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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 3 OF 2001)

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CARSWELL LCJ

On 5 November 2001 the offender was sentenced at Omagh Crown Court, sitting at Enniskillen, by His Honour Judge Foote QC on a plea of guilty to suspended sentences in respect of a number of offences committed against young children. The Attorney General referred the case to the court to review the sentencing, on the ground that it appeared to him to be unduly lenient.

The offender pleaded guilty on 21 March 2001 to nine counts of inciting children to commit an act of gross indecency with him, contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968, and six counts of indecently assaulting children, contrary to section 52 of the Offences Against the Person Act 1861. One count of rape was not dealt with, and we assume that the judge ordered that it lie on the file. The judge sentenced the offender on each count to a sentence of 21 months' imprisonment, suspended

for three years, all sentences to be concurrent. He was also ordered to register as a sex offender for a period of five years.

The series of offences commenced in or about 1963 with P, the youngest sister of the offender's wife, who lived with the family and was then aged ten years. On many occasions the offender touched P inappropriately, played with her private parts and made her masturbate him. The offences went on until P was aged 15 or 16 years. Counts 10 to 12 in the indictment are sample counts charging the offender with indecently assaulting P.

The offender then committed a series of offences against his daughter S. Between 1973, when she was aged seven years, and 1975, he regularly touched her inappropriately and had her stroke his penis so that he could masturbate. Counts 1 to 3 and 7 to 9 on the incitement charge the offender with inciting S to commit acts of gross indecency with him, and Counts 4 to 6 charge him with indecently assaulting her.

Counts 14 to 16 charge the offender with three offences in or about 1977-8 of inciting his younger daughter T, who was then aged seven to eight years, to commit acts of gross indecency with him. These offences involved similar behaviour of having T stroke his penis.

None of the offences came to light until much later, when the complainants told each other about them, and they were not reported to the police until April 2000. The offender made some admissions in interview, but denied most of the allegations made by the complainants. He pleaded not guilty on arraignment, and did not change his plea to guilty until a late stage.

They judge adjourned the matter to obtain a pre-sentence report and reports on the victims, and the offender was eventually sentenced in November 2001.

The offender is now aged 63 years. He claimed to the probation officer that he had been sexually abused by his father as a child and when he was nine years old subjected to a serious incident of buggery. He served with the Royal Artillery in Cyprus, where he was wounded. He served for a number of years with the Ulster Defence Regiment until his retirement at the age of 54. He was married in 1959 and has four children. The marriage appears to have been somewhat unhappy and the couple divorced in 1982. The pre-sentence report describes his current state of health as follows:

> "The offender informs me that he is in receipt of ongoing and substantial medical intervention. He describes suffering from an enlarged prostrate gland that has led to difficulties of incontinence. In addition he suffers from clinical depression and panic attacks which he attributes to his experiences during Northern Ireland's historical troubles when he was a UDR soldier. In addition the defendant states he suffers from poor circulation and angina. He is currently dependent upon crutches to move around his home and would describe himself as being virtually housebound. The defendant also states he suffers from tinitus [sic]."

Counsel for the offender handed in to the court, by leave, a report from his general practitioner setting out his present medical condition, in the following terms:

> "This gentleman is a patient of the above surgery and suffers from the following medical conditions:-

1. Severe Depression
   Attended Dr McCourt (consultant psychiatrist) since 17th January 2001 with depression and memory problems. He is awaiting CT brain and is on numerous medications. At present his mental state is very poor and his medication has been recently increased. At times he feels life is not worth living.

2. Lumbar spine ostoarthritis, poor mobility, requiring 2 crutches for walking. He requires tramadol for analgesia for moderate to severe pain.

3. Hypertension – on medication. BP today 200/100, implying very poor control at present.

4. Angina – chest pains x 2 per week. On medication for this.

5. High cholesterol – requires medication for this.
6. Tinnitus.

The prison regime would have an adverse effect on all of the above medical conditions, specifically his depression, hypertension and angina. His poor mobility would also make prison conditions difficult."

The offender informed the probation officer that he had never committed any similar acts against other children and that he had no sexual interest in others. He has no criminal record and it was not suggested that he was suspected of any offending other than that with which he was charged. Although unable to articulate what had made him commit the offences against the complainants, he maintained that his inclination to do so had "gone away". The probation officer expressed the view that in order to gain

further understanding of the offender's level of propensity to reoffend, it would be necessary for him to undergo focused work designed to combat this type of offending behaviour. It seems to us doubtful on the evidence before us whether he does now present a continuing risk to the public, which would make a probation-based disposition less appropriate.

The judge had available to him, as we had, reports on two of the victims. The report by a probation officer on P gave details of her other adverse experiences and of the injuries sustained in a road accident at the age of 18 which have left her confined to a wheelchair. The combined effect of these have left her with difficulty in forming positive attachments in adult life. It is not possible to separate out the strands in her life which have had this effect, but the probability that the offender's behaviour to her has had lasting results is borne out by her statement to the probation officer that "You never forget".

A report was obtained from a consultant psychiatrist on T. She appeared to cope with her experiences at the hands of the offender during the rest of her childhood. Difficulties surfaced, however, about a year after her marriage which may have their roots in those experiences. She tends to avoid sexual intercourse if possible, although her husband has been supportive and helpful in her difficulties. She has insecurities in her personality, and the childhood abuse played a very significant and possible major part in their causation. On examination she was tense and emotional and she has a recent history of depression. Dr Fleming states that persons subjected to childhood

sexual abuse are prone to depression and considers that she is going to be vulnerable to episodes of depression in the future, particularly at times of stress.

There was no victim impact report on S, but at the end of her statement made to the police she states that the offender has ruined her life, which at its lowest demonstrates that the matter has left its mark on her.

In his sentencing remarks, which were markedly laconic, the judge described the offences as very serious. He referred to the offender's clear record and his military service, the fact that the offences occurred a long time ago and that there was no danger of a recurrence. Other than that he did not attempt to catalogue the aggravating and mitigating features of the case. He then sentenced the offender to imprisonment for one year and nine months, suspended for a period of three years.

In paragraph 6 of the reference the Attorney General set out the aggravating features of the case:

> "It is submitted that the following aggravating features exist:
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> (a) The youth, innocence and vulnerability of the victims.
>
> (b) The number of victims.
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> (c) The protracted period during which the offences were committed.
>
> (d) The multiplicity of offences committed.
>
> (e) The abuse of a position of trust during substantial periods of the victims' childhoods.

(f) The impact of the offences on the victims.

(g) The maintenance of a plea of not guilty until a very advanced stage of the proceedings.

(h) The offender's doubtful appreciation of the gravity of his conduct.

(i) The absence of any genuine remorse."

In paragraph 7 he set out the mitigating features:

"The following mitigating features appear to be present:

(a) The offender's age (now 63 years old).

(b) His apparent reform during the past 25 years approximately.

(c) The absence of any appreciable risk of re-offending.

(d) His apparent suitability for participation in a sexual offenders programme.

(e) The abuse which he suffered when a child from his father.

(f) The virtually complete social isolation which he suffers due to his generally unhappy family circumstances, which include these offences and the breakdown of his marriage.

(g) His career in the armed services of some 37 years duration.

(h) The psychiatric trauma which he has suffered as a result of serving in Northern Ireland.

(i) His poor health: it is documented that in addition to suffering from depression

> (supra), he is afflicted with an enlarged prostrate gland, angina and poor blood circulation. Furthermore, he requires crutches for mobility."

We agree that these paragraphs set out the respective features correctly enough, though some of those relied on as mitigating features might more appropriately be described as non-aggravating features: cf *Attorney General's Reference (No 1 of 1989)* [1989] NI 245 at 251, per Hutton LCJ.

The maximum term of imprisonment which a court could impose for either of the offences charged was two years at the time when they were committed. It has been increased to ten years for indecent assault, but remains at two years for inciting children to commit an act of gross indecency, a term which we have previously described as unrealistically low. It would, however, have been completely justifiable in the present case for the judge to have imposed consecutive sentences for this series of offences committed over a long period, subject always to the totality principle.

We have referred on all too many occasions in this court to the threat of sexual abuse to children in modern society and the duty resting on the courts to deal severely with those who may be tempted to harm young children sexually. As a general rule we consider that cases of this kind must attract immediate custodial sentences of some length, unless there is some altogether exceptional factor to take the case out of the general rule. We have to place renewed stress on the necessity for the courts to mark emphatically the abhorrence of society of acts such as those committed by the offender,

particularly when they were premeditated and planned actions perpetrated on children towards whom he stood in a relationship of trust.

We do not overlook the observations of Lord Lane CJ in *Attorney General's Reference (No 4 of 1989)* (1989) 11 Cr App R (S) 517 at 521 on the approach to be adopted to these references, which we have regularly followed in this court:

> "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, to the fact that the offender has been at liberty until now and to the possibility advanced by his

counsel that he may have been prejudiced by the length of time which has passed since the offences were committed.

Our task now is to balance the several factors in order to determine whether the sentences passed were unduly lenient. In our judgment the heinous nature of the offences was such that an immediate custodial sentence was inescapable. There are cogent mitigating factors in the personal situation of the offender, and we would not send a man in his condition to prison unless we were fully satisfied that it was necessary in the public interest. In this case we are so satisfied, and the public interest in deterrence and marking the seriousness of these offences has to take priority over the considerations which are personal to the offender. We accordingly conclude that the sentences passed by the learned judge were unduly lenient.

If it were not for the element of double jeopardy and related factors, we would regard the case as meriting a sentence of three to four years. Taking those factors into account, however, we take the view that we should leave the length of the term at 21 months and remove the suspension. We do not consider it an appropriate case for a custody probation order or an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996. We quash the sentences passed by the judge and impose in their place a sentence of 21 months' imprisonment on each count, all sentences to be concurrent. The offender must surrender to custody in 48 hours.

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J U D G M E N T O F

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