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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS

THE KING

v

GERARD McKENNA
and
PAUL SHERIDAN

Mr Charles MacCreanor KC with Ms Nicola Auret (instructed by the Public Prosecution Service) for the Applicant
Mr Barra McGrory KC with Mr Michael Boyd (instructed by McIvor Farrell & Co Solicitors) for the respondent McKenna
Mr McNeill KC with Mr Coiley (instructed by MacElhatton Solicitors) for the respondent Sheridan

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Before: Keegan LCJ, Treacy LJ and McBride J

KEEGAN LCJ (*delivering the judgment of the court*)

The complainants in this case are entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[1] This is a reference brought by the Director of Public Prosecutions for Northern Ireland ("DPP") under section 36 of the Criminal Justice Act 1988 as amended by section 41 of the Justice (Northern Ireland) Act 2002.

[2] The sentences referred to this court were imposed upon the respondents by His Honour Judge Lynch KC ("the trial judge") as follows.

[3] McKenna was convicted after a trial and guilty verdicts of the following offences:

Count 1 Sexual assault of a child under 13 by penetration, contrary to Article 13 of the Sexual Offences (Northern Ireland) Order 2008 (digital penetration).

Count 2 Rape of a child under 13, contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008 (vaginal rape).

Count 3 Sexual touching by an adult of a person under 16 years, contrary to Article 16(1) of the Sexual Offences (Northern Ireland) Order 2008 (kissing second complainant).

Count 4 Offering to supply a Class A drug, namely cocaine, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971.

Count 9 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

Count 10 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

[4] In relation to these offences McKenna was sentenced to a total period of nine years' imprisonment and a three year extended custodial sentence along with ancillary orders.

[5] Sheridan pleaded guilty to the following offences:

Count 5 Sexual assault of a child under 13 by penetration, contrary to Article 13 of the 2008 Order (digital penetration).

Count 6 Sexual assault of a child under 13 by penetration, contrary to Article 13 of the 2008 Order (digital penetration).

Count 7 Rape of a child under 13 contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008 (oral rape).

Count 8 Rape of a child under 13 contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008 (vaginal rape).

Count 9 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

Count 10 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

[6] Sheridan was sentenced to a total period of six and a half years' imprisonment and a three year extended custodial sentence along with other ancillary orders.

[7] The Public Prosecution Service ("PPS") maintain that the sentences are unduly lenient.

The nature of a reference

[8] In *R v Sharyar Ali* [2023] NICA 20 this court recently explained the nature of a reference as follows. The reference procedure does not provide the prosecution with a general right of appeal against sentence. *Taylor on Criminal Appeal* (3rd ed, 2022), helpfully summarises the applicable legal principles as follows:

> "13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:
>
> (1) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.
>
> (2) Leave should only be granted in exceptional circumstances and not in borderline cases.
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> (3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being to allay widespread public concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.
>
> (4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.

> (5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'
>
> (6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?
>
> (7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted that sentencing is an art and not a science and that the trial judge is well placed to assess the weight to be given to various competing considerations.
>
> (8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy."

[9] It follows from the above that there is a high and exacting threshold for a reference to succeed. The Court of Appeal when considering a reference must first decide whether to grant leave. The court must also decide whether a sentence is unduly lenient not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play.

[10] In this jurisdiction the Court of Appeal has also given guidance on the principles to be applied in reviews of sentencing over many years following the decision in *Attorney General's Reference (No 1 of 1989)* [1989] NI 245. This case followed *Attorney General's Reference Number 4 of 1989* [1990] 1 WLR 41 where Lord Lane CJ described the parameters of a reference at para [45] as follows:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased — with all the anxiety that this naturally gives rise to — merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance

> given by this court from time to time in the so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.
>
> [2] The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.
>
> [3] Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence."

Factual Background

[11] We have set the background out previously when dismissing the conviction appeal brought by McKenna reported at [2023] NICA 12. We will not repeat the background save to summarise the salient features of this case as follows.

[12] The charges arise from events of 23 December 2019. On that date the two respondents attended at a children's home ("the home"). Sheridan is a former resident of the children's home. At the time McKenna was 27, and Sheridan was 23. The first complainant was 12 years of age, and the second complainant was 15.

[13] The first complainant underwent an ABE and most of the convictions relate to criminal activity against her. The second complainant did not cooperate with investigations and the one conviction of McKenna against her was based upon CCTV footage of her in a Spar shop with Mc Kenna.

[14] When the two men arrived at the home, they became acquainted with the complainant and the second complainant. The evidence points to the fact that the men arrived at the home together at around 2:40pm.

[15] Having arrived at the home the two men were given a cup of coffee by one of the staff members who engaged with them for a short while and then encouraged them to move on. She overheard both males conversing with residents of the home and picked up from the conversation that Mc Kenna may have known the brother of one of the residents who is the second complainant in this case.

[16] In or around this time the first complainant, returned from a Christmas shopping trip with one of the other care workers and left with the two males and the other complainant despite concerns about this being expressed by staff and a warning issued to the men concerning the ages of these girls as they were at the time respectively 12 and 15 years (although staff indicated that one was 14). By contrast the respondents were grown men.

[17] It is noted in the papers that the staff at the home were concerned about the presentation of the men and had concerns as to why they were at the children's home. It is noted that a staff member tried to call the girls back when they decided to leave with these men and said to them, "they can't go with you, she is only 12 and she is 14, please don't take them away."

[18] The police were alerted to these events. As a result, the girls were ultimately recovered after being located by police in a wooded area near the river and the towpath. Police formed the view that the two young girls and the two adult men were intoxicated. The evidence discloses that a Constable Jenkins confirmed the identity of the two men and asked Mc Kenna why he was hanging around with girls aged 12 and 14. He responded that he did not know them and that they had just tagged along. He also is reported to have said something to the effect of knowing that it would be "statutory rape."

[19] Following these initial interactions, police officers took the two girls back to the staff member and advised the two men to go home stating that the girls were 12 and 14 and that they should stay away. The males walked off. Around 4:30pm the two complainants returned to the home. However, the complainants immediately left again as they appeared to be angry at being brought back to the home. Once they got out of the van that had brought them back, they ran off. Again, staff followed them in their vehicle and saw the two men and the second complainant nearby. The staff member shouted again but was ignored and so called the police for a second time.

[20] After this second report the first complainant was located by the deputy manager of the home who was involved in the search. The staff member therefore decided to obtain the assistance of police.

[21] The first complainant pursued a criminal complaint. She reported that she had been assaulted on three occasions the previous day, twice by one man and once by another man. The assaults were said to have occurred on the grass by the riverbank and to have involved vaginal penetration without a condom. On medical examination some bruising was found on the upper thigh area, of a nature that was not

determinative, one way or another of the allegations of sexual assault. No vaginal injuries were found but the medical doctor remarked that this was not determinative of the allegations of sexual assault either.

[22] Vaginal DNA swabs were taken from the first complainant. DNA analysis of swabs taken from the respondents were subsequently analysed. A forensic link was found in relation to Sheridan however no forensic link was established by virtue of DNA evidence with McKenna.

[23] The sequence of offending has been helpfully set out as follows:

Counts 9 & 10 The abduction of both children from the home;

Count 5 Sheridan digital penetration of the first complainant;

Count 4 McKenna offering cocaine;

Counts 1 McKenna digital penetration of the first complainant;

Count 2 McKenna vaginal rape of the first complainant;

Count 6 Sheridan digital penetration of the first complainant;

Count 7 Sheridan oral rape of the first complainant;

Count 8 Sheridan vaginal rape of the first complainant;

Count 3 McKenna sexual activity by kissing with a child of the second complainant.

Consideration

[24] The reference acknowledges that the judge had regard to the authority of *R v Kubik* [2016] NICA 3 which he had been referred to by the prosecution. It is also accepted that the judge relied upon the following aggravating features of this case:

- The age of the first complainant who was 12 years old at the time.

- The fact that the complainants were resident in a children's home. The judge found that the respondents were aware of this factor and took advantage of that vulnerability and the willingness of these girls to leave the home for their own purposes.

- The judge found there to be a deliberate removal of the first complainant despite remonstrations from the staff;

- He noted the provision of alcohol as an inducement to accompany them and its consequent disinhibiting effect on the complainant.

[25] In addition, the reference states that:

> "The learned judge proceeded to carefully consider the relevant legislative framework and authorities regarding dangerousness as well as the specific analysis proffered by PBNl in relation to each offender. He concluded both men met the threshold of dangerousness and set out his reasons for so finding."

[26] There is no suggestion that the judge made an error of law. That is because he applied the guidance in *R v Kubik* which deals with sentencing for rape in this jurisdiction. There was no suggestion that the *Kubik* guidelines were inapplicable given that this case involved children. The guidelines include offences against children as an aggravating factor. We have continued to apply this case in this jurisdiction and have not been asked to do otherwise.

[27] Each case is of course highly fact sensitive. It is also recognised that sentencing should not be approached in a mechanistic way. Rather the sentence should reflect the circumstances of each case as a whole.

[28] This court has given guidance in *R v Hegarty* [2022] NICA 55 as to aggravated rape and in that case dismissed an appeal from an 18-year sentence. *Hegarty* had a previous rape conviction, engaged in multiple rapes, and inflicted serious GBH. Hence, we found the sentence appropriate on the particular facts of that case.

[29] It is common case that this was higher starting point case of eight years. That follows from *Kubik* which refers to this being the level of sentencing appropriate where:

(i) the rape is committed by two or more offenders acting together;

(ii) the offender is in a position of responsibility towards the victim (eg in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (eg a clergyman, an emergency services patrolman, a taxi driver, or a police officer);

(iii) the offender abducts the victim and holds him or her captive;

(iv) rape of a child, or of a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability;

(v) racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (eg homophobic rape);

(vi) repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped); and

(vii) rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

[30] Having considered all of these factors and applied them to the facts pertaining to both respondents, the trial judge stated that the appropriate sentence was one of nine years – this being one year in excess of the starting point suggested in *Kubik* for cases of this sort.

[31] In Mc Kenna's case it is accepted that there was little by way of mitigation available given the fact that he contested the case, had a poor criminal record and was continuing to deny his guilt. The report from Dr Bownes, consultant forensic psychiatrist did little to assist him.

[32] In addition, the probation report does not reflect well on McKenna in numerous respects not least his derogatory comments about a previous partner. We remind ourselves that in McKenna's case he was also extremely disparaging towards the complainants in his police interviews.

[33] In Sheridan's case there was greater mitigation due to the reports filed on his behalf which show very low-level functioning and also his guilty pleas. The lack of any previous sexual offending, his intellectual ability, his previous mental health difficulties and his antecedents were all brought to the judge's attention during a plea in mitigation. His very difficult upbringing and his ongoing issues relating to substance abuse were highlighted.

[34] Sheridan's diagnosis of attention deficit hyperactivity disorder and his likely undiagnosed post-traumatic stress disorder arising from the death of his close friend were also matters highlighted from within the expert report from Dr Duncan Harding, child and adolescent psychiatrist. The additional report from Dr Devine, clinical psychologist, states that Sheridan operates in the borderline range of intellectual functioning and that he has significant deficits in relation to his cognitive ability. The probation report filed in relation to Sheridan is also more positive than in McKenna's case and shows a degree of remorse.

[35] It is the prosecution case that an increase of one year from the starting point selected in *Kubik* does not adequately reflect the gravity of the offending. They place reliance on the aggravating factors relating to the abduction of the complainants and

the provision of drugs and alcohol by the respondents. Therefore, the prosecution say that the appropriate sentence fell further up the range.

[36] Against that it must be borne in mind that the trial judge in this case heard the evidence and so he was uniquely placed to assess the weight to be given to aggravating and mitigating factors and to an overall view of the case. This we point out is unlike the situation in *R v Ali* where the trial judge was asked to indicate an appropriate sentence at a *Rooney* hearing without the benefit of hearing the evidence and without proper assistance from counsel.

[37] In truth Mr MacCreanor could only point to one area where the judge did not mention the potential supply of drugs by McKenna. However, this was not the most significant factor given that drugs were not found at any stage. When broken down Mr MacCreanor could not say that the judge had left out of account any of the aggravating factors in this case. Rather, this reference came down to the weight the judge placed upon the aggravating factors and is therefore concerned with the exercise of discretionary judgment.

[38] It is accepted by both respondents that the trial judge could have selected a higher starting point in this case and that a sentence of ten years would not be manifestly excessive. However, the sentence of nine years, whilst at the lowest end, is within the general scope of the sentences envisaged by *Kubik*.

[39] Notwithstanding Sheridan's foolhardy and frankly immature actions in absconding for a period, his very low level of functioning provides some context. He did plead guilty and prevent the complainant having to go through a second trial and as such we think the judge was entitled to afford him the reduction that he did. In Sheridan's case the starting point could have been higher than McKenna's given his plea to two forms of rape. However, we also think that his mitigation was stronger so in either case the same sentence before credit for the plea was generous but within the judge's discretion.

[40] This was undoubtedly a difficult case which engenders strong emotions among right thinking people given the vulnerability of the complainants. This type of offending is also deprecated by our society and so there is a deterrent aspect to any sentence imposed. We also note the significant effects upon the young complainant in this case which will no doubt shape her life for years to come.

[41] However, each sentence must be related to the particular facts and nuances of a case. In this instance, the sentences were imposed by a highly experienced criminal judge with considerable care in a manner which we cannot criticise. The sentences of imprisonment imposed are not insignificant in themselves and are within a range for these offences. A sentence is only unduly lenient where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. The court as we have said at the outset may only increase a sentence that is unduly lenient and not merely because it is of the opinion

that the original sentence is less than that court would have imposed, unless there is a manifest error.

[42] Whilst this case features the removal of the children, it is nevertheless worthy of note that they were not removed against their will or taken by the use of threats or force. There was we think an element of spontaneity to this offending as Sheridan was a former resident of the home. If this were not the case and these men were attending a children's home to which they had no connection the sentence would be considerably higher in this or any other case of its nature.

[43] In addition, we point out by way of guide that if either respondent had had a previous rape conviction, the sentence would have been higher towards the upper end of the 8-15 year range. This should serve as a warning to repeat offenders that after a first offence the second conviction will result in a higher sentence.

[44] As we have said it is not suggested that there is any manifest error in this case. Therefore, the question is not what sentence this court would impose but whether the trial judge has gone outside the range available to him. Overall, we think that nine years was lenient. However, the judge has considered all factors and applied the weight he thought appropriate to them having heard the evidence. In addition, whilst at the lowest possible end of the range the sentence was within the range open to the judge. Therefore, whilst this court understands the concerns raised in what is a disturbing case, we cannot say that the sentence meets the high test for undue lenience.

[45] Finally, we have considered the additional submissions made to us as regards the extension period. It is common case that there are two constituent parts to an extended sentence, one for the purpose of punishment and deterrence and the other (the 'extended sentence') for the purpose of public protection when a court determines that this is required in accordance with the Criminal Justice (Northern Ireland) Order 2008.

[46] *Blackstone's Criminal Law and Practice* 2023 Section E paragraph 16.12 also provides the following commentary which is of use in this area:

> "To the custodial term there must always be added the appropriate extension period, the maximum being five years for a specified violent offence, or eight years for a specified sexual offence or a specified terrorism offence. The length of the extension period is a matter for judicial assessment in each case, and is that which the court considers necessary to reduce the future danger posed by the particular offender. In *Phillips* [2018] EWCA Crim 2008, [2019] 1 Cr App R (S) 11 (85), the Court of Appeal said that the purpose of the licence period was preventive rather than punitive, and so was not tied to the seriousness of the

> offence. It should be no longer than necessary for the relevant purpose and should not be such as to crush the offender. The judge should be guided by what realistically can be achieved within the licence period (including the availability of accredited programmes within prison) to secure the offender's rehabilitation and to prevent reoffending. According to the Court of Appeal in ARD [2017] EWCA Crim 1882, [2018] 1 Cr App R (S) 23 (163), the length of the extension period is not to be determined by D's age or lack of previous convictions save insofar as they were indicators as to the degree of harm D posed into the future and for how long D would pose that harm. The total term of an extended sentence of imprisonment (or detention in a young offender institution) must not exceed the maximum penalty for the offence."

[47] The fact that both these offenders have been designated as dangerous is of additional relevance as it addresses public protection. The three-year extended custodial sentence means that either respondent may have to serve considerably more time in custody than they would under a determinate custodial sentence. At present the indicators are not good for either respondent.

[48] An extended custodial means that each offender will have to serve at least half of the custodial term in prison at which stage a risk assessment will be conducted by the Parole Commissioners to determine whether they can be safely released on licence. Thus, the respondents may only be released on licence once they have served half of the appropriate custodial term or at any time during the remainder of that term provided that the Parole Commissioners consider it safe to release. If the Parole Commissioners do not support release due to risk to the public the respondents may have to serve the entire custodial term in prison imposed upon them. At the end of the custodial terms each respondent is automatically released but remains subject to licensed supervision for the three-year extension period during which they are liable to be recalled to custody should they breach any of his licence conditions.

Conclusion

[49] We therefore refuse leave. We dismiss this reference applying the legal requirements necessary for a successful reference to each case. In doing so we reiterate the fact that lengthy extended custodial sentences have been applied in this case to reflect society's abhorrence of such crimes and to deter those who offend in this way.