IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ATTORNEY GENERAL'S REFERENCE (NO.5 OF 1996)

(R v D)

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MacDERMOTT LJ

CAMPBELL J

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 McCollum LJ upon the offender D at Belfast Crown Court on 11 October 1996.

The offender had been tried on an indictment containing 7 Counts:

Count 1 Indecent assault on J between 25 February 1974 and 23 January 1982.

Count 2 Indecent assault on J during the same period.

Count 3 Indecent conduct towards J (a child) between 25 February 1974 and 25 February 1979 (contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968.

Count 4 A further charge of indecent conduct towards the same child during the same period.

Count 5 Rape of J during the period 25 February 1974 to 23 January 1982.

Count 6 A further charge of rape during the same period.

Count 7 Rape of J on 24 April 1979.

The jury found the offender guilty on Counts 1 to 6 and on Count 7 returned a verdict of indecent conduct with a child. The learned trial judge imposed a

concurrent sentence of 5 years' imprisonment on each of the rape Counts and lesser concurrent sentences in respect of the other offences.

The various Counts were specimen Counts covering a period of some 8 years. The victim J (born on 25 February 1965) is the daughter of the offender who was born on 27 November 1936 and so now is a man of 60. As is clear from the dates of the offences they occurred many years ago (15 to 23 years ago) when the victim was aged between 9 and 16 years and living in the family home with the offender, his wife and their 3 sons.

At the trial the offender denied that he had ever interfered with the victim. The jury rejected his evidence accepting that of the victim which is summarised at paragraph 9 of the Attorney-General's reference in this way:

"(a) When the victim was about 9 years old the offender committed sexual offences upon her in the family home. On occasions people were in the house when these offences occurred. These offences also occurred in the offender's car.

(b) On one occasion after the offender had been drinking he went to the victim's bedroom, put his hand below the covers and felt around the area of the victim's vagina before inserting a finger inside her vagina thereby causing pain to the victim.

(c) The offender would feel and kiss the victim's breasts.

(d) The offender masturbated in the victim's bedroom.

(e) The offender had full sexual intercourse with the victim from the time she was aged 9 years. This full sexual intercourse occurred in the kitchen, hall, living room and bedroom. It also occurred when the victim's brothers were downstairs in the family home.

(f) The offender forced the victim to masturbate him and he would penetrate the victim.

(g) The offender forced the victim to have oral sex with him.

(h) When the victim was about 11 years of age she remembered learning that she could become pregnant as she had started periods.

(i) When the victim asked the offender about this he said it was `okay, that he had had the snip'.

(j) The offender had sexual intercourse with the victim 2 or 3 times per week between the ages of 9 years and 16 years and he would always ejaculate inside the victim.

(k) When the victim was 14 years old the offender kept the victim away from school. He committed sexual offences upon the victim in a bed and in the bath.

(l) ...

(m) If the victim refused the offender's sexual assaults he would beat the victim. On one occasion the victim thought she was going to die because he was choking her as she had refused to have sex with the offender.

(n) The offender would drive the victim to a country lane where he felt her vagina.

(o) On the night of the death of the victim's maternal grandmother the offender committed a sexual act upon the victim.

(p) The offender told the victim that if she was ever raped she was to pretend to enjoy it, nothing worse would happen and it could save her life.

(q) The victim has experienced difficulty in coming to terms with the sexual abuse by the offender. The offender's conduct has made it very difficult for the victim to lead an absolutely normal life.

(r) The victim, now aged 31 years and married, is concerned that similar abuse could happen to her daughters.

(s) On Tuesday, 26 January 1982, 3 days after the victim's wedding, the offender admitted in the presence of his wife and the victim's husband that he had slept with the victim."

On behalf of the Attorney-General Mr Coghlin QC (who appeared with Mr Lynch) submitted that there were several aggravating features in the case which supported his primary submission that a sentence of 5 years' imprisonment was unduly lenient:

"(a) The victim's age when the offences commenced.

(b) The offences took place regularly and frequently over a period of some 7 years.

(c) The offender is the victim's father. He was in a position of responsibility and trust towards the victim.

(d) In addition to the offences of rape, the victim was subjected to sexual assaults and other indignities.

(e) The offender on occasion used violence on the victim.

(f) The offences have had a damaging effect on the victim's emotional well-being."

When passing sentence the learned trial judge said "I would rank it among the more serious cases of incestuous rape". We fully agree. As the learned trial judge recognised a lengthy custodial sentence was required. We would take as our starting point in our consideration of this reference the observation of Hutton LCJ in Attorney-General's Reference (No. 1 of 1989) [1989] NI 245 at 251:

"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."

We turn next to a brief consideration of the familiar guideline decisions in this field. R v McDonald and Others [1989] NI 37 establishes that the correct starting point when deciding upon the proper sentence in a contested rape case is one of 7 years. And it will be remembered that this court saw fit by that decision to raise the current starting point term of 5 years favoured by the Court of Appeal in England in R v Billam and Others [1986] 8 CAR(S) 48.

Unfortunately cases of rape within the family setting (often described as incest) have been coming before the courts in increasing numbers and often in relation to offences committed many years ago as in this case. There is therefore a wealth of judicial decisions to guide the sentencer in this difficult field. Thus in R v Charters [1989] NI 262 this court affirmed a sentence of 9 years' imprisonment imposed on a man of 45 charged with incest with his daughter on his plea of guilty. The court took the opportunity to consider the English guideline cases on this topic and especially Attorney-General's Reference (No.1 of 1989) [1989] 1 WLR 1117. At page 264 of Charters Hutton LCJ said:

"We respectfully consider that this judgment is a most valuable contribution to the law on the appropriate levels of sentence for this crime, and we wish to adopt it as containing guidelines which should also be applied in future by Crown Courts in Northern Ireland when sentencing and by this court when hearing appeals against sentence."

There have been several relevant decisions in England in the last few years which we have considered. R v R [1992] 14 CAR(S) 328; R v C [1992] 14 CAR(S) 562; R v

D[1993] 14 CAR(S) 1993; Attorney-General's Reference (No.3 of 1992) 15 CAR(S) 149. We however remind ourselves of the need to approach other cases with caution and readily repeat the words of Carswell LJ (as he then was) in R v Williamson (unreported, October 1995):

"Previous decisions, and particularly those in which the courts have attempted to provide guidelines for sentencers, give an indication of the range of sentences which may ordinarily be expected to follow from conviction of a class of offences, and constitute a reminder of the factors to which a sentencing court should have regard in approaching the case before it. They do not provide a tariff to be applied in a mechanistic manner like logarithm tables. They are rather an avenue along which the sentencer may proceed in his consideration of the case with which he is dealing. He then has to reach a conclusion appropriate in all the circumstances of the case, and it need hardly be said that these will vary infinitely."

There is no doubt that the learned trial judge enjoyed all the benefits which follow from hearing a case fought out before him and he clearly gave much thought to the question of what was the appropriate sentence. Indeed when he re-convened to vary the sentences on Counts 1 and 2 in order to accord with the statutory provisions he made a point of re-stating his reasons for imposing a sentence, 5 years, which he recognised might be considered low. These were:

1. The offender appeared to be sincerely repentant when the offences came to light in 1982 and since then represented no danger to any member of the family.

2. Since 1982 the offender has led a life free from any crime.

3. The offences happened a long time ago and have now come back to haunt the offender.

4. At his age, 60, prison will be a much harder experience than for a younger man especially when he will be seen as a sex offender. This point was put this way by Lord Lane in Attorney-General's Reference (No.1 of 1989) [1989] 1 WLR 1117 at 1120:

"More often than not the offender, as here, is a man who has never been in trouble with the law before. He will usually be in his 50s or 60s; this offender is 55. In prison he is likely to be, as this man is, on rule 43, segregated from his fellow-prisoners. On release from prison he will in all likelihood be without family and friends. We are told that divorce proceedings have been put in train by the wife in this case. Conversely, where the family has not been broken up, the victim of the incest may, albeit irrationally, blame herself for the fact that the father/breadwinner is in prison and the longer the term the worse that feeling will become."

Understandably, Mr Cinnamond QC, who appeared with Mr Hill for the offender, emphasised these points. He underlined the undoubted experience and

understanding of the learned trial judge and strenuously argued that this is one of those cases where this court should not exercise its discretion by increasing a sentence which might appear lenient if the guideline cases were applied in an insensitive manner. The guideline cases are, of course, not set in stone and in sentencing (which as has often been said is an art rather than a science) the sentencer must have regard to the special circumstances of the instant case. Nevertheless in order to achieve a necessary uniformity of approach to cases of a similar nature the principles of established guideline cases are of the utmost value and should provide the starting point in the determination of an appropriate sentence.

In response Mr Coghlin for the Attorney-General pointed out:

1. The learned trial judge's starting point of 7 years was too low a threshold. He had said "I would have thought had you been convicted more close to the date it would be a clear case deserving a total of something like 7 years' imprisonment".

7 years is the correct starting point in a contested rape case but as there were numerous grave aggravating features a proper starting point before considering any mitigating factors had to be in excess of 10 years. We agree. In our judgment the offender's persistent abuse of his daughter over many years justified a starting point of at least 12 years after having regard to the aggravating factors.

2. The fact that offences occurred in the fairly distant past is a factor to which a sentencer should have regard but it must not be forgotten that the offences did occur and the victim, as in this type of case, must have suffered greatly.

As Taylor LJ (as he then was) said in R v Tiso [1990] 12 CAR(S) 122:

"Offences involving sexual abuse within the family are by their very nature likely to remain undetected for substantial periods partly because of fear, partly because of family solidarity and partly because of embarrassment. We consider that whilst any factors which have positively emerged in the time between the offences and the trial are open to the court to be taken into consideration, the mere passage of time cannot attract a great deal of discount by way of sentence ..."

and in the same year Lord Lane said in R v Murphy [1990] 12 CAR(S) 530:

"Perhaps the most important matter is the 16 years delay between these offences and the occasion when he stood his trial. One of the most difficult tasks of a sentencing judge is to know what allowance or discount it is proper to make when the offence took as long ago as in the present case. 16 years, in the experience of the members of this Court, is the largest period we have experienced."

Considering those cases in R v McMillan (unreported 1994) Kelly LJ said:

"In the instance case, the relevant period was 15 years. We consider that some discount should have been given, particularly by reason of the fact that during that period, the appellant has not been convicted of any custodial offence and appears to be leading a normal social and sexual life. That discount must be small having regard to the serious nature of the offences and the distressing consequences that have followed."

3. The offender's repentance must be considered in the context of the offender having contested the case. He is entitled so to do but a consequence of so doing is to expose the victim to the trauma of the trial and the revival of sad memories. In this connection Mr Coghlin asks us to remember the victim. We do not however appear to have the benefit of a victim impact report which is unfortunate. There is no evidence of the effect of the offender's conduct on his daughter - then a child now a woman of 31 - but this is one of those cases where a court is entitled to apply its commonsense and experience and while not inferring any specific and serious psychological damage conclude that it is wholly obvious that the child will have been to some extent damaged. Her childhood could have been impaired or destroyed.

4. The learned trial judge attached undue weight to the age of the offender. As Roskill LJ (as he then was) said in R v Wilkinson (November 1974) "No court willingly sentences a man of 60 to spend a large part of the remainder of his life in prison". Nevertheless as was pointed out in that case a substantial custodial sentence was the only "proper way of dealing with the case". The same issue arose in R v C [1992] 14 CAR(S) 562 where the offender was 79 and a sentence of 8 years was affirmed.

We are satisfied that the sentences of 5 years for rape in the context of this case were unduly lenient and we consider that it is a case in which we should increase the sentence. Bearing in mind all the points so clearly presented to us by Mr Cinnamond and Mr Coghlin and also the fact that there is the element of double jeopardy in these reference cases we have concluded that the minimum sentence which we can properly impose is one of 8 years' imprisonment on Counts 5 and 6. As before all sentences will be served concurrently.