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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT AT BELFAST

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THE QUEEN

-v-

GM

_____

Before: Morgan LCJ, McCloskey LJ and Horner J

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Mr Terence Mooney QC and Mr Conor Holmes (instructed by Chambers Solicitors) for the Appellant
Ms Laura Ievers, (instructed by the Public Prosecution Service) for the Respondent

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McCloskey LJ (delivering the judgment of the court)

Reporting Restrictions

As these proceedings concern a sexual offence automatic reporting restrictions apply, the complainant being entitled to lifetime anonymity by virtue of section 1 of the Sexual Offences (Amendment) Act 1992. Giving effect to this both the complainant and the Appellant are described in anonymised terms throughout this judgment.

Introduction

[1] The central question raised by this renewed application for leave to appeal is whether the sentence of three years and nine months, divided equally between imprisonment and licenced release, imposed upon the Appellant, a mature adult father, for a single count of sexually assaulting his daughter aged four years contrary to Article 14 of the Sexual Offences (NI) Order 2008 is manifestly excessive or wrong in principle.

[2] It is appropriate to draw attention to the commendable expedition which characterised the prosecution underlying this appeal. To summarise, the index

offence occurred on 24 August 2019, the Appellant was charged on 26 August, he was committed for trial on 04 October, he was arraigned on 16 October, a re-arraignment was conducted on 10 December following amendment of the indictment, he pleaded guilty on that date and he was sentenced on 14 February 2020.

Factual Matrix

[3] The female child concerned was aged four years and nine months on the date of the offending. The offence occurred in circumstances where the Appellant was having his first overnight contact with his daughter. This took place at the home of the Appellant's mother, the paternal grandmother. Father and daughter shared a bed. The following day the child complained to her great aunt about the Appellant's conduct the previous night. She described an assault by him on her vaginal area which "*hurt*" and "*he would not stop*". Following an immediate report to the police the child, in an ABE interview, described the assault both verbally and by motioning with her finger. The essence of the complaint was that the Appellant had placed his finger in the area of her vagina moving it back and forth and from side to side. The child had been in night dress at the time. She asked the Appellant to stop and said it was sore.

[4] The Appellant was arrested and interviewed the following day. From that point until the date of his re-arraignment (*supra*) he protested his innocence. This was reflected in his formal defence statement.

[5] The medical evidence consisted of two reports compiled by Dr Alison Livingstone, a Consultant Community Paediatrician. The first was based on her assessment and examination of the child on the date following the alleged assault. The findings on examination were, in summary, bruising and abrasions in the area of the outer genitalia. Dr Livingstone opined that the clinical findings were consistent with blunt force trauma caused by "*forceful digital penetration or from a firm object such as with penile penetration*". She considered, and excluded, the possibility of self-infliction, expressing the opinion that the injuries were "*more likely than not due to sexual abuse*". Upon further examination some 3 weeks later Dr Livingstone found that the abrasions had healed completely and the bruising had resolved.

Prosecution

[6] The Appellant was committed for trial on a single count of sexual assault of a child aged under 13 years by penetration, contrary to Article 13 of the 2008 Order. This charge was initially replicated in the indictment. However as noted above the indictment was amended by adding a second count of sexual assault of a child aged under 13 years, contrary to Article 14. The Appellant pleaded guilty to this count, while the initial count remained "on the books" in the usual terms.

[7] It is common case that the prosecution took the foregoing course following discussions between counsel. It is evident that the stimulus for this course was that the prosecution would be unable to establish the essential element of penetration in order to secure a conviction under Article 13. It is convenient to note at this juncture that an offence under Article 13 is punishable by life imprisonment while an offence under Article 14 (this case, ultimately) attracts a maximum punishment of 14 years imprisonment.

Grounds of Appeal

[8] From a combination of the Form 3 Grounds and the written and oral submissions on behalf of the Appellant the omnibus ground noted at [1] above, namely that the sentencing of the Appellant was manifestly excessive and wrong in principle, is susceptible to the following breakdown:

(i) Insufficient credit was allowed for the Appellant's plea of guilty.

(ii) The judge erred in her assessment of the impact of the offending on the child victim.

(iii) The judge's assessment of the risk of the Appellant re-offending was erroneous.

(iv) The starting point of 5 years imprisonment selected by the judge was excessive.

We shall consider each of these discrete grounds in turn.

Insufficient Credit for Guilty Plea

[9] The judge reduced her selected starting point of five years imprisonment to reflect the credit which she considered due to the Appellant for his plea of guilty. She reasoned as follows:

> "*… there was no reason why a plea of guilty to sexual assault could not have been entered at arraignment, even if it was not accepted by the prosecution.*"

We consider it appropriate to pause at this juncture as the judge's statement is, in our view, unanswerable. As already noted, the Appellant maintained a blanket denial of all allegations from the outset until the latest stage imaginable. His failure to acknowledge the extent of his offending at a considerably earlier stage is inexcusable and unjustifiable. This in our view is the critical factor in evaluating this ground of appeal.

[10] In the remainder of the passage in question the judge expressly acknowledged the "*enormous relief and vindication*" provided by a plea of guilty in sexual offence prosecutions and the acknowledgement on behalf of the prosecution to this effect. This court detects nothing in either the judge's reasoning or the *terminus* reached by her to call into question how she dealt with this matter. Mr Terence Mooney QC (with Mr Conor Holmes of counsel) on behalf of the Appellant, founded substantially on the following passage in the decision of this court in *R v Maughan* [2019] NICA 98 at [70]:

> "*A plea at the door of the court is likely to obtain a significantly lower discount. However, in circumstances where there is a late plea in a rape case, the benefits* ***may*** *lead to a greater discount than those available in other cases because the victim is saved from the particularly distressing emotional trauma of giving public evidence as to the circumstances of the offence ….*"
>
> [Emphasis added.]

The "*benefits*" to which this passage refers are identified in an earlier passage, at [66], namely (inexhaustively) "*relieving witnesses, vindicating victims, saving court time and indicating remorse*".

[11] We have highlighted the word "*may*" for the purpose of illuminating what this court considers to the import of this passage in *Maughan*. We consider the correct analysis to be following:

(a) The generally acknowledged credit, or discount, of up to 33% for a plea of guilty where an offender accepts his guilt at the first opportunity, is normally not available in cases where an offender is either "*caught red-handed*" or "*the evidence is overwhelming*".

(b) However, there are no hard and fast rules. The reason for this is that the circumstances of every case are infinitely variable and the sentencing court is accorded a reasonable margin of appreciation accordingly.

(c) Thus, in a rape case – and we consider, by extension, other cases of sexual offending – the benefits which are achieved or promoted by a plea of guilty may justify a more generous approach to the issue of credit for a late plea of guilty than in other cases.

(d) The key word is "*may*". Whether an approach more generous than that generally applied is justified and appropriate will always be a matter for the discretion of the sentencing judge which will be

exercised according to the particular facts and circumstances of the individual case.

[12] We consider that there is nothing in *Maughan* or, for that matter, any of the leading cases on discount for guilty pleas in this jurisdiction to undermine the approach of the judge in this case. We consider her reasoning and *terminus* to lie beyond legitimate challenge. Indeed, the more one reflects on the timeline outlined above, the stronger the view that credit of 25% in the circumstances of this particular case was positively generous to the Appellant.

[13] For this combination of reasons the first ground of appeal cannot be sustained.

Erroneous Victim Impact Assessment

[14] This ground of appeal is based on the following passages in the sentencing transcripts:

> "*It is not difficult to accept that a child who is able to disclose that her father has hurt her in this way will suffer long term emotional harm ….*
>
> *While it is impossible to predict the level of future harm, what can be said without much difficulty is that long term psychological harm is inevitable in this case …*
>
> *This child was physically injured and the long-term emotional harm in particular is likely to be very significant, for the reasons that I have already explained.*"

Mr Mooney's critique of this approach was unambiguous. He condemned it as inappropriate guesswork.

[15] Mr Mooney based his argument on two previous decisions of this court. The first is *R v McCaffrey* [Unreported – 1991 Lexis citation 4067]. That case was an appeal against a sentence of three years imprisonment for an adult male for indecent assault on a girl aged 15 years. One of the issues was, in the words of Kelly LJ (delivering the judgment of this court), the "*possible after effects on the girl herself*". The judgment states:

> "*On this, regrettably, we have not had any evidence from a specialist source.*"

Next, having adverted to the evidence which was available, namely the report of a general medical practitioner who opined that the victim had been "*permanently affected*", Kelly LJ continued:

> "*We are reluctant to act on this, having regard to the fact that it does not come from a psychiatrist or psychologist …*
>
> *Nevertheless, we consider it appropriate to act on the fact that the girl at the impressionable age she has suffered for a significant period distress, nervousness, sleeplessness and depression and that this may continue for a period in the future.*"

[16] The second decided case on which Mr Mooney relied is *R v Kubik* [2016] NICA 3, another case of sexual offending where the Appellant was convicted of rape and sexual assault on a lady of mature years. In considering the discrete issue of the impact on the victim this court examined, and criticised, a report prepared by a consultant Clinical Psychologist which proffered a diagnosis of post-traumatic stress disorder. Having described this report as "*unsatisfactory*" for the reasons given, the Lord Chief Justice stated that the sustainability of the trial judge's assessment of "*significant mental consequence for the victim*" as an aggravating factor was questionable. See [22]:

> "*We have already commented on the unsatisfactory nature of the medical evidence … If such matters are to affect the level of sentence they must be established to a rigorous standard …*
>
> *In the absence of a satisfactory report based on the relevant notes and records we cannot find* [this aggravating factor] *present.* ***We acknowledge, however, that an attack of this nature inevitably has a profound effect on the victim.*** *That was no doubt apparent to the learned trial judge and she was entitled to give it some weight albeit the weight is tempered by the absence of medical corroboration.*"
>
> [Our emphasis.]

[17] In its recently promulgated decision in *R v Valliday* [2020] NICA 43 this court had occasion to say the following, at [31]:

> "*Judges at every tier of the legal system apply experience, common sense and realism in a variety of ways in the daily exercise of their functions and the discharge of their responsibilities. These are valuable resources.*"

This statement has some resonance in the context of this ground of appeal. We consider that it is not undermined by the passages in *McCaffrey* and *Kubik* reproduced above. Furthermore, the decisions in *McCaffrey* and *Kubik* belong to their particular context. They do not promulgate any sentencing principle of general application. They are rather case sensitive illustrations of what the appellate court considered reasonable and appropriate for the sentencing judge in their particular contexts. Finally, the second part of the relevant passage in *Kubik,* emphasised above, supports this analysis.

[18] This court recently adopted an approach similar to that of the sentencing judge in the present case in *R v QD* [2019] NICA 23. There the DPP was granted leave to challenge, as unduly lenient, the sentence of five months imprisonment for an offence of sexual assault on a child aged under 13 years, his son aged two years and seven months, contrary to Article 14 of the 2008 Order. This court concluded, at [68]:

> "*We consider that the sentence imposed was unduly lenient. We would have imposed a sentence of 18 months imprisonment and a SOPO but taking into account double jeopardy we would have sought to achieve an effective sentence of 15 months imprisonment and a SOPO. However, given that the respondent consents we impose a three year probation order containing a number of requirements ….*"

The three main factors which the court balanced, in exercising its discretion, were the Respondent's release from sentenced custody, having completed his punishment, the promotion of his rehabilitation and the protection of the public from harm. *En route* to this conclusion the court, having identified that the three central considerations to be weighed were the degree of harm to the victim, the level of culpability of the offender and the level of risk proposed by the offender to society, adverted to the consideration that there was not only one victim of the offending. Rather there was an adverse impact, which the court was prepared to infer, on other family members: see [53]. Pausing, this must surely be an illustration of what this court more recently stated in *Valliday* (*supra*).

[19] The court then turned to the specific issue of future harm to the child victim, at [54]:

> "*We accept that there was no physical harm but we consider that there is real long term emotional harm. This incident not only affected relationships as between* [the child's] *parents, but it has affected* [the child's] *relationship with his father and may well affect his relationship with his mother. In relation to his father it has*

> *prevented* [the child] *from having any relationship and this may continue throughout his formative years. Depriving a child of the opportunity of forming emotional attachments to his father is a real and significant psychological harm to* [him] *… it is inevitable that* [he] *will ask questions about his father and why he is not playing a part in his life.* [His] *mother will have the difficult task of deciding what information should be given to* [him] *and when. When she does tell him there will be a substantial risk of further emotional and psychological damage to* [him] *particularly during his adolescence. We consider that there will also be a substantial risk to the relationship between* [the child] *and his mother. All of this amounts to significant harm to* [the child]. *The lack of any physical injuries,* [the child's] *young age when this offence occurred and* [his] *lack of memory of it should not obscure the serious psychological harm which is being and will be caused* [to him]."

Once again, the *Valliday* formulation is clearly of application.

[20] Even the briefest of reflections on the radical changes in the legal landscape relating to the prosecution and punishment of sexual offences during the last two decades serves to explain at least in part the judicial assessments of future harm to child victims in *QD* at [53] – [54] and the present case. There has been an intense public interest in this subject since, at the latest, the publication of the Home Office Review Report Setting the Boundaries: Reforming the Law on Sex Offences in 2000. This was followed by a White Paper, published in 2002, Protecting the Public (CM 5668) and the ensuing legislative reforms considered further in this judgment *infra*. Associated with these (and subsequent) developments has been an exponential increase in the amount of information available on this subject and associated awareness and understanding of its multi-faceted issues. The courts, the guardians of the law, have found themselves in the vanguard not only in the sphere of the criminal law but also in children's and family cases. It is no coincidence that these developments followed closely upon the major reform of the law of children some few years previously. As was stated in the Preface to the third edition of Sexual Offences Law and Practice (Rook and Ward), published in 2004:

> "*The issue climbed the political agenda in the 1990s. There is now a much greater public awareness of the nature and effect of sexual assaults, combined with an increase in reporting sexual crimes …*
>
> *High quality investigation and clear presentation in court are of fundamental importance. Similarly, it is vital that*

victims feel that they will receive appropriate support from the criminal justice system."

[21] It is appropriate to highlight also that in tandem with the significant developments noted above, there has been a notably increased emphasis on judicial training. While this of itself has generated obvious benefits, a surge in the reporting of sexual offences and the consequential increase in prosecutions have also combined to ensure that judicial awareness and understanding have continued on an upward graph. Few would seriously dispute the aforementioned author's assessment of the nexus between developments in the levels of sentences imposed upon sexual offenders and "*a much greater understanding of the harm such offending can cause*" during the last two decades (*ante* page xvi). This level of understanding applies to *inter alios* the judiciary.

[22] More generally, in an appeal to this court, whatever the litigation context, where an issue concerning the first instance judge's assessment of future possibilities arises the question will always be one of degree, the fundamental enquiry being whether the first instance judge crossed the notional line, or went too far. Irrationality will normally be the touchstone to be applied by this court. To take a concrete example, if a sentencing judge were to make an assessment of possible future harm to an injured party which was irreconcilable with tenable and largely unchallenged expert evidence, intervention by this court could well be appropriate. That, of course, is not this case.

[23] The foregoing reflections serve to underline the impact of the passage of time, the radically changed landscape and the ever evolving culture in the realm of sexual offending and punishment. We have already drawn attention above to the limitations of the approach of a differently constituted panel of this court in *McCaffrey*. To this critique must be added the further reflections upon which we have embarked above. The *McCaffrey* approach to what a sentencing judge may legitimately consider in cases belonging to this realm is confined to the very different historical context to which that case belongs. We consider that it has no enduring currency. Of course there will always be scope for the robust assessment of expert medical and other evidence as in *Kubik*. Unsatisfactory expert evidence of this kind will continue to receive both at first instance and on appeal the kind of penetrating examination carried out in that case.

[24] We consider it clear from the passages in the sentencing transcript under scrutiny that the judge was acting in a manner harmonious with *Valliday*, coupled with the evolving environment outlined above. Moreover there is no suggestion that in doing so the judge failed to take into account the evidence before the court, in particular the medical evidence summarised above. In our view the judge's approach to the issue of emotional and psychological harm to the child victim withstands challenge. The judge expressed herself in measured and balanced terms which we consider sustainable. Reverting to the language in which the Appellant's submission was formulated, happily judges do not have to resort to "*guesswork*" in

matters of this kind for the reasons we have given and the judge did not do so in the present case. This ground of appeal has no merit accordingly.

The judge's assessment of the risk of reoffending

[25] The essence of this ground of appeal is gleaned from the following passage in counsels' skeleton argument:

> "*The learned judge concluded that the Appellant was not a low risk offender. We respectfully submit that on a proper reading of the pre-sentence report the learned judge (and the probation officer) were in error to conclude that the previous record of the Appellant was relevant in the sense that weight should be attached to it in considering the risk of reoffending. The previous offence was in an entirely different category. The IP was a consenting party to the sexual activity that led to the conviction and indicated her desire to exonerate the Appellant. She refused to co-operate with the police investigation. Subsequent to the prison sentence served by the Appellant he formed a long term relationship with the girl involved that endured for 3 years.*"

The previous offence identified in the foregoing passage is that of unlawful carnal knowledge of a girl aged under 17 years, committed in June 2008 when the Appellant was aged 21. It was punished by a custody probation order comprising 6 months imprisonment and 12 months' probation. The Appellant's criminal record also discloses nine road traffic convictions, one conviction for breaching PSV/HGV regulations, 1 criminal damage conviction, one AOABH conviction punished by a suspended sentence and one sex offenders' notification conviction punished by a fine of £100.

[26] The pre-sentence report records a history from the Appellant that following his release from custody he and the subject of the unlawful carnal knowledge conviction were in a relationship for some three years. The victim was aged 14 years when the offence was committed. The report contains the following assessment relating to the future:

> "[The Appellant] *is currently assessed by PBNI as presenting a medium likelihood of generic reoffending and not as posing a significant risk of serious harm. However, there are concerns regarding* [his] *apparent lack of insight or understanding of his sexually abusive behaviour towards his young daughter.*"

The relevant passages in the sentencing transcript are these:

> *"You also have a relevant criminal record for sexual offending. Whilst I accept that the circumstances of that prior offence are very different and the child appears to have consented to the sexual contact with you, nevertheless your previous conviction demonstrates a willingness to engage in sexual acts with a minor for your own sexual gratification. Children can be in need of protection from themselves and the law recognises this. You, as an adult, committed a serious sexual offence which resulting in imprisonment ….*
>
> *It has been suggested on your behalf that there appears to be a low risk of reoffending. In my view this is not correct. The pre-sentence report assesses you as a medium risk of general offending and in terms of sexual recidivism you are in the moderate to high category for supervision and intervention. In mitigation, there is nothing in the pre-sentence report to explain your offending and the only mitigating factor that I have identified is your plea of guilty."*

[27] In resolving this ground of appeal we acknowledge firstly that while the sentencing judge was not bound to follow the assessments contained in the pre-sentence report these are not challenged or undermined in any sustainable way. They are not the subject of any competing evidence, expert or otherwise and are expressed in properly informed and balanced terms. Within the margin of appreciation available to her, the trial judge was *ad idem* with the professional assessment contained in the report. It follows that any resulting challenge before this court has a demonstrably unpromising launching pad.

[28] As noted this ground takes issue with both the professional assessment of the probation officer and that of the sentencing judge. We consider the correct prism to be the following. Each was making an assessment of a future possibility. Each did so on the basis of essentially the same information. There was no element of fact finding in this exercise. Nor was any burden or standard of proof engaged. This was rather a matter of evaluative judgement. This judgement was not based solely upon the Appellant's previous sexual offending. It was, rather, informed by a considerably wider range of information. The essential complaint is that both the probation officer and the judge should have viewed the Appellant's previous sexual offending in a different, more benign light. However the inescapable reality of the previous offending is that it involved violating the criminal law during the period of the unlawful conduct. The Appellant knowingly and willingly broke the rules. Furthermore, whatever the romantic attachment, he knowingly and willingly subjected a young teenager to all of the risks associated with maintaining a relationship of this kind. We consider that this ground of appeal engages the

touchstone of rationality. For the reasons given we are entirely satisfied that both the professional and the judicial assessment of the risk of the Appellant reoffending were entirely tenable. It matters not that there may have been scope for other opinions. This ground of appeal must fail accordingly.

Excessive starting point of five years

[29] The mainstay of this, the final, ground of appeal is that the starting point adopted by the sentencing judge was (per counsels' skeleton argument) "*out of line with comparative cases in Northern Ireland*".

[30] The previous decisions on which this ground of appeal rests are the following. In *R v McCaffrey (ante)* a sentence of three years imprisonment for an indecent assault was reduced to one of 15 months on appeal. The indecent assault was perpetrated by an adult male against a babysitter, a girl aged 15 years, a neighbour's daughter. The report describes the offending in these terms:

> "[The offender] *asked her to draw the curtains in order to show her a video film. She did this. It turned out however that the video film was pornographic. The girl watched this in revulsion and great distress while the Appellant sat on the sofa beside her. During the course of it he put his hand on the outside of her skirt in the region of her vagina and he rubbed that area up and down. Then he pulled her down on the sofa and lay on top of her and tried to kiss her. He unzipped his trousers and pulled them partly down and his underpants. He took out his penis and exposed it to her. He put his hand up her skirt and grabbed for her pants. At this stage fortunately she was able to free herself …*"

In reducing the sentence the court reasoned as follows: it was common case that whereas the statutory maximum punishment was 10 years imprisonment, the "normal" range was 9 months to 2 years; the Appellant had pleaded guilty; he had no previous convictions; and there had been a significant adverse impact on his personal life.

[31] In *R v Lemon* [1996] NIJB 1 a sentence of three years imprisonment for one count of indecent assault was quashed and substituted by 12 months imprisonment. There the injured party, a girl aged almost 15 years, was staying the night at a house occupied by an adult male previously frequented by the Appellant and her mother. The Appellant persuaded her to sleep on a couch in his bedroom rather than in either of two other bedrooms. According to the report:

> "*The Appellant persuaded her to get into bed with him, which she did, because she was scared in case he shouted at her and when she got into bed he kissed her on the forehead.*

> *She turned away from him and he then put his arms around her and starting to hug her … he moved his hands up inside the shirt she was wearing and inside her bra and started to feel her breasts … the next thing she knew was that he had put his hand inside her underpants and was rubbing her vagina. This went on for about 5 or 10 minutes and he kept telling her that she was alright. She then told him to leave her alone and go and sleep on the settee.*"

The Court of Appeal reasoned, firstly, that the sentence was manifestly excessive as it did not adequately reflect certain mitigating and positive factors concerning the Appellant. The court took cognisance of the fact that in 1985 the statutory maximum punishment for the offence of indecent assault had been increased from 2 to 5 years. It considered certain English cases, in particular *R v Gibbons* [1988] Crim L Rev 129, approving the following commentary in the report:

> "*The longer sentences which are now possible should presumably be reserved for indecent assaults involving serious aggression and serious interference comparable to rape.*"

This court stated:

> "*We agree with the commentary and take the view that the increase in the maximum sentence for indecent assault was a recognition of the fact that that charge may be the only one appropriate to deal with some quite extreme examples of sexual interference which the court has found that it has to deal with. It should not be a consequence of the raising of the maximum sentence that an isolated case of indecent assault of the kind involved in this case, and in those cited, should carry a heavier sentence than those imposed before 1986.*"

[32] In *R v DM* [2012] NICA 36 this court considered a DPP's referral of a sentence of 30 months imprisonment suspended for three years for one count of sexual activity involving penetration with a child aged between 13 and 16 years. The offender, a male person aged 23 and the victim, his 15 year old cousin engaged in consensual unprotected sexual intercourse. The consequences for the victim were considerable, including in particular pregnancy and a subsequent termination. The offender denied everything until the morning of trial. This court noted that the Sentencing Guidelines Council ("SGC") had endorsed a range of three to seven years imprisonment for the equivalent offence in England and Wales. This had previously been acknowledged in *R v SG* [2010] NICA 32. Having concluded that the sentence was unduly lenient this court reviewed in some detail certain trial events prior to the imposition of the sentence. In doing so this court, in substance,

formed the view that the offender's plea of guilty was a pragmatic one made in the reasonable expectation that a suspended sentence would follow. Its overall conclusion was:

> "*In this case the picture is somewhat clouded. In all of these circumstances we have come to the conclusion that we should not interfere with this sentence.*"
>
> [See [16]].

[33] In *R v McCormick* [2015] NICA 14 the Appellant, then aged 29, received a three year determinative custodial sentence divided equally between imprisonment and licensed release for the offence of engaging in sexual activity with a girl aged 15 years and nine months. This court on appeal reduced the sentence to one of two years with the same configuration, reasoning thus at [11] – [12]:

> *"In order to arrive at a sentence of three years the learned trial judge must have started somewhere between 3 ½ and 4 years before making allowance for the late plea. In our view that starting point is significantly in excess of the appropriate period suggested by cases such as R v DM in circumstances such as these. We consider that the appropriate starting point before making allowance for the plea was in or about 2 ½ years…*
>
> *The learned trial judge considered that he should reduce the credit for the plea because of what he described as the lateness at which it was entered. In fact he pleaded guilty at arraignment to the sole count on which the prosecution proceeded. He had, however, denied having any knowledge or contact with the girls and sought to deny the level of his behaviour and sexual contact. We consider that in those circumstances he is not entitled to full credit but is entitled to substantial credit. We will substitute a determinate custodial sentence of 2 years comprising 12 months in custody and 12 months on licence."*

We shall comment further on this decision *infra*.

[34] Two further decisions of this court featured in Mr Mooney's elaboration of this ground of appeal. In *R v TH* [2015] NICA 48 this court dismissed an appeal against the imposition of a determinative custodial sentence of three years imprisonment, with the usual division, for an offence of sexual assault by penetration concerning two adults and involving the forcing of a finger or fingers into the victim's vagina. While noting at [12] that decisions such as *R v Foronda* [2014] NICA 17 were indicative of a "*starting point*" of two years imprisonment

after trial for the offence of sexual assault by penetration, having identified a multiplicity of aggravating factors the court's decision was to dismiss the appeal.

[35] In *R v QD* (considered in a different context in [17] – [18] above) the DPP referred to this court a sentence of five months imprisonment imposed on a father who had committed the offence of sexual assault on a child aged under 13 by masturbating over the back of his son aged two years and seven months. The sentence was imposed following a contested trial. The judge considered that the starting point was six months imprisonment. This court expressly rejected the submission on behalf of the prosecution that the starting point should be one of four years imprisonment – see [51]. It concluded that the sentence was unduly lenient. Turning to the exercise of its discretion it identified two factors, namely double jeopardy and the offender had been released from prison following a term of 2 ½ months. Having determined that "*… the effective sentence should be 15 months imprisonment …*" – [61] – the court identified a series of supporting an ultimate disposal of probation and substituted three years' probation for the sentence of 5 months imprisonment.

Discussion

[36] It is an entrenched sentencing principle that in every case the court should consider the degree of harm to the victim, the level of culpability of the offender and the risk posed by the offender to society. These three considerations encompass the generally recognised sentencing touchstones of retribution and deterrence. They are their out-workings. This has been emphasised by this court in *inter alia Attorney General's Reference, No 3 of 2006 (Gilbert)* [2006] NICA 36 and, most recently, in *QD* at [39].

[37] The decisions of this court reviewed above fall conveniently into two groups. The first group comprises *McCaffrey* and *Lemon* which were decided, respectively, some 30 and 25 years ago respectively. We draw attention to their vintage on account of the major legislative developments which have occurred since these cases were decided. Both cases involved the offence of indecent assault. That offence attracted a maximum punishment of two years imprisonment in this jurisdiction until 02 October 1989, when it was increased to 10 years imprisonment: see further [39] *infra*.

[38] Since then statutory reforms have effected a veritable sea change in the prosecution and punishment of sexual offences. These developments (noted briefly above) began in the jurisdiction of England and Wales with the introduction of the Sexual Offences Act 2003 (the "*2003 Act*"). This is commonly regarded as the most significant overhaul of the law in this field since the Victorian era. The White Paper which preceded the new legislation contained the following passage:

> "*The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual*

Offences Act 1956 and most of that was simply a consolidation of 19th century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date."

The 2003 Act, which came into force on 01 May 2004, created over 50 offences and abolished a series of offences which had become increasingly archaic including incest, indecent assault, buggery, bestiality and gross indecency between men.

[39] The jurisdiction of Northern Ireland followed suit soon after with the enactment of the Sexual Offences (NI) Order 2008 (the "*2008 Order*"), which came into operation on 02 February 2009. This measure mirrors closely its English statutory counterpart. The parallels between these two instruments are detailed in a helpful schedule in Sexual Offences Law and Practice (Rook and Ward 5th Edition) at 32.75 in a chapter written by His Honour Judge McFarland, the (then) Recorder of Belfast. This valuable treatise demonstrates *inter alia* that this major reform of the law of Northern Ireland preceded the devolution of policing and justice powers to the Northern Ireland Assembly via the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. This serves to emphasise the close alignment between the new statutory regimes in the two jurisdictions. The 2008 Order, in tandem with its English counterpart, namely the Sexual Offences Act 2003, represented the legislature's response to the growing prevalence of this kind of offending, the compelling need to protect the vulnerable, the necessity of greater deterrence and society's revulsion at this type of criminality.

[40] It is instructive to set out briefly the history of the offence of indecent assault on a female in this jurisdiction. In brief compass:

(i) Indecent assault on a female was a statutory offence, introduced by section 52 of the Offences Against the Person Act 1861, which later became section 14 of the Sexual Offences Act 1956 in England and Wales only. The maximum sentence was two years imprisonment.

(ii) In England and Wales, a distinction was made from 1961 in cases where the injured party was a girl under 13 years old, in which case the maximum sentence was five years imprisonment. This was not replicated in Northern Ireland

(iii) In 1989, per Article 12(1) of the Treatment of Offenders (NI) Order 1989, the maximum sentence for indecent assault on a female was increased to 10 years imprisonment, regardless of the age of the injured party.

(iv) The section 52 offence of indecent assault on a female was abolished by the 2008 Order.

[41] The cases of *McCafferty* and *Lemon* involved prosecutions for the now obsolete offence of indecent assault. Insight into the important factor of historical context is enhanced by the following commentary in Rook and Ward (*op.cit*) at [30.153]:

> "*Indecent assault includes conduct which would today be prosecuted as rape (penetration of the complainant's mouth with the defendant's penis) or assault by penetration (digital penetration of the vagina).*"

As this passage and subsequent passages make clear, the focus of the new legislation is a whole series of different types of sexual assault, reflecting the inadequacies of the previous offence of indecent assault. The law has been truly modernised in this field.

[42] In *R v McCartney* [2007] NICA 41 this court, addressing the issue of statutory increases in sentences in a different context (causing death by dangerous driving), approved the approach of the Court of Appeal in England and Wales in *R v Richardson and others* [2006] EWCA 3186 in these terms, at [31]:

> *"The President of the Queen's Bench Division, Sir Igor Judge, identified the issue arising in the appeals as "the impact of the increased maximum sentences on the guidance offered to sentencers in Cooksley. At paragraph 4 he said: -*
>
> > *'Statutory changes in sentencing levels are constant. In recent years, maximum sentences have been increased (for example, drug related offences) or reduced (for example, theft). In general, changes like these provide clear indications to sentencing courts of the seriousness with which the criminal conduct addressed by the changes is viewed by contemporary society. In our parliamentary democracy, sentencing courts should not and do not ignore the results of the legislative process, and as a matter of constitutional principle, reflecting the careful balance between the separation of powers and judicial independence, and an appropriate interface between the judiciary and the legislature, judges are required to take such legislative changes into account when deciding the appropriate sentence in each individual case, or where guidance is*

> *being offered to sentencing courts, in the formulation of the guidance.'*

Kerr LCJ continued at [32]:

> *"These observations echo what this court said in* ***R v Sloan*** *[1998] NI 58 at 63-4 when considering the then recent increase in the maximum penalty for dangerous driving: -*
>
> > *'This substantial increase from five to ten years was Parliament's response to the growing carnage on the roads due to dangerous driving (previously described as reckless) which in turn is often due to excessive speed or driving when under the influence of drink or drugs. In taking this course Parliament was itself responding to a growing volume of complaints by members of the public whose friends and relatives were being killed or seriously injured in increasing numbers on the roads. In their turn the courts have been ready to play their part in trying to make the roads a safer place by imposing sentences which reflect the culpability of the driving and as was said by Roch LJ in A-G's Ref (No 30 of 1995) [1996] 1 Cr App R (S) 364 at 367 a proper sentence 'must now have in it elements of retribution and deterrence'."*

We consider these passages to be of general application. The proposition that judicial sentencing must be compatible with the will of Parliament as expressed in legislation is, as a matter of constitutional law, incontestable.

[43] The cases of *McCafferty* and *Lemon* were decided in a wholly different historical and statutory context. Furthermore they endorsed a proposition drawn from certain English decisions, namely that levels of sentencing for the offence of indecent assault prior to the increase from two years to five years imprisonment (in England and Wales) provided continuing guidance, which this court cannot endorse. We consider that in every sentencing context courts are bound to give effect to the readily discernible Parliamentary intention which this kind of statutory reform reflects. This must apply with particular force to the reforms effected by the 2008 Order. For these reasons, the decisions in *McCafferty* and *Lemon* cannot be considered a guide to the appropriate level of sentencing in prosecutions under Article 14 of the 2008 Order or for kindred offences. They should exert no influence on sentencing courts and, indeed, henceforth they should not be considered at all.

[44] There is one particular and inescapable feature of the new statutory regime. The maximum sentence for the majority of child sex offences is 14 years imprisonment, while certain offences attract the punishment of life imprisonment. These features *per se* declare that any attempted comparison between the prevailing legal landscape and that existing at the time of decisions in cases such as *Lemon* and *McCafferty* is doomed to failure.

[45] We further consider that the decision in *DM* provides no guide to either starting points or levels of sentencing of general application in cases of this kind, fundamentally on account of its case specific context. It was an intensely fact sensitive case and the circumstances of the offender's sentencing were highly case specific. This court expressly acknowledged the "*very wide variety of circumstances in which this offence can be carried out*" at [14]. Furthermore, the differences between the factual matrix of the three English decisions considered in [12] of the judgment and that of the present case are unmistakable.

[46] Accordingly the reference to *DM* at [11] of this court's later decision in *McCormick* must be considered in light of the immediately foregoing analysis. Furthermore this court's reference in the same passage to "*circumstances such as these*" draws attention again to the individual and inherently variable factual framework of every case. The consensual sexual activity of the (almost) 16 year old girl in *McCormick* is light years removed from the factual framework of the present case. So too is the case of *TH*.

[47] It is appropriate to repeat: offences under Article 14 of the 2008 Order and sexual offending generally belong to a wide factual spectrum in which the circumstances may vary almost infinitely. In cases involving an egregious breach of trust and the most vulnerable and defenceless of victims – of which the present case is a paradigm illustration – the requirements of retribution and deterrence will resonate with particular strength. The personal circumstances of the offender, such as those which found some sympathy with the court in *Lemon*, are highly unlikely to attract any weight. In contrast the court will attribute appropriate weight to an acceptance of guilt or plea of guilty at the earliest opportunity, genuine remorse and concrete evidence of self-correction and reform. This is not intended to be an exhaustive list.

[48] The immediately preceding reflections are echoed in Sex Offenders: Law, Policy and Practice (Cobley, 2nd Edition) at paragraph 4.183:

> "*The* [English] *Court of Appeal has been reluctant to set sentencing tariffs for offences of indecency, which cover a wide range of behaviour, from a slap on the buttocks of an adult to sexual abuse of a young child falling just short of sexual intercourse. The court has acknowledged the wide spectrum of behaviour, noting that in each case, although it would take due*

> *notice of decisions in similar cases, the circumstances of indecency vary infinitely in their different circumstances.*"

This passage continues:

> "*Furthermore, sentences in earlier cases must also be viewed against the statutory framework which was in force at the time when the offences were committed. The increased sentencing powers in recent years have led the Court of Appeal to comment that, in most cases, the personal circumstances of the offender will have to take second place behind the plain duty of the court to protect the victims of sexual attack and to reflect the clear intention of Parliament that offences of this kind are to meet with greater severity than may have been the case in former years when the position of the victim may not have been so clearly focused in the public eye.*"

These considerations are expressed with particular clarity in *R v Lennon* [1999] 1 Cr App R(S) 19.

[49] This court does not consider it appropriate to devise sentencing guidelines for offences contrary to Article 14 of the 2008 Order. The task for the sentencing court in every instance will be to tailor the sentence which it considers appropriate, giving effect to the requirements of retribution and deterrence, in the fact sensitive context of each case. Courts should derive assistance from the analysis of the decided cases and the review of the evolution of sexual offending and punishment contained in this judgment.

The Present Case

[50] Reverting to the present case, the ultimate question for this court is whether the sentence imposed upon this offender in the fact specific context to which his offending belonged was appropriate, having regard to the requirements of retribution and deterrence. As the foregoing demonstrates this sentence has withstood the challenge posed by a series of carefully constructed and forcefully argued grounds. Our overarching conclusion that this sentence is beyond reproach is, ultimately and standing back, driven by the two factors which, by some measure, overshadow this case namely the appalling breach of trust and the acute vulnerability of the helpless child victim.

Disposal

[51] Having called on prosecuting counsel to address the court on some limited issues, leave to appeal is granted. For the reasons given the appeal against sentence is dismissed.