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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**16/05/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

QD

_____

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (NUMBER 6 of 2019)

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Before: Morgan LCJ, Stephens LJ and Treacy LJ

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Stephens LJ (delivering the judgment of the court)

Introduction

[1] This is a reference by the Director of Public Prosecutions for Northern Ireland under Section 36 of the Criminal Justice Act 1988 as amended by Section 41(5) of the Justice (Northern Ireland) Act 2002. At the hearing of the reference we granted leave to challenge, as unduly lenient, the sentence of five months imprisonment imposed on 28 November 2018 by HHJ Kerr, QC ("the judge") on the respondent, whom we anonymise as QD for an offence committed at the end of May 2011 of sexual assault on a child under 13 contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008. Automatically, without any order of the court by virtue of Sections 80 and 82 of the Sexual Offences Act 2003 ("the 2003 Act") notification requirements are imposed on the respondent for the appropriate notification period. Also without any order of the court by virtue of the Safeguarding Vulnerable Group (NI) Order 2007 the respondent was included on the children's barred list. However, during the sentencing exercise the prosecution sought, but the judge declined to make, a sexual offences prevention order ("SOPO") under section 104 of the 2003 Act. By this reference the DPP contends that both the period of imprisonment and the failure to impose a SOPO were unduly lenient.

[2] The respondent had appealed his conviction but that appeal was dismissed by this court on 1 February 2019 under citation [2019] NICA 7.

[3] In this judgment so that the child's identity should be protected, as the Sexual Offences (Amendment) Act 1992 requires, we have not given his real name. Furthermore, we have anonymised the names of his mother and father. We draw the attention of anyone hearing or reading this judgment to the prohibition on identifying the victim of a sexual offence of this kind.

[4] Mr Mateer QC and Ms Walsh appeared on behalf of the prosecution and Mr Greene QC and Mr Magill appeared on behalf of the respondent.

Factual Background

[5] The respondent is the father and MC is the mother of a boy whom we shall call Jack. Jack's parents separated in August 2008. Jack resides with his mother. At the end of May 2011 when Jack was 2 years and 7 months old, an arrangement was made between his parents that the respondent would babysit for a few hours whilst MC was at work. Upon her return from work the respondent left MC's flat in a rush without saying goodbye and appearing to be really nervous. MC found that Jack was in his pyjamas bouncing up and down on the bed. She asked him if he had had a good time with his father to which he replied that he had. She then asked him what he had been doing with his father and he said that both of them had been playing with their penises though he used a different word to describe that part of their anatomy. He also said that his father had poured milk on him and that the milk had come from his father's penis. It appeared to MC that Jack did not understand that there was anything wrong with what he had described. She stripped off Jack's pyjamas checking for any physical injuries including to his anus. There were none. Jack's mother was shocked by what she had been told and she telephoned the respondent recounting what Jack had told her. He initially denied it but then replied that she knew who he was which was not going to change. He also stated that if you accept that then they could be together as a family. MC explained that this statement was a reference to events in 2008 when he had shown her pornographic images on a computer of a very old man having sex with a girl who was at the most five years old. She stated that when she had been shown these images she had been told by the respondent that normal sex did nothing for him.

[6] After the incident the respondent told MC that if she told anyone he would get her "cut into little pieces" and that he "knew the right people."

[7] It is apparent that the incident involved Jack being encouraged to or at the very least not being dissuaded from exposing and playing with his own penis whilst the respondent watched for his own sexual gratification, exposed his penis and then masturbated so that he ejaculated over Jack. The touching which was the subject of the assault was the ejaculate landing on Jack. There was no physical harm to Jack who had been left in an excited state having been led to believe that what had occurred with his father was a positive experience.

[8] On 28 September 2018 the respondent was convicted and on 28 November 2018 the judge imposed the five month sentence of imprisonment. The respondent is entitled to 50% remission and given the length of his sentence he is not subject to a licence on release and therefore not subject to any licence conditions for the remaining 50% of his sentence. We were informed that taking into account the periods spent on remand the respondent has been released from custody for some 6 months and has returned to reside in England.

The respondent's circumstances as set out prior to sentence being imposed on 28 November 2018

[9] The sentencing exercise before the judge and the hearing in this court was informed by the pre-sentence report dated 22 October 2018 ("the initial report") which was prepared by Fergal Doyle. On 22 February 2019 at the conclusion of the hearing in this court we indicated that if we determined that the sentence was unduly lenient that one of the options we wished to consider was a probation order of sufficient length to enable QD to participate in a Community Sex Offender Group Work Programme. To inform such consideration we directed a further probation report. The further report is dated 27 April 2019 and was prepared by Helen Flavell. There are differences between the two reports. The further report was made available to the parties and they have stated that they do not wish to make any submissions in relation to it.

[10] In preparing the initial report Mr Doyle had sight of amongst other material the depositions which would have included evidence in relation to counts upon which the respondent was acquitted and also evidence which the judge directed the jury should be excluded from their consideration.

[11] The initial report gave the respondent's date of birth and stated that he is now 38 years of age. The respondent had informed Mr Doyle that he was the youngest of four children and that he had an idyllic childhood. The respondent stated that he left school with no formal qualifications but that he subsequently completed qualifications in construction before gaining employment as an apprentice bricklayer. The respondent stated that he had been in regular employment within the construction sector. He also stated that in the past he had issues around alcohol and drug misuse from his early teenage years though this was not a present feature of his lifestyle.

[12] The respondent suffers from Whipple's disease which has caused intermittent abdominal pain with generalised joint pains mainly in his ankles, feet and calves. In July 2018 he required to receive inpatient treatment for 2 weeks with intravenous antibiotics. He was discharged on long term oral antibiotics and referred to the eye clinic where on examination on 20 July 2018 despite his vision in both eyes being 6/9 he showed suspicious cupped optic discs with a resulting referral for further management to the glaucoma clinic.

[13] The respondent described himself to Mr Doyle as heterosexual with an attraction to adult females. He denied any sexual fantasies about or an attraction to children or any other sexually deviant behaviour. He acknowledged that he had been found guilty in court but denied that he had committed sexual abuse on the victim.

[14] The respondent was assessed in the pre-sentence report as a medium likelihood of future general reoffending and as not presenting a significant risk of causing serious harm. There was no challenge by the prosecution to either of those assessments before the judge.

[15] Consideration was given in the report to the respondent's sexual offending behaviours. The following factors were found to exist:

(a) Sexually motivated interest in children;

(b) Lack of victim appreciation and perspective;

(c) Attitudes and beliefs held which permitted the respondent to commit his offending behaviour;

(d) Significant breach of trust given his role in the family at the time of the offence;

(e) Poor decision making; and

(f) The vulnerability of the victim.

However, the protective factors included:

(i) No previous relevant offending; and

(ii) No issues regarding alcohol or substance misuse at this time.

Reference was then made by Mr Doyle to Stable 2007 which was developed to predict recidivism, assess change in risk status and identify intervention needs for those adult males who commit sexual offences against identifiable victims. Mr Doyle stated that this when combined with the Risk Matrix 2000 provides a composite assessment of risk/needs and estimates recidivism. On this basis he considered that *a composite assessment of the respondent placed him in the high priority category for supervision and intervention*. Mr Doyle whilst recognising that given the nature of the offence the respondent was likely to remain in custody felt that in order to address deficits and manage the respondent some additional requirements should be incorporated into any probation order, or, if deemed appropriate, post release supervision on an order or licence. Mr Doyle then identified appropriate terms of any order or licence as including a requirement that the respondent should

participate actively in the Community Sex Offender Group Work Programme and to comply with the instructions given by or under the authority of, the person in charge. This programme requires a period of three years community supervision to complete.

[16] Before the judge there was no challenge to Mr Doyle's composite assessment. As we have indicated in preparing his report Mr Doyle had considered all the depositions which would have included a significant amount of evidence which the judge had directed the jury ought not to be taken into account. Accordingly, in this court it was suggested that in arriving at that composite assessment Mr Doyle may have taken into account matters which ought to have been excluded on the basis that they were not proved at trial or were matters which the judge directed the jury should not be taken into account. We emphasise that if there was to be a challenge on this ground or on any other ground to the probation officer's composite assessment or to any of his assessments then it ought to have been made before the judge. If the judge was persuaded to depart from any of Mr Doyle's assessments then there would have been an obligation to identify the reasons for doing so. The sentencing exercise is the main event and this court will not speculate as to what evidence Mr Doyle did or did not rely upon in forming his composite assessment. In this case in the absence of any challenge during the sentencing exercise and subject to anything contained in the further report we proceed on the basis of the composite assessment which placed the respondent in the high priority category for supervision and intervention with a suggested intervention being participation in a Community Sex Offender Group Work Programme over a three year period.

The further report

[17] QD's current accommodation is a privately rented room, located above a Public House. He is seeking to relocate to other premises in the area which would have the effect that he was away from the temptation of having a Public House so close.

[18] The further report reveals that the account given by QD to Mr Doyle in relation to alcohol consumption was incorrect. In fact QD has a concerning present level of consumption. Between Mondays to Thursdays after work he will consume between two and three pints of lager, on Fridays and Saturdays he will consume approximately eight pints of lager and on Sundays approximately three pints of lager. He does not have an alcohol-free day. He struggles to acknowledge that this level of alcohol consumption is in excess of recommended safe adult weekly amounts, stating that this has been a "normal" pattern for him since being approximately 20 years of age.

[19] Unlike Mr Doyle Ms Flavell did not combine Stable 2007 with Risk Matrix 2000 rather she used the latter as the sole sexual offence predictive scoring. Furthermore she relied on updated information provided by QD. Mr Doyle considered that a *composite assessment of the QD placed him in the high priority category*

for supervision and intervention. Ms Flavell currently assesses QD to be at a *low risk* of analogous re-offending behaviour.

[20] On the basis of Ms Flavell's assessment QD does not currently fulfil the criteria to undertake an accredited group sexual offending behaviour programme. However, given QD's long-standing unhealthy relationship with alcohol, Ms Flavell assessed him as posing *a medium risk* of serious physical or psychological harm to the public, staff, known individual or child. On this basis she assessed him as being suitable to undertake an 18-month Community Order, comprising of a 30-day Rehabilitation Activity Requirement, to undertake Maps for Change, in conjunction with a non-residential Alcohol Treatment Requirement, overseen by Change Grow Live, not exceeding a period of 12 months. She stated that QD has consented to the imposition of these requirements.

[21] We are prepared to proceed on the basis of Ms Flavell's risk assessment though we do not consider that this limits the period of any probation order to 18 months.

The respondent's previous convictions

[22] The respondent has nine previous convictions the most serious of which was for an offence committed in 2006 of possessing explosives under suspicious circumstances. His other convictions included offences such as breach of the peace, burglary, criminal damage, disorderly behaviour and road traffic offences.

[23] The respondent has no previous convictions for any sex offence.

The judge's sentencing remarks

[24] The judge stated that the evidence accepted as true by the jury was that when the respondent was babysitting he had masturbated over Jack.

[25] The judge stated that in order to assess the proper range of sentencing in any case one must assess the gravity of the behaviour, the degree of culpability and the harm caused to the victim.

[26] On the basis of a number of factors the judge was satisfied that the custody threshold had been passed. He identified those factors as being the extreme youth of the victim and the two fold breach of trust in that Jack was QD's son and the offence was committed in the child's home whilst QD was babysitting.

[27] The judge then stated that the case attracted a low level of sentence because (a) it was a single incident; (b) the assault itself was ejaculating over the child as opposed to what is normally described as touching; and (c) at the time the child made the report there was no evidence he was distressed by what had occurred and

when spoken to after the incident, it was reported that he had no recollection of the incident having taken place.

[28] The judge considered that the proper starting point was six months imprisonment.

[29] It is apparent that in arriving at that starting point the judge had taken into account all the aggravating features but not mitigation. Thereafter the judge in considering mitigation stated that there was none for a plea as the respondent was convicted after a trial. However, the judge stated that the pre-sentence report indicated that the respondent had a "good background and childhood." The judge also took into account two references from people who knew the respondent from attending their pub and who spoke highly of him not only as a customer but as a friend. The judge also referred to the respondent's eye problems and to a report from the prison which suggested that he had been behaving well.

[30] The judge having taken those factors into account reduced the sentence from six months to five months custody.

[31] The judge declined to make a SOPO considering that it had not been established to be necessary.

The grounds of the reference

[32] In support of the proposition that the starting point in this case ought to have been a custodial term of 4 years and accordingly that the sentence imposed was unduly lenient Mr Mateer relied on the decisions of this court in *R v AB* [2018] NIJB 77 and *R v M* [2015] NICA 56 and on a number of authorities in England and Wales; in particular to *R v Teeder* [2010] EWCA Crim 1425 and *R v Moulding* [2010] EWCA Crim 1690.

[33] Mr Mateer submitted that the approach to sentencing in this type of case should have been informed by the observations in *Attorney General's Reference (No. 2 of 2002)* [2002] NICA 40 and in *Attorney General's Reference (No. 4 of 2005) (Martin Kerr)* [2005] NICA 33 so that there should be severe punishment to "reflect the gravity of the offence, the need to deter others, the obligation to protect the most vulnerable members of society, the grave public concern and revulsion aroused by this type of offence and the importance of maintaining public confidence in the sentencing system." He submitted that the sentence imposed in this case could not be described as "severe punishment" so that it did not comply with the approach set out by this court.

[34] In relation to the SOPO it was submitted that the judge incorrectly considered the relevant test to be whether the respondent was dangerous within the meaning of Article 15 of the Criminal Justice (Northern Ireland) Order 2008 rather than applying

the test of the SOPO being necessary as explained in *R v Rampley* [2006] EWCA Crim 2203 as approved by this court in *R v Samuel Shannon* [2008] NICA 38.

Submissions on behalf of the respondent

[35] Mr Greene on behalf of the respondent carefully analysed and highlighted the differences between this case and the authorities upon which the prosecution relied as establishing that the starting point was unduly lenient.

[36] In relation to the decision not to impose a SOPO it was submitted that whether it was necessary gave sentencing courts a significant degree of discretionary latitude and that this court should not interfere with the exercise of judicial discretion unless the decision was plainly wrong.

Sentencing guidelines

[37] The maximum sentence on indictment is 14 years imprisonment.

[38] The approach to sentencing in cases involving sexual abuse of young children has been set out in *Attorney General's Reference (No. 2 of 2002)* [2002] NICA 40 by Carswell LCJ who stated:

> "Counsel for the Attorney General submitted that the course taken by the judge was excessively lenient and that it failed to reflect the gravity of the offence, the need to deter others, the obligation to protect the most vulnerable members of society, the grave public concern and revulsion aroused by this type of offence and the importance of maintaining public confidence in the sentencing system. He pointed to the remarks of this court in Attorney General's Reference (No. 3 of 2001) (2002, unreported) at page 8, where we placed renewed stress on the necessity for the courts to mark emphatically the abhorrence of acts of child abuse, which he submitted were, mutatis mutandis, entirely apposite to the present case and had not been taken into account by the judge. In a similar vein were the court's remarks in Attorney General's Reference (No. 2 of 2001) [2002] NIJB 117 at 122a:
>
> "It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from following their example".

Also in *Attorney General's Reference (No. 4 of 2005) (Martin Kerr)* [2005] NICA 33, Kerr LCJ stated that:

> "This court has repeatedly warned that sexual offences against young children will be met with severe punishment…"

We confirm that this remains the approach to sentencing in cases of this nature.

[39] In *R v Millberry & Ors* [2003] 2 Cr App R (S) 31 it was stated that in assessing the gravity of an individual offence there are broadly three dimensions to consider. The first is the degree of harm to the victim; the second is the level of culpability of the offender and the third is the level of risk proposed by the offender to society. Those three dimensions were approved by this court in *Attorney General's Reference (No 2 of 2004) (Daniel John O'Connell)* [2004] NICA 15 and *Attorney General's Reference (No 3 of 2006) (Michael John Gilbert)* [2006] NICA 36. We consider that it will always be necessary to consider any individual case as a whole taking into account the three dimensions to which we have referred.

SOPO

[40] The circumstances in which a court may make a SOPO under section 104(1) of the 2003 Act were considered by this court in *R v Shannon* [2008] NICA 38, *R v Simpson* [2014] NICA 83 and *R v CZ* [2018] NICA 53. We adopt but do not considered it necessary to repeat what Campbell LJ stated in *R v Shannon* in delivering the judgment of the court in that case.

[41] We consider that the decision whether to impose a SOPO is not a discretion but rather is a decision involving an evaluative judgment by the sentencing judge. This court recognises that in forming that evaluative judgment there is an area which must be left to the sentencing judge so that on a reference or on an appeal against sentence this court will not readily interfere unless the judge was clearly wrong or failed to give adequate consideration to a significant factor.

Aggravating features

[42] We consider that the following aggravating features are present.

(a) Particular vulnerability of Jack due to his extreme youth. The offence is committed in relation to a child who is under 13 but extreme youth, such as in this case, is an aggravating feature.

(b) Breach of a paternal relationship of close family trust and also breach of the trust involved in the respondent's engagement to babysit Jack.

(c) Threats to the mother to dissuade her from reporting the incident.

(d) Ejaculation. It was submitted that this was not an aggravating feature as it was the touching which constituted the offence. On that basis it was submitted that to treat this as an aggravating feature would amount to double counting. Furthermore it was submitted that Jack was completely unaware that the substance was ejaculate. We consider that the touching involved in a sexual assault can occur in many different ways so that the nature of the touching can be an aggravating feature. Sexual touching of some parts of the anatomy can be more distressing than touching other parts. Similarly how a victim is touched can be more degrading or distressing than other methods of touching. We accept that to have a memory of a sexual assault and to carry that memory from its commission, which would be the case for instance if Jack had been 10, is worse than subsequently learning about a sexual assault about which one has no intrusive recollections. We also accept that Jack did not know and does not presently know that he was assaulted or that the substance with which he was touched was ejaculate. However, we consider it inevitable that at some stage he will know both of those matters as he will have to be told. We consider that this will lead him to feel particularly bitter given the additional degradation involved in ejaculate being the method of touching. He may well consider that the only contribution that his father made to his upbringing was to masturbate so that he ejaculated over him. We consider that this is an aggravating feature in this case.

(e) An issue arises as to whether this offence was opportunistic or impulsive or whether Jack was specifically targeted as a particularly vulnerable child so that the offence was premeditated and planned. We consider that this aggravating feature is present.

(f) The offence occurred in the victim's home.

(g) We do not consider that the respondent's criminal record is an aggravating feature given the absence of convictions for sex offences. However, his record is relevant to an evaluation of character as potential mitigation.

Mitigation

[43] The conviction was at trial so that there is no discount for a plea of guilty.

[44] There is no remorse for the offence so this mitigating feature is absent.

[45] We have given consideration to the following points in mitigation

(a) The respondent's background, childhood, work record, his conduct in prison together with the references all of which have to be evaluated in the context of his previous convictions and on the basis that personal circumstances are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 at paragraph [15]; *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 at paragraph [37] and *R v Keith McConnan* [2017] NICA 40 at paragraph [49].

(b) His medical condition, which we consider to be an aspect of his personal circumstances rather than a serious illness warranting separate mitigation, see *R v Bernard* [1997] 1 Cr App R (S) 135; *R v Hall* [2013] 2 Cr App R (S) 68 (434); *R v Sloan* (Neutral Citation no. (2000) 2132 and *Attorney General's Reference (No.1 of 2006) Gary McDonald, John Keith McDonald and Stephen Gary Maternaghan* [2006] NICA 4.

[46] It has been submitted that the nature of the offending not involving penetration is a mitigating factor but we consider that it is the absence of a further aggravating factor.

[47] It can be seen that whilst some mitigating features should be taken into account they are of limited effect.

Consideration

[48] The prosecution relied on a number of cases seeking to establish that the starting point should be four years custody. We will refer to two of those cases.

[49] The first case is *R v AB* in which a determinate custodial sentence of 3 years 6 months had been imposed in the Crown Court. The offender appealed against sentence but the appeal was restricted solely to the question as to whether a custody probation order ought to have been made. Our system of precedent requires that consideration is given to what was in issue in an earlier case. Quite simply the appropriate length of imprisonment was not in issue in that case. This court was not asked to nor did it endorse 3 years 6 months as appropriate. In addition the respondent submitted that the following features distinguished that case from the present case so that even if 3 years 6 months was appropriate in that case it was not in relation to the present case. Those features were:

(a) The offender had been convicted on two counts of sexual assault on a child under 13 years of age by penetration contrary to Article 13 of the 2008 Order following a trial.

(b) The victim was older than Jack being described as under 10 years of age.

(c) The offender was 19 years of age at the time of the offence.

(d) At the time of the offending the offender and the victim were regarded as cousins.

(e) The offender had come into the victim's bedroom one night while she slept touching her under her clothes.

(f) He had returned and repeated the behaviour, touching her under her clothes.

(g) On each occasion he had inserted his fingers inside her vagina.

We agree that those are distinguishing features.

[50] The second case is *R v M* in which a determinate custodial sentence of 3 years had been imposed in the Crown Court. The offender appealed against his conviction but not against his sentence. The issue as to whether the sentence imposed was manifestly excessive or unduly lenient simply did not arise on the appeal and this court was not asked to nor did it endorse 3 years as appropriate in that case. In addition the respondent submitted that the following features distinguished that case from the present case so that even if 3 years was appropriate in that case it was not in relation to the present case:

(a) The offender had been convicted on two counts of sexual assault on a child under 13 years of age contrary to Article 14 of the 2008 Order following a trial.

(b) The victim was older than Jack being described as 10 years of age.

(c) The victim was awoken in the early hours of the morning by the offender sitting on his bed. The offender then made his way up the inside of the bed against the wall, lay down beside victim and put his arms around him. The offender then pulled down the victim's pyjamas and pants, felt and squeezed his penis and then kissed his back and wrist.

(d) The victim then arose, went to the bathroom and then returned to his bedroom and got into bed. The offender was still there and he repeated the same acts.

We agree that those are distinguishing features.

[51] We consider that none of the authorities relied on by the prosecution are comparable. We reject the submission that the starting point in this case ought to have been 4 years custody. However, we consider that there are a number of other

aspects of this case which could lead to a determination that the sentence was unduly lenient.

[52] The judge did not identify any harm to Jack nor did he identify any victim other than Jack. That was also a feature of a submission in this court on behalf of the respondent that there was "no evidence that *the victim* suffered any harm from the offence" (emphasis added). We have two observations to make about that submission.

[53] First we do not agree that there was only one victim. This was a sexual assault by a father on his son. It is not appropriate to ignore the family setting by limiting the victims to the person assaulted. Family life is multi-faceted and crimes committed in relation to one family member will impact adversely on other family members. It is inevitable that other family members will have feelings of betrayal, shock and disgust together with feelings of loss of trust and confidence in others. In this case family life between Jack's parents had been disrupted prior to the incident but was destroyed by it. The position of Jack's mother as a victim and the harm that has been and will be caused to her is ignored in the submission that there was only one victim and was not taken into account by the judge.

[54] Second even if one concentrates on the harm to Jack we do not agree that there is or will be no harm to him. 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 Jack's parents but it has affected Jack's relationship with his father and may well affect his relationship with his mother. In relation to his father it has prevented Jack 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 real and significant psychological harm to Jack. It is apparent that MC is devoted to Jack which will be a great benefit to him as he develops but it is inevitable that Jack will ask questions about his father and why he is not playing a part in his life. Jack's mother will have the difficult task of deciding what information should be given to Jack and when. When she does tell him there will be a substantial risk of further emotional and psychological damage to Jack particularly during his adolescence. We consider that there will also be a substantial risk to the relationship between Jack and his mother. All of this amounts to significant harm to Jack. The lack of any physical injuries, Jack's young age when this offence occurred and Jack's lack of memory of it should not obscure the serious psychological harm which is being and will be caused to Jack.

[55] The judge also considered and again it was submitted to this court that the "single incident" nature of the assault is relevant to the assessment of the respondent's culpability. The respondent was prosecuted for but acquitted of the offences of rape of a child and possessing indecent photographs of a child. The evidence in relation to those charges must be ignored in the sentencing exercise and in that respect we accept that this was a single incident in the sense that this offence was not part of a sequence of offending and that this is relevant to an assessment of

the respondent's culpability. However, culpability is determined by the extent to which the offender intends to cause harm – the worse the harm intended, the greater the offender's culpability. If this offence had been part of a sequence then the respondent's culpability would have increased. However, the concept of culpability in relation to sexual offences is somewhat different in that the offender's intention may be to obtain sexual gratification, financial or some other result rather than to harm the victim. However, where, as here, the activities are in any way exploitative, the offence is inherently harmful and therefore the offender's culpability is high. Furthermore where, as here, the offence was planned this makes the offender more highly culpable. In summary the fact that this was a single incident should not obscure the respondent's degree of culpability.

[56] As we have indicated it will always be necessary to consider any individual case as a whole taking into account the three dimensions to which we have referred in paragraph [39]. The third dimension is the level of risk proposed by the offender to society. In this case evidence of that risk can be taken from (a) the nature of the offence itself which demonstrates an interest in sexual acts involving young children; (b) MC's evidence that the respondent intended the assault on Jack to be part of a future sequence in that normal sex did nothing for him and if she accepted him for what he was they could be together as a family; (c) the initial report which contained the assessment that the respondent was in *the high priority category for supervision and intervention*; and (d) the further report which reduces the level of risk but reveals ongoing abuse of alcohol. The judge stated that in order to assess the proper range of sentencing in any case one must assess the gravity of the behaviour, the degree of culpability and the harm caused to the victim. He did not identify the third dimension which is the level of risk proposed by the offender. It is not necessary for every factor to be expressly considered but in this case if the evidence at (a)–(c) had been taken into account it would have impacted on the length of the custodial sentence and on the necessity for a SOPO.

[57] A SOPO should only be imposed if it is necessary. We consider that it was clearly necessary given the evidence which we have set out at (a)–(c) in the previous paragraph and that its necessity was enhanced because, given the short custodial sentence imposed, the respondent would be released back into the community without any licence conditions. Before the judge there was an unchallenged high priority for supervision and intervention. The notification requirement gave limited supervision and the barring order gave limited intervention. Clearly what was required was a higher degree of intervention particularly given that the respondent was not to participate in the recommended Community Sex Offender Group Work Programme over a three year period.

[58] On the hearing of this appeal and given the information contained in the further report we consider that a SOPO would still be necessary if QD did not consent to probation.

[59] Having carefully considered all these factors and everything that was advanced to us on the respondent's behalf we have come to the conclusion that the sentence imposed was unduly lenient both in relation to the length of the term of imprisonment and in relation to the failure to impose a SOPO. That sentence in our judgment should not have been passed.

[60] We must now address the question as to what the proper disposal should be**.** We consider, subject to what we say about probation, that taking into account the aggravating features together with the modest impact of mitigation the sentence ought to have been 18 months imprisonment and a SOPO ought to have been imposed.

Double jeopardy

[61] We must take account of the effect of double jeopardy. The respondent has had to face the ordeal of a second sentencing exercise after he has been released from prison having served 2 and a half months in custody. He has had to endure the worry and uncertainty that all this inevitably entails given the potential for him to return to prison. We consider that subject to the question of probation and taking into account double jeopardy the effective sentence should be one of 15 months custody. The question then arises as to whether by virtue of Paragraph 10 of Schedule 3 to the Criminal Justice 1988 Act the respondent will be credited by the Prison Service with the period of time when he was at liberty between the Crown Court sentence and the order of this court so that given he has been at liberty for approximately 6 months a sentence of 18 months imprisonment has already been reduced to 12 months.

[62] Paragraph 10 of Schedule 3 provides:

> "The term of any sentence passed by the Court of Appeal … under section 36 above shall, unless they otherwise direct, begin to run from the time when it would have begun to run if passed in the proceeding in relation to which the reference was made."

This paragraph was considered by this court in *AG's References (Nos.1 and 2 of 1996) (Kennedy and Clarke)* [1996] NI 456 and in *Attorney General's Reference (No.1 of 2006) (G McDonald, J McDonald and Maternaghan)*. As in the second of those authorities we also have not heard full argument on the point and we consider that it would be appropriate to receive submissions on behalf of, amongst others, the Prison Service. The question is whether the impact of paragraph 10 is that an offender is credited with the period of time when he is at liberty between the Crown Court sentence and the order of this court. In this case that would mean that the respondent would be credited with a period of six months.

[63] As we have indicated taking into account double jeopardy the effective sentence should be 15 months imprisonment together with a SOPO. If the offer of probation is not accepted by the respondent then how that is to be achieved will have to be determined. So if the offer of probation is not accepted then we will adjourn in order to receive submissions on behalf of the parties and on behalf of the Prison Service so that we can determine the correct construction of Paragraph 10 of Schedule 3. If the offer of probation is accepted then we will direct that a copy of this judgment is sent to the Prison Service so that they can consider this point in conjunction with the PPS with a view to its determination in a future reference.

[64] We are of the opinion that the supervision of the respondent by a probation officer is desirable in the interests of (a) securing the rehabilitation of the offender; and (b) protecting the public from harm from him or preventing the commission by him of further offences. We have been informed that a probation order can be carried out in England. As an aspect of double jeopardy given that (a) the respondent has been imprisoned, (b) the need for supervision and intervention for the benefit of the respondent and (c) for the benefit of public protection we consider that we could substitute for the sentence of 5 months imprisonment imposed by the judge a sentence of 3 years' probation directing that it should commence from the date of the order of this court. This would enable the respondent to complete a 30-day Rehabilitation Activity Requirement, to undertake Maps for Change, in conjunction with a non-residential Alcohol Treatment Requirement, overseen by Change Grow Live, over a period of 12 months. This would satisfy the need for supervision and intervention so that a SOPO was no longer necessary. We make it clear that in relation to a probation order it will be a requirement that:

(a) The respondent will reside at such accommodation as is specified by his supervising probation officer and at no other address during the entire probation period.

(b) The respondent will keep all appointments with the probation officer as are notified to him during the entire probation period.

(c) The respondent will engage in psychological assessments as required by his supervising probation officer during the entire probation period.

(d) The respondent will present himself in accordance with instructions to the National Probation Service or at a venue specified by his supervising probation officer to participate actively in a 30-day Rehabilitation Activity Requirement, to undertake Maps for Change, in conjunction with a non-residential Alcohol Treatment Requirement, overseen by Change Grow Live, over a period of 12 months during the Probation period; shall comply with the instructions given by his supervising probation officer or by or under the authority of the person in charge of any such programme.

We explain to the respondent that if he fails to comply with any of the requirements of the probation order then the court has power to deal with any such failure by for instance revoking the order and imposing a period of imprisonment or fining him or requiring his future compliance with the probation order or imposing a further community service order upon him and requiring his compliance with that order. We also explain to the respondent that the court has power to review the order on his application or on the application of his supervising probation officer.

[65] If the respondent does not consent to the probation order then the sentence that we will impose is one so as to secure an effective sentence of 15 months imprisonment and we will also impose a SOPO.

[66] We must now enquire from the respondent as to whether he consents to a probation order. Does the respondent consent to the probation order being made?

[67] We understand that the respondent consents. Accordingly, we will substitute for the sentence imposed by the judge of 5 months imprisonment a three year probation order containing those requirements but direct that the order shall commence from today.

Conclusion

[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 which order commences as from today.