 Act:

> "`sentence' includes any order of the court of trial made on conviction with reference to the person convicted or his wife or children, and any recommendation of that court as to the making of a deportation order in the case of a person convicted;"

The difference in wording does not in our view lead to a different conclusion on the extent of the power to refer a deferred sentence to the Court of Appeal in Northern Ireland. In *R v L* [1999] 1 WLR 479 at page 483G Lord Bingham of Cornhill CJ remarked that it would be very hard to argue that an order deferring sentence did not come within the definition of "any order made on conviction" contained in section 108 of the Magistrates' Courts Act 1980. In so stating he referred to the conclusion reached by the court in the earlier case of *R v Williams* [1982] 3 All ER 1092, where Lord Lane CJ said at page 1095c:

> "It seems to this court that plainly that [the definition in section 50(1) of the Criminal Appeal Act 1968] includes the order that the judge made in this case, namely the order of binding over, which was contingent on the conviction and could not have been made otherwise than on conviction."

We would respectfully agree with both of these statements and apply them to the present case. It follows that the deferment of sentence under Article 3 of the 1996 Order constitutes an "order of the court of trial made on conviction" and that it falls within the class of cases which the Attorney General may refer to this court. Not only is this conclusion correct in our opinion as a matter of construction, but if such a case could not be referred two surprising and unsatisfactory results would follow, as Lord Taylor of Gosforth CJ remarked in *Attorney General's Reference (No 22 of 1992)* [1994] 1 All ER 105 at 109c:

> "First, there would be no right of appeal against a deferred sentence order under s9 of the 1968 Act. That would be a surprising lacuna, since there could well be cases in which it could be argued that an immediate non-custodial sentence should have been passed rather than a deferred sentence order. Secondly, as Mr Nutting pointed out, an Attorney General's reference could not be made until the final disposal had been ordered by the trial court where there had been a deferred sentence. Thus the offender would fall to be dealt with three times, rather than twice, in the event of such a reference, and suspense would be the more prolonged."

We therefore give leave to bring the reference.

[20] We are unable to accept the argument advanced by counsel for the offender that the reference is premature. The reality of deferment of sentence

was clearly spelt out by Lord Bingham of Cornhill CJ in *R v L* [1999] 1 WLR 479 at 482G:

> "Where such an order is made the court lays down certain conditions, which may relate to reparation, the voluntary undergoing of treatment, employment, abstention from criminal activity or any other relevant matter clearly prescribed by the court, and the clear understanding is that, if the defendant complies with those conditions, he will not be sentenced to custody on the date to which sentence is deferred: see *Reg. v. George* [1984] 1 WLR 1082. Thus, although the court, when deferring sentence, has made and announced a decision not to pass sentence on that occasion, it has in practice committed itself to a sentencing strategy any departure from which, in breach of the understanding indicated, would found a successful appeal by the defendant."

Although the judge in the present case mentioned in the passage which we have quoted from his sentencing remarks the possibility that he would pass a sentence of 18 months' imprisonment at the expiry of six months, it is in our view entirely clear that he was intending to convey only that he would reserve the power to do so if the offender did not make sufficient attempt to comply with the requirement of treatment which he had just prescribed, and that if he did so comply he could properly expect that a sentence of immediate custody would not be passed. We therefore consider it right to proceed now to determine whether such a disposition was unduly lenient.

[21] In approaching the issues before the court we remind ourselves once again of the frequently quoted observations of Lord Lane CJ in *Attorney General's Reference (No 4 of 1989)* (1989) 11 Cr App R (S) 517 at 521:

> "The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the

> relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this Court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particular well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.
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> The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this Court has a discretion as to whether to exercise its powers."

We must also have regard to the factor of double jeopardy.

[22] We feel it necessary to repeat the passage, which we have quoted in several previous cases, from the Wolfenden Committee's Report (*Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247) (1957)), in which it summarised the function of the criminal law in the field of sexual offences:

> "To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."

The present case is a good example of the need to preserve a balance between the need to impose severe sentences on offenders to act as a deterrent to others and the need of the offender himself for rehabilitative treatment. The disposition adopted by the judge focused unduly in our judgement on the needs of the offender and insufficiently on the importance of deterrence and the public factors emphasised by the Attorney General in the reference. We cannot ourselves accept without reservation the view expressed by the judge that deterrence of others and the consequent protection of vulnerable victims is more likely to be effected by detection than by condign punishment of those who commit such offences. Moreover, the approach which he has taken gives altogether insufficient weight to the need to express the public's revulsion in due form through the system of criminal justice. As we have

frequently said in various contexts, these considerations may in appropriate cases have to take priority over those which are personal to the offender.

[23] We do not need to rehearse again the serious and repellent aspects of this case. We would regard it as one which should inevitably attract an immediate custodial sentence, which on a plea of guilty should be of the order of three years. We accordingly hold that the sentence passed by the judge was unduly lenient.

[24] We have given consideration to the possible imposition of a custody probation order under Article 24 of the 1996 Order. As we observed in *R v McGowan* [2000] NIJB 305 at 310, the disposition provided for in Article 26 of the 1996 Order is more appropriate in the case of sexual offences where the conditions specified in Article 26(1)(b) are satisfied. In our view those conditions are satisfied in the present case. We have taken into account the fact that the court cannot impose conditions on the offender's licence requiring him to undergo specified treatment, whereas it could do so under a custody probation order. The Secretary of State has, however, power under Article 26(3) to specify conditions in the licence and we have no doubt that he would give careful consideration to imposing a requirement that the offender attend the type of programme for the prevention of sexual abuse which the judge thought likely to assist him.

[25] Taking into account the element of double jeopardy, we shall substitute in place of the order made by the judge an immediate sentence of 30 months' imprisonment and order that Article 26 of the 1996 Order shall apply on the offender's release from prison. We direct that he shall surrender to custody within 72 hours.