Neutral Citation No: [2025] NICA 33	*Ref:*	**KEE12799**
	ICOS No:	**23/61344/A03**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**12/06/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

ROBERT GEORGE DAVID ANDERSON

IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS (NI) UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002)

Mr Gregory Berry KC with Mr Luke Curran (instructed by Madden & Finucane Solicitors) for the Defendant
Ms Laura Ievers KC with Mr David McNeill (instructed by the Public Prosecution Service) for the Crown

---

Before: Keegan LCJ, Horner LJ and O'Hara J

KEEGAN LCJ (*delivering the ex-tempore judgment of the court***)**

In this judgment, the identity of the victim has been protected as the Sexual Offences (Amendment) Act 1992 (as amended) requires. Furthermore, we draw to the attention of anyone hearing or reading this judgment, that there is a prohibition on identifying the victim of a sexual offence of this nature.

Introduction

[1] This is a reference brought by the Director of Public of Prosecutions in relation to a sentence of 18 months' imprisonment imposed by His Honour Judge Kerr KC ("the judge") on 5 November 2024, in relation to historic sex offending.

[2] The nature of a reference is explained in recent cases of this court including the case of *R v Ali* [2023] NICA 20. To summarise, a reference is not a generalised

right of appeal. A sentence must be wrong in principle or outside the reasonable range open to a sentencing judge for a reference to succeed. A sentence must not just be lenient, but unduly lenient, and even if a court reaches that point, a court has a discretion not to interfere with a sentence imposed. We also reflect that considerable weight is given to the position of a trial judge who conducted the trial.

[3] The sentence that we are asked to review covered a number of offences, namely five counts of indecent assault on a female, contrary to section 52 of the Offences against the Person Act 1861, including one count, count 7 which is the most serious count, of digital penetration. The judge imposed a total sentence of 18 months' imprisonment split equally between custody and licence on that count, and he imposed 12 months' imprisonment concurrently on all other counts and a five-year restraining order. There is no issue taken with the concurrent sentencing exercise that was adopted or with the ancillary orders that were made and refused by the judge. Rather, two points are raised on this reference, namely what is termed the starting point was too low on count 7, which as I have said, is the count covering an offence of digital penetration and also that the judge's methodology of applying a 50% reduction for personal mitigation was wrong in principle.

Background

[4] Very briefly in terms of the case trajectory, this defendant was arraigned on 27 September 2023, pleaded not guilty to the offences, was convicted after trial of the counts that I have referred to, and acquitted on other counts and further counts against other complainants were left on the books.

[5] The victim in this case was aged between seven and eleven years old when she suffered these sexual assaults. They were committed between 1993 and 1997. The defendant lived in the vicinity of the complainant, aged in his forties at that time, he is now approximately 76 years of age, and the various counts show an escalating picture up to the most serious digital penetration count which occurred after the victim was injured at the defendant's house. We also note that there are two specimen counts.

[6] The judge reflected all of this in his sentencing remarks which we have read. He also referred to the considerable victim impact in this case which is set out in a victim statement. That refers to the clear adverse effects this offending has had on the life of the victim and the sequalae that she has suffered as a result of that is plain.

[7] We have had the benefit, as the trial judge did, of a pre-sentence probation report which refers to the defendant as being 76 years of age, and a single man with no relevant previous convictions. He denied the offences. Reference is made to the defendant's physical health, in particular his psoriasis and mental health issues including depression. These are also referred to in a report that was filed on behalf of him by Dr Michael Curran. That report highlights the issues that this defendant

would likely have if imprisoned, leading to potential mental health issues which may require the help of the SPAR service in prison which helps vulnerable persons.

The sentencing exercise

[8] The aggravating factors in this case are not in dispute. There are two mitigating factors which are in dispute in the sense that it is submitted that the judge gave too much weight to them, namely the defendant's age and his medical conditions. The real question in this case is - is it out of range for the judge to have settled on an 18-month sentence of imprisonment given that count 7 relates to the most serious offending of digital penetration? Allied to that is the subsidiary question - did the judge err in principle in terms of the methodology he applied?

[9] All of the cases in this area refer to the wide margin of discretion afforded to trial judges in these types of difficult cases given the fact sensitive nature of this offending. This court has specifically referred to that principle in a case of *R v CD* [2024] NICA 9 at para [33]. In addition, as Mr Berry submitted and Ms Ievers accepted, there is a need to apply some regard to the fact that this is an historic offending case. That principle and the need for a "measured reference" in cases of historic sexual offending is set out in a case of *R v DL* [2020] EWCA Crim 881, particularly, para [24]:

> "The term "measured reference" is not intended to prescribe a mathematical exercise, but rather to cause the court to reflect the previous maximum sentence as part of the composition of the sentence based on current guidelines. It must achieve a proper calibration and thereby some reduction to reflect the statutory maximum available at the date of offending."

[10] We have been referred to a number of other cases which I will briefly mention. Firstly, the case of *R v GM* [2020] NICA 49, this was a case involving a single count of sexual assault by a father on a four-year-old. The court pointed out that this was on the cusp of the more serious offence. A distinguishing factor is the medical evidence which established significant bruising to that child and resulted in a sentence after a plea of three years and nine months.

[11] Perhaps of most significance, for the purposes of this reference, is a more recent decision of this court in *R v CD*. In that case the Court of Appeal discussed the case of *GM* in a reference in relation to a two-year sentence for two counts of sexual assault of a child who was 10 or 11 years old, consisting of touching. We provided some guidance in that case in relation to the way judges should approach sentencing in this area.

[12] We also note one other case which we think is of relevance here which is *R v AB* [2015] NICA 70, which concerned two counts of assault by penetration on a

child under 10 years of age, where a sentence of three years and six months was appropriate.

[13] We were not asked to provide any updated guidance on this type of historic offence or the current Article 13 offence under the Sexual Offences (Northern Ireland) Order 2008. So, with that brief recitation of the sentencing decisions, we come to the points raised in this reference.

[14] First, the judge's methodology of applying a 50% reduction for personal mitigation after he had settled on a starting point of three years, was clearly wrong in principle. Rightly, Mr Berry did not take any serious issue with that error because it is obvious. Any sentencing judge should consider aggravating and mitigating factors having considered culpability and harm and then make any reductions after that for guilty pleas or for culpable delay. The judge's different approach leads to confusion and, in some cases, will result in sentences having to be adjusted by this court. The reference that has been put before us succeeds as the judge's methodology was wrong in principle.

[15] However, the core question really is, whether the ultimate sentence was too low given count 7, the digital penetration count. The answer depends on whether or not the judge has erred in relation to the range. We are sympathetic to the judge in this regard because he was not addressed on a particular range, and he may not have appreciated *CD*. Putting that aside, the problem in this case is that taking into account aggravating and mitigating factors we consider that the judge gave too much weight to the issues pertaining to the defendant, namely his age and the medical conditions that he has.

[16] As decisions of this court have said including *R v Vincent Lewis* [2019] NICA 26, the age of an offender will have limited weight and can be taken into account as personal circumstances but should not be elevated to an exceptional circumstance. Health issues will depend on the factual circumstances of a particular case. Again, we consider, these are part and parcel of personal circumstances. In this case at its height, the medical evidence indicated a condition of psoriasis and depression which could be exacerbated by the stress of imprisonment. We do not consider that there was anything more critical vouched in evidence that would lead that issue to be taken as exceptional on the facts of this case.

[17] Thus, we find that the judge has also erred in fixing the proportionate sentence for offending of this nature. The range here, we think, very broadly was somewhere between three and five years. Any case will depend on its own facts where it falls within that range. The aggravating factors are clear. Against that, some mitigation is provided by the age and medical conditions. So, we think, that a sentence of around three and a half years was appropriate. That means that the judge's settling on a sentence of 18 months is not just lenient, but unduly lenient, and well outside the range. Therefore, we grant leave and allow the reference and

substitute our own sentence that meets the justice of this case which will be an increased sentence.

[18] Finally, the only other issue that has validly been raised with the court is in relation to double jeopardy. This principle is explained in *R v Ahamad* [2023] NICA 52. The defendant expected to be released in August 2025. There is no real issue that double jeopardy applies in law because he will not be released in August. Having taken double jeopardy into account, we will make a small reduction. The final sentence will be three years' imprisonment on count 7, the other sentences remain unaltered, to run concurrently. Other matters such as disqualification will follow as matter of law. The restraining order remains unaltered.

Conclusion

[19] We allow the reference and substitute a sentence of three years' imprisonment for the 18 months previously imposed.