

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM DOWNPATRICK CROWN COURT

R

-v-

ALASTAIR CARSWELL

Coghlin LJ, Weatherup J and Treacy J

WEATHERUP J (delivering the judgment of the Court)

[1] This is an appeal against a sentence of 14 years' imprisonment imposed on the appellant by His Honour Judge Miller QC at Downpatrick Crown Court on 28 November 2014. The appellant faced multiple charges of sexual offences against male and female children under three Bills of Indictment. Mr MacCreanor QC and Mr Thompson appeared on behalf of the appellant and Ms Ievers on behalf of the prosecution.

[2] The first Bill of Indictment contained 6 counts, being 4 counts of indecent assault on a female AB, one count of indecent assault on a female CD and one count of indecent assault of a female EF, the offences occurring between 1998 and 2002. At arraignment, the appellant pleaded not guilty.

[3] The second Bill of Indictment contained one count of sexual activity with a child GH between 2010 and 2012. At arraignment, the appellant pleaded not guilty.

[4] The trials in respect of the first and second Bills of Indictment were fixed for hearing in February 2014. On 4 February 2014, the appellant was re-arraigned and pleaded guilty to all 6 counts on the first Bill of Indictment. On 5 February 2014, the appellant was re-arraigned and pleaded guilty to the single count on the second Bill of Indictment.

[5] The third Bill of Indictment contained 25 counts, being 10 counts of indecent assault on a male IJ between 1995 and 2003 and 15 counts of indecent assault on a male KL between 1999 and 2003. At arraignment, the appellant pleaded not guilty to each count. The trial of the appellant on the third Bill of Indictment commenced in May 2014 and on 10 June 2014 the jury returned a guilty verdict against the appellant on 18 counts. The appellant was convicted on 6 of the 10 counts of indecent assault against IJ and 12 of the 15 counts of indecent assault on KL.

[6] The appellant applied to vacate his guilty pleas in respect of the counts on the first and second Bills of Indictment. On 23 October 2014, the appellant's application to vacate the guilty pleas in respect of the first two Bills of Indictment was refused.

[7] The offences against the first victim involved inappropriate touching and an instance of using the child's hands to masturbate himself. With the second and third victims, it was inappropriate kissing. The fourth victim was a further instance of using the child's hands to masturbate himself. With the fifth and sixth victims, there were instances of mutual masturbation. The appellant did not engage in any penetrative sexual activity.

[8] The aggravating features were: breach of trust given the nature of the relationships between the appellant and his victims; secondly, repetition of offending over several years; thirdly, the significant age difference between the victims who were all children and the appellant who is now 48 years; fourthly, the number of victims; and fifthly, the effect upon the victims as outlined in medical reports. The trial judge stated that there were no mitigating factors with the possible exception of a lack of any relevant criminal record prior to the offences coming to light. As to the pleas of guilty on the first two Bills of Indictment, the appellant had sought to vacate the guilty pleas and the trial Judge stated that the corresponding lack of credit was tempered as the refusal to permit the appellant to change his pleas spared the witnesses the trauma of having to give evidence.

[9] On 28 November 2014, the appellant was sentenced in respect of the 6 counts on the first Bill of Indictment, the single count on the second Bill of Indictment and the 18 counts on the third Bill of Indictment as follows:

<i>Count</i>	<i>Charge</i>	<i>Sentence</i>	<i>Maximum sentence</i>
Bill 13/105575 1	Indecent Assault on female AB cont. to S.52 of the Offences Against the Person Act 1861 (between 7 Feb 1998 and 8 Feb 2000)	6 months imp. Concurrent with 2 and to count 4 - Art 26 shall apply	10 years imp.
2	Indecent Assault on female AB cont. to S.52 of the Offences Against the Person Act 1861 (between 7 Feb 2000 and 8 Feb 2001)	6 months imp. Concurrent with 1 and to count 4 - Art 26 shall apply	10 years imp.

<i>Count</i>	<i>Charge</i>	<i>Sentence</i>	<i>Maximum sentence</i>
3	Indecent Assault on female AB cont. to S.52 of the Offences Against the Person Act 1861 (between 7 Feb 2000 and 8 Feb 2001)	1 year imp. Concurrent with count 4, Art 26 to apply	10 years imp.
4	Indecent Assault on female AB cont. to S.52 of the Offences Against the Person Act 1861 (between 7 Feb 2000 and 8 Feb 2002)	3 years imp Art 26 of Criminal Justice (NI) Order 1996 shall apply	10 years imp.
5	Indecent Assault on female CD cont. to S.52 of the Offences Against the Person Act 1861 (between 24 Nov 1999 and 25 Nov 2001)	9 months imp. Consecutive to count 4 - Art 26 shall apply	10 years imp.
6	Indecent Assault on female EF cont. to S.52 of the Offences Against the Person Act 1861 (between 22 Oct 2001 and 23 Oct 2002)	3 months imp. Consecutive to count 5 - Art 26 shall apply	10 years imp.
Bill 13/119441 1	Sexual activity by adult with a child GH under 13 cont. to Art.16(1) of the Sexual Offences (NI) Order 2008 (between 31 May 2010 and 6 July 2012)	Determinate custodial sentence of 1 year - 6 months imp. followed by 6 months on licence - consecutive to BOI 13/105575	14 years imp.
Bill 14/16470 1	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 31 Dec 1995 and 18 Feb 1998)	1 year 6 months imp. Art 26 shall apply	10 years imp.
2	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 31 Dec 1995 and 18 Feb 1998)	2 years imp. Concurrent with Count 1 - Art 26 shall apply	10 years imp.
3	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 18 Feb 1998)	Acquitted	10 years imp.
4	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 18 Feb 2001)	Acquitted	10 years imp.
5	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 18 Feb 2001)	Acquitted	10 years imp.
6	Indecent Assault on male IJ cont. to S.62 of the Offences Against the	1 year 6 months imp. Concurrent to Count	10 years imp.

<i>Count</i>	<i>Charge</i>	<i>Sentence</i>	<i>Maximum sentence</i>
	Person Act 1861 (between 31 Dec 1995 and 18 Feb 1998)	1 - Art 26 shall apply	
7	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 28 July 2003)	1 year 6 months imp. Consecutive to Count 1 - Art 26 shall apply	10 years imp.
8	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 31 Dec 1995 and 18 Feb 1998)	2 years imp. Concurrent with Count 1 - Art 26 shall apply	10 years imp.
9	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 28 July 2003)	2 years imp. Consecutive to count 7 - Art 26 shall apply	10 years imp.
10	Indecent Assault on male IJ cont. to S.62 of the Offences Against the Person Act 1861 (between 19 Feb 1998 and 28 July 2003)	Acquitted	10 years imp.
11	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 9 May 2000)	9 months imp. Concurrent with Count 9 - Art 26 shall apply	10 years imp.
12	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	9 months imp. Concurrent with Count 11 - Art 26 shall apply	10 years imp.
13	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	1 year imp. Concurrent with Count 11 - Art 26 shall apply	10 years imp.
14	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	Acquitted	10 years imp.
15	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	1 year 6 months imp. Consecutive to Count 9 - Art 26 shall apply	10 years imp.
16	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	Acquitted	10 years imp.

<i>Count</i>	<i>Charge</i>	<i>Sentence</i>	<i>Maximum sentence</i>
17	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 10 May 1999 and 28 July 2003)	6 months imp. Concurrent with Count 11 - Art 26 shall apply	10 years imp.
18	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 28 July 2003 and 10 May 2008)	9 months imp. Concurrent with Count 20 - Art 26 shall apply	10 years imp.
19	Indecent Assault on male KL cont. to Art 21(1) Criminal Justice (NI) Order 2003 (between 28 July 2003 and 10 May 2008)	1 year imp. Concurrent to Count 20 - Art 26 shall apply	10 years imp.
20	Indecent Assault on male KL cont. to Art 21(1) Criminal Justice (NI) Order 2003 (between 28 July 2003 and 10 May 2008)	2 years 6 months imp. Consecutive to Count 15- Art 26 shall apply	10 years imp.
21	Indecent Assault on male KL cont. to Art 21(1) Criminal Justice (NI) Order 2003 (between 28 July 2003 and 10 May 2008)	1 year 6 months imp. Concurrent to Count 20 - Art 26 shall apply	10 years imp.
22	Indecent Assault on male KL cont. to Art 21(1) Criminal Justice (NI) Order 2003 (between 28 July 2003 and 10 May 2008)	Acquitted	10 years imp.
23	Indecent Assault on male KL cont. to Art 21(1) Criminal Justice (NI) Order 2003 (between 28 July 2003 and 10 May 2008)	2 years imp. Concurrent with count 20 - Art 26 shall apply	10 years imp.
24	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 1 April 2003 and 1 July 2003)	1 year 6 months imp. Concurrent to Count 20 - Art 26 shall apply	10 years imp.
25	Indecent Assault on male KL cont. to S.62 of the Offences Against the Person Act 1861 (between 1 April 2003 and 1 July 2003)	2 years imp. Concurrent with count 20 - Art 26 shall apply	10 years imp.

[10] The appellant received a total sentence of 14 years' imprisonment. In addition the Court ordered that: reporting restrictions remain in place; the appellant be disqualified from working with children under the Protection of Children and

Vulnerable Adults (Northern Ireland) Order 2003; a Sexual Offences Prevention Order be imposed for a period of 10 years; the appellant be registered indefinitely on the Sex Offenders Register; and the Independent Safeguarding Authority may include the appellant in the Adult and Children's Barred List, as required under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

[11] This appeal relates to the sentence of 14 years' imprisonment. The appellant's grounds of appeal are as follows:

- (1) the total sentence of 14 years was excessive;
- (2) the imposition of multiple consecutive sentences lifted the criminality into a higher sentencing bracket than was appropriate and brought about a sentence more often imposed for much more serious offences;
- (3) there was a failure properly to take account of the level of offending; and
- (4) there was a failure properly to consider and assess the totality of the sentence.

[12] The trial judge explained his approach to the sentencing of the appellant as follows:-

"I have taken a view that where several offences are committed against a specific victim the sentence for each form of activity should be concurrent for each defined period of activity but consecutive for repeated acts over a subsequent timeframe. Equally I consider that the sentences applying to each victim should in turn be consecutive one to another and that the total sentences on each bill should also be consecutive to each other. Finally I have adjusted the individual sentences so as to take account of the totality principle and in so doing have concluded that the appropriate total sentence will be 14 years."

[13] The sentence imposed in respect of indecent assault on the first victim was three years' imprisonment. The sentence imposed for indecent assault on the second victim was nine months' imprisonment consecutive. The sentence imposed for indecent assault on the third victim was three months' imprisonment consecutive. Accordingly the total sentence on the first Bill of Indictment was four years' imprisonment.

[14] The sentence imposed for sexual activity with the fourth victim under the second Bill of Indictment was one year's imprisonment consecutive.

[15] The sentence imposed for the 6 counts of indecent assault on the fifth victim under the third Bill of Indictment was five years' imprisonment. This comprised a sentence of 18 months for offences from 1995 to 1998, 18 months consecutive for offences between 1998 and 2003 and a further two years consecutive for a further offence between 1998 and 2003. The sentence imposed for the 15 counts of indecent assault on the sixth victim under the third Bill of Indictment was four years' imprisonment. This comprised 18 months consecutive for offences between 1999 and 2003 and 2 years 6 months consecutive for offences between 2003 and 2008.

[16] The trial judge stated that he had adjusted the individual sentences so as to take account of the totality principle to reach what he described as the appropriate total sentence of 14 years. The nature of the adjustments made was not stated. It was assumed by Counsel and this Court that, after applying the individual sentences, the trial judge had reached a total sentence in excess of 14 years and that the adjustments stated to have been made were to reduce individual sentences to achieve a total sentence of 14 years' imprisonment. With such an exercise being undertaken by the sentencing judge, Mr MacCreanor for the appellant accepted that criticisms of individual sentences and the imposition of consecutive sentences in particular cases would not be a useful exercise when the nature of the adjustments made were not known. In the event, Counsel conducted the appeal on the ground that the sentence of 14 years' imprisonment was manifestly excessive.

[17] All the offences related to events that occurred before the coming into operation of the Criminal Justice (Northern Ireland) Order 2008, save for the single count on the second Bill of Indictment. The trial judge considered whether that offence, as a specified sexual offence under the 2008 Order, was such as to require the Court to consider whether or not the appellant was a dangerous offender. The Probation Report assessed the appellant as posing a medium likelihood of re-offending but not presenting a significant risk of serious harm by the commission of further offences. The trial judge concluded that, on balance, that assessment was reasonable, based on there being no previous history of sexual offending, the appellant having had no opportunity to access children via an intimate or domestic relationship and the appellant being prepared to abide by external controls in managing his risks, as outlined in the report. The trial judge therefore determined that the appellant was not a dangerous offender as defined by the 2008 Order. Further, the trial judge was satisfied that the sentence he intended to pass was such that there was no need to invoke the enhanced sentencing powers provided by Article 20 of the Criminal Justice (Northern Ireland) Order 1996. Further, as the trial judge was proposing to sentence for a period in excess of 12 months, he considered whether to impose a custody probation order under Article 24 of the 1996 Order or to apply the licence provisions under Article 26 of the 1996 Order. The trial judge concluded that he should not make an Article 24 Order but rather that the appellant would be released on licence under the provisions of Article 26.

[18] The sentence imposed should be that which is just and proportionate. The totality principle has been expressed by Morgan LCJ in R v Daniel Curran [2013] NICA 1 paragraph [16] as follows:

“The totality principle is designed to secure a global sentence that is just and proportionate.”

[19] In England and Wales, the Sentencing Council definitive guideline on totality states as follows:

“The principle of totality comprises two elements –

- (1) All courts, when sentencing for more than a single offence, should pass a total sentence which reflects *all* the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
- (2) It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.”

[20] During the hearing, there was argument as to the manner in which the sentencing Judge should approach the task of sentencing for multiple offences. In dealing with multiple offences, the general approach to the determination of the sentence should be as follows:

- (1) Consider the sentence for each individual offence, referring to any relevant guidelines.
- (2) Determine whether the case calls for concurrent or consecutive sentences.
- (3) Apply the principle of totality and pass a total sentence which reflects all the offending behaviour and is just and proportionate.

[21] The appellant contends that, while accepting all the aggravating factors, the particular offences were of a lower order of non-penetrative sexual activity, which defines the character of the overall offending. Further, the applicant contends that the total sentence imposed of 14 years' imprisonment approaches the level of sentencing that might be expected to be imposed in relation to a campaign of rape offences. The appellant refers to Attorney General's Reference No. 4 of 2005 (Martin Kerr) [2005] NICA 33. The defendant pleaded guilty to five offences of indecent assault and was sentenced to a three year probation order on each count. The offender had earlier pleaded guilty to 36 offences of indecent assault and 12 offences

of gross indecency committed against five boys and a custody probation order had been imposed comprising two years' custody and two years' probation. The offences for which he had already been sentenced were described as being towards the lower end of the scale of behaviour, there was some doubt that the offender was a fully mature adult and there were no victim impact reports. The offences for which he was later being dealt with had occurred during the same period but did not come to light until later. The offender contended that had the offences come to light and been dealt with at the same time as the earlier sentencing the offender would not have received any more severe penalty. The Court of Appeal noted the impact of the offences on the sixth boy and concluded that it was entirely likely, on that account, that a much more substantial sentence would have been passed had the offences been dealt with on the earlier occasion. It was concluded that the appropriate sentence should have been in the order of two years' imprisonment and two matters were taken into account in mitigation of that period. The first matter was that the offender was unlikely to have been sentenced to an additional period of two years in respect of the additional offences had they been dealt with at the original trial and the second matter was the effect of double jeopardy. As a result, the Court imposed a sentence of 12 months' imprisonment. In this instance, of course, the totality principle was being applied where the Court was dealing with multiple offences that had occurred over the same period but where the defendant was sentenced on two separate occasions.

[22] The Court finds Attorney General's Reference No 4 of 2005 of little assistance in considering the present appeal. As repeatedly stated by the Court, each case is fact specific and the sentence imposed in one case will be of limited assistance in considering the sentence to be imposed in another case. However, the Court agrees, for the reasons advanced on behalf of the appellant, that taking account of the appellant's overall culpability and the overall effect of the offending behaviour, the total sentence imposed of 14 years is manifestly excessive.

[23] In taking account of all the circumstances, we conclude that the overall sentence that is just and proportionate is one of 10 years' imprisonment. Accordingly, we will vary the sentence on count 4 on the first Bill of Indictment to one of two years' imprisonment for indecent assault on female AB, vary the sentence on count 9 of the third Bill of Indictment to two years' imprisonment concurrent to count 7 for indecent assault on male IJ and vary the sentence on count 20 of the third Bill of Indictment to 18 months' imprisonment consecutive to count 15 for indecent assault on male KL.