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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**13/09/19**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT
IN NORTHERN IRELAND

THE QUEEN

–v-

THOMAS GERARD SCARLETT and MARTIN STANLEY NICHOLAS BURKE

Before: Deeny LJ, McCloskey LJ and Huddleston J

McCLOSKEY LJ (delivering the judgment of the court)

Reporting Restrictions

The injured party in this matter has waived her right to anonymity, but does not wish her name to be published. She is content to be referred to as "a daughter of Thomas Scarlett".

Introduction

[1] These are two conjoined appeals against sentence only, leave having been refused by the single judge in Mr Scarlett's case and granted in that of Mr Burke. The appeals were heard together on 28 June 2019. The dismissal of Mr Scarlett's application for leave to appeal was announced at the conclusion of the hearing. Judgment was reserved in Mr Burke's appeal, the court having directed that the evidence of the injured party at the trial be transcribed. The transcript thus directed has now been received.

The Prosecution

[2] The first Appellant, Thomas Gerard Scarlett, is the father of the injured party. The second Appellant Martin Stanley Nicholas Burke, is her maternal uncle. The indictment contained eight counts of indecent assault on a female contrary to Section 52 of the Offences Against the Person Act 1861. The first and second counts were preferred against Mr Burke. The remaining six counts were preferred against Mr Scarlett. The offending was alleged to have occurred on sundry dates between October 1989 and October 2001. In common with many cases of this kind time and age uncertainties are unavoidable and estimates abound. On the first of dates specified in the indictment, 01 October 1989, the injured party was aged 6 years. On the last of the dates specified in the indictment, 01 October 2001, she was aged 16.

[3] All of the charges were contested. On 27 June 2018, following a jury trial of some 10 days duration, Mr Burke was unanimously convicted on counts 1 and 2. Thomas Scarlett, the father of the victim, was convicted by a majority verdict on counts 3, 4 and 5. Counts 6 and 7, specimen counts relating to alleged offending similar to that in count 5, were the subject of no Crown evidence and the jury was directed to return verdicts of not guilty on each. The jury was unable to reach a conclusion on count 8 and this was left on the books, not to be proceeded with without the leave of the Court.

[4] On 10 September 2018, the Appellants were sentenced by the Recorder of Londonderry in the following way:

Count	**Offence**	**Plea**	**Sentences**
1	Burke – Indecent assault on female, between 1/10/89 & 1/10/91	Not guilty	4 years prison
2	Burke – Indecent assault on a female, between 1/10/92 & 1/10/94	Not guilty	5 years prison – concurrent with count 1
3	Scarlett - Indecent assault on a female, between 1/10/95 & 1/10/97	Not guilty	2 years prison – concurrent with count 4
4	Scarlett - Indecent assault on a female, between 1/10/95 & 1/10/97	Not guilty	3 years prison – concurrent with count 3
5	Scarlett - Indecent assault on a female, between 1/10/99 & 1/10/01	Not guilty	7 years prison – consecutive to counts 3 & 4 – Total of 10 years
6	Scarlett - Indecent assault on a female, between 1/10/99 &	Not guilty	Jury direction – Not guilty

	1/10/01 – specimen count		
7	Scarlett - Indecent assault on a female, between 1/10/99 & 1/10/01 – specimen count	Not guilty	Jury direction – Not guilty
8	Scarlett - Indecent assault on a female, between 1/10/99 & 1/10/01	Not guilty	Left on the books

Factual Matrix

[5] The injured party reported the alleged offences to the police in 2013. As noted at [1] above this court directed that a transcript of her evidence be provided. This arose out of certain doubts and queries relating to dates, ages and related matters. The transcript has now been provided and considered. What follows in the ensuing paragraphs is based on its contents.

[6] The first count related to an incident in the injured party's home when she estimated that she was aged about 4 or 5 years. Mr Burke entered her bed, she reacted by crying for her mother, he covered her mouth and told her to be quiet, he pulled up her nightdress and removed her underwear, touching of her vagina followed, he placed his penis in her hand and he kept saying that the witches would get her if she was not quiet. The incident lasted a few minutes.

[7] The second count allegedly occurred when the injured party was aged around 10 or 11 years. Burke was babysitting the injured party and her two siblings. Having fallen asleep in the living room, the injured party awoke to discover that her underwear had been removed, Burke was on his knees with one hand on her belly, he was fondling her vagina externally and internally with his fingers and the incident ended abruptly when her brother awoke. The injured party having spoken to her mother about this incident, both went to Burke's house where a confrontation ensued. His response was "*…. that he didn't - he didn't realise he had done it, that he must have had too much drink and he smoked, he smoked the cannabis …. He says he would kill his self, that he couldn't go to jail.*" His mother said "*…. she wouldn't let - he won't go to jail that it's okay, she would sort it out.*" Her mother "*…. told [*her*] nobody would believe me.*" Thereafter the injured party sought to protect herself by placing stepladders or an ironing board against the back of her bedroom door and sleeping in the middle of a row of three beds, flanked by her siblings.

[8] As regards the third count, when the injured party was aged 12 or 13 years and sleeping in her parents' bed Scarlett (her father) touched her vagina fore and aft with his hand. This occurred on five or six occasions altogether, maybe more and this is reflected in the fourth count. The locations were her parents' bed or her own bed.

[9] The fifth count concerned a specific incident when the injured party was aged 14 or 15. Scarlett crawled into her bedroom, removed her lower pyjamas and engaged in extensive touching of her vagina, inserting his fingers and licking it. She described this incident as "*the worst one*".

[10] At this juncture it is appropriate to record that the prosecution adduced no evidence in respect of the sixth and seventh counts: see [3] above. The transcript of the injured party's evidence confirms that the same analysis applies to the eighth count.

[11] Some years later, following family altercations and confrontations, her father, having initially denied everything, stated that if he had committed the alleged abuse he must have been drunk and was sorry. This was described by him as "*rubbish*" in his police interviews. The injured party finally made a complaint to the police in 2013.

<u>Appeal – Thomas Gerard Scarlett</u>

[12] Mr Scarlett's grounds of appeal are as follows:

> *"The total sentence imposed of 10 years imprisonment was manifestly excessive and wrong in principle for the following reasons:*
>
> *(i) The totality of the cumulative sentence of 10 years imprisonment is out of line with, and well in excess of, sentences imposed in this jurisdiction in previous cases for this type of offence.*
>
> *(ii) Alternatively, the Trial Judge erred in failing to make an appropriate adjustment to the individual sentence imposed in relation to count 5, that would have taken account of the totality principle.*
>
> *(iii) The Trial Judge erred in finding as a fact that the applicant did nothing in relation to the report of abuse by the complainant's uncle and co-defendant because he wanted to do something similar to the complainant, which finding was suggestive of prior pre-meditation (sic.) and/or planning, but which was entirely unsubstantiated by the evidence and was conjecture.*
>
> *(iv) The Trial Judge failed to give sufficient weight to the applicant's essentially clear record, the absence of a high volume of incidents of abuse and the absence of offending,*

> *either prior to or after those incidents reflected by counts 3, 4 and 5 on the bill of indictment.*
>
> *(v) The Trial Judge failed to give sufficient weight to the applicant's relevant poor health and, in particular, a diagnosis of post-traumatic stress disorder or to explore same in any detail."*

[13] The grounds of appeal in both cases are broadly similar. Fundamentally, both Appellants contend that the principle of totality was not observed by the judge. It is accepted that the aggravating factors were all correctly identified. It is further accepted that neither is entitled to any discount. No real submission is made in relation to mitigating factors on behalf of either Appellant.

[14] In addition to the foregoing, Mr Martin O'Rourke QC (with Mr Andrew Moriarity, of counsel) on behalf of Scarlett did not contend that the judge committed any error in imposing a higher sentence of imprisonment (3 years) in respect of the fourth count than that imposed on the third (2 years). Nor was it contended that the judge erred in imposing a consecutive sentence of imprisonment in respect of the fifth count. Rather the essential complaint was that the consecutive sentence was excessive giving rise to an overall manifestly excessive sentence of imprisonment.

[15] Counsel developed their central submission by a detailed rehearsal of previous indecent assault cases in this jurisdiction. As this court has stated on numerous occasions this kind of exercise is almost invariably an unprofitable one. It was assuredly so in the present case. The specific terms in which the submission was formulated by counsel were that this case is "*not as bad as some of the reported cases*". This formulation betrays the fallacy involved in the exercise undertaken. Furthermore, counsels' submissions failed to engage with the reasoning of the single judge at [9], which we gratefully reproduce:

> *"….. I conclude that an appeal against sentence is not arguable. The sentence of 7 years on Count 5 may be severe but the perpetrator is the victim's own father and it is probably the worst of all the offences. So far as the totality contention is concerned, the victim was sexually abused on multiple occasions, given that Count 4 is a specimen charge. This abuse by her father started when she was 12 to 13 years and ended when she was 15 to 16 years old. He knew that she had already been abused by her uncle but he did not report that fact and inflicted more suffering on her."*

We adopt this passage in its entirety.

[16] The themes of the single judge's decision resonate in the sentencing remarks of the Recorder, who stated, *inter alia*:

> *"This offending by both Burke and Scarlett is aggravated in a number of ways. It is firstly a gross abuse of trust by her father as her parent and by Burke when he was babysitting for her parents. In addition* [the injured party] *was obviously vulnerable due to her age …….*
>
> *It is an aggravating feature of the offending that the abuse took place in her own home and indeed on occasions in her own bedroom. A child should feel and be safe in such places. The actual abuse was particularly serious consisting of very deliberate digital penetration by both defendants and by her father indulging in oral sex on her at an age when she would have been going through puberty."*

[17] It is also necessary to highlight the psychological impact on the injured party of this protracted course of abuse perpetrated by her father and uncle during a period of approximately 10 years, beginning when she was aged around six and ending in her mid-teenage years. For this purpose it is convenient to borrow the following passage from the sentencing transcript at [18]:

> *"I have read a victim impact statement …… I also saw and heard her give her evidence in this case from the witness box. She was very obviously upset at times …… and it was clear that she has suffered a great deal both at the time of the abuse, since it and when giving her evidence."*

In her victim impact statement the injured party describes episodes of self-harm, attempted overdoses and virtually constant mental trauma.

[18] Each of the counts of which Scarlett was convicted attracts a maximum sentence of 10 years imprisonment. The real question in this appeal is whether the consecutive sentence of seven years is manifestly excessive. While it clearly belongs to the upper end of the notional scale, we are satisfied that it falls within the range of sentences which the judge could reasonably impose in the intensely fact sensitive context of this case. Giving effect cumulatively and having regard to all that we have rehearsed in [15]-[17] above we conclude that this application has no merit and leave to appeal is refused accordingly.

<u>Appeal – Martin Stanley Burke</u>

[19] Mr Burke's grounds of appeal are:

> *"The effective sentence of 5 years custody is manifestly excessive and wrong in principle in that:*
>
> *(i) Insufficient regard was given to the fact that the offences were committed approximately 5 years apart and were isolated incidents and not part of a "campaign" of abuse;*
> *(ii) Respective sentences of 4 and 5 years custody were too high in respect of each episode of offending;*
> *(iii) Whilst the sentencing judge opted to impose concurrent as opposed to consecutive sentences, he failed to stand back and apply the totality principle to the effective sentence imposed."*

[20] It is common case that the sentence imposed on Burke in respect of the first count involved an error on the part of the judge. In passing, he cannot be faulted for this as the matter was clearly not drawn to his attention. The first count recites that the indecent assault occurred between 01 October 1989 and 01 October 1991. The maximum sentence of two years imprisonment was increased to 10 years on 03 October 1989 by the Treatment of Offenders (Northern Ireland) Order 1989. The principle which this engages was stated by the English Court of Appeal in ***R v Orlando*** [1992] 13 Cr. App. R. (S) 306, at 308, in the following terms:

> *"…. Where the particulars of the indictment as in this case under Count 3 embrace a period both before and after the operative date [*i.e. the date when the statutory maximum sentence was increased*] …… and where in particular the nature of the evidence before the court is such that it is impossible to identify with certainty whether the act in question was indeed perpetrated before or after that date, then the judge is obliged to conclude that his powers are limited to those in force prior to that date."*

Orlando was a case involving indecent assaults under the English statutory regime and the particular issue concerned the operative date of Section 3(3) of the Sexual Offences Act 1985. The decision in ***R v Strait*** [1997] 2 Cr. App. R. (S) 309 is to like effect (see especially page 311).

[21] While there would appear to be no comparable decision in this jurisdiction, we can identify no reason why this principle should not apply in the present case. While neither of the aforementioned English cases provides any elaboration of substance, its rationale must surely be, as observed by Deeny LJ in argument, that the onus rests on the prosecution to prove all of the ingredients, including the date, of each offence alleged in the indictment and to do so beyond reasonable doubt.

[22] On the premise, not seriously contested on behalf of this Appellant, that the judge if alerted to the foregoing would probably have imposed a sentence of two years imprisonment in respect of the first count, the following analysis arises:

(a) This gives rise to a marked disparity, of three years, between the sentences imposed on the first and second counts.

(b) There is nothing in the sentencing transcript to indicate why the judge considered that the second count warranted a heavier sentence than the first. The evidence before this court, which now includes the injured party's evidence transcribed, indicates that in terms of culpability, gravity and revulsion there is no substantial difference between these two offences.

(c) There is no evident justification for the imposition of lesser terms of imprisonment - 2 and 3 yeas respectively - on the injured party's father in respect of the two counts of indecent assault of which he was convicted. This is striking, given that in the same passage of the sentencing transcript the judge described Scarlett's offending as "*horrifying*" and "*horrific*".

The foregoing, in our own words, is the essence of the submissions developed by Mr James Gallagher QC (with Mr Mark Reel, of counsel) on behalf of this Appellant.

[23] At this juncture it is appropriate to highlight the basis upon which the single judge granted leave to appeal in Burke's case:

> "*The learned trial judge imposed sentences of two years and three years on Counts 3 and 4 on Mr Scarlett but sentences of four years and five years on Counts 1 and 2 on Mr Burke. The basis of that approach is open to some debate because it is arguable that the degree of differentiation is unwarranted. In my opinion it is arguable that the sentences imposed on Mr Burke are excessive, at least in comparison to Mr Scarlett.*"

If the sentencing of the two Appellants in respect of the two groups constituted by the first four counts on the indictment had been reversed this would be unsurprising as it would reflect the incontestable assessment, emphasised in both the sentencing remarks of the judge and the decision of the single judge, that the offending of the father belonged to a higher plane of gravity. Approached in this way it may be said that Scarlett is the beneficiary of a benign disposal as regards the third and fourth counts. This court, however, must act upon the sentences imposed and evaluate their consequences in the exercise of comparison which must be undertaken. This exercise, as we have highlighted, has included consideration of the injured party's evidence in full.

[24] We are impelled to conclude that there is no discernible justification, objective or otherwise, for the disparity in the sentencing of the two Appellants in respect of Counts 1 and 2 (Burke) and Counts 3 and 4 (Scarlett). There is no identifiable basis upon which the sentencing of Burke in respect of the two counts of indecent assault should attract a greater punishment than that applied to Scarlett in respect of the corresponding two counts. Furthermore, as demonstrated above there is a sharp disparity between the maximum sentence which the judge could lawfully have imposed on Burke in respect of the first count (two years) and that imposed as regards the second (five years). Thus there are both internal and external disparities of substance. Giving effect to this reasoning we allow Burke's appeal, substituting a sentence of two years imprisonment in respect of the first count and three years imprisonment in respect of the second count, to operate concurrently. In this way the lack of equilibrium both internally and externally is rectified