IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ROBERT MAGILL

HUTTON LCJ

This is an appeal against sentences imposed by His Honour Judge Watt QC at Newtownards Crown Court on 7 December 1988. On that date the appellant pleaded guilty to 3 counts of unlawful carnal knowledge of a girl under the age of 17 years contrary to section 5 of the Criminal Law Amendment Act 1885 under which the maximum sentence is 2 years' imprisonment.

It was accepted by the Crown that the 3 offences took place within a period of 2 or 3 weeks in September and October 1987. At that time the girl was aged about 14 years and 7 months, her fourteenth birthday having been on 26 February 1987. The appellant was a widower aged 46, his wife having died about 8 years previously and he had a completely clear record. The appellant's wife had been a cousin of the girl's mother.

The learned Judge sentenced the appellant to 21 months' imprisonment on each count and made the sentences consecutive, thus imposing a total sentence of 5 years and 3 months' imprisonment.

In imposing sentence the judge said:

"There was not the shadow of a doubt that this was a case of an older man taking unfair advantage of a very young, immature and adolescent girl. As well as that you debased your position in relation to the girl because you were so far as she was concerned something of a father figure. You say so yourself.

Moreover this was not a case of someone who was overcome with the passion of the moment. You made a conscious decision to seduce this girl. You say so yourself and you made that decision knowing her age and her immaturity …

Having made the decision you planned it. The offences were carried out on 3 quite separate and distinct occasions. In my view you corrupted this child and I used the word child advisedly. You certainly have done her great harm never mind physically but certainly mentally, and it may be on the evidence that I have heard this morning from Dr Cashel that that harm will be irreparable. Who knows? No one can tell, but that is a distinct possibility.

I think that this is one of the worst cases of unlawful carnal knowledge that I have seen and heard and I have to say that I have seen and heard a good many. The maximum sentence of imprisonment is 2 years for an offence of this kind and of course it is well recognised that that is totally inadequate to deal with all cases of unlawful carnal knowledge.

I understand that the law now is about to be changed but of course I must deal with the law as it is, and I propose to do that.

I take account of your plea of guilty and your record and all the matters that have been set out on your behalf and to which my attention has been drawn. I take those into account and were it not for those matters I would propose a heavier sentence than the one I intend to impose in your case.

But, as I say it is one of the most serious cases of unlawful carnal knowledge that I have seen. It was a deliberate and calculated piece of conduct on your part.

Accordingly in relation to each count I will propose a sentence of 21 months' imprisonment, the reduction being because of what I have just said in your favour. The sentence in relation to each count of unlawful carnal knowledge will run consecutively which means that you will serve a total of 63 months of imprisonment, that is 5 years and 3 months".

The principal ground of appeal was that the learned judge was wrong in principle in imposing consecutive sentences in this case and should have imposed concurrent sentences, and it was further submitted that, in effect, the judge passed consecutive sentences as a means of enabling him to impose a heavier sentence than the maximum sentence of 2 years laid down by Parliament.

The appellant committed 3 separate acts of unlawful carnal knowledge of the girl on 3 different days over a period of some weeks, but the authorities establish that where an accused repeats the same criminal conduct towards the same victim within a relatively short space of time, the proper principle to follow in sentencing is to pass concurrent sentences and not consecutive sentences. R v Lewis, 3 July, 1972, in Current Sentencing Practice A5.2(b) is noted as follows:

"The appellant pleaded guilty to 5 counts of indecency with a child, 3 counts of buggery and one count of attempting to procure an act of gross indecency. He

was sentenced to 1 year's imprisonment on each count of indecent assault, all concurrent, 3 years consecutive for buggery, and 6 months consecutive for the attempt to procure gross indecency. All the offences except the attempt to procure were committed on the same boy over a period of several months. The boy had previous sexual experience with other men.

Orr LJ: We think that it was proper in this case to make the terms of imprisonment for buggery and indecency with the same boy, those being all acts under the same association and within the same period, concurrent and not consecutive.

(Sentence for buggery reduced to 2 years and ordered to run concurrently with the sentences for indecent assault; sentence for attempting to procure to remain consecutive)".

R v Paddon 3 March, 1971 is also noted in Current Sentencing Practice at A5.2(b) as follows:

"The appellant was convicted of 3 offences of obtaining property by deception, and 2 of obtaining a pecuniary advantage by deception. He was sentenced to 15 months' imprisonment on each count of obtaining property, with concurrent terms for obtaining pecuniary advantage. A suspended sentence for unrelated offences was activated consecutively. All the offences were committed against the same person within a short period of time, the victim being induced to lend the appellant 3 sums of money on the basis of false representations relating to the purchase and sale of cars.

Lord Parker CJ: The only matter which has troubled this court is that in all the circumstances these offences having taken place over a matter of 3 or 4 days it would be appropriate to impose concurrent rather than consecutive sentences … the proper course would have been to give whatever the total sentence was on each count making them concurrent.

(Sentence varied by substituting concurrent sentences of 3 years on each of the counts for obtaining by deception; suspended sentence to remain consecutive)".

Thomas on Principles of Sentencing (2nd edition) states at p.54:

"The concept of 'single transaction' may be held to cover a sequence of offences involving a repetition of the same behaviour towards the same victim, such as a series of sexual offences with the same partner, a number of frauds on the same victim or several perjured statements made in the course of the same trial, provided the offences are committed within a relatively short space of time".

There are exceptional circumstances where a court can depart from the rule that concurrent sentences should be imposed where the offences can be regarded as one transaction. Archbold paragraph 5/173 states:

"The Court of Appeal has recognised that a court may depart from the principle requiring concurrent sentences for offences which form part of one transaction if there are exceptional circumstances. In Wheatley [1983] 5 Cr.App.R.(S) 417, CSP A5.2(j) the appellant pleaded guilty to driving while disqualified, driving with an excess alcohol level and driving without insurance. He was sentenced to 12 months' imprisonment for driving while disqualified, with 6 months' consecutive for driving with an excess alcohol level. McCowan J observed that the appellant 'poses 2 separate problems. He persistently drives while disqualified and persistently drives when he has had too much to drink. In these circumstances the practice of the court operated in many cases of passing 2 concurrent sentences for 2 offences arising out of the same facts, cannot apply. Otherwise this man would have a licence to drive with excess alcohol without any added penalty'. In Dillon [1983] 5 Cr.App.R.(S) 439, CSP A5.2(j), Farquharson J commented that in Wheatley 'this court, while recognising there may be a general rule in ordinary circumstances where offences arising out of the same incident should not be the subject of consecutive sentences, held that it is not a universal rule and when the circumstances demand it, consecutive sentences should be imposed'".

Another case where there were exceptional circumstances and where the Court of Appeal held that it was proper to pass consecutive sentences was R v Cowburn [1959] C.L.R. 590 where the report reads:

"C. pleaded guilty at quarter sessions to assault with intent to ravish and to possessing an offensive weapon. He was sentenced to 2 years' imprisonment (ie, the maximum) for each offence, the sentences to run concurrently. The offence took place when C. stopped a hospital nurse on a towpath, threatened her with a knife and made clear his intention to ravish her. At the time of the operation C. had just completed 4 years' imprisonment for rape. On appeal to the Court of Criminal Appeal, counsel for C. asked the court to give its blessing to the performance of an operation on C. in prison, which might have the effect of curing C. and which C. was prepared to undergo.

Held, that C. was apparently a psychopath with uncontrollable sexual impulses. In the ordinary way 2 consecutive sentences should not be passed for what was in effect one act and one offence, but here an exception ought to be made to that rule. It was essential in the appellant's own interest and for the protection of the public that C. should be given a sentence for each of the offences to run consecutively. The court refused to give its blessing to an operation on C. What took place in prison was not its concern. The appeal would be dismissed and the sentences must stand".

In this case the circumstance which caused the judge to pass consecutive sentences was his view, which he stated in clear terms, that the maximum sentence of 2 years laid down by Parliament was totally inadequate for the type of case with which he was dealing where a middle-aged man who was something of a "father figure" to a girl aged just over 14 took unfair advantage of her and had sexual intercourse with her and further, as he admitted in his statement to the police, on one occasion before sexual intercourse took place had committed acts of sexual perversion with her. But the view of the judge (with which this court agrees) that the maximum sentence of 2 years is inadequate for a case of this nature does not constitute exceptional circumstances which justified the judge in departing from the principle that where the same offences were committed against the same victim within a relatively short space of time concurrent sentences should be imposed. Therefore this court is of opinion that the learned judge was wrong in principle in imposing consecutive sentences.

This was a very bad case of unlawful carnal knowledge, but some reduction in the sentence should be given to take account of the appellant's plea of guilty. Therefore we consider that the appropriate sentence to pass in respect of each count was 21 months, being 3 months less than the maximum sentence and we vary the order made by the learned judge and direct that the sentences of 21 months be concurrent and not consecutive.

As we have stated, we agree with the learned judge that a maximum sentence of 2 years' imprisonment for a very bad case of this nature is inadequate. In many cases of unlawful carnal knowledge a sentence based on a maximum sentence of 2 years may be enough, but we consider that in a very bad case, such as this case was, the maximum sentence should be higher than 2 years and that the law should be changed to provide a maximum sentence in excess of 2 years.