Neutral Citation No: [2020] NICA 51 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11335** *ICOS No:* *Delivered:* **23/10/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

REGINA

v

GT

and

HT

_____

IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS (NI) UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002)

_____

Before McCloskey LJ, Maguire J and McAlinden J

_____

Mr David McDowell QC and Ms Laura Ievers (instructed by the Public Prosecution Service)
Mr Gregory Berry QC and Mr Neil Fox (instructed by Keown Nugent Solicitors) for GT
Mr Eugene Grant QC and Mr Tom McCreanor (instructed by Keown Nugent solicitors) for HT

_____

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 all relevant persons are described in anonymised terms throughout this judgment.

McCLOSKEY LJ (**delivering the judgment of the court**)

Introduction

[1] The sentencing of the above-named Defendants ("*the offenders")* has been referred to this court by the DPP in accordance with the unduly lenient review statutory provisions identified in the title hereof. At the conclusion of the prosecution presentation we granted leave to proceed.

[2] Giving effect to the reporting restrictions specified above, the following descriptions are employed throughout this judgment:

(a) The first Defendant: "*GT"* and: "*the adult male offender*."

(b) The second Defendant: "*HT"* and "*the adult female offender*."

(c) The complainant/victim: "*the injured party*."

The judgment has also been crafted in terms which seek to exclude anything – such as places, addresses, other names *et al* – which could serve to identify either of the offenders or the injured party.

An Overview

[3] The offenders are husband and wife. They pleaded guilty to a total of 26 offences of a sexual nature. There was a single direct victim of their offending ("*the injured party*"). Their offending belonged to three distinct phases:

(i) **2001 – 2003**: in respect of this period the adult male offender pleaded guilty to 6 specimen counts of taking an indecent photograph of a child, 2 counts of gross indecency with a child, 2 counts of indecent assault on a female and 2 counts of rape. The adult female offender pleaded guilty to 4 specimen counts of taking an indecent photograph of a child, 2 counts of gross indecency with a child, 2 counts of indecent assault on a female and 2 counts of aiding and abetting rape. (The injured party was aged 18 – 39 months during this phase of offending).

(ii) **21 May 2011**: the adult male offender pleaded guilty to three specimen counts of distributing indecent photographs of a child on this date.

(iii) **21 July 2012 – 21 July 2014**: the adult male offender pleaded guilty to a single count of sexual assault on a child (the injured party, by now a young teenager) on one occasion during this period.

The indictment ultimately comprised 30 counts, four of which were "left on the books."

[4] Each of the 26 offences outlined above was perpetrated against the injured party alone. The offences belonging to the first phase were committed when the injured party's age ranged from 18 months to 3 years, 3 months. The offences belonging to the second phase were committed when the injured party was aged 11 years. The single offence which occurred in the third phase was committed when the injured party was aged 13/14 years. The offenders were the godparents of the injured party. This relationship provided the impetus and opportunity for their offending.

[5] The police investigation began in January 2018. The offenders were committed for trial one year later. They ultimately pleaded guilty to the 26 counts noted above (detailed further *infra*). They were sentenced in January 2020. A full appreciation of their offending and this judgment requires the reproduction of some sordid and disturbing details.

The Injured Party

[6] Most of the offending, save for the later offence of indecent assault (Count 16) and the offences of distribution (Counts 13 to 15) occurred between 2001 and 2003 when the injured party was a toddler between the ages of eighteen months and 3 years 3 months. The evidence showed her to have been sexually abused by the offenders on three different occasions, two of which led to her rape. She was dressed up in sexualised clothing and photographs were taken of the abuse. These were later distributed over the internet, in 2011 (counts 13 – 15). Count 16 related to a separate occasion when she was abused by the adult male offender when aged 13 or 14.

[7] The injured party was assessed by Dr Michael Paterson, Consultant Clinical Psychologist, in May 2019, when she was aged 19 years. She self-reported the following symptoms in particular: intrusive thoughts; sleep disturbance; withdrawal from social interaction; avoidance of heterosexual relationships; impaired concentration; heightened irritability; anger and upset; and adverse impact on her studies. She has a full recollection of the indecent assault offence which occurred in her early teens. While she has no recollection of the offences committed when she was a toddler she has been made aware of these.

[8] The consultant, applying a recognised diagnostic tool, concluded that the injured party is experiencing "*other specified trauma and stressor-related disorder due to an adjustment like disorder with prolonged duration of more than 6 months without prolonged duration of the stressor*". He recommended a referral by the injured party's general medical practitioner to specialist services for the provision of appropriate therapies.

The Offences Uncovered

[9] In October 2017 computer equipment was seized by police in the course of a search of the offenders' home. An external hard drive was found in a locked storage cupboard in their bedroom. A computer tower was seized from the dining room. Analysis revealed that on 21st May 2011, 17 indecent images of a child (the injured party) had been shared using 'Yahoo Messenger' from the account A to another user, B. The content of 'chats' with that user and others was recovered. It disclosed a sexual interest in young children on the part of the user, GT. Repeated reference was made to the abuse of the injured party and the pleasure it had brought him. He expressed a desire to abuse the child and other children in the future. He discussed abusing a five month old child with another user advising him that the abuse of children aged over two presented "too much of a risk". GT appeared to glory in his past abuse of the victim.

[10] The external hard drive was examined for the presence of indecent images of children. A total of 47 indecent images of a child were located in two directories: one referred to as "\transfer02\home" and the others as "\transfer02\xcamx". There were four Category A images, 11 in Category B and 32 in Category C. The photographs recorded three separate incidents of abuse. The child in each case was identified as the injured party.

The First Phase

[11] It is necessary to examine the offending belonging to the three phases identified above in a little more detail. Within the first phase there were three separate identifiable episodes.

The First Episode

[12] The dates of the images on the hard drive suggested that the first incident had occurred when the injured party was almost two years old. The sequence of photographs begins with her lying naked on a towel. One of the photographs then shows HT wiping the injured party's vagina before putting on her nappy (count 17: HT– Indecent assault). Other photographs then show the child standing, wearing a white vest but naked from the waist down so that her genitalia can be seen. She is then joined by HT who is completely naked and holding the child's arm. Another photograph shows HT then holding the child's leg before another where she appears to be putting on her nappy. At one point, the child is holding her bottle. HT is identifiable by a tattoo (count 18: HT – gross indecency with a child).

[13] In further photographs in the sequence the injured party is lying down naked with her genitalia exposed, looking in the direction of the camera. There are adult pornographic magazines around her. She is then joined by the naked GT with penis erect. A later photograph shows him with his hand on his penis with his other arm around the child in order to open her legs. There is a pornographic magazine in

front of her and he appears to be arousing himself (counts 7 and 8: GT – gross indecency with a child (posing) and indecent assault (touching)). In a later, image the child is holding a pornographic magazine as if she were reading it.

The Second Episode

[14] On the other directory within the portable hard drive, referred to as "\transfer02\home" were three photographs taken when the injured party was aged around two and a half years. The first shows her wearing a cream coloured top. In the second photograph, she is naked, lying down on a bed. Her legs are spread apart and she is looking in the direction of the camera. GT is placing the head of his penis into her vagina. In the final photograph, his penis is partially inserted into her vagina (count 9: GT – rape). It is apparent from the images that the camera was hand-held. HT was the photographer and thus encouraged the rape (count 19: HT – aiding and abetting rape).

The Third Episode

[15] Within the same directory, there were photographs of a third incident when the injured party was aged around three years and three months. The sequence of photographs begins with her wearing an earring and dressed up in white pants, a white bra and black stockings. HT is seen adjusting the bra strap. Later the child is seen wearing a short black dress. A further photograph shows her taking it off. In a number of the images, the child is looking in the direction of the camera.

[16] The injured party is then seen on an office chair wearing the white bra and pants, sitting with her legs open. Then she is photographed bent over wearing nothing but the stockings with her pants down round her legs. Later, she is again on the office chair wearing only the stockings and with her legs spread open, exposing her vagina.

[17] In the next photograph, the injured party is dressed in a pink top and pants with flower motifs, as well as the black stockings. She is posing with her legs crossed beside a computer desk. On the photograph after that she is sitting naked on HT's lap. HT is clothed, wearing a brown top and cream trousers (count 20: HT – gross indecency with a child). Cream trousers are captured in a number of the earlier images showing the presence of HT.

[18] In another image, GT is sitting on the black office chair with the injured party naked on his lap. He has spread her legs with his hands. In subsequent images, she remains on his lap with his erect penis exposed between her legs and with both her hands holding it. (count 10: GT – gross indecency with a child). In another image his erect penis is in contact with her vagina (count 11: GT – indecent assault).

[19] The next images show the injured party lying on a bed with GT with his erect penis positioned in the area of her vagina before he is seen penetrating her. The last

image of GT on the bed shows him on top of the child with her arm and leg wrapped around him (count 12: GT – the second rape).

[20] An imaging expert determined that the photographer was using a hand-held camera (rather than a tripod). This was HT (count 21: HT – aiding and abetting the second rape).

[21] The photographs belonging to the final group depict the injured party lying naked on the same bed with HT standing alongside completely naked, holding a cloth or baby-wipe and with her other hand on one of the child's legs. In the next, HT is bending over the child, looking into her face (count 22: HT – indecent assault).

[22] Redacted copies of these two photographs were also recovered. The tattoo on HT's arm had been erased, evidently in an attempt to protect her identity and thus evade detection.

The Second Phase

[23] The aforementioned edited photographs were included within the 17 photographs distributed on line by GT to another user on 21st May 2011. The distributed photographs included those of both incidents of rape (counts 13 to 15: GT – distributing indecent images of children). The distribution of the photographic images of the injured party was effected by the adult male offender only. The recipient was an unidentified person. We interpose here an observation. While the reality of the dark world in which this was taking place is that multiple further acts of distribution may have occurred and may continue to occur, the prosecution of this offender did not include any evidence to this effect.

[24] Messages exchanged between them commented upon the images in sordid and salacious terms. In July 2011, they communicated again, in similar terms. There was also on line contact ("chat") between GT and another user. This was repeated on 31 July 2011. It then recurred with this user and another in August and October 2011. Altogether GT had on line contact with three other users, beginning with his distribution of the indecent images, on some five occasions between May and October 2011.

The Third Phase - Final Offence: 2012-14

[25] The final incident of sexual abuse was uncovered after GT had been first interviewed, in January 2018. After the discovery of the images, the police made contact with the injured party, now aged 18 years. Upon being asked whether she had ever been touched by GT she reported that he had done so when she was aged 13 or 14. She did not recall any of the earlier abuse.

[26] Describing the last mentioned incident, the injured party recounted that on a summer's day she had popped in to the offenders' house to say hello to her

godparents. She was sitting on the sofa and, when HT was in the kitchen, GT put her on his knee and rubbed her leg before putting his hand down her dungarees and onto her pants, rubbing her vagina over them with his fingers. After a while, he moved his hand underneath her pants and rubbed her vagina again. Afterwards, he wiped some of her menstrual blood from his fingers on a napkin (count 16: GT – sexual assault). While the injured party recounted this incident to her father, no report to the police was made.

[27] The injured party's mother reported that when the child was aged two or three years she contracted genital warts around her vagina and anus. She received treatment for them from her doctor who was content that there might have been an innocent explanation. Her mother further reported that the child began 'masturbating' from the age of two or three which continued until she was eight or nine years old, making sexualised noises while she did so.

Arrest and interview: GT, the adult male offender

[28] The offenders were arrested on 30th January 2018. In reply to caution GT said "nothing to say at the minute" while HT made no reply. GT made no comment during his first two police interviews. In his third interview he answered questions. He denied having a sexual interest in children saying that he would not be aroused by a photograph of a child but would be if it was a woman. He said "It is just the wrong road I have taken."

[29] GT identified the injured party from one of the photographs on his computer and accepted having sexual contact with her. He said they had babysat her on a maximum of three occasions, one of which was overnight. Shown one of the images of them together (and him with an erection) he disputed penetration, saying that he was merely simulating for the photograph. He again denied arousal by the naked child, claiming that he had probably played with himself instead. He later accepted penetration of her vagina when shown a clearer photograph. He denied sharing the image knowingly and said he was "totally ashamed" that it had happened. He claimed that the image was taken with a tripod and a timer. He said that he had looked at the image only twice in 15 years but not for sexual gratification.

[30] Of the photographs in stockings he said that he and HT had bought them especially for 'posing' and that it was his idea. Of those where the injured party had her hands on his penis, he said he had no recollection of asking her to hold it and denied that it was for his sexual gratification. Of the last set of photographs he accepted putting his penis into the child's vagina but claimed that the purpose was to take the photo rather than to have sexual intercourse. He denied that HT was using the baby wipe to clean ejaculate. He denied that the photographs of her had been edited to remove her tattoo so that they could be shared online. He claimed that the child had posed with the pornographic magazines of her own accord.

[31] In his sixth interview GT was asked about being a school bus driver and confirmed that sometimes he would drive primary school children but denied looking at them sexually. He then accepted going through a phase where he was sexually attracted to children and that it was around the time when he abused the injured party but he insisted that this was only to a degree and he was not "wholly sexually attracted". He said that it was he who had introduced children to his and HT's sexual relationship.

[32] GT was asked about using chatrooms online around the time of the distribution of the images in May 2011. He told police that he and HT would use the name C and that they used the aliases 'Mike' and 'Fiona'. He struggled to explain a chat where he had discussed online security and that he had seen "too many folks go down through being careless". He was shown a chat where they discussed "that kid you looked after". He confirmed it was the injured party and that he had shared the indecent image. He denied the truth of his comment during a chat that [as he put it] "every time my cock was near her cunt I came LOL". He claimed he was embellishing for the sake of the chat. There was other 'chat' evidence to like effect.

[33] GT was interviewed again after the injured party's later allegation. He denied sexually assaulting her, claiming that she had come round and plonked herself on his knee, saying that she was always a "huggy person". He said she left when he refused to give her a lift down the road and hadn't been back.

Arrest and interview: HT, the adult female offender

[34] HT was also interviewed. On being shown an indecent image of a child in a bedroom, she said "It could be [*the injured party*]". She expressed herself as 60-70% confident in her identification. She denied being aware of the photograph of her husband penetrating the injured party. She confirmed that it was in her bedroom and, after consultation, identified GT as the male in the photograph but denied taking it. When asked whether she was aware that this was happening in her home, she paused and then said "not penetration". She commented that it was "just a fantasy that we carried too far", before correcting herself, saying "It was his fantasy, not mine really." She said the fantasy was "possibly kids dressed up", saying that it was "way back" and she had blocked a lot of things out. When asked if she shared that fantasy, she said "No, not really" saying that she "played along".

[35] As regards the act of penetration, she said she could have been working or shopping when it happened. When asked how she felt, looking at the image, she said "sick". It was suggested that the child was looking at someone taking the photograph and she continued to deny taking it, saying that she dressed the child once. She also denied being aware of the second rape albeit she identified her cream trousers in the photographs leading up to it. She accepted that they had bought the black dress, stockings and underwear the injured party had been dressed in, from a named store, possibly weeks before. She said that she was sorry it ever happened and would apologise to the injured party if she ever saw her.

[36] When shown the photograph of the injured party taking her dress off, she replied: "it doesn't show me stripping her". She failed to answer when shown the photo of the injured party taking off her pants in her presence. Having initially denied being present when the photograph of the injured party with her legs open had been taken, she then accepted that she "possibly could have been". She then accepted that they must have bought more than one outfit for the injured party. She said they had dressed the child up "once or twice it was not more than that". When it was put to her that a photograph of the child holding GT's penis was taken from the angle where she had previously been seen sitting, she was unable to answer when asked whether she had been present. She then said "probably not".

[37] Of the photograph of her wiping the injured party whilst naked, she claimed that they had been in the bath and that it was "perfectly innocent" despite GT taking a photograph of her doing so. She denied taking any photographs at all. She was asked about online chats using the profile C [and the pseudonyms "Mike" and "Fiona"] where sexual abuse of young children was discussed. She denied typing anything online or sitting beside her husband while he did so. She suggested that the description in those messages of her performing sexual acts on children was fantasy on GT's part. It was put to her that one message: "It's just Mike here at the moment" implied that she had been present on other occasions. She responded: "But Fiona obviously isn't, isn't there all the time".

[38] In the last interview, she repeated her denials that she had taken the photographs. She claimed that the pictures of the rapes had been taken using a tripod and that when she dressed the injured party up, she did not think it would go as far as it did. Asked what she would apologise to the injured party for (because of her earlier comment to that effect), she replied: "For what he's done to her". She said she hadn't done anything.

The Course of the Prosecution

[39] We begin with the timeline prepared at the request of the court and agreed among the parties.

30 October 2017	Search at the offenders' property.
22 January 2018	Investigation commences into images of injured party.
30 January 2018	Start of Defendants' interview process. On the same date the injured party (then aged 18) was informed that indecent images had been found which were believed to be of her.
30 January 2018	First six Interviews of **GT** during which he is shown images: 1. No comment. 2. No comment.

3. Accepted he had sexual contact with injured party. He disputes penetration then says the tip of his penis entered her but that he was just putting it against her vagina, not intending to penetrate. He said he did not share image with anyone knowingly. Did not know why he had kept image and had no recollection of sharing it.

4. Said he did not have a sexual interest in children and did not intend to share images. Last contact with injured party was 4/5 years ago when she called in to say Hello. Suggests that HT had not taken photos of him with the child.

5. Reference photo 0022 – the word rape never entered my head, I thought of it as simulating a sex act, but my penis is against her. Then accepts penetration but the purpose was to take a picture and not to have sexual intercourse. Suggests some images which include HT are not sexual. Denies editing out HT's tattoo in order to share online. Accepts chat rooms but does not remember sharing pictures. Then admits to editing 0026 image but has no memory of sharing.

6. Says he went through phase of being sexually attracted to children but not "wholly" so. Said that 90% of the chat in the logs is fantasy and that HT did not get involved in this.

30 January 2018 First five interviews of **HT**

1- 3 Asked about number of images (not all relevant to this case). Said she can't upload pictures.

4. Said she had not seen the image of GT penetrating injured party and was not aware penetration was taking place. Denied taking second image of rape. Admits to dressing child up. Bought clothes weeks before "it probably was planned and then just came out of the blue again". Said she would apologise to injured party if she ever saw her. Agrees that she "might" have been present during some of the abuse.

5. Does not remember taking some of the pictures and suggests tripod was used. Denies being present during rape.

31 January 2018 Further interviews (7 to 9) of **GT**

7. Accepted that he shared and received images.

8. Confirms that 17 images were shared during chat on 21 May 2011. He said that he did not abuse injured party again (after 2003).

9. Said that he did not remember a named user. Expressed remorse for "taking the wrong turn" and said that he has not accessed images since Oct 2017.

31 January 2018 Further interviews (6 to 9) of **HT**

6. Denies knowing who is in image 0022 and who made it. Said that image 0025 was her changing a nappy and was "perfectly innocent".

7. Denies taking bab01 and that GT looked after injured party alone once a week. Says that bab08 was perfectly innocent. Denies taking other images.

8. Denies they were in partnership on the abuse.

9. Again denies taking rape picture and says it was tripod. Said that she was going to apologise to injured party for what he has done to her. She denied doing anything.

16 May 2018 Final interview of **GT** (regarding Phase 3 ie the allegation of sexual assault). Denies allegation. Says that injured party plonked herself on his knee and then took a "strunt" when he refused to give her a lift.

11 June 2018 First appearance at Magistrates' Court.

[40] The chronology from committal for trial to the Crown Court listings is as follows:

17 January 2019 Preliminary Enquiry

08 February 2019 Senior/Junior Counsel for HT attended at Lislea Drive PSNI to view images (edited) with Solicitor

19 February 2019 Arraignment. GT pleaded guilty to counts 1 to 15 inclusive and not guilty to count 16. HT pleaded not guilty to all counts.

28 February 2019 Case reviewed in court and Judge updated on progress

06 March 2019 Further review in court

13 March 2019 Further review in court

20 March 2019 Further review in court

25 March 2019	Review of images (unedited) by HT's senior counsel at Lislea Drive PSNI
28 March 2019	Further review in court
01-30 April 2019	Arrangements being made to consult in Hydebank in order to review images in the presence of HT
01 May 2019	Review of the images by HT's defence counsel at Hydebank. Thereafter arrangements made with Court Office to list for re-arraignment
08 May 2019	Indictment amended by adding three specimen counts (23, 24 and 25). HT re-arraigned and accepted the full facts. Remaining counts (2-6) left on the books in the usual terms.
08-13 May 2019	Injured party made aware that she would not be required to give evidence
14 May 2019	GT re-arraigned in respect of count 16 (Phase 3-sexual assault) and pleaded guilty, following inter-counsel discussions
04 June 2019	First listed for plea and sentence
26 June 2019	Plea adjourned by the court
12 August 2019	Plea adjourned by the court
15 November 2019	Plea adjourned by the court
21 November 2019	Plea Adjourned by the court
23 January 2020	Pleas in mitigation hearing
05 February 2020	First listed for sentence
10 February 2020	Sentencing listing

The Sentencing of the Offenders

[41] On 10th February 2020, in the Crown Court at Belfast, HHJ Grant sentenced the adult male offender (GT) as follows:

Counts 9 and 12: rape	12 years (Article 26 licence)
Counts 1 to 6: taking indecent photographs	5 years concurrent
Counts 7 and 10: gross indecency	18 months concurrent
Counts 8 and 11: indecent assault	6 years concurrent
Counts 13 to 15: distributing indecent images concurrent	3 years plus 3 years' extended licence
Count 16: sexual Assault	3 years consecutive plus 3 years' extended licence

Total effective sentence

15 years' imprisonment, coupled with three years' extended licence.

[42] On the same date the adult female offender (HT) was sentenced thus:

Counts 1 and 23 to 25: taking indecent images	5 years (2 custody; 3 probation)
Counts 18 and 20: gross indecency	18 months
Counts 17 and 22: indecent assault	6 years (3 custody; 3 probation)
Counts 19 and 21: aiding and abetting Rape	9 years (6 custody; 3 probation)

Total Effective Sentence

Custody probation order of nine years comprising six years' imprisonment and three years' sequential probation.

Ancillary orders were also made in respect of each offender to include Sexual Offences Prevention Orders and disqualification from working with children.

The Governing Principles

[43] We begin with the statute. Section 36 of the Criminal justice act 1988 ("*the 1998 Act*") provides:

> *"36 Reviews of sentencing*
>
> *(1) If it appears to the Attorney General –*
>
> *(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and*
>
> *(b) that the case is one to which this Part of this Act applies,*
>
> *he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may –*
>
> *(i) quash any sentence passed on him in the proceeding; and*

(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.

(2) Without prejudice to the generality of subsection (1) above, the condition specified in paragraph (a) of that subsection may be satisfied if it appears to the Attorney General that the judge

[(a) erred in law as to his powers of sentencing; or

(b) failed to impose a sentence required by –

[(zi) section [1(2B) or] 1A(5) of the Prevention of Crime Act 1953;]

(i) section 51A(2) of the Firearms Act 1968;

….

(9) In the application of this section to Northern Ireland –

(a) any reference to the Attorney General shall be construed as a reference to the [Director of Public Prosecutions for Northern Ireland];…"

The legal principles to be applied in s 36 cases were established some three decades ago and have been applied consistently ever since. This follows from the decision of this court in *Attorney General's Reference (No 1 of 1989)* [1989] NI 245 at 248d – 249a, where this court endorsed without qualification the approach of the English Court of Appeal in *Attorney General's Reference Number 4 of 1989* [1990] 1 WLR 41 at 45h – 46e:

> *"1. The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably*

consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.

2. The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.

3. Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence."

[44] It has been a recurring feature of the jurisprudence of this court that in every sentence referral under the 1988 Act the factor of double jeopardy must be reckoned. See for example *Attorney General's Reference (Number 1 of 2004)* [2004] NICA 6 at [17] - [18]. Double jeopardy, in this context, denotes the exposure of the offender to punishment for a second time. Furthermore, in cases involving a multiplicity of offences the principle of totality must be observed: see for example *Attorney-General's Reference (No 1 of 1991)* [1991] NI 218at 224b–225b.

[45] Next we turn our attention to certain unremarkable sentencing principles of application in cases of this kind. It is trite that every sentence must reflect the requirements of retribution and deterrence. During recent years the path which the sentencing of offenders for abhorrent sexual offences has taken has been informed by a combination of legislative intervention and judicial decision making. In this way the general considerations of retribution and deterrence have undergone some refinement and are now the subject of more focused analysis and attention. This has seen the emergence of a now entrenched sentencing principle that the court must consider the degree of harm to the victim, the level of culpability of the offender and the risk posed by the offender to society: see for example *Attorney General's Reference Number 3 of 2006 (Gilbert)* [2006] NICA 36 and, more recently, *R v GM* [2020] NICA …. at [36].

[46] In similar vein it is instructive to recall this court's uncritical acceptance of the following submission made on behalf of the Attorney General in a case of indecent assault on a child:

> *"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.'"*
>
> (*Attorney General's Reference Number 2 of 2002* [2002] NICA 40 at [15])

We consider that this passage enshrines well established sentencing principles to be applied in every case of this kind. This court is also alert to the radical statutory developments in the realm of the configuration of sexual offences and the marked increase in punishments which have been features of the past two decades in this jurisdiction, summarised in *GM* (*supra*) at [37] – [41].

[47] The brief overview above of the applicable jurisprudence is not complete. In our examination and resolution of both the central and ancillary issues raised by this reference we shall identify other relevant decided cases and principles.

The adult male offender (GT): the central issues identified and determined.

[48] In response to the court Mr David McDowell QC who, with Ms Laura Ievers of counsel, represented the DPP, helpfully confirmed that this DPP's reference entails (in the court's paraphrase) a frontal challenge to the starting point selected by the sentencing judge for the punishment of this offender's dominant offences. We preface our consideration of the out workings of this contention with the uncontentious observation that in the case of this offender the headline offences were the two counts of rape which, being a common law offence, attracts a

maximum sentence of life imprisonment. The maximum punishment for each of the other 14 offences committed by this offender was 10 years imprisonment, with the exception of the offence of gross indecency with a child which at the material time attracted a maximum sentence of two years' imprisonment (later increased to ten, by the Criminal Justice (NI) Order 2003, effective from 08 May 2003).

[49] The contours of the core submission on behalf of the DPP formulated above are uncluttered. The point of departure is provided by two decisions of this court namely *Attorney General's Reference Number 1 of 2004 (O'Connell)* [2004] NICA 15 at [15]–[17] and *R v Kubik* [2016] NICA 3 at [14] and [20]. We find it unnecessary to either elaborate on these passages or to engage in the debate which they might stimulate since, in the present case, this court has no reason for interfering with the uncontentious starting point of 15 years imprisonment adopted by the sentencing judge and supported by all three parties.

[50] From this point of departure one arrives speedily at the nettle to be grasped by this court. The sentencing judge, having referred to the English guidelines, categorised the offending of GT as a campaign of rape attracting a starting point of 15 years imprisonment which warranted an uplift to 16 years having regard to –

> "*…the serious sexual abuse carried out over a considerable period of time which included two distinct and separate rapes of a very young child with additional serious sexual abuse …*"

The judge then, correctly, addressed separately the issue of credit for guilty plea, assessing this at 25% giving rise to a resulting dominant sentence of 12 years imprisonment.

[51] The DPP's challenge to the starting point determined by the sentencing judge is focused and uncomplicated. It involves the submission that the starting point and, hence, the ensuing sentence failed to reflect a multiplicity of aggravating features namely:

(i) the victim was extremely young at the time of the offending and therefore particularly vulnerable;
(ii) the offences constituted an abuse of trust;
(iii) the two offenders acted together;
(iv) the victim was specifically targeted;
(v) the offences were planned and prepared for;
(vi) there was additional degradation by:
    a. the use of pornography; and
    b. dressing the victim in sexualised clothing;
(vii) photographs were taken of the abuse and distributed on the internet;
(viii) the offences of rape were accompanied by other sexual offending;
(ix) the offences occurred over a period of approximately 18 months;

and, in respect of the later sexual assault:

(x) a history of sexual assaults against the same victim.

On behalf of this offender there was no challenge to this analysis and it is accepted by this court.

[52] Detachment and objectivity on the part of both the sentencing court and the appellate court are important values in every criminal case, the more so where (as in the present case) the offending is of an abhorrent and repulsive nature, involving an appalling breach of trust and a repeatedly abused defenceless child of very tender years. See, in this context, *GM* (*supra*) at [50]. The judicial task and responsibility do not admit of emotion or comparable sentiments.

[53] The sentencing judge adopted the English Sentencing Advisory Panel's (SAP's) guideline starting point of 15 years imprisonment for a campaign of rape against an adult. Notably, the SAP's methodology is that only one of its list of some 10 possible aggravating factors is required in order to attract any of its suggested starting points for the offence of rape. This analysis follows from paragraphs 32 – 36 read together.

[54] While the initial part of the judge's exercise was compatible with the decision of this court in *R v Kubik* [2016] NICA 3 at [14]ff , the consideration that the victim of the two rapes was a totally defenceless young child should *per se* have warranted a point of departure in excess of the judge's chosen figure of 15 years. The weakest and most vulnerable members of society occupy a special position in the criminal justice system. Deterrence and retribution resonate most strongly where they are concerned.

[55] Having identified a "*starting point*" of 15 years imprisonment, it was incumbent on the judge to embark upon the identification and influence of both aggravating and mitigating factors. The judge, correctly, considered firstly the aggravating factors. He did so in the terms set forth in [50] above. The unmistakable feature of the exercise which followed was the failure to identify and reckon the majority of the aggravating factors noted in [51], none of which can be seriously debated. We consider that these factors had the indisputable effect of elevating the offending of GT to a plane which the judge's ultimate starting point manifestly failed to reflect. Furthermore, this analysis entails no element of double counting since the judge did not reckon any aggravating factors, expressly or by implication, in the initial part of his exercise ie in determining his starting point of 15 years imprisonment.

[56] Having regard to the foregoing, in our judgement the starting point in this case should have been 20–22 years' imprisonment, subject to downward adjustment for mitigating factors. Mindful that this is a sentence referral under the 1998 Act governed by the principles set forth in [44]–[46] above, to be contrasted with an

appeal against sentence, this court is driven inexorably to the conclusion that the sentence imposed upon the adult male offender, GT, was unduly lenient.

[57] The foregoing conclusion is made before two further aspects of the sentencing of GT are considered. The first is the amount of credit given to this offender for his pleas of guilty. The route whereby the judge determined a commensurate, or effective, sentence of 12 years imprisonment was to identify 15 years as the starting point, adding one year for aggravation and then subtracting four years (25%) for this offender's pleas of guilty. It is not in dispute that there was no other mitigating feature to be weighed.

[58] It is necessary to examine the credit of 25% for GT's please of guilty. As earlier passages in this judgment demonstrate, GT made certain admissions during police interviews, confined to some limited physical sexual contact with the injured party. As the interviews progressed he accepted that penetration had occurred. In later interviews he made admissions to the "Phase 2" offending, namely sharing the images in 2011. He adamantly denied the final count on the indictment, namely the "Phase 3" sexual assault upon the injured party.

[59] GT was committed for trial on 17 January 2019 and when first arraigned on 19 February 2019 he pleaded guilty to the first 15 counts but not the 16th. While the indictment was amended by the addition of three new specimen counts on 08 May 2019 this related exclusively to the co-accused HT. During the second week of May 2019 GT's willingness to plead guilty to the sexual assault count was confirmed in discussions between counsel and, it would appear, relayed very quickly to the injured party. The formal plea of guilty was made on 14 May 2019 when GT was re-arraigned.

[60] In sentencing both offenders the judge said the following:

> "*Both of you were arrested on 30 January 2018. During the first two interviews* [GT] *made a 'no comment' interview but made admissions gradually during the course of the third interview. By this stage the police had available to them all of the evidence presentable in this case …*
>
> *There was a considerable weight of evidence identifying each of the Defendants in each of these offences. To obtain full credit of a third reduction in their sentences Defendants must admit the offence at the earliest opportunity, although neither did so on this occasion. I recognise that they saved the victims and others much distress in avoiding the need for evidence and a lengthy trial. For that reason I am prepared to allow a significant degree of credit of one quarter. Each of you has a clear record but as has been made clear by the authorities that must be of limited value and benefit to any person entering a plea in relation to serious offences such as this.*"

The sentencing path which followed was, sequentially, the determination of the starting point, the one year uplift for aggravating factors and the application of a 25% reduction. Independently, the judge imposed a consecutive sentence of three years imprisonment, coupled with an extended licence period also of three years, in respect of the 16th count (the Phase 3 offence).

[61] An admission of guilt attracts mitigation of sentence as it betokens the offender's acknowledgement of his offending, constitutes a promising starting point for the offender's rehabilitation, obviates the need for a contested trial – which is manifestly in the public interest – and provides the injured party with some measure of vindication and relief. It has been a constant theme of the jurisprudence of this court that in order to qualify for maximum credit the offender must accept his guilt at the earliest opportunity. A notional sliding scale comes into operation.

[62] Offences against the person constitute a broad category of offending. They range from minimal technical assaults to crimes of shocking violence. Offences of a sexual nature have become a free standing compartment within this broad category. This development has occurred mainly as a result of major statutory intervention. This subject was reviewed in the recent judgment of this court in *R v GM* [2020] NICA …… This court observed at [38] that statutory reforms –

> "*… have effected a veritable sea change in the prosecution and punishment of sexual offences.*"

The Sexual Offences (NI) Order 2008, in operation since 02 February 2009, established over 50 offences. Against this general background, in prosecutions for sexual offences courts have focused their attention on the discrete issue of the benefit to an injured party flowing from a plea of guilty.

[63] In *R v Maughan* [2019] NICA 98 a different constitution of this court stated 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.]

As an earlier passage at [66] indicates the "*benefits*" are not confined to the injured party. Rather they extend to "*relieving witnesses, vindicating victims, saving court time and indicating remorse*". In *GM (ante)* this court, having observed that this is an inexhaustive list, continued at [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."

[64] There is one consideration in particular which may not have been sufficiently highlighted in previous decisions of this court. We consider that every victim of sexual offending presumptively suffers emotional distress and psychological trauma from an early stage of the criminal justice process. In many cases this will begin when a report is first made to the police. In other cases it will commence when the injured party first becomes aware of a police investigation. There may be other variables. Furthermore, the degree of the emotional distress and psychological trauma will vary from case to case. While we consider it appropriate to assume this impact in every case the court will always pay careful attention to any available relevant evidence, such as a psychologist's report (as in the present case).

[65] For these reasons the court asked to be informed of the date upon which the injured party first became aware of the police investigation in this case. We were informed that this occurred on 30 January 2018. This court also asked to be informed of the date upon which the injured party first learned that she would not have to give evidence and, as already noted, this occurred during the second week of May 2019. Pausing, it will almost invariably be appropriate for a sentencing court to acknowledge this factor as a benefit to the injured party which will be reflected in the degree of credit considered appropriate for the offender's guilty plea. However

courts will not assume that the injured party's emotional distress and psychological trauma end abruptly at the stage just noted. To do so would be contrary to both reality and common sense. Once again, while an assumption of some continuing psychological distress and trauma will nearly always be appropriate, the sentencing court will seek to take its cue from any relevant available evidence.

[66] We elaborate on this as follows. GT was first interviewed about the free standing offence of sexually assaulting the injured party (the 16th count: July 2012 – July 2014) on 16 May 2018. He denied the allegation. He eventually acknowledged his guilt fully one year later, some three weeks before the scheduled trial date. For the injured party the intervening period would have been one of anxiously waiting and wondering. The analysis is quite uncomplicated: GT pleaded guilty to this offence because he committed it. In sentencing mitigation terms, therefore, he should have accepted his guilt when first interviewed by the police one year earlier.

[67] The judge correctly recognised that GT's guilty plea "*… saved the victim … much distress in avoiding the need for evidence ...*" However, as our preceding analysis demonstrates, we consider this perspective too narrow. The judge further stated that both the injured party "*and others*" were saved much distress by not having to give evidence. The only other witnesses identifiable in the papers are police officers involved in the investigation. Their evidence would have involved proving distressing photographs and sordid "chat room" communications together with interviews of the offenders. We do not seek to minimise the impact of having to give such evidence. It will always be an uncomfortable experience. While the impact upon such witnesses is to be contrasted with that upon the injured party, we accept that this is an appropriate factor to be reckoned in the mitigation equation, as in the present case, provided that this distinction is acknowledged.

[68] There is one final feature of the sentencing of the offender GT in this discrete context. The judge described the absence of any criminal record as something "*… of limited value … and benefit …*" Successive decisions of this court have made clear that previous good character and the absence of a criminal record normally qualify for no weight in prosecutions of this kind. They are generally to be viewed as neutral, non-aggravating factors. See, for example, *R v C* [2002] NIJB 254 at 258e.

[69] The exercise conducted above impels to the conclusion that the attribution of 25% credit for this offender's pleas of guilty was clearly excessive. The earliest opportunity to fully acknowledge his guilt occurred when interviewed by the police. As regards all 16 counts, he failed to do so and did not alter his stance of denial until approximately one year later. This clearly made a contribution to an unduly lenient sentencing outcome. The credit for his guilty pleas should not have exceeded 15%. We shall revert to this issue *infra.*

[70] The final feature of the sentencing of the offender GT to be considered is the punishment which was imposed in respect of the three specimen counts of distributing indecent images of a child, namely a sentence of three years

imprisonment plus a licence extension period of three years to operate concurrently with all other sentences. As already noted these were free standing offences committed during a distinct phase which we have identified above as the second of three separate phases. The effect of the concurrent sentence is that the offender has received no effective punishment for these discrete offences.

[71] In our determination of this discrete issue, the central question which arises, bearing in mind that the overarching question for this court is whether the sentencing of this offender, viewed as a whole, infringes the principles of undue leniency, is this: should the court have imposed a consecutive sentence for these three specimen offences? Alternatively phrased, adopting the formula which we have applied in [72] above, does the failure of the sentencing court to impose any effective custodial period in punishment of these offences make a material contribution to an overall assessment of undue leniency?

[72] In our view an affirmative answer is irresistible. These three offences manifestly did not arise out of a single incident or transaction. Their separation in time from the Phase 1 offending and the Phase 3 offending is measured in terms of years. They did not involve repetition of the offending belonging to either of the other two phases. They involved offending of a kind wholly different from each of the other 13 offences for which this offender was sentenced. The circumstances in which they were committed are obviously separate from those applying to each of the other offences. They share but two features in common with the other offences namely they belong to the broad category of sexual offending and the identifiable injured party is the same person. We say "identifiable" because where this particular type of offending is concerned a broader perspective is necessary. Offending of this kind has an indirect adverse impact on many others, one of the clearer examples being children who become the victims of offending perpetrated or perpetuated by those whose inclination to abuse them is stimulated by viewing the images.

[73] We shall consider the consequences of our immediately preceding analysis and conclusion in the context of our examination of the principles of totality and double jeopardy *infra*.

The Female Adult Offender: HT

[74] As regards this offender the three issues raised by the DPP's reference are (a) the starting point applied, (b) the credit given for her guilty pleas and (c) the imposition of a custody/probation order. We shall examine each in turn. Before doing so it is appropriate to highlight some of the judge's sentencing comments.

[75] The judge described this offender's level of culpability as "*very high indeed*". His assessment of the gravity of her offending is discernible from the following excerpts:

"[The injured party] *was extremely vulnerable and quite defenceless against your sexual abuse of her.*

[As godparents] *... you would undertake to look after the child and her moral welfare … you both stood in a position of trust as regards* [the injured party] *…*

All of the offending conduct on your part represents a very serious breach of trust. These offences were planned, carefully considered and premeditated. Pornographic images of what you were doing were carefully posed and connected … and then disseminated for your sexual gratification and that of others. These images are now out on the web, they cannot be taken back, they cannot be recovered and they will be there in the very long term. It is clear that you were happy to distribute these images to others and I am satisfied that there was an expectation that you would receive similar material in return and this would widen the circle of similarly minded people …

You sought to purchase items of provocative clothing, including underwear and stockings and dressed [the injured party] *in these clothes to enhance the sexual nature of what was happened to her. There can be little doubt that you engaged in grooming this vulnerable child …*

The rapes were committed by both of you acting together in order to control [the injured party] *and in order to commit these offences you* [GT] *engaged in sexual intercourse with* [the injured party] *while you* [HT] *aided and abetted the rapes on both occasions. It is usual to approach culpability on the basis that the culpability of the aider and a better is less than that of the principal. I am satisfied that I should adopt that approach in this case, but I am also satisfied that* [HT] *your level of culpability is very high indeed. I am satisfied that throughout you actively encouraged* [GT] *to rape* [the injured party]. *You filmed or photographed these instances, you prepared* [the injured party] *knowing what was going to happen to her by purchasing and dressing her up in what you considered to be provocative clothing. You did everything you could to facilitate what* [GT] *did to this defenceless child. A further aggravating factor is the duration of the period of the sexual abuse of the victim … a period of approximately two years …*

It is clear … that each of you was highly culpable in the offences that you committed against the victim and each of you fully understood what you were doing. It is clear that each of you has

> *an enthusiastic interest in child sex abuse and the propensity to carry out such offences …*"

Pausing, we interpose two observations. First, we consider that the judge's approach to the gravity of both offenders' crimes and their respective levels of culpability was unimpeachable. Second, this is not disputed before this court.

[76] The sentencing path which the judge then followed was identical to that in the case of GT, subject to the different figures: see particularly [64] above. Having identified a starting point, with aggravation, of 16 years in the case of GT the judge turned to HT in these terms:

> "*I take the view because you did not engage in penetrative sex or intercourse with the victim, although you did actively facilitate and encourage it, a starting point for your sentence should be a period of 12 years.*"

This the judge reduced to nine years applying 25% credit for the guilty pleas. Following a reference to the pre-sentence report the judge continued:

> "*I am satisfied that she was throughout a full, active and willing participant in the abuse committed. In the report she is assessed as presenting a medium likelihood of reoffending, but this does not reach the dangerous threshold.*"

[77] The judge had previously observed, without elaboration, (correctly) that the sentencing of HT would be under the Criminal Justice (NI) Order 1996 (the "*1996 Order*"). What followed at the end of the sentencing exercise was an exchange between bench and bar initiated by prosecuting counsel enquiring as to whether the disposal in the case of HT was via the mechanism of custody/probation or custody/licence. The same issue was raised in respect of the offender GT. In his case the judge then completed his sentencing by specifying that the mechanism would be that of custody/licence with a 50/50 division (ie applying Article 26 of the 1994 Order) plus the consecutive sentence of three years plus an extended licence period of three years. Finally, the judge then stated that custody/probation (under Article 24 of the 1996 Order) would be the disposal as regards HT, entailing six years imprisonment to be followed by three years' probation. This offender's consent to the latter disposal was then communicated to the court.

[78] We consider that, by some measure, the central issue arising in the case of this offender, HT, mirrors that arising in the case of GT namely the starting point selected by the judge. GT was sentenced as a principal party while HT was sentenced <u>partly</u> as a secondary party. Adopting the judge's assessment, while their levels of culpability belonged to different grades the difference, while objectively ascertainable, was far from dramatic. HT was an energetic, enthusiastic and proactive secondary party in the commission by her husband, GT, of two heinous

crimes of rape upon this child. Her status of secondary party ends there. The other eight offences for which she was sentenced – four specimen counts of taking an indecent photograph of the child, two counts of gross indecency with the child and two counts of indecent assault on the child – were all committed as a principal party. Standing back, the main material distinction between the two offenders relates to the rapes: while GT perpetrated the two rapes, HT aided and abetted their commission. The second point of distinction, namely that there was no replication in the case of HT of the three specimen distribution counts against GT in the indictment, is of lesser moment.

[79] Thus the levels of culpability of the two offenders were different, but not radically so. The first question is whether this difference was adequately reflected in the starting points, 16 years and 12 years imprisonment respectively, determined by the judge. Mindful of the need to avoid a mechanistic or arithmetical prism, we consider that the answer is clearly "No". This assessment is readily made via a combination of the "stand back" principle and the indelible fact that whereas the 12 years determination should have been the judge's point of departure before applying a substantial uplift for aggravating factors this necessary latter exercise was not carried out at all.

[80] The facts and factors which aggravated the offending of GT applied substantially to HT: in summary the extreme vulnerability and defencelessness of the injured party; the appalling abuse of trust; acting in concert; the specific targeting of the injured party; associated detailed and callous planning and premeditation; and the additional degradation caused by the use of the pornographic magazines and dressing the child up in sexualised clothing. None of these features was reckoned in the determination of the starting point for the offender HT. The starting point of 12 years is unsustainable in consequence.

[81] The court has already concluded that the sentencing of the first offender, GT, was unduly lenient, mainly on account of the excessively low starting point. This assessment inevitably has certain consequences for HT given the principal and secondary offender relationship with regard to the two headline offences of rape. If this were the only consideration the conclusion that the sentencing of HT is unduly lenient would follow inexorably. There is, however, a further consideration of a substantive nature, namely the diagnosis that the sentencing of HT failed to reflect any of the multiple aggravating facts and features of her offending.

[82] There is a third consideration arising in the case of HT. Turning to the second of the three issues identified in [76] above, the interviews of HT were characterised by substantial denials of wrongdoing, some very limited admissions of involvement in the events, shifting the blame to her husband and the demonstration of very limited awareness of either the gravity of the offending or its consequences for the injured party. Against this background HT pleaded not guilty to all counts when arraigned on 19 February 2019, when the prosecution had entered its second year. Her plea of guilty was not made until some three months later (approximately one

month pre-trial) following amendment of the indictment by the addition of three further counts of taking indecent images of the injured party which she accepted. These counts substituted for counts two to six which were in similar terms but were not pursued in the event.

[83] The proposition that this offender should have made appropriate admissions when first interviewed by the police seems to us unanswerable. We balance this with a submission of some potential merit advanced by Mr Grant QC on behalf of HT namely that final advice on the pleas of guilty to be made could not be provided until the *inter-partes* "negotiations" relating to the final form of the indictment had been completed and all of the offending images had been viewed by her legal representatives. This court acknowledges the fact that in cases of this kind it is not habitual for photographic albums of the offending images to be made. Nor is it habitual for the images to be supplied electronically by the prosecution to the defence. Indeed the members of the court experienced this phenomenon at the hearing with regard to seeing the images for themselves. While this was capable of being effected it resolved to a single police officer with sufficient expertise displaying the images on a single lap top in the court room.

[84] However, we have characterised Mr Grant's submission as one of "potential" merit only, since our review of the chronology of the prosecution above leads us to conclude that there is no conceivable justification for HT's heavily delayed acceptance of guilt. Giving effect to the foregoing analysis the conclusion that the offender HT received excessive credit for her pleas of guilty and that this made a material contribution to the undue leniency in her sentencing assessed above follows inexorably.

Our Conclusions

[85] On the grounds and for the reasons elaborated above the omnibus conclusion of this court is that the sentences received by both offenders lay outside the range of sentences which, applying and evaluating all relevant facts and factors, could reasonably be considered appropriate and, hence, were unduly lenient. In the language of the applicable test, as demonstrated above the sentencing judge did not consider all relevant factors and imposed sentences deviating below the level of condign punishment required for both offenders' repulsive, shameful, sordid and protracted abuse of this defenceless young child.

[86] Our specific conclusions are the following:

GT

(i) The starting point for this offender should have been a minimum of 21 years imprisonment.

(ii) His convictions in respect of the three counts of distributing indecent images should have been punished by the imposition of a consecutive sentence which, on a stand-alone basis, would have merited a minimum of five years imprisonment. In the context of this indictment, allowing for the principle of totality the punishment should have been at least two years imprisonment.

(iii) The maximum credit for his pleas of guilty should not have exceeded 15%.

(iv) To the foregoing must be aggregated the consecutive sentence of three years imprisonment (plus three years extended licence) imposed for the 16th and final count. This produces a total gross sentence of 26 years imprisonment reduced by 15% for the guilty pleas to a round figure of 22.

[87] Making allowance for the factor of double jeopardy, which does not resonate strongly in a case of this kind and in this case in particular, our conclusion is that GT should be the subject of a commensurate effective sentence of 21 years imprisonment. Taking into account the intricacies arising out of the different dates/periods of this offender's crimes and the legislative changes, we concur with the submission of Mr McDowell QC that the breakdown of this substituted sentence should be as particularised in the Schedule to this judgment. We substitute the sentence of GT in these terms.

HT

[88] As regards the adult female offender HT:

(i) We conclude that this offender's headline offences, namely aiding and abetting the two rapes committed by her husband upon the injured party, warranted a sentence of not less than 12 years' imprisonment without aggravation. Reckoning the aggravating factors the punishment should have been 16 years' imprisonment.

(ii) The maximum credit for this offender's belated pleas of guilty should not have been higher than 15%.

(iii) This produces an effective, or net, term of 13 ½ years' imprisonment.

(iv) Each of the ten terms of imprisonment imposed upon her was ordered to operate concurrently. We consider that this was appropriate in the circumstances. We must reckon finally the factor of double jeopardy which, as already observed, is of limited force in the circumstances of this case. We reflect this by determining, and substituting, a net overall sentence of imprisonment of 12½ years.

[89] The final issue in the case of HT concerns the DPP's challenge to the judge's selection of the custody/probation mechanism. The contention is that this should have been custody/licence. The arithmetic makes clear that this made a material contribution to undue leniency in the overall sentence. The application of the orthodox division in cases to which Article 26 of the 1996 Order applies results in the reduction of the gross custodial period by 50%, with the balance of the period devoted to licenced release (subject to certain qualifications). The effect of a custody/probation disposal is that this 50% reduction does not apply to the probation element, but becomes operative when one half of the custodial component has been served. Thus in the case of HT eligibility for release would have crystallized at the point of three, rather than 4 ½, years in sentenced custody (per Articles 24 and 25 of the 1996 Order), subject of course to any appropriate remand custody adjustment.

[90] This court has previously held that Article 24 custody/probation disposals are intended by the legislature to be viewed as a commensurate term of imprisonment: *Attorney General's Reference Number 1 of 2002* [2002] NIJB 87. In the same case it was held that Article 24 and Article 26 disposals are mutually exclusive. We take into account also what this court has decided previously, albeit in fact sensitive contexts, about the length of the custodial element: see *R v Devenney* [2001] 10 BNIL 90 and *R v Dunbar* [2003] NIJB 73. In the former case this court upheld a disposal entailing ten years imprisonment to be followed by a probation period of one year.

[91] Our determination of this discrete issue is driven by three considerations. First, as a matter of sentencing principle in cases where the more onerous and exacting conditions enshrined in Article 26 are satisfied, the court should ordinarily sentence under this statutory provision: *R v McGowan* [2000] NIJB 305 at 310, reiterated by this court in *R v Larmour* [2001] 6 BNIL 116. Second, by the very nature of her offending the qualifying conditions in Art 26 were plainly satisfied in the case of this offender. Third, the recommendations in the first pre-sentence report were clearly directed to the custody/licence mechanism, while the second, updating report indicates a continuing stance of denial of any criminality on her part and the most recently generated report (from the prison) in substance adds nothing material. Having regard to the decision of this court in *R v Sloan* [2006] NICA 27 at [29], we are unable to ascertain a sufficient foundation for the assessment that this offender would positively benefit from probation *simpliciter*, with the resulting advantage to society.

[92] It must follow that the device of licenced release, entailing as it would the considerably greater reach and influence of licence conditions – to be contrasted with the manifestly weaker and more limited tool of mere probation – is clearly the more appropriate option in principle and will serve to rectify the unduly lenient effects of the Article 24 custody/probation mechanism. In this discrete respect, the provisions of both s 36(1) (undue leniency) and s 36(2) (error of law by the sentencing judge) of the 1996 Act fall to be applied.

[93] Summarising, the dominant sentence in the case of this offender was nine years imprisonment divided between a custodial period of six years and an ensuing probationary period of three years. We have concluded that the gross period of imprisonment for this offender should be 12½ years under the custody/licence provisions of Art 26 of the 1996 Order, with the customary equal division between the custodial and licenced release periods.

[94] We are satisfied that the foregoing assessments and conclusions make adequate allowance for the SOPOs imposed on both offenders, together with the principles of totality and double jeopardy and, finally, the prisons pandemic factor.

[95] The mechanical and arithmetical outworking of our conclusions to be reflected in the reconfiguration of the sentences imposed on each of the offenders, count by count, are reflected in the Schedule to this judgment which has been agreed by all parties.

SCHEDULE

GT

Counts 9 and 12: rape	**18 years imprisonment (release on licence under Article 26 of the 1996 Order)**
Counts 1 to 6: taking indecent photographs	**6 years imprisonment concurrent**
Counts 7 and 10: gross indecency	**21 months imprisonment concurrent**
Counts 8 and 11: indecent assault	**8 years imprisonment concurrent**
Counts 13 to 15: distributing indecent images	**Extended custodial sentence of 18 months years imprisonment and 18 months extended licence (under Article 14 of the 2008 Order) consecutive to the other sentences**
Count 16: sexual assault	**Extended custodial sentence of**

	18 months years imprisonment and 18 months extended licence (under Article 14 of the 2008 Order) consecutive to the other sentences
Total sentence	**21 years custody and 3 years extended licence**

HT

Counts 1 and 23 to 25: taking indecent images	**6 years imprisonment concurrent**
Counts 18 and 20: gross indecency	**21 months imprisonment concurrent**
Counts 17 and 22: indecent assault	**8 years imprisonment concurrent**
Counts 19 and 21: aiding and abetting rape	**12 years 6 months imprisonment concurrent**
Total sentence	**12 years 6 months imprisonment (release on licence under Article 26 of the 1996 Order)**