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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

ZB

Mr Richard Weir KC with Mr Burns (instructed by Paul Campbell Solicitors) for the Appellant
Mr Hedworth KC with Ms Walsh (instructed by Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Horner LJ, McBride J

KEEGAN LCJ (*delivering the judgment of the court*)

We have anonymised the appellant's name to protect the identity of the complainant and so this will appear as the cypher above. The complainant is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[1] This is an appeal from a sentence imposed by His Honour Judge Fowler ("the trial judge") on 10 December 2021. The appeal is brought with leave of the single judge, Huddleston J, on three grounds.

[2] The appellant pleaded guilty to grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861 and sexual assault of a child under 13 by penetration, contrary to Article 13 of the Sexual Offences (Northern Ireland) Order 2008. The appellant was sentenced to a total period of 19 years' imprisonment plus an extended licence period of five years, the sentences to run on a concurrent basis.

[3] In this judgment the court provides guidance on sentencing for two equally serious offences on a concurrent basis applying the totality principle.

Grounds of Appeal

[4] The appeal notice is dated 4 January 2022. Whilst it contains seven purported grounds there are, in fact, as we see it, four core grounds of appeal as follows:

(i) The ultimate sentence did not take into account the principle of totality and resulted in a manifestly excessive global sentence. This was due to the fact that the starting point in relation to both offences was too high.

(ii) The court incorrectly identified premeditation and lack of remorse as aggravating factors.

(iii) The discount provided by the trial judge of 15% for a guilty plea was inadequate in all the circumstances.

(iv) The appellant should not have been assessed as a significant risk to members of the public of serious harm.

[5] During the course of the appeal before us Mr Weir KC concentrated on the first and second grounds of appeal that we have articulated above. These were the grounds upon which the single judge gave leave. We can immediately say that he was correct to do so as we see no merit in the other grounds of appeal for the reasons we will shortly provide.

[6] In truth the only real point in this appeal is whether, applying the principle of totality, 19 years' imprisonment is a manifestly excessive sentence for the two serious offences which the appellant faced. There was no argument made to us that an extended custodial period for five years was inappropriate although Mr Weir did not entirely abandon the point. In addition, Mr Weir made some submissions in relation to the reduction allowed for the plea which we are not attracted to.

[7] In assessing the remaining grounds of appeal, we begin by reference to the factual circumstances of this case.

Factual Background

[8] The facts of this case are particularly horrific given that the offending behaviour was directed towards a 12-day old baby.

[9] The appellant is the child's father. He was in a relationship with the child's mother and lived with her and her 2½ year old son from a previous relationship when the offences occurred.

[10] The offences occurred over a period spanning the night of 29th September 2018 into the morning of 30th September 2018. This was shortly after the newborn baby arrived home with his parents.

[11] Post birth of the baby there had been several visits from the community midwife which did not highlight any concerns. On Friday 28 September 2018 the midwife examined the child and noted that he was bright and alert. He was described as slightly constipated and so later that afternoon was taken to a general practitioner. However, nothing of any significance was noted at that stage.

[12] On the following evening, 29 September 2018, the appellant told his partner that he would look after the child and that she could rest downstairs. He took the baby upstairs to a bedroom and assumed sole care of him from around 10:30pm. The mother fell asleep at around 11:30pm and did not hear anything during the night. When she awoke at around 8:25am she heard the child crying from upstairs. Shortly thereafter, the appellant took the baby down to his mother. At this point he said that he did not think the baby was breathing properly. The mother noticed a wheeze from the child who was pale and blue around his lips with dry blood around his nose. As a result of this presentation the parents took the baby to hospital.

[13] By the time the baby was taken to Daisy Hill Hospital in Newry he was acutely unwell. At this stage the mother noticed blood in the baby's nappy and bruising around his stomach area. Doctors were extremely concerned about the baby who required high flow oxygen therapy. An intra-osseous line (into the marrow of a bone) was inserted. Ventilation was required. The baby went into cardiac arrest and was resuscitated. A blood transfusion was given and IV canulation was required to enable drug administration.

[14] At 11:40pm the child was transferred to the paediatric intensive care unit at the Royal Victoria Hospital for Sick Children in Belfast. There he spent 13 days in intensive care during which he was ventilated for 9 days. He was transferred back to Daisy Hill Hospital on 8 November 2018 and discharged into foster care on 22 November 2018.

[15] In his ruling the trial judge detailed the myriad injuries sustained by this baby. His summary is taken from a large number of expert medical reports which all paint a sorry picture of what happened. We will not recite all of the medical details here. Suffice to say that there was a large measure of consensus across a wide range of experts that this baby suffered the following injuries:

(i) A traumatic head injury most likely involving shaking.

(ii) At least one rib fracture causing subcutaneous surgical emphysema.

(iii) Anterior rib fractures consistent with being caused during resuscitation.

(iv) Nine fractures to the metathesis of the lower legs, consistent with non-accidental injury requiring up to a moderate degree of force/swinging.

(v) A fracture to the right radial bone representing the application of a moderate degree of blunt force trauma in the form of angulation.

(vi) Perianal injury to include multiple anal lacerations and bruising which was caused by an object at least half an inch in diameter being inserted into the anus, requiring at least mild to moderate degree of force.

(vii) A scrotal injury that was caused either by blunt trauma to the right testes (ie an additional abuse of events) or by blood tracking from the damaged perianal tissues (ie caused by the same event that caused the anal trauma) and the bruising to the penis was caused by catheterisation (ie a medical procedure).

(viii) Legs, hands, left arm and abdomen bruising consistent with mild degree of blunt force trauma such as gripping, potentially related to the head injury or sexual injury.

[16] The above list highlights the constellation of injuries including a brain injury, rib fractures, an arm fracture, substantial bruising and a sexual injury.

[17] As regards the brain injury, the medical experts were unanimous that this was a shaking type injury. Whilst it could not be entirely ruled out that there was also an impact to the child's head of some description, the focus of the medical opinion was very much on shaking and the consequences of acceleration/deceleration forces generated by such an action.

[18] As to the injuries to the anogenital area, it was clear on the basis of the medical evidence that there had been forceful penetration of the baby's anus. The injuries documented and the laxity of his anus when he was admitted to the hospital led the Consultant Paediatrician, Dr Kim Troughton, to conclude that an object consistent with the size and shape of a penis had been inserted into the child's bottom.

[19] We note the opinion of Dr Cartlidge, consultant paediatrician who opined that all of the injuries would have caused significant pain to this child. Dr Cartlidge found the appearance of the anus and the perianal area to be "very abnormal." He concluded that this can only have been caused by an object being pushed into the anus, subject object being at least half an inch in diameter and probably a lot larger. He said that this would have been "excruciatingly painful."

[20] The medical experts could not definitively say whether a penis or an object was inserted into the child's anus. Hence, the medical consensus was that the

mechanics of this injury should be described in terms of "a dangerous object" being inserted into the anus of the child.

[21] The medical evidence was that the nine fractures to the child's legs were the result of sheering or distracting forces. On the basis of evidence this occurred by virtue of shaking or swinging of the child.

[22] In addition, it was the opinion of the medical experts that the bruising was caused as a result of the episodes of harm caused to the child which would require the child to be gripped.

[23] The prosecution were not able to be definitive about when the events occurred and whether the sexual assault and the shaking injury occurred in and around the same time. However, the medical consensus was that the incident most likely occurred early in the morning of 30 September 2018 around 8:30am. The evidence also refers to the fact that a number of soiled nappies were located within the property; three of which had blood staining on them. A Babygro located in the house also had blood staining on the inside crotch area.

[24] When the appellant attended at Daisy Hill Hospital he said that he did not know what had happened to the child but that he was unsettled. A similar story was provided by the appellant at the Royal Victoria Hospital.

[25] The appellant was first interviewed by police on 1 October 2018. During that interview he said that the child had been having trouble with bowel movements. He repeated the account that he had given regarding the night in question, namely that the child was unsettled. He expanded on this account as follows. He said that he had tried to settle the baby by winding him and rocking him. He said that he had taken the baby outside for a few minutes when he went to get a smoke. He said that he tried to give him a bottle and eventually at about 3:30am he settled. He said he heard the child about 8:30 in the morning, when he looked over his lips were blue, and his head was swollen, and he had trouble breathing and seemed to be gasping for air. He also said he had tried to give a bottle, but the child did not want to take it. He said he would not do anything to harm his son as he was very small and fragile.

[26] During a subsequent interview the appellant mentioned he had seen dry blood at the child's nostrils when he saw him at 8:30am. In a further interview the appellant said he was tired on the night in question and that he may have been too rough with the baby. He said that he may have caused the injuries, but he could not say whether he did or did not. However, the appellant categorically denied sexual assault on his son.

[27] The limited extent of responsibility accepted by the appellant is encapsulated in the following quotation from him:

> "I just shook him, well not shake him sorry, I was rocking him and I don't know I was frustrated, I was tired, I may have been too rough and I says he's only a wee baby I do not know my own strength so maybe I was too rough while trying to get him to relax or calm down and I don't don't know … my head's just all over the place."

[28] Further interviews took place until 2 October 2018. During these the appellant maintained that he may have been too rough in trying to get the child to settle but denied causing any of the other injuries.

The prosecution case

[29] This was set out for the trial judge in a very comprehensive note for sentencing. There was no basis of plea offered by the defence. It follows that in the absence of anything to the contrary the judge was entitled to proceed on the basis of the facts stated by the prosecution.

[30] It is instructive to set out the specifics of this case as contained in the prosecution's note for sentencing at paras [44]-[49] as follows:

> "44. In the absence of a basis of plea being advanced by the defendant, the prosecution rely on the evidence of the medical professionals that have been reported in this case. It is not specifically known, therefore, whether the shaking of the child which resulted in the brain injury occurred before or after the sexual assault.
>
> 45. In terms of the injuries to the anogenital area, it is clear that there has been forceful penetration of the child's anus with an object. The injuries documented and the laxity of his anus when he was admitted to the hospital led Consultant Paediatrician, Dr Kim Troughton, to conclude that an object being consistent with the size and shape of a penis had been inserted into the child's bottom. Consultant Paediatrician, Dr Cartlidge, concluded that there had been forceful penetration of an object being at least half an inch in diameter and probably quite a lot larger. Additionally, in order for this penetration to have been achieved, the child would have been gripped and either or both of the bruising/marks to his hands and abdomen area could have been sustained during such an episode. The gripping, and particularly the penetration of his anus, would have been painful for the child and would have resulted in immediate distress. One does not need to be an expert to acknowledge the reaction and fear

that such an episode would have on a child of any age but particularly a 12 day old baby whose anatomy is, correspondingly, very small.

46. In terms of the severe brain injury, the medical experts are unanimous that there has been a shaking injury. Whilst it cannot be entirely ruled out that there was an impact to the child's head of some description as well, the focus of the medical opinion is very much on shaking and the consequences of the acceleration/deceleration forces generated by such an action. Once again, the child would have been gripped in some way and it is possible that this could have been by his hands or by his chest. Whilst it is acknowledged that the medical reports cannot definitively rule out that some of the rib fractures could have been caused during resuscitation attempts, it is clear that there has been at least one rib fracture due to the presence of emphysema. Dr Cartlidge noted that the subcutaneous emphysema would have been caused by the fractured ribs and there is very strong evidence that these would have occurred prior to arrival at the emergency department and very probably before 8:30am. It should be noted that the defendant himself described a swelling and trapped air underneath the child's scalp prior to taking the child downstairs, indicative that pneumothorax had occurred by this stage.

47. Medical opinion cannot be definitive as to the degree of force and the length of time of shaking or swinging any particular child resulting in a particular level of injury. It is emphasised that the defendant has pleaded guilty to intending to cause really serious harm to the child. The observations of Dr Williams are also repeated at this juncture, namely that having reviewed the imagery regarding the child, the clinical findings are a marker to severe brain injury typically seen in high energy injuries such as high speed road traffic accidents and severe assaults. Mr Jayamohan also stated that amongst the injuries that he has dealt with in young babies, he found the child's injuries in clinical condition to be at the severe end.

48. The nine fractures to the child's legs were the result from sheering or distracting forces that, on the evidence in this case, occurred with shaking or swinging

> the child. These injuries require up to a moderate degree of force and would have been immediately painful. The fracture to the right radial bone represents the application of a moderate degree of blunt force trauma in the form of angulation. It could have been caused as part of the cause of the head injury, the sexual abuse, or a separate application of force.
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> 49. In terms of the timing, once again, the prosecution are not able to be definitive about when the events occurred and whether the sexual assault and the shaking injury occurred in and around the same time. However, although Mr Jayamohan opined it was possible that [the child] was able to spend a few hours in an abnormal neurological state, given how rapidly he descended into cardiac arrest when he was admitted to hospital, he believed it was much more likely that the traumatic event was closely timed to the recognition of the child being unwell at around about 8:30am on 30 September 2018. The prosecution submit that the most likely scenario from the available facts is that the defendant carried out the penetrative assault and the excruciating pain led to the child being acutely distressed. Subsequent to this, the defendant has then sought to quiet him by forcefully shaking him."

Prognosis and victim impact

[31] The child was reviewed following the incident. Miraculously, he was found to be making good progress developmentally although some concerns remained which we summarise as follows. It was reported that he tended to ignore his left side and was not as responsive when looking to the left. He was also attending physiotherapy. He had quite marked head lag and tone in his upper limbs. It was thought he may have a degree of cerebral palsy. He was engaging in occupational speech and language therapy. By virtue of a review report of 1 March 2021 his gross motor skills were reported to be within the normal range. In that report it was noted that there was no reported impairment in his vision and his hearing was normal. He was showing some speech and language delay, but he had not had any seizures. He remained under review with the neurosurgical service given that he had a ventriculoperitoneal shunt in situ.

[32] Worthy of note is that the report on prognosis flagged a significant risk of this child developing epilepsy. Whilst the child did not show obvious signs of neurodevelopmental delay the report states that some difficulties may not be present until he is much older. The report concluded that he was at risk of learning

difficulties and mental health problems and that there still remained considerable uncertainty about overall future prognosis for this child.

[33] The child's mother also provided a victim impact statement dated 29 March 2021. From that report we extract the following salient features. Understandably, the mother was highly distressed by this incident and describes the child being in an incubator for the first week and half and seeing him with numerous tubes in his body and being physically separated from him.

[34] Also as a result of events the mother's elder son was removed from her care for a period of time on 29 November 2018. Thereafter, the mother, became homeless, her mental health deteriorated, and she was placed on antidepressants and sleeping tablets and had to seek help in 2019 from the mental health unit in Daisy Hill Hospital in Newry.

[35] The mother did not resume care of her children until 10 July 2019, a period of seven months. It was only at this stage that she was exonerated from any wrongdoing. The elder child had been placed in the care of her mother and father from 29 September 2018. He is reported as being confused as to where his baby brother was and why he could no longer live with his mother.

[36] One other issue which feeds into the victim impact is found in in the report of Dr James Hughes, the treating paediatrician. In his report dated 1 March 2021 he poignantly articulates the trauma and upset caused to many staff members who treated this young baby when he first presented to Daisy Hill Hospital.

The pre-sentence report

[37] The appellant's personal circumstances are set out in a probation pre-sentence report filed by Katherine O'Loughlin and dated 11 March 2021. In the report the probation officer describes the appellant as a 28 year old single man. He is the second eldest in a family who had a father troubled by alcoholism. He reported to the probation officer that there was frequently violence in the home.

[38] The appellant attended primary and secondary schools and he then began to work as a tyre fitter in Newry and a mechanic in Jonesborough. For the two years prior to his remand into custody the appellant had been employed in the manufacture and installation of ventilation ducts.

[39] The appellant reported no particular issues with alcohol. As regards drug use the appellant shared that he had been a regular cannabis user from the age of 18 or 19 years and that this had significantly increased over time. He volunteered that at the time of his arrest he was using two grams a day. He reported to the probation officer that he would start smoking it when he got into his car to leave work and would have smoked all evening. At the weekend he would have smoked cannabis all day. The appellant reported being in a relationship with the child's mother for 20

months prior to his arrest and that they had lived together for 18 months. He said that she was the main care giver. He said that the relationship ended at the point of his arrest. The appellant accepted that he is unlikely to have any contact with his son in the near future.

[40] As to the appellant's attitude to the offences the probation officer stated:

> "In exploring the offences with [ZB] he did not vary very much from what he had originally told police officers in interview. He shared how his partner was tired as she had had little sleep the previous evening and decided to sleep downstairs. He brought their son upstairs but when he lifted the infant he started crying, the baby had been having difficulties with reflux, wind and constipation on the days prior to this and was on medication prescribed by the GP. [ZB] described being unable to settle the child, he tried rocking him, giving him his dummy, laying him on the bed beside him, he heated a bottle for him at one stage which he says the child did not take. [ZB] shared that he felt he did not know what he was doing. He felt there was an assumption that he should know how to care for his son, but he did not and on this night it was the first time he had been in sole care of the child, and he said he did not know how to go about calming him down and getting him to sleep."

[41] In relation to the appellant's acceptance of responsibility the following passage from the report is also important to note:

> "ZB] states that he accepts responsibility for the physical injuries caused to his son, despite the lack of a consistent explanation of how he inflicted such extensive injuries, both physical and sexual, but he completely denies the sexual offence. He expressed regret for having physically hurt his son, describing himself as being torn up inside, and he acknowledged the impact this will have on his own life and that of his family. However, [ZB] lacks empathy for the mother of his son, she was without both of her children living with her until July 2019, as they were in foster placement, and she will have to manage the ongoing care of her young child who he harmed. He is upset that she applied to remove parental responsibility from him. He demonstrates a lack of insight into the adverse consequences there have been for the child, the child's mother, and the wider family."

[42] The probation report records that the appellant has no previous convictions of a violent or sexual nature. He has some previous offences all relating to motoring matters. Using probation's ACE assessment tool, the probation officer assessed the appellant as presenting a medium likelihood of reoffending. Risk factors identified in this assessment include family/personal relationships, history of substance misuse, distorted reasoning and thinking skills, aggression, impulsiveness sexual nature of offending, limits to responsibility denying the sexual offence, his lack of disclosure could hamper engagement in services as part of his supervision on licence. Some protective measures were noted, namely that the appellant reports ongoing family support, he has been able to sustain a stable employment record previously, current abstinence from substance misuse and motivation to maintain this, responsibility taken for physical harm to his son albeit without an explanation of how these were inflicted, regret expressed for the harm caused to his son. However, he was unable to disclose how or why he inflicted the injuries on the infant. The overall composite assessment placed the appellant in the moderate to high priority category for supervision and intervention.

The assessment of dangerousness

[43] The Probation Service concluded that the appellant did not present a significant risk of serious harm. However, the probation report said that the assessment could be subject to change upon the availability of further evidence.

[44] Further evidence was obtained from a Clinical Psychologist namely Professor Robin Davidson. He was instructed by the prosecution to consider the risk assessment methodology applied by probation.

[45] Having conducted his own independent assessment Professor Davidson disagreed with the pre-sentence report's conclusion. He assessed the risk of serious future harm to others as high in this case and the likelihood of reoffending as moderate/high. He questioned how probation were able to make a definitive conclusion in respect of the applicant when it was stated that his "inability and unwillingness to engage in full disclosure hampers a full assessment of the motivation for offences."

[46] Professor Davidson was also of the opinion that the factors in the appellant's favour found by probation were disproportionately positive and failed to reference a number of issues including how calm the appellant was at the time of the incident and afterwards, indicating a lack of concern. Professor Davidson also placed some reliance upon the appellant's lack of urgency and openness immediately after events. He also referred to a report of domestic violence within the relationship provided by the mother. The appellant declined to be interviewed by Professor Davidson and so could not refute any of these claims.

[47] Professor Davidson was of the view that certain variables were not robustly evaluated in the probation assessment. To his mind there was no proper assessment

of personality disorder, egocentricity, emotional coldness, lack of empathy, manipulative behaviour and vagueness in an answer to questions in relation to remorse or guilt. He thought that the effect of cannabis misuse was not fully and comprehensively considered in the probation assessment. Professor Davidson's overall conclusion was that the appellant posed a serious risk of serious harm which meant that he was dangerous.

The ruling of the trial judge

[48] We commend the trial judge for the comprehensive ruling that he gave. The judge sets out in some detail the factual background to this case, the medical, victim impact and the accused's personal circumstances. There is no issue taken with any of that.

[49] At para [28] of the judgment the trial judge sets out what he perceives to be the aggravating and mitigating factors as follows:

> "[28] In the present case I identify the following aggravating factors:
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> (i) EF was a helpless, small, vulnerable 12 day old baby when these offences were perpetrated on him.
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> (ii) He depended on his father to keep him safe, to love him and protect him from harm in a home where he would thrive and reach his full potential. Yet it was his own father who physically and sexually abused him in a most outrageous breach of trust.
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> (iii) The number and nature of the injuries sustained by EF were clearly life threatening at the time he was admitted to hospital. He almost died but for the care he received at hospital. It may be many years before the full extent of the impact of his injuries will manifest. I conclude EF suffered severe physical and psychological injury.
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> (iv) EF was penetrated forcefully by a large and dangerous object relative to his size given that he was only 12 days old when this penetration occurred.

(v) The defendant isolated EF from his mother by taking him upstairs and there was an element of premeditation in his sexual penetration of EF.

(vi) There is the wider victim impact for the family especially in relation to EF's mother and brother.

(vii) Lack of remorse or empathy.

(viii) The defendant had smoked cannabis on the night the offending took place."

[50] The judge then referred to the sentencing guidelines and some authorities that had been put before him which we will discuss later in this judgment. Ultimately, at para [37] the rationale for his sentence is found as follows:

> "[37] However, it is necessary in the relatively rare and unique factual circumstances of the present case, involving both a very serious sexual assault by penetration and an equally serious offence of grievous bodily harm with intent on a 12 day old baby, to stand back and look at what is the appropriate global sentence in respect of the totality of offending. No offence is put forward as the headline offence by either prosecution or defence. I agree – it is the combination of both offences taken together that underline the severity of this case. In taking into account the identified aggravating and mitigating factors together with the combination of both the grievous physical and sexual penetration offences, and applying the principal of totality, the court comes to the conclusion that had the defendant contested this case the appropriate global sentence would be one of 22.5 years' custody after a trial. I consider given the lateness of the plea that the appropriate credit to be afforded is in the region of 15% giving a sentence of 19 years' custody."

[51] In addition, the judge found that the defendant did pose a serious risk of serious harm and so pursuant to the Criminal Justice (Northern Ireland) Order 2008 he considered the test for dangerousness found in Article 13(1) of that Order met and he imposed an extended custodial sentence of five years.

[52] Various other ancillary orders were made pursuant to Schedule 1 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007. The defendant was included on a barred list for children. Further, by virtue of the nature of the conviction he was disqualified from working with children by virtue of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003.

Finally, the judge made a Sexual Offences Prevention Order with certain prohibitions. None of these ancillary orders is in dispute.

Discussion

[53] We start by reiterating the particularly horrific facts of this case. The sentencing exercise is also complicated by the fact that there are two distinct offences. Neither represents a headline offence. Therefore, the outcome of this case comes down to an assessment of totality. The maximum sentence for each offence is one of life imprisonment.

[54] In relation to the offence of causing grievous bodily harm counsel agreed that the range of sentences flows from a case of *R v Darren Fegan* [2018] NICA 2. In that case the court when dealing with a section 18 offence against children said at paragraph [23]:

> "Sentencing policy must, therefore, reflect that vulnerability. Where significant force is applied to a young child with intent to cause that child grievous bodily harm, the increased likelihood of significant damage to the child renders the conduct itself highly culpable. In general, therefore, we consider that a range of 7-15 years for such conduct is appropriate. The place within the bracket will be heavily influenced by the extent of harm actually caused but we recognise that there will be cases where a person of good character is engaged in an isolated incident as a result of which a sentence below the range might be appropriate. That is not, however, this case."

[55] The above quotation illustrates the point that this type of offending arises in a wide range of situations. In our experience these span from inadequate parenting which is not malicious and where there is acceptance and remorse to circumstances without remorse where criminal intent is established.

[56] In *Fegan* a sentence of 13 years and six months was described as stiff but not manifestly excessive. This was a case where the child victim was two years of age and had been severely punched to the head resulting in life changing injuries including the use of a wheelchair, supporting seat and mobility limitation. The defendant also had 19 assault related convictions and an extensive domestic abuse history.

[57] Counsel for the defence contended that this case involved an isolated incident by a defendant with effectively a clear record and with no history of violence. Against these factors must be borne in mind that this was a particularly significant incident against a 12 day old baby. Thus, whilst *Fegan* talks about a sentence being

imposed outside of the range in the case of an isolated incident or where there is a clear record in this case the trial judge also had to consider the particular facts. In our view, it was perfectly acceptable for him to think that this was a case which came into the top of the range due to its own particular circumstance. Specifically, he was entitled to think that this was case of high culpability and high harm and especially serious as it involved a 12 day old baby. Therefore, applying his discretion there is no reason to think that he could not have settled on a sentence of 13-15 years for this offence prior to looking at some reduction for the guilty plea.

[58] The complication in this case is that there is a further count which was the sexual assault by penetration. We were told that there no direct authority on sentencing for this specific offence in Northern Ireland. That is perhaps unsurprising given the range of circumstances in which this type of offending can arise and the need for sentencers to have flexibility rather than be bound by mechanical formulae. That is neither necessary nor apt in this area. In similar vein, this court in *R v GM* [2020] NICA 49, when dealing with an Article 14 case said:

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

[59] Some reference was made to the sentencing guidelines of England & Wales. That was with the caveat expressed in *R v H* [2016] NICA 49 that in this jurisdiction courts do not mechanistically look at sentencing and the guidelines are by way of assistance in identifying issues of culpability and harm rather than applied as a strict code. In cases of high culpability and high harm (category 1) there is a range of 13-19 years depending on the extent of harm and culpability for assault by penetration of a child under 13.

[60] The defence criticises the trial judge for selecting a starting point at the highest end of the English Sentencing Guidelines for the offence of assault by penetration of a child under 13 as this was a single incident perpetrated by a defendant with no relevant convictions. Whilst we acknowledge the point, we repeat the fact that in Northern Ireland a large measure of discretion is left with the trial judge to tailor a sentence to the facts of a particular case. We consider that the range should be kept wide given that this type of offending can arise in a variety of different circumstances.

[61] The culpability for this offence was clearly high given that this was a father and an egregious abuse of trust to a child and the child's mother. This is also a case of the highest harm as it involved penetration of a new-born baby. It is hard to imagine a more significant sexual assault on a defenceless child. On that basis, this case can well attract a sentence of at least 15 years on its own before reduction is made for a guilty plea.

[62] Turning to methodology, the judge decided that there should be concurrent rather than consecutive sentences. We see nothing wrong with that approach. In our view it was the correct approach to sentencing in a case where the offences are related in time. In a case such as this the judge cannot simply add the two sentences which he would have reached for the offences if separate. Rather, he should decide what is an appropriate overall sentence having considered both offences which in this case are equally serious. Counsel did not dispute this methodology. The real question is whether when standing back does the total sentence appear to be manifestly excessive.

[63] In answering this question we find some assistance in the England & Wales Totality Guidance 2012 as it focuses the judges mind on two core questions as follows:

> "The principle of totality comprises two elements:
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> 1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
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> 2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with factors personal to the offender as a whole."

[64] Before assessing totality we have to decide if the trial judge dealt with all of the aggravating features properly. There are two points that are raised by the defence as problematic in this regard. First, the defence says that the judge erroneously decided there was some pre-planning and premeditation to these offences. Second, it is contended that the judge erred in including lack of remorse as an aggravating factor. We will deal with these points in turn.

[65] On the first point we find it hard to agree with the judge's assessment that this crime was premediated. The bulk of the evidence was directed towards the

assaults having occurred on the morning after the appellant volunteered to care for the child. This chronology does not square with a person deliberately taking a child into his care to assault it. Therefore, we think that the judge erred in making the assessment that he did in relation to premeditation. That said, it cannot seriously be suggested that anal penetration of a 12 day old baby is a spontaneous act. The intention required for a sexual assault of this nature speaks for itself. Thus, while we think the judge's assessment of premeditation was not correct it does not absolve the appellant in the manner contended for by the defence.

[66] We should say that if this offence had been premeditated in terms of the sexual offence this would have led to an even higher sentence than that which was imposed.

[67] On the second issue we think that the judge has erred in including a lack of remorse as an aggravating factor. The authorities should be well known in this area. Remorse may provide mitigation in a given case but is not an aggravating factor. *R v Walker* [2019] EWCA Crim 1825 is quite clear in relation to this at paragraph [33]:

> "33. So far as lack of remorse is concerned, we accept that to the extent that the only lack of remorse was the continued maintenance of his innocence, it was not appropriate to regard this as an additional aggravating factor. However, given the presence of all the other aggravating factors, the question for us ultimately is whether the sentence was wrong in principle or manifestly excessive."

[68] Against the errors which we have highlighted above we also identify an aggravating factor which the judge has left out of account. He has failed to factor in the appellant's attitude at the hospital and the fact that the appellant has by not accepting the position early on led to the mother losing care of both of her children. These actions on the part of the appellant were significant enough to be put in the balance.

[69] Having reached these conclusions we have to decide notwithstanding the errors we have identified whether the overall sentence was manifestly excessive. We therefore turn to examine the judge's core reasoning on sentence as follows.

[70] The judge decided that the sentence before adjustment for the plea should be 22½ years. As we have said there is no headline offence. Both are equally serious. One does not aggravate the other. Rather a court must consider them both in their own right and then make a reduction for totality to reach a just and proportionate sentence.

[71] It is important not to be overly mechanical in this exercise but rather to stand back and say what sentence actually meets this crime which has two equally serious

elements. Mr Weir submitted that the range should be 15-18 years, but we do not think that enough to reflect both heinous crimes at issue and to incorporate the need for deterrence. Upon considering the case as a whole we think that a judge could justifiably get to 22½ years before reduction for a plea. We accept that this makes for a very stiff sentence outside of the usual range. However, to our mind it is just and proportionate on the facts of this case which we consider exceptional.

[72] A striking feature of this case is that there was no mitigation whatsoever save for the guilty pleas. Unlike other cases we have seen in the criminal and family sphere this appellant had no learning or mental health difficulties. He did not have the benefit of youth. Unlike other cases, he also displayed no remorse and was concerned only for himself and his own family rather than the effect of his behaviour on the mother of two children and the effect on two children going forward. In addition, the appellant did nothing substantial to assist medical professionals, police or social services when the offences occurred with the result that both of the mother's children were removed into care for a time. These facts markedly distinguish this case from other cases we have seen in this area.

[73] The extent of reduction for a plea as explained in the case of *R v Maughan* [2022] UKSC 13 is clearly a discretionary matter. The statutory provision in relation to the reduction in sentence for a guilty plea in Northern Ireland is Article 33 of the Criminal Justice (Northern Ireland) Order 1996 which provides:

> "33(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account –
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.
>
> (2) If, as a result of taking into account any matter referred to in paragraph (1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

[74] In *Maughan* the Supreme Court approved the guidance provided in *R v Pollock* [2005] NICA 43 in relation to the reduction which can be allowed for guilty pleas in this jurisdiction. The court also reiterated that this is discretionary matter. At para [33] the court also said as follows:

> "Article 33 of the 1996 Order is neither prescriptive nor exhaustive. It does not expressly require the judge to reduce the sentence because of the plea nor does it prescribe any rate of discount if he does so although there is a clear steer that a discount should be considered. It does not prescribe how any indication of an intention to plead should be given or indeed to whom it should be given. Admissions at interview have been considered sufficient but correspondence from solicitors to the Public Prosecution Service or an indication at court during a remand would also be sufficient to trigger the obligation under Article 33. If the judge reduces the sentence for the plea, he must articulate that he has done so and take into account when and in what circumstances an indication of an intention to plead was given."

[75] In this case the appellant was arraigned on 13 December 2019 and pleaded not guilty to both charges. A trial date was set for May 2020 and then adjourned until 12 January 2021 due to the Covid pandemic. Previous senior counsel passed papers in December 2020.

[76] In these circumstances, Mr Weir does not argue for the full reduction of 33% which our courts apply to early pleas pre-trial. He accepts that the plea was at the date of trial and so the reduction is lower. In England & Wales this would be 10%.

[77] In this jurisdiction there is flexibility in relation to the reduction to be applied for a late plea. We accept that in some cases this may extend to 25%, however, that will depend on the circumstances. In this case we do not accept the argument that a greater reduction should have been applied due to admissions at interview. Limited concessions were made, they related only to the section 18 and they did not result in a plea at arraignment. Instead, the prosecution had to assemble considerable medical evidence as did the defence and it was only at the last minute that a plea was entered. To our mind the fourteen directions hearings that took place pre-trial highlights the fact that the issues in the case did not suddenly crystallise close to trial.

[78] We do not fault Mr Weir's conduct of the case although we find it unfortunate that counsel changed at such a late stage. That said there is nothing to indicate that prior to December 2020 a position could not have been taken and a consultation facilitated as it was in January 2021. We are not aware that the lack of consultation was raised as an issue by previous counsel.

[79] We cannot see that this is a case where some additional credit is appropriate by virtue of the Covid-19 pandemic. The circumstances of where credit may be applied due to those circumstances are explained in *R v Stewart* [2020] NICA 62 and

do not pertain here. Therefore, we do not interfere with the discretionary judgement to apply 15% for a late plea at trial in the circumstances of this case.

[80] Finally, we will not interfere with the assessment of dangerousness which Mr Weir frankly did not dispute in any great detail. That was again, a discretionary decision made by the judge on the basis of the evidence he had before him; see *R v Hegarty* [2022] NICA 20. Having established that this defendant was dangerous the judge was entitled to impose an extended custodial sentence. We think that five years is at the high end of this for a person of clear record. Against that an obvious issue of dangerousness arises due to the circumstances of this offending.

[81] Therefore, we think it necessary that the public should have the protection of this extended custodial sentence. Thereby, the parole commissioners have to decide if the appellant can be released at an appropriate stage on the basis of an assessment of public protection.

Overall Conclusion

[82] This sentence is undoubtedly very stiff. However, after careful consideration, we do not consider it is manifestly excessive in the exceptional circumstances of this case. This was not a case of a baby being shaken by a new father losing momentary control. In addition, the appellant perpetrated an extremely serious sexual assault which if not premeditated represents depravity which right thinking people would not begin to contemplate. The appellant has provided no real explanation or offered remorse. As such there is no valid reason why we would interfere with the judge's sentence. Accordingly, we dismiss the appeal.

[83] This decision confirms the sentence of 19 years' imprisonment and an extended custodial period for five years imposed by the trial judge to reflect the entirety of the offending. The sentence that we have imposed means that the appellant will have to serve at least half of the 19 year custodial term in prison at which stage a risk assessment will be conducted by the Parole Commissioners to determine whether he can be safely released on licence.

[84] If the Parole Commissioners do not support release due to risk to the public the appellant may have to serve the entire 19 year custodial term in prison. At the end of the 19 year term, the appellant is automatically released but remains subject to licensed supervision for the five year extension period during which he is liable to be recalled to custody should he breach any of his licence conditions.