Neutral Citation no. [2002] NICA 49 | *Ref:* **CARC3823**

Judgment: approved by the Court for handing down | *Delivered:* **13/12/2002**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

M

Before: Carswell LCJ and McLaughlin J

CARSWELL LCJ

[1] This is an appeal brought with leave against sentences imposed by His Honour Judge Markey QC on 28 June 2002 at Belfast Crown Court, consisting of three consecutive terms each of 21 months' imprisonment, an effective term of five years and three months.

[2] The appellant was charged on five counts and pleaded guilty on arraignment to the first three:

1. inciting a child to commit an act of gross indecency with him on 18 July 2001;
2. committing an act of gross indecency with the same child on a date unknown between 1 September 2000 and 1 April 2001;
3. committing an act of gross indecency with the same child on a date unknown between 30 April 2001 and 19 July 2001.

The fourth and fifth counts charged indecent assault on the same child on dates between 1 January and 19 July 2001. It was ordered that these lie on the file, not to be proceeded with until further order. The learned judge imposed the three consecutive sentences of 21 months, and made an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996.

[3] On 18 July 2001 the appellant returned from his work about 9 am and, thinking that his partner was out of the house, went into the bedroom of her daughter L, aged nine years. He told his son to go downstairs for breakfast and offered L £6.00 to suck his penis. L's mother came out of her room to find the appellant standing with the zip of his trousers open, while L was kneeling on a pillow in front of him reaching out with her hand towards the front of his trousers. She immediately intervened, ordered the appellant out of the house and contacted the police. The appellant left the jurisdiction and went to Holland, but returned a couple of days later and gave himself up to the police on 22 July 2001, stating that he felt guilty and wanted to face up to what he had done.

[4] The appellant admitted in interview that he had had L perform an act of oral sex on him on two previous occasions, but denied her averment made in her video interview that it had happened more than five times. He denied her claim that she had seen him ejaculate and also denied her allegations of inappropriate touching of her genitals. He claimed that she had asked him about oral sex after watching one of his pornographic videos which she had found and watched and that she took part willingly in the acts. L stated in interview that the appellant had imposed it on her in November 2000 by way of a punishment for failing to do what she was told. She also said that the appellant would push her head "so that it would go in further". The appellant admitted that he had given L sums of money as a reward for her participation. He also accepted that he instructed her not to tell her mother lest she throw him out of the house.

[5] A victim impact report on L was prepared by Ms M McTaggart, a social worker at the Child Care Centre. She reports on the effect on L's behaviour, her disrupted sleep pattern, her feeling of powerlessness and poor self-esteem and her sense of betrayal. She stated in paragraph 6.5:

> "6.5 Traumatic Sexualisation
>
> L experienced serious sexual abuse in a repetitive, intrusive and intensive way. She has sexual knowledge that she learnt in a frightening and inappropriate manner. Consequently I have no doubt that she was traumatised by these experiences."

L has been helped by the positive support and encouragement of her mother. Ms McTaggart concluded her report as follows:

> "7. Conclusion
>
> L has clearly been profoundly effected by her experiences of sexual abuse. Therapeutic work with L is still in the early stages. To date she has been able to articulate and explore some of the impact of the abuse on her emotional well-being and psychological state. However the sexual abuse traumatised her in such a way that, in order to survive it, L disengaged herself emotionally from her experiences.
>
> This is a common response for survivors of sexual abuse. L internalised this into her coping mechanisms and now she essentially has to re-learn healthy, appropriate ways of coping.
>
> L's disengagement from her emotions had clear implications for her ability to engage in therapeutic work which aims to assist her in processing her emotions. Consequently, to enable L to engage in this, therapeutic work initially had to assist her in confidently and safely re-engaging with her emotions and feelings.
>
> L is demonstrating the ability to engage in this complex and difficult work, and although she is making progress in treatment, she will continue to be in need of ongoing treatment for a considerable period of time."

[6] The appellant, who is now aged 33 years, has no criminal record. The pre-sentence reports describes him as having a disturbed childhood and having been subjected to serious sexual abuse by his elder brother. The probation officer expressed the opinion that there was significant incongruity between the appellant's rationalisation of his behaviour and the evidence in the case. He sought to attribute a degree of responsibility for his behaviour on to his victim, a not uncommon distorted perspective. Nor did he accept that his behaviour had harmed the child. The probation officer considered that these attitudes are indicative of dynamic risk factors which the appellant needs to address, as his entrenched attitudes are a cause for concern. She concluded that given the appellant's rationalisation for his behaviour and his limited victim awareness, she had assessed the risk he posed to other children as high. She expressed her opinion that –

> "the totality of M's sexual history and behaviour needs to be assessed in detail to confront:-
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> - his sexual interest in young girls;
> - his capacity for grooming victims;
> - his distortion of his own and others behaviour;
> - the absence of concern for his victim."

The work could be undertaken within the context of a Sex Offender programme, commencing during a prison sentence and followed up on release through a custody probation order, with a condition that he attend a course at Alderwood House.

[7] The appellant's solicitors arranged for him to be examined by Dr Ian T Bownes, a consultant forensic psychiatrist, who saw him on 11 June 2002. In his report of 17 June 2002 Dr Bownes described an attitude similar to that described by the probation officer. The appellant had only a very limited grasp of the damaging effects of his actions and minimised his own responsibility. Dr Bownes said that he could detect only limited evidence of any reflective thought regarding the need for change on his own part. He stated at page 12 of his report:

> "In the absence of severe disorders of personality or mental impairment, individuals who repeatedly engage in sexual offences against children typically develop a style of thinking that facilitates their behaviour. M displayed a range of inappropriate ideas on related themes at the present interview that are likely to represent a considerable investment in rationalising his actions in the index offences [in] his own mind and that had continued to allowed him to avoid fully confronting and accepting responsibility for their seriously inappropriate and damaging nature. Although M persistently denied that his behaviour in the index offences had reflected an established sexual interest in children, it was clearly apparent that M had obtained pleasurable feelings from engaging in sexual contact with the injured party of a nature such that he had been unable to resist repeating this despite his knowledge of the risks involved, and ongoing ideas on the general theme that his behaviour in the index offences had principally reflected effects of external events and influences outside his own control, such as his unhappy childhood, were repeatedly evident that

> could conceivably facilitate further similar offending if not effectively addressed."

Dr Bownes considered that the appellant had sufficient intellectual ability and mental resources to engage in a meaningful manner with specialist instruction and supervision such as that available under the auspices of the Probation Service.

[8] In passing sentence the judge was exercised by the fact that the maximum sentence provided for by the legislature for gross indecency with a child or inciting a child to commit an act of gross indecency is two years' imprisonment. Pointing out that the maximum has been increased in England to ten years, he described his sentencing powers as totally inadequate and a public scandal. He considered that a proper term of imprisonment for the appellant's offences would, on a plea of guilty, be of the order of eight years. Since they had amounted to a course of conduct over a period of time he regarded it as justifiable to make the terms consecutive, which they would have to be in order for them to be any way near adequate. He rejected the suggestion of making a custody probation order, on the ground that it would be regarded by the public as a soft option, and instead made an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996.

[9] It was submitted on behalf of the appellant that the judge was not justified in making the sentences consecutive and that he should have made a custody probation order. It also formed one of the grounds in the appellant's notice of appeal, though the point was not pursued by counsel in argument, that the totality of the sentence was manifestly excessive.

[10] We can deal shortly with the last point. Like the judge, we regard a total sentence of five years and three months as manifestly insufficient punishment for these offences. The victim was a young child, to whom the appellant was in a position of trust, which he shamefully betrayed. The judge stated quite justifiably that he had gone a considerable way to rob her of her childhood. He also described the offences as oral rape, again with some justification, and in terms of the heinous nature of the acts they are quite as bad as some rapes. If the judge had been free to do so, he would have imposed a much longer sentence of imprisonment, which we agree would have been required to reflect the criminality of the appellant's behaviour.

[11] The thrust of the argument presented on behalf of the appellant was that the judge was in error in making the sentences consecutive. Counsel relied on the decision of this court in *R v Magill* [1989] 4 NIJB 81, a case which bears some resemblance to the one before us. In that case the appellant had committed offences of unlawful carnal knowledge against a girl of 14 years within a period of two to three weeks. The trial judge imposed three

consecutive sentences of 21 months, the maximum sentence for the offence being, as here, two years' imprisonment. This court held that concurrent sentences should be imposed where the offences were committed within a relatively short space of time, as it held they were. The inadequacy of the judge's sentencing powers did not constitute exceptional circumstances which would justify his departing from that rule. It was accordingly ordered that the sentences should run concurrently.

[12] In the present case the offences occurred over a period of several months, on the appellant's version from February to July 2001 and on L's from at latest November 2000. Taking the appellant's accepted version, it is not in our judgment to be regarded as a relatively short space of time. By any standard this was a series of offences, and could not be described as coming within the concept of a single transaction. The learned judge based his imposition of consecutive sentences primarily on the inadequacy of his sentencing, which, as we held in *R v Magill*, does not constitute a sufficient reason, but he would in our view have been quite entitled to do so on the secondary ground to which he referred, that this was a course of conduct.

[13] Similarly, we regard his decision to make an Article 26 order rather than a custody probation order as having ample justification, though the reason which he articulated is again one which it would not be possible to sustain. As we held recently in *Attorney General's Reference (No 1 of 2002)* [2002] NIJB 187 at 190, we cannot regard a period of probation comprised in a custody probation order as in some way less of a sanction than the period of custody imposed. On the other hand, we stated in *R v McGowan* [2000] NIJB 305 at 310 that in sexual offences Article 26 should be put into operation rather than a custody probation order under Article 24, so long as the statutory conditions are satisfied. In this case they clearly are satisfied in our judgment, in view of the continuing danger to young children posed by the appellant, and we consider that an Article 26 order is the proper disposition. We are aware that the court cannot impose conditions on the licence which will operate on the appellant's release, but we are confident that the Secretary of State will recognise the desirability of requiring the appellant to attend a course at Alderwood House, and, as he has power to do, will make his release on licence subject to an appropriate condition.

[14] We are, however, exercised by the small amount of discount given in each sentence for the early plea of guilty, the degree of remorse shown by the appellant and his giving himself up to the police soon after the discovery of his offence in July 2001. We should not regard it as unjustified to impose the maximum sentence on a contest on each of these charges, for they are very bad cases of their kind. As a matter of consistent principle, however, we feel that it is important to adhere to the practice of giving a material discount when such factors are present, in order to give recognition to their significance and encourage other offenders to face their crimes and accept

guilt at an early stage, particularly where it will save vulnerable victims from having to give evidence. We consider that the proper discount in the present case is six months, so reducing the sentence on each count to 18 instead of 21 months. We are acutely conscious that this reduces the appellant's term of imprisonment even further below that which he thoroughly deserves, but we feel that we must nevertheless uphold the principle.

[15] The appeal will therefore be allowed and a term of 18 months substituted on each count, to run consecutively, making an effective sentence of four and a half years. In all other respects the orders made by the judge are confirmed.

[16] We cannot leave this appeal without repeating a call to the legislature to amend the maximum term of imprisonment which may be imposed by way of sentence for the offences under section 22 of the Children and Young Persons Act (Northern Ireland) 1968 involving gross indecency. The law is crying out for such an amendment, which is long overdue, and we would urge the Government to address it as a matter of urgency.