IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

W

CARSWELL LJ

In this application the applicant seeks leave to appeal against sentences passed upon him by His Honour Judge Hart QC at Ballymena Crown Court on 11 April 1995. The applicant pleaded guilty to a number of charges on 2 indictments involving sexual offences against his daughters, and was sentenced to an effective total of 10 years' imprisonment.

The charges against the applicant and the sentences on each were as follows:

Bill No 16/95

Counts 1, 3 and 5: indecent assault on T -- 5 years' on each count;

Counts 2, 4 and 8: rape of T -- 10 years' on each count;

Counts 6 and 7: committing acts of gross indecency with T -- 21 months' on each count.

Bill No 44/95

Counts 1, 3 and 5: indecent assault on C -- 5 years' on each count;

Counts 2, 4, 6 and 7: rape of C -- 10 years' on each count.

All sentences were concurrent.

The applicant pleaded not guilty when arraigned on the first bill on 9 January 1995, but changed his plea to guilty when re-arraigned on 23 January 1995 and was put

back for sentence. When arraigned on the second bill on 21 March 1995, the applicant pleaded guilty and was put back for sentence.

The grounds of appeal put forward by the applicant were as follows:

"1. The sentence of 10 years' imprisonment is manifestly excessive in that no allowance or mitigation is indicated for the accused's plea of guilty.

2. The sentence is wrong in principle in that it is in excess of the guideline sentence considered appropriate as the starting point in a contest.

3. In the guideline case of R v [Charters] the accused had systematically abused the victim. He further subjected her to violence over and above that abuse. He allowed the case to go to court as a contest and only pleaded guilty when it became clear that the victim was determined to give evidence against him.

That case had almost every possible aggravating factor present. It is quite clear that the learned trial judge in this instant case gave insufficient weight to the attitude adopted by the accused W."

The single judge refused leave to appeal, and the application was renewed before this court.

The offences first came to light on 18 July 1994 when T, in some distress, informed a school friend that her father had been having sexual relations with her. When the friend's mother heard what T had to say she took her to the police and the story came out. The applicant at first denied that her complaints were true, but subsequently admitted them. He later went on to admit having committed a series of similar offences against his daughter C. She had originally made a statement denying that her father had committed any offences against her, but in November 1994 she withdrew that statement and described a course of sexual relations and indecent conduct over a long period.

T said that the offences started in the summer of 1991, when she was approaching 12 years'. It developed from tickling her in

intimate places to digital exploration, and full sexual intercourse first took place in January 1992. Further acts of intercourse

took place at intervals and on occasion the applicant asked T to masturbate him. Regular intercourse took place during 1994,

until the time when she made the complaint in July. She said that it was not with her consent, but she did what she was told.

On one occasion in early 1994 the applicant threatened to reveal the fact that she had had intercourse with her boyfriend if she

told anyone about his acts.

The applicant did not accept all of the matters of which T complained, but did admit that he had had intercourse with her about 10 times. Dr Stewart's findings on examination were consistent with her having had regular intercourse over a length of time.

C said that the applicant began indecent conduct towards her before she was aged 10 years, which goes back to the spring of 1988. It started with his tickling her and touching her breasts. On the next occasion, when she was still under 10, he forced himself upon her and had intercourse with her. This hurt her and made her bleed. From then onwards sexual intercourse took place frequently, according to C several times a week. He attempted to have oral sex with her, but she resisted, and on a number of times he had anal intercourse. These acts went on right up to the time when T made her complaint. The applicant regularly threatened that he would hurt or kill C, and on one occasion he broke her arm. C said that she was scared to tell anyone because she was scared of what the applicant would do to her or her mother. The applicant admitted most of C's allegations, except the breaking of her arm, but said that it started when she was 12, not 10 years of age -- which from other facts in C's account may be correct.

Both children were adversely affected by their experience, though, as the judge observed, their symptoms were not as extreme as in some cases with which he has had to deal. They describe feelings of fearfulness and of being dirty and suffering from nightmares. T has strong feelings of anger against her father. The concentration of both girls at school was affected and the quality of their work declined.

The applicant has a clear record. He was remorseful and extremely anxious and distressed when interviewed by a psychiatrist in February 1995. He claimed that his course of conduct dated from the time when he had a vasectomy, following which he had difficulties in intercourse with his wife. He became aroused with his children, and once indecent behaviour started he said that he could not stop himself. The psychiatrist expressed the opinion that the events appear to be largely "the result of underlying inadequacies or weaknesses in his personality."

The judge was referred to the decisions in which this court has laid down some guidelines in cases of sexual offences, R v McDonald [1989] NI 37 and R v Charters [1989] NI 262. The latter is of particular significance, since it involved offences of incest, indecent assault and gross indecency against the applicant's daughter. The court expressed agreement with the approach adopted by Lord Lane CJ, when giving the decision of the Court of Appeal in England in Attorney

General's Reference (No 1 of 1989) [1989] 3 All ER 571. It adopted with approval the aggravating and mitigating factors set out in that decision, to which courts in such cases should have regard:

"Aggravating factors

Other aggravating factors, whatever the age of the girl might be, were inter alia:

1. If there was evidence that the girl had suffered physically or psychologically from the incest.

2. If the incest had continued at frequent intervals over a long period of time.

3. If the girl had been threatened or treated violently by or was terrified of the father.

4. If the incest had been accompanied by perversions abhorrent to the girl, for example, buggery or fellatio.

5. If the girl had become pregnant by reason of the father failing to take contraceptive measures.

6. If the defendant had committed similar offences against more that one girl.

Mitigating features

Possible mitigating features were, inter alia:

1. A plea of guilty. It was seldom that such a plea was not entered, and it should be met by an appropriate discount, depending on the usual considerations, that is, how promptly the defendant confessed and his degree of contrition and so on.

2. If it seemed that there had been a genuine affection on the defendant's part rather than the intention to use the girl simply as an outlet for his sexual inclinations.

3. Where the girl had previous sexual experience.

4. Where the girl had made deliberate attempts at seduction.

5. Where, as very occasionally was the case, a shorter term of imprisonment for the father might be of benefit to the victim and the family."

Counsel for the applicant laid emphasis on the features which distinguished Charters from the present case, in particular the fact that the applicant in Charters waited until the last moment before pleading guilty, hoping that the complainant would be unwilling to go through with giving evidence. The learned judge took note of this and also of the fact that the charges in Charters were of incest and not of rape, although he properly observed that the distinction between the 2 in such cases may not be easy to draw. He took the view, rightly in our opinion, that the commission of the offences against 2 children in the family was a seriously aggravating factor. He said in the course of passing sentence:

"Nevertheless I have to bear in mind that these offences were committed against 2 children. They were both very young when the offences started. They were repeated again and again over a long period of time and various other forms of sexual abuse were engaged in as well."

We pause at this point to observe that in the case before us 5 of the 6 aggravating features enumerated by Lord Lane CJ were present and only one of the mitigating features, the applicant's plea of guilty which spared the daughters from having to give evidence. The learned judge justifiably regarded it as a bad case, and concluded:

"I consider that in all of the circumstances, and taking into account the pleas of guilty but reflecting the repeated nature of the offences and the serious breach of trust involved that the total sentence of 10 years' imprisonment is appropriate."

Mr McDonald QC for the applicant sought to compare this case in detail with Charters as the foundation for an argument that the sentence ought to be lower than that of 9 years' upheld in Charters. It has constantly been said that it is not a profitable exercise to compare sentences in this manner. 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.

We cannot fault the approach of the judge in the present case. He obviously devoted much care and thought to the sentence which he should impose. He was fully aware of the factors to which he should have regard and stated them and summarised the facts fairly and accurately. We do not consider that the sentence was wrong in principle in any respect.

It was urged upon us that the court should start from the figure of 6 years' referred to by Lord Lane CJ as appropriate for cases of incest of the "ordinary" type committed with girls under 13, and that it was manifestly excessive to go up as high as 10 years' when the applicant had entered an early plea of guilty. We should observe first that the guideline figure of 6 years' is only a starting point and that Hutton LCJ in Charters at page 267C stated that the court would have been fully entitled to impose a sentence considerably in excess of 6 years'. When one considers the previous decisions reviewed by Lord Lane CJ in Attorney General's Reference (No 1 of 1989) examples may be found of sentences substantially longer than 6 years'. Secondly, it is important that in imposing sentences in cases of this type the court should, as Hutton LCJ said, endeavour to deter other men from acting in this way and mark its disapproval and that of the community of this sort of behaviour. We would repeat the Wolfenden Committee's summary of the function of the criminal law in the field of sexual offences:

"To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."

We agree with the view of the learned judge that this was a bad case, for all of the reasons which he has expressed. We also bear in mind that although the distinction between rape and incest may be hard to draw in some cases, the applicant forced himself upon Colleen at least and this fell clearly on the rape side of the line. In all the circumstances we are unable to say that the sentence was manifestly excessive and we refuse the application.