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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

JASON MAGILL

Before Weir LJ and Keegan J

WEIR LJ (delivering the judgment of the court)

The Nature of the Appeal

[1] The appellant appeals with leave of the single judge, Stephens J, against a cumulative sentence of 10 years' imprisonment imposed by Her Honour Judge Smyth on a total of 26 counts involving sexual misconduct with three children. He further seeks leave to appeal against a finding of dangerousness and the consequent imposition of an extended custodial sentence and against the term of that extension which was 5 years.

The Factual Background

[2] The offences were committed between February 2012 and July 2013 against three brothers; AA who at the time was aged between 9 and 10, AM who was between 10 and 11 and MM who was between 7 and 9. The children had for some years been in the care of social services by reason of neglect within their birth family and at the time of these offences were placed in a foster family. The appellant, who was at the time aged between 35 and 36, unmarried with a clear record and an excellent working history, came into contact with the children because his parents were friendly with the foster parents and the circumstances of their friendship were such that the appellant had ample opportunities to befriend the boys who then became his victims.

[3] In July 2013 the appellant bought iPods for the three boys and for a daughter of the foster family. On 25 July 2013 the foster mother looked at the messages on AA's iPod where she discovered the appellant had sent AA a picture of an erect adult penis; he had sent messages to AA saying "show me your C" and "you need to make it hard"; there were also two photographs of a child's penis and the foster mother recognised the clothing of the boy. She confronted the appellant about sending the picture and he initially denied having done so but then said that it was a "one-off". The foster mother very properly involved social services who in turn contacted the police. The boys' iPods were seized and so too were the appellant's iPod, mobile phone and computer. On his computer the police found a video of the appellant playing wrestling with a young boy in a bedroom setting, 4 indecent photographs and a video of AA looking at the camera saying "fuck Jason, I want to fuck you hard". On the appellant's iPod was a still image depicting an adult penis and 3 indecent images. On AA's iPod were two indecent photographs.

[4] In his ABE video, AA described how the appellant had downloaded a messaging App on to the iPods which he had bought for the boys in order that they could message each other. He said that he was in his bedroom with his brother messaging the appellant when the appellant sent him a picture of his penis and requested AA to send a picture of his penis in return. AA also described an occasion when he was playing football with his brothers and he had gone to get the ball out of the bushes where the appellant followed him, pulling down AA's shorts and underwear to expose AA's penis and then pulled at AA's penis. The appellant then told him "don't tell your mum or you'll get in trouble; I'll kill you if you tell mum". When AA was showing the appellant his room at home the appellant pulled down AA's trousers and underwear and AA said that he saw the appellant also pulling down AM's trousers. The appellant also brought up a picture on his computer and told AA to look at it and AA described the picture as a dummy with a penis hanging out and two naked women beside it. The appellant had again told AA that he would kill him if he told his mum. The appellant also told AA that he had had sex in school in the toilets with his girlfriend. He told police that the appellant grabbed his hand and made him touch his private parts and that this had occurred on several occasions in the appellant's room, in a caravan, in the house where they first lived and in the house to which they moved after the first house had been destroyed by a fire. He also said that the appellant told him "if you tell mum I will spit on your grave". A further incident occurred when they were playing "battleships" in the caravan and the appellant touched AA under the table. Finally, AA described how in the appellant's family caravan, the appellant got AA to go into the bathroom and record himself on the appellant's iPod touching his private parts.

[5] AM is the eldest brother. In his ABE interview he described how when he and AA were showing the appellant their bedroom in the new house, the appellant put them both on the bed and then touched them; the appellant had touched AM's genitals under his clothes and at the same time put his hand down inside his own trousers. The appellant had done the same to AA. The appellant then threatened to kill them if they told anyone. When in the caravan the appellant showed him a

picture of a doll with a naked man and naked women. The appellant had also shown him a video of a man and woman "doing stuff" by which he meant having sex. AM described how, when they were playing football, the appellant would touch him and his brother under their clothes while the others were looking for the ball. AM said that the appellant touched him "loads of times". He further described that at the caravan the appellant took AM's hand and made him touch the appellant's private parts inside his clothes.

[6] MM is the youngest of the brothers. In his ABE interview he said that the appellant showed him a picture of a naked lady on his phone. On another occasion he had shown him a picture of a naked girl on the phone. He said that the appellant had said to him "if you tell anyone, I will kill you and you will never see your mum or dad again". The appellant had shown him a further photograph of a naked girl. He had used the App on the iPod to send MM a picture of the appellant lying in bed with no top on. The appellant spoke to him about kissing his girlfriend; he also told MM about a website which shows boys and girls kissing while naked. MM described the appellant pulling down AM and AA's trousers and touching them on their "bad places".

[7] In his PACE interview, the appellant admitted to sending a picture of an erect adult penis to AA; said that it was "banter" and that he regretted it. He further accepted that AA had sent him a picture of AA's penis which he had deleted the same day. He was unsure why he sent a message to AA saying "it has to be hard". He denied any wrong doing or sexual intent. He denied all allegations of sexual touching or sexual assaults or threatening to kill them. He said that he had told AM and AA not to tell their mother of their conversations but this was because AM often asked sexual questions. He accepted that he has looked at adult pornographic websites but denied showing them to any of the boys and claimed that they may have found them themselves in his internet search history.

The Charges

[8] The appellant was tried on a total of 29 counts against the three children. He denied all the offences but, after a trial at which the children gave evidence, he was convicted on 26 of the counts. Those were as follows:

Counts 1, 10, 14, 15, 17 and 25

Causing a child under 13 to engage in sexual activity, contrary to Article 17(1) of the Sexual Offences (NI) Order 2008. Sentence on each count 10 years concurrent.

Counts 2, 3 and 18

Possession of indecent photographs of a child, contrary to Article 15(1) of the Criminal Justice (Evidence etc) (NI) Order 1988. Sentence 18 months on each count concurrent.

Counts 4, 9, 22, 23, 26 and 28

Causing a child under 13 to look at an image of a person engaging in sexual activity, contrary to Article 19 of the Sexual Offences (NI) Order 2008. Sentence 5 years on each concurrent.

Counts 7, 13, 20, 21 and 24

Sexually touching a child under 13, contrary to Article 14 of the Sexual Offences (NI) Order 2008. Sentences of 10 years concurrent.

Counts 5, 6, 16, 19 and 27

Threats to kill, contrary to Section 16 of the Offences against the Person Act 1861. Sentences of 5 years concurrent.

Count 29

Meeting a child following sexual grooming, contrary to Article 22 of the Sexual Offences (NI) Order 2008. Sentence 10 years concurrent.

[9] In summary, therefore, the trial judge imposed an overall sentence of 10 years' imprisonment with at least half of that term to be served in prison and with the Parole Commissioners to determine thereafter when during the remainder of the term the appellant should be released. To that she added an extended custodial sentence of 5 years.

The Grounds of Appeal

[10] These were realistically and crisply presented by Mr McKay QC who appeared for the appellant with Mr Lannon. He frankly accepted that this was a serious case involving a grave breach of trust and the taking advantage of three young and vulnerable children. He further conceded that the use of the iPods was a deliberately contrived method of making improper communication with the children and that the appellant's plea of not guilty had meant the resultant need for the giving of evidence by the children who had certain learning difficulties and two of whom required registered intermediaries to assist them so that it was for them "no easy task". He did not therefore challenge the need for condign punishment and the consequent imposition of severe sentences but those actually imposed were he submitted both wrong in principle and manifestly excessive in the circumstances.

The Judge's use of the Victim Impact Reports

[11] In her sentencing remarks the judge referred to the decision of this court in R v TH [2015] NICA 48 in which, at paragraph [19], the court enjoined sentencers

against placing much weight upon Victim Impact Reports that had been prepared without reference to any independent evidence and in particular without reference to the injured parties' medical notes and/or GP records. As Treacy J put it:

> "As a matter of fairness and professional obligation such reports must be assiduously prepared with reference to relevant records."

[12] In the present case Victim Impact Reports had been prepared in relation to each of the three children by a Ms Boyce, described as an experienced Senior Practitioner in Social Work specialising in child sexual abuse. While each child was interviewed by her, as was the foster mother, and transcripts of the victims' ABE interviews and of third party witness accounts examined, no reference was made to GP or other medical specialist notes or records nor to social work records. The trial judge, having noted the importance accorded by TH to such matters, does not then appear to have observed that such material had not in fact been obtained and consulted by the author of the reports in the present case. As a result the judge took at face value the contents of those reports when assessing the degree of harm suffered by the children. As Dr Maria O'Kane, Consultant Psychiatrist, pointed out in her report prepared on behalf of the appellant:

> "There is no evidence to suggest that Mr Magill has physically harmed any of the children. There is a suggestion that he has caused serious psychological harm in my opinion it is difficult to determine the actual extent of the psychological impact of his actions on these children. Ms Boyce outlined symptoms in each child but it is not clear whether or not any of these symptoms existed in part before they were abused and have been re-activated by Mr Magill's behaviour. In addition she recognises that all of them have a learning disability and a history of severe neglect and abuse necessitating removal from their biological parents and the experience of being in a fire. Given this they will all be more vulnerable than peers in the population to the impact of abusive behaviour as a feature of their disabilities and early life experiences. It is difficult then to separate out the actual harm caused by Mr Magill. Arguably the most severe adult action he perpetrated against the children was in making threats to kill rather than the sexual pictures and touching, neither of which are recognised as being at the severe end of sexual abuse. I am not excusing his behaviour or suggesting that his behaviours were without impact but objectively stating that the impact on the children of his behaviours has not been fully described and separated from the children's'

> previous risk of psychopathology. All of the children although frightened and distressed do not appear to meet the ICD Diagnostic criteria for Post-Traumatic Stress Disorder for example, hyper-vigilance, avoidance, reliving and foreshortened affect and as pointed out, none of them has yet been provided with treatment. Mr Magill should not have sexually abused these children but abuse does not automatically cause serious personal injury and in fact the literature suggests that 50% of those in society who have been sexually abused by a single individual, particularly not severely sexually abused, ever reach caseness. These children are vulnerable and likely to develop caseness particularly because of his treatment of them, partially because of their past and partially because they have learning disabilities."

[13] This report by Dr O'Kane was available to the trial judge but these observations are not the subject of comment in the sentencing remarks. It is therefore impossible to know whether the trial judge took them into consideration. She also referred to the fact that one of the children had set fire to the original family home because, according to an account he gave months afterwards, he wanted his family to move to a new house where he could avoid the appellant and the sexual abuse would stop. Mr McKay submitted that there appeared to be no confirmation of this belatedly-expressed motive. This court considers and Mr McKay does not dispute that these vulnerable children were significantly harmed by their treatment at the hands of the appellant but, as Mr McKay put it, the Victim Impact Reports failed, for the very reason identified in TH, to establish a "baseline" from which the extent of that harm could be reliably assessed. We therefore conclude that the trial judge accorded too much weight to the content of these unsatisfactory Victim Impact Reports and accordingly reached a view of the extent of the harm suffered by the children that was not warranted on the evidence.

The age of the children as an aggravating factor

[14] In her judgment the trial judge observed that, as an aggravating factor "these children were particularly vulnerable because of their age". Mr McKay pointed out that most of the offences of which the appellant had been convicted are expressly related to children and in 17 of them expressly to children under the age of 13 with maximum penalties fixed accordingly. He submitted that there was a danger that by adopting the children's ages as an aggravating factor the judge had in effect "double counted" this feature. This court considers that there is substance in this point.

Conclusion on the ten year global sentence

[15] The imposition of a global sentence of 10 years, the make-up of which has unfortunately not been explained, appears to this court to be manifestly excessive. Sentences of 10 years on the most serious counts for which the maximum sentence is one of 14 years were not warranted on the facts established by satisfactory evidence. Indeed, on Count 29, that of grooming a child, the sentence of 10 years imposed was the maximum possible. We consider, having taken full account of the measured submissions of Ms O'Kane, who appeared for the prosecution both at the trial and on the appeal, that the appropriate global sentence for these offences is one of 7 years' imprisonment being 3½ years in custody and a similar period on licence. Accordingly, on each of counts 1, 7, 10, 13, 14, 15, 17, 20, 21, 24 and 25 we substitute for the sentence of 10 years a sentence of 7 years and on count 29 we substitute for the sentence of 10 years a sentence of 5 years. The remaining sentences will be unaltered and all sentences will be concurrent.

The imposition of an Extended Custodial Sentence of 5 years

[16] The trial judge concluded that the appellant poses a danger to children within the meaning of the Criminal Justice (NI) Order 2008. She further concluded that in order to protect the public an extended custodial sentence would be both adequate and required. She assessed that period as one of 5 years. The appellant challenges both the justification for and in any event the length of that extended sentence.

[17] The genesis of the extended sentence imposed lay in the careful pre-sentence report prepared by Ms Atkinson of the Probation Board. It repays quotation at some length:

> "Using PBNI's risk assessment tool, ACE, Mr Magill is assessed as posing a high likelihood of re-offending. This is largely attributable to his level of denial and lack of insight and responsibility for his actions and evidence of distorted thinking.
>
> **Risk of Serious Harm**
>
> PBNI assess an offender to be a significant Risk of Serious Harm if there is a high likelihood of the offender committing a further offence, causing serious harm, ie death or serious personal injury.
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> The Court is likely to be very concerned given the nature of the offences and the on-going impact upon the victims. A multi-agency risk management meeting was convened on 5 May 2015 to explore these issues. The risk management meeting considered that the factors in this case were finely balanced when considering the threshold of significant risk of serious harm as outlined. It was

agreed that Mr Magill has demonstrated capacity to inflict harm and that this was evidenced in the offences perpetrated against the victims. It was debated at this time, whether the inclusion of significant external controls may help support Mr Magill and lower the likelihood of harm. It was agreed that should Mr Magill agree to compliance with the direction of the Court and subsequent conditions he may be managed within the community. The controls discussed include but are not limited to the following:

- Notification Requirements with the PSNI.

- Public Protection Arrangements for Northern Ireland, a process which will require a multi-agency monitoring and a risk management plan to be implemented.

- Limited access opportunities with Mr Magill unlikely to be able to gain access through positions of responsibility through the imposition of a Disqualification Order.

- Adherence to the restrictions offered by a Sexual Offences Prevention Order (SOPO), if deemed appropriate by the court.

- PBNI supervision and compliance with assessed programmes, ie Community Sex Offender Group Work Programme.

- Adherence to Child Protection Procedures.

While we acknowledge that while external controls can be effective, it is essential that the defendant should both accept and comply with these directions in its fullest sense and in the case of Probation supervision that he gives his consent to programme involvement. To this end any assessment of significant risk of harm was contingent upon this compliance. On 7 May 2015 a further interview was arranged with Mr Magill and this position was explained to him. Mr Magill advised that he would not be willing to undertake any work related to sexual offending nor would he be in an environment where he would be in the company of people convicted of sexual offences. The supervision process was

> explained and he was advised that he would be afforded the opportunity to work through these issues with professional support. However, at this juncture this is not a course of action he feels he will be able to allow. When discussing the mandatory Notification requirements, Mr Magill suggested he could not fully accept any controls which reinforces his guilt in these matters.
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> As a result of the above the risk management was reconvened on 11 May 2015. It was the agreement of the meeting that, considering the information available, and the extent of Mr Magill's attitudes and distorted thinking he does meet the threshold for significant risk of serious harm."
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> The report then set out the factors which had contributed to this assessment and continued:
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> *"Until such time as the defendant begins to recognise the potential risk he poses and addresses the areas highlighted, the risk of significant harm to others will remain. An ongoing holistic approach, which would include compliance with external controls alongside therapeutic work, is a necessity. It is my assessment any sentence should include a period of post-supervision within the community to continue to assess and manage risk."* (emphasis supplied)

[18] The essence of Mr McKay's submission that the extended sentence was not required was that the conclusion of the probation officer that the appellant would not be willing to undertake any work in relation to sexual offending nor indeed to be in an environment where he would be in the company of other people convicted of sexual offending was not correct but was rather due to a misunderstanding on her part as to the appellant's true attitude to participating in such therapy. It was submitted that an examination of the evidence of Ms Atkinson given at the sentencing hearing would confirm such a misunderstanding and a transcript was accordingly provided to this court.

[19] The court was brought at some length through that transcript but is quite unable to accept the submission that its contents support a conclusion that the appellant's attitude to therapy was somehow misunderstood by the probation officer. In her evidence the officer firmly rejected the suggestion of a "communication breakdown" leading to an erroneous recommendation based on "a wrong assumption of fact". She summarised the position by saying:

> "I made it very clear about the risk of serious harm and the need for the controls and why they were there and that if he was not able to comply with this … certainly he made it quite clear at each level the pieces that he was not able to do or was not willing to comply with … but no, it was made very clear."

[20] The appellant may now have belatedly come to appreciate the potential consequences for him of his intransigent approach to acceptance of the idea of therapy. Certainly it is much to be hoped that he will change his attitude and agree to participate in the therapeutic work that the Probation Board, the trial judge and this court all consider necessary. However, for the purpose of this appeal we are entirely satisfied that the judge was correct on the material available to her (and to us) to order an extended custodial sentence.

[21] However, turning to the length of that extended sentence, we consider on the basis of information helpfully provided by Ms O'Kane, who presented the prosecution case before us in an exemplary fashion, that the term of 5 years is rather longer than is required. She informed us that among the programmes available to prisoners convicted of sexual offences and who have been assessed as suitable for treatment is one of 2 years' duration that can, if necessary, be finished after the offender has returned to live in the community. We therefore consider it appropriate to substitute for the extended sentence of 5 years one of 3 years and to that extent we grant leave to appeal on this ground.

[22] We were not invited to and nor do we alter the other ancillary orders made by the learned judge.