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*(subject to editorial corrections)**

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

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**THE QUEEN**

**-v-**

**AB**

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**Before: Morgan LCJ, Gillen LJ and Weir LJ**

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**GILLEN LJ (giving the judgment of the court)**

[1] At the outset we have determined that automatic reporting restrictions should apply in relation to the victim of these offences. Given the risk of jigsaw identification arising from a familial relationship, the publication of the applicant's name would breach that restriction.

[2] This is an application for leave to appeal conviction and an appeal against sentence by the applicant/appellant following his conviction before a jury on 19 February 2015 at Belfast Crown Court on two counts of sexual assault on a child under 13 years of age by penetration contrary to Article 13 of the Sexual Offences (NI) Order 2008. He was given a determinate custodial sentence of three years six months comprising 21 months in custody and 21 months on licence concurrently on each count.

[3] The Single Judge refused leave to appeal conviction but granted leave to appeal sentence.

[4] Mr Kelly QC appeared with Mr Stanbury on behalf of the appellant. Mr Mooney QC appeared on behalf of the prosecution with Ms Kitson. We are grateful to counsel for their helpful oral and written submissions.

**Background facts**

[5] On 21 March 2009 when the offences occurred the complainant was under 10 years of age and the applicant was 19 years of age. At the time of the offending the

applicant's mother and the complainant's uncle were partners so that to all intents and purposes the applicant and complainant were regarded as cousins.

[6] In January 2013 when the complainant was 12 years of age, she disclosed to her mother, in the presence of her grandmother and her great aunt, that the applicant had sexually abused her on an unspecified date in the past. During the initial disclosure the complainant did not elaborate on what had happened. However she was asked specifically by her grandmother "did he put anything inside you", to which she had replied "no".

[7] The complainant's grandmother and aunt spoke to her the following day. The grandmother's evidence was that the complainant told them about the applicant touching her and that she had pushed a teddy to stop him, as if she was going to waken up. The aunt asserted that the complainant said she had not felt comfortable telling her mother that the applicant had put his hands under her pants for a good five minutes and she had to push him away. She had observed the applicant squatting down at the door peeking into her room.

[8] In early February 2013, the complainant's mother had sought medical attention for the child because she was not eating or sleeping. In explaining why she felt unwell she disclosed the complaint referred to in paragraphs [6] and [7] above. This triggered referral to Social Services and later involvement of the police.

[9] The police interviewed the complainant on 16 April 2013. She informed police that the applicant had come into her bedroom one night while she slept. She was facing the wall and he touched her under her clothes. She woke up and turned to face him and he left the room and stood at the doorway. At this point she recognised him. He had returned and repeated the behaviour, touching her vagina under her clothes. When questioned she said that on each occasion he had inserted his fingers inside her.

[10] The complainant ultimately told police and the jury that on both occasions the applicant put his fingers inside her vagina. She informed the court that when her grandmother asked "did he put anything inside you", she had thought her grandmother was referring to an object rather than the applicant's fingers. Her grandmother said that she had meant the applicant's penis.

[11] The applicant in interviews with the police had accepted that he had been at the complainant's house on the night of 21 March 2009 but he had not stayed over or crept up the stairs. He denied committing any assaults. His evidence, together with that of his mother, was that he had stayed for a couple of hours and then he and his mother had left together taking a taxi home.

**The Grounds of Appeal**

[12] There are three grounds of appeal namely that –

(i) the good character direction given by the learned trial judge was significantly diluted in terms of the credibility and propensity limbs,

(ii) the direction of the judge on the requirement to be satisfied that penetration had occurred was insufficiently clear in view and carried with it the possibility that the jury might have concluded that the applicant had committed sexual assault without penetration and

(iii) the learned trial judge had been in error in imposing the sentence on the applicant under the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") whereas it should have been imposed under the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order").

**Ground (i) – The Good Character Direction**

[13] The defendant had chosen to disclose to the jury that he had a conviction for handling stolen goods in 2009 when he was 18 years of age. This had occurred almost contemporaneously with the offences with which he was now charged.

[14] It was common case that before the learned trial judge charged the jury he had enquired from counsel what directions were sought. Defence counsel Mr Stanbury had sought a good character direction but accepted at that time that it would be a modified good character direction in light of the conviction. This application was not opposed by the prosecution. The learned trial judge had listened to the submission but had not committed himself further.

[15] No details of the conviction for handling stolen goods were before the court save that it was accepted that the applicant had pleaded guilty to the charge.

**The Learned Trial Judge's Charge to the Jury**

[16] Relevant extracts from the judge's charge on this issue at pages 7-8 included the following:

> "In this case the defendant has chosen to refer his character to you and you have been told that when he was a young man in 2009 he committed an offence which was handling stolen goods. Now, the reason for placing the character in front of you, … is this: because what he will say in relation to this offence, that is the offence as charged, sexual offences, that although he has a conviction for dishonesty some considerable time ago when he was young, that he has no offence of this nature and that you have regard to that when you are considering the evidence against

> him. Ordinarily a jury could be told where someone has a good character that all other things being equal a person of good character is less likely to have committed an offence than a person of bad character. That may be the reason why the character was placed before you.
>
> The second way in which it is sometimes said that a defendant's character can affect a case is whether or not you accept or believe any account that he has given to the police and/or his evidence in court. Now, in this case, …….. you may feel that this is of less value to you in this case because although it may be some time since his conviction and although his conviction is a single conviction from when he was young, it is a conviction that relates to honesty, in other words handling stolen goods is an offence of dishonesty. But he has said that you should have regard … to the fact that that is the only time he has ever committed a criminal offence and you should give it such weight as you think appropriate. It is a matter for you … to throw it in the balance."

[17] There was no requisition by defence counsel on this aspect of the charge at its conclusion. We record at this stage that there had been a previous aborted trial of this applicant on these charges when the jury had been discharged at a late stage in the trial. On that occasion it is common case that counsel appearing for the applicant, who did not appear in the instant trial, had not only made a submission that the good character of the applicant should be before the jury but he had provided to the trial judge a copy of a good character direction that he suggested be given to the jury. There had been discussion about this at that hearing. Counsel in the instant trial, Mr Stanbury, was aware that this discussion had taken place in the course of the earlier trial.

**Legal Principles Governing Good Character Evidence**

[18] The practice of admitting evidence of the good character of an accused is of longstanding. In modern law evidence of good character is admissible as of right, both to show that the accused is less likely to have committed the offence because he lacks a propensity to do so and, if credibility of his account is in issue, to show that it is more likely to be truthful than if it came from a person who is not of good character (see R v Aziz [1996] AC 41 per Lord Steyn at p. 50).

[19] The significance accorded to evidence of good character led to a rule, borne out of a need for a pragmatic solution to the problem of inconsistency and

uncertainty, that fairness required the judge to give the jury specific directions on its relevance (see R v Vye [1993] 3 All ER 241).

[20] The law on the nature and extent of the good character issue was thoroughly reviewed by a strong five man Court of Appeal in R v Hunter [2015] EWCA Crim. 631. This case was referred to approvingly in this jurisdiction in R v Stewart [2015] NICA 62.

[21] Having conducted a thorough review of the case law that both preceded and followed Vye and Aziz, Hunter's case identified a number of categories relevant to the instant case.

(a) Absolute good character: a defendant, who has no previous convictions or cautions recorded against him and no other reprehensible conduct alleged, admitted or proven, is entitled to both limbs of the good character direction. This is not relevant to the present case.

(b) Effective good character: where a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character, by assessing all the known circumstances of the offence(s) and the offender and then deciding what fairness to all dictates, ensuring that only those defendants who merit an "effective good character" are afforded one; the judge should not leave it to the jury to decide whether or not the defendant is to be treated of good character; if he is to be so treated, then the judge must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure the jury are not misled. (See Hallett LJ at paragraph [80]).

(c) Where a defendant adduces evidence of previous convictions or cautions which are not in the same category as the offence alleged, in the hope of obtaining a good character direction on propensity, he has no entitlement to either limb of the direction; it is a matter for the discretion of the judge, who will decide whether to give any part of the direction and, if so, on what terms, in accordance with what fairness dictates.

[22] However Hunter's case makes it clear that there can be no fixed rule or principle that a misdirection or non-direction in relation to good character is necessarily or usually fatal. At para [89] et seq Hallett LJ said:

> "89. What if the judge goes wrong? The sole statutory test for the Court of Appeal Criminal

> Division is now one of safety of the conviction. There can be no fixed rule or principle that a failure to give a good character direction or misdirection is necessarily or usually fatal. It must depend on the facts of individual cases. It follows that all the decisions put before us in which convictions were quashed as a result of a misdirection were entirely fact specific. They provide no guidance at all.
>
> ……..
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> 91. … It is sometimes forgotten that the extent to which a direction on the defendant's good character is likely to impact upon a jury's deliberations is not the same in every case. More often than not the significance of good character is obvious. Members of a jury are more likely to believe the trusted employee example in Vye and can no doubt work out for themselves that he is less likely to have stolen. To our mind there is a tendency to underestimate the average juror, assuming that unless a judge endorses defence submissions to the full extent the jury will ignore them and relevant character evidence. We prefer to assume that the jury can and should be trusted to bear the evidence in mind and to assess the weight to be placed on it.
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> 92. It would be wrong therefore to assert … that if a defendant is entitled to a good character direction and a judge fails to give it in proper form, the conviction will be quashed as a matter of course."

[23] In the context of this case it is also significant to advert to Hallett LJ's remarks at para [98] where she said:

> "98. We shall also add that if defence advocates do not take a point on the character directions at trial and or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics. In those cases this court should be slow to grant extensions of time and leave to appeal."

**The Applicant's Contentions**

[24] Mr Kelly, in characteristically concise fashion, contended:

- Acknowledging that in the wake of Hunter his task would have been more difficult had no good character direction at all been given, the situation changed fundamentally once it is recognised that the learned trial judge in the instant case *did* exercise his discretion to provide a good character direction to the jury in modified form.

- Having exercised his discretion to do so, he then completely failed to carry this task out. It is the character of the direction given by the judge which has caused the mischief in this case.

- The learned trial judge adopted a third person approach relating simply what defence counsel had said. It was not a direction from the judge in any true sense. It rendered the trial judge's direction insufficiently emphatic.

- The use of the adverb "ordinarily" in the course of the charge seemed to imply that the principle did not apply in the applicant's case and no qualification was given. This was a significant dilution of the propensity limb and the jury was potentially left with the impression that it was not applicable in the applicant's case.

- The applicant's previous conviction was so trivial that it should have attracted an unqualified direction or, if some qualification was necessary, a much lesser form of qualification was appropriate.

**The Prosecution's Contentions**

[25] Mr Mooney, in an equally concise submission, contended:

- Whilst it might have been preferable not to have couched the direction in the third person, nonetheless in substance the learned trial judge was setting out through the mouth of defendant's counsel what the appropriate tests were.

- Nothing was known of the previous offence other than it involved the handling of a stolen item and that the applicant had pleaded guilty. He was not therefore entitled to an unqualified good character direction and the judge was entitled to modify whatever direction he gave as, in the event, was appropriate in the circumstances of the credibility limb.

- The use of the adverb "ordinarily" merely sets the previous offence in context in a modified direction. The manner of the expression of the propensity issue was clearly set before the jury for their consideration in the context of the effect of an old conviction.

- The applicant is seeking to restore the pre-Hunter approach to good character evidence.

**Conclusions**

[26] We reject this ground of appeal for the following reasons:

[27] First, there is much to be said for the approach adopted by the authors of Blackstone's Criminal Practice 2016 where it is asserted that a natural inference from the tenor of the judgment in Hunter is that an Appeal Court should consider whether a direction would have added anything significant to the view of the evidence that the jury would already have formed in light of the evidence of good character put before them. Just as it had been questioned whether juries need elaborate and detailed summaries of the facts of cases, so also it was questionable whether the average juror was likely to ignore or fail to probe with objective thoroughness defence submissions on character in the absence of a clear judicial endorsement in the summing up.

[28] This court recognises that it undoubtedly would have been preferable if the learned trial judge, having decided to give a direction on good character, had dealt with the matter in a manner that reflected *his* guidance on the two respects on which good character might be relevant. To have expressed the direction as a statement of why the defence might have wanted to rely upon the applicant's good character did not fully respect the exercise of his discretion that he, qua judge, would give such a direction.

[29] However having said that, the fact remains that post-Hunter the learned trial judge could well have exercised his discretion not to give any good character direction. Notwithstanding that the offence had occurred six years prior to the trial (relevant to the propensity limb) and three years from the date of his apprehension (relevant to the credibility limb), such a decision would probably have been unimpeachable before this court.

[30] Of course the fact that he did exercise his discretion does invoke additional considerations.

[31] In looking at the circumstances posited in this case however, it must be borne in mind that the jury had the benefit of a full assertion of the good character point in the course of the closing address by the applicant's counsel when doubtless he had made the point that whilst the effect of his previous conviction some years before on his credibility required modification, it arguably afforded an unqualified assertion of good character in relation to his propensity. This matter must have been fresh in the jury's mind when they came to their deliberations. There could have been no misunderstanding as to the issues particularly since the judge repeated what defence counsel had asserted.

[32] Importantly, as indicated in paragraph [17] above, defence counsel would have had knowledge of the previous trial where the good character issue was raised and debated with a different trial judge. This renders it all the more significant that at the close of the learned trial judge's charge in the instant case, no requisition was made to the judge concerning any inadequacy in the direction on good character. This is all a good indication that in the dynamics of this trial, nothing was considered amiss at that time by counsel. The trial and charge thus must have been considered fair.

[33] We endorse Hallett LJ's assertion in Hunter that courts must avoid the tendency to underestimate the average juror. We can safely assume that this jury fully understood the issues as outlined by defence counsel and the trial judge and must be trusted to bear that evidence in mind and to assess the weight to be placed on it.

[34] In all the circumstances therefore whilst the learned trial judge's charge on this matter did contain deficiencies, we are satisfied as to the safety of the conviction and dismiss this ground of appeal.

**Ground (ii) - The Elements of the Offence**

[35] Article 13 of the Sexual Offences (NI) Order 2008 provides as follows:

> "Assault of a child under 13 by penetration
>
> 13.—(1) A person commits an offence if—
>
> (a) he intentionally penetrates the vagina or anus of another person with a part of his body or anything else,
>
> (b) the penetration is sexual, and
>
> (c) the other person is under 13."

[36] The learned trial judge's charge to the jury was the source of complaint by the applicant in this instance. It is therefore appropriate to set out the relevant passages of the charge on this aspect of the trial.

[37] At page 5 of his direction the learned trial judge said, inter alia, as follows:

> "You have to consider each of the charges separately and consider the evidence in relation to them. Now, if you look at the charges themselves: sexual assault of a child under 13 by penetration. That is the nature

> of the offence which is charged. A sexual assault … it is perfectly clear in a case such as this, if it is alleged that someone placed their finger inside the vagina of a young girl you would have little difficulty in deciding that was a sexual assault. A girl of that age cannot consent to any such behaviour and of course on the evidence in this case you may find that there is no issue in relation to that at all."

At page 6 the learned trial judge continued:

> "So in each of these (*charges*) you will have to decide was there a sexual assault: did it take place within the time span on the indictment: and was she a child at the time. You must decide those elements beyond a reasonable doubt before you can convict. If you are not sure of any of those elements beyond reasonable doubt, well then he is entitled to be acquitted. So that is all I want to say about the charges."

**The Applicant's Contentions**

[38] Mr Kelly contended as follows:

- This direction was rolled up in terms of the concepts of sexual assault and penetration. There needed to be distinct elements put before the jury so that they recognised that in this case the Crown was relying entirely on sexual assault by penetration.

- The failure on the part of the learned trial judge to ensure that the jury was aware that absent penetration there could be no conviction was highlighted by the requisition of counsel at the end of his charge drawing to his attention that he had inadequately asserted this. The learned trial judge had robustly refused to call back the jury on this issue asserting that in his view it was perfectly clear.

- Notwithstanding that this issue of penetration had been addressed by both counsel in their closing speeches, the fact remained that the learned trial judge was the last person to address the jury and he was the sole guardian of law in the case. His failure, for example in the extract from page 6 above, to include the ingredient of penetration was a fundamental error.

**The Prosecution's Contentions**

[39] Mr Mooney advanced the following assertions:

- This case had been opened on the basis of assault by penetration, it had been the subject of close cross-examination of the complainant, it had been the basis of closing speeches by both counsel and the judge in turn had placed the issue before the jury. The jury could have not failed to understand what the real issue was.

- Sexual assault without penetration was not an alternative verdict on this charge albeit of course the prosecution could have added an additional count. The question of an alternative to the charge of sexual assault by penetration had never been argued and had never surfaced during the course of the trial.

**Conclusion**

[40] Whilst it is the view of this court that the learned trial judge's description of the ingredients of the offence could have borne more detailed reference to the need for penetration in order to establish the crimes charged, we do not consider that any such inadequacy in the charge has been sufficient to render the verdict unsafe.

[41] The fact of the matter is that, albeit on only one occasion, the learned trial judge had expressly adverted to the fact that the charge required the element of penetration. Any failure on his part to follow this up in subsequent references to the offence was far outweighed by the references to the concept of penetration that coursed through the whole ambit of this trial.

[42] Mr Mooney correctly contended that the issue of penetration surfaced not only in the opening of the Crown case and the close cross-examination of the complainant, but both the closing speeches of the applicant's counsel and Crown counsel were laced with such references.

[43] We are satisfied that Mr Kelly's assertions resonate with an underlying assumption that juries are less profound than in fact they are. We are content to assume that this jury could have been trusted to bear the evidence in mind, to have listened to the speeches of counsel and to have observed the directions of the judge in his charge in that context. We fail to see how they could possibly have been deaf to the central issue on this case namely whether or not penetration had occurred. The judge rounded this off by making it clear that it was an essential ingredient of the charges.

[44] This court, in answering the question "was the verdict unsafe", does not require to retry this case. It requires this court to examine the evidence and speeches given at this trial and to gauge the safety of the verdict against that background. We are not persuaded that the verdict is unsafe having carried out that exercise and accordingly we dismiss this ground of appeal.

**Ground (iii) – The Sentence**

[45] This matter can be dealt with in fairly short compass. It was common case that, after hearing submissions from counsel, the judge had directed the jury that they should concern themselves only with events on 21 March 2009 when considering their verdicts. During the sentencing hearing on 19 March 2015 defence counsel had submitted that the appropriate disposal would be a custody probation order pursuant to Article 24 of the Criminal Justice (Northern Ireland) Order 1996 and not any sentence under the Criminal Justice (Northern Ireland) Order 2008 which had only come into force on 1 April 2009.

[46] The learned trial judge had adjourned sentencing until 24 March 2015 and, significantly in the circumstances of this case, had directed that counsel need not attend. However in imposing sentence he indicated, erroneously, that the offending had taken place between March 2010 and March 2012.

[47] The significance of this error was that the provisions of Article 24 of the 1996 Order were ignored. Pursuant to this provision, a custody probation order had to be considered. The relevant terms of Article 24 are as follows:

> "Custody probation orders
>
> 24.-(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence … a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both -
>
> (a) to serve a custodial sentence; and
>
> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.
>
> (2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences.

> (3) A court shall not make a custody probation order in respect of any offender unless the offender consents and, where an offender does not so consent, the court shall not pass a custodial sentence of a greater length than the term the court would otherwise pass under Article 20.
>
> (4) Where in any case a court does not consider a custody probation order to be appropriate, the court shall state in open court that it is of that opinion and why it is of that opinion."

[48] From the appellant's point of view, the importance of these provisions is to be found in Rule 30 of the Prison and Young Offenders Centre (NI) Rule 1995 which would have applied had the applicant been sentenced under the 1996 Order. This provides for remission for good conduct of no more than half the period of the actual term. Counsel submitted that because of the invariable invocation of Rule 30(1) the effect of this is to create a legitimate expectation on the part of sentenced prisoners that they will receive remission of 50% of their pronounced sentence (see R v McAfee [2008] NIQB 142 per Kerr LCJ at [9]).

[49] In the event, the learned trial judge did not consider a custody probation order and sentenced the appellant to a determinate custodial sentence of three years and six months (21 months imprisonment and 21 months on licence) presumably under the provisions of the Criminal Justice (Northern Ireland) Order 2008. Mr Mooney candidly accepted that this was the unfortunate position.

[50] Counsel on behalf of the appellant recognised that no criticism could be made of the total sentence of three years and six months. That sentence was clearly proportionate to the offending. Counsel's contention was rather that a custody probation order would have been an appropriate sentence in this case. This would result in the appellant being eligible for remission against the custodial part of the sentence.

[51] Having considered the pre-sentence report which was before us and, equally importantly, a report from the prison on the appellant's welcome progress during the period that he has served to date, and provided the appellant consents pursuant to the terms of article 24 of the 1996 Order, we are well satisfied that a custody probation order should be made in this case. Accordingly if the appellant consents we accede to the appellant's case on this ground and propose to vary the sentence of the learned trial judge to one of two years and six months custody and one year's probation.

[52] We do not propose to leave this case without observing that this is yet another concerning instance to come before this court where both counsel have failed to draw to the attention of a trial judge an obvious error in his sentencing remarks.

[53] There is a positive obligation on counsel, both for the prosecution and the defence, to ensure that no order is made which the court has no power to make. (See Brown [1996] Crim. LR 134, R v Webb [2004] Crim. LR 306 and Reynolds [2008] 4 All ER 369).

[54] In R v Cain [2007] 2 Cr. App. R. (S) 135 the Lord Chief Justice of England and Wales observed:

> "It is of course the duty of a judge to impose a lawful sentence, but sentencing has become a complex matter …. In these circumstances a judge relies upon the advocates to assist him with sentencing. It is unacceptable for advocates not to ascertain and be prepared to assist the judge with the legal restrictions on the sentence that he can impose on their clients.
>
> This duty is not restricted to defence advocates. We emphasise the fact that advocates for the prosecution also owe a duty to assist the judge at the stage of sentencing. It is not satisfactory for a prosecuting advocate, having secured a conviction, to sit back and leave sentencing to the defence. Nor can an advocate, when appearing for the prosecution for the purpose of sentence on a plea of guilty, limit the assistance that he provides to the court to the outlining of the facts and details of the defendant's previous convictions …. It is the duty of the prosecuting advocate to ensure that the judge does not, through inadvertence, impose a sentence that is outside his powers."

[55] In the instant case the learned trial judge had released counsel from the obligation of attending for sentencing. In the event we understand counsel did not attend although the defence solicitor with carriage of the case was present when sentencing occurred.

[56] Mr Kelly informed the court that the practice in England and Wales is that invariably sentencing will not occur unless counsel are present before the court.

[57] This court strongly endorses that approach and deprecates the current practice in Northern Ireland whereby on occasions counsel who have conducted the trial are not present during the sentencing stage.

[58] Moreover in this case, not only were counsel not present, but there was a bewildering failure to recognise in the aftermath that the sentence had been imposed under the incorrect legislation. By virtue of Section 49(2) of the Judicature (NI) Act

1978, a Crown Court can, subject to certain provisos contained therein vary or rescind a sentence or order within 56 days (this time limit having been increased from 28 days by the Criminal Justice and Immigration Act 2008). By virtue of Order 45 of the Crown Court (NI) 1979 any such variation or rescission must be performed in open court. In the event no step was taken to alert the learned trial judge to his error or his power to invoke the provisions of this legislation within the requisite period.

[59] We direct that this portion of the judgment be made available to the Bar Council, the Law Society and the Director of Public Prosecutions to ensure that the current practice of non-attendance during the sentencing aspect of a case is terminated.