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COURT DELIVERS SENTENCING GUIDANCE

Summary of Judgment

The Court of Appeal[1] today upheld an appeal against sentence for serious sexual offences and substituted a sentence of 11 years' imprisonment for one of 14 years. Its judgment provides guidance for sentencing judges where the bulk of the offences were committed when the offender was under 18 years of age.

Dennis Allen ("the appellant") was sentenced on 19 December 2022 to 14 years' imprisonment in relation to 13 counts of serious sexual offending against his stepsiblings, Gordon Allen and Sara Allen (now Potter), both of whom have waived their anonymity. The sexual offending against Gordon lasted for around two years, with the offending against happened when she was aged 6-7 years up to nine years of age. The appellant was convicted after trial before a jury. The offending, apart from one count, was committed when the appellant was under 18 (between the ages of 13 and 15½ approximately). The primary submission on appeal was that the judge erred in his calculation of a starting point of 15-19 years before he reached a 14-year sentence and should have made a greater reduction for the fact that the offending in large part occurred when the appellant was in law a child.

An ancillary point was raised on appeal. It was contended that the judge did not have the sentencing powers to impose custodial sentences on six of the offences. The court said that an application could have made to the sentencing judge to correct this error pursuant to section 49 of the Judicature (Northern Ireland) Act 1978 which allows an application in the rare case where an issue arises such as this to be made within 56 days. The court had no doubt that if such an application had been made the judge would have adjusted his sentencing. As there was an appeal against other validly made sentences in this case, the court said the procedural point was not so acute. There was agreement between the prosecution and the defence that the sentences of imprisonment should be quashed on these counts and the court substituted absolute discharges on each of those counts.

Judge's sentencing remarks

The judge was cognisant of the fact that most of the offending took place when the appellant was a minor and therefore, correctly in the view of the court, chose a count of rape against Sara as the headline offence because it could be definitively ascertained that the appellant was over 18 at the time that he committed this offence. The judge decided that the offending was "clearly a campaign of rape … with aggravating factors that adjust the starting point from 15 years to one of 19 years." Further, he found that "culpability cannot be described as low in this case, but it is impacted to some degree by relative youth when some of the offending occurred. Its progression into adulthood means, however, that his culpability extends towards without quite reaching high."

[1] The panel was Keegan LCJ, O'Hara J and McFarland J. The LCJ delivered the judgment of the court.

Next the judge dealt with the issue of the high level of harm suffered by the victims in this case. He then considered the risk of reoffending in relation to the appellant. The judge recorded that the appellant had no previous convictions for sexual offences and his past offending is not relevant. He also noted that since being remanded into custody the appellant became an enhanced prisoner, gained employment and signed up for a number of courses designed to assist in future employment when released from custody.

Relevant authorities

The court was referred to three authorities, namely *R v ML* [2013] NICA 27, *R v Finnegan* [2014] NICA 20 and a subsequent case in England & Wales of *R v Nazir Ahmed et al* [2023] EWCA Crim 281 which it said were all of some assistance.

- *R v ML* was an appeal against a sentence imposed for sexual offences which occurred when the appellant was aged 13 or 14 and the complainant, his sister, was aged 10 or 11. The Court of Appeal reduced the sentence setting out the factors that should be taken into account when assessing the appropriate sentence in an historic sex case for an offender who was a child at the time of the commission of the offence. In *R v ML* the court considered that the youth and immaturity of the appellant at the time of the commission of the offences made it a case of low culpability, but the harm was significant, and the appellant made the complainant endure the rigors of a trial.
- *R v Finnegan* [2014] NICA 20 was a reference from a total sentence of 11 years' imprisonment after a trial for offences that occurred when the offender was aged between 14 and 28 years involving five victims. The court said that if the offender had been of full age when he committed the offences an overall sentence of 18 years or more would have been appropriate for such a campaign of violence and corruption against the children. It found that 14 years was an appropriate sentence before some further reduction for double jeopardy.
- *R v Ahmed* sets out guidance for sentencing an adult for an offence committed when the offender was a child. The judgment made substantial reference to the Sentencing Code in E&W which does not apply in Northern Ireland and also to the sentencing guidelines produced by the Sentencing Council in E&W. In para [30] the decision refers to cases of a hybrid nature where the offender has committed offences both as a child and an adult. It said it will commonly be the case that the later offending is the most serious aspect of the overall criminality and can be taken as the lead offence(s), with concurrent sentences imposed for the earlier offences. In such circumstances the key considerations for the court are likely to be an assessment of the extent to which the offending as a child aggravates the offending as an adult, and the application of the principle of totality. The decision concluded that in each case the issue for the court to resolve will be whether there is good reason to impose on the adult a sentence more severe than he would have been likely to have received if he had been sentenced soon after the offence as a child.

Consideration

The court said this was a difficult sentencing exercise for any judge given the span of offending against two victims. Also, this was a historic case where the appellant had a clear record and where there was a considerable period of some 20 years between his last offending and his arrest for these offences. All of that said, the court recognised by the appellant that a significant period of imprisonment was required.

The core question in the appeal was how the sentence should reflect the fact that a large part of the offending occurred when the appellant was under 18. The court endorsed the principles established by *R v ML* saying it provides an effective template with a level of flexibility for any sentencing judge:

- In a case where an offender has committed offences both as a child and an adult, the court recommended that sentencing judges should first assess whether the bulk of the offending occurred whilst the offender was a child. If that is the case, the recommended approach should be to determine an initial starting point based on the offence(s) committed when an adult, using that as the headline offence. That sentence can then be increased to take into account the offences committed when a child.
- If the bulk of the offences were committed as an adult, then the approach of fixing a starting point for an adult offender based on the totality principle and then reducing it to take into account the offending which occurred when the offender was a child is favoured.
- In either scenario it is possible to reach a final sentence which reflects the correct level of culpability and harm taking into account any mitigating factors, thereby reaching a sentence which is just and proportionate in a given case.

The court commented that the judge effectively adopted this methodology in this case as follows:

> "The headline offence was rape of a child. From there we think that a judge can then aggravate the starting point based on the other offences that have occurred when the offending was as a child. This involves a method of elevating the sentence upwards. However there may also be some discounting or allowance made for the fact that the additional offending occurred whilst a child. The sentencing guidance in England & Wales states that such a reduction should be a half to two thirds. This is a broad rule of thumb which we adopt with the caveat that any reduction should be applied flexibly. In this case we consider that a half is the right amount. Applying these principles to the case at hand, we consider that the judge was right to choose a headline offence [of rape when the appellant was aged over 18]. Then, applying *R v Kubik* this was clearly a higher starting point rape case as it was rape of a child. There has been no real argument in this appeal that such a rape would attract a sentence of at least eight years."

The court said the difficulty then arose because the judge described the offending as a campaign of rape and effectively elevated the starting point to the range that would apply if all of the offending had occurred when the appellant was an adult. It said that such an approach does not fully reflect the difference between childhood and adult culpability and, therefore, the judge was not correct to say that this was a campaign of rape leading to a higher bracket as applies to consistent adult offending. In this case, most of offending perpetrated by the appellant was when he was a child. The court said that while this remains very serious offending against two victims who will suffer lifelong harm, proper account must also be given to the fact that the appellant's culpability was lower when a child:

> "Applying the methodology that we have suggested the judge would have had to add a further period of imprisonment to the eight years on the headline rape to reflect the other offending that occurred whilst the appellant was a child against two victims. We consider that the correct figure to represent the additional offending was in and

> around six years to reflect totality and the fact that there were two victims. That brings the sentence to 14 years. However, an allowance then must be made for the fact that this additional offending all occurred when the appellant was less culpable because he was a child. That is the law which we think the judge has not properly applied. We would therefore reduce the figure of six years by half which leads to an overall sentence of 11 years."

The court concluded by saying that both victims have suffered greatly because of this offending and are to be commended for their bravery:

> "We understand that no sentence can fully repair the pain and damage caused by such sibling abuse, however, the sentence we have imposed fully vindicates their position and it is a public record which we hope provides some solace and deterrence to others."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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