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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 26/2/2013

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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-v-

RD

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCES

(NUMBER 4 of 2012)

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Before: Morgan LCJ, Higgins LJ and McCloskey J

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MORGAN LCJ

[1] This is a reference by the PPS of a sentence of 2 years imprisonment suspended for 3 years for indecent assault and 9 months imprisonment concurrent suspended for 3 years for 2 counts of gross indecency imposed by Judge Kerr QC at Belfast Crown Court on 20 November 2012.

Background

[2] The injured party was born in January 1981 and is the sister of the respondent who was born in March 1973 and is almost 8 years older. The offences occurred during the summer of 1992 when the injured party was 11 and the respondent was 19 years old. The injured party was left in the care of the respondent by their parents in the family home. On some occasions he sent her to the shops to buy papers and showed her pictures of naked women in them. There is no suggestion that the newspapers were other than those that were freely in circulation. At times he would give her sweets after these incidents. Thereafter he progressed to undressing in front of her on a number of occasions. Then he encouraged her to undress so that he would be naked and she would be wearing only her pants. This behaviour occurred

on a number of occasions. During these incidents he would lock the front door and pull the curtains in the house.

[3] Subsequently the respondent while naked asked the injured party to touch his genitals on a number of occasions and she did so. The offending culminated in an incident of indecent assault. During this incident the injured party was naked save for her pants and the respondent was also naked. He asked the injured party to lie down on a bed face down and he lay on top of her. He rubbed his erect penis all over her back and pushed it against bottom so that she was sore. He ejaculated during this incident.

[4] The injured party reported the matter at school on 31 January 1996. The respondent then left the family home, leaving a note indicating he was sorry and that his sister was not to blame herself for what he had done. The injured party says this occurred some time after 31 January 1996 whereas the respondent states that it was the same day. A complaint was not made to police but the offending behaviour was made known to Social Services. Counsel for the respondent outlines how he attended a psychiatrist with expertise in the area of sexual deviance and how there were several family issues ongoing including gender issues relating to another brother and gambling problems associated with their father.

[5] The injured party made a complaint to police in England in 2009 but felt unable to pursue it until giving her recorded interview to police on 26 May 2010. The respondent was interviewed by police on 16 February 2011 and denied the allegations. He was further interviewed on 8 February 2012 when police put to him evidence that he had made admissions to medical professionals and social workers in 1996, 1999, 2000 and 2002. He made no admissions during these interviews.

[6] The respondent had been interviewed by police on 27 April 2006 in relation to the possession of indecent images of children on 13 March 2004. He accepted that he had used a credit card to pay for access to an internet website. He had accessed that website on two occasions and had viewed indecent images of female children who were partially or fully naked. He stated that the children were mostly teenagers but some were 10 to 12 years old. He admitted the images displayed the breasts and genitalia of the children. He was not charged or prosecuted for any offence arising out of those interviews but the admissions made by him were relied upon as bad character evidence. The images fell into the lowest Oliver category.

[7] The Pre-Sentence Report indicated that the respondent regretted his actions and effects on his sister. He said at the time he did not view the actions as wrong but that during the indecent assault realised his behaviour was serious and following that ceased the abuse. While acknowledging the assault he did not recognise any pattern of abusive behaviour or that there was a grooming process. The report assessed the respondent as not presenting a risk of serious harm.

[8] Dr O'Kane, Consultant Psychiatrist prepared a report in which she noted that the respondent said there had been no planning in what he had done. He denied any touching or penetration and viewed this as sexual exploitation and curiosity rather than serious sexual offending. He stated that at the time he did not realise it was wrong but was now concerned about the impact on his sister. He denied any previous or ongoing interest in children. The opinion expressed in the report was that the respondent appeared to have been opportunistic as a teenager and engaged in sexualised behaviour in the course of experimentation in the context of a family that struggled to discuss or think about sexual matters in a constructive way. There did not seem to be evidence that he presented an ongoing risk to children or others.

[9] The assertions in this report need to be viewed cautiously. The respondent induced the injured party to engage in increasingly serious contact leading eventually to ejaculation over a period of months. He admits that he persuaded her to touch his genitalia. It also appears that in 2006 he paid for access to an internet website to view indecent images of female children.

[10] We have been provided with the victim impact statement but no medical evidence in relation to the injured party. It is clear that she has suffered many challenges in her life and these offences must have had a detrimental impact upon her. It is to her credit that in recent years she has achieved so much.

[11] The learned judge identified as aggravating features the fact that there was more than one incident; the youth of the injured party; the impact upon her; the fact that she was the respondent's sister involving a breach of trust; and the fact that they took place in the family home with a degree of pre-planning. A commensurate sentence for the indecent assault count would be 4 years' imprisonment. Mitigating features were the youth of the defendant at the time of the offence; his clear record in relation to sexual offences; and his guilty plea at the first opportunity. This merited reduction of the sentence to 2 years' imprisonment.

[12] The learned judge further took into account the pre-sentence report assessment of the respondent as a low risk of general offending. It was an unusual feature of the case that the injured party had brought the offences to light in 1996 and the respondent had engaged in some therapeutic treatment. The learned judge considered that this impacted on the proposition that ordinarily no allowance should be made for the historic nature of such an offence. While there were no relevant previous convictions, there was bad character evidence in that the respondent admitted that he had accessed by computer pornographic material involving young girls. The respondent now had a stable relationship and living environment.

[13] Having regard to the above matters the learned judge considered it appropriate to suspend the sentence. Public protection would be afforded by means of the duration of the suspended sentence and the imposition of a disqualification

order in respect of children, a Sexual Offences Prevention Order for 5 years, and registration as a sexual offender for 10 years.

Consideration

[14] This offending had several serious aggravating features. The injured party was only 11 years old at the time and the respondent was 19 years old. The age gap of approximately 8 years is significant. The respondent was placed in a position of trust. The victim has suffered a significant adverse effect. The respondent engaged in a course of conduct during which more serious offending developed. He ejaculated during the course of the indecent assault. These factors plainly justify a starting point of four years imprisonment on a contest.

[15] The respondent pleaded guilty at arraignment and the injured party was alerted that he would do so. He did not, however, admit his guilt at interview. He underwent a protracted period of treatment at Belfast City Hospital which is a considerable indicator of remorse. The learned trial judge took into account his youth but the benefit of that must be marginal in the case of a 19-year-old man. He has no convictions for other sexual offences and has clearly changed his life since his imprisonment for attempted robbery in 1998.

[16] We agree that these are significant mitigating factors and justify a reduction in the starting point to a sentence of two years imprisonment. That cannot diminish, however, the culpability of the respondent in persisting in this abuse over a period of months and the harm that he has caused to his sister. The suspension of a sentence of imprisonment against that background could only be justified in the most exceptional circumstances.

[17] The learned trial judge relied upon the mitigating factors as a whole to justify his decision to suspend the sentence. In our view most of these factors are among those frequently found in cases of this nature. We accept that in this case upon the complainant disclosing the abuse in 1996 the respondent admitted his responsibility in a note he left for the family on that day. We also recognise that his subsequent treatment at hospital is a feature not usually found although it is from time to time present where the offender is supported by an institution of which he is a member. We consider, however, that to be exceptional, the circumstances have to be sufficient to justify suspension of the proper term of imprisonment for an offence of this gravity. This was a case of increasing abuse of a vulnerable child over a period of months while in a position of trust. We do not consider that the acceptance of his responsibility to his family and his subsequent treatment are sufficient to justify a suspension of the sentence in the present case. Accordingly we consider that the sentence was unduly lenient.

[18] We consider that we should interfere with the sentence taking into account the discretion available to us and the principle of double jeopardy. We will

substitute a sentence of 15 months imprisonment. The respondent should surrender himself to Maghaberry prison by 10 AM on Thursday, 28 February 2013.