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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

W

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Girvan LJ Coghlin LJ and Weatherup J

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Girvan LJ (delivering the reasons of the court)

Introduction

[1] This is an application by W pursuant to a notice of appeal against sentence dated 8 May 2014 for leave to appeal against a total sentence of 5 years 8 months imprisonment imposed by Horner J following W's pleas of guilty to a total of 23 offences against her children in the 1980s, comprising of 12 counts of wilful neglect of her children, 5 counts of wilful assault upon her children and 6 counts of gross indecency with or towards her children. Leave to appeal was refused by the single judge on 8 August 2014. The applicant's husband, X, was also prosecuted and pleaded guilty to a total of 17 offences comprising 6 counts of wilful neglect of his children and 11 counts of wilful assault upon his children. He was sentenced to a total of 4 years' imprisonment. He sought leave to appeal that sentence. He was likewise refused leave by the single judge. He has since abandoned his appeal. At the conclusion of the application we informed the applicant that the application was dismissed and that reasons would be given later. We set out our reasons in this judgment.

[2] The learned trial judge prohibited publication of any information that would identify the victims. For the purposes of his sentencing remarks he referred to the applicant as "W" and to the father as "X." In this judgment we use the same mode of anonymising the identity of the mother and father of the victims.

[3] Mr Kelly QC and Mr Fox appeared for the applicant. Mr MacCreanor QC and Mr Steer appeared for the Crown. We are grateful to counsel for their well-presented written and oral submissions.

History of the Case

[4] On 29 August 2013 W and X were committed for trial in the Crown Court sitting in Belfast in respect of a total of 50 and 26 counts, respectively, relating to the cruelty and physical and sexual abuse of their four children during the 1980s. Four other persons, two of whom were the children's uncles, were also committed for trial on various counts of physical and sexual abuse of the children.

[5] At their arraignment on 18 October 2013 both applicant and X pleaded not guilty to all counts. However, on 10 January 2014 W was re-arraigned and pleaded guilty to 12 counts of wilful neglect, 5 counts of wilful assault and 4 counts of gross indecency. She subsequently pleaded guilty to two additional counts of gross indecency on 13 January 2013. The remaining counts were left on the books not to be proceeded with without the leave of the court. On 15 January 2014 X was re-arraigned and pleaded guilty to 17 of the counts against him. The remaining counts were left on the books not to be proceeded with without the leave of the court.

[6] On 11 April 2014 the judge sentenced W to a total of 5 years 8 months imprisonment and, pursuant to the Protection of Children and Vulnerable Adults (NI) Order 2003, he disqualified her from working with children. On the same date X was sentenced to a total of 4 years imprisonment and, pursuant to the Protection of Children and Vulnerable Adults (NI) Order 2003, he disqualified him from working with children.

The Offences

[7] W is aged 58 years. She was married to X in 1971 when they eloped to Gretna Green. He is aged 60 years. They had six children together in quick succession when they were very young. Four of them were the victims of their criminal behaviour. They are A, a male, now aged 39, B, a female, now aged 35, C, a female, now aged 36 and D, a female, now aged 38. W and X lived with their six children at various addresses in and around South Down until they divorced in the 1990's. All six children were taken into care in 1986. During and after the marriage, all the children spent time in children's homes, training schools or under the care of foster parents. The family was dysfunctional and hopelessly chaotic.

[8] Horner J at paragraphs [3], [5] and [6] of his judgment described conditions thus:

> "[3] What these four children had to endure is almost unimaginable. They were neither properly clothed nor fed. They were often hungry. Their diet was poor. They

were allowed to run wild. What discipline was administered by their parents was often physically abusive. The first defendant was often drunk or under the influence of drugs. She often brought men back to the family home for drinking sessions during the day and to enjoy sexual relations with them. Some of the children were sexually abused by these visitors, one of these was their uncle, the fifth named defendant. Another uncle, the sixth named defendant watched as the first named defendant abused her own child. The children were unwashed. They wore the same clothes for days. No attempt was made to see whether they attended school, never mind do the homework which they had been set. Some of them suffered arrested physical and mental development because of a lack of stimulation. For example, B was confined to her cot for the convenience of the first named defendant. The social worker recalls:

> "B was almost 2 years and should have been walking and talking with an extensive vocabulary when, in reality, she couldn't speak or stand alone. This is quite shocking. She should have a considerable range of motor skills."

The home was filthy. C describes one of the houses as being "a dirty hole". There were mice droppings in the Cornflakes box in one of the homes, hardened dog excrement on the floor of another house and one witness describes seeing urine and faeces lying in a wardrobe at one of their residences. There were holes in the walls and broken windows at another of the houses where they lived during this period in the 1980's. There were no sheets or pillows on the beds. Mattresses were ripped and full of holes. D, who suffered from bedwetting, was often left lying in her own urine. The children were the subject of ridicule by their parents. D was referred to as being a penny short of a shilling by her father. The second named defendant was away working long hours, but he did nothing to intervene. He preferred to turn a blind eye to what was happening when he was away working. Indeed, the first named defendant's callous disregard for the welfare of her offspring was almost matched by the second named defendant who was fully aware of their living conditions and did little, if anything, to improve them.

> [5] The first and second named defendants were inconsistent in their treatment of the four children, content most of the time to let them run wild. When they did administer chastisement, this often involved physical beatings of the most brutal kind. For example, the first defendant used a poker to administer a beating on A. The second defendant was guilty of physically assaulting, D, C, and B. Indeed, on occasions he beat B so severely she wet herself.
>
> [6] But it was not enough to neglect and physically ill-treat these defenceless young children. The first named defendant brought back some of her drinking companions and sexual partners to the family home. These included Patrick Kilmartin, the third named defendant, born on 23 May 1954, a baker from Newcastle. Thomas Fitzpatrick, the fourth named defendant, born on 11 May 1960, a policeman from Dundrum and two of the children's uncles and the first named defendant's brothers, Y who is aged 64 and Z who is aged 70. These men were involved and/or connived in the sexual abuse of some of these children. Their behaviour was criminal, shameful and despicable."

The relevant counts

[9] The following is a brief summary of the individual counts on the indictment to which the applicant and X pleaded guilty:

(i) In respect of both W and X:

Count 3 - (Cruelty to child/wilful neglect) – Poor standard of living conditions home when A was 5-8 years old.

Count 4 - (Cruelty to child/wilful neglect) – Poor standard of living conditions in home when A was 9-12 years old.

Count 5 - (Cruelty to child/wilful neglect) – Ongoing general neglect of B by both parents when she was 4-7 years old.

Count 6 - (Cruelty to child/wilful neglect) – Ongoing general neglect of B by both parents when she was 8-11 years old.

Count 7 - (Cruelty to child/wilful neglect) – Ongoing general neglect of C by both parents when she was 6-9 years old.

Count 9 - (Cruelty to child/wilful neglect) – General neglect of D when she was 5-8 years old.

(ii) In respect of W only:

Count 11 - (Gross indecency) – Forced A, when he was 5-7 years old, to suck her breasts.

Count 12 - (Gross indecency) – Forced A, when he was 5-7 years old, to suck her breasts.

Count 27 - (Cruelty to child/wilful assault) – Pushed A, when he was 3-7 years old, against a mirror and sliced his finger.

Count 28 - (Cruelty to child/wilful assault) – Hit A with a poker when he was 3-7 years old.

Count 37 - (Cruelty to child/wilful assault) – Hit A with a poker when he was 11-12 years old.

Count 38 - (Cruelty to child/wilful neglect) – Condition of home and failing to feed A when he was 11-12 years old.

Count 39 - (Cruelty to child/wilful neglect) – General neglect of B until he was taken into care at the age of 10.

Count 40 - (Cruelty to child/wilful neglect) – Failing to seek medical treatment when C suffered a head wound when she was 4-9 years old.

Count 41 - (Cruelty to child/wilful neglect) – General neglect of C when she was 5-9 years old.

Count 42 - (Cruelty to child/wilful neglect – General neglect of C when she was 8-9 years old.

Count 43 - (Gross indecency) – Forced C and D to watch her having sexual intercourse with various men when C was aged 8-9 years old.

Count 45 - (Cruelty to child/wilful neglect) – General neglect of D when she was 4-8 years old.

Count 46 - (Cruelty to child/wilful assault) – Beating D with a belt when she was 4-8 years old.

Count 47 - (Cruelty to child/wilful neglect) – General neglect of D when she was 4-8 years old.

Count 48 - (Gross indecency) – Making C and D watch her having sexual intercourse with a man when D was 7-8 years old.

Count 96 - (Gross indecency) – Making A watch his uncle perform sexual acts on her (not involving intercourse) when A was 8-10 years old.

Count 97 - (Gross indecency) – Making A watch his uncle perform sexual acts on her (not involving intercourse) when A was 8-10 years old.

Pre-sentence report

[10] A report by Patricia Barr of the PBNI, dated 26 February 2016 describes W as a 58 year old woman who left school without any formal qualifications and married X when she was 16. She gave birth to her first child when she was 18 and had five further children after that. W claimed that she was the victim of domestic violence, including sexual violence, by X and was fearful of X. W claimed she had been treated for depression for nearly 30 years and that she had self-harmed in the past. W acknowledged that she found it difficult to cope with so many children but she denied that they or the family home were neglected. Rather she claimed that the children were "out of control" which she blamed on X due to his lack of input. W denied sexual activity with other family members; denied forcing the children to conduct sexual acts and denied forcing them to watch sexual acts (saying that they may have accidentally seen sexual acts if they came down from bed). W was assessed as presenting a medium risk of re-offending but not a significant risk of serious harm to the public. The author of the report noted:

> "In interview [W] failed to demonstrate any remorse or indeed any distress that her children feel abused in any way either by her, other family members or associates of hers. In this respect she represents as somewhat callous and cold. She has had no contact with her children for many years now. She further alleges that as adults the victims would visit her and that they would physically assault her and steal her benefit money. She believes that her children made the allegations against her motivated by financial gain."

The author of the report opined that the applicant required professional intervention and that she should be made subject to an Article 26 licence upon her release from prison.

Victim impact statements

[11] Victim impact reports were compiled for A, B, C and D. Each of the victims described how the treatment to which they were subjected as children had ruined

their lives. It has impacted on their social functioning, private relationships and mental health. Their treatment as children had caused some of the victims to either self-harm or attempt suicide in the past. Three of victims have been diagnosed as suffering from post-traumatic stress disorder.

The judge's sentencing remarks

[12] In a meticulous and careful judgment the judge gave careful consideration to the principles applicable to the task of sentencing in historic offences, paying careful attention to the harm caused to the victim and he considered carefully the question when concurrent or consecutive sentences are appropriate. He further considered the discount for the pleas of guilty entered by the applicant and X, respectively, and determined that 20% was appropriate in the circumstances. In relation to W, the judge said that he was uncertain whether W's motivation for the gross indecency offences was sexual gratification and/or sexual arousal from the children's humiliation or whether she was motivated by the need to control or, perhaps, did the acts simply because she could. He noted that the offending took place when W was relatively young to be married with a family of six children. He took account of the facts that her close family were renowned alcoholics, that she too became an alcoholic and that she was the victim of regular domestic violence. He considered that while the wilful neglect and wilful assaults were persistent and serious they fell short of being extreme. However, they were aggravated by the length of time over which they took place. He noted the contemporaneous documents from the time which indicated her low intelligence and also the fact she received minimal assistance from her then husband, X, in caring for the six children. However, in referring to W's denials in police interview and her refusal to countenance any responsibility when being interviewed for the Pre-Sentence Report, the judge commented:

> "Your chilly indifference to your children's welfare generally and your complicity in the sexually deviant behaviour you inflicted on A, C and D speaks of a heartless tormentor interested primarily in her own pleasures and enjoyment. However, I do accept that you are not a predatory paedophile. Not only are you pathetic, weak willed and inept but you are also selfish and uncaring."

[13] The judge identified what he considered to be the aggravating factors namely:

- W's position of trust;
- She was one of two primary carers looking after young and vulnerable children and also offended in their presence;
- The coercion of A, C and D in respect of the gross indecency offences;
- The offending took place over a prolonged period of time;
- The absence of genuine remorse;

- The serious adverse psychological effects on all four victims.

[14] He considered the mitigating factors to be:

- The absence of previous convictions;
- W's indifference and apathy towards the children being a result of her low intelligence and alcohol and drug dependency;
- W's immaturity and inability to cope and her physical and mental problems including depression.

[15] In relation to the counts of cruelty, the judge used a starting point of 18 months, which was increased to 20 months taking account of the aggravating and mitigating factors. He then discounted that to 16 months for the guilty pleas. He ordered the sentence on each of the wilful neglect counts to run concurrently to each other. He ordered the sentence on the wilful assault counts also to run concurrently to each other but consecutive to the wilful neglect. In respect of the gross indecency counts, the judge took a starting point of 12 months which was increased to 15 months taking account of the aggravating and mitigating factors. He then discounted that to 12 months to take account of the pleas. He ordered counts 11 and 12 to run concurrently to each other but consecutively to the other counts. Similarly he directed the sentence on counts 96 and 97 to run concurrently to each other but consecutively to the other counts. Likewise the sentence on counts 43 and 48 were to run concurrently with each other but consecutively to the other counts. This resulted in a total sentence of 5 years 8 months which the judge concluded was appropriate applying the principle of totality.

The grounds of appeal

[16] W's grounds of appeal against sentence can be summarised as follows:

(i) The imposition of consecutive sentences was unjustified in the circumstances;
(ii) The sentence was contrary to the totality principle ;
(iii) The judge failed to give adequate consideration to the mitigating circumstances;
(iv) The judge failed to distinguish the applicant from those offenders who carried out the offences with full knowledge of the pain or abuse being caused;
(v) The judge set the applicant's level of culpability too high and caused a marked disparity between her sentence and that of X.

The parties' submissions

[17] While accepting that the judge had carried out the sentencing exercise with great care Mr Kelly on behalf of the applicant submitted that the overall sentence which equated to a sentence of 7 years 1 month on a contest was manifestly

excessive. Although grave, her neglect of the children was not the worst of its kind and was as a result of ineptitude, alcoholism and domestic violence. Furthermore, neglect often includes instances of assault and, therefore, the totality of the cruelty offences should not have been in excess of the 2 year maximum for an individual offence. The judge's sentence equated to a sentence of 3 years 4 months in a contest. Moreover, the majority of the gross indecency offences related to making the children watch sexual acts rather than them being directly involved in the sexual acts. Whilst grave, they were not of the worst kind and were as a result of her drunkenness and chaotic lifestyle. Counsel argued that insufficient credit was given for her plea of guilty given that originally the case against her was much more serious and that one of the victims was not going to give evidence at trial. The judge failed to give adequate credit for the fact she had suffered domestic violence which was an agreed fact with the prosecution; the fact she had tried over a long period of time to care for the children but was simply incapable of such responsibility; the fact that she lived in the same conditions alongside the children; and her low intelligence and depressive illness for 29 years. It was argued that there is disparity between her sentence and others on the indictment.

[18] Mr MacCreanor submitted that the appeal was without merit. The totality principle was properly considered by the sentencing judge as a central sentencing principle. The prosecution contended that the judge looked carefully at the extent of the mitigation and took full account of all matters. The mitigation argument must be viewed in the context of the applicant's ability to "hoodwink" Social Services as to her behaviour, the lack of any real maternal instinct, the probation assessment that she is somewhat callous and cold and her initial denial of wrong doing and lack of remorse.

Conclusions

[19] The sentencing authorities stress that sentencing in cases of child neglect and child cruelty necessitates a careful consideration of the entire factual context. In R v Orr [1990] NI 287 the Court of Appeal stressed that it is necessary for the courts to protect children and to deter those who might cause them injury. Cases of repeated actions are more serious than a simple incident. The English Court of Appeal in R v Brereton [2002] 1 Crim App Reports (S) 63 pointed out that the sentencing authorities in child cruelty cases are distinctly limited as each case of this type turns on its own facts. The courts must ensure punishment and deterrence (R v Durkin [1989] 11 Crim App Reports (S) 313). There can be an immense variety of facts in such cases and the degree of seriousness with which they will be regarded (Attorney General's Reference (No 105 of 204) [2005] 2 Crim App Reports (S) 42). It is thus clear that no two cases in this field will be the same and the precedent value of other sentencing decisions in different factual context will be limited.

[20] At the time at which the offences in the present case were committed the sentencing maxima for each of the relevant offences was two years' imprisonment. The statutory maximum in respect of sentences has been considerably increased.

The sentencing judge was required to ensure an overall sentence that was proportionate in the light of the more limited sentencing maxima at the time of offending.

[21] At the outset of his oral submissions Mr Kelly sought to argue that the judge had misdirected himself in the context of the sexual offending by others. It was argued that the judge had treated the applicant as liable for the sexual acts of others whereas her own sexual offending was limited. However, it is clear that the judge recognised that the applicant did not accept that it was an aggravating feature of specific neglect that the children fell to be abused by others. He took account of the applicant's low intelligence and the fact that she appeared to be oblivious to the more important aspects of childcare. Reading the judgment of the sentencing judge fairly we do not consider that he misdirected himself in this regard.

[22] In relation to the sentences fixed in respect of the child neglect and the wilful assault counts we detect no error of approach on the part of the judge. It is necessary to bear carefully in mind that the offences related to four separate children over a protracted period and that the wilful assaults were separate categories of offending. The judge decided to run the sentences in respect of those counts concurrently rather than consecutively, which he could properly have done subject to totality, a point which, according to Crown Counsel's skeleton argument unchallenged on that point, was accepted by the defence during the plea.

[23] In relation to sentencing in respect of the sexual offences we detect no error on the part of the judge in deciding to impose consecutive sentences. As is clear from Attorney General's Reference (No 2 of 2009) [2009] NICA 44 there are various permutations by which a sentencing judge is entitled to arrive at the appropriate global or total sentence. It is clear that the judge was fully and correctly aware of the totality principle. The ultimate question in this application is whether the total sentence was manifestly excessive.

[24] Mr Kelly in his submissions sought to reduce the applicant's culpability and down play the seriousness of the sexual offending which he described as by no means the worst of its kind in the calendar of the offence of gross indecency. Nevertheless, as counsel conceded, the offences were grave. They were depraved acts involving separate children, separate occasions and a number of separate sexual partners of the applicant. The decision by the judge to make the sentences consecutive and to pitch the sentences at the level at which he did cannot be faulted. He properly took account of the maximum sentence available in respect of the offending at the time. It is clear that under the current sentencing regime an overall sentence would have been very considerably longer. The resultant total sentence imposed by the judge could not be categorised as excessive, much less manifestly excessive.

[25] We reject the submission that the judge did not give sufficient weight to the pleas of guilty. The pleas of guilty came at a late stage and even then as appears

from the pre-sentence report, the applicant continued to deny guilt, failed to demonstrate remorse and continued to make allegations against the children. The discount of 20% was as generous as the applicant could have hoped for.

[26] Having regard to the fact that X was not implicated in the sexual offending and taking account of the particular circumstances applying to the other defendants we see no substance in the disparity argument.

[27] Accordingly, the applicant has failed to persuade the court that the sentence imposed by the sentencing judge was manifestly excessive and it is for this reason that the application for leave to appeal was dismissed.