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Judgment: approved by the Court for handing down | *Delivered:* **25/03/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GERARD McCORMICK

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Before: Morgan LCJ, Girvan LJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal, leave having been granted by the Single Judge, against a 3 year determinate custodial sentence, comprising 18 months in custody and 18 months on licence, imposed upon the appellant following his plea of guilty to the offence of engaging in sexual activity with a girl aged 15 years and 9 months. Mr McCreanor QC and Mr Holmes appeared for the appellant and Ms Ievers for the PPS. We are grateful to counsel for their helpful oral and written submissions.

Background

[2] On 1 May 2014 the applicant was returned for trial on a total of six counts comprising four counts of sexual activity involving penetration with a child aged between 13 and 16 and one count of inciting a child aged between 13 and 16 to engage in sexual activity involving touching, all in respect of one complainant, and a further count of inciting a child aged between 13 and 16 to engage in sexual activity involving touching in respect of a second complainant. At his arraignment on 12 June 2014 the applicant pleaded not guilty to all counts on the indictment. On the same date, however, a seventh count was added to the indictment, namely, that the applicant had engaged in sexual activity involving touching with a child aged between 13 and 16. The applicant pleaded guilty to this seventh count and the learned judge directed the remaining six counts on the indictment be left on the books not to be proceeded with without the leave of the court or Court of Appeal.

[3] The applicant was sentenced by HHJ Grant on 3 September 2014 to a 3 year determinate custodial sentence, comprising 18 months in custody and 18 months on licence. The learned judge also imposed a Sexual Offences Prevention Order for a period of five years and the applicant was further disqualified from working with children and is subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 indefinitely.

[4] The plea was entered on the basis of an agreed statement of facts:

> "The Defendant's DOB is 18 August 1985.
>
> The charge relates to events on 01/02 September 2012 when the complainant was aged 15 years and 9 months and the Defendant had just attained 27 years. At the relevant time the complainant had been celebrating [R's] 15th birthday. Both girls had consumed alcohol at a party and then socialised with friends near the football pitches in Donaghadee.
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> They encountered the Defendant as he walked past them with his dogs and [the complainant] asked him to get her some tobacco. He did so and introduced himself to the girls as "G". He invited them to a party in his flat.
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> It appears that the Defendant and [the complainant] swapped phone numbers. The girls returned to [R]'s home in Donaghadee late on the evening of 1 September. [The complainant] had planned to spend the night there. They were reprimanded by [R]'s father for inter alia their late arrival home and they had gone to [R]'s room.
>
> The Defendant lived in a flat above that occupied by [R] and her father. He climbed down from his balcony, attracting the girls' attention and urging them to go to his party. He offered them alcohol. They sneaked out of their bedroom and sat with him in the garden before going up to his flat (where they wrongly believed others would be present) and where they were given more alcohol. During the course of the evening (into the early hours of 2 September) the Defendant engaged in a number of sexual acts with [the complainant] and these are

reflected in the single charge to which he has pleaded guilty.

On four occasions (on the stairs, the balcony, on the sofa and in the bedroom) the Defendant placed his hands down her pants, touching her vaginal area. He kissed her and briefly performed oral sex upon her when they were together in the bedroom. He invited her to put her hand down his trousers and onto his penis, which she did. Some of this behaviour was witnessed by [R] who formed the view it was consensual. At one point the Defendant invited [R] to join them in a "threesome" causing her offence and upset. [R] tried to persuade [the complainant] to return home with her but [the complainant] declined and [R] left the Defendant's flat alone. The activity in the bedroom occurred after [R] had left the flat. [R] encountered some male friends outside and they all returned to the Defendant's flat to get [the complainant]. [The complainant] left with them at that stage; she made no disclosures or complaints to anyone at the time.

The complainant did not in fact report matters to police until 24 March 2013. The Defendant was interviewed on 10 June 2013. He denied knowing the complainant and he denied the allegations. He was further interviewed in August 2013 and he continued to deny any criminality suggesting that the two girls had fabricated their accounts and that they had never been in his flat.

Evidence of telephone contact between the complainant and the Defendant on the night in question had been obtained by police and this was put to the Defendant. It was then that the Defendant accepted the girls had been in his flat. He said however that the only sexual contact he had had with [the complainant] was a kiss which she had initiated. He said the girls stayed at his flat for a couple of hours but that when he discovered they were under 16 he asked them to leave.

The Defendant sent a text to [the complainant] on the morning of 2 September 2012 to the effect: Keep this

> between us as I don't want my partner Nicola to find out.
>
> The two girls remained friends and the report to police followed on from a disclosure made by [the complainant] to [R] in February/March 2013."

[5] The appellant has no relevant criminal convictions. It appears that shortly after the disclosure to police local paramilitaries were informed of the background as a result of which the pre-sentence report noted that the appellant had been made homeless. He has an eight year old daughter from a previous relationship but is now only permitted supervised contact due to child protection concerns. The applicant claimed he had not considered the complainant's age when engaging in the consensual sexual activity, but accepted he should have been aware of it considering the complainant had asked him earlier in the evening to buy her cigarettes as she was too young. He further accepted that whilst the activity was consensual he had taken advantage of the complainant for his own sexual needs. The probation officer assessed the applicant as a medium likelihood of reoffending but not posing a significant risk of serious harm. The probation officer, however, recommended that professional intervention is necessary to address the applicant's sexual offending.

[6] A victim impact report indicated that the complainant was blamed by her father after the disclosure as a result of which she now lives with her aunt. She described symptoms of sleeplessness and irritability which she attributes to the attack. She indicated that she stopped attending school and did not take her GCSEs. She was noted to be pregnant in August 2014 having formed a relationship with her boyfriend about a year after the incident. Unfortunately the report writer has not had access to the medical notes in relation to two incidents of overdosing on tablets. The date of these incidents is not disclosed. In the absence of consideration of the medical notes one is entirely dependent on the recollection of the victim in assessing the significance of these events. That is unsatisfactory and perhaps unfair to the victim. Where the prosecution are arranging for such reports and especially where there is a relevant medical history access to the victim's medical notes should be made available if possible.

[7] It is clear from the sentencing remarks of the learned trial judge that the submissions made to him focussed to a large extent on the application of the Sentencing Council Guidelines. As we have recently sought to explain in R v McCaughey and Smith [2014] NICA 61 the danger with this approach is that the court is encouraged to identify specific aggravating or mitigating factors which may alter the position of the sentence in a particular sentencing box. At paragraph 11 of R v DM [2012] NICA 36 we pointed out that the circumstances in which this offence can be committed vary widely and the court is required to balance those particular circumstances. We indicated in R v DM that R v Corran, R v Barrass and R v Frew

were likely to be of more assistance than the Sentencing Council Guidelines in arriving at the appropriate sentence.

[8] We accept that the learned trial judge was correct to identify the age difference between the appellant and the complainant as significant. He was 27 whereas she was 15 years and 9 months. Although she was very close to 16 at which stage no criminal offence would have been committed we consider it important that those who sexually abuse children of this age should realise that they will face a stiff custodial term when detected.

[9] Secondly, it is clear that the complainant was under the influence of alcohol when she first approached the appellant and he continued to ply her with drink. He enticed the girls to his flat with the promise of a party. The learned trial judge accepted that he did not get the complainant drunk in order to commit the offence but recognised that he must have appreciated that the degree of intoxication would have blurred her appreciation of the significance of what she was doing.

[10] Thirdly, we have already dealt with the question of harm to the complainant. Although we have indicated reservations about the assistance that we can derive from a report which is not evidenced in any way by reference to the medical notes and records there is a convincing basis for the acceptance that this event caused material harm to this young girl.

[11] In order to arrive at a sentence of three years the learned trial judge must have started somewhere between 3 ½ and 4 years before making allowance for the late plea. In our view that starting point is significantly in excess of the appropriate period suggested by cases such as R v DM in circumstances such as these. We consider that the appropriate starting point before making allowance for the plea was in or about 2 ½ years.

[12] The learned trial judge considered that he should reduce the credit for the plea because of what he described as the lateness at which it was entered. In fact he pleaded guilty at arraignment to the sole count on which the prosecution proceeded. He had, however, denied having any knowledge or contact with the girls and sought to deny the level of his behaviour and sexual contact. We consider that in those circumstances he is not entitled to full credit but is entitled to substantial credit. We will substitute a determinate custodial sentence of 2 years comprising 12 months in custody and 12 months on licence.

[13] The second element of this case that caused concern was the breadth of the Sexual Offences Prevention Order. In effect the Order prevents the appellant seeing his child other than under arrangements approved by Social Services and the Designated Risk Manager. The proper approach to such an Order in circumstances such as these was considered in R v Smith [2012] EWCA Crim 1772. The Court of Appeal considered that the test of necessity contained in the statute brings with it

subtests of proportionality and that particular consideration should be given to any other protection afforded by any ancillary orders.

[14] In cases where the offender has children of his own or within his extended family, where there is a risk that offences against them may be committed then those children may need protection. But if there is no sign of a risk that he may abuse his own family it is both unnecessary and an infringement of the children's entitlement to family life to impose restrictions which extend to them. We consider that there is nothing in the papers before us to indicate a risk to his child. Ms Ievers indicated, however, that this issue was not fully debated before the learned trial judge. In those circumstances we remit the issue of whether the SOPO should be amended to specifically exclude any restriction on his contact with his child to the trial judge.

Conclusion

[15] For the reasons given we allow the appeal in respect of the term of the sentence and remit consideration of the SOPO to the trial judge.