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	Delivered:	22/03/2024

IN HIS MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

—————
THE KING

v

JONATHAN PLAYFAIR
—————

Mr C McCreanor KC with S Mullan (instructed by McCallion Jones Solicitors) for the
Applicant
Ms R Walsh KC with Mr Purvis (instructed by the Public Prosecution Service) for the
Crown

—————
Before: Keegan LCJ, Treacy LJ and Horner LJ
—————

Nothing should be published which would identify the complainants in this case. The complainants are entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

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

Introduction

[1] Following the refusal of leave by the single judge the applicant renewed his application for leave to appeal the effective overall sentence which was an extended custodial sentence (“ECS”) of six years’ imprisonment and four years extended licence. The overall sentence was arrived at in respect of counts of sexual offending and related counts including blackmail against three teenage schoolgirls. These counts are contained over three indictments. The applicant pleaded guilty to all counts.

[2] We have attached as an appendix, agreed by the parties, a document that sets out the sentences imposed by the trial judge in respect of each of the counts over three different indictments.

[3] The methodology adopted by the trial judge in constructing the overall sentence was to identify the headline offence(s), examine the totality of the offending to take account of the scale of the offending and consider all the aggravating and mitigating factors (excluding discount for the plea). By this process he arrived at a starting point of nine years. He then allowed full discount for the plea and reduced the sentence to one of six years. Having made a determination of dangerousness, a finding which is not challenged, he imposed an ECS with a custodial period of six years and four years extended licence. He also imposed a Sexual Offences Prevention Order (“SOPO”) for 10 years.

[4] A determination of dangerousness may only be made when the requirements of Article 14(1) and (2) of the Criminal Justice (NI) Order 2008 (“the 2008 Order”) are satisfied. These provide that if a person is convicted of a specified offence and the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences by the offender it “shall” impose on the offender an ECS. Once the finding has been made, the court does not have a discretion to impose a determinate custodial sentence (“DCS”).

[5] The trial judge identified the blackmail offences as the headline offences. It is now correctly accepted by both the prosecution and the defence that the judge did not have the power to impose an ECS in respect of the ‘headline’ blackmail offences because blackmail is *not* a specified offence and an ECS cannot therefore attach to it. However, most of the other counts on the indictment are for specified offences. These offences are:

- Distribution of an indecent image of a child, contrary to Article 3(1)(b) of the Protection of Children (NI) Order 1978.
- Possession of an indecent image of a child contrary to Article 15 of the Criminal Justice (Evidence etc) (NI) Order 1988.
- Sexual activity with a child, contrary to Article 16(2) of the Sexual Offences (NI) Order 2008.
- Causing or inciting a child to engage in sexual activity contrary to Article 17(1) of the Sexual Offences (NI) Order 2008.
- Sexual communication with a child, contrary to Article 22A of the Sexual Offences (NI) Order 2008.

Once the finding of dangerousness was made the trial judge was obliged, by virtue of Article 14(1) and (2) of the 2008 Order to impose an ECS.

[6] The net effect of the foregoing is that (i) the trial judge was not empowered to impose an ECS for the blackmail offences; (ii) nor was he empowered to impose a DCS in respect of the specified offences to which attaches the finding of dangerousness generating a mandatory requirement to impose an ECS.

[7] It appears therefore that the trial judge attached the right form of sentence, the ECS, to the wrong offences namely, the blackmail offences which are not specified and to which an ECS cannot be applied. It is unfortunate that no one noted the errors identified above and that it only emerged by way of a late application to amend the Notice of Appeal.

[8] In view of the above, it is agreed that court must adjust the sentences so that the required ECS attaches to the specified offences in line with the legislative scheme. The clear function of the court is to consider the length of the custodial period and whether the extended licence of four years requires any adjustment.

[9] The judge selected a global starting point of nine years and discounted it by three years for the guilty plea resulting in a custodial period of six years and an extended licence of four years. No issue is taken with the finding of dangerousness or the imposition of an ECS, nor with the discount allowed for the plea. This appeal therefore focussed principally on the starting point of nine years with the applicant contending that the overall sentence was manifestly excessive.

[10] To evaluate this claim we set out below a broad outline of the offending which is across three indictments and involves three victims all of whom were school children at the time. We also set out the aggravating and mitigating factors identified by the trial judge.

The offending in brief

[11] The first Bill of Indictment relates to 15 specimen counts, five in each category. The circumstances of the offending are that the applicant was found to have 138 images and 21 videos of a 16-year-old girl, V1, on his phone following a search of his address on 4 May 2020. Of these, 19 images and 13 videos were Category A, 23 images and six videos Category B and 96 images and two videos Category C. Category A encompasses images involving penetrative sexual activity, sexual activity with an animal or sadism. This was previously Categories 4 and 5. Category B encompasses images involving non-penetrative sexual activity which was previously under categories 2 and 3. Category C encompasses other indecent images not falling within A or B which was previously Category 1.

[12] The second Bill of Indictment concerns a threat made in August 2018 by the applicant to V2, aged 17, who had previously sent him an image of her breasts, that he would upload this image to Facebook unless further explicit images were sent. The applicant then uploaded the image, tagging V2.

[13] The third Bill arises out of various offences committed between June and November 2018 against V3. This victim was aged 13 or 14 at the time. The applicant had arranged to meet at [x] Leisure Centre. The applicant had sexual intercourse with her in a room at the leisure centre and subsequently threatened to tell her mother what had happened unless she sent explicit images to him, which she then did.

[14] In a subsequent incident, the applicant covertly recorded V3 performing oral sex on him. This video was sent to the victim's mother and sister and also came into the possession of her classmates.

[15] It is important to note two further matters. First, the 2020 offending described in the first indictment occurred whilst the applicant was on bail for the other offences. Secondly, the evidence revealed that the applicant continued to attempt to contact V3 whilst on bail.

The offending in detail

First Indictment: No.21/059533

[16] This consists of 15 counts of possession of an indecent image of a child ("IIOC"), contrary to Article 15(1) of the Criminal Justice (Evidence etc) (NI) Order 1988, all dated 4 May 2020.

[17] On Thursday 12 March 2020 an acquaintance of the applicant attended Musgrave PSNI station to report that the applicant had breached his bail conditions by being in possession of a mobile phone with internet and camera facilities.

[18] As a result of the information provided to police, in relation to the content the acquaintance had seen on the applicant's phone, police conducted a search of the applicant's address on 4 May 2020, where he was located, and his phone was seized.

[19] An initial digital examination dated 15 September 2020 identified a specimen total of 15 videos and images, comprising 5 for each Category A, B and C, representative of the total number of IIOCs and forming the evidential basis of the counts on the indictment; as advised in a letter to the defendant's representatives by letter of 21 July 2021.

[20] The total number of images and videos was follows:

Category A - 19 images and 13 videos

Category B - 23 images and 6 videos

Category C - 96 images and 2 videos

Total 138 images and 21 videos

[21] The Investigating Officer identified V1 as the sole subject of this material who was 16 years old at the time of the offences. The applicant was also identified in some of the images from his facial features.

[22] The various sexual activities identifiable from the material were put to the defendant at interview on 3 December 2020. These included images of the female in underwear, and images of her breasts and bottom, in posing positions; acts of oral sex, penetrative sex, digital penetration, kissing and masturbation.

[23] When interviewed about these matters the applicant made no comment in response.

Second indictment: No.21/007938

[24] The second indictment contains three counts:

Count 1 Blackmail, contrary to section 20 of the Theft (NI) Act 1969.

Count 2 Possession of an indecent image of a child contrary to Article 15(1) of the Criminal Justice (Evidence etc.) (NI) Order 1988.

Count 3 Distribution of an indecent image of a child, contrary to Article 3(1)(b) of the Protection of Children (NI) Order 1978.

Facts

[25] On 11 August 2018, police received a report from the injured party V2, who informed police of the history of her friendship with the applicant through various platforms originating on a Facebook account '*Jonathan JB Playfair*' commencing in 2017. These exchanges were described by her as occasionally flirty, but mostly friendly.

[26] Shortly after the commencement of her exchanges with the applicant, she received a friend request from a person who purported to be 'JH' on Facebook. We have anonymised the actual named used. From the commencement of her chat exchanges with JH, the content was of a sexual nature. JH repeatedly made requests for an image of her exposed breasts to which she eventually agreed, and the injured party noted that he had saved the image and taken a screenshot. She then requested JH to delete the image which he refused to do. Thereafter there was no contact for several months with either account, until 10 August 2018. On that evening, both the applicant and JH contacted her on Facebook regarding the image. It was at this point that the injured party first suspected that the applicant and JH accounts were operated by the same person.

[27] The following day, 11 August 2018, JH communicated to the injured party that unless she sent further explicit pictures of herself, he would upload the original image of her exposed breasts to Facebook. Both the Playfair and JH accounts sent through the image to reiterate the threat. The injured party challenged both to delete the image, but this was refused. As well as the JH blackmail demand, she also received voice note messages from Playfair alluding to him going into Snapchat with the picture.

[28] Subsequently, she was notified through her Facebook account that she had been tagged in a picture, which was the original picture of her exposed breasts and was posted on the JH Facebook page. She removed the tag from the picture and attempted to delete it, but the request was unsuccessful; thereafter she reported the matter to Facebook and contacted police.

[29] Police investigated the information provided on the two accounts from the injured party, and further information received from the National Crime Agency. It was established at the time of the demand, both accounts were being accessed from an identical IP address, which was traced to a Virgin Media account in the name of the applicant's mother and home address.

[30] On examination of the applicant's phone it was found to contain the injured party's phone number, saved as a contact using her first name, and examination of the injured party's phone found the applicant's contact details and screenshots taken by the injured party V2 at the time of the image and history of her contacts with the two Facebook accounts 'Playfair' & 'JH.'

[31] The injured party V2 was 17 years old at the time of these events. The date of birth provided on her Facebook profile indicated that she was 18 and she had not informed the applicant otherwise.

[32] The injured party in her statement has detailed how the episode has made her upset and nervous and fears that the picture will be posted to other people and put online again. This has caused her embarrassment, and her anxiety was heightened by subsequent contacts from the applicant.

Third Indictment: 21/089414

[33] On this indictment the applicant pleaded guilty to:

Counts 1-3 Three offences of sexual touching of a child by way of penetration between 1 June and 2 November 2018, contrary to Article 16(2) of the Sexual Offences (Northern Ireland) Order 2008.

Counts 4-5 Two offences of causing or inciting a child to engage in sexual activity between 1 June and 2 November 2018, contrary to Article 17(1) of the 2008 Order.

- Count 6 Possession of an indecent photograph of a child on 19 November 2018, contrary to Article 15(1) of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988.
- Counts 7-8 Two offences of sexual communication with a child between 1 June and 3 November 2018, contrary to Article 22A of the Sexual Offences (NI) Order 2008.
- Counts 9-10 Blackmail between 1 June and 2 November 2018, contrary to Article 20 of the Theft Act (Northern Ireland) 1969.
- Counts 13-14 Disclosure of private sexual photographs and films with intent to cause distress between 1 October 2018 and 1 October 2019, contrary to section 51(1) of the Justice Act (Northern Ireland) 2016.

The remaining counts were left on the books not to be proceeded with.

[34] All offences concern V3 as the injured party. She was aged 13/14 at the time of the offences. The applicant was aged 19 at the material time.

The Facts

[35] We include here considerable detail of the facts grounding the offences in the third Bill of Indictment. This has been done, in part, so that educators and influencers of the young and, indeed, the young people themselves, may have available to them real-life examples of the type of social media contact that will offend the criminal law and the serious consequences that can ensue for perpetrator and victim.

[36] The applicant and V3 met through a mutual friend. This friend knew the applicant was 19 years old and states that she told him that V3 was 14 years old, coming 15. V3 was actually 13 and turned 14 close to the start of the indictment period. She stated that the applicant became aware of her age.

[37] In her ABE interview carried out on 14 January 2019, V3 explained that she met the applicant on a number of occasions and after a couple of weeks, they went to Lisburn leisure centre as it was cold outside, and they ended up in the seating area for the pool. They went to a small room and Playfair sat on a chair and pulled her towards him and asked would she have sex with him. She stated that he pulled her trousers down, he pulled his trousers down, placed her on top of him and had sex with her. She said that it lasted about five minutes and it felt sore and stingy to her afterwards. She was 13 years old at the time. This is count 1.

[38] Subsequent to this, she said the applicant sent her a photograph of his penis and told her to send a picture back. He told her that if she did not, he would text her

mum. He asked her to send a photograph of her vagina which she sent. She was aware that he took a 'screen shot' this image from Snapchat and then said that he would tell her mum that she had sent photographs. She described that she felt intimidated as he kept asking her to do stuff that she did not want to do such as send photographs of herself naked. She described another occasion that the applicant sent a photograph of a penis to her and asked her to send one back. When she declined, he said if she did not, he would text her mum again. She sent a picture of her vagina back to him describing that she was wearing pants in the image, but part of her vaginal area could be seen. This is part of the factual basis of the incitement to engage in sexual activity and sexual communication charges at counts 4, 7 and 8 respectively.

[39] At some point, V3 tried to break up with the applicant but said that he turned up at her school and they started talking again. She said the next time they were out, they were walking down the Lagan and she had oral sex with him in some bushes near the Civic Centre. This is count 2. When she got home, he sent her the non-consensually filmed video that he had taken of her performing oral sex. This footage is the indecent image referred to in count 6. She asked him to delete it, but he refused. She said she was upset, and she stopped talking to the applicant in and around this time.

[40] A couple of days after this she started being contacted by a Facebook profile in the name of ['MG'] asking her to stay away from her boyfriend, ['J']. This profile eventually sent V3 the film of her performing oral sex on the applicant through Facebook. She was aware that this profile had also contacted her Mum saying that V3 had been sleeping around. V3 and her mother were not aware but subsequent investigations demonstrate that it was the applicant who was also operating this Facebook account. The video is the subject of the possession of an indecent image at count 6.

[41] V3 met with the applicant on other occasions and, on one of these, they had sex for a second time at the leisure centre. Again, she said that he pulled her shorts down and had lowered his own trousers. He pulled her on top of him and they had sex. This is count 3.

[42] At some point, V3's mother became aware of messages being sent to her daughter by the applicant and her mother contacted him. However, in her ABE interview, V3 refers to the applicant calling her mobile telephone using 'no caller ID' and leaving messages asking her to call him. As a result of this, V3 changed her telephone number. It was in and around this time, V3 became aware that a girl in her class had received the footage of her performing oral sex on the applicant and, within a short time, a number of people in her class had also received it. In relation to the dissemination of the video amongst the class, there is no evidence that the applicant sent it to each individual. However, it is clear that in addition to sending it to her mother and sister, he sent it to at least one person outside of the victim's family leading to its wider dissemination in her class. (Counts 11 and 12). V3 was

also contacted by a Facebook profile in the name of James who sent her the video. She later found out that this was a fake account as the photograph was of someone else that she knew. She did not, however, realise it was the applicant who was actually operating this Facebook account.

[43] Despite this victim changing her telephone number, the applicant was able to get her new telephone number and continued to call her. Telecommunications data was obtained as part of the investigation, and this is addressed below. One aspect that she described was that the applicant would take her telephone when they met and would keep it. He did not give a reason for taking her phone, but if she did not give it to him, he would say that she must be hiding something. He could not access her phone, however, as he did not know her password.

[44] A further ABE was carried out on 23 April 2019. She was asked if she had access to the applicant's social media accounts (as he had suggested in his first police interview) and she said that she did not.

[45] V3 was using a telephone with a number ending 052. On 18 December 2018, she received 70 calls from a withheld number. This was after she had first gone to speak to police on 14 December 2018. She obtained a new number (ending 193) and continued to receive numerous calls, including 21 between 1 and 4 April 2019. V3's telephone was examined as part of the investigation. The messages that were retrieved show:

(i) On 29 September 2018, the applicant asks V3 if she had been cheating on him and says:

"I hope the fuck u haven't been cheating on me from we have been going out cuz see if u have am acc texting your mum and I'll tell her it's all true xx."

(ii) On 30 September 2018, the applicant texts:

"if I find out your lying she won't be the only one texting your mum just saying I stunk up for u and this are you pay me xx."

(iii) On 1 October 2018, there is a message from V3 in which she asks the applicant why he would send nude pictures of her to her mum. She concludes saying that she wants to kill herself and cannot cope with her life like this. On the same day, she sends messages saying that she thinks they rushed it (a sexual relationship) and she wished she had never done anything like this. She messages:

"... I'm not in the right place rn cuz I'm really not well u always threatening me with my nudes and telling me that

your gonna text my mum how do u think that makes me feel x”;

- (iv) The messages continue on the same evening with the applicant saying he wants the fighting to stop. The victim states that she feels like a tramp, and she would be so ashamed if her mum or dad found out and she has let her family down. The applicant messages that he will not “use” her nudes because he does care about her. There is a message from her referring to “M” texting her mother and asking if she has said she will leave her and her mum alone. The applicant replies stating, “Yeah she said if u sent me a picture of u in your underwear, she will but I know you won’t do that xx.” The applicant persists, stating, “she wants you to send me a picture then she will or she said she going to keep it up xx.” V3 replies, “Just say I sent u one or something or I acc will kill myself omg xx.” He replies, “she won’t believe me ... and she said something about ss me on a call and she wants a video of us talk dirty or she’s going to text everyone she can find xx.” This message forms the basis for the blackmail at count 9;
- (v) On 8-9 October 2018, the applicant messages her that he is going to the police station, and she asks him not to. He states that he is going to give them her name. She messages, “R u happy that I wanna die I hope your proud x.” He replies that he does not care, and he might as well go to jail and drop himself in it as he did this all for nothing. On the evening of 9 October, he tells her he is sitting in the car outside the police station.
- (vi) On 13 October, the applicant accuses her of lying about having contact with someone on Snapchat and states, “... don’t know why your lieing but sweet am just going to drop myself in it with your mum right now then that’s it x.” Later that evening, he messages “u have 5 minutes to ring if not then acc going to be a dick again xx.” V3 messages that it is blackmail and the applicant then messages, “times up x”, “your acc going to make me start” and “u really don’t want me to start and send this x” (Blackmail count 10)
- (vii) The message continues on 14 October 2018 with the applicant stating, “be dirty one last time and I swear over anything I will always be happy for u x.” She replies that she does not want to do anything like that again until she is 16. He persists in a further message asking “to do both” and says it won’t take him long to ‘cum’ followed by, “if I want this to work just help me xx.” (Incitement to a child to engage in sexual activity - count 5)
- (viii) On 16 October, the applicant messages, “send me a picture x” and, later, “cuz wen am home your in big trouble I can’t lie to your mum x.” V3 states that if he texts her mum she will go to police and the applicant replies, “you go to the police I’ll go to your mum now if your being like that x.” (Blackmail count 10)

- (ix) On 17 October 2018, V3 messages that she cannot believe he sent 'that' to her mum and the applicant replies, "I haven't sent it yet but am getting ma shoes on and going to the police x."
- (x) On 19 October 2018, the applicant messages V3, "I'll be outside your school the day bestie xx." V3 asks why and the applicant replies, "I have had enough of u your mum's getting fucking texted can't believe u xxxxxx"..."see fucking out no more being nice had enough not getting me no were xxxxx."

[46] On 18 February 2019, V3 made a witness statement in which she set out that in February 2019 she had been added to a group chat on Snapchat which had about 20 individuals in the group. She noticed that one of them was the applicant's profile name. He had bail conditions not to contact her but started to send her messages saying, "Doggy shut up trying to get me done for rape. If u got raped u wouldn't be another boy wouldn't even let u kiss u never touch u now leave." He then posted a photograph of himself with the word "Streaks" in front and sent a further message saying, "[V3] I'll be at your door after." She immediately blocked everyone in the group so she could not receive any more messages and she was terrified he would come to her door.

[47] On 29 March 2021, V3 made a further witness statement in which she stated that around the time that she made a report to the police she had been receiving telephone calls from a withheld number for a number of months but had not answered them. Her sister noticed her telephone ringing and told her to answer the phone. She did and put it on loudspeaker. She recognised the caller's voice to be the applicant and he said, "Good try getting the police to my door. It didn't work. Better luck next time." She said she felt scared and upset by the call.

[48] V3's mother made a statement. She stated that her daughter turned 14 in June 2018 and from around that time her behaviour changed. She was aware that her daughter had a boyfriend called Jonathan, but she did not know much about him. On 13 September 2018, she received a Facebook message from "Jonathan Playfair." The first message said that there was something that her daughter had not been telling her that she had a right to know and asked her to telephone a number ending in 179. She received eight further messages from this account until 2 November 2018 but did not reply. On 14 September 2018, she also received a message from a profile name, "MG." The first message asked her if she was V3's mum and was she aware if she went out with someone. On 16 September 2018, she received a further message, "Your daughter is a dirty cunt sending nudes to people" and "Makes me sick." Her mother spoke to her daughter who initially told her that she had not done anything but then said that she had had sex with Jonathan. The messages from MG continued and on 2 November 2018, this profile sent her a video of her daughter performing oral sex on a male. She was so upset that she replied saying that she was going to the police (count 13). The evidence demonstrates that 'MG' was actually the applicant.

[49] Her mother also contacted the profile Jonathan Playfair and said to delete any videos or pictures of V3, or she would go to the police. The applicant replied saying he had not got any pictures and asking what was going on as he has not done anything. He denied taking photos or videos of her daughter. Her mother asserted that he had taken videos and pictures as her daughter had told her. The applicant said that her daughter had sent them (to him) and he did not ask (for them). When her mother said the video he had taken had been sent to her, the applicant replied, "She told me to take that video plus she kept saying she was always horny on the phone and she wanted me to always make her cum." He continued that V3 won't talk to him and he has lost a "really good friend" and he asked what she had said about him.

[50] The victim's sister received a message containing footage on Facebook from a profile that she did not know. She realised it related to her sister and so did not watch it. The same footage was sent twice more on the same day (count 14).

Arrest and Interviews

[51] The applicant was arrested on 19 December 2018. At that time, his telephone was seized and in June 2019 a further telephone was seized. The applicant was first interviewed on 19 December 2018. He said he knew V3 through her cousin stating he met her on 20 June 2018. He said that they spoke on the phone a couple of times and then V3 added him on Facebook and started texting him. He gave her his number and she kept ringing and texting and 'didn't give up.' He said he had been in a relationship with her for about two months in the Summer. He said the relationship was good although there were lots of arguments. He said he thought she was 17. He said she told him this as did her Mum and all of her friends, and it was on her Facebook. He was asked if he had any sexual contact with her and he said no. He then said he made a video and that was it. He said that she had initiated the contact. He said that she gave him a 'blowjob' and got him to hold the phone. He said he recorded it on her telephone, and she then sent it to him. He said he deleted it but claimed she kept sending it to him. He said she has access to his Facebook and Snapchat and was sending pictures. He denied sending the recording to anyone else.

[52] The applicant was asked about 'MG' and he said that this was a person he met on holiday in Spain who now lives in Belfast. He said he was close and would see her a lot. He said he knew MG and V3 were 'slobbering' at each other. He denied sending the video to MG. He said V3 had access to his phone and would add him to group chats.

[53] He maintained they did not have sex but confirmed oral sex. With regard to the latter incident, he said that she pulled him into the bushes, untied his trousers and got down on her hands and knees. She handed him her phone and asked him to video it. He maintained he was not aware of the video being sent to anyone else, including V3's mother. He said that she told him she was horny all the time and

would talk dirty. He said that she told him to look at his Snapchat and she had sent him a recording of her sitting playing with herself.

[54] A further interview was carried out on 21 July 2020. At the outset of this interview, his legal representative indicated he was not content with disclosure and had advised the applicant to answer no comment. During the interview, the messages that had been found between him and V3 were read out including those that referred to having sex with each other.

Telephone Evidence

[55] In addition to the messages referred to above, the applicant's telephone was examined and footage of V3 performing oral sex on him was located. As it depicts penetrative activity, it is Category A. A constable in the cyber support unit was able to ascertain that the file had been made on 16 July 2018 by the applicant's phone at 17:21 hours and was 35 seconds long (count 6).

[56] Investigations with Facebook demonstrated that the same IP address was used in relation to a Facebook profile in the applicant's name Jonathan Playfair, in the name 'JH' and also in the name 'MG.' This IP address was traced back to the applicant's home address. It is clear that the applicant was operating each of these profiles.

[57] Call data was obtained for the telephone number attributed to the applicant (ending in 179). This demonstrated that between 18 December and 19 December, the applicant telephoned V3 approximately 170 times and between 28 December 2018 and 25 May 2019, there were 438 calls.

Applicant's personal circumstances

[58] The trial judge considered the applicant's personal circumstance in some detail. The applicant was 23 with a complex background which is laid out in the pre-sentence report. He lived with his grandparents prior to being sentenced to imprisonment. He left mainstream education in primary 4 and moved to a Special School. His education was fragmented, and he was moved between special schools. He was diagnosed as having "a moderate learning difficulty and behavioural problems." Probation and Trust services have attempted to have assessments carried out, but the applicant has declined to engage. To some extent, the judge considered this deficit is overcome by the reports of Dr Bownes and Dr Davies. He noted that the applicant has documented references to moderate learning difficulties; has developmental delay in literacy and numeracy as well as speech and language. He appears to have an IQ of 54. He also noted that the applicant has no employment history, reports emotional health difficulties with self-harm and that he is under the SPAR regime in HMP Maghaberry.

[59] The judge regarded as telling the sexual assessment portion of the pre-sentence report, noting the following. The applicant reports few sexual partners, one of whom is his first partner, and the mother of his child. He met this schoolgirl in [x] School, and she has learning difficulties. PBNI advised that there was a non-molestation order (“NMO”) in place due to allegations of sending messages to this child through numerous social media accounts. This NMO was later removed. The applicant describes one of his “relationships” as having been with the 13 year old (V3) victim on Indictment 21/089414. The judge sets out the following comments from the author of the pre-sentence report:

“The court may have concern at his continued minimisation of his deviant behaviours and subsequent targeting of vulnerable female teenagers to meet his sexual needs.”

The applicant tells the author of the report that he does not consider himself “guilty” and pleaded guilty upon advice. The author comments:

“It is clear, that Mr Playfair is not willing to accept any level of responsibility for the sexual offending against [V3] and instead engaged in victim blaming behaviour. He did not show any insight into the pathway to offending, nor the motivation behind such offending.”

[60] It is further noted in the PSR that the victim, V1, in the images forming the basis for Indictment 21/059533 is known to police and Social Services as a highly vulnerable individual.

[61] The judge noted that the applicant has some 21 previous convictions but none of these relate to sexual offending or blackmail.

[62] He also noted that the applicant was deemed to be a high risk of re-offending and presented a significant risk of serious harm to the public so that the dangerousness provisions under the Criminal Justice (NI) Order 2008 were clearly in play.

The judge's sentencing remarks

[63] The judge understandably described this as a “highly complex sentencing exercise”:

“There are three separate Bills of Indictment involving three separate victims. There are overlapping criminal behaviours. Some of these behaviours have sentencing guidelines and some do not. So far as I am aware, there is a paucity of guidance on Blackmail outside of the

paramilitary context (See *A-G Ref (No. 5 of 2004) R v Thomas Potts* [2004] NICA 27) in this jurisdiction. There is certainly little on online “sextortion.” In addition, the defendant’s own issues together with the issue of “dangerousness” under the 2008 Order present significant difficulty”

[64] He referred to *A-G Ref (No.8 of 2009) R v McCartney* [2009] NICA 52 where the Court of Appeal considered the sentencing guidelines applicable to the downloading, making and possession of indecent images of children where Morgan LCJ stated:

“[5] The downloading or possession of a large quantity of material at levels 4 or 5 is a serious offence and for an adult offender without previous convictions after a contested trial a custodial sentence of between 12 months and three years will generally be appropriate. The Sentencing Guidelines Council in England and Wales has now suggested a slightly lower range, but we see no reason to depart from the range set out in *Oliver*. The age of the children involved may be an aggravating feature and assaults on babies or very young children are particularly repugnant because of the fear or distress they may have induced in the victim. The manner in which the images are stored on the computer may indicate a high level of personal interest in the material. Distribution of material at any level will be a serious aggravating factor and distribution of images at levels 4 or 5 would justify sentences in excess of three years. Where the distribution is for commercial gain or by way of swapping substantially increased sentences are appropriate.”

[65] The sentencing judge noted the offending in *McCartney* was the online downloading of images. The offences to which this applicant pleaded guilty he did not consider comparable. On the contrary, in this case, he said that the applicant had:

“... direct agency in bringing the images into existence through coercion and blackmail. Accordingly, where the possession of images are produced or obtained through coercion and possessed thereafter or disseminated it seems proper to regard them as an aggravating factor in the overall assessment of totality”

[66] We are in agreement with the judge that where the possession of images are produced or obtained through coercion and thereafter disseminated that it is proper to regard them as serious aggravating factors in the overall assessment of totality.

[67] The judge then considered the sentencing guidelines in relation to contact offences.

[68] In *R v DM* [2012] NICA 36 the Court of Appeal considered sentencing guidelines for the Article 16 offence of sexual activity involving penetration with a child between 13–16. Having noted at para [11] that consecutive sentencing was appropriate the Court of Appeal then reviewed decisions from the Court of Appeal in England and Wales:

“[12] There are three decisions of the English Court of Appeal which are helpful in determining the appropriate range in a case of this type. *R v Corran* [2005] EWCA Crim 192 was a case in which the court gave preliminary non-prescriptive guidance in connection with the new offences created by the Sexual Offences Act 2003. The court concluded that earlier authorities suggesting a sentence on a guilty plea of 15 months’ imprisonment where there was consensual sexual activity between a man in his twenties and a girl under the age of 13 would remain of assistance. In *R v Barrass* [2006] EWCA Crim 2744 the court took *Corran* into account in imposing a sentence of 18 months’ imprisonment on a plea where the defendant was 26 and the victim 14 and the sexual intercourse had occurred at a party where alcohol was consumed. *R v Frew* [2008] EWCA Crim 1029 was decided after the promulgation of the Sentencing Guidelines Council report. That was a case of a single act of consensual sexual intercourse between a 29 year old man and a girl of 15 and a half as a result of which the girl became pregnant and underwent an abortion. The offender pleaded guilty. The court noted that the Sentencing Guidelines themselves referred to the need for flexibility and variability and a sentence of 2 years was reduced to 18 months taking into account Corran and Barrass.”

[69] The sentencing judge took from *R v DM* the uncontroversial proposition that the focus is on culpability and harm. Culpability will be considered with respect to a non-exhaustive list of factors and harm will be considered with regard to consequences for the victim.

Sextortion – Online blackmail

[70] The judge then turned his attention to what he referred to as “sextortion.” This is not a legal term, but it is intended to describe the practice of extorting money or sexual favours (or both) from someone by threatening to reveal evidence of their sexual activity.

[71] He noted that there are no non-paramilitary sentencing guidelines available from the Court of Appeal in Northern Ireland. He referenced *A-G Ref (No.5 of 2004) (R v Potts)* [2004] NICA 27 where Kerr LCJ said that blackmail cases were always “highly fact specific.” He also noted *R v Cioffo* [1996] 1 Cr App R(S) 427 where Baker J said:

“Blackmail is always a serious offence. As has been said by this court in the past it preys on the soul of the victim ... Deterrent sentences have to be passed by the courts when those guilty of these offences are brought to justice.”

[72] The trial judge assessed blackmail to represent the headline offence and stated:

“With respect to starting points and sentencing ranges, this offence type, given its wide ranging nature, presents difficulty. Adopting ranges from similar 14 year type offences where there is high culpability or high harm, sentencing ranges may well run from 12 months to six years, with a likely starting point of three years. Where there is high culpability and high harm, a range from four to nine years, with a starting point of at least five years, represents a likely range. Sentences above 10 years may well be reserved for cases where there are exceptionally aggravating factors. For example, on culpability, where the offence involves the systematic targeting by serious and organised crime gangs, or on harm, where a vulnerable victim is seriously harmed or kills themselves.”

[73] Having identified the range of starting points, the judge went on to assess the aggravating and mitigating factors at play in the instant case.

Aggravating factors

- (i) Targeting and grooming of vulnerable victims;
- (ii) The fact there were three separate victims;

- (iii) All victims were vulnerable to a greater or lesser extent;
- (iv) Blackmail was used to commit a contact offence which in turn produced more material for blackmail;
- (v) The material was actually disseminated to the victim's family and friends with a clear intention to cause maximum distress and practical disruption of every feature of the victim's life.

Mitigating factors

- (i) The applicant was relatively young at the time of the offending;
- (ii) He has had a significant degree of upset and difficulty in his life;
- (iii) He has a low IQ and learning difficulties;
- (iv) The pleas of guilty.

[74] The judge commented that had he proceeded on the basis of consecutive sentences, he would quickly have reached a starting point in double figures but rather than doing that, he would adopt the headline offence approach and make all other sentences concurrent.

[75] Applying the principle of totality, the judge determined that nine years would have been the minimum total sentence after conviction by a jury. He afforded the applicant the full reduction of one third for his plea and therefore imposed a total sentence of six years' custody.

[76] He was satisfied that the applicant met the threshold for dangerousness under the 2008 Order, in agreement with the PBNi assessment. He was particularly concerned at the nature of the offending, the degree of coercion involved, the applicant's inability to accept responsibility and the lack of willingness to engage in therapeutic work. As a result, he imposed a period of extended supervision of four years.

[77] Finally, he accepted the prosecution case that the terms of the proposed SOPO were both proportionate and necessary for a period of 10 years.

The Grounds of Appeal

[78] The applicant seeks leave to appeal against the sentence on the following grounds:

- (i) The starting point was wholly excessive;

- (ii) The four-year extension period was wholly excessive;
- (iii) The SOPO was unnecessary and contrary to principle.

[79] The applicant does not dispute that this is serious offending but contends that the starting point of nine years failed to reflect the applicant's age, learning difficulties and problems in his background. Reliance is placed on *R v Daniels* [2019] EWCA Crim 296 where the Court of Appeal in England & Wales commented that the youth and maturity of an offender will be factors informing any sentencing decision, even if the age of 18 has been reached.

[80] Similarly, in *R v N, D and L* [2010] EWCA Crim 941, the same court stressed that maturity will be as important as chronological age and is a proper factor to take into account.

[81] The applicant criticises the trial judge for failing to identify what weight he gave to the identified mitigating factors (save for the plea of guilty). As a result, it is argued, the judge erred in allowing the case to stray into an impermissibly high sentencing bracket particularly when one takes into account the youth of the applicant.

Discussion

[82] None of the points advanced by the applicant carry much weight. Plainly, the judge had read, considered and referenced the pre-sentence and expert reports. He also expressly addressed the applicant's age, maturity, learning difficulties and the problems in his background. Detailed submissions were made before him on these very points. The judge did not attribute particular weight to individual factors, nor was he obliged to do so. It was always quite clear what the main points in mitigation were and no one is suggesting that the judge overlooked them. Subject to rationality and the overall assessment of whether, looked at globally, the sentence was manifestly excessive, the impact of the mitigation involves an evaluative assessment by the sentencing judge taking into account all the expert reports, the relevant caselaw, sentencing guidance where available and the oral and written submissions of the parties. Where, as here, that has been faithfully done it will ordinarily be very difficult to surmount the high threshold required to condemn a sentence as not just excessive but 'manifestly excessive.' Nor do we consider that there has been any material error of principle or otherwise in the approach he took.

[83] The precise effect of the various factors on selecting the starting point of nine years is unclear because the judge was not required to attribute specific weight to each factor. This is as it should be – sentencing is an art not a science and certainly not a box-ticking exercise. It is clear that had the judge not identified any mitigating factors the starting point of nine years would have been well into double figures. Therefore, on the judge's approach he must have given significant discount for mitigation to arrive at a starting point in single figures. The judge then, generously,

gave full discount of one third for the plea reducing the custodial sentence to one of six years. No issue is taken by either the defence or the prosecution to the discount for the plea. We turn now to the scale of the offending and the aggravating and mitigating factors.

[84] The decision of a sentencing judge to impose concurrent sentences, rather than consecutive sentences, in this multi-offence sentencing exercise, was a matter of discretion provided it resulted in a just and proportionate sentence. Such a sentence necessarily entails taking full and proper account of the scale of the offending to include all the aggravating and mitigating factors to arrive at the starting point and then to make the appropriate adjustment for the plea. The judge then has to stand back and satisfy himself that the overall sentence he has arrived at is just and proportionate. If not, he should adjust it accordingly to ensure he arrives at such an outcome. Usually, in arriving at the starting point, the judge will have had regard to the sentencing ranges for the specific type of offending, laid down by the Court of Appeal. Even where such guidance as exists is not directly applicable it may, depending on the circumstances of the case, provide some assistance on the road to arriving at the appropriate sentence in otherwise relatively uncharted territory. In some cases, and this is very definitely one, there will be little difficulty in recognising that it is a case where a significant period of imprisonment is required to achieve the requisite punishment and deterrence. Equally, this is a case where the dangerousness provisions were in play as was apparent from the pre-sentence report, and this is confirmed by the acceptance across the board that there is no basis for challenging that assessment by the trial judge.

[85] For reasons which we explained earlier the trial judge has imposed sentences which for important, but essentially technical reasons, he was not empowered to impose. It is quite clear what the judge was trying to do and, indeed, why. The recognition of all these factors means that an ECS is the necessary sentence. Since that outcome, perhaps surprisingly, was not available for blackmail the sentences will have to be rearranged in a manner that keeps jurisdictional faith with the statute. If we assume that the judge intended to arrive at the same sentencing result whichever offence was selected as the 'headline' offence within the package, but in a manner consistent with the 2008 Order, then the central question for us becomes whether a starting point of nine years is manifestly excessive for the totality of the offending in this case. If we so conclude, the sentence will have to be appropriately adjusted.

[86] Since the judge adopted the blackmail offence as the headline offence and chose to impose concurrent sentences it follows that the sentence imposed for the blackmail offences is not the sentence he would have imposed for that offending behaviour if it had been limited to those counts. The custodial element has been elevated in order to reflect all the other offences on the indictments. That analysis, proffered by the prosecution, and which we accept, supports our view that the central task is whether the nine year starting point is manifestly excessive for all the offending behaviour in this case.

[87] Blackmail involves the demanding of payment or benefit (or both) from someone in return for not revealing compromising or damaging information about them. Blackmail has many faces, all ugly. Blackmail, at its core, involves the abuse of power to extort. In the present case we are dealing with the threatened and actual dissemination of a non-consensually obtained sexual recording and images involving schoolchildren as the means of coercion. The seriousness of the offence of blackmail is reflected in the fact that it can attract a maximum sentence of imprisonment of 14 years.

Bill 21/089414 - V3

[88] This schoolgirl is the youngest victim in this case. She was 13 years old at the start of the offending and turned 14 soon after. She engaged in vaginal sexual intercourse on two occasions with the applicant and had oral sex on one occasion. These are reflected in three counts of sexual activity involving penetration by an adult with a child aged 13-16 contrary to Article 16(2) of the Sexual Offences (NI) Order 2008. The applicant filmed the latter incident without the victim's consent.

[89] There was a backdrop of the applicant inciting the victim to engage in sexual activity and to send him images of herself as reflected in counts 4-5, 7-8. As part of this, the victim described that the applicant threatened to tell her mother about the nature of their relationship if she did not send sexual images of herself on two occasions. This resulted in her sending an image of her vaginal area on both occasions. The applicant was coercive and controlling in his interactions with the victim and it was obvious that she was reluctant to engage. Counts 4-5 were of an adult causing/inciting a child aged between 13-16 to engage in sexual activity contrary to Article 17 of the 2008 Order. The separate offences identified in counts 1-5 each carry a maximum sentence of 14 years' imprisonment. Counts 9-10 were two counts of blackmail. The particulars of these two offences were that between 1 June 2018 and 2 November 2018 the applicant with a view to gain or intent to cause loss to another made an unwarranted demand for sexual images from her with menaces. The maximum prison sentence for blackmail is 14 years.

[90] Blackmail is an offence that can be committed in a vast number of ways and for different motivations. In the current case, it is clear that the applicant's motivation was to obtain further sexual images of the victim and/or engage in further sexual activity, notwithstanding her clear distress at that prospect. The applicant's threats to send 'nude' pictures of the victim to her mother were frequently made and the victim told him that she wanted to kill herself and that she could not cope with her life like this. Despite this, the applicant persisted and used a fake Facebook profile in the name of another female to try to coerce the victim to send him images and videos of herself to engage in sexual communication with him telling her that the other female would continue to contact the victim and her mother and 'text everyone she can find' if the victim did not comply. This formed the basis of the offence of blackmail at count 9.

[91] Despite the victim's attempts to distance herself from the applicant and revealing her suicidal thoughts to him, he continued to threaten her. A short time later, the applicant threatens to "go to her mum" if the victim reported him to the police. This behaviour was reflected in the blackmail offence at count 10. In an episode of calculated wickedness the applicant sent the video of the victim performing oral sex upon him to the victim's mother and sister.

[92] His behaviour and its consequences to the victim also caused severe distress to the girl's family, especially her mother and here sister to whom he sent the video.

[93] Put simply, this man did his absolute utmost to wreak havoc in the life of this victim and her family and he fully deserves the 'dangerous' classification which has been ascribed to him.

[94] We were referred to *R v Arshad* [2014] EWCA Crim 2485; *R v George Hadjou* (1989) 11 Cr. App. R. (S.) 29; *R v Olivia Burgan* [2020] EWCA Crim 1186; *R v James Lee Pickering* [2019] EWCA Crim 936. Those cases are of little assistance because of the quite distinct factual matrix in the present case. Here there are three schoolchildren victims the youngest of whom was thirteen. The present case involved sexual abuse of a child with the applicant pleading guilty to three counts of sexual activity involving penetration by an adult of a child aged 13-16, two counts of inciting the same child to engage in sexual activity and blackmail - all counts which carried a maximum sentence of 14 years. The harm suffered in the case of the youngest victim was particularly severe. He disseminated the video to her mother and sister and at least one other pupil was also sent the footage by the applicant leading to its wider dissemination within her school. This action by him led to her being bullied at school and ultimately being forced to leave that school altogether, so maximising the disruption and damage to her life.

Bill 21/007938 and Bill 21/059533

[95] In addition to balancing totality with regards to the offences in Bill 21/089414, the judge also had to factor in the two further indictments. Bill 21/007938 concerned a further offence of blackmail, possession of an indecent image of a child and distribution of an indecent image of a child. This concerned threats made by the appellant to a 17 year old female to disseminate an image of her exposed breasts unless she sent him further images. The threat was emphasised by two separate Facebook profiles - one in the applicant's real name and one in a false name purporting to be someone else - sending the image of the victim. When the victim refused, the image was posted on the Facebook page in the false name tagging the victim in. She was able to remove the tag but was unable to delete the image. She reported the matter to the police. It is accepted that the applicant would have thought the victim was 18 years old as this was the age she had on her profile. Whilst the victim in this case was able to withstand the applicant's threats and no further sexual images were sent, it is notable that the applicant persisted in his

behaviour and posted the image onto Facebook tagging her into it. This would have enabled her contacts to see the image until she removed the tag and constitutes a public dissemination of the image albeit there is no evidence as to who has seen it. This displays the same malicious intent to cause harm as was present in the case of the youngest victim [V3].

[96] It is accepted that the offence of blackmail reflected on this indictment is less serious than those described above, however, it is nonetheless a serious offence motivated by the applicant's desire to obtain sexual images irrespective of the impact on and consequences for the victim.

[97] Finally, the judge had to factor in the offending reflected in Bill 21/059533. This related to possession of a number of images and videos of a female who was aged 16 years old at the time of the activity. There are no offences in relation to the applicant's sexual interactions with this female. It is simply that the law requires a person to be aged 18 or over before they can be the subject of sexual images.

Mitigating Features

Learning difficulties, developmental delay, youth and maturity

[98] The prosecution accept that the applicant's learning difficulties and developmental delay are mitigating features potentially reflecting on his culpability and ability to understand the gravity of his offending. The effect of his learning difficulties may also be compounded by his relative youth and, in this regard, it is accepted that the principle set out in *R v Daniels* [2019] EWCA Crim 296 is applicable. Thus, the youth and maturity of an offender will be factors that inform any sentencing decision even if the offender has passed his or her 18th birthday. As noted earlier the judge had regard to all these features and on our analysis of his sentencing must have accorded due weight to these factors to bring the sentence down to single figures.

[99] We are satisfied that there is no evidence of any error in the judge's handling of these mitigating factors. The impacts of mitigating factors such as these must necessarily be limited in view of the gravity of the offending and the determined, persistent and actively malicious criminal activity of the type under consideration here.

[100] The applicant also contends that delay is a feature in the case. In terms of Bill 21/089414 (V3), the alleged offending was first reported to the police in December 2018 and the arraignment was due to take place on 18 February 2022. However, the applicant's mental health was explored to determine if he was fit to plead or stand trial, and this was not resolved until July 2022. The matter was first listed for sentence in January 2023 but due to the probation officer's finding regarding the dangerousness provisions, the matter was adjourned to facilitate the defence obtaining expert opinion regarding this. The plea and sentence hearing took place

on 23 March 2023. After a number of adjourned hearings, sentence was passed on 9 May 2023. In relation to the other two cases, these were committed to the Crown Court and first reviewed in November and December 2021. Obviously, the issues relating to fitness to plead/stand trial and, latterly, the issue of dangerousness also impacted upon the chronology of the proceedings. We agree that in the above circumstances there was no culpable delay which would have required the judge to make a downward adjustment.

Conclusions

[101] We return now to the principal issue we must decide which is whether the nine year starting point was too high and resulted in a manifestly excessive sentence.

[102] There is no doubt that in this case the custody threshold is passed, that a deterrent sentence was required and that the finding of dangerousness excludes a DCS as an option in respect of offences which are specified under the 2008 Order. Realistically, the only option is an ECS with the central focus being the length of both the custodial element and the extended licence.

[103] We, propose to adopt a concurrent approach to the sentencing in this case, having identified the headline offences. Given this approach we derive only limited assistance from the decisions in the other cases to which we were referred, as they were not concerned with the multi-offence sentencing exercise which confronted the trial judge here and are not factually on a par with the offending in this case.

[104] The court must take into account, the scale of offending, the number of victims, the high culpability and the high harm that the applicant has caused to his victims. His serious sexual offending against the youngest and very vulnerable girl who was only 13 when he started is reflected in counts 1-5 of the relevant indictment. Each of those offences, like the blackmail offences, are regarded as so serious that the maximum sentence they carry is 14 years' imprisonment. Viewed globally, the scale and seriousness of the offending is such as to require a significant period of imprisonment to punish the seriousness of the offending and, importantly, to deter others from committing further offences.

[105] The aggravating factors in this case include:

- Targeting and grooming of vulnerable victims.
- Three separate victims.
- The persistence of the offending.
- The use of coercive and controlling behaviours.
- A degree of planning.
- The dissemination of material to the victim's family and school to cause maximum distress and disruption of every important feature of the youngest victim's life.

- Unprotected sex with his youngest victim thereby exposing her to obvious risks.

Culpability and harm

[106] In terms of culpability, the applicant was fully aware of the victim's distress because she told him that she could not continue to live like this and was contemplating suicide. His response was that he did not care. His subsequent actions were clearly intended to cause her maximum distress and humiliation. His planning of these activities involved the use of fake profiles and his contact of the victim's mother and sister. He caused the victim significant harm. The harm was inevitable, clearly foreseeable was intended. The applicant exploited the victim's distress and shame to carry out the offences. Where, as here, the threat is implemented in the most callous, calculating manner to inflict real harm on a vulnerable child, rendered suicidal by the threat of such exposure, this constitutes an exceptionally significant aggravating factor both in terms of culpability and harm. In the case of V3, in an act of incomprehensible wickedness, he disseminated the video to her mother, her sister and a school colleague thus ensuring maximum exposure amongst those closest to her, where the humiliation was likely to be overwhelmingly crushing. This offender's culpability is high. The harm is also high. She suffered humiliation, distress and harm. His actions caused her to be bullied at school, resulting in her having to leave her school for her own safety. Her education was impacted by the disruption to her schooling. She also suffered serious physical and psychological harm as is clear from her victim impact report. He caused her such severe psychological distress that she succumbed to an eating disorder and to depression and low mood which required her to be given both medication and long term counselling support. For a period of time this applicant's behaviour wrecked this young girl's life.

[107] V3 suffered grave harm including an eating disorder – to the point where she stopped eating altogether; she engaged in self-harm; she required to get a therapy day to support her through her trauma and distress; she attended counselling and was offered extra sessions when the standard treatment time came to an end; she became distrustful of people.

[108] Adopting a concurrent approach to the sentencing in this case we identify the headline offences to be the penetrative sexual offences charged at Counts 1-3 of Indictment 21/089414.

[109] In view of the aggravating features we have identified we consider that a starting point of nine years is entirely appropriate having regard to the scale and gravity of the offending in this case. No issue is taken with the reduction of three years given by the trial judge for the plea.

[110] Finally, in relation to the extended sentence, we agree with the trial judge that a four-year extension is appropriate given the determination, persistence, maliciousness, victim blaming and limited insight of the applicant.

[111] We consider that there can be no doubt that in all but exceptional cases, deterrent custodial sentences should be imposed upon those who engage in blackmail and overlapping or related sexual offending, particularly where the victim is young, vulnerable or both.

[112] As the judge noted, an increasingly significant number of blackmail cases are being dealt with in the Crown Court in Northern Ireland where the blackmail takes place online or through social media. In *A-G Ref (no. 8 of 2009) (R v McCartney)* [2009] NICA 52 the court commented at paragraph 16:

“[16] The internet has revolutionised the way in which we live. It has provided us with ready access to information and facilitated social contact. Children have enjoyed many positive educational experiences, but it is in the social sphere that the change has been most marked. An Ofcom survey carried out last year found that 49% of children aged 8 to 17 have an online profile on a social network and indeed more than a quarter of 8 to 11-year olds in the United Kingdom also have such a profile. A survey published this week by the University of Ulster found that 48% of P7s use social network sites even though the providers of those sites purport to prohibit children of that age from such use. Although it is clear that there is much that is positive about the internet this case demonstrates the dangers to which children can be exposed as a result of which they may be corrupted or indeed in some cases exploited.”

[113] Fast forward 15 years to 2024 and the menacing problems identified in *McCartney* have significantly grown. So called “sextortion”, as the sentencing judge pointed out:

“ranges from the use of social media where the offender and victim know each other in real life through to organised online gangs in so-called “troll farms” who stalk the internet accessing computers and devices of the often vulnerable to then exploit those victims to send intimate images which are then used to blackmail them. There have been a number of such cases, where confronted with humiliation, young people have taken their own lives.”

[114] We agree with the trial judge that the online threat to a victim that they will stand humiliated or embarrassed indefinitely, given the near permanent nature of online publication, is a serious threat.

[115] In light of the foregoing we affirm the overall sentence imposed namely six years' imprisonment and four years extended licence.

[116] For the reasons explained earlier in the judgment the individual sentences imposed will however require restructuring. Counts 1-3 on Bill of Indictment 21/089414 are counts of sexual activity involving penetration of a child aged 13-16. We will treat these as the headline offences. In respect of each of those counts we substitute an extended custodial sentence comprising six years custody with four years extended licence. Those sentences are concurrent. In respect of the blackmail offences, which are not specified offences, at counts 9-10 on the same indictment we substitute a DCS of six years. In respect of all other specified offences (identified in the appendix to this judgment) we substitute an ECS comprising a custodial term of the same duration as the DCS originally imposed together with an extension period of four years. All of these sentences are concurrent with each other and with the sentences for the headline offences. Save for the foregoing the other sentences are affirmed.

[117] The applicant also raised a discrete challenge to the Sexual Offences Prevention Order contending that the judge did not factor in the practical impact of an extended custodial sentence when determining the necessity of the SOPO. Reliance was placed on the decision of the Court of Appeal in *R v Gerard O'Hara* [2021] NICA 1.

[118] In the present case, the pre-sentence report sets out proposed licence conditions. On receipt of the actual SOPO made by the court, it was noted that the judge had adopted the proposed licence conditions (set out in the PSR) into the SOPO and not the proposed terms of the SOPO. In *R v Smith & Ors* [2011] EWCA Crim 1772 the Court of Appeal considered the potential applicability of other regimes managing risk, including licence conditions (see para 9(iii)). A relevant consideration should be the anticipated length of the licence period when an offender is released. The sanction for breach of a licence is not the commission of a criminal offence, but potential recall. As the prosecution point out, at paragraph 14 *R v Smith* the court held that a SOPO may be necessary if the sentence is a determinate term or an extended term:

“In each of these cases, whilst conditions may be attached to the licence, that licence will have a defined and limited life. The SOPO by contrast can extend beyond it and this may be necessary to protect the public from further offences and serious sexual harm as a result.”

[119] The judge imposed a SOPO of 10 years commencing on the date of the sentence although the police requested a SOPO that would begin on the date of the completion of any custodial term to be served pursuant to the sentence of the court. Given that the intention is that the SOPO will have practical utility we will alter the order made so that it will begin on the completion of the custodial term to be served. If the applicant were released having served half of the custodial term, he would be subject to licence conditions for a period of seven years. However, in accordance with Article 18(3) of the Criminal Justice (NI) Order 2008, his release will only take effect if approved by the Parole Commissioners. The current SOPO replicates the proposed licence conditions and will not expire until 9 May 2033. The SOPO in the present case will extend beyond the life of the licence and in the circumstances of this case is necessary to protect the public from further offences and serious sexual harm.

Disposal

[120] Accordingly, we grant leave and allow the appeal to the extent of setting aside the invalid orders [see *Longworth* [2006] 1 All ER 887 (HL)] and substituting the sentences identified in para [116] hereof. We affirm an extended custodial sentence of six years' imprisonment with an extended licence of four years.

**JOINT SCHEDULE OF CHARGES
AND SENTENCES IMPOSED**

Bill 21/007938

Offence/Count	Maximum Sentence	Sentence Imposed
1-Blackmail, section 20 Theft Act (NI) 1969	14yrs	3yr DCS
2-Possession IIOC, Article 15(1) Criminal Justice (Evidence, Etc) (NI) Order 1988 <u>*specified offence under 2008 Order*</u>	5yrs	15 month DCS SOPo – 10 years - imposed until 9/5/33, mirrored across all three bills on counts detailed below, see p161-166 of Book of Appeal for terms Disqualified from working with children, Protection of Children & Vulnerable Adults (NI) Order 2003 Placed on ISA Adults & Childrens Barring List, Safeguarding Vulnerable Groups (NI) Order 2007 Notification Order, 10 years, under Sexual Offences Act 2003
3-Distributing IIOC, Article 3(1)(b) Protection of Children (NI) Order 1978 <u>*specified offence under 2008 Order*</u>	10yrs	18 month DCS SOPo, Disqualification Order, Barring Order & Notification Order as above

Bill 21/059533

Offence/Counts	Maximum Sentence	Sentence Imposed
1-5 & 7-15 Possession IIOC, Article 15(1) Criminal Justice (Evidence, Etc) (NI) Order	5yrs	15 month DCS SOPo, Disqualification Order, Barring Order as above

1988		Notification Order, 10yrs under Sexual Offences Act 2003
<u>*specified offence under 2008 Order*</u>		

Bill 21/089414

Offence/Count	Maximum Sentence	Sentence Imposed
1-3 - Sexual Activity involving penetration by adult with child aged 13-16, Article 16 (2) Sexual Offences (NI) Order 2008 <u>*specified offence under 2008 Order*</u>	14yrs	21 month DCS SOPO, Disqualification Order, Barring Order as above Notification Order, 10yrs under Sexual Offence Act 2003
4-5 – Adult causing/inciting child aged 13-16 to engage in sexual activity, Article 17(1) Sexual Offences (NI) Order 2008 <u>*specified offence under 2008 Order*</u>	14yrs	15 month DCS SOPO, Disqualification Order, Barring Order & Notification Order as above
6 – Possession IIOC, Article 15(1) Criminal Justice (Evidence, Etc) (NI) Order 1988 <u>*specified offence under 2008 Order*</u>	5yrs	15 month DCS SOPO, Disqualification Order, Barring Order & Notification Order as above
7-8 – Sexual Communication with a child, Article 22A Sexual Offences (NI) Order 2008 <u>*specified offence under 2008 Order*</u>	2yrs	12 month DCS SOPO, Disqualification Order, Barring Order & Notification Order as above
9-10 – Blackmail, section 20 Theft Act (NI) 1969	14yrs	6yr ECS with 4yr extended licence £50 Offender Levy (Count 9)
13-14 – Distributing private sexual	2yrs	12 month DCS

photographs/film, section 51(1) Justic Act (NI) 2016		
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