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| Neutral Citation No: [2026] NICA 6 | Ref: KEE12974 |
| | ICOS No: 21/19843/A01 24/42024/A01 |
| | Delivered: Ex Tempore 30/01/2026 |
| Judgment: approved by the court for handing down (subject to editorial corrections)* | Written reasons: 20/02/2026 |

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

GW

Mr Hutton KC with Mr McLean (instructed by Phoenix law) for the Appellant
Mr Magee KC with Ms McKay (instructed by the Director of Public Prosecutions) for the
Crown

Before: Keegan LCJ, O'Hara J and McLaughlin J

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

In this judgment, the appellant has been anonymised to protect the identity of his children. Nothing must be disclosed or published without the permission of the court which might lead to the identification of the children. The initials used are not the real initials.

Introduction

[1] The appellant appeals, with leave of the single judge, against a sentence imposed on 27 September 2024 by His Honour Judge Irvine KC ("the judge") for five historic offences against three child victims two sons (we will call A and B) and stepson (C), contrary to section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968. The total sentence was eight years' imprisonment which the appellant claims is manifestly excessive.

[2] At the end of the hearing we summarised our decision with written reasons to follow. These are our reasons.

[3] The case chronology shows that the sentence at issue followed a fourth trial. Undoubtedly, this trajectory has affected all of those concerned not least the complainants who have had to give evidence on various occasions over a long period of time.

[4] The make-up of the sentence is set out in the certificate of conviction. It is comprised of various sentences over the five counts by way of consecutive sentences to reflect the offending for each of the victims in relation to whom the appellant was convicted.

[5] The first indictment is dated 10 March 2023 and contained 35 counts involving seven complainants. The appellant was convicted of one count, count 24, on that indictment, that is wilful assault on his son A. He was sentenced to a determinate custodial sentence of one year concurrent with a count in relation to A on the second indictment. He was acquitted of four counts and the jury failed to reach a verdict on the other counts.

[6] The second indictment is dated 27 February 2024 and contained 25 counts. The appellant was acquitted of 21 of these counts and convicted of four counts:

- Count 16, which was a specimen account of wilful assault on his son A between a period 1994-1996. Determinate custodial sentence of three years.
- Two specimen counts, 8 and 9, of child cruelty by ill-treatment against his stepson C between May 1988 and May 1997. Determinate custodial sentence of two years consecutive to Count 21.
- Count 21 A specified count of child cruelty by wilful assault in relation to the appellant's son B committed in a period between 8 June 2005 and 8 June 2008. Determinate custodial sentence of 3 years consecutive to Count 16.
- Total sentence - Three years in relation to A, two years in relation to C, and three years in relation to B - all consecutive resulting in a determinate custodial sentence of eight years split equally between custody and licence.

[7] The nature of the offending against each victim in the second indictment was as follows. The first count that the appellant was convicted of was in relation to A. That offending occurred on 25 June 2007. It followed an argument with his brother and an action by the appellant which involved grabbing and pulling and dragging of his son who was at that time was aged 14 to 15. It is important, however, to note and, indeed, it is reflected by the fact that the judge imposed a one year sentence in relation to this particular offence, that the judge was satisfied that this was an assault at the lower end of the scale, no physical injuries having been sustained and, as I have said, the injury to A's thumb was pre-existing.

[8] The other specimen count in relation to A contained in the second indictment is in relation to physical and verbal abuse having occurred between a period of seven years, when A was between 10 and 16. This offending is described as involving variously roaring and shouting and also slapping and physical punishment for not being able to undertake certain tasks in the home or in relation to school work.

[9] The offending against the second victim, the appellant's stepson, C is contained in two counts 8 and 9. These were counts reflecting verbal abuse during a period of 11 years directed towards C including referring to him as stupid.

[10] The third victim is B, who is the other son of the family. The specific count in relation to him for which the appellant was convicted concerned one incident which occurred between 8 June 2005 and 8 June 2008 which followed B accidentally shooting a friend with a pellet gun. The appellant drove to a field and used the pellet gun on B.

This appeal

[11] We summarise the grounds of appeal as follows:

- (i) the judge failed to adopt an interpretation of the jury's verdict most favourable to the appellant.
- (ii) the judge failed in making a finding of significant harm.
- (iii) the judge failed in his analysis on count 16 to find that it was one offence rather than an offence occurring on numerous occasions.
- (iv) the judge failed on counts 8 and 9 in concluding that the verbal abuse was on numerous occasions over years; and
- (v) applying totality, the judge reached a sentence which is manifestly excessive with no deduction for delay.

[12] Mr Hutton KC sensibly accepted that the custody threshold was passed. However, he focused on the factual basis for the sentence. There was clearly a dispute as to the factual basis for the jury's verdicts which led to a further hearing before the judge on 3 September 2024. We can see that written submissions were filed and that the judge had those available to him but declined to make any detailed factual findings himself save an assessment about the first count 24, reduced in severity due to a previous injury to the finger.

Consideration

[13] As has been said before in this court, cases of child cruelty, ill-treatment, neglect, wilful assault are all fact specific. The salient features of this case are that it involved three victims, it was fully contested and, indeed, as Mr Magee KC points out, the appellant in respect of much of the offending said that it did not occur.

[14] The contextual backdrop the sentencing judge had to consider was that the appellant was acquitted of the more serious charges brought against him, and the five counts for which he was convicted are at the lower end of the scale of seriousness for this type of offending.

[15] Sentencing proceeded with the benefit of a probation report, and victim statements. There was also a report from Dr East on the appellant which set out some of his own mental health difficulties and a subsidiary report which set out some difficulties experienced within his current family structure.

[16] The judge refers to all of the above in his sentencing remarks. He also refers to the fact that the appellant has no criminal record of relevance and has his own issues. Finally, the judge acknowledges that he had to sentence only on the basis of the convictions returned by the jury. The appellant submits that, notwithstanding this comment, the judge failed to do so.

[17] The updated four-page legal submissions, provided by prosecution and defence counsel, amply highlight the points on appeal. Helpfully, the PPS accept an error with how the judge sentenced on count 16, because the jury acquitted on count 15 which concerned injury.

[18] As to the legal issues a helpful summary of the current law is found in *Blackstone's Criminal Practice 2025* D20.57 which states:

“D20.57

Sentencing for Sample Offences Following a Trial - Where the offender pleads not guilty to the offences on the indictment but is found guilty, the offender should not be sentenced as if found guilty of other offences not included in the indictment even if the prosecution had described them as ‘specimens.’ This is the view adopted in *Burfoot* (1990) 12 Cr App R(S) 252. The offender ought not to be deprived of the right to jury trial because offences are omitted from the indictment.

In *Clark* [1996] 2 Cr App R(S) 351, the Court of Appeal followed the reasoning in *Burfoot* and in *McKenzie* (1984) 6 Cr App R 99. Their lordships said that the weight of

authority supported the proposition that, where D was convicted on a single count, the sentencer must not sentence D on the basis of being guilty of further offences of a similar nature unless D admitted that this was so.

In *Canavan* [1998] 1 Cr App R 79, Lord Bingham CJ stated that a court could not base its decision as to sentence on the commission of offences not forming part of the offence for which D was to be sentenced.

In *Clifford* [2014] EWCA Crim 2245, the Court of Appeal said that it would be inappropriate to sentence D to a greater sentence on the basis of material adduced as bad character evidence at trial.

An alternative to the above procedure is now set out in the DVCVA 2004, s.17. This allows the prosecution to apply for trial by jury on sample counts, with the judge trying the remaining counts alone (see D13.87 for details)."

[19] Having considered the relevant authorities we agree with Mr Hutton that the jurisprudence indicates an approach to sentencing of a narrow interpretation of a jury's verdict. Also, where a count is a specimen count, held up as an example of a wider course of conduct involving multiple instances of offending, conviction on such a count will not entitle a court to sentence based on multiple instances of offending as to do so is contrary to basic fundamental principle, as per *R v Canavan*.

[20] The Crown Court Rules (Northern Ireland) 1979 do not allow for a multi-incident count in the same manner as in England and Wales. However, even where the English rules allow for a multiple count indictment, which means more than one instance of offending, without attention to the drafting of such counts, they will be presumed to signify conviction based on two, rather than one instance of offending. More fundamentally for present purposes, a defendant convicted of such a count should not be sentenced in respect of other alleged offences in respect of which he was not indicted or convicted. A specimen count signifies for sentencing purposes one instance of commission of an offence, whereas a multi-incident count signifies two incidents, unless specified otherwise in the count.

[21] Of continued utility is the guidance provided by *R v M* [1999] NI 45 when the Court of Appeal in Northern Ireland reviewed authorities including *R v Rackham* [1997] 2 Crim App R 222 to the effect that an indictment needed to be drawn in such a way that a defendant would know the case he had to meet and so that the judge, in the event of a conviction, would know precisely what it was that the jury had found proved. At page 56B-E the court stated:

“We would make some general observations of general application to cases involving the use of specimen counts to cover a series of repeated offences:

1. It is important that where specified incidents can be identified they should be so identified in particular counts.
2. It is not necessary that detailed particulars are set out in the indictment but if the defence requires the examples to be particularised at the trial then this should be done in so far as it is possible to do so and failure to do so may result in a finding that conviction is unsafe.
3. Where it is impossible to identify the circumstances of particular incidents the jury should be directed that they must be satisfied that the offence alleged took place on at least one occasion, and in respect of each similar count that the offence took place on a further occasion.
4. A sufficient number of charges should be laid to reflect the extent of the criminal behaviour.
5. Different categories of offences should be reflected by different counts.
6. This court will rarely interfere when the jury have had a full opportunity to decide fairly the real issues between the parties and their decision is clear and consistent as between different counts.”

[22] In this case there was a level of disagreement as to the substance of the counts for which the appellant was convicted. It is unfortunate that the judge did not determine this issue as this failure has given rise to the issues which have necessitated this appeal. We have had the advantage of detailed submissions on appeal. As a result we can see that given the particulars of each count for which the appellant was convicted in the indictment the judge was not entitled to treat the relevant specimen counts of which the appellant was convicted as if they constituted convictions in respect of multiple other offences of the same type of behaviour that the appellant had not been convicted of. Furthermore, the prosecution went too far in this case in maintaining a position of repeat offending on any of the counts for which the appellant was convicted for the purpose of sentencing.

[23] Whilst the defence submissions on sentencing contended that the jury's verdict should be interpreted favourably to the appellant the precise consequences of the *R v Canavan* line of the authority were not spelt out. Hence, the judge was led into error. Properly analysed the judge has failed to base his sentence on a narrow interpretation of the verdicts and the underlying facts for the counts on which the appellant was convicted. He has failed to proceed on the version most favourable to the defence which was single incident offending, and he has overestimated the extent and level of the offending. These are all errors of principle. The well-known legal principles which Mr Hutton relies on do not require further elucidation save to reiterate that the factual basis of the offending for which a defendant is convicted dictates the sentence. Applying *R v King* [2017] EWCA Crim 128 if there is any uncertainty about interpretation of the jury's verdict a judge must pass sentence on the one most favourable to the defence.

[24] In addition, as counsel accept, the judge was required to cast a critical eye on victim impact in this case in reaching his sentence. The victim statements all paint a picture of the effects of this offending on three people who are now adults which we do not underestimate. In this case, those statements appear to reflect the views of the victims in relation to the totality of the allegations which they made against the appellant, including matters for which not guilty verdicts were returned. It is understandable that the statements may have been prepared in this way and no criticism can or should be made of the victims in this case because they proceeded to trial to present all of their allegations. However, we come back to the fact that the appellant was only convicted of five of the counts and not the entire history of abuse alleged including much more serious offending presented by each of the victims. It is not clear that the judge has appreciated this in his ultimate sentences.

[25] There is also a valid delay point. The delay in this case was that the appellant was initially interviewed in 2007 and then 2013, 2018 and last interviewed in 2022. The delay has been explained as a period of 11-17 years, which is extreme. The prosecution rightly accepts that during that period the critical time is really 2013-2017 where no explanation can be given for the failure to interview the appellant and progress the case. Mr Magee, therefore, conceded that the judge in this case should have made some allowance for delay.

[26] It will be apparent from the above that unfortunately errors have been made which affect the sentence. The remaining issue is whether the sentence is proportionate given the level at which this offending occurred.

[27] The only authority in this area that has been referred to us is *R v W* [2014] NICA 71 which set a starting point of seven years for more serious offending including sexual offending. *R v W* is obviously a more serious case of higher-level offending.

[28] Mr Hutton, submitted that the sentence should have been 18 months to start, perhaps increasing this by virtue of the fact that there were three victims to a

maximum of three years. We have considered that argument having looked at the underlying facts and having done so we do not think that that suggested range truly reflects the offending in this case.

[29] As this court stated in *R v CD* [2021] NICA 45 at para [15]:

“[15] In *R v W* [2014] NICA 71 the Court of Appeal summarised the principles in applying sentencing in cases of child neglect and child cruelty at para [19] and we repeat these:

‘[19] The sentencing authorities stress that sentencing in cases of child neglect and child cruelty necessitates a careful consideration of the entire factual context. In *R v Orr* [1990] NI 287 the Court of Appeal stressed that it is necessary for the courts to protect children and to deter those who might cause them injury. Cases of repeated actions are more serious than a simple incident. The English Court of Appeal in *R v Bereton* [2002] 1 Crim App Reports (S) 63 pointed out that the sentencing authorities in child cruelty cases are distinctly limited as each case of this type turns on its own facts. The courts must ensure punishment and deterrence (*R v Durkin* [1989] 11 Crim App Reports (S) 313). There can be an immense variety of facts in such cases and the degree of seriousness with which they will be regarded (*Attorney General’s Reference (No 105 of 2004)* [2005] 2 Crim App Reports (S) 42). It is thus clear that no two cases in this field will be the same and the precedent value of other sentencing decisions in different factual context will be limited.’”

[30] Drawing the above together we conclude as follows. This was a case where the judge was entitled to apply consecutive sentences to reflect the offending against each of these victims when they were children. However, given the errors which have been identified, there must be some adjustment to this sentence as follows in relation to the offending against the child A on 25 June 2007 which the judge himself felt was at the lower end of offending and applied a one-year sentence. Sentencing on count 16 should have attracted a similar sentence and so we substitute the sentence on count 16 to one year applied consecutively which makes a total sentence of two years. In relation to C the offending was verbal abuse, with some element of humiliation. This is comprised in two counts and represents two incidents.

Therefore, the sentence imposed by the judge was manifestly excessive and should be reduced to a total sentence on the two counts of 18 months, concurrent with each other. The offending against B was a one-off incident in relation to the pellet gun. This was denied, so even though it is a one-off incident a sentence of 18 months is merited.

[31] The above analysis results in an overall sentence of five years rather than eight years. This remains a significant sentence for the level of offending which occurred but reflects the fact that there were three victims and a serious breach of trust. Finally, given the extensive delay particularly between the first interview and charge and the proper concession made by the prosecution that there should have been a deduction in relation to delay, six months should be deducted from the five years. This leads to a total sentence of four and a half years. As the offences occurred prior to the commencement of Article 8 of the Criminal Justice (Northern Ireland) Order 2008, the sentence being imposed is not a determinate custodial sentence and the court is not required to specify when the appellant is to be released on licence.

Conclusion

[32] Accordingly, we allow the appeal and substitute a sentence of imprisonment of four years six months.