

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

SG

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant appealed with the leave of the single judge a total sentence of 4 years imprisonment imposed by the Recorder of Belfast, HH Judge Burgess, after pleas of guilty to 6 counts of unlawful carnal knowledge of a girl under 14, 7 counts of indecent assault on a female child and 6 counts of gross indecency with a child. We dismissed the appeal on 10 September but said that we would give our reasons later.

[2] At the time of the offending the appellant was 19 years of age and the victim was 13 years of age. The appellant and the victim were in a relationship and the sexual activity between them was consensual. He was charged as follows:-

Count 1

Rape – this count was left on the books

Count 2

Unlawful carnal knowledge of a girl under 14 contrary to Section 4 the Criminal Law Amendment Act 1885 in that between 14 and 19 December 2006 he had unlawful carnal knowledge of KB a girl under the age of 14.

Counts 3 to 7 inclusive

Unlawful carnal knowledge of a girl under 14 on dates between 18 December 2006 and 18 January 2007.

Count 8

Unlawful carnal knowledge of a girl under 14 between 18 December 2006 and 18 January 2007 - this offence was left on the books.

Count 9

Indecent assault on a female child contrary to Section 52 of the Offences Against the Person Act 1861 in that between 14 December 2006 and 19 December 2006 he indecently assaulted KB a female child.

Counts 10 to 13 inclusive

Indecent assault on a female child on dates between 18 December 2006 and 18 January 2007.

Counts 14 and 15

Indecent assault on a female child on dates between 31 March 2007 and 1 May 2007.

Counts 16 to 19 inclusive

Gross indecency with a child contrary to Section 22 of the Children and Young Persons Act (NI) 1968 in that between 18 December 2006 and 18 January 2007 he committed an act of gross indecency with or towards a child namely KB.

Counts 20 and 21

Gross indecency with a child between the dates of 31 March 2007 and 1 May 2007.

[3] The appellant was arraigned on 21 January 2009 before HH Judge Burgess, Recorder of Belfast, at Belfast Crown Court. He pleaded not guilty to all counts. On 20 November 2009 he was re-arraigned and pleaded guilty to counts 2 to 6 inclusive and 9 to 21 inclusive and on 4 December 2009 he was re-arraigned and pleaded guilty to count 7. Counts 1 and 8 were left on the books.

[4] He was sentenced by HH Judge Burgess on 21 December 2009 as follows:-

Count 2 - A custodial period of 1 year 6 months

Count 3 - A custodial period of 1 year 6 months consecutive to count 2

Counts 4 to 7 inclusive - A custodial period of 1 year 6 months concurrent with each other and count 3

Count 9 - A custodial period of 1 year consecutive to count 3

Counts 10 to 21 inclusive- A custodial period of 1 year concurrent with each other and to count 9.

A sexual offences prevention order was also made and it was ordered that the appellant sign the sex offenders' register for an indefinite period. The total period of imprisonment imposed was 4 years and the court ordered that Article 26 of the Criminal Justice (NI) Order 1996 should apply.

Background

[5] In mid January 2007 the victim (born in 1993) – then aged 13 years of age – disclosed to her aunt that she feared that she might be pregnant and that she had been having sexual intercourse with her boyfriend – the appellant – who had not used any contraception. The victim told her aunt that her boyfriend was 17 years of age but when her aunt and family made enquiries they discovered that he was 19 years of age. The aunt told the victim's father what had happened who reported it to police and social services. The victim at that time did not want to make a formal complaint to the police because she did not want anything to happen to the appellant. The victim accepted that the sexual activity between them had been consensual.

[6] The relationship appears to have started when the victim was introduced to the appellant by her cousin. The cousin's statement states that the appellant knew about the victim's age from the outset. The appellant and the victim then started to communicate via social networking sites on the internet such as Bebo and MSN and also met in person several times a week. The appellant had sexual intercourse with the victim at his father's house and on 4 occasions at a friend's house.

[7] The relationship ceased following the intervention of the victim's father in January 2007. One of the disturbing features of this case is that

despite the fact that the appellant ought to have been aware of the need to exercise caution in relation to young girls he had consensual intercourse with a 15 year old child at the end of January 2007. He was sentenced to 8 months imprisonment suspended for 2 years in February 2008 in respect of this. He then started up a relationship with his present partner who is of age in February 2007 but during the currency of that relationship he renewed his contact with the victim between March and May 2007 and committed offences of indecent assault and gross indecency on her. When the victim's father became aware of this he reported the matter to the police and a formal complaint was made.

[8] The counts of indecent assault included incidents where the appellant digitally penetrated the victim and the gross indecency counts represented incidents of mutual masturbation. During his police interviews the appellant denied having a sexual relationship or sexual intercourse with the victim or that there was any relationship between them. There was no change in this stance until his trial was due.

[9] In the Pre-Sentence Report the appellant maintained that he believed the victim was 18 years old when he met her although admitted that whenever her father contacted him in January 2007 he realised she was only 13. In his sentencing remarks, however, the Recorder indicated that it was clear from the papers that he would have known that the victim was below the age of 17 at all times. He admitted then re-establishing a relationship with her in April 2007 being aware of her true age. He spoke of having feelings for the victim and they maintained daily contact through MSN prior to meeting again in April 2007. They did not have full sexual intercourse between March and May 2007 but did participate in sexual activity. The appellant was assessed as meeting the criteria for risk of serious harm and presenting as a high risk of re-offending.

[10] The appellant displayed some victim insight stating that he hoped the incidents would not cause any long term consequences and stated that he regretted what had happened. However he also minimised his actions and placed some blame onto the victim. He did accept that a programme to minimise his risk of offending behaviour would be helpful and he also consented to the imposition of a sexual offences prevention order with the conditions as recommended by the Probation Officer.

[11] A report was prepared by Dr Judith O'Neill, Consultant Psychiatrist, who interviewed the victim. She concluded that following

disclosure of the relationship with the appellant the victim had engaged in acting-out behaviours. She found it difficult to cope with her inner emotions and feelings or to express them in a verbally articulate manner and therefore acted out with angry outbursts, self harm, alcohol and drugs. She felt ashamed and disgusted and perceived that other people were also disgusted by her which had a negative impact on relationships with her family and friends. It is positive that her relationships with her family are now improving. She has tended to cope with emotional difficulties by repression. She is still occupied by memories and mental images of what happened and her level of pre-occupation can lead to difficulties focusing on other things. A direct consequence of these events appears to have been her under-attainment at school due to a lack of ability to focus and concentrate and her rebellious behaviours. There are no signs or symptoms of mental illness at present but she does have psychological sequelae of having been violated or abused. The whole situation comprising both the relationship and the impact of disclosure were traumatic. However she appears to be strong minded and ambitious which is positive for her in terms of recovery.

[12] The appellant submitted that the sentence was manifestly excessive. In particular it was contended that he was immature for his years and had been introduced to the victim through the same group of friends. The sexual activity was consensual. The victim had displayed problems at school before the relationship and there had been no long lasting impact on her. The appellant had eventually pleaded guilty. The appellant also submitted that it was wrong in principle to impose a sentence on count 9 (indecent assault) consecutive to the sentence in respect of the unlawful carnal knowledge committed at the same time.

Consideration

[13] In a case of this kind the culpability of the offender will be the primary indicator of the seriousness of the offence. It will also be necessary to take into account the age and vulnerability of the victim, the age gap between the child and the offender and the youth and immaturity of the offender. The Recorder was satisfied on the papers that the offender would have been aware at all times that the victim was under 17 and therefore underage. He was clearly aware of her actual age in respect of the second group of offences and the Recorder was entitled to take a particularly serious view of the fact that he renewed his offending after being warned off by the victim's father. He engaged in unprotected sex which resulted in

this child fearing that she may be pregnant. The child was exposed to considerable trauma as a result of her experiences.

[14] The age gap in this case is considerable. This is not a case of sexual experimentation by children of the same age group. The Pre Sentence Report does note that the offender was a person of low self esteem and that he had been bullied at school as a result of which he was vulnerable but did not support the submission that the appellant was immature.

[15] It is clear from his sentencing remarks that the Recorder imposed a global sentence of 4 years imprisonment looking at all of the factors in the case and in examining his sentence we should focus on the overall outcome rather than examining any particular combination of concurrent or consecutive sentences. This was properly accepted by Mr Barlow in his submissions on behalf of the appellant. There is no guideline case in this jurisdiction on section 4 of the Criminal Law Amendment Act 1885 but the availability of a life sentence indicates that those who abuse children in this way must expect substantial periods of imprisonment.

[16] We consider that there is assistance to be derived from the final report of the Sentencing Guidelines Council in England and Wales on similar offences under the Sexual Offences Act 2003. The recommended starting point after a contest in a case of sexual activity with a child involving penile penetration is 4 years imprisonment with a range of 3 to 7 years depending on the circumstances.

[17] The appellant is entitled to some credit for his plea of guilty but it came at a very late stage. When initially confronted the appellant had robustly contended that these allegations had been made up maliciously by the victim. Those who wish to obtain maximum benefit for their pleas are expected to face up to their responsibilities at the earliest reasonable opportunity (see AG Ref No 1 of 2006 [2006] NICA 4 at paragraph 19).

[18] There are 2 serious aggravating factors in this case. First the appellant comes before the court with a relevant conviction in respect of offending committed before the second group of offences charged as counts 20 and 21. He could not fail to have been aware of the seriousness of his conduct as a result of the detection of his earlier offences with the victim. Secondly, having been warned off by the victim's father and given a chance he renewed his offending with the victim in the circumstances outlined above.

[19] Taking into account the age difference between them, the vulnerability of the victim and the effect on her we are satisfied that we should not interfere with the overall sentence in this case. We accept the submission that count 9 should not have been consecutive to the earlier counts and make that count concurrent to those sentences but order that count 20, in respect of the later offending, should be consecutive to the earlier sentences and count 21 should be concurrent with count 20. We allow the appeal to that extent but the effect, therefore, is that the sentence remains the same.