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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-

JR

_____

Before Kerr LCJ, Campbell LJ and Sheil LJ

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KERR LCJ

Introduction

[1] This is an appeal against sentences imposed by His Honour, Judge Burgess, the Recorder of Belfast, at Belfast Crown Court on 13 June 2005 for a series of offences to which the appellant had pleaded guilty. These comprised a succession of sexual assaults on his two daughters over a period of years. In relation to the first victim (whom we shall refer to as 'AR') the offences took place between 1974 and 1982. She was aged between four and twelve years during this period. As regards the second victim (whom we shall call 'BR') the offences occurred between 1980 and 1987 when she would have been between the ages of eight and fifteen. The appellant has been in custody since November 2004.

[2] The Recorder imposed a series of concurrent and consecutive sentences in relation to the total of twenty two charges to which the appellant pleaded guilty. We need not set these out in any detail because Mr Lyttle QC, who appeared with Mr Barry Gibson for the appellant, accepted that the imposition of consecutive sentences was appropriate. The total effective sentence was ten years' imprisonment. The appellant was ordered to remain on licence when he is released from prison pursuant to article 26 of the Criminal Justice (Northern Ireland) Order 1996. The propriety of this disposal is not challenged on the appeal.

[3] The appeal is presented on two grounds. It is argued firstly that, applying the principle of totality, the selection of an effective sentence of ten years' imprisonment was excessive and disproportionate. Secondly, it is submitted that, because of the appellant's current medical condition (he suffers from cancer of the larynx which required a total laryngectomy in March 2006) a more merciful disposal is now warranted.

Factual background

[4] The appellant pleaded guilty to ten counts of indecent assault in respect of AR. Without unnecessarily rehearsing the detail of these sordid offences they consisted mainly of her being taken from her bed and laid down on the appellant's bed, her underwear was removed and the appellant fondled her vagina. On occasions he would place her hand on his penis and hold it there while he masturbated to ejaculation. The offences took place late at night or early in the morning, often when the children's mother was at work. AR recalls that on one occasion near the time that she was to celebrate her first holy communion she had a laceration on her vagina as a result of the abuse and the appellant gave her cream to put on it.

[5] The appellant admitted eleven counts of indecent assault and one of gross indecency with a child in respect of his daughter BR. These usually took the form of his masturbating while fondling the child's vagina. On one occasion, he grabbed her left breast. On another occasion he attempted to place his penis in her mouth. The acts of masturbation occurred on a number of occasions each week on an ongoing basis over the period of seven years. As the Recorder put it, this systematic abuse "became virtually a way of life for this young girl".

[6] The offences against BR largely took place in the appellant's bed. Her mother would take the child to the parental bed as a form of protection from the appellant's violence which often occurred when he had been out drinking. After her mother left for work at around 6am the child would remain in the parental bed and the abuse would take place there. On other occasions the appellant would be in bed and would knock the bedroom floor to summon BR to bring him cigarettes or a glass of water. When she delivered these to him, he would ask her to get something out of the bedside cabinet, run his hand up the inside of her leg and masturbate.

The appellant's personal background

[7] The appellant is now almost 64 years' old, having been born on 13 January 1943. He came from a violent home and his father had a drink problem. When he was aged twelve he was the victim of a predatory male rapist and as a result tried to commit suicide. Although he had been reasonably successful in his studies up to that point, he left school without any qualifications but with competent literacy and numeracy. He had a series of manual jobs until 1968 but after that undertook a number of self-employed occupations, the most recent of which was window-cleaning. He has a longstanding alcohol problem, having begun drinking at the age of thirteen. He has been married for forty years but this was punctuated by violence and he has been ejected from the matrimonial home after these offences came to light. There are seven children of the family, five boys and the two girls who have been the victims of his abuse.

[8] The appellant had two previous offences, both over forty years ago; a juvenile court appearance in 1952 for an offence of malicious damage, and a second court appearance in 1960 for malicious damage and larceny for which he received six months imprisonment. He has no previous sexual convictions and no further convictions for any offences occurring after 1987. He is to be treated as having a clear record, therefore.

The appellant's medical condition

[9] At the beginning of 2006 the appellant was transferred from HM Prison Magilligan to hospital where he was found to have a large laryngeal tumour mass. This required a total laryngectomy and right modified radical neck dissection. He has a permanent tracheostomy stoma and requires to use a suction pump to clear his airways of mucus. He has undergone post operative radiotherapy and there is a risk of the recurrence of cancer. He is only able to speak by using an electronic voice-box but has not become proficient in its use so far. The prognosis for his future is guarded.

The appellant's psychiatric state and insight into his offending

[10] A report from Dr Ian T. Bownes, a consultant psychiatrist, recorded no evidence of a categorical disorder of personality but did note "significant and longstanding deficits regarding his ability to manage negative mood states such as stress, boredom or undue emotional demands from others including his partner without recourse to alcohol". Dr Bownes expressed the view that since such individuals "often find the safety from the

emotional demands of a partner by engaging in sexually offensive behaviours with compliant and emotionally unsophisticated others particularly gratifying", the offending was opportunistic. It arose from the appellant's character deficits rather than being within the clinical diagnosis of paedophilia which would render future reoffending inevitable. While Dr Bownes noted that re-offending of this nature was likely to be low, in some individuals "sexual interest in pre-pubertal children can remain in fantasy for some time and that extinguishing the interest completely can be difficult particularly in the absence of age appropriate relationships and leisure activities that are solitary or do not involve emotional investment in wholesome others…" He recommended residency in a supervised setting, attendance at a sex offender programme, victim work to address the appellant's apparently limited understanding of the impact of his behaviour, advice and guidance on coping with negative emotions and stress without alcohol and advice and guidance on developing and maintaining age appropriate relationships. Dr Bownes advised that the appellant is naturally extremely concerned about his present medical condition and stated that as a result of continuing stress and anxiety the possibility of a prolonged and distressing depressive reaction could not be discounted.

[11] An educational report from Colin McClelland, a clinical psychologist, indicated that the appellant was of average and sound intelligence, with a strong reading ability and should be able to discriminate between right and wrong, at least in straightforward circumstances.

[12] The pre-sentence report from the Probation Service, while acknowledging that it was more than twenty years since the appellant last offended, suggested that this did not preclude the risk of further offending, especially if he fails to address the reasons for his behaviour. Some concerns were expressed in relation to the risk to other children but the probation officer believed that the likelihood of reoffending would be reduced if the appellant was willing to take full responsibility for his offending and successfully engage in a sex offender treatment programme to understand and take control of his behaviour.

[13] The appellant pleaded guilty at an early stage, although when he was interviewed about the offences by the police claimed that he was unable to remember committing the offences because of the effects of his alcohol abuse. Pre-sentence and psychiatric reports indicate that he is not forthcoming about the offences and takes limited responsibility for his

actions, blaming the abuse on drink. We consider, however, that the appellant is entitled to the full appropriate discount to reflect his early pleas of guilty.

Victim impact reports

[14] The victim impact report on AR stated that while the abuse was ongoing she at first thought that it was normal, but realised this was not the case by the time that she was aged eleven or twelve years. She acquired one CSE in English, left school at the age of nineteen, and is in full-time employment. She has been in a stable relationship for 4 years, with one son of 18 months. At the time of the report (April 2005) she was pregnant with her second child. She has had a history of depressive episodes, but has not inflicted harm on herself. She has coped poorly with stress in the past and is obsessive about washing her hands, which she blames on the abuse.

[15] AR has few happy memories of childhood, due to the abuse and to witnessing violence by her father towards her mother. On realising that the abuse was wrong, she began to hate her father, and this affected her emotional development. She has difficulties with intimacy, has a low opinion of herself, and has had flashbacks of the abuse, especially during the criminal proceedings. The disclosure of abuse has disrupted family relationships, especially with her brothers, whose pride she describes as being "hurt". She had difficulty in conceiving, which she felt was punishment for allowing herself to be abused. During this period she suffered from depression and was off work for four months.

[16] In his report on AR, Dr Michael Nicholson stated that she was in the difficult position of trying to protect her mother from her father during adolescence. Her past depression and post-traumatic flashbacks were, he considered, likely to have been linked to her abuse. Her obsessive compulsive symptoms and difficulty in controlling her temper are characteristic of young women who have been abused. The abuse has affected her relationship with her son, of whom she is overprotective (with separation anxiety) and Dr Nicholson felt that she could face difficulties when he gets to the age at which she was first abused. She has done well to acquire permanent employment and remain in a stable relationship.

[17] The report on BR indicated that she suffered from enuresis until the age of 16. She tended to get into conflict at school. She left school at 18

with one exam in physical education. She worked in a residential home until she became pregnant, but after that worked in community centre after school clubs and with special needs children. She is currently a school dinner supervisor. She enjoys working with children and felt that she was protecting them through her work in after school clubs.

[18] BR has one daughter aged 8 and a son aged 3 to her current partner, with whom she lives. She has a history of alopecia which recurred at the time of the police investigation. At the age of 9 she believes that she developed a sexually transmitted disease from her father's abuse, with bleeding from the genital area. She disclosed her abuse during a family row at the age of twenty but was not believed and following this took an overdose. She subsequently retracted the allegations but repeated them some twelve years later. She suffered depression after the birth of her second child (this remained untreated) and attended a Women's Centre for counselling. She described her childhood memories as spoiled by the abuse. She remembered trying to protect her mother by staying in bed with her, and then being abused by her drunken father. She has always felt vulnerable in a sexual relationship and had a fear of intimacy when younger. Despite the abuse, she continued to live with her parents up to 2004, as she was afraid that other children (including her brother's children) would be abused by her father. She felt that she needed to stay at home to protect them.

[19] Dr Nicholson concluded that the abuse had a major impact on BR's self esteem and confidence. She acted as a bully in school to gain confidence. The emotional turmoil of the first attempt at disclosure resulted in parasuicide and running away from home. The many years of her adult life spent trying to protect other children visiting the home, and her own daughter living in the home, are characteristic of abused women. Her adult sexuality and enjoyment of intimacy have been affected, and she has difficulty in controlling her temper (also a characteristic of abused women). The enuresis was closely linked to her experience of abuse. She does not suffer from a mental disorder, but has had significant difficulty in adjusting to the events unfolding around the trial and conviction. She would benefit from counselling to help her achieve closure and deal with future issues including her daughter's psychosocial development.

The appellant's arguments

[20] While acknowledging that sentences passed in other cases did not necessarily provide an infallible guide to the appropriate penalty in the present case, Mr Lyttle drew our attention to a number of decisions of this court which, he suggested, clearly indicated that the overall sentence of ten years' imprisonment was manifestly excessive. In particular, he referred to *Attorney General's reference (No 1 of 2003) (JC)* [2003] NICA 19, *Attorney General's Reference (No 12 of 2003) (Sloan)* [2003] NICA 35, *Attorney General's Reference (No 9 of 2003)* [2003] NICA 41, and *Attorney General's Reference (No 16 of 2003)* [2003] NICA 44. Many of the features of these cases were replicated in the present case, Mr Lyttle claimed. He suggested that the penalties imposed in those cases established a range of sentences for offences such as those to which the appellant had pleaded guilty of between three and seven years' imprisonment.

[21] In suggesting that the Recorder had failed to give full effect to the totality principle, Mr Lyttle relied on the decision of this court in *Attorney General's Reference (No 1 of 1991)* [1991] NI 218 where Hutton LCJ outlined the proper approach to this issue in the following passage –

> "The overriding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, must be appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences. In other cases he may achieve it more satisfactorily by imposing concurrent sentences. As Lord Widgery remarked in *R v Kastercum*, if a judge imposes consecutive sentences in respect of several offences arising out of the same situation the disadvantage of adopting this course is that "the total very often proves to be much too great for the incident in question". But we consider that the same disadvantage may arise even if there are two incidents occurring close to each other in time. On the other hand the disadvantage of concurrent sentences may be that the total sentence is too small. That is why we stress that, whether the sentences are concurrent or consecutive, the overriding and important consideration is that the total global sentence should be just and appropriate."

[22] It is worth observing at this point that Hutton LCJ was there dealing with a case in which the offenders had assaulted police officers in an attempt to escape after they had committed a burglary and the issue was whether the imposition of a consecutive sentence for the assault, occurring as it did within a short time of the burglary, would have been appropriate. It appears to us that very different considerations arise where a long series of offences, albeit similar in nature, has occurred over many years. The danger of failing to properly punish a long catalogue of criminal behaviour by imposing concurrent sentences in respect of such offences is, to our mind, both obvious and significant.

[23] The second ground of appeal related to the appellant's current severe medical condition. Mr Lyttle relied on the principle (recognised in such cases as *R v Bernard*) that an offender's serious medical condition might enable a court, as an act of mercy in the exceptional circumstances of a particular case, to impose a lesser sentence than would otherwise be appropriate.

Sentencing in cases of familial sexual abuse

[24] Sentences passed in this jurisdiction in cases of familial sexual abuse have inevitably varied widely. This variation reflects the infinite range of types, duration and effect of such offences. Some cases involve a short period of offending with a single victim. Others involve multiple victims where those who are subject to the abuse suffer grievous long term effects. In some cases the abuse persists for several years. In some instances the effect of the discovery of the offending has an impact on others besides those who are direct victims. In some cases there is a gross breach of trust as, for instance, between a parent and a child. In many cases the offending begins when the victim is scarcely more than an infant; in others the child is more mature. In some cases the abuse is violently coercive.

[25] Comparisons with other cases are especially invidious in this particular sphere precisely because of the wide variety of offending. Such an exercise is also beset with the problem that, despite the fact that in many cases condign punishment has been meted out for this type of offending, familial sexual abuse cases are among the most frequently encountered in courts in this jurisdiction. The maximum penalty for indecent assault has been increased – no doubt in part because the offending continues so persistently – from two years' imprisonment to ten years. All of the

offences to which the appellant has pleaded guilty, however, are subject to a two year maximum penalty and, as the Recorder correctly recognised, it would be wrong to impose consecutive sentences so as to achieve an effective penalty more consonant with the maximum punishment that is now available for more recent offences. It must also be kept in mind that the appellant's offending ended some twenty years ago.

Conclusions

[26] The present case combines many of the worst aspects of familial sexual abuse. Both the appellant's daughters were exploited by him. In the case of one of the girls the abuse began when she was very young. In both cases it continued for many years. In the case of BR it took place with such regularity over a period of some seven years that it became a routine incident of her young life. All members of the family were affected by the discovery that this sexual abuse had been occurring over so many years. Both victims have been traumatised by their father's mistreatment of them and both will continue to suffer as a consequence of it.

[26] All these factors must be taken into account in deciding on the appropriate penalty. It must also be borne in mind that the appellant pleaded guilty at the earliest opportunity and that, quite apart from the fact that he now suffers from a very grave illness, the effect on him of his offending has been the total rejection of his family and the loss of his home, however well merited those consequences may be.

[27] We consider that, applying the totality principle to the appellant's case, and bearing in mind that the maximum penalty for each of the offences was two years' imprisonment, the imposition of an effective ten years' sentence (which is the maximum that could now be passed on a single count of indecent assault) was excessive. We believe that the appropriate overall penalty is one of eight years' imprisonment. We shall therefore quash the sentence of fifteen months passed on those eight counts that were made consecutive with each other and substitute therefor a sentence of twelve months on each of those counts. This will produce an effective sentence of eight years' imprisonment and to that extent the appeal is allowed.

[28] We have carefully considered the medical evidence relating to the appellant's current condition. We recognise that his condition is grave and that, for him, imprisonment will be more difficult to endure than one who

enjoys good health. We have concluded, however, that this is not one of those wholly exceptional cases where an exceptional level of mercy was justified. Consistent with the first principle enunciated in *Bernard* we believe that his medical condition (which might at some unspecified future date affect either life expectancy or the prison authorities' ability to treat the prisoner satisfactorily) was not a reason for this to interfere further with the sentences imposed, although it may be a matter for the Secretary of State to consider in relation to his powers of release.