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| **Neutral Citation No: [2026] NICA 4** | *Ref:* | **KEE12949** |
| | *ICOS No:* | **24/62290/A01** |
| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* | **16/01/2026** |

**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE KING**

**v**

**GORDON McBREARTY**

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**Mr McConkey KC and Mr Boyd (instructed by McIvor Farrell Solicitors) for the Appellant**
**Ms McKay (instructed by the Public Prosecution Service) for the Crown**

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**Before: Keegan LCJ, McBride J and Smyth J**

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

***Introduction***

[1] We are grateful to counsel for the written and oral arguments in this appeal and as a result we are able to provide a ruling today.

[2] This is an application brought with leave of the single judge to appeal a sentence imposed by His Honour Judge Kerr KC ("the judge") at Belfast Crown Court on 18 September 2025. The sentence imposed was for one count of intentional sexual touching, contrary to article 7 of the Sexual Offences (Northern Ireland) Order 2008("the 2008 Order."). The ultimate sentence arrived at after reduction for a guilty plea was one of 45 months, 22½ months in custody and 22½ months on licence.

[3] The indictment in this case comprised three counts as follows:

Count 1 - Assault with intent to commit rape or assault by penetration;

Count 2 - Sexual assault which was pleaded to; and

Count 3 - Attempted sexual assault by penetration.

[4] On 8 November 2024, the appellant was arraigned and pleaded not guilty to all counts, he was then rearraigned on 30 May 2025 and pleaded guilty to the less serious count 2 and the more serious counts 1 and 3 were left on the books.

*Factual background*

[5] The factual background is set out in the comprehensive decision of the single judge. In summary this offending occurred in the early hours of the morning on 4 June 2023, when police received calls from concerned members of the public reporting a woman in distress in the area of May Street in Belfast. When officers arrived, they found the victim who was upset and apprehended a male who is the appellant in this case.

[6] The victim gave a recorded Achieving Best Evidence ("ABE") interview. She accepted that she had been drinking on the night in question at Belfast city centre. After the bar closed, she was trying to get a taxi. When unsuccessful, she decided to walk home and was approached by the applicant, who said he was also looking for a taxi. He was initially friendly and then that changed. When walking the victim was on the phone with her partner, who was coming to collect her and without warning the appellant grabbed her and pushed her against railings, lifted her dress and touched her down her underwear touching her vagina.

[7] Police arrested the appellant shortly after and he gave an incredulous account at interview. The Pre-sentence Report [also recorded] that [he] maintained the version that the complainant had agreed to go back to his flat, which [the probation officer] noted seemed highly unlikely in all the circumstances. The probation officer does, however, also note that he is remorseful for what happened.

[8] The sentencing judge in this case took into account this background, and he had the benefit of a presentence report which we have also read. Very much in summary, this tracks the appellant's past history. He has a criminal record which is set out and explained in the probation report but, significantly, it does not include any sexual offending. He has had some difficulties himself in the past which are set out in the report. Ultimately, the conclusion of probation was that he did not pose a significant risk of serious harm to the public. However, in view of his other antecedents for different types of offending, he does present a high likelihood of general reoffending and, indeed, one of the complications in this case is that he has served a range of short sentences for other types of offending since his remand into custody. In relation to sexual re-offending he is in the moderate category for supervision and intervention.

*This appeal*

[9] The grounds of appeal are set out in the single judgment but really amount to one which is that the judge erred in adopting a starting point of five years' imprisonment for a single count of sexual touching and that this was too high for a

non-penetrative assault. The case is simply made that the cases on penetrative assault under Article 6(1) of the 2008 Order would not result in this level of sentence and this is a lesser offence. So, a consistency argument is made by Mr McConkey in writing and orally, that this sentence is out of line with the appellate guidance generally in this area and really reflects a sentence which would have been imposed had the other two counts on the indictment been proceeded with.

[10] We turn now to the judge's sentencing remarks, which we have read. The judge does set out the aggravating factors which are not substantively contested. They are:

(i) the vulnerability of the complainant or victim, who was a lone female under the influence of alcohol;

(ii) the fact that this occurred in a public place;

(iii) the fact that there was some aggression used towards the victim, although we note that the injuries sustained were at a relatively low level; and

(iv) the persistence of the offending.

[11] The mitigation which should be rightly acknowledged was that the appellant entered a guilty plea avoiding the need for a trial and that this was something of importance to the victim in the case. The judge did also record that the appellant had no previous convictions for sexual offending, and that he expressed shame and remorse in relation to this offending. Thus, the judge settled on a starting point or an end point having considered aggravation and mitigation of five years which was reduced by 25% for the plea. That reduction is not challenged. In addition, the judge did not make a Sexual Offences Prevention Order ("SOPO") and there is no argument now on appeal in relation to that aspect of the sentence.

***Consideration***

[12] The appeal really turns on how this court should view the sentence in light of established authority in the area of penetrative sexual offending both against adults and children and whether this sentence was manifestly excessive.

[13] We have considered the arguments in relation to the consistency point raised by this appeal. We have also considered what was put to the sentencing judge in relation to this issue. Subsequent to this case being dealt with, this court has issued a judgment *R v Collins & Mateer* [2025] NICA 50 which states that counsel should assist courts by articulating the suggested appropriate range.

[14] This sentencing judge did not have the benefit of the submissions that we have had from both the prosecution and the defence which, in truth, are not hugely divergent in relation to what the appropriate range should be for the index

offending. We also understand that there is no direct authority from the Court of Appeal on sexual assault of this nature pursuant to article 7 of the 2008 Order, that is, committed by an adult against an adult.

[15] However, as both the defence and prosecution accept, there is assistance to be gleaned from the nearest authority which is a relatively recent case of *Byrne & Cash* [2020] NICA 16. That case did involve the more serious offence of digital penetration of an adult which is the article 6(1) offence. In that case, the Court of Appeal stated at para [14] that the offence attracted a two-year sentence starting point without aggravation or mitigation. In *Byrne's* case the fact that the victim was vulnerable and the predatory nature of the offending justified a six-month increase to the two-year starting point. A prior case of *TH* [2015] NICA 48, which was also a case of assault by digital penetration, resulted in a global sentence of three years, but that was due to quite marked violence which was involved in the offending.

[16] These are two headline cases although others have been mentioned to us which we are familiar with which deal with child offending *GM* [2020] NICA 49 and *CD* [2024] NICA 9, in particular. What we glean from these authorities is that for the more serious offence under article 6(1), the range that has been approved by this court has been 2-3 years.

[17] In this case, the judge chose five years as a starting point in circumstances where he was bound by the agreed facts, which are set out in the prosecution opening, and in circumstances where the prosecution did not proceed with the more serious counts of assault with intent to commit rape, or assault by penetration and attempted assault by penetration. Obviously, if the prosecution had proceeded with either of these more serious counts, there would be no question that the sentence was within range. However, the plea was only to a lesser offence, and the judge was not entitled to sentence for the two charges left on the books by agreement between the prosecution and defence.

[18] Mr McConkey, maintains that the appropriate range was 12 months to two years maximum. He states that a two-year maximum is the most the court should have arrived at looking at previous authorities, as we have said, for the more serious offending.

[19] Ms McKay, on behalf of the prosecution, frankly, stated that Mr McConkey was not far off in the range he put forward, and she suggested a slight increase to two and a half years as appropriate before reduction for the plea. Implicitly, she therefore agreed with the defence that the sentence was too high.

[20] Considering all that has been said the question that we as an appellate court must ask ourselves and, indeed, a sentencing court must ask themselves, is whether the offending in this case justified a starting point of five years or, in other words, whether the sentence was proportionate.

[21] To answer this question, as the court said in *CD* we look to the culpability, harm and risk in this case. Culpability in this case may be gleaned from the circumstances of what happened. The judge says that this was a bad example of sexual assault, some violence was used, it was predatory in nature, it involved taking advantage of a drunk female who was alone in a public street. We agree with all of that. The circumstances can only be described as high culpability for the article 7 offence.

[22] The judge then considered the victim impact statement and describes harm at the higher end of medium. We can see, understandably, that this victim has been affected by this assault upon her. In terms of risk the judge relied on what probation found, that the appellant is not a risk of serious harm to the public, but he presents a high risk of general offending.

[23] All of the above clearly means, to our mind, that the judge could move from the purported notional range of up to two years to reflect the specific offending in this case. We say so because of the aggravating factors that we have identified in this case and the points that we have just articulated.

[24] Therefore, Mr McConkey's argument that an absolute maximum of two years being the proportionate sentence is not sustainable. It cannot be right that just because the more serious offence of digital penetration has attracted sentences in this area, that a bright line is created for sexual assault cases. Rather, a judge has to have the flexibility to consider the facts of each particular case to reach a proportionate sentence.

[25] Plainly, the problem arises in this case, because the judge was not fully addressed on the range. We are not overly critical about that given the lack of authority in this area. However, the judge does not actually fully explain how he gets to five years. We have had the advantage of more focused submissions.

[26] It is not appropriate or helpful for us to rigidly categorise cases of this nature given the variety of circumstances in which they arise, save to give the most general of guidance which we will now summarise.

[27] Obviously, the lower end of this type of offending is prosecuted in the magistrates' court. We can see that first time offending with no aggravation and high mitigation can attract lower sentences or in some cases, the custody threshold may not be met. Where this type of offence is prosecuted in the Crown Court, the custody threshold will usually be met. Where a serious sexual assault occurs with aggravation, we think that the custody threshold is quite clearly passed. In this case Mr McConkey, rightly, did not demur from that proposition. Even though this case did not involve digital penetration, it was clearly on the cusp involving skin to skin contact. Allied to that is the harm caused to this victim which we do not underestimate and the need for deterrence.

[28] If the judge had been addressed on the authorities, particularly *Byrne & Cash* and *TH* in particular he would have seen the parameters of sentencing in this area. But we also think he was entitled to go beyond the notional two years maximum in this case given the facts and to deter men from preying on women in this way.

[29] Hence, as the prosecution effectively accepts the index offending should have attracted a sentence in the range of three years reduced by 25% to 27 months. That is the sentence that we think is just and proportionate having looked at the authorities particularly those for the more serious article 6(1) offence and having looked at the particular facts of this case. Crucially, the sentence had to reflect that it was a sentence applied to one count and not the other two more serious counts. This is where the error has arisen.

[30] Accordingly, we allow the appeal on the primary basis that the judge has strayed beyond the agreed facts and sentenced for more serious sexual offending the appellant was charged with ie counts 1 and 3. In doing so, we reiterate the view of the trial judge that this was shameful offending by a man on a vulnerable woman at night on the street. It is offending which this court obviously deprecates and that is why we have arrived at the sentence that we have of three years.

[31] We also take this opportunity to state that for a second offence of this nature, the judge would have been entirely justified to look at a higher starting point and, if this case had been prosecuted on the basis of the other counts, as we have said, the sentence imposed would have been entirely justified or may have been greater.

***Conclusion***

[32] For all the reasons, we have given, we allow the appeal. We substitute a sentence of 27 months to be served split equally between custody and licence.