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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT

THE QUEEN

-v-

GERALD O'HARA

Before Morgan LCJ, McCloskey LJ and Scoffield J

Brendan Kelly QC and Mark Barlow of counsel (instructed by Higgins, Hollywood and Deazley Solicitors) for the appellant
Gary McCrudden of counsel (instructed by the Public Prosecution Service) for the respondent

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Leave to appeal to this court having been refused by the single judge, Gerald O'Hara ("*the offender*") renews his application to the plenary court. The offender is aged 68 years, a married man and the father of four adult children.

Prosecution and Conviction

[2] It is appropriate to begin with the injured parties. These are three adult ladies, all of whom have waived their right to anonymity. They are Sinead McKenna, Brenda Moore and Denise Moore. The offender is their uncle. The crimes perpetrated against them were committed during an estimated period of around nine years, between 1985 and 1994. The periods of offending against the three injured parties ranged from around two years to around seven years respectively. The injured parties' ages ranged from approximately 10 to approximately 17 years. They were children at all material times. All of the offences

were perpetrated at the offender's home and place of work. The overall period under scrutiny was estimated to be 1980 to 1994. (This court recognises that precise specification is not realistically possible). The injured parties first complained to police in October 2013. The offender has at all times maintained his innocence.

[3] The history of the criminal process is a little protracted. The charges preferred against the offender consisted of 23 counts of indecent assault on a female person contrary to section 52 of the Offences Against the Person Act 1861 (the "*1861 Act*") in a single indictment. The offender has undergone two trials, each in the Crown Court before a jury. The outcome of his first trial in April 2017 was a jury verdict convicting him of 8 of the 23 counts and no agreed verdict in respect of the remainder. On 23 May 2017 he was sentenced to nine years imprisonment, with a custodial element of seven years to be followed by two years' probation. On 09 January 2019 a different constitution of this court allowed his appeal and ordered a retrial on all 23 counts.

[4] The offender's second trial was conducted between 20 May and 04 June 2019. On the latter date the jury found him guilty of 14 of the counts and not guilty of the remaining nine.

Sentencing

[5] On 05 July 2019 the offender was sentenced. The particulars are set forth in the table reproduced below. He received an effective total sentence of 10 years and 6 months imprisonment. This had a custodial element of 8½ years, with a sequential period of two years' probation. This took the form of a custody/probation order made under Article 24 of the Criminal Justice (NI) Order 1996 (having regard to the dates of the offences). The judge also imposed a sexual offences prevention order ("*SOPO*") (see *infra*).

Count	Victim	Particulars of indictment	Sentence of imprisonment	Cumulative sentence
4	Brenda Moore	Specific count re abuse at the car (rubbing around vagina area with hand)	9 months	9 months
6	Brenda Moore	Specific count – While the victim was babysitting, the applicant came into the bedroom and digitally penetrated victim's vagina.	18 months concurrent with count 4.	18 months
7	Sinead McKenna	Specific count re first time of abuse at the car (touching vagina area with	9 months concurrent with 8 and 9; consecutive to the	3 years

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		hand)	above counts.	
8	Sinead McKenna	Specific count re first time of digital penetration abuse at the car	18 months concurrent with 7 and 9; consecutive to the other above counts.	3 years
9	Sinead McKenna	Specimen count re digital penetration abuse at the car	18 months concurrent with 7 and 8; consecutive to the other above counts.	3 years
12	Sinead McKenna	Specific count - digital penetration in bathroom	12 months concurrent with count 13, consecutive to the other above counts.	4 years 6 months
13	Sinead McKenna	Specimen count – digital penetration in bathroom was regular occurrence.	18 months concurrent with count 12, consecutive to the other above counts.	4 years 6 months
14	Sinead McKenna	Specific count - digital penetration in coal bunker.	12 months concurrent with count 15, consecutive to the other above counts.	6 years
15	Sinead McKenna	Specimen count – digital penetration in coal bunker was regular occurrence.	18 months concurrent with count 14, consecutive to the other above counts.	6 years
16	Sinead McKenna	Specimen count – one or two occasions of touching victim's chest	6 months consecutive to the above counts.	6 years 6 months
17	Sinead McKenna	Specific count - While the victim was babysitting, the applicant came into the bedroom and digitally penetrated victim's vagina.	18 months consecutive to the above counts.	8 years
18	Sinead McKenna	Specific count – applicant took victim to a bedroom and got her to lie on top of him and moved her body as if to simulate sex	18 months consecutive to the above counts.	9 years 6 months

19	Denise Moore	Specific count – first time victim abused while playing "ride a donkey", touching thigh.	6 months concurrent with count 20, consecutive to the other above counts.	10 years 6 months
20	Denise Moore	Specimen count – other times victim abused while playing "ride a donkey", touching thigh.	12 months concurrent with count 19, consecutive to the other above counts.	10 years 6 months

[6] Eight of the 14 counts of which the offender was convicted involved so-called digital penetration of his victims. Three of them involved touching the victim's vaginal area without penetration. Two of them entailed touching the victim's thigh. The last, and 14th, involved touching the victim's chest. Five of the 14 convictions related to specimen counts.

[7] The total effective sentence of 10½ years imprisonment is constituted by nine individual consecutive sentences and five concurrent sentences. The analysis is as follows:

(i) For six of the eight convictions involving digital penetration the sentence was 18 months imprisonment, a mixture of concurrent and consecutive periods.

(ii) As regards the other two counts involving digital penetration the sentence was 12 months imprisonment, concurrent with and consecutive to certain of the other sentences imposed.

(iii) The two convictions involving vaginal touching were each punished by sentences of nine months' imprisonment, concurrent with and consecutive to specified other periods of imprisonment imposed.

(iv) The two convictions involving touching the victim's thigh were punished by sentences of six and 12 months imprisonment respectively, concurrent with and consecutive to specified other custodial periods.

(v) The conviction involving touching the victim's chest was punished by six months imprisonment, consecutive to other specified sentences.

(vi) The conviction involving simulated intercourse over the clothed victim was punished by 18 months imprisonment consecutive to other specified periods.

[8] There are two features of the sentencing context which must be highlighted. First, at the time of all of the alleged offences indecent assault upon a female was the only offence applicable to the descriptions provided by the injured parties. Second, by virtue of the dates when the offences were committed, the maximum punishment for each offence was a sentence of two years imprisonment.

First Ground of Appeal: Manifestly Excessive Sentence

[9] The first ground of appeal is that the effective sentence of 10½ years imprisonment is manifestly excessive. The components of the supporting submission of Mr Brendan Kelly QC (with Mr Mark Barlow, of counsel) are these: the *ex facie* excessive period of imprisonment; the intermittent, rather than continuous, nature of the offending; the judge's erroneous statement that the offending spanned a period of 15 (rather than 9) years; the judge's erroneous treatment of the issue of delay; the generally opportunistic nature of the offending, the lack of threat or force and the absence of the factor of escalation; and, finally, the commensurate sentence did not adequately reflect the offender's good character both before and after the offending: in particular, he had not reoffended during a period of approximately 30 years.

[10] In *R v DO* [2006] NICA 7, the offender appealed to this court against the sentences imposed on him for 47 counts of sexual abuse consisting of attempted rapes, attempted buggery, indecent assaults and conspiracy to commit an act of gross indecency. The injured parties were his daughter and three nieces whose ages ranged from nine to 14 years at the material time. He was punished by the imposition of a series of concurrent and consecutive sentences giving rise to a total effective term of 20 years imprisonment. His appeal succeeded to the extent that this was reduced to 17 years. There are three noteworthy features of the decision of this court. First, the espousal of the advice of the Sentencing Advisory Panel of England and Wales that the gravity of the offending in cases of this nature should be measured by reference to the degree of harm to the victim, the offender's level of culpability and the level of risk posed by the offender to society: see [21] – [22]. Second, the propriety of imposing consecutive sentences in this kind of case provided always that the principle of totality, namely that the overall sentence is appropriate, is observed: see [24] – [26]. Third, the need to impose "*severe sentences … condign punishment …*" in cases entailing the sexual abuse of young children to whom the offender owed a duty of care and trust: see [29]. In the immediately preceding passage Kerr LCJ quoted from this court's decision in *Attorney General's Reference No 1 of 1989* [1989] NI 245 at 251:

> "*The threat of sexual abuse to children in modern society has become so grave and the duty resting on the courts to deter those who may be tempted to harm little children sexually has become so important that severe sentences must be passed on those who commit rape against little children even if before the offence they had good records and good reputations.*"

As demonstrated by a succession of decisions of this court, these sentiments apply with full force to offences of sexual abuse of children falling short of rape.

[11] In *R v MH* [2015] NICA 67 the offender was sentenced to an effective global term of 19 years imprisonment for 48 sexual offences comprising 1 count of rape, 1 of attempted rape, 9 counts of gross indecency, 9 of cruelty to children, 7 of indecent assault and 8 of false imprisonment. The injured parties were his daughters, aged between 4 and 15 years during this campaign of abuse. He was sentenced to 19 years imprisonment for the count of rape. Lesser terms, all ordered to operate concurrently, were imposed in respect of the other 47 counts. In dismissing his appeal against sentence, this court reiterated its decision in *R v DO*. Secondly, it reiterated its decision in *R v McCaughey and Smith* [2014] NICA 61 that in this jurisdiction recourse to the guidance/guidelines published by the relevant organisations in England and Wales should normally be confined to the exercise of identifying aggravating and mitigating features, simultaneously recognising that recommended "*appropriate ranges of sentencing*" may sometimes be "*worthy of consideration*" by sentencing judges here (at [24] – [25]): see [14] – [15].

[12] While this umbrella ground of appeal involves the contention that the overall period of imprisonment imposed on the offender is manifestly excessive, it embraces two discrete issues of sentencing principle. The first concerns the correct approach to the issue of delay in the prosecution process. It is common case that the judge, in dealing with this issue, stated correctly that the injured parties first complained to police in October 2013, the offender was first interviewed in April/May 2014 and the first trial occurred in the spring of 2017. We have outlined in [3] – [4] above the subsequent course of the offender's prosecution. The judge, by implication, accepted that in sentencing the offender the issue of delay had to be weighed and he did so in these terms:

> "*I have taken this matter into account in my sentencing by not imposing the maximum sentence in relation to the most serious offending regarding penetration.*"

As already noted, the judge imposed several sentences of 18 months imprisonment (the statutory maximum being 24 months) for these particular offences.

[13] In *R v Dunlop* [2019] NICA 72 this court, having reviewed the relevant leading jurisprudence, rehearsed at [29] what it described as the "*most important general principles to be distilled from the binding decisions of the House of Lords and UK Supreme Court*", in these terms:

> "*(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.*
>
> *(ii) In determining whether a breach of the reasonable time requirement has been established the court will consider*

in particular but inexhaustively, the complexity of the case, the conduct of the Defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.

(iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.

(iv) In cases where a breach of the reasonable time requirement is demonstrated the question of remedy must be considered: see in this context section 8 of the Human Rights Act 1998.

(v) The appropriate remedy is not to discontinue the prosecution or to stay it as an abuse of process, much less to launch judicial review proceedings.

(vi) The appropriate remedy (or "just satisfaction") will depend upon the nature of the breach, considered in conjunction with all relevant circumstances, including particularly the stage of the proceedings at which the breach is established. Other case sensitive facts and factors may feature.

(vii) Remedy options include a public acknowledgement of the breach, steps to expedite completion of the trial process and the release of the accused on bail.

(viii) Specifically, one of the remedy options is 'a reduction in the penalty imposed on a convicted Defendant'".

[14] This topic was further considered by this court in *DPP's Reference (No 5 of 2019): Harrington Legen Jack* [2020] NICA 1, at [40] – [45]. There are two especially noteworthy principles to be distilled from these passages. The first is that in cases where a breach of the reasonable time requirement has been established the court, in determining what consequential remedy would be just and appropriate, must take into account the gravity of the offending and the importance of public confidence in the criminal justice system. The second is that a public acknowledgement – by the court – of the breach will "*frequently*" be sufficient.

[15] In every case where an issue of Article 6(1) ECHR delay arises, the first question for the sentencing judge is whether there has been a breach of the reasonable time requirement. The court must make its assessment of this issue. Where there is a concession by the prosecution this is not binding on the court and

some circumspection will be appropriate. Furthermore, while arithmetical precision is far from necessary, the court must undertake a basic measurement of any period of delay to be reckoned. The question which the court must have in mind at every stage is whether there has been (in shorthand) culpable delay, to be measured from a determined starting point, in the initiation, pursuit and completion of the prosecution. Self-evidently the court requires all necessary information to perform this exercise.

[16] The overall period under scrutiny in the present appeal divides neatly into two segments. As regards the second of these, we consider it clear that the fact of two trials of the offender, separated by an appeal to and decision of this court, all belonging to a measurable period of approximately two years, cannot be considered to amount to unreasonable delay. The real question is whether there was unreasonable delay during the period of approximately three years preceding the offender's first trial. The overall period must, of course, be reckoned.

[17] The necessary detailed analysis of this period of delay was not carried out in the sentencing of the offender. It would appear that the information available to explain the course of the prosecution from the initial events of October 2013 – April 2014 noted above was extremely limited. Nothing beyond what is contained in the brief material passage in the sentencing transcript, from which we have quoted above, was provided by either party to this court. Taking into account that in this court prosecuting counsel was unable to provide any information relating to the first segment of time, it is highly likely that the sentencing judge similarly did not receive this necessary assistance. Furthermore, there are no indications of correct self-direction in law by the sentencing judge. The net result is that the requisite exercise was not undertaken. In brief compass, there was no judicial enquiry into the period under scrutiny, no identification of relevant milestones and no judicial assessment that a breach of the reasonable time requirement of specified dimensions on the part of an identified public authority or authorities had occurred. Nor was any consideration given to s 8 of the Human Rights Act and, in particular, the range of options available to the court.

[18] However, notwithstanding the foregoing, the prosecution evidently accepted at the sentencing stage that a breach of the reasonable time guarantee had occurred; and it is equally clear that the judge sentenced the offender on the basis that there was delay which warranted recognition by the court. This court has not been equipped to adequately review whether the judge committed any error of law in this respect. Accordingly the offender continues to be the beneficiary of this approach.

[19] We are satisfied that the specific mechanism devised by the judge – quoted in [12] above - to address the issue of delay more than withstands scrutiny. This is so for two reasons. First, the repeated physical invasion of the most private, intimate and sensitive part of two defenceless young girls' anatomies by an adult relative, exacerbated by a series of aggravating features and mitigated by nothing, must sensibly belong to the top of the sentencing scale for the now defunct offence of

indecent assault on a female. Notably there is no complaint that any of the individual sentences of 18 months imprisonment for the digital penetration offences is manifestly excessive or wrong in principle. We consider that a sentence of 24 months imprisonment – the maximum – if imposed would have withstood challenge on appeal to this court. This is linked to our analysis of sentencing in elderly cases below. Viewed in this context, and in light of this court's analysis in *Jack* (*supra*) of the appropriate response to a breach of the reasonable time requirement in a case of this nature, the judge's allowance for the factor of delay was, if anything, generous.

[20] The second of the two reasons mooted is embedded in this court's overall conclusion that the first ground of appeal must be rejected. It is trite that the global sentence of the offender must be viewed as a whole and standing back. This exercise must take into account the multiplicity of aggravating factors which his offending entailed. This was a protracted campaign of self-gratifying and lustful sexual abuse of three children in which the following features stand out: their youth and vulnerability; gross abuse of trust by an adult relative; the multiplicity of attacks perpetrated; the factors of planning and premeditation; and the profound adverse impact on the injured parties. In these circumstances the offender's personal circumstances, specifically his previous and subsequent good behaviour, cannot qualify as a factor of a mitigating nature of any material weight, particularly in a context where (*per* the pre-sentence report) he continues to defy the jury's verdict by insisting upon his innocence, notwithstanding the absence of any appeal against conviction. Previous decisions of this court make clear that an offender's personal circumstances will rarely mitigate the requisite sentence. See for example *R v GM* [2020] NICA 49 at [47]:

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

[21] It is also appropriate to repeat what this court stated recently in *R v Ferris* [2020] NICA 60 at [57]:

> *"A sentence which, in the opinion of the appellate court, is merely excessive and one which is manifestly excessive are not one and the same thing. This simple statement highlights the review (or restraint) principle considered above and simultaneously draws attention to the margin of appreciation of the sentencing court. Thus it has been frequently stated that an appeal against sentence will not succeed on this ground if the sentence under challenge falls within the range of disposals which the sentencing court could reasonably choose to adopt. The "manifestly excessive" ground of challenge applies most readily in those cases where the issue is essentially quantitative, i.e. where the imposition of a custodial sentence is indisputable in principle and the challenge focuses on the duration of the custodial term. "*

And in *R v GM* [2020] NICA 49 this court stated at [36]:

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

[22] Standing back and viewed globally, this court considers without any reservations that the overall sentence imposed upon this offender for a shameful and self-gratifying campaign of protracted sexual abuse of his three young nieces during an important formative stage of their lives and giving rise to serious adverse consequences for the injured parties is unimpeachable. The contention that an effective term of imprisonment of 10½ years duration is manifestly excessive is unsustainable.

[23] It is necessary to add the following. The mischief diagnosed in [17] above would have been averted if the PPS had furnished the trial judge with a suitably detailed chronology of the prosecution. This is an indispensable requirement in every sentencing exercise in which Art 6(1) ECHR delay issues may foreseeably arise. Henceforth it must be scrupulously observed.

[24] The second of the discrete issues of principle noted in [12] above may be framed thus. In elderly prosecutions where there have been material post-offending and pre-sentencing changes in societal values and attitudes, the statutory maximum punishments and sentencing practice, what is the correct approach for the sentencing court?

[25] The starting point is as uncomplicated as it is uncontentious: the offender cannot be punished by a sentence greater than that available at the time of his offending. This follows from Art 7 ECHR (the *lex gravior* principle), one of the protected Convention rights under the regime of the Human Rights Act, and the associated common law principle of *lex mitior*, which in the domain of international law finds expression in Art 15 of the UN International Covenant on Civil and Political Rights.

[26] This principle was affirmed by the Supreme Court in *R v Doherty* [2016] UKSC 62. Lord Hughes helpfully formulated the governing principles thus:

> "*43. With the exception of the mandatory life sentence for murder, the sentence for English criminal offences is not prescribed by statute. The statute prescribes the maximum. Sentence within that maximum is a matter for the judgment of the judge according to the individual aggravating and mitigating factors relating to the offence and to the offender. Nor, with very few exceptions, does the statute prescribe a minimum sentence. English sentencing statutes do not, as many laws in other countries do, fix a range between top and bottom points within which a sentence must fall. Guidance is given as to the assessment of the gravity of offences, and as to the likely range of sentence, by both the Court of Appeal (Criminal Division) when hearing individual appeals, and, now, by the Sentencing Council, which publishes general guidelines. But the judge remains the arbiter of when justice requires him to depart from the guidelines: see for example the explicit provision to that effect in the legislation relating to Sentencing Council guidelines, by way of section 125(1) of the Coroners and Justice Act 2009.*
>
> *44. Thus:*
>
> *(a) if the maximum sentence has been increased by statute since the offence was committed, the English court cannot sentence beyond the maximum which applied at the time of the offence, because that is the sentence to which the defendant was at that time exposed (lex gravior);*
>
> *(b) if the maximum sentence has been reduced by statute since the offence was committed, the English court will sentence within the now current maximum; in R v Shaw [1996] 2 Cr App R (S) 278 the statute reducing*

the maximum sentence (for theft) was held as a matter of construction to apply to past as well as to future offences, but in R v H (J) (Practice Note) [2011] EWCA Crim 2753; [2012] 1 WLR 1416, a guideline case dealing principally with the sentencing of cases of historic sexual abuse, Lord Judge CJ stated the general approach at para 47(b):

> *'Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.'*

(c) if sentencing practice as to the assessment of the gravity of an offence has moved downwards since the offence was committed, the court should sentence according to the now current view, and if it did not do so the sentence would be vulnerable to reduction by the Court of Appeal on the grounds that it was manifestly excessive;

(d) if a new sentencing option which is arguably less severe is added by statute or otherwise to the menu of available sentences after the commission of the offence but before the defendant falls to be sentenced, that new option will be available to the court in his case, unless the statute expressly otherwise directs; in the Canadian case of The Queen v Johnson 2003 SC 46 the menu of sentencing options for those presenting a future risk had had added to it a new, and for some offenders a possibly less severe, option of post custody supervision in the community; this was applied to the defendant although his offence had been committed before the change in the law; if such circumstances were to occur in England the result would be the same.

(e) appeals against sentence to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it either erred in law or principle or was manifestly excessive, and those questions are determined by reference to the law and practice obtaining at the time that the sentence was passed by the trial judge: see R v Graham [1999] 2 Cr

App R (S) 312 and R v Boakye [2012] EWCA Crim 838 discussed at para 53 below; accordingly the situation which arose in Scoppola out of a change in the law between sentence and appeal could not raise a similar difficulty here;

(f) moreover, except in very limited cases the Court of Appeal has no power to increase a sentence on appeal (Criminal Appeal Act 1968 section 11(3)); in the exceptional case where it can do so on the application of the Attorney General, its power is limited to putting itself in the position of the trial judge and asking whether on the rules then applying he passed an unduly lenient sentence; for this reason also if the circumstances of Scoppola were to occur in England there could be no question of the trial judge's 30 year sentence being replaced on appeal by a life sentence;

(g) similarly, in the separate case of sentences for minor offences which are appealable from the Magistrates' Court to the Crown Court, an appeal lies only at the suit of the defendant; although the Crown Court re-sentences ab initio and can thus pass a more severe sentence than did the magistrates, the practice, if such a step is contemplated, is to give notice of this risk to enable the defendant to abandon his appeal if he wishes; once again therefore the kind of sequence of events which obtained in Scoppola would not occur."

[27] The answer to the question posed in [24] above is provided in a later passage in the judgment of Lord Hughes, at [47]:

"*The well settled aspects of English legislative and judicial practice set out above in relation to the penalties provided for need to be distinguished from the exercise of the sentencing judge's discretion within the maximum permitted at any time. The sentence to which a defendant was exposed, at the time of his offence, is, by English law, a sentence up to the maximum then permitted. It is well recognised that the multifarious factors which fall to be considered when fixing a sentence will inevitably vary in weight as time passes. New aggravating or mitigating factors will be recognised from time to time, or the weight accorded to such factors will alter. The long term damage to victims of sexual abuse, for example, is very much better understood now than it was 30 years ago. Very large*

> *numbers of crimes of persistent sexual abuse committed many years ago are now coming before the courts, principally because victims are belatedly feeling able to reveal them. New investigation techniques, such as DNA testing, may also identify various types of offender, by no means only sexual offenders, years after the event. The discovery of a recent offence may not infrequently lead to the revelation that the offender has been committing similar offences for many years. Although a court sentencing today for an offence committed many years ago must confine itself within the maximum which was available by statute at the time of the offence, it is not required, nor should it be, to apply an outdated assessment to the gravity of the conduct. Nor, if the impact of the offending on the victim has been greatly increased by years of suppression in consequence of the manner of abuse, should the court ignore that fact. The basic rule, as carefully explained by Lord Judge CJ in R v H (supra) is that the applicable maximum is that in force at the time of the offence, but it is positively wrong for a court in 2016 to attempt to evaluate the particular offence by hypothesising that it is sitting in (say) 1984."*

In practice, the principle contained in this passage resonates with particular force in so-called historical sexual offending cases.

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

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

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

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

(iv) The s 52 offence of indecent assault on a female was abolished by the Sexual Offences (NI) Order 2008.

See *GM (ante)* at [40].

[29] Furthermore, as stated recently by this court in *GM* at [20] – [21]:

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

> *'The issue climbed the political agenda in the 1990s. There is now a much greater public awareness of the nature and effect of sexual assaults, combined with an increase in reporting sexual crimes …*
>
> *High quality investigation and clear presentation in court are of fundamental importance. Similarly, it is vital that victims feel that they will receive appropriate support from the criminal justice system.'*

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

[30] In short, in contexts of this kind the trial judge does not sentence in either a vacuum or a time warp. For all the reasons identifiable in [18]–[21] above, we consider that there can be no sustainable challenge to the judge's maximum sentences of 18 months' imprisonment, the global custodial term of 10½ years or the internal configuration of this figure. We are equally satisfied that a sentence of the statutory maximum of two years' imprisonment for one or more of the offences of digital penetration would have been neither manifestly excessive nor wrong in principle.

Sexual Offences Prevention Orders

[31] Turning to the second ground of appeal, the SOPO imposed on the offender was, *per* the sentencing transcript, in these terms:

> "*(1) The Defendant is prohibited from having any form of contact, directly or indirectly or via a third party, with* [any of the injured parties].
>
> *(2) The Defendant is prohibited from having any contact or communication with any child or children under the age of 16, other than such as is inadvertent or not reasonably avoidable in the course of daily life, without the prior approval of his designated risk manager or social services.*
>
> *(3) The Defendant is prohibited from denying police access to his home to ensure compliance with this order."*

The terms of this SOPO were drawn verbatim from the recommendations of the probation officer in the pre-sentence report. The essence of this ground of appeal is that the SOPO is infected by error of law.

[32] The power conferred on the court to make a SOPO is contained in the Sexual Offences Act 2003 ("*the 2003 Act*"). The statutory regime is found in sections 104-107 inclusive. Section 107 of the 2003 Act provides, in material part:

> "*(1) A sexual offences prevention order –*
>
> *(a) prohibits the defendant from doing anything in the order, and*
>
> *(b) has effect for a fixed period (not less than five years) specified in the order or until further order.*

> *(2) The only prohibitions that may be included in the order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant*".

[33] By section 107(6), where a court makes a SOPO in respect of a person already subject to such an order the earlier order ceases to have effect. Section 108 makes provision for the variation, renewal and discharge of SOPOs. An application for variation, renewal or discharge may be made by the defendant or the PSNI. Such applications may be made (a) where the appropriate court is the Crown Court, in accordance with Rules of Court and (b) in any other case, by complaint. [It would appear that there are no specially devised provisions in the Crown Court Rules (NI) 1979, as amended, for this purpose]. Applications for variation, renewal and discharge of SOPOs are determined by the court following an *inter-partes* hearing. Section 108(5) repeats the statutory criterion of "*… necessary to do so for the purpose of protecting the public or any particular members of the public from serious sexual harm from the Defendant*". By section 108(6), the discharge of a SOPO prior to expiry of the minimum statutory period of five years is possible only if both the defendant and the PSNI consent. By section 109 an interim SOPO may be made by the court in circumstances where the main application under section 104(5) or section 105(1) has not been determined. Pursuant to section 110, a SOPO has the status of a sentence and gives rise to a right of appeal on the part of the defendant, extending to an interim SOPO.

[34] In summary, a court may make a SOPO where it deals with a defendant in relation to any of the offences listed in Schedule 3 or Schedule 5 to the 2003 Act. The pre-requisite to making such an order is that the court "*… **is satisfied that it is necessary to make such an order, for the purpose of protecting the public or any particular members of the public from serious sexual harm from the Defendant***". By virtue of section 106(3), this means protecting the public in the United Kingdom, or any particular members of that public, from serious physical or psychological harm caused by the commission by the defendant of one or more of the offences listed in Schedule 3. Acts, behaviour, convictions and findings include those occurring prior to the commencement date (i.e. 1st May 2004), per section 106(4). This is a matter of obvious significance, having regard to the considerable vintage of the offending which frequently gives rise to prosecutions in this field. The statutory word "*satisfied*" would attract its ordinary and natural meaning, without any reference to burden or standard of proof, bearing in mind that the court is engaged in a *sentencing* exercise.

[35] Where a defendant to whom a SOPO applies without reasonable excuse infringes any of the prohibitions specified in the order, this constitutes a freestanding offence which is punishable on summary conviction by imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both – or, upon conviction on indictment, imprisonment for a maximum term of

five years. In such a case, the court does not have the option of making a conditional discharge order, by virtue of section 113.

[36] There is some guidance in decisions of this court. In *R v Shannon* [2008] NICA 38, the Northern Ireland Court of Appeal considered an appeal against a five-year SOPO. The conditions of the SOPO stipulated that the appellant was not to own or drive a motor vehicle; was not to be alone or solicit to be alone in a motor vehicle with a female; was not to frequent beaches; was not to take up any employment or activity without the approval of a designated risk manager; and was not to develop a relationship with any female unless verified disclosure had been made to her about his criminal antecedents. The appellant had previous convictions for sexually orientated offences, including breaching a custody probation order. He had accumulated eighteen convictions for indecency offences, ten for offences of indecent assault and three for sending obscene messages by public telecommunications during a period of some twenty years. On behalf of the appellant, it was accepted that there was a high risk of reoffending, but it was argued that the statutory pre-requisite of protecting the public or any particular members of the public from serious sexual harm was not satisfied.

[37] The Court of Appeal, having considered some of the English decisions belonging to this field, allowed the appeal to a limited extent, by varying the first of the five conditions enshrined in the SOPO. *Per* Campbell LJ:

> "[25] *The order in the present case is for a period of five years (the minimum period for which such an order may be made) and if being unable to drive to work limits the Applicant's opportunity to obtain employment it will go beyond the purpose of the order. We will allow the appeal, for which leave has already been given, against this condition to the extent that the Applicant will be permitted to travel, unaccompanied, by car directly to and from a specified place of work or activity which has been approved by the designated risk manager. He must travel by a route and at times approved by the designated risk manager and provide him, in advance, with details of the make and registration number of any vehicle that he owns and/or uses for this purpose. To this extent the appeal is allowed*".

The main themes in this key passage are those of permissible purpose and proportionality. The touchstone of proportionality flows from the statutory language. This decision highlights that the court must be satisfied that it is "***necessary***" to make a SOPO *for the specified purpose*. It is insufficient for the court to conclude that a SOPO is merely desirable or appropriate in the circumstances. Furthermore, the statutory purpose should be to the forefront of the court's deliberations and conclusions at all times.

[38] In *R v CK* [2009] NICA 17, the appellant, aged fourteen years, was committed to the Crown Court for trial on thirteen counts including assaults, acts of gross

indecency and rape. His victims were a young boy aged eight years and a girl aged five years, both of them his cousins. Ultimately, he pleaded guilty to five counts of indecent assault and gross indecency and one count of attempted rape vis-à-vis the young boy and one count of gross indecency with or towards the young girl. The commensurate sentence was one of three years detention in a Juvenile Justice Centre and the court also imposed a SOPO. Given the appellant's age, the sentencing exercise involved giving effect to Article 45(2) of the Criminal Justice (Children) (NI) Order 1998 (the "1998 Order") and section 53 of the Justice (Northern Ireland) Act 2002. In the domain of international law, the most prominent instruments are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the "Beijing Rules" – paragraph 5 especially) and the United Nations Convention on the Rights of the Child [Articles 3.1, 37(b) and 40(1) especially]. The unifying, or central, theme of this collection of international standards is the need to have particular regard to the welfare of the child offender. The Court of Appeal noted that the remission of sentence provisions enshrined in rule 30 of the Prison and Young Offenders Centre Rules (NI) 1995 have no equivalent in the Juvenile Justice Centre Rules (NI) 2008, albeit the Secretary of State is empowered to release a juvenile detainee on licence at any time during the relevant period of detention, per Article 46(1). Thus:

> "*A sentencer should, we believe, proceed on the assumption that the sentence imposed will be served in full*".

(See paragraph [28]).

[39] The outcome was the substitution of a Juvenile Justice Centre Order under Article 39 of the 1998 Order, comprising detention for twelve months followed by supervision for twelve months. With regard to the SOPO, the court construed section 107(1)(b) as follows:

> "*[39] … a term for the duration of the order should be specified unless the judge imposing it considers that it should be for an indefinite period or that it should be subject to review after the elapse of a particular period. The court should therefore stipulate the length of time that the order is to endure* ***or*** *declare that it is to remain in force until further order*".

[My emphasis].

The court concluded that a SOPO of indefinite duration would be counterproductive to the process of rehabilitation of the appellant and determined that an order of five years duration would be appropriate. Next, the court considered the terms of the SOPO, in particular the provision which prohibited the appellant from –

"*Having or seeking to have any unsupervised contact with any child under the age of eighteen years unless approved by Social Services …* [AND] …

from entering the area of North Belfast as delineated on [the map to be attached] *except for any circumstances approved in advance by Social Services*".

In determining to allow the appeal to the extent of deleting these two provisions, the court reasoned:

"*[42] We believe that* [these provisions] *would be extremely difficult to enforce and, for the reasons earlier given, might well prove to be an inhibition to progress while not affording a great deal in the way of practical and effective elimination of risk*."

Finally, the court addressed the second of the prohibitions contained in the SOPO, which forbade the appellant from "*having contact whatsoever with the victims A and B*", concluding thus:

"*[43] The most difficult part of the order on which to arrive at a confident view is the condition which forbids all contact with the victims. It is to be remembered that these are his cousins and that, according to the reports, the appellant's mother continues to enjoy a close relationship not only with him but also with her siblings who are parents of the victims. One can wholly understand and sympathise with any desire on the part of the parents of the victims to keep the appellant entirely away from them but it is difficult to prescribe for the future in terms of intra-familial relationships and we are conscious that nothing should be done that might imperil the prospects of repair not only of the appellant's life but also of those relationships. After anxious thought, we have concluded that the same proviso as applies to the first condition should be added to the second condition. In its amended form it shall read that the appellant should be prohibited from 'having contact with the victims 'A' and 'B' unless this has been approved in advance by Social Services and/or the 'designated risk manager'.* "

The judgment also highlights the impact of the notification requirements in the 2003 Act, noting that these come into effect by operation of the statute [section 82] rather than the order of the court.

[40] Certain aspects of the SOPO sentencing mechanism were further considered by this court in *R v Simpson* [2014] NICA 83. In this case the offender, having pleaded guilty to 16 counts arising out of some 840 indecent child images on his computer, was sentenced to four months imprisonment and a SOPO of five years

duration. The SOPO was challenged on appeal to this court. The main focus of the challenge was the following provision in the impugned order:

> "*The Defendant is prohibited from having access to or association with any child or children under the age of 18 years without the approval of Social Services save for that which is unforeseen and unavoidable in the course of daily life.*"

Delivering the judgment of the court Coghlin LJ noted at [16] that the appellant and his wife had a son aged 8 years and, further, she had three teenage sons by a previous relationship. These facts, it was noted, were not addressed in the sentencing of the appellant. The court stated at [16]:

> "*In this case and in others which are comparable, we believe that some consideration should be given in the course of framing the order to the question of the best way to resolve any inter-familial disputes that are foreseeably likely to arise, including the option of recourse to the Family Proceedings Court, after consultation with Social Services.*"

The court's conclusion was formulated thus, at [18]:

> *"We have listened carefully to the well analysed submissions advanced on behalf of the appellant and the Crown and we have read the transcripts of the pre-sentence and sentencing hearings. Having done so, we are left with a real concern that, in a highly fact specific case, inadequate attention was directed to the obligation to ensure proportionality and the need to avoid oppression. We also have a real concern that the learned trial judge was entitled to receive significantly greater assistance with regard to those obligations and the relevant authorities. Accordingly, we propose to allow the appeal in respect of the specific terms of the SOPO. In the circumstances the case will be remitted back to the learned trial judge for further consideration."*

[41] As regards leading English decisions, *R v D* [2006] 1 WLR 1088; [2005] EWCA Crim 2951 contains several convergent themes and principles. The decision emphasises *inter alia* that the language of the 2003 Act is "*serious sexual harm*". This is to be contrasted with "*serious harm*", which is found in other statutory provisions: for example, section 5A (2) of the Sex Offenders Act 1997 and section 229 of the Criminal Justice Act 2003.

[42] The distinction between these differing statutory terminologies was highlighted in *R v Rampley* [2006] EWCA Crim 2003. The interaction between a SOPO and a statutory notification requirement was considered by the English Court of Appeal in *R v Hammond* [2008] EWCA Crim 1358, where the appellant appealed

against an indefinite SOPO made pursuant to section 104, in circumstances where he was also ordered to comply with the statutory notification provisions for a period of five years. The inconsistency between these two measures featured in the appeal. The court observed:

> "[11] … *In circumstances such as this the notification requirements of the 2003 Act have to run parallel to the terms of a* [SOPO]. *Although the judge imposed the correct period of time in respect of the notification requirements, that period of time is overridden by the provisions relating to* [SOPOs]. *This means that there is an inconsistency between the terms of the* [SOPO] *imposed by the judge and the term of the notification requirements made under Schedule 3 of the 2003 Act …*
>
> [12] ***... In general terms, when imposing a*** [SOPO] ***at the same time as imposing the requirement to register ... it will normally be important to ensure that the terms of the*** [SOPO] ***are consistent with the duration of the notification requirements***".
>
> [Emphasis added].

[43] The decision in *R v Richards* [2006] EWCA Crim 2519 considers the inter-relationship between a sentence of imprisonment for public protection under sections 224-229 of the Criminal Justice Act 2003 and a SOPO. (The equivalent Northern Ireland provisions are Article 12-15 of the Criminal Justice (NI) Order 2008 – "Dangerous Offenders"). An argument was formulated, based on the similarity of the wording of the two statutory regimes, that if the "*dangerousness*" provisions of the 2003 Act were considered not to be satisfied, the same conclusion should apply to sections 104 and 106 of the 2003 Act. The court rejected this argument, emphasizing the greater degree of harm required by the 2003 Act (which encompasses the risk of death), which is not within the specific contemplation of section 104. Moreover, the court reasoned, the two statutory regimes have different schedules of offences. See especially [26] and [27].

[44] It is beyond plausible argument that *clarity and precision of language* are highly desirable features where a court is imposing a SOPO. For those who have some familiarity with mandatory injunctions, the analogy seems appropriate. These characteristics are all the more necessary in circumstances where an infringement of the order exposes the defendant to criminal liability and, possibly, loss of liberty in consequence. One must also be alert to the ECHR principle of clarity and foreseeability, which forms part of the doctrine of proportionality. In the context of Article 7 of ECHR (Freedom from Retroactive Criminal Offences and Punishment) it has been held that the term "*law*" implies qualitative requirements, including those of accessibility and foreseeability, the import of the latter being that the individual must be able to ascertain from the language of the relevant legal rule or provision

what acts or omissions will expose him to criminal liability: see *CR v United Kingdom* [1995] 21 EHRR 363, at [42] especially.

[45] Where SOPOs are concerned, there is also scope for some overlap between the concepts of clarity and breadth. Thus, for example, in *Regina v Demidoff* [2006] EWCA Crim 1017, the Court of Appeal held that a SOPO prohibiting the defendant from being alone with any female aged under sixteen years in any premises or on any means of transport was too wide. It is a little surprising, perhaps, that issues relating to clarity and precision of language have not arisen with greater frequency in this sphere.

Second Ground of Appeal: the SOPO

[46] In the present case the SOPO under challenge has the minimum statutory period of five years duration. It is common case that it was designed to take immediate effect, *viz* from the date on which sentence was pronounced, 05 July 2019. Duly analysed:

(i) The effect of the sentencing package devised by the judge was that the offender would, immediately, be incarcerated for a substantial period.

(ii) The period of immediate incarceration was not susceptible to precise measurement, particularly in the absence of information relating to remand custody in a case with a complex prosecution history and having regard to other future imponderables.

(iii) The SOPO would have limited or no practical impact while the offender remained a sentenced prisoner.

(iv) As a minimum, a period approaching 2½ years would elapse before the SOPO would have any real practical impact. During this period the SOPO would serve no useful purpose.

(v) The "no contact/communication" prohibition made no distinction between male and female children and was not expressly examined.

(vi) The terminology "*inadvertent or not reasonably avoidable in the course of daily life*" is pregnant with uncertainty and a receipt for confusion and dispute.

(vii) The judge did not undertake any consideration of the interplay between the terms of the SOPO and the likely provisions of the offender's supervisory probation of two years duration to follow upon his release from sentenced custody.

[47] To summarise, the SOPO imposed in this case had no immediate practical effect, could not have any practical effect until the offender's release (temporary or otherwise) from prison and would, upon completion of his custodial term, find itself coexisting with the terms of his probation which would then come into operation. This analysis applies to a context wherein the judge, having determined to impose a SOPO, was obliged by statute to stipulate a minimum duration of five years.

[48] The Parliamentary intention must surely have been that every SOPO will have practical utility and effect throughout its entire term. This flows inexorably from the statutory test (*supra*) and the statutory regime as a whole. This legislative intention will not be achieved if in a given case by virtue of the intervention of an immediate custodial term the practical operation of a SOPO is in effect postponed to a future date, with an ever-reducing duration during the intervening period. Allied to this is the consideration that at the time of sentencing this future date will not be ascertainable with certainty. This is so not least because it is not the function of a sentencing judge to gather information about matters such as remand custody or to carry out related calculations.

[49] However, if the sentencing of an offender is to have combined elements of an immediate custodial term and a SOPO the judge must be sufficiently informed to make a reasonable estimate of the date when the SOPO will have practical effect. Furthermore, we consider that the language of section 107(1)(b) of the 2003 Act empowers the sentencing judge to specify the date upon which a SOPO will take effect. If reinforcement for this analysis is required it is readily found in s 49(1) of the Judicature (NI) Act 1978. The "*fixed period (not less than five years)*" will begin on the future date specified in the order of the sentencing court. We are further satisfied that this can be achieved by reference to a future event. In the ordinary case this event will be the completion of the custodial term. This will be achievable by the inclusion of a provision such as "*The fixed period of XX years specified in section 107(1)(b) of the 2003 Act, as determined by the Order of this court, will begin on the date of completion of the custodial term to be served pursuant to the sentence of this court*".

[50] It is of course possible that the offender will make relevant progress during the custodial term through mechanisms such as the completion of appropriate courses or the receipt of counselling. We consider that such cases are accommodated by s 108 of the 2003 Act which makes provision for the variation, renewal and discharge of SOPOs. The determination of such applications is governed by precisely the same statutory criterion of necessity.

[51] It is understandable that in busy Crown Courts issues pertaining to SOPOs might appear ancillary or secondary to the main event and sometimes may not receive the necessary attention on the part of all concerned. Moreover, there may be a tendency to adopt without critical consideration the SOPO provisions recommended in the pre-sentence report. However, it must be remembered that the statutory test of necessity both erects a substantial threshold and is framed in the very specific terms of "*… necessary for the purpose of protecting the public or any*

particular members of the public from serious sexual harm from the defendant". The final consideration is that a SOPO exposes the offender concerned to possible future criminal liability involving a sentence on indictment of up to five years imprisonment. Thus, there must in every case be a careful focus on whether the statutory test of necessity is satisfied and, if so, the need to frame the prohibitions in clear, realistic and comprehensible terms which are proportionate and not oppressive, as emphasised in *Simpson* (*supra*) and, more recently, *R v CZ* [2018] NICA 53 at [67] – [70].

[52] Reverting to the present case, the thrust of the second ground of appeal is that the statutory test of necessity was not satisfied having regard to the elapse of approximately 30 years since the end of the period of offending, the Probation Officer's assessment that the offender presents a low likelihood of reoffending and no significant risk of serious harm, the offender's recorded willingness to engage in appropriate programmes and the factor of a two year period of probationary supervision following completion of the custodial term. On the other side of the notional balance sheet are the offender's continuing protestations of innocence, the Probation Officer's assessment that the offender belongs to the "*moderate priority category for supervision and intervention*" as regards the risk of committing future sexual offences, the related assessment that a SOPO "*… could be an effective measure in managing risk and ensuring that the defendant's opportunity to engage in sexually harmful behaviour is limited …*" and, finally, the strong deterrent effect of a SOPO having regard to the potential for criminal liability.

[53] This court was informed of an expectation that the earliest date when the offender may become the beneficiary of temporary release from prison is November 2021. There is no indication that he has undertaken, or will undertake, any relevant courses or therapies as a sentenced prisoner. If he is released into the community on a temporary basis prior to completion of his custodial term the extant SOPO will have immediate practical effect. Subject to imponderables it is fairly clear that the period of practical effect will be of the order of 2 to 2 ½ years. Thus, if this court were not to intervene the underlying legislative intention identified above would not be fulfilled. Taking this into account, in tandem with the limited enquiry conducted at first instance and the equally limited enquiry available to this court, we consider on balance that such measures as are considered necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm on the part of this offender (the statutory SOPO test) can be evaluated by the different mechanism of professional evaluation by the Probation Board when it is determining the terms of his probationary period of two years. We are satisfied that this mechanism will be adequate to provide sufficient protection to those who may require it in the future. It follows that the second ground of appeal succeeds.

Disposal

[54] As the court has rejected the first ground of appeal the various sentences of imprisonment imposed by the judge are affirmed. The appeal succeeds to the extent

that this court varies the sentencing order of the judge by discharging the SOPO with immediate effect.