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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/05/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WY

David McDowell QC with Lauren Cheshire (instructed by the PPS) for the Prosecution
Patrick Lyttle QC with Barry Gibson (instructed by MSM Law) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Huddleston J

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

Anonymity

[1] We have anonymised the respondent's name to protect the identity of the complainant and so this will appear as the cypher above. The complainant is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[2] This is a reference brought by the Director of Public Prosecutions ("DPP") under section 36 of the Criminal Justice Act 1988 (as amended by section 41 of the Justice (Northern Ireland) 2002) in which the DPP asserts that the sentence imposed was unduly lenient.

[3] The respondent was convicted after a trial on two counts of engaging in sexual activity with a child under the age of 16 years, contrary to section 16(1) of the Sexual Offences (Northern Ireland) Order 2008. The trial judge imposed a sentence of imprisonment of nine months on each count to run concurrently. The judge activated two suspended sentences, although ordered that they run concurrently to the sentence of nine months. Following that hearing, the court communicated administratively that the judge had altered his decision and that the suspended

sentences would not be activated because they would have expired in 2016. A Sexual Offences Prevention Order was imposed which is not disputed.

[4] At the hearing of this reference on 29 April 2022 we announced our decision that the sentence was unduly lenient and should be increased to a sentence of 18 months on each count and that there should be activation of the suspended sentence, all sentences to run concurrently resulting in nine months to be served in custody and nine months on licence. We now provide our reasons for this decision.

Factual Background

[5] The context of this case is that both the victim and the respondent are Romanian nationals. The victim was at the time of the offences a young girl aged between 14 and 15 years of age. The respondent was aged 31 and 33 at the relevant times when the offences occurred. As a result of the respondent's conduct the victim twice became pregnant and gave birth to two children.

[6] The two counts of which the respondent was convicted were specimen counts of sexual abuse, the first count to cover the sexual activity that occurred throughout the time period, including that which resulted in the first pregnancy, and the second to cover all the sexual activity that occurred after the first pregnancy.

[7] The history may be summarised as follows. In November 2014, the victim was introduced to the respondent and his brother by her aunt in Romania. It is reported that she understood that the respondent had approached her aunt as he was "looking for a wife". She believed that he was "twenty-one years of age and … a born again Christian." The victim stated that she had wanted to get married, as was customary in the Roma tradition from which she and the respondent both come. She said that her mother agreed to the marriage and to allow her to go to Northern Ireland with the respondent, but only for three months. The victim's evidence was that following the arrangement, the respondent and her mother took her to get her identification card and a Power of Attorney to permit the respondent to take her to Northern Ireland.

[8] The victim said that at first she lived with the respondent for a short time in Romania, and that the sexual relationship commenced about three or four days after the marriage arrangement. However, when she told her mother that she was unhappy, her mother told her that she did not have to stay with the respondent. She went to stay at her father's, but the respondent "kept ringing" and "convinced" her to come back. When she returned with him, the evidence was that the respondent had her pack her bags and told her that they were going to buy the tickets. The evidence was also that the respondent took her to the airport with his friends and that she did not realise initially that they were leaving Romania.

[9] When the respondent and the victim came to Northern Ireland, they travelled to the respondent's home in Belfast, which he shared with his mother, two sisters,

his brother-in-law and three children. The victim described how she was not happy with the domestic arrangement and she made various allegations of ill treatment although these were not pursued at the trial.

[10] When the situation became known to statutory services the victim and her daughter were removed from the respondent's home on 13 June 2016 by police and Social Services. At the time, the victim was pregnant with her second child. In her initial account she confirmed that she was pregnant again to the respondent, and described her relationship to police and Social Services in positive terms.

[11] The victim initially declined to make an Achieving Best Evidence ("ABE") interview, but consented to police taking buccal swabs from the child in order to establish paternity. The victim subsequently changed her mind, and an ABE interview was conducted on 3 February 2017 in which she detailed how she met the respondent, how she came to Belfast, and her dissatisfaction with how she was treated in the course of the relationship.

[12] The victim declined to make a victim impact statement. We were told that she now lives in the community with her two children. The respondent made some efforts to see his daughter but not his son and now does not have contact with the children.

Interview and antecedents of the respondent

[13] During interview the respondent told police that he and his brother had visited the victim's aunt, who said that the victim wanted to get married, had been involved in two or three other relationships and had previously been engaged. He claimed that the victim's mother told him that the victim was 18, and she wanted her daughter to get married because her stepfather had taken a sexual interest in her and she had "already had other men".

[14] The respondent claimed that he paid the victim's mother to marry her, and the 'marriage' was an informal traditional agreement between families. He claimed that he did not find out until a month after the 'wedding' that the victim was fourteen. He said that he wanted to end the relationship when he found out her age, and took her back to her father's house, but the victim's family threatened him so he took her back.

[15] The respondent accepted that the age of consent in Romania was fifteen, but claimed that in the Roma community it was 'twelve/thirteen', and it is normal for older men to marry girls as young as twelve. He admitted to having sex with the victim from the outset of the relationship, and continued to have sex with her after he brought her to Belfast.

[16] The respondent has eighteen previous convictions, including two offences of sexual assault, committed against adult females in public in November 2013 for

which a probation order was initially imposed, but later revoked following the respondent's failure to comply. This was substituted on 24 September 2014 by concurrent sentences of six months' imprisonment suspended for two years. The respondent was also subject to sex offender registration requirements at the time of the offences.

Aggravating factors

[17] The aggravating factors set out at paragraph [18] of the reference were not disputed and are as follows:

(i) a significant disparity in age between the respondent and the victim;

(ii) repeated instances of penetrative sexual contact over a substantial period of time;

(iii) isolation of the victim;

(iv) pregnancy resulting from each of the offences;

(v) breach of suspended sentences for sexual assault; and

(vi) previous convictions for sexual offences.

Mitigation

[18] This aspect of the case was not agreed. On the respondent's behalf it was contended that his behaviour was the exercise of different cultural values held by the Roma community, and that he had been punished significantly by the loss of his children. During this hearing Mr Lyttle built upon this point by reference to a report from the European Roma and Travellers Forum entitled "Making early marriage in Roma communities a global concern" to illustrate the cultural context of the case.

[19] In addition, Mr Lyttle relied on the fact that the victim has expressed affection for the respondent and was living successfully in the community.

[20] We allowed Mr Lyttle to submit a report from Dr Bownes, consultant psychiatrist. This report referred to the respondent's social isolation and difficulties in prison given his cultural background. Mr Lyttle maintained that this was a factor to take into account in mitigation.

[21] Finally, Mr Lyttle raised the issue of delay and double jeopardy if the respondent were to have his sentence increased.

Delay

[22] It was not disputed that this case involved considerable delay. The charges relate to events in 2014 and 2015. The respondent was interviewed by police on 26 July 2016. The ABE interview of the complainant was conducted on 3 February 2017. The PPS say that the transcript of this interview was received on 23 May 2017. Whilst some delay occurred by this stage it is the next period that causes us most concern. That follows the reported allocation of the file to a Senior Prosecutor on 17 November 2016. On 23 November 2016 additional material was sought. However, after that as the reference highlights "no further substantive action" was taken on the file until May 2019, when a request for further information was made by the Directing Officer to the PSNI. Upon receipt of that information in September 2019, the decision was taken to prosecute on 22 October 2019 and committal papers were sent for preparation.

[23] Thereafter, in terms of case progression the summons was created on 30 April 2020. Some delay occurred due to the Covid-19 pandemic. The summons was issued on 9 April 2021, the committal date was set for 24 May 2021 and the respondent was returned for trial on 1 June 2021. The trial began on 11 October 2021 and a guilty verdict was returned on 13 October 2021. The respondent was sentenced on 21 January 2022. It is accepted that there has been a breach of the reasonable time requirement.

Consideration

[24] The argument boiled down to three issues as follows:

(i) what is the appropriate sentencing range for an offence of this nature;

(ii) what reduction could be made for mitigation, delay and taking into account double jeopardy; and

(iii) how should the court deal with breach of suspended sentences?

We will deal with each of these matters in turn.

[25] The offences we are dealing with now attract a maximum sentence of 14 years' imprisonment. However, it is apparent that cases of this nature arise in a wide variety of circumstances. That inevitably means that a judge should have the flexibility to sentence in a manner that meets the justice of a case taking into account the particular circumstances.

[26] In *R v DM* [2012] NICA 36 at [12] Morgan LCJ considered three English cases as being of assistance in determining the appropriate sentencing range in this type of case: *R v Corran* [2005] 2 Cr App R (S) 73 192, *R v Barrass* [2007] 2 Cr App R (S) 1 and *R v Frew* [2009] 1 Cr App R (S) 17.

[27] In *Corran* at [10] Rose LJ indicated that where there was consensual sexual intercourse involving a girl aged 13:

> "Pre-Act authorities such as *Bulmer* (1989) 11 Cr App R (S) 586, *Oakley* (1990–91) 12 Cr App R (S) 215 and *Brough* [1997] 1 Cr App R (S) 55, which indicate a sentence of the order of 15 months for a respondent in his 20s, will continue to provide assistance, particularly bearing in mind that life imprisonment was the maximum sentence for the pre-Act offence of having sexual intercourse with a girl under 13."

[28] Of the offence of sexual activity with a girl aged between 13 and 16, Rose LJ further noted at [11] to [13] the increase in the maximum sentence for the offence, from two years to 14 years, remarking that:

> "These increases in the maximum penalty must be appropriately reflected in sentences imposed by the courts in relation to offenders of whatever age."

[29] Flowing from this authority, the factors relevant to sentence were those identified at paras [7] to [9] including:

> "The age of the respondent, of itself and when compared with the age of the victim, is also an important factor. A very short period of custody is likely to suffice for a teenager where the other party consents. In exceptional cases, of which there is one before this court, a non-custodial sentence may be appropriate for a young respondent. If the offender is much older than the victim a substantial term of imprisonment will usually be called for.
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> [9] Other factors include the nature of the relationship between the two and their respective characters and maturity, the number of occasions when penetration occurred, the circumstances of the penetration, including whether contraception was used, the consequences for the victim, emotionally and physically, the degree of remorse shown by the respondent and the likelihood of repetition. A reasonable belief that the victim was 16 will also be a mitigating factor, particularly where the respondent is young. A plea of guilty will, of course, be pertinent, in accordance with the guideline issued by the Sentencing Guidelines Council."

[30] At [27] to [40] of *Corran* the court considered the case of *Cutler*, in which the appellant (aged 35 at the time of the offences) pleaded guilty to two specimen counts of engaging in penetrative sexual activity with a 13-year-old child over a significant period of time. The court determined that an extended sentence of four years with a custodial term of two years and an extended licence of two years was not manifestly excessive.

[31] In *Barrass*, the court reduced the sentence imposed upon a 26-year-old man, for an isolated act of sexual intercourse with a 14-year-old girl following a meeting at a birthday party at which alcohol was consumed, to one of 18 months on a plea of guilty where there had been no previous sexual offending.

[32] In *Frew* the court noted at [12] referring to *Barrass*, that older men faced longer sentences than those imposed on younger men before the publication of the Sentencing Guidelines Council's Definitive Guidelines. In that case, involving one instance of sexual intercourse between a 29-year-old man and a girl aged 15½, a sentence of two years was reduced to 18 months on a guilty plea. The court noted at [14] the "serious aggravating feature" of the pregnancy and its consequences (a late abortion in that case).

[33] There are three cases decided in this jurisdiction to which we also refer as follows. In *R v McCormick* [2015] NICA 14 at [11] the court considered that for a case of a single instance of non-penetrative sexual activity between an adult aged 27 and a child aged 15 years nine months, the appropriate starting point before making allowance for the plea was in or about two and a half years.

[34] In *DM* the offender was aged 23 and the victim 15. Morgan LCJ considered at [13] that "A sentence of 30 months' imprisonment was stiff for an offence of this kind", having noted the aggravating factors of the age difference, the pregnancy and termination resulting in post-traumatic stress disorder, the vulnerability of the victim due to alcohol and the late plea of guilty.

[35] *R v SG* [2010] NICA 32 where the victim was aged 13 years and the offender 19 years and the offending continued over a period of around 18 months, a sentence totalling four years on a plea of guilty was upheld. The offender had a previous conviction for a similar offence against a 15-year-old girl for which he had received a suspended sentence and had renewed his offending having been warned off by the victim's father.

[36] It will be apparent from all of these authorities that cases of this nature are fact sensitive and what the ultimate sentence will be in a particular case will be dictated by the specific facts. In this case there are a number of aggravating factors which are set out at paragraph [17] above. In these circumstances an immediate custodial sentence was clearly appropriate. The defence submissions made at the lower court in support of a suspended sentence were unrealistic and bound to fail.

[37] This is not to say that the sentencing exercise in this type of case is straightforward. Any court looking at this case would be cognisant of the realities of the situation. In particular, we understand the point made that the respondent did not and does not realise the wrong he has committed due to his upbringing. Against that the respondent knew that the age of consent in Romania was 15 years. Therefore, any possible credit is clearly lost. This type of conduct cannot be justified simply by virtue of the fact that it may be prevalent in another jurisdiction for the reason that it is not acceptable in Northern Ireland. We agree with the prosecution that there is no personal mitigation in this case. The element of misunderstanding on the respondent's part does not excuse this behaviour although it may explain it.

[38] The report of Dr Bownes does not amount to personal mitigation given that the issues raised in it will be common to many prisoners who come from different ethnic backgrounds. There is no evidence that the respondent was impacted more than might reasonably be expected. The report on child marriage patterns filed by the respondent is helpful in that it highlights an international consensus on the need to educate in this area with the aim to reduce incidence of this behaviour. However, the cultural context of this offending is not of itself a mitigating factor.

[39] We were wholly unimpressed by the argument that the victim expressed some affection towards the respondent at various stages when she was a child. In addition, the argument based upon the respondent's loss of contact with his children is unsustainable.

[40] The impact upon the victim is not diluted by the absence of a victim impact statement as the Court of Appeal explained in *R v Campbell Allen* [2020] NICA 25. The current stability which the victim enjoys does not detract from the conduct perpetrated upon her when she was a very young girl as a result of which she had two children.

[41] Overall, we consider that the appropriate starting point was in the order of two and a half years' imprisonment. That takes into account the significant aggravating factors and the absence of personal mitigation. In our view the only reduction in sentence can possibly derive from delay and double jeopardy.

[42] The judge concluded that the reasonable time requirement had been breached. We also consider that on this basis a reduction in sentence is appropriate given the breach of this requirement which is at the high end. On its own this may not amount to a significant period however in addition there is the associated issue of double jeopardy in that the respondent now faces a substantial increase in sentence.

[43] We note the comments made in *Attorney General's Reference* No 1 [1993] NI 38 to the effect that if the sentence imposed is unduly lenient it does not automatically follow that it should be quashed given the principle of double jeopardy. That is

because the offender has to face the ordeal of a second sentencing exercise. We find some merit in this argument in this particular case. The need for an increased sentence prevails over upholding the original sentence for the reasons we have given and to reflect the need to deter this type of offending in future. However, some reduction can be applied. Therefore, in all of the circumstances the increased sentence we will impose is one of 18 months' imprisonment.

[44] We also consider that the suspended sentences should have been activated. The court's powers to activate a suspended sentence are found in section 19 of the Treatment of Offenders Act (Northern Ireland) 1968. The Court of Appeal, in *DPP's Reference (No.2 of 2019) (R v KT)* [2019] NICA 42 at [57] emphasised the duty to activate suspended sentences unless in all the circumstances it is considered unjust to do so. In this instance, the offences were sexual assaults on adult female strangers, in respect of which the respondent was convicted after a trial. However, applying the principle of totality and given that the sentence has already been doubled by this court on the two counts we consider that the suspended sentences should be made concurrent with the other sentences imposed.

Conclusion

[45] Accordingly, for the reasons given above, we will grant leave and allow the reference. We have decided that the sentence imposed is unduly lenient. Accordingly we increase it to one of 18 months' imprisonment. There will also be activation of the suspended sentences. All sentences are to run concurrently, which means that the respondent will spend nine months in custody and nine months on licence. The additional orders made by the trial judge remain in place. We also direct that this judgment should be translated for the benefit of the respondent.