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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

D O

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] This is an appeal against sentences imposed on 16 June 2005 by His Honour Judge Burgess, the Recorder of Belfast, on the appellant at Belfast Crown Court. He had pleaded guilty to forty-seven counts of sexual abuse involving four young girls, one of them his daughter, the other three nieces. He appeals with the leave of the single judge.

[2] In respect of the first victim, his daughter (whom we shall refer to as C), the appellant pleaded guilty to one charge of attempted rape; to two offences of attempted buggery; to two charges of inciting a child to commit an act of gross indecency; and to twenty-two charges of indecent assault. In respect of the second victim (whom we shall call N) the appellant pleaded guilty to fourteen charges of indecent assault and three charges of gross indecency and in respect of the other two victims (whom we will call Ch and A) he pleaded guilty to one charge of indecent assault in respect of each. The offences against C occurred over the period from 1997 until 2003

when she was between the ages of 9 and 14. The offences against N also took place between 1997 and 2003 when she was a similar age to C. Both offences against Ch and A happened in July 2003 when Ch was 12 years old and A was 14.

[3] The appellant was sentenced to a period of imprisonment of six years in respect of each of the counts of attempted rape and attempted buggery of C. These sentences were ordered to run concurrently. He was sentenced to concurrent terms of imprisonment of five years in respect of the two offences of inciting a child to commit an act of gross indecency. (The maximum penalty for this type of offence was increased from two years to ten years' imprisonment by the Criminal Justice (Northern Ireland) Order 2003 with effect from 28 July 2003. Since the offences were committed before that date, the relevant maximum penalty was two years' imprisonment and the sentences imposed cannot therefore be allowed to stand.) The appellant was sentenced to a concurrent six year term on one of the offences of indecent assault and to terms of eight years' imprisonment in respect of the remaining indecent assault charges involving C. These sentences were ordered to be concurrent with each other but consecutive to the six years imposed in respect of the attempted rape.

[4] In respect of the offences on N the appellant was sentenced to two terms of three years' imprisonment in respect of two charges of indecent assault. These were ordered to be consecutive on each other and on the sentence for the attempted rape. In relation to the remaining charges of indecent assault and gross indecency on N the sentences were three years concurrent. (The same situation applies to the gross indecency charges in relation to N as obtains with the charges against C. The maximum penalty at the material time was two years' imprisonment and the sentences of two years cannot be upheld.)

[5] The Recorder imposed sentences of two years' imprisonment concurrent for the offences of indecent assault against Ch and A. The total effective sentence imposed, therefore, was one of twenty years' imprisonment. An order under article 26 of the Criminal Justice (Northern Ireland) 1996 was imposed. This operates so that the appellant, instead of being granted remission of his sentence, will be released on licence and must comply with such conditions determined by the Secretary of State as may be specified in the licence.

Background to the offences

[6] Over the course of three lengthy interviews C revealed a catalogue of abuse at the hands of her father. She told a social worker that whenever she was in the house alone with her father he tried to touch her. She told police that she had been abused between three and six times a week. There is a veritable legion of incidents in which the appellant subjected his daughter to gross indignities and sexual assaults. What follows is but a sample of these: -

- C first remembered her father touching her inappropriately was when she was aged 7 or 8. This progressed to him asking her to touch his penis and then trying to get her to put his penis in her mouth. This began when she was aged about 10 years. She said that the appellant would masturbate while touching her. On other occasions she would be made to sit on top of the appellant and rub up and down on his penis.

- One of the earliest assaults occurred when he entered her bedroom while his wife was in hospital. She had been doing her homework and he pushed her papers away and tried to lift her into his bedroom. He put his hands underneath her clothes and touched her breasts. He then tried to undo her brassiere but she managed to push him away and ran to the garden locking the back door behind her.

- On another occasion the appellant took C upstairs, undressed and lay naked, masturbating on the bed. He asked her to remove her clothes and dance around him. C went to the bathroom and locked herself in until her mother returned home.

- Her father forced C to play strip poker which culminated in him forcibly trying to undress her. He also showed her pornographic internet sites.

- On one occasion she was made to masturbate the appellant to ejaculation in the bathroom of her home.

- The appellant made her watch pornography on television. On one occasion she had been made to watch a pornographic DVD with her cousin, the other main injured party, N.

- In another incident she and N were in the appellant's house and he called them into his bedroom. He was naked and masturbating and made the girls dance naked around him. He touched the girls on the breasts, bottom and vagina, got them to masturbate him and tried to bribe them with money so that they would not tell anyone else.

- C was digitally penetrated by the appellant shortly before making her complaint. He told her that this was to prepare her for sexual intercourse. He had also done this when she was aged 10 or 11 and it happened 5 or 6 times in all.

- On another occasion her father chased C upstairs into her bedroom, undressed her, undressed himself and attempted to have anal sex with her despite her protests. He held her down on the bed, face down, and lay on top of her while she kicked and struggled. He desisted when he thought that C's brother was back in the house. C then locked him out of the room. When she refused to allow him back in he said "I can't wait till you're a bit older."

- Another attempt at anal sex (possibly in April 2003) took place in the bathroom of her home when the appellant pulled her over the bath and put baby oil on her anus. When she escaped he said "I will get you when you're a bit older."

- On 5 September 2003 the appellant attempted to rape C. He pushed her onto a sofa but she ran upstairs to the bathroom where he pursued her, forced her to the floor and carried out the assault.

[7] The abuse came to light on 23 September 2003 when C's mother read two notes that C had written to herself regarding her father's actions and the impact that they were having upon her. On the same day C handed her mother a letter from the appellant in which he made certain admissions. Shortly after this the appellant then attempted suicide. Some months later C's mother committed suicide by hanging herself on her wedding anniversary. It is clear that C's mother had mental health problems that were not related to the discovery of her husband's abuse of their daughter but it is equally clear that this revelation played some part in her decision to take her own life.

[8] The appellant had secured C's silence over many years by telling her that terrible things would happen if she told anyone about the abuse. He said that her mother would probably die, her brothers would commit suicide and that, if he was sent to jail, when he was released he would make sure that she died painfully. On one occasion he said that he would kill her if she told her mother and on another that her mother would have a mental breakdown if she found out. When, finally, C told her father that she was going to inform her mother of the abuse he told her simply to say that he had touched her and had done nothing else.

[9] N is the appellant's niece by marriage. When she was staying with C the appellant would regularly bring them to the computer and masturbate to ejaculation while talking to women on chat rooms. In the course of this he would touch them inappropriately on the breasts and vagina both over and under their clothes. He would also show them online pornography.

[10] On one occasion, when N was aged around 12, he showed N and C pornographic magazines and made them pose naked like the women in the photographs. They were then made to dance for him while he masturbated and they lay on a bed and he touched them on the bottom, breasts and vagina. N said she was afraid not to comply as the appellant said he would hit her. He told her not to tell anyone or she would be hurt. N also told the police that the appellant would touch her legs as he drove her in his car. At the end of her interview she asked police how she could be protected because the appellant had threatened to kill her.

[11] Ch and A are also the appellant's nieces by marriage. In July 2003 the appellant had asked them to go to his house to watch a DVD. They were aged 11 and 14 at the time. While watching the film the appellant produced playing cards with pictures of women and asked the girls to mimic the images shown on the cards. They refused. Later that evening they went to the bathroom and while they were there the appellant asked them into the bedroom. He made them sit on the bed and asked them to pull up the top part of their clothing. They complied because they felt that he would not let them out otherwise. The appellant started to masturbate and made the girls lie on the bed with the top part of their clothes pulled up. He told them that if they told anyone he would kill them. He offered them £5 but they refused the money.

The impact on the victims

[12] C was examined by a chartered psychologist in May 2005 and was found to be suffering from severe clinical depression. She had suicidal thoughts, suffered from bouts of tearfulness, self dislike, lethargy, irritability and loss of appetite. She also met the criteria for post traumatic stress disorder characterised by hyper arousal, avoidance and re-experiencing. She lacks trust in males and has self harming tendencies. C was receiving counselling but it was considered that it would take at least 18 months for her to begin to overcome the more injurious effects of the abuse and possibly longer to make a full recovery. Ms Kelly, the psychologist, expressed the opinion that C had been deeply traumatised by

her premature and forced introduction to adult sexuality and that this has had and would continue to have many injurious effects on her life. Apart from the direct effects of the sexual abuse she continued to grieve at the loss of her mother with whom she had a close, sisterly relationship.

[13] N was also found to be suffering from severe clinical depression and post traumatic stress disorder. She had similar symptoms to those experienced by C. She was considered to be in need of skilled therapy but in light of her reluctance to talk about the abuse, it was unlikely that she would feel able to undertake this. There was a degree of family estrangement as a result of her anger about the abuse that she had suffered. Ch was considered to suffer from moderate depression but not post traumatic stress disorder. Her symptoms were not severe and were unlikely to be long-lasting. There was no report on A's condition.

The appellant's admissions

[14] In police interview the appellant immediately admitted that he had touched his daughter and had performed oral sex on her. He recalled undressing her, touching her and "rolling about" with her on his bed. He asserted that C was a willing participant in these activities. He denied attempted rape, attempted buggery or digital penetration. The appellant thought that sexual contact had occurred 10-15 times.

[15] The appellant admitted that N and C danced naked for him while he masturbated but denied touching them inappropriately. He said that he did not show the girls the pornographic magazines but that they had found them but eventually admitted that he asked them to undress. He denied N's other assertions of sexual impropriety. He admitted the offences concerning Ch and A and, contrary to their account, said that it had happened on more than one occasion. He said that the girls were willing participants.

[16] The appellant told a probation officer, Eileen Richardson that he knew his behaviour was wrong but that he felt he had no control over his actions. He told her that the acts gave him sexual satisfaction without humiliation or ridicule. While noting that the appellant claimed to have regretted his behaviour, Ms Richardson expressed the opinion that he

tended to avoid fully confronting the harm that he had caused. He viewed himself as a victim of circumstances. He believed that unfortunate personal and domestic circumstances (which we shall touch on below) contributed to his sexual abuse of children.

[17] The appellant was examined by Dr Ian Bownes, a consultant psychiatrist. In his account to Dr Bownes he took issue with some of the factual assertions of the injured parties e.g. who had undressed whom. He accepted that he was aware that what he was doing was wrong and claimed to have apologised to his daughter on one occasion. The appellant expressed feelings of regret and remorse and said that he was committed to avoiding similar future offending but Dr Bownes reported that the appellant's answers were patently guarded and self-serving at times. He displayed limited recognition of his own shortcomings and other people's perspectives. He repeatedly displayed a tendency to avoid fully confronting the exploitative and damaging nature of his behaviour by presenting himself as the victim of circumstances outside his control. There was limited evidence of the appellant having reflected in a meaningful fashion on the impact of his offending and at times he implied that the injured parties had condoned his activities. He had a limited grasp of the commitment required to engage with professional intervention.

[18] Dr Bownes' conclusions were expressed as follows: -

> "In the absence of severe personality and attitudinal problems or mental impairment, individuals who repeatedly engage in sexual offences typically develop a style of thinking that facilitates their behaviour and minimises its damaging effects. Mr O displayed a range of ideas at the …interview including on the theme that the injured parties had condoned his activities in some way and that his behaviour could be attributed to the erective (*sic*) difficulties he had experienced that clearly represented a significant investment in rationalising his actions in his own mind and that could conceivably facilitate further offences."

The appellant's personal circumstances

[18] The appellant claimed to Ms Richardson that he had been the victim of sexual abuse by his father. He had suffered for many years from erectile dysfunction and his wife's severe depression put a strain on the marriage which ended in divorce. A report from Professor Dinsmore confirmed that in 2002 the appellant attended his clinic with long term erectile problems. On one visit the appellant's wife also attended and was observed to be angry and aggressive. The appellant told the professor that his wife called him insulting names that reflected on his sexual capacity. Professor Dinsmore considered that he would not be able to force penetrative sex.

[19] The appellant has no relevant criminal record.

Sentencing guidelines in sexual abuse cases

[20] In *Attorney General's reference (No 2 of 2004)* NICA 15 this court had occasion to review recent sentences for sexual offences. We decided that sentencers in this jurisdiction should now apply the guidelines proposed by the Sentencing Advisory Panel in England and Wales. In that case the court was dealing with offences of rape and counsel for the appellant in the present case suggested that a clear distinction should be drawn between that case and the present where the act of rape had not actually taken place but it is clear that rape did not occur in the present case because the appellant was incapable of forced penetrative sex, rather than by reason of any lack of inclination on his part. Moreover, the squalid violation of his daughter while he attempted to commit rape and buggery on her and the effect that his actions have had upon her make this case in many respects as serious as if rape had in fact occurred.

[21] The Sentencing Advisory Panel suggested that the seriousness of the offence should be assessed by adopting the following approach: -

> "The panel suggests that there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the *degree of harm to the victim*; the second is *the level of culpability of the offender*; and the third is *the level of risk posed by the offender to society*. … three more general features … might be considered relevant: the gender of the victim, the relationship (if any) between the victim and the offender, and the nature of the rape itself (whether vaginal or anal)."

[22] On all of the criteria or factors outlined in this passage the appellant scores at a high level. Substantial, potentially long-lasting harm has been done to at least some of his victims. His behaviour has been at least partly responsible for his estranged wife's suicide so that his daughter, in trying to come to terms with the impact that his offending has had on her, must do so without the support and society of her mother with whom she had enjoyed a close and loving relationship. On the issue of culpability his rating must also be regarded as considerable. He was in a position of trust in relation to all of the complainants. He took advantage of their youth and their vulnerability. He accompanied his predatory crimes with threats as to what would befall them if they revealed his abuse of them. He preyed on his own daughter persistently. Her fear and apprehension were compounded by his statements as to how his sexual exploitation of her would continue and progress in the future. Finally, the failure of the appellant to confront his crimes with the necessary insight into the harm that he has caused and his reference to some of his victims having been compliant give rise to serious risk that he would re-offend.

[23] The panel proposed a starting point of 8 years, after a contested trial, for a case with any of a number of enumerated features. These included the situation where the offender is in a position of responsibility towards the victim and the rape of a child. Factors reflecting a high level of risk to society, in particular evidence of repeat offending, should attract a substantially longer sentence and the panel endorsed the 15 year starting point in *Billam* (1986) 8 Cr App R (S) 48 for a campaign of rape, and proposed that it should apply to cases where the offender had repeatedly raped the same victim over a course of time, as well as to those involving multiple victims. In the present case not only has the appellant engaged in a campaign of abuse against but he was in a position of responsibility towards all his victims. There was also an element of grooming of some of his victims and the threat of violence if they did not submit to his demands.

Consecutive sentences/totality principle

[24] Mr Dermot Fee QC, who appeared for the offender, did not dispute that it was open to the trial judge to impose consecutive sentences in respect of those offences where that disposal was made. He based his submission that the sentences imposed were excessive on the single ground that the total penalty was too great, taking into account sentences for similar offences by this court in the past. He claimed that in no case that

bore any similarity to the present was a sentence of such proportions passed.

[25] Mr Fee was entirely right not to challenge the passing of consecutive sentences. It is clear that these were related to separate episodes of offending and there are several recent examples where this court has approved this form of disposal in cases involving distinct instances of offences.

[26] It is well settled that where consecutive sentences are imposed the court should consider whether the total sentence passed is commensurate with the gravity of the case as a whole. Clearly, the trial judge purported to do this for he acknowledged that he must address the issue of totality and arrive at a sentence to reflect the "global nature of the offending that took place…". He indicated that the global sentence ought to be 20 years.

[27] Mr Fee suggested that the total sentence must be regarded as excessive not only because it was so clearly out of line with sentences in similar cases but also because the trial judge purported to give the appellant full credit for his plea of guilty. If this was indeed the basis on which the sentence was passed the punishment that would have had to be imposed if the appellant had contested the case would be in the range of thirty years and this was plainly inconsistent with penalties imposed for this type of offence both here and in England and Wales.

Disposal

[28] An examination of recent sentences considered by the Court of Appeal for offences of this type (see, for example, *AG's Reference (Campbell)* (June 2005 unreported); *AG's Reference (No 9 of 2003) (Thompson)* (31/10/03); *AG's Reference (No 12 of 2003) (Sloan)* (26/9/03) and *Attorney General's reference (No 2 of 2004)* NICA 15 among others) discloses that the sentence imposed in the present case is greater than that passed in similar cases in the past. Two observations must be made that qualify that statement, however. First, no two cases are precisely similar and one must guard against assuming that sentences chosen for earlier cases provide the infallible guide for the correct sentence in the present appeal. Secondly, we must keep closely in mind what this court said in *Attorney General's Reference (No. 1 of 1989)* (1989 NI 245, JSB 2.21): -

> "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."

[29] Despite the imposition of severe sentences for sexual abuse of young children to whom the offenders owed a duty of care and trust, this type of offence remains disturbingly prevalent. The courts must react to this enduring and unacceptable phenomenon by the imposition of condign punishment, even where the offender pleads guilty. On that issue, we recall what we have had occasion to say recently in *AG's reference (No 1 of 2006) (Mc Donald and Maternaghan)*: -

> "To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset."

[30] The appellant, although he pleaded guilty to all the offences for which he was sentenced, did not do so at the earliest opportunity and it is relevant that he disputed some of the accounts of his victims when he was interviewed by police. We do not consider, therefore, that he qualified for the full discount that might have been appropriate if he had made a clean breast of his guilt from the outset. Nevertheless, he was plainly entitled to a reduction in the sentence that would have been passed had he contested these charges and we have concluded that this reduction ought to have brought the sentence below that which the trial judge chose. A sentence of twenty years would not have been out of keeping with conviction after a contest but we consider that it strays beyond what can be justified on a plea of guilty.

[31] We have given consideration to the question whether a custody/probation order under article 24 of the 1996 Order would be

suitable and in this regard have taken into account what has been said by both the probation officer and Dr Bownes but we have concluded that the appellant will remain a risk to young women with whom he may come in contact and are therefore of the view that the trial judge was right in his decision to make an article 26 order in this case. We consider, however, that the appropriate global sentence making due allowance for the plea of guilty and reflecting the totality principle was one of seventeen years and this is the entire effective sentence that we will impose.

[32] That result can be most conveniently achieved by reducing the concurrent sentences passed on counts 9 to 30 from eight years' imprisonment to five years. These sentences will remain, as before, consecutive to the sentences imposed on counts 2, 4 and 5 (attempted rape and attempted buggery). The concurrent sentences of five years' imprisonment imposed in respect of counts 6 and 7 and 33 to 47 cannot stand for the reasons given at paragraphs [3] and [4] above. They will be reduced to eighteen months' imprisonment concurrent on each of those counts but this technical adjustment will make no difference to the effective sentence that the appellant will be required to serve.