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Judgment: approved by the Court for handing down | *Delivered:* **26/11/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

M H

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Before: Morgan LCJ, Weatherup LJ and Colton J

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WEATHERUP LJ (delivering the judgment of the court)

[1] The applicant appeals against a sentence of 19 years' imprisonment imposed on 27 May 2014 upon the applicant's conviction on 48 counts involving sexual offences against his two daughters aged between 4 years and 15 years in the period 1993 to 2004. Ronan Lavery QC and Mr Connolly appeared for the applicant and Ms McCullough appeared for the prosecution.

[2] The applicant received a sentence of 19 years' imprisonment on one count of rape against one of his daughters and a sentence of 15 years' imprisonment on a charge of attempted rape against his other daughter. On nine counts of gross indecency he was sentenced to 2 years' imprisonment, on nine counts of common assault to 12 months' imprisonment, on eight counts of false imprisonment to 9 years' imprisonment, on four counts of threats to kill to 9 years' imprisonment, on seven counts of indecent assault to 9 years' imprisonment and on nine counts of cruelty to children to 7 years' imprisonment. All sentences were to run concurrently. Some of the charges involved specimen counts. The applicant was to be released on Article 26 licence. In addition, the applicant was disqualified from working with children, made the subject of a sexual

offences prevention order, made subject to the notification requirements of the Sexual Offences Act 2003, required to register as a sex offender and informed that the Independent Safeguarding Authority would include him on the Children's Barred List.

[3] The applicant denied all the allegations. He claimed that the charges had been fabricated by the complainants and members of his family because of an inheritance dispute about his parents' farm, after the death of his mother in March 2008.

[4] The pre-sentence report recorded the applicant as being 59 years old who married in 1979 and separated in 2004. The couple had four children, being two sons and the two daughters who were the victims of the offences. When the marriage ended in 2004 the applicant moved to County Monaghan. When his mother died in 2008 family tensions increased over his parents' farm and the present allegations were made against the applicant. The applicant had previous convictions relating to driving offences. The applicant was assessed as presenting a high likelihood of general reoffending and a significant risk of serious harm.

[5] His Honour Judge Smyth QC was the sentencing Judge. In his sentencing remarks he stated that he had had regard to the guidance in the Court of Appeal in Northern Ireland in R v DO [2006] NICA 7 (reported as R v O [2006] NIJB 437) as well as the guidelines of the Sentencing Council of England and Wales. There was stated to be a coming together of features in this case which took the case outside the guidelines if they were to be applied in a general sense. There were stated to be numerous aggravating features:

(a) Breach of trust.

(b) The victims were sisters abused on many occasions in each other's presence.

(c) Associated offences had the result of humiliating the children.

(d) The children were very young.

(e) A sustained campaign of abuse over a significant period with premeditation and planning.

(f) The children felt completely powerless.

[6] Having considered a statement of impact from one of the victims the sentencing Judge referred to significant and lasting harm to the children. Thus culpability was stated to be high and harm was stated to be very high.

[7] In relation to mitigation, reference was made to the record of minor offences influenced by abuse of alcohol and the circumstances of the applicant's upbringing by his grandparents.

[8] The sentencing Judge referred to a six year delay impacting grievously on the victims and on the applicant. This resulted in a marginal reduction in the overall sentence from the original intention to impose a 20 year sentence of imprisonment to one of 19 years because of the delay.

[9] The applicant's grounds of appeal are, first of all, that the sentence was wrong in principle and manifestly excessive having regard to the Sentencing Council Guidelines in England and Wales and the Northern Ireland Guidelines. Secondly, that there had been inadequate deduction because of delay. Thirdly, that there had been a failure to have regard to the absence of offending from 2004.

Northern Ireland sentencing

[10] For Northern Ireland authority in relation to historic family sexual abuse it is not necessary to look further than R v DO [2006] NICA 7. The Court of Appeal considered a plea of guilty to 47 counts of sexual abuse involving four young girls, one of whom was the appellant's daughter and the others his three nieces. A total sentence of 20 years' imprisonment was imposed by the sentencing Judge and the Court of Appeal reduced the total sentence to one of 17 years' imprisonment.

In respect of the appellant's daughter he pleaded guilty to charges of attempted rape, attempted buggery, inciting a child to commit an act of gross indecency and 22 charges of indecent assault when she was aged between 9 and 14. The appellant was sentenced to 6 years' imprisonment in respect of attempted rape and the attempted buggery, to run

concurrently. In addition he was sentenced to 5 years' imprisonment for inciting a child to commit an act of gross indecency (overturned as the maximum sentence at the relevant date was 2 years) and 8 years for the indecent assault charges, to run consecutively. The total sentence in respect of the daughter was therefore 14 years.

In respect of one of the nieces the appellant pleaded guilty to 14 charges of indecent assault and 3 charges of gross indecency and was sentenced to two terms of 3 years' imprisonment which were consecutive to each other and to the attempted rape of the daughter, making a total of an additional 6 years for the offences against the niece. In respect of the other two nieces the appellant pleaded guilty to one charge of indecent assault against each and was sentenced to 2 years' imprisonment concurrent for each offence. The total sentence was 20 years' imprisonment.

[11] The appellant submitted that the total sentence must be regarded as excessive, not only because it was clearly out of line with sentences imposed in similar cases but also because the trial judge purported to give the appellant full credit for his plea of guilty. On that basis it was contended that a sentence in the range of 30 years would have been imposed if the appellant had contested the case. The Court of Appeal stated that although the appellant had pleaded guilty to all the offences for which he was sentenced, he had not done so at the earliest opportunity and it was relevant that he had disputed some of the accounts of his victims when he was interviewed by police. The Court of Appeal concluded –

> "A sentence of 20 years would not have been out of keeping with conviction after a contest but we consider that it strays beyond what can be justified on a plea of guilty" (para [30]).
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> "We consider, however, that the appropriate global sentence making due allowance for the plea of guilty and reflecting the totality principle was one of 17 years and this is the entire effective sentence that we will impose" (para [31]).

[12] It will be noted that, in contrast to the present case, the methodology of sentencing adopted in R v DO involved consecutive sentences not only in relation to different victims but also in relation to different offences against the same victim. Either approach is acceptable

provided the final sentence reflects the principles of fairness, proportionality and totality.

The approach in Northern Ireland to Sentencing Council Guidelines

[13] In R v DO the Court of Appeal also referred to an earlier decision that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel in England and Wales in the advice of 24 May 2002 on sentencing in rape cases (A-G's Reference (No. 2 of 2004) [2004] NICA 15). At that time the Panel adopted an approach based on harm, culpability and risk with a starting point of 8 years for rape on a contest and a 15 year starting point for a campaign of rape.

[14] Later guidelines on sentencing have become more elaborate. Various starting points and ranges of sentences have been stated for the same offence by reference to degrees of harm and culpability. This Court last reviewed the assistance to be derived from guidelines issued in England and Wales in R v McCaughey and Smith [2014] NICA 61. The case concerned pleas of guilty to counts of burglary, attempted burglary and obstruction. As was made clear at paragraph [24] of the judgment, the approach set out applied equally to sentencing sexual offences cases. The Court of Appeal stated (*italics added*) -

> "(i) In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the *assistance to be derived from the aggravating and mitigating features* identified by the Sentencing Council in its guidance but *we have discouraged judges and practitioners from being constrained by the brackets of sentencing* set out within the guidance (para [22] of R v McCaughey and Smith).

> (ii) The Definitive Guideline suggests *starting points and ranges depending on the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach.* In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide *useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing* worthy of consideration depending upon the precise circumstances of the individual case (para [23] of R v McCaughey and Smith).

[15] It appears from the conduct of sentencing appeals in the Court of Appeal and from what the appeals illuminate about the conduct of sentencing hearings, that practitioners tend to disregard the above propositions and seek to engage in detailed analysis of the contents of the sentencing guidelines in England and Wales. Taking account of the character of the Crown Court Judiciary in Northern Ireland, this Court restates the position as follows -

First of all, assistance may be obtained from the lists of aggravating and mitigating factors.

Secondly, while ranges of sentences may be considered, sentencers should not be constrained by the ranges of sentences. In particular, the guidelines are developing ranges of sentences based on degrees of harm and degrees of culpability, resulting in multiple ranges of sentences for an offence. For reasons set out at 14 (ii) above, this Court considers there to be dangers in this approach. Accordingly, consideration of the range of sentences for a

particular offence should be of the overall range across the categories of harm and culpability. Ultimately the reference to the ranges of sentences permits the sentencer to identify a comparator for the sentence to be imposed, without the sentencer being constrained by that comparison in the exercise of discretion.

Thirdly, the sentencer should take account of all relevant circumstances, which will include the harm factors and the culpability factors set out in the guidelines. Again that is part of the overall sentencing exercise, without the sentencer being constrained to adopt stated categories of harm and culpability in arriving at a starting point.

The Sentencing Council Guidelines

[16] The Sentencing Guidelines Council for England and Wales issued a Definitive Guideline on sexual offences which applied to offenders sentenced on or after 14 May 2007.

[17] The Sentencing Council for England and Wales issued a Definitive Guideline on sexual offences applying to all offenders aged 18 or over sentenced on or after 1 April 2014. The applicant was sentenced on 27 May 2014.

[18] The approach to the English Guidelines outlined in R v McCaughey and Smith recognises the useful assistance in identifying aggravating and mitigating factors. Judge Smyth set out the aggravating and mitigating factors. The 2014 Definitive Guidelines set out aggravating factors that include the specific targeting of a particularly vulnerable victim, ejaculation, the presence of another child, steps taken to prevent the reporting of an incident. Mitigating factors include the absence of relevant or recent convictions.

[19] The approach to the English Guidelines outlined in R v McCaughey and Smith also recognises the dangers in adopting starting points and ranges depending on the category of harm and the nature of the offender's role. The 2014 Definitive Guidelines provide, at step one, for the Court to determine the offence category based on harm and culpability. Harm factors and culpability factors are listed. Step two requires the Court to use the starting point identified for the relevant category to reach a sentence within the category range. The Court is then required to consider adjustment within the category range for aggravating or mitigating factors

set out for each offence. Having considered all factors the Guidelines recognise that it might be appropriate to move outside the identified category range. This Court has stated that this approach may lead to the sentencing Judge being distracted from finding the right sentence for the individual case. This is an exercise that this Court seeks to discourage in this jurisdiction.

[20] The approach to the English Guidelines outlined in R v McCaughey and Smith also expresses caution in relation to ranges of sentencing. The application of the 2007 Sentencing Guidelines provided that repeated rape of the same victim had a starting point of 15 years and a range of 13-19 years (although the present case was one of repeated sexual abuse). The starting point for the rape of a child under 13 involving breach of trust was 13 years with a range of 11 to 17 years. In 2014, for the rape of a child under 13 years, the starting point would be 16 years and a range of 13 – 19 years. Counsel for this applicant undertook an analysis of the 2007 and 2014 guidelines and their application to the applicant. He contended that while the applicant would have been in category A for culpability he would have been borderline category 1 for harm and Counsel sought to vary the specified starting points and ranges of sentences accordingly. This degree of analysis of the English Guidelines is not considered appropriate in view of the dangers referred to above. Again this is an exercise that this Court seeks to discourage in this jurisdiction.

[21] Ranges of sentences may be worthy of consideration, while the sentencer should not be constrained. The ranges of sentences for rape extend to 19 years. That may be taken into account as a comparator for the sentence imposed.

The sentence imposed

[22] The Court of Appeal has also had occasion to encourage the indication of a starting point in the sentencing exercise –

> "One of the issues debated before us on the appeal was the degree of discount for the plea which had been allowed in the original sentence. As has been common in this jurisdiction the trial judge did not spell out in her sentencing remarks to what level of sentence she was applying the discount and what amount of discount she was allowing. If the appellate process is to work satisfactorily, the sentencing remarks must enable the appellate court to understand

> why the judge reached his decision. In the interest of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the sentence. Sentencing should be transparent to both the parties and the public." (Para [27] of R v McKeown, R v Han Lin (DPP's Reference Nos. 2 of 2013 [2013] NICA 28).

[23] The intended sentence of 20 years reflected the contested charge, the aggravating and mitigating factors noted and all the circumstances of the case. The conclusion in relation to the first ground of appeal is that it is clear from the decision of this Court in R v DO that a total sentence of 20 years was an appropriate sentence in all the circumstances of the present case. This is equally so when regard is had to the Definitive Guidance of the Sentencing Council for England and Wales to the extent referred to above. The intended sentence of 20 years was not manifestly excessive nor wrong in principle.

Delay

[24] The applicant contended that a reduction of one year's imprisonment by reason of a delay of six years was inadequate. It is well established that an infringement of the reasonable time requirement provided by Article 6(1) of the European Convention on Human Rights for a fair and public hearing within a reasonable time may be addressed by a reduction in sentence. In R v Shaw and Others [2011] EWCA Crim 98 the Court of Appeal in England and Wales dealt with sentences imposed on pleas of guilty to the importation and supply of cocaine. The defendant sought discount on sentence further to delay between arrest and final sentence. Two years prior to sentence the principal defendants had pleaded guilty to the main conspiracy. Final sentence was deferred for two years pending disposal of lesser offenders. The sentencing judge refused any discount by reason of delay. It was concluded that a delay of two years for the trials of those not alleged to be principal offenders gave rise to a valid argument in favour of the proposition that a reasonable time had elapsed and that the judge should have reduced the sentence to reflect the excessive delay. The Court of Appeal reduced the sentences of 14, 15 and 16 years by 6 months for that reason. While the defendant sought discount for delay between arrest and sentence the operative period of delay in the Court's decision was the period of 2 years from plea to sentence. More

generally, Leveson LJ stated that it may be that, in order to protect the Article 6 rights of offenders waiting to be sentenced, once it becomes apparent that a lapse of time of this order is likely occur, the Court should proceed to sentence even though the preferable approach would have been that the sentencing exercise was undertaken only once in order that all the facts could be considered at the same time (para [40]).

[25] In the present case the first report to police was a complaint by one daughter in February 2008 and a statement obtained in March 2008. Police were informed that the second daughter wished to make a statement in July 2008 but a statement was not provided. Police recorded a statement from the mother in March 2009 and the second daughter made a statement in April 2009 indicating that she did not wish to make a complaint but would support her sister's complaint. Further statements were obtained from both sisters in May 2010. Contact arrangements with the applicant were made through An Garda Siochana. The applicant attended the Garda station as a voluntary attendee in March 2011. The file was submitted to the Public Prosecution Service in October 2011. The applicant's trial took place in April 2014. None of the delay was attributable to the applicant. Even if the reasonable time requirement ran from the proposed engagement with the applicant by the Garda in 2011, it was three years before the matter was brought to trial. There was unreasonable delay that warranted a reduction in sentence.

[26] The applicant relied on a further point about delay. Under the 2007 Guidelines in England and Wales the starting point was 15 years' imprisonment. Under the 2014 Guidelines, which applied in England and Wales on the date the applicant was sentenced, the starting point was 16 years. The applicant contends that the delay in dealing with the case brought into play an increased starting point. The Court has concluded as stated above that the sentence of 20 years on a contest was appropriate in the circumstances. This Court was not influenced, nor is there any indication that the sentencing Judge was influenced, in reaching that conclusion, by any increase in the starting point in the English Guidelines in 2014. The sentence imposed reflected the approach in Northern Ireland to such offences occurring in the circumstances of the present case.

[27] As to the amount of discount for unreasonable delay, this Court has not been satisfied that there is any basis for interfering with the decision of the sentencing Judge in this regard. The conclusion in relation to the

second ground of appeal is that the discount of one year was entirely appropriate to reflect the delay in proceedings.

The applicant's record since 2004

[28] The applicant's record was stated to be a mitigating factor. That included the absence of any record of sexual offences, a record of unrelated motoring offences and an absence of convictions in recent years. This Court is satisfied that the absence of any recent record was factored into the overall sentence of 19 years. In any event this Court has taken account of the absence of a recent record along with the other aggravating and mitigating factors in concluding that the sentence imposed was not manifestly excessive or wrong in principle.

[29] The appeal against sentence is dismissed.