Neutral Citation No: [2021] NICA 5 | *Ref:* **MOR11409**

Judgment: approved by the Court for handing down | *Delivered:* **05/02/2021**

(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

DAVID GEORGE RAYMOND BELL

DEFENDANT

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DIRECTOR OF PUBLIC PROSECUTION'S APPEAL

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Ms Walsh appeared for the DPP instructed by the PPS
Mr Taggart appeared for the defendant (instructed by Faloon and Co Solicitors)

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Before: Morgan LCJ, McCloskey LJ and Maguire LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This reference arises from the imposition of a determinate custodial sentence of 2 years imprisonment suspended for 2 years imposed on the offender as a result of his plea of guilty to 5 counts of indecent assault on a male contrary to section 62 of the Offences Against the Person Act 1861 and 5 counts of Gross Indecency with or towards a Child contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968.

Background

[2] The victim is now 39. The offender is now 71. The offending occurred when the victim was between 5 and 10 years old. During that period the victim regularly spent Friday nights at the home of the offender and the offender's sister and Saturdays on his grandfather's farm. Counts 1 and 2 concerned an incident when the victim was five or six years old. The offender pulled down the victim's trousers and

underpants, masturbated his penis and then encouraged the boy to masturbate himself while the offender was doing likewise.
[3] Counts 3 and 4 concerned occasions on the grandfather's farm when he was abused in a similar way by the offender. Counts 5 and 6 occurred when the victim stayed overnight at the offender's house. On occasion oral sex would be performed on the victim by the offender. Counts 7 and 8 concerned further similar behaviour in the fields of his grandfather's farm and counts 9 and 10 concerned similar abuse and oral sex by the offender on the victim and by the victim on the offender. The abuse occurred about five times a month and there were approximately 10 occasions when the victim was required to perform oral sex on the offender.

[4] In 2013/14 the victim went to the offender's property to confront him about what had occurred years before. The offender admitted what had happened. The victim recorded the conversation but subsequently deleted it because he could not bear to listen to the recording again. He attended relate counselling and in his first session broke down describing what occurred.

[5] The offences were reported to the police in April 2018. The offender was interviewed in August 2018. He did not want a solicitor to be present. He admitted that he performed oral sex on the victim but denied that it was as frequently as alleged by the victim. He denied that he was sexually attracted to the victim. He stated that he liked pornographic magazines but was not sexually attracted to women.

[6] When arraigned on 11 December 2019 the offender entered not guilty pleas to all 14 counts he was facing. It was indicated to the judge that discussions between the prosecution and defence were ongoing. On 2 March 2020 the offender was rearraigned on an amended bill of indictment and entered guilty pleas to the 10 counts in respect of which he was sentenced. The original date for sentence was 30 March 2020 but due to the impact of Covid 19 the plea did not take place until 14 October 2020.

[7] The offender has no previous convictions. He lives alone and does not appear to have any peer friendships. His only support is from his older sister who undertakes his laundry. In the pre-sentence report he denied having any sexual interest in children generally or the victim specifically. He stated that he did not have any sexual interest at this time. He accepted the victim's description of what occurred and claims that he stopped the abuse because he was disgusted with himself. He was unsure about how the assaults would have impacted on the victim but thinks he was most likely annoyed. He said that he always knew that at some stage police would want to talk to him about his behaviour.

[8] He was assessed as posing a medium likelihood of general re-offending. That assessment noted the breach of trust involved in this offending, his willingness to engage in inappropriate sexual behaviour to meet his own sexual needs and limited victim understanding. The specialist assessments suggested moderate treatment and

supervision needs. He was assessed as not posing a significant risk of serious harm to the public generally taking into account his willingness to engage in the risk management process voluntarily. A note from his general practitioner indicated that he had been diagnosed with Chronic Obstructive Pulmonary Disease in August 2012 and that in November 2019 it was deemed that his condition was moderate in severity.

[9] The victim chose not to make a victim impact statement but it is clear from the papers that he sought counselling in order to help him deal with the effects of the abuse. It is also clear that the abuse which occurred approximately 30 years ago is still having an effect in relation to him. As this court said in R v GT [2020] NICA 51 any victim of sexual abuse can also be presumed to have suffered emotional distress and psychological trauma from an early stage of the criminal justice process.

Consideration

[10] There was no dispute about the relevant aggravating factors:

(i) the victim was aged between five and 10 years during the period of abuse;

(ii) the age difference between the victim and the offender was in the region of 30 years;

(iii) this was a protracted and persistent course of exploitation of the victim;

(iv) the offender was in a position of trust; and

(v) the offences included penile penetration of the victim's mouth.

[11] In mitigation the offender has no previous convictions and that includes a period of 30 years subsequent to these offences. He admitted the offences without apparent equivocation in 2013 to the victim and although there was some qualification about the extent of the offending he made substantial admissions when interviewed by police. We accept that the learned trial judge was entitled to take the view that there was an element of remorse beyond that recognised by his plea.

[12] It was submitted that the respondent's patently lonely and difficult life was also a relevant mitigating factor. In our view little weight can be attributed to this. Sentencing for sexual abuse of young children has a clear deterrent element and the personal circumstances of the offender are therefore unlikely to offer significant mitigation. It is regrettably the experience of this court that offenders in these sorts of cases often come before the court with little or no criminal background. Clearly if there were any similar criminal background that would be a serious aggravating factor.

[13] The maximum sentence for the offence of indecent assault at the time of the commission of these offences was 10 years imprisonment. The maximum sentence for gross indecency was two years imprisonment. We agree that in the case of this nature the culpability of the offender will be the primary indicator of the seriousness of the offence (R v SG [2010] NICA 32 at [13]). These offences were clearly towards the upper end of the culpability scale. The victim was very young and vulnerable. The offender was in a position of trust. The age gap between the child and the offender was substantial. The offending continued over a period of five years and the nature of the offending included penile penetration of the mouth.

[14] In considering the appropriate starting point before a plea it is necessary to also take into consideration the harm to the victim which we have discussed above and the risk to the public of further offending. In light of the pre-sentence report that risk appears to be manageable.

[15] Having regard to the significant culpability in this case it would have been open to the court to impose consecutive sentences in relation to some of these counts and it is unlikely that we would have interfered with an assessment that a figure of 6 to 8 years was appropriate before mitigation in a case of this type (R v M [2002] NICA 49). In a reference where the issue is undue leniency we consider that the court should examine the question from the perspective of the bottom of the sentencing range. Taking a generous view we consider in this case that a total sentence of 5 years is the bottom of that range before allowing for mitigation.

[16] We accept that the learned trial judge was entitled to allow some discount for remorse and limited discount for personal circumstances. We also take into account that there was some perfectly understandable delay on the part of the victim between 2013 and 2018 but that again is not significant in this case. We consider, therefore, that the appropriate starting point before discount for the plea was at least four and a half years imprisonment.

[17] Having regard to the indication given to the learned trial judge at arraignment and the broad admissions made at interview and to the victim we accept that the learned trial judge was entitled to give substantial discount for the plea. That would suggest an overall sentence of at least three years' imprisonment. Accordingly we grant leave to apply.

[18] Mr Taggart drew attention to the decision of this court in R v Jason Stewart [2020] NICA 62 where the court approved the approach taken by the then Recorder Judge McFarland in R v Beggs [2020] NICC 9 allowing a modest additional discount where the offender had pleaded guilty in face of the pandemic. That is not this case. This court also approved the approach taken by Lady Dorrian in Her Majesty's Advocate v Iain Lindsay [2020] HCJAC 26 suggesting a reduction in sentence may be applicable for those whose sentences are on the borderline of custody. In light of our conclusions this case is far beyond the borderline of custody.

[19] This court will not intervene simply because the sentence is lenient. We are satisfied, however, that this sentence is unduly lenient. We have considered the issue of double jeopardy but given the generous approach we have taken in respect of the starting point we do not consider that any further discount is appropriate.

[20] We give effect to our conclusion by substituting a determinate custodial sentence of 3 years imprisonment on each of the indecent assault counts concurrently. The suspension on the gross indecency counts should be removed and those sentences should be served concurrently with the indecent assault counts. The offender will remain on the sex offenders register for life. The offender should present himself at Maghaberry prison at 10 am on Monday 8 February 2021 to commence service of that sentence. All other orders will continue as before.