IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (NO.4 OF 1995)

(R v DAVID MOORE)

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MacDERMOTT LJ

This is a Reference by the Attorney-General to the Court of Appeal under section 36 of the Criminal Justice Act 1988 of a sentence which he considers to be unduly lenient.

The sentence was one of 5 years' imprisonment imposed by His Honour Judge David Smyth QC upon the offender, David Moore, at Belfast Crown Court on 26 October 1995 upon his plea of guilty to a charge of rape which occurred on 29 May 1993.

On 10 October 1994 the offender was tried on an indictment containing 4 counts:

1. Rape of N on 29 May 1993 - a child of 8 years and 10 months at that time.

2. Indecent assault on N.

3 and 4. Assaults on D and R. These were 2 young boys aged 10 who had been playing with N on an area of rough ground known as "the Sandies" off the Causeway End Road, Lisburn.

The case was tried at Belfast Crown Court in October 1994 and the offender was convicted on all 4 counts. The judge deferred sentence and the matter was brought speedily before this court on appeal as the judge had inadvertently read to the jury various passages which had been edited out of the depositions. On 22 February 1995 this court quashed the convictions and ordered a new trial.

On 16 October 1995 a jury was empanelled to hear the case but the hearing was adjourned to the next day, 17th, so that, inter alia, counsel could marshal their arguments regarding the admissibility of evidence relating to various items found in the possession of the offender - at the first trial this evidence had been excluded but it would seem to have been an arguable point as far as the Crown was concerned. When counsel for the Crown and the defence had been discussing the running of the

case with the judge in Chambers he indicated, without any prior discussion, that in the event of a guilty plea there would be "a chance of 5 years".

On the next day 17 October the offender was re-arraigned and pleaded guilty to all counts. The matter was adjourned for reports and on 26 October the offender received concurrent sentences of 5 years (Count 1), 2 years (Count 2) and 6 months (Counts 3 and 4).

The background facts of the incident were not in dispute and we repeat the paraphrase of the evidence set out in the Reference:

"a. On 29th May 1993 the rape victim, a young girl then aged 8 years and 10 months, was playing with her brother, aged 10, and another small boy, also aged 10, in the backyard of the girl's home. They were building a hut and decided to go to some nearby waste ground to look for wood.

b. As they searched for the wood, the offender, wearing an army suit and black boots approached the children. He had camouflaged himself with leaves about his head and neck. He also wore a balaclava mask and carried a knife. He grabbed the children by the hands and pulled them to another part of the waste ground. He told the 2 boys to cover their eyes with their t-shirts and hit them. The offender then blindfolded the girl with a scarf, removed her shoes, trousers, and knickers and told her to lie on the ground. Her only recollection of the assault was that she believed he had put something into her bottom which she described as feeling like a thumb.

c. The girl began to cry but the offender told her that he would kill both her and the 2 boys unless she stopped. Having finished assaulting the girl, the offender said he was going but would return in 10 minutes.

d. The 3 children then made their way back to the girl's home and related what had happened to the girl's mother. The police were called.

e. On examination, a doctor found multiple scratches and bruising on the girl's back and buttocks. There was generalised abrasion of the labia anteriorly accompanied by some swelling and bruising. The clitoris was red and swollen. The anterior wall of the low vagina was swollen and abraded and accompanied by a slight ooze of blood. The doctor was unable to carry out an internal examination as the child said that touching the affected areas was too painful. It was not possible, therefore, to examine the child for possible injury to the hymen. The girl was very distressed throughout the examination and was too upset to allow any rectal examination ....

f. The examining doctor stated that the nature of the injuries she had found left her in no doubt that penetration had occurred with some object entering the vagina in a fairly rough manner.

g. The offender was principally traced because local residents had noticed him loitering in that area on many occasions and one had noted the registration number of his car. The police traced the owner of the car and the offender was arrested on 1st June 1993.

h. A search of the offender's home and of his locker at the Territorial Army Centre in Abbott's Cross, Newtownabbey produced a camouflage jacket, black army boots and a black scarf. The scarf was later found to have attached to it a number of hairs which were forensically indistinguishable from the hair of the victim. [A briefcase in the offender's bedroom was found to contain a collection of girl's knickers and vests, tissues and used condoms, newspaper cuttings about young girls, and a video depicting children at a dancing class with the camera focused on the girls' genital area. Further items of girls' clothing were found in the offender's car.] The passage in brackets relates to the items at the centre of the dispute about the admissibility of evidence to which we have already referred.

i. In interview, the offender denied having been in the area of the assault at all. In the second interview he claimed to have seen a man in combat gear running from the scene and reported it to a police officer. He later agreed that he did habitually leave his car in the area and claimed that he went jogging there on a regular basis. In his third interview he was asked to explain the contents of his briefcase. He claimed the items belonged to friends he was not prepared to name. He went on to assert that he had been in the area looking for a friend called Gareth Campbell who was practising military manoeuvres. He saw Campbell with the 3 children and guessed what was going to happen. He left before anything happened. He claimed that Campbell was wearing the items that had been found in the offender's attic."

Mr Coghlin QC (who appeared with Mr T Mooney QC and Mrs Kitson for the Attorney General - the latter had appeared for the Crown at the trial) submitted that on any showing a sentence of 5 years for the rape of a young child in the circumstances of this case was not only lenient but unduly so by several years. He emphasised various aggravating features:

"a. The victim was a young girl aged 8 years and 10 months at the time of the rape;

b. The rape was planned;

c. The assault was a terrifying incident for all 3 children. The victim had been taken to a secluded spot and blindfolded. The 2 young boys she was with were similarly blindfolded, were assaulted, and had to listen to the attack on a younger sister and friend;

d. The offender had a knife and threatened to kill all three children;

e. There was evidence that the assault would have a profound and lasting effect on the victim;

f. The offender will remain a potential danger to children."

Mr Ramsey (who appeared with Mrs Gillen for the offender) in his reply accepted that the sentence was lenient but not, he argued, unduly lenient. He also submitted that even if this court felt that the sentence was unduly lenient we should not in the exercise of our discretion increase the sentence. In support of this argument Mr Ramsey stressed the following points:

1. The offender had pleaded guilty, albeit at a late stage in the proceedings. He developed this proposition by reminding us that in taking this course the respondent avoided any question of the children having to give evidence and, further, at the first trial the offender had agreed to their statements being read and had specifically stated that he was intending to do so at the second trial. This attitude, Mr Ramsey argued, showed that Moore was not a "monster" who would wish in any way to embarrass the children and indeed was a person whose plea was a genuine indication of remorse. In support of this latter submission he directed our attention to the detailed report of the offender's Probation Officer dated 24 October 1995. The last paragraph contains this sentence:

"He (Moore) expresses regret for his behaviour and remorse for the long term consequences for his victims who have inevitably suffered because of his behaviour."

Mr Ramsey also emphasised that the plea of guilty was significant because there were weaknesses in the Crown Court case though he readily acknowledged that the previous jury had found the offender guilty.

2. Mr Ramsey disputed Mr Mooney's claim that this was a planned attack. This is an arguable point depending upon when the offender in fact decided to act as he did. What is beyond question is that the offender, out jogging, saw fit to carry a knife (which is surprising), threatened the children with the knife and led them off to a denser part of the waste ground where he raped the little girl.

3. The offender's previous good character, though Mr Ramsey realistically accepted that previous good character is of only minor relevance.

4. The lengthy period of time which had elapsed between the incident and final sentencing. Much of that delay was not of the offender's making and as he was on bail in hostel accommodation without committing misconduct, that was another factor which, Mr Ramsey submitted, should mitigate his sentence.

The judicial approach to References of this nature is well established. In this jurisdiction we apply the principles set out by Lord Lane CJ in Attorney-General's Reference (No. 4 of 1989) [1990] 1 WLR 41 at 45:

"The correct approach to section 36

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 this 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 particularly 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.

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. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance; where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.

Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence."

We also remind ourselves that applications of this nature are not determined by the members of the appellate court concluding that they would individually or collectively have imposed a significantly longer sentence. The appellate court has to consider the sentence imposed by the trial judge and ask if it was clearly inappropriate in relation to the circumstances of the case having regard to the range of sentences imposed in other cases of a similar nature: unless it was it cannot be described as unduly lenient.

In relation to the offence of rape, Crown Court Judges have the benefit of well established guideline cases. In R v Billam [1986] 8 Cr.App.R(S) 48 it was held in England that 5 years should be the starting point in a sentencer's assessment of the proper sentence in a rape case and from that base the sentence would be increased or

reduced depending on the nature of the aggravating or mitigating factors peculiar to that particular case. In this jurisdiction in R v McDonald, Taggart and Farquhar [1989] 3 NIJB 28 the appropriate starting point was declared to be 7 rather than 5 years. Rape is always a grave offence - but this was an offence of particular gravity, because it was committed against a child, the offender was armed with a knife, and he threatened her and the 2 little boys with her that he would kill them unless she stopped crying. In her Victim Impact Report prepared following the first trial Dr Alice Swann was of the opinion that the victim had been deeply affected by the rape but did not yet realise the true nature of what had happened to her. The present indications are that the effect on the child may not be as serious as was previously anticipated. Nevertheless it is self-evident that this child must have been subjected to a most traumatic and potentially very damaging experience. In our judgment a sentence of about 12 years would have been appropriate on conviction after a plea of not guilty.

A plea of guilty is always a mitigating factor especially in cases of this nature where the victim is spared the trauma of giving evidence. However the plea of guilty was at a very late stage and this court is sceptical as to the offender's remorse, bearing in mind that he did not admit his guilt at the first trial and for a number of months thereafter. Therefore we consider that the discount should be relatively small. Making due allowance for all that Mr Ramsey has so ably urged on behalf of Moore we consider that in the particular circumstances of this case the proper sentence on a plea of guilty would have been about 10 years. It is however well recognised that when a sentence is increased on a Reference the offender has had to undergo a prolonged period of uncertainty and anxiety and a somewhat lesser sentence is appropriate. We would fix this at 9 years.

Mr Ramsey however submitted that we should not increase the sentence because in the circumstances prevailing in this case it would be unfair so to exercise our discretion. This submission flowed from the fact that though the case was prepared by Mr Ramsey on the basis that it would be fought he felt it proper to raise the question of pleading guilty with his client in the light of the judge's indication of how his mind was working in relation to a possible sentence on a plea of guilty. In taking this course Mr Ramsey was acting properly in the best interests of his client and also fully observed his duty as laid down in the Regulations of the Bar and did not pass on the observation of the judge to his client. This matter was considered by this court in R v McNeill (1995, unreported) where this court held that the fact that there had been a discussion between the trial judge and defence counsel in the presence of Crown counsel as to the level of sentence which the judge had in mind was not a reason why this court should not exercise its discretion to increase the sentence imposed if it considered that the sentence was unduly lenient.

Accordingly we quash the sentence of 5 years' imprisonment on Count 1 and substitute a sentence of 9 years' imprisonment to run concurrently with the lesser sentences on the other counts.

In conclusion we emphasise what this court stated in Attorney-General's Reference (No. 1 of 1989) [1989] 10 NIJB 84 at 94:

"The threat of sexual abuse to children in modern society has become so grave and the duty resting on the courts to deter those who may be tempted to harm little children sexually has become so important that severe sentences must be passed on those who commit rape against little children even if before the offence they had had good records and good reputations."

The sentence which we have imposed on this offender for this very grave and wicked offence is intended to be a warning that the courts in this jurisdiction, in so far as they can, are determined to stop sexual attacks on children by imposing severe sentences which are intended to deter potential offenders. Those who are tempted to sexually attack children must realise that if they do so, they will be very seriously punished on conviction.