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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

JONATHAN HUTTON

Appellant

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Mr Fahy KC with Ms Doherty (instructed by Jack Quigley Solicitors) for the Appellant
Mr Sam Magee KC with Mr McNeill (instructed by the PPS) for the Crown

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Before: Keegan LCJ, McCloskey LJ and McBride J

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

Introduction

[1] This is an appeal with leave of the single judge from a sentence imposed upon the appellant by His Honour Judge Kinney ("the judge") on 10 March 2022 for a variety of sexual offences against two young female victims unrelated to him. The judge reached a total determinate custodial sentence of 12 years' imprisonment split equally between custody and licence.

[2] The appellant pleaded guilty to 18 offences on an amended indictment containing 20 charges (including numerous specimen counts) with two counts, 9 and 10, kept on the books. We pause to observe that the original indictment contained 121 counts and so self-evidently it was greatly reduced.

[3] The appellant was also placed on the Sex Offenders Register, and a disqualification order was made preventing him from working with children and a sexual offending prevention order ("SOPO") was made for 10 years. No issue is taken with these ancillary orders.

[4] The sentences which we will describe below imposed for counts 1-8 were concurrent with each other, as they all relate to the first victim in this case. The

sentences for counts 11-20 were concurrent with each other as they relate to the second victim in this case. However, the determinate custodial sentence of six years imposed for counts 11-20 was made consecutive to the determinate custodial sentence of six years imposed on counts 1-8.

[5] The table of offending and the sentencing imposed is therefore as follows:

(i) Count 1: Sexual activity with a child aged between 13 and 16 years, contrary to Article 16(1) of the Sexual Offences (Northern Ireland) Order 2008 – three years.

(ii) Count 2: Adult causing or inciting a child aged between 13 and 16 to engage in sexual activity, contrary to Article 17(1) of the Sexual Offences (Northern Ireland) Order 2008 – three years.

(iii) Count 3: Voyeurism, contrary to Article 71(3) of the Sexual Offences (Northern Ireland) Order 2008 - one year.

(iv) Count 4: Sexual activity involving penetration by an adult with a child aged between 13 and 16 years, contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008 – six years.

(v) Count 5: Sexual activity with a child aged between 13 and 16 years, contrary to Article 16(1) of the Sexual Offences (Northern Ireland) Order 2008 – six years. (specimen count)

(vi) Count 6: Sexual activity involving penetration by an adult with a child aged between 13 and 16 years, contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008 – (this was a specimen count) – four years.

(vii) Count 7: Sexual activity with a child under 18, abuse of trust, contrary to Article 23 of the Sexual Offences (Northern Ireland) Order 2008 – three years.

(viii) Count 8: Sexual activity with a child under 18, abuse of trust, contrary to Article 23 of the Sexual Offences (Northern Ireland) Order 2008 – (specimen count) - three years.

(xi) Count 11: Meeting a child following sexual grooming, contrary to Article 22 of the Sexual Offences (Northern Ireland) Order 2008 – two years.

(xii) Count 12: Adult engaging in sexual activity in the presence of a child aged between 13 and 16 years, contrary to Article 19 of the Sexual Offences (Northern Ireland) Order 2008 – three years.

(xiii) Count 13: Sexual activity involving penetration by an adult with a child aged between 13 and 16 years, contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008 – six years.

(xiv) Count 14: Sexual activity with a child under 18, abuse of trust, contrary to Article 23 of the Sexual Offences (Northern Ireland) Order 2008 - three years. (specimen count)

(xv) Count 15: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 – two years. (specimen count)

(xvi) Count 16: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 – two years. (specimen count)

(xvii) Count 17: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 – two years. (specimen count)

(xviii) Count 18: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 – two years. (specimen count)

(xix) Count 19: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 – two years. (specimen count)

(xx) Count 20: Making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 - two years. (specimen count)

This appeal

[6] Two points of appeal are raised in a notice dated 7 April 2022 which we distil into the following propositions:

(i) That the sentence was manifestly excessive as the judge did not take any/adequate account of the principle of totality.

(ii) That the sentence was wrong in principle and lacking in transparency as to how the 12-year custodial term was arrived at.

Factual background

[7] We commend the parties for agreeing a comprehensive statement of facts which formed the basis of plea. This is of course good practice but often it is followed more in the breach than the observance. We draw the following salient facts from the document that was agreed.

[8] The appellant's offending behaviour began in early 2013. Subsequently, he was arrested in November 2017 and his phones and computers were seized. It was at that time that images were then found dating back to 2008 up to 2015.

[9] The first victim was identified from the material that was seized. She subsequently partook in an Achieving Best Evidence ("ABE") interview when she gave an account of the abuse that was perpetrated upon her. This first victim was under 16 when the offending behaviour started. The appellant had been retained as a music teacher for her by her mother. He was in his late 20's. During this relationship of trust, the appellant began to groom the victim. The victim agreed to do work for the appellant including ironing and cleaning in his house. As well as paying her in cash for this, the appellant began to buy her clothes and presents.

[10] This grooming behaviour escalated in that on one occasion when the victim was in the appellant's house doing housework she ended up in his bed where the appellant took her clothes off and rubbed the outside of her vagina. He then commenced his sequence of offending and abusive behaviour which included the following sexual abuse; requiring the victim to masturbate him whilst he recorded the abuse on his phone; sexual abuse which fell short of vaginal penetration but did include continuing masturbation including masturbation to the point of ejaculation; penetration of the victim's mouth with the appellant's penis and on more than one occasion he attempted to penetrate her anus with his penis.

[11] The victim turned 16 and the appellant then started to take her out in his car which then involved sexual activity. Part of this activity was for the appellant to simulate sex with the victim by rubbing his penis between her legs. On one occasion he inserted his penis in her vagina and began to thrust. He recorded this incident on his phone. His pattern of abuse of offending continued nearly every week when the victim was between 16 and 18 years of age. They would engage in vaginal sex, oral sex and masturbate each other. The appellant encouraged the victim to start taking the contraceptive pill whilst continuing to buy her presents and giving her a card which she could use to spend his money. The offending stopped when the victim was 18 and still at school.

[12] The second victim was abused from September 2018. This abusive behaviour arose as the appellant contacted the victim via SnapChat on her mobile phone. Although she was 13 at the time, she told the appellant that she was 14. He claimed to be 20, although he would have been at least 34 at the time. In relation to this victim the appellant engaged in grooming behaviour as he was sympathetic and supportive to the young victim. He moved from SnapChat to text messaging and then released pictures of the victim wearing her underwear and naked photographs of breasts and the genital area. The abusive behaviour escalated culminating in an occasion when the appellant called the victim using FaceTime. On this occasion she was in her bedroom, and he was in a car. She lifted her top to show him her bra and he exposed himself and showed her that he was masturbating his naked penis.

[13] The appellant then travelled to meet the victim. He continued to message her in a sexualised way. When they met in the appellant's car, he initially touched her over her clothes. The victim described how he pressurised her and made negative comments to her. The victim was reluctant to make full disclosure of what had happened to her. However, she eventually described a time when the appellant had penetrative sex with her in the car when she was still 13. She said it happened on one occasion. The victim said that he penetrated her vagina from behind for about 10 or 15 minutes.

[14] During this period of offending the appellant had his phones and computers seized by the police. This seizure did not result in an amelioration of his behaviour. He was granted police bail in 2015, but obviously continued with his abusive behaviour towards the second victim post that. On 5 March 2021, the appellant was sentenced to 16 months' imprisonment for 22 indecent images found on his mobile phone seized from him in 2015. These images were mainly of Category C but included some Category A and some Category B images of children aged between four and 15.

[15] On the appellant's laptop police found 11 Category A videos of his first victim, 18 Category B videos and 165 Category B images. They also found two Category C images and 135 Category C videos. On the appellant's phone they found nine Category B videos of his second victim and three Category B images along with 26 Category C images. On another laptop there was one Category C video and 10 Category C images of unknown girls which may have been downloaded from the internet. On a further mobile phone seized in 2017 there were 10 Category C images of the first victim.

[16] The above factual background was contained in the prosecution opening for sentence. The defence also provided submissions in support of the mitigation that they said existed in this case for sentencing.

[17] The new Bill of Indictment comprising 20 counts was preferred on 8 July 2021 after discussions between counsel. The appellant pleaded guilty to all counts on that date save two counts in relation to victim 1 regarding watching sexually explicit movies which were left on the books. He, therefore, fell to be sentenced for the 18 offences that we have set out in para [5] above.

The pre-sentence report

[18] This report refers to the fact that the appellant was a 38-year-old single man when sentenced. He was subject to a 16-month sentence for offences of possession of indecent images or pseudo photographs of a child. A positive upbringing is described including high educational attainment up to university education and then teaching. The appellant also has a 14-year-old daughter from a brief relationship with whom he has no contact. However, during his teenage years, the report refers to the appellant's

use of cannabis which the appellant stated had had a significant detrimental impact upon his life.

[19] In discussing the agreed statement of facts the appellant communicated his desire to accept full responsibility for his actions. The report also records a desire on the part of the appellant to obtain help as in his own words he said, "the programming in my head has gone wrong in terms of my inhibitions … I need help with it, I'm keen to get help with it."

[20] The appellant was assessed as posing a medium likelihood of reoffending. He was not assessed as posing a significant risk of serious harm given the protective factors available to him namely a family support network and a self-reported willingness to engage in programmes of work, interventions and access services relating to his behaviour.

[21] An expert report from Professor RJ Davidson was filed by the defence dated 21 January 2022. This report also refers to the appellant's history of cannabis and alcohol use. He also refers to that fact that "there is clear evidence of offence planning in as much as there is a history of predatory behaviour, as opposed to impulsive or opportunistic offending."

[22] On a positive note, Professor Davidson noted that the appellant "is aware of his culpability and the seriousness of the offences" and opined that the appellant is "beginning to address the issue of drug misuse and the importance of a healthy lifestyle." We were also told that the appellant has achieved enhanced status in prison and has not had any adverse drug tests or adjudications.

Victim impact

[23] We have read two impressive statements from each victim in this case. We are struck by the profound effect the appellant's behaviour has had upon them and will continue to have upon them as adults particularly in terms of forming relationships and trusting people.

The sentencing exercise

[24] In addition to legal submissions from both prosecution and defence the judge considered the pre-sentence report and the report from Professor Davidson before passing sentence. The judge references these reports in his sentencing remarks. We note that after some lengthy discussion the judge decided that the appellant did not meet the criteria to be designated dangerous. There is no issue raised about the dangerousness finding in this appeal.

[25] In his sentencing remarks the judge also recited the aggravating and mitigating factors in this case. The judge specifically referred to the fact that he would apply the principle of totality. He then stated that some consecutive sentencing was appropriate

given that there were two victims. Again, we point out, that there is no issue taken with the application of consecutive sentences.

[26] In terms of his conclusion we note that the judge recorded that if the appellant had not pleaded guilty a global sentence of between 17 and 19 years would have been appropriate. Then he arrived at 12 years as the final sentence on the fairly obvious basis of 18 years less maximum credit for the plea which is not in issue. That much is clear enough, if not spelt out.

[27] There is no real issue taken in relation to the aggravating factors which are cited as follows by the judge:

(i) The appellant's grooming behaviour of both of the victims taking place over a considerable period of time.

(ii) The planning and premeditation which went into these offences.

(iii) Abuse of position of trust as a music teacher (in relation to victim 1).

(iv) Recording the abuse in videos and photographs (although the judge was conscious of the danger of double counting in this regard).

(v) The disparity in ages between the defendant and his victims.

(vi) The element of targeting of his victims and exploitation of vulnerabilities.

(vii) The defendant asked his victims to keep this behaviour secret from others.

(viii) The defendant was on police bail at the time he committed the offences against the second victim.

(ix) The production of the images of the first victim involved a breach of trust.

[28] The judge referred to mitigating factors as follows:

(i) The appellant's guilty plea.

(ii) Confirmation to the victims that they would not have to give evidence in court at an early stage.

(iii) Lack of criminal record.

[29] During this appeal hearing there was more debate in relation to the mitigating factors as the prosecution maintained that the judge had been generous in his articulation of the mitigating factors.

[30] As the judge says it was acknowledged by the prosecution and the defence that their limited authorities for offences which encapsulate the nature of those committed by the appellant particularly over prolonged periods of time where he prayed on vulnerable girls to satisfy his own perverse sexual preferences and where the offending escalated and progressed from touching to oral, anal and vaginal penetration.

[31] Clearly the judge was satisfied that this offending behaviour against both victims was at the upper end of the culpability scale. He reached this conclusion because the victims were young and vulnerable. He also took into account the position of trust in relation to the first victim and the deliberate grooming campaign in relation to the second victim. He said the age gap between the victims and the defendant was substantial. He also said that the offending continued over a lengthy period of time.

[32] The judge had the benefit of victim impact reports which we have also read. These statements are a striking testament to the effects on these two young girls by virtue of the appellant's behaviour. We agree with the sentiments expressed by the judge where he said:

> "Nothing can undo the harm caused by the appellant to each of them, but it is important that the victims understand that none of what happened to them was their fault and that the defendant must carry full responsibility for his adult acts. … Each of the victims had their childhood torn from them by the defendant's behaviour. The impact of the abuse reverberates still for both of them."

Is the sentence manifestly excessive?

[33] As will be apparent from the foregoing, the core argument on appeal is that the effective sentence of 12 years' imprisonment is manifestly excessive. The components of this submission are essentially that the judgment lacked transparency in enunciating his sentence. Also, that the judge must have chosen a sentence of nine years' imprisonment prior to credit for the plea on the Article 16 charges and that this was beyond the range for offending of this nature.

[34] On the first issue which is the transparency of sentence Mr Fahy relied upon *R v McKeown & Han Lin* [2013] NICA 28 and the dicta contained therein at para [27] which reads as follows:

> "[27] This was a case in which the appellant was detected at the property with the cannabis. He was, in effect, caught red-handed. One of the issues debated before us on the appeal was the degree of discount for the plea which had been allowed in the original sentence. As has been

> common in this jurisdiction the trial judge did not spell out in her sentencing remarks to what level of sentence, she was applying the discount and what amount of discount she was allowing. If the appellate process is to work satisfactorily, the sentencing remarks must enable the appellate court to understand why the judge reached his decision. In the interests of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the sentence. Sentencing should be transparent to both the parties and the public.

[35] When a judge imposes any term of imprisonment, particularly one as long as 12 years, it is always necessary for him or her to explain, in simple language, how that term has been calculated. The judge is not required to identify every last plus or minus in the calculation, or to use particular phrases or expressions; sentencing is not a formulaic exercise; and it is an art, not a science. But it is necessary to explain to a defendant, in clear terms, how the overall term of imprisonment has been calculated. Whilst the overall sentencing exercise is clear in terms of the sentences passed for each offence the judge did not specifically record the starting point before reduction for the plea. However, we think it patently clear that the judge was starting at 18 years to reach a final sentence of 12 years. To our mind this would have been clear and obvious to the appellant and his advisors and so the omission is not fatal to the overall assessment.

[36] We are fortified in this conclusion by virtue of the fact that this was clearly a case where maximum credit for the plea was appropriate. The prosecution accepts that analysis. Para [28] of *McKeown & Han Lin* also refers:

> [28] In this jurisdiction the full discount for a plea is generally in or about one third where an offender faces up to his responsibilities at the first opportunity. In appropriate circumstances it can be higher or a non-custodial rather than a custodial sentence may become appropriate. Where, however, the offender is caught in the act the discount is generally reduced because the plea is the product of his being caught rather than his immediate remorse. However, even in such cases, a plea at an early stage can relieve witnesses, vindicate victims, save court time and indicate remorse. In appropriate cases where offenders are caught red-handed the circumstances may justify a discount closer to the full level of discount.

[37] The approach identified above was confirmed by this court at para [66] of *R v Maughan and Maughan* [2019] NICA 66. This decision was upheld by the Supreme Court in *R v Maughan [*2022] UKSC 13 in which the court reiterated the discretion given to sentencing judges in this area and the role of the Northern Ireland Court of Appeal in providing guidance.

[38] In this case we note that the appellant made no comment at interview. However, when the case reached the Crown Court, an intention to plead guilty was indicated at an early stage. This was also a case where the indictment was substantially reduced after a process of discussion between counsel. In these circumstances as Mr Magee conceded in argument, we think that the judge has justifiably applied a reduction of one third to the sentence he would have imposed had the charges been contested. Accordingly, we dismiss the first ground of appeal based on a transparency argument.

[39] The second appeal ground relies upon a totality argument. It is this ground which gains more traction on appeal. By way of preliminary observation, we bear in mind the following uncontentious matters. First, the aggravating features are not disputed and clearly make this a case of high culpability. It is also a case of high harm involving two victims. Second, and again of no controversy in this appeal is the fact that the judge was entitled to sentence consecutively for the campaign of sexual abuse against the two young women at the heart of this case. The only question for this court is whether an effective term of imprisonment of 12 years' duration is manifestly excessive.

[40] Any judge sentencing for more than a single offence needs to have express regard to the totality principle. Of course, in most cases, that is a relatively straightforward matter. But in a case like this, where there were a variety of different offences, committed at different times, it was important for the judge to have particular regard to the overall length of the sentence that he intended to impose, in order to ensure that it was just and proportionate.

[41] The defence submission references *Blackstone's Criminal Practice* 2024 E13.22 when dealing with the application of the totality principle and cites the England & Wales Sentencing Guidelines which comprises two elements:

(a) the overall sentence should reflect all the offending behaviour with reference to overall harm and culpability, together with aggravating and mitigating factors; and

(b) be just and proportionate.

Blackstone continues in the following vein:

> "There are no inflexible rules as to how the sentence should be structured. If consecutive, it is usually impossible to

> arrive at a just and proportionate sentence simply by adding together notional single sentences. Ordinarily some downward adjustment is required. If concurrent, it will often be the case that the notional sentence on any single offence will not adequately reflect the overall offending. Ordinarily some upward adjustment is required."

We adopt these passages.

[42] In this jurisdiction we do not have formal rules on the totality of sentence guidance referenced above. However, judges sentencing in the Crown Court are well versed in the totality principle and the ultimate test which is to reach a sentence just and proportionate in each case.

[43] There is also the concomitant requirement for restraint at appellate level when considering the outcome reached by a sentencing court. In that vein, in *R v Ferris* [2020] NICA 60 this court at para [58] stated as follows:

> "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, ie where the imposition of a custodial sentence is indisputable in principle and the challenge focuses on the duration of the custodial term."

[44] Further, in examining the methodology employed by the sentencing judge we have regard to what this court stated in *R v GM* [2020] NICA 49 at para [36]:

> "[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]."

[45] The case *R v GM* [2020] NICA 49 also discusses the evolution of the law in this area and the fact that reforms were made to reflect the need for appropriate sentencing and deterrence given the rise in this type of offending and society's condemnation of it. Paras [38] and [39] refer:

> "[38] Since then statutory reforms have effected a veritable sea change in the prosecution and punishment of sexual offences. These developments (noted briefly above) began in the jurisdiction of England and Wales with the introduction of the Sexual Offences Act 2003 (the "2003 Act"). This is commonly regarded as the most significant overhaul of the law in this field since the Victorian era. The White Paper which preceded the new legislation contained the following passage:
>
> > 'The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual Offences Act 1956 and most of that was simply a consolidation of 19th century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date.'
>
> The 2003 Act, which came into force on 1 May 2004, created over 50 offences and abolished a series of offences which had become increasingly archaic including incest, indecent assault, buggery, bestiality and gross indecency between men.
>
> [39] The jurisdiction of Northern Ireland followed suit soon after with the enactment of the Sexual Offences (NI) Order 2008 (the "2008 Order"), which came into operation on 2 February 2009. This measure mirrors closely its English statutory counterpart. The parallels between these two instruments are detailed in a helpful schedule in Sexual Offences Law and Practice (Rook and Ward 5th Edition) at 32.75 in a chapter written by His Honour Judge McFarland, the (then) Recorder of Belfast. This valuable treatise demonstrates, inter alia, that this major reform of the law of Northern Ireland preceded the devolution of policing and justice powers to the Northern Ireland Assembly via the Northern Ireland Act

> 1998 (Devolution of Policing and Justice Functions) Order 2010. This serves to emphasise the close alignment between the new statutory regimes in the two jurisdictions. The 2008 Order, in tandem with its English counterpart, namely the Sexual Offences Act 2003, represented the legislature's response to the growing prevalence of this kind of offending, the compelling need to protect the vulnerable, the necessity of greater deterrence and society's revulsion at this type of criminality."

[46] The prosecution maintains, as it did in the Crown Court, that the authorities provided could only give very limited assistance to the judge, who faced a difficult sentencing exercise without any clear guidance from reported precedents in this jurisdiction. The reason for that is, of course, because this is an intensely fact specific exercise.

[47] In this regard we reiterate the comments of the Northern Ireland Court of Appeal in the case of *R v DM* [2012] NICA 36, that the circumstances in which this type of sexual offending occurs vary widely and so it is unwise to set prescriptive or rigid guidelines and we decline to do so.

[48] However, some assistance is drawn for sentencers in conducting an exercise of this nature by the fact that by virtue of the change in the law brought about by the 2008 Order, the maximum sentence of 14 years was imposed to reflect the seriousness of the Article 16 offence which was clearly the headline offence in each case.

[49] Direct comparisons with recent reported English authorities, cited at *Banks on Sentence* (2023) at 226.23 (for breach of trust cases) and 226.39 to 226.43 (for cases of sexual activity with a child), are also problematic because all such authorities are necessarily predicated on the starting points and ranges set out in the England & Wales Sexual Offences Definitive Sentencing Guidelines. In addition, the issues on appeal and therefore the ratios of the judgments all concern how the facts of each offence can be placed in brackets within those Guidelines. As this court has consistently stated, such guidelines are not applicable in this jurisdiction but may be utilised when considering issues of culpability and harm, together with aggravating and mitigating factors.

[50] So far as counts 15-20 are concerned, the prosecution referred the judge to the cases of *Attorney General's Reference (No 8 of 2009) (Christopher McCartney)* [2009] NICA 52 which adopts the sentencing guidelines as set out in *R v Oliver and Others* [2002] EWCA Crim 2766, and *R v Simpson* [2014] NICA 83, which affirmed that the guidelines in *Oliver* continue to apply in Northern Ireland. It follows that the higher bracket identified in *Oliver* applied to Counts 15-20:

> "… Sentences longer than three years should be reserved for cases where (a) images at Levels 4 or 5 have been shown

> or distributed; or (b) the offender was actively involved in the production of images at Levels 4 or 5, especially where that involvement included a breach of trust, and whether or not there was an element of commercial gain; or (c) the offender had commissioned or encouraged the production of such images. An offender whose conduct merits more than three years will merit a higher sentence if his conduct is within more than one of categories (a), (b) and (c) than one where conduct is within only one such category."

[51] Within the factual matrix just described the judge faced a difficult sentencing exercise in this case, without any authorities in this jurisdiction on prolonged courses of conduct of grooming and sexual activity with children.

[52] However from examination of his careful sentencing remarks the judge clearly had proper regard to all relevant factors which the prosecution identified in its skeleton argument as follows:

(a) He found that culpability was high, on the basis that the victims were young and vulnerable, the appellant was in a position of trust in relation to victim 1, and deliberately set out on a grooming campaign in relation to victim 2, the age gap was substantial, and the offences were committed over a period of time.

(b) He also found that harm was high, having regard to the nature of the offences and the victim impact statements, summarised as the victims having had their "childhoods torn from them" by the appellant's actions.

(c) He carefully considered whether the appellant could be assessed as presenting a significant risk of serious harm to the public by the commission of further specified sexual offences, and concluded that he did not, although he did find that he continued to pose a risk to society and young females in particular.

(d) He properly selected a global starting point after taking into account all relevant aggravating and mitigating factors, then reducing for credit for the guilty pleas (although see below for the extent of the reduction). Rather than lacking transparency, this is the approach recommended by this court: see *R v O'Toole* [2016] NICA 59 at paras [11] and [12] and *R v Stewart* [2017] NICA 1 at paragraph [28].

(e) He had regard to the totality principle and properly composed his sentence of two sets of concurrent sentences (Counts 1-8 and Counts 11-20) which he made consecutive to each other.

(f) He chose to make the indecent images counts concurrent with the victim 2 counts, so that they would not be double counted with the aggravating factor

of recording the abuse. He could have made Count 19 consecutive given that it involved neither of the two main victims but did not do so.

[53] To the extent that the judge found three mitigating factors, we disagree. The only mitigating factor was the plea which led to the reduction we have discussed above. While it is a case where the appellant was entitled to the maximum credit of one third for the guilty plea, we reject any inference that the appellant should have additional credit because the victims would not have to give evidence at court. That is to double count. Also, we consider that the absence of a criminal record is a neutral factor in this case (as in the majority of cases) and should not have been recorded by the judge as a mitigating factor.

[54] We must stand back and view the sentence globally to determine if a just and proportionate sentence has been reached. Self-evidently with the maximum sentence of 14 years for the Article 16 offence, the judge did not step beyond the permissible range. However, he effectively applied a nine-year sentence on the headline offences in the case of each victim before reduction for the plea. Does that result in a sentence which is manifestly excessive?

[55] In answering this question, we derive little assistance from the cases that have been put before us that were before the sentencing judge namely *R v DM* [2012] NICA 36, *R v McCormick* [2015] NICA 14, *R v Frew* [2008] EWCA Crim 1029 and *R v Barrass* [2006] EWCA Crim 2744. We need not recite the details of these cases save to say that all of them involve single incident type circumstances where much lower sentences were imposed. The only case of some assistance in terms of range is that referenced by Mr Fahy of *R v GJ* [2022] EWCA 1094 where a ten-year sentence plus a two-year extended term was upheld for familial abuse by an uncle over six years against two victims, one under 13.

[56] Following the hearing the court alerted the parties to a recent decision of the Court of Appeal in England & Wales of *R v ADX* [2024] EWCA Crim 196 and invited further written submission on it. As with all other English authorities which post-date the Sentencing Council Guidelines, the length of sentence is predicated on the brackets within the guidelines. In accordance with the principles expounded in *R v ZB* [2022] NICA 69 (applying *R v GM* [2020] NICA 49), we repeat the fact that this will not assist courts in our jurisdiction on the appropriate length of sentence. We also note that was a reference by the DPP and involved a more serious offence of rape.

[57] However, the authority is of value in terms of the methodology to be applied when dealing with totality in a multiple offence, multiple victim case. We note in particular paras [32] – [37] of the decision which we set out as follows:

> "32. We part company with the judge in relation to the issue of totality. The Sentencing Council issued a revised guideline in relation to totality on 1 July 2023 which the judge was required to apply. We shall assume that he had

it in mind, although he did not at any point refer to the terms of that guideline. The issue of totality arose at two points in the sentencing exercise. First, in relation to each victim the judge was required to ensure that the sentence reflecting all of the offences was just and proportionate in relation to that offending. In our view the judge only just achieved that object in relation to the overall sentence imposed in relation to C1 ie before any reduction to take account of the sentence to be imposed in relation to C2. His conclusion in relation to the appropriate overall sentence in relation to C2 was wrong. It failed to reach a just and proportionate sentence reflecting the many very serious offences committed against her.

33. More important was the second point at which totality fell to be considered, namely in assessing the appropriate sentence on the indictment as a whole. The judge reduced the sentence in relation to each victim by two-and-a-half years "to reflect totality of the overall offending involving both victims." The overriding principle of totality, as identified in the guideline, is that the overall sentence must "reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender and be just and proportionate." The guideline sets out the general approach to be adopted. There are three relevant bullet points:

> '1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
>
> 2. Determine whether the case calls for concurrent or consecutive sentences. When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate.
>
> 3. Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.'

34. Consecutive sentences will generally be appropriate where, as here, there are separate victims

against whom quite separate offences are committed over different periods. The guideline concludes:

> 'Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.'

35. In this case the judge adopted the approach of imposing a lead sentence in relation to each victim. We do not criticise that approach in the context of this case. In terms of the court order it is recorded that he imposed consecutive sentences in relation to the different victims. That is not what he said in the course of his sentencing remarks. The sentence imposed on any offender is the sentence announced in open court by the judge. Had he imposed consecutive sentence, that would have been the proper course to take given the facts and circumstances of this case.

36. Where the judge fell into error was in the extensive downward adjustment he made in relation to the overall sentence in relation to each victim. His sentence had to be just and proportionate in relation to each victim. It had to reflect all of the offending behaviour. The judge in order to do that had to make an assessment of the proper sentence in relation to each type of offending the offender committed. He failed to so that. For instance, in the case of C2 he referred only to the sentence in relation to the offence of rape. He did not make any reference to the serious offences of assault by penetration. It may be that his failure to do that led him into the error which we have identified.

37. Given that the total sentence had to reflect all of the offending behaviour, we are satisfied that it required the judge to make only a modest adjustment to the lead sentence appropriate in relation to each victim. A simple addition of the two sentences we have concluded ought to have followed after allowing for a reduction of 20% from the sentences after trial for the pleas of guilty would lead to an overall sentence of 19 years 10 months. That assumes that the sentence in relation C2 (13 years six months) would run consecutively to the sentence in respect of C1 (six years four months). Some adjustment to that overall sentence

> would be required to ensure that the total sentence is just and proportionate. The extent of the adjustment would only be modest. We emphasise that this was serious offending against two different young children of the family. It was successive, one child being abused after the other. The series of offences committed by the offender required a very substantial period of imprisonment."

[58] There is not a direct read across to this jurisdiction. However, without suggesting an unduly mechanistic approach, we provide some guidance for our jurisdiction which we hope will assist sentencing judges when dealing with multiple offence, multiple victim cases in future as follows:

(i) Consider the sentence for each individual offence and consider identifying a headline offence.

(ii) Determine whether the case calls for concurrent or consecutive sentences. When sentencing for multiple offences a combination of concurrent and consecutive sentences may be appropriate.

(iii) Consecutive sentences will generally be appropriate where there are separate victims against whom quite separate offences are committed over different periods.

(iv) Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole and decide whether any downward adjustment is needed to reflect totality.

(v) Apply an appropriate reduction for a guilty plea.

[59] Without the benefit of this guidance the judge in the instant case has in fact applied the principles we highlight in large measure although in a different order. Notwithstanding this he adopted the correct approach to the calculation of sentence, namely the identification of a lead offence for each victim for which a commensurate sentence was determined which reflects the totality (including the repeated nature) of the offending against each victim. We agree with the prosecution submission that the judge in the present case clearly avoided the error made by the sentencing judge in *ADX,* as identified at para [36] cited above.

[60] Whilst the judge did not expressly identify a notional sentence before a reduction for totality, we do not consider that the approach taken in the present case rendered the sentencing process either opaque or illogical. This was a difficult and complicated sentencing exercise, and the judge did not have the benefit of the guidance which we have now provided. In any event a failure to identify the notional sentence before totality, does not, of itself, render a sentence manifestly excessive

because the overarching question is whether the ultimate sentence reflects the totality of the offending.

[61] Turning to the overarching question, this case involved a course of conduct involving a myriad of different types of sexual offending. The only factor that is perhaps missing is threats of violence or additional coercive behaviour which would bring the sentence into an even higher bracket, such as in *AGs Ref [2017] Re Armstrong* [2017] EWCA Crim 1598 which was the case referenced by Mr Magee where a 24 year starting point was applied before reduction for a plea brought the overall sentence to 16 years eight months for highly manipulative behaviour which also involved blindfolding, tying up, gagging of victims and use of a whip.

[62] In this appeal the ultimate question which we must determine is whether, standing back, the overall sentence imposed is just and proportionate. The only point of possible substance is whether the judge has truly applied the totality principle. In this regard Mr Fahy submits that the judge seemed to apply the totality principle at too early a stage in his judgment. We reject that argument which is based on a mechanistic read of the sentencing remarks and ignores the fact that the judge clearly considered totality.

[63] Mr Fahy accepts that the judge was entitled to apply the highest sentence to the headline offences for each victim in this case in relation to the Article 16 counts. We agree because in doing so the judge was clearly cognisant of all of the other offences committed against each victim for which he sentenced concurrently. It would have been wrong to simply add up all of the sentences and so the judge made all sentences concurrent with the headline offences under Article 16. There is nothing wrong with that methodology when multiple offences are involved.

[64] In truth, the real complaint is that in adopting this approach the judge applied too high a tariff to the headline offences and that the judge appeared to simply add the headline sentences together for each victim which was wrong. We will deal with each of these points in turn.

[65] First, we will deal with the six years applied to the headline offences for each victim. This was clearly a sentence reached after reduction for the plea. This was also a sentence that for both victims was clearly designed to reflect a range of other serious offending over a wide spectrum of sexual activity including sexual touching, inciting sexual activity, grooming, voyeurism, and making indecent photographs. The appellant also had a relevant conviction for indecent images and we consider that the judge was generous in his analysis of mitigation.

[65] Mr Magee has described the six-year sentence for each headline offence as "stiff" although just and proportionate for the myriad offending. The question for us is whether the final sentence was manifestly excessive. Having considered this question carefully we find that six years after reduction for the pleas to effectively cover two offences of this nature involving penetration against victim one and all of

the other serious sexual offending was entirely appropriate. In relation to victim 2 there was only one Article 16 offence and so we think there is a valid argument that the final sentence could have been slightly reduced to five rather than six years to cover that offence and the other serious sexual offending against her.

[66] *Blackstone* which we have quoted at para [40] herein cautions against adding sentences together in an individual case which is undoubtedly good advice. However, in this case we think that the judge took a holistic view, cognisant as he was of the totality principle which he expressly referred to. To our mind the judge clearly decided what the overall sentence should be with totality in mind before he applied individual sentences to each offence and each victim to reach an end result which was just and proportionate.

[67] The opinion of this court is that the overall sentence in this case should have been in the region of 11-12 years after the maximum reduction of one third for the plea. Such a sentence is just and proportionate to reflect the persistent and serious nature of the offending which escalated to penetrative offences against each victim. We reject Mr Fahy's submission that a much-reduced sentence should have been imposed.

[68] Whilst the judge has opted for the higher end of the range, applying the requisite modicum of appellate restraint we do not consider that we should interfere with the sentence imposed even though a slightly reduced sentence would also have been appropriate. It follows that we do not consider that this was a manifestly excessive sentence given the particular facts of this case which involved sustained sexual offending against two victims, high culpability and high harm.

Conclusion

[69] We dismiss the appeal for the reasons we have given.