Neutral Citation No. [2005] NICA 37 | *Ref:* **NICC5357**

Judgment: approved by the Court for handing down | ***Delivered:*** 16/09/05
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

JOSEPH HENRY BATESON

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Before Nicholson LJ, Campbell LJ and Sheil LJ

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NICHOLSON LJ

[1] We have already dismissed Mr Bateson's application for leave to appeal against conviction on 9 counts of gross indecency with a child, 8 counts of indecent assault and one count of buggery. We adjourned the application for leave to appeal against sentence.

[2] We received the Victim Impact Report on the victim (to whom we shall refer as G) at the end of August 2005 and re-listed the case for further argument. Mr Dermot Fee QC had already made submissions in relation to sentence and made further submissions to the court. Mr Hunter QC for the Crown indicated that the Crown did not intend to make submissions. In the course of our judgment we set out the detailed allegations of the victim.

[3] Accordingly we do not intend to rehearse what we said about the offences in this judgment. We remind ourselves that there were a number of specimen counts and that the offences were committed over a period of approximately 8 years.

[4] We accept that a starting-point in dealing with offences committed many years ago can be to ask oneself: what would have been the appropriate sentence(s) if the applicant had been sentenced at the time when the offences were committed? The first offence was committed in 1978 when the victim was 6 years old and the applicant was 13 years of age. The last offence was in 1986 when the victim was 14 years old and the applicant was 21 years old. Accordingly a trial involving all the convictions to what we have referred would have taken place in the late 1980s.

[5] In Cuddington (1995) 16 Cr App R(S) 24 Potter J (as he then was) giving the judgment of the court, said:-

> "The most telling point raised before us seems to be the point made that had the matters been discovered and timeously dealt with, the appellant would have been entitled to be dealt with as a juvenile .. whilst this is not in itself definitive of any sentence which should later be imposed upon him, it is a powerful factor to be taken into account."

And in Dashwood (1995) 16 Cr App R(S) 733 Lord Taylor CJ said:-

> "We take the view that there is no axiomatic approach to a problem of this kind which would entitle the court to say that the right sentencing approach is to look at the matter as at a particular date. We consider that the matter has to be looked at in the round. The fact that the series of offences was committed when the offender was 14 or 15 is, as was said in Cuddington, a powerful factor in affecting the appropriate sentence to pass as at today. On the other hand, it is not the sole and determinative factor. We also have to look at how a 14 to 15 year old might be dealt with today, and we have to look at all the circumstances of the case, including the way in which the appellant chose to conduct his defence."

[6] Lord Woolf CJ said in R v Millberry [2003] 2 All ER 939 at 945:-

> "The fact that the offences are stale can be taken into account but only to a limited extent. It is after all open to an offender to admit the offences and the fact that they are not reported earlier is often explained because of the relationship between the offender and the victim which is an aggravating factor of the offence …".

[7] In Attorney General's Reference No 2 of 2004 (O'Connell) [2005] NIJB 185 Kerr LCJ said at paragraphs [15] to [18]:

> "[15] In its latest advice to the Court of Appeal on sentencing in rape cases (24 May 2002) the Sentencing Advisory Panel suggested that the seriousness of the offence should be assessed by adopting the following approach: -
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> > "The panel suggests that there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the *degree of harm to the victim*; the second is *the level of culpability of the offender*; and the third is *the level of risk posed by the offender to society.* … three more general features … might be considered relevant: the gender of the victim, the relationship (if any) between the victim and the offender, and the nature of the rape itself (whether vaginal or anal)."
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> [16] The panel proposed a starting point of 8 years, after a contested trial, for a case with any of a number of enumerated features. These included the situation where the offender is in a position of responsibility towards the victim and the rape of a child. …
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> [17] In *R v Milberry & others* [2002] EWCA Crim 2891, the Court of Appeal in England accepted the panel's recommendations as to starting points (see

> paragraph [26] of the judgment). The Court of Appeal in this jurisdiction referred to this in the *Thompson* and *Sloan* cases cited above and, while not expressly adopting a similar approach, in the same context remarked that the levels of sentencing in rape cases have historically been higher in Northern Ireland than in England.
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> *Disposal*
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> [18] It is opportune for this court now to confirm that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel."

[8] Mr Fee QC has emphasised the age of Bateson at the time when these offences were committed and the fact that he cannot have had the insight which an older offender would have had. He submits that Bateson presents no risk to society now and is a model citizen, model husband and model father. He married at the age of 25. The effect on his family is devastating and he criticises as artificial the decision of the learned trial judge (the judge) to divide the sentences into the periods which he did.

[9] We consider, however, that the judge was mindful of all the matters placed before us. He said, for example:- "Now I do appreciate that you, as a 13 year old, may not have had a full understanding of life at that time" when the victim was 6 years of age. He went on: "Any excuse that you have as to your own age soon disappeared as you continued to abuse this young boy until he was 14½ and you were 21½. It was an 8 year period of sustained abuse. The abuse involved all sorts of sexual depravity …" And again: "During this period G grew up intimidated by you because of your age, and your physical violence that you perpetrated against him, forcing him to submit to your sexual desires. It took G through his own puberty and beyond. It also included a most brutal act of buggery, committed when G was 11 years of age and you were 18. … G … is a man robbed of his childhood, whose attempt to fill that void has led him into the depths of despair; into the abuse of alcohol, mental illness, episodes of self-abuse, episodes of loss of temper and violence, leading eventually to him seeking inpatient psychiatric care." We have had the opportunity of reading the Victim Impact Report on G which was not before the trial judge but which bears out everything that he says about the effect on the victim.

The judge correctly identified the aggravating and mitigating features. As to the latter he pointed to the fact that since his early twenties the appellant had worked, had married and clearly had become a good husband and father. He took into account that the lives of his wife and children had been altered forever.

In our view he rightly decided to make no reduction by reason of the delay in bringing the charges. As he said: "It was not a delay which involved something hanging over you for a period. The delay was caused by your total physical and sexual dominance of this young boy and in any case could have been avoided by you confessing your crimes at an earlier stage … I am, however, bearing in mind that these offences were committed by you as a 13 to 20 year old, and not by you as you now are, a 39 year old."

In our view he rightly applied the guideline case of Millberry and in view of the period of 8 years of sustained abuse rightly considered it appropriate to pass consecutive sentences to reflect the passage of time and the repetitive nature of the offending.

The starting point for buggery in this jurisdiction is 7 years' imprisonment and we consider the sentence of 6½ years fully justified. He then split the other offences into 3 periods. The first was 1978-1982 when the applicant was in his early to mid teens. For that period the sentence was one year's imprisonment on a number of counts. For the period 1983-84 when he was in his late teens the sentence was 1½ years imprisonment on further counts and for the period between 1985 and 1986 when he was in his early twenties the sentence was 2 years' imprisonment on a number of counts. The judge said: "The escalation of these periods [of imprisonment] reflects your age and added culpability." These sentences were made consecutive to the sentence for buggery and, therefore, the total sentence was one of 11 years' imprisonment.

He then considered the totality of the sentences. He rightly rejected the making of a Custody Probation Order and in our view was correct in holding that it was inappropriate to make any order under Article 26 as he stated: "I do not believe that the public needs to be protected from serious harm after your release." He made the appropriate order in relation to the Sex Offenders Register. Accordingly we dismiss the application for leave to appeal against sentence.

It remains for us to pay tribute to the manner in which His Honour Judge McFarland conducted the trial and to counsel for all the help and assistance which they gave to the court.