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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

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Applicant

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Before: Keegan LCJ, Treacy LJ and O'Hara J

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Mr Brian McCartney KC with Mr Paul Foster (instructed by Mark Reid Solicitor) for the Applicant
Ms Lauren Cheshire (instructed by the Public Prosecution Service) for the Respondent

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

Introduction

We have anonymised the applicant's name to protect the identity of the complainant. She is entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992. The applicant is a referred to as a cypher to avoid jigsaw identification of the complainant.

[1] This is a renewed application for leave to appeal against a total sentence of eight years' custody and three years' probation, imposed on 11 September 2023 by the Recorder of Londonderry HHJ Rafferty KC ("the judge") at Londonderry Crown Court for various sexual offences set out below. Leave was refused by the single judge, McAlinden J, in a comprehensive ruling. After hearing from counsel, we indicated our decision to dismiss the appeal. These are our reasons.

[2] The applicant was returned for trial on the 9 August 2022. The applicant was arraigned and pleaded not guilty to all counts on the Bill of Indictment on 14 October 2022. The matter was listed for trial to begin on 20 February 2023. The applicant was re-arraigned and pleaded guilty to counts 1, 2, 3, 5, 7, 9, 12 and 15 on 20 February 2023. The remaining counts were left on the books. The applicant was then sentenced as follows:

Count	Type	Sentence
1. Indecent Assault (1/1/86 – 31/12/86)	Specific	18 months' custody
2. Indecent Assault (1/1/86 – 31/12/87)	Specimen	18 months' custody
3. Indecent Assault (1/1/86 – 31/12/87)	Specific	18 months' custody
5. Indecent Assault (1/1/86 – 31/12/90)	Specimen	8 years' custody, 3 years' probation
7. Indecent Assault (1/1/86 – 31/12/87)	Specific	18 months' custody
9. Indecent Assault (1/1/86 – 31/12/90)	Specimen	8 years' custody, 3 years' probation
12. Indecent Assault (1/1/90 – 31/5/94)	Specific	8 years' custody, 3 years' probation
15. Indecent Assault (1/1/90 – 31/5/94)	Specimen	8 years' custody, 3 years' probation

All of the above sentences were to run concurrently.

[3] The applicant lodged a notice of appeal dated 5 October 2023. We also allowed an application at hearing for amended grounds of appeal to be argued before us. Mr McCartney KC focussed on the following appeal points:

(i) The judge adopted a cumulative starting point of 16 years' custody and thereafter made reductions. It was submitted that the starting point of 16 years was too high given the nature of the offences that the applicant had pleaded guilty to.

(ii) The judge did not give any or sufficient weight to mitigation in particular the admissions and acknowledgements that the applicant had made to the injured party and to his family at the time in 1994 when the offending behaviour was first brought to light and the health of the applicant.

(iii) The judge gave too much weight to the victim statement and did not seek medical reports to corroborate the victim's history of the medical effects of the abuse.

[4] In addition, given the very helpful skeleton argument filed by Ms Cheshire, this court must consider whether an error was made in the make-up of the

sentencing. We are very grateful to Ms Cheshire for alerting us to this issue which we summarise as follows. As regards counts 5 and 9, as Ms Cheshire rightly said, the judge sentenced the applicant to eight years' custody, three years' probation for two specimen counts with a date range of 1 January 1986 to 31 December 1990. The maximum sentence for the offence was increased on 2 October 1989.

[5] Ms Cheshire suggested that the court may wish to adjust the sentencing on these two counts because when a situation arises wherein the offending took place on dates unknown, the benefit of any doubt or uncertainty must go to the applicant, and he ought to be sentenced according to the lower maximum sentence which is two years. Notwithstanding this issue Ms Cheshire submitted that applying totality the overall sentence was appropriate and could not be described as manifestly excessive.

Background facts

[6] The facts of the case are as follows. In October 2018, the victim who was born in 1979, came forward and made a complaint of historical sexual abuse against her estranged stepfather, the applicant. She conducted three Achieving Best Evidence, ("ABE") interviews and outlined the catalogue of sexual offending which had taken place against her.

[7] The victim's first memory of abuse was when she was approximately seven years of age. The applicant came into her bedroom at night when she was sleeping, lifted up her nightdress, rubbed her chest area and he then rubbed her vaginal area (count 1). Similar episodes to this incident occurred in 1986 and 1987 and were treated as specimen offences (count 2).

[8] A further incident in 1986-1987 involved the applicant coming into the victim's bedroom, in a state of complete undress, leaning on her bed, rubbing her chest, kissing her nipples, rubbing her vaginal area before digitally penetrating her vagina (count 3). Further incidents of digital penetration occurred between 1986 and 1990 and were treated as specimen offences (count 5).

[9] In the period 1986 and 1987 the victim recounted that the applicant forced his penis into her mouth (count 7). The victim complained of a further course of conduct involving oral penetration between 1986 and 1990 and these incidents were treated as specimen offences (Count 9).

[10] Between 1990 and 1994 the applicant touched the victim's vagina while she was sleeping in a single bed (count 12). Similar other incidents took place in the same time period and were treated as specimen offences (count 15).

[11] In his sentencing remarks, the judge referred to the contents of the pre-sentence report ("PSR"), noting that the applicant (then aged 62 years) who had a limited criminal record is the father of three children, from whom he is estranged.

He is also estranged from a number of his siblings although he receives some support and assistance from two of his sisters as he has a number of health issues. The applicant has suffered a number of strokes in recent years and was diagnosed with Parkinson's disease in 2022. The author of the PSR noted the applicant's speech to be slightly slurred, and that he walked with some difficulty.

[12] In relation to the index offending, the PSR notes that the offences were first disclosed by the victim to her mother in 1994, following which the applicant left the family home. The applicant advised the PSR author that he had pleaded on the advice of his solicitor and that, "I denied them at the time but when my solicitor showed me the evidence, I accepted they happened." The PSR reflected that there was a degree of denial in respect of the offences on the part of the applicant, as he insisted his offending had not been sexually motivated and that he had not gained any sexual satisfaction from his offending. The applicant was assessed as a medium likelihood of reoffending, and as not currently posing a significant risk of serious harm.

Sentencing remarks

[13] The judge opened his remarks by referring at length to the personal impact statement, reflecting that the victim now struggles to recall any happy memories from her childhood. The judge noted that the victim still suffers from consequences of the abuse she sustained at the hands of her stepfather. The victim indicated that though the applicant had been removed from the family home, his presence "on the periphery" of her life continued to cause her anxiety and led to alcohol and drug abuse, as well as self-harming episodes. The judge noted that the victim had been diagnosed with PTSD, depression, anxiety, chronic fatigue syndrome, borderline personality disorder and fibromyalgia.

[14] The judge then set out the facts, and the content of the PSR as reflected above. The judge reflected that the offending had been conducted over an eight-year period, starting when the victim was aged only seven. Then the judge referenced a number of medical reports which had been served on the court from Dr Curran, Dr Amine and Dr Pollock. Specifically, the judge quoted from Dr Pollock's report regarding the difficulties the applicant would experience in prison as a result of his health issues, which would require attention.

[15] The judge found that there were a number of aggravating factors in the case including the injured party's young age and associated vulnerability, the breach of trust and the campaign of abuse to which the victim was subjected over an eight-year period. In terms of mitigation, the judge identified the guilty plea, and he specifically acknowledged that there had been early admissions and that there had been a need to "tidy up" the indictment before the plea was entered. The judge also took account of the age of the applicant (62) and his state of physical ill health, noting that the applicant is not particularly old but that his health issues render him

infirm beyond his years; the applicant's previous good character; and "his own personal mitigation."

[16] Furthermore, the judge referred to the case of *R v David Bell* [2021] NICA 5 and the need for a deterrent sentence in cases of sexual abuse of children, while also noting the limited benefit of personal mitigation in such cases. The judge also referred to *R v Kubik* [2016] NICA 3, due to the accusations of both digital and oral penetration in this case, however, he qualified his comments by acknowledging that this was not a rape case.

[17] Finally, the judge reminded himself of the need to have regard to the principle of totality. Having considered all of the above he settled on a starting point of 16 years, absent any mitigating factors. Applying *DPP's Reference (1 of 2018) Vincent Lewis* [2019] NICA 26 in relation to the applicant's age and ill-health the judge reduced that starting point to 13 years to reflect those factors. The judge said that this would have been his starting point after a trial. Reflecting a 25% allowance for the plea of guilty the judge then arrived a sentence of nine years and nine months. The judge then stated his intention to impose a custody probation order under Article 24 of the Criminal Justice (NI) Order 1996.

[18] Importantly the judge stated that it was his intention to headline the offences under the counts which carried 10-year maximum sentences, and although he was sentencing on a concurrent basis, he indicated that he would have arrived at the same sentence had he engaged in an adding up exercise by imposing consecutive sentences.

[19] As a consequence of the three-year period of probation, the judge allowed a reduction in the custodial element of 19 months. Applying an element of rounding down, the judge then handed down the sentences which are outlined in the table above, and which made a total sentence of eight years' custody and three years' statutory supervision.

Consideration

[20] The offending by the applicant covered an eight-year period and was perpetrated against his stepdaughter in the home environment. These factors are outlined as aggravating features by the judge and no issue is taken with that. Given the serious nature of the offending, the course of conduct over a protracted time frame against an extremely vulnerable individual, and the significant impact that the offending had on the victim, leading as it did to substantial personal and health issues for her, we consider that the identified starting point is neither manifestly excessive nor wrong in principle.

[21] Furthermore, the judge allowed a reduction of three years to reflect the applicant's personal mitigation. Given the nature of the case, and the line of authorities referred to by the judge that indicate the limited benefit of personal

mitigation in cases which require deterrent sentences, we consider that a reduction of three years for such personal mitigation as existed was appropriate and certainly not inadequate.

[22] The mitigating factors put forward now by the applicant which were not expressly described and acknowledged as such by the judge relate to the applicant leaving the family home following the initial disclosures by the victim to her mother. We consider that it is difficult to classify these matters as mitigating factors given that, in light of the nature of the offending in the disclosures, it would have been impossible to imagine a scenario where it would have been appropriate for the applicant to continue to reside at the family home or engage in family life. I consider that what happened to the applicant after the initial disclosures were made can properly be categorised as a direct consequence of the applicant's offending rather than as mitigating factors and I believe that the judge was correct in not referring to them as such. I also consider it significant, as noted by the judge in his opening remarks, that the ongoing presence of the applicant on the periphery of the victim's life had a profound and detrimental impact on her.

[23] Mr McCartney also placed great emphasis upon the fact that the initial complaints were made in 1994 but not pursued until much later. In the intervening period Mr McCartney maintains that the applicant should be given further credit for the shame and stigma he suffered. We are unattracted by this argument, not least because it was not advanced before the judge. In addition, the merits of the argument are questionable for a number of reasons. First, the applicant remained on the periphery of the family and disengaged from the psycho-sexual work which was recommended when the allegations first arose. Also, applying credit for the fact that the victim only felt able to pursue matters with the police after a period would be unfair and would not allow for adequate punishment to be provided for this serious offending.

[24] The applicant also asserts that insufficient credit was allowed for the plea entered. The applicant was returned to the Crown Court on 9 August 2022 and was then arraigned and pleaded not guilty to all counts on the Bill of Indictment on 14 October 2022. The matter was listed for trial to begin on 20 February 2023 at which point the applicant sought to be re-arraigned and pleaded guilty to a number of counts. Even if one were to accept that there was some basis for a degree of delay in pleading due to a need to sort out the specimen charges, the fact is that the applicant did not plead guilty until the morning of the scheduled commencement of the trial and in the absence of an earlier indication that the matter was unlikely to proceed before a jury, the victim was left with the uncertainty of whether she would be required to give evidence. As noted by the judge and referred to above, the impact of the applicant's offending on the victim was significant. In circumstances where the guilty plea was not formally entered until the morning of the trial listing, we consider that a 25% reduction for a plea at that stage cannot legitimately be described as inadequate.

[25] Mr McCartney's new point on appeal was as regards the judge's reliance on the personal impact statement. In respect of this, Mr McCartney relied on para [11] of *Kubik*. In this regard we note that Mr McCartney did not ask for medical reports or verification of the victim's health issues before the judge. He could give no reason why he had not done so. Counsel should know that if points are to be raised, such as this, they should first be canvassed before a trial judge and not simply before the Court of Appeal.

[26] In any event the paragraph relied upon from *Kubik* is on a different point that experts must view GP's notes before filing their reports on victim impact. Here there was nothing to suggest that the victim had not suffered as she had. If there was some issue as to the victim's credibility, we would have expected the applicant to have raised it and/or counsel to consider it. Thus, we find no merit in this argument in the circumstances of this case. Furthermore, whilst the judge was obviously struck by the detailed personal impact report, we do not find in the circumstances of this case that he applied disproportionate weight to it.

[27] In addition, we consider that the judge was entitled to make a custody probation order as per Article 24 of the Criminal Justice (NI) Order 1996. *R v McDonnell* [2000] NICA 2453 refers to the balance to be struck between the custodial and probational elements of an order under Article 24. He has made no error in relation to this aspect of the sentence.

[28] The judge also considered totality. It is particularly significant that he said the overall sentence was appropriate if made up of concurrent or consecutive sentences. We agree. Therefore, we refuse leave on all of the applicant's grounds of appeal.

[29] The only point of any merit in this appeal was that raised by Ms Cheshire (who did not appear at trial). As to disposal we are again very grateful to her for her updated position paper she has provided on the legal points that she so ably debated with us during the hearing. It is unfortunate that the judge was unwittingly drawn into procedural error as none of the parties raised the issue with him. Luckily, it did not make any difference to the outcome in this case.

[30] The disposal we favour is that counts 1 to 3 remain at 18 months' custody concurrent, count 5 is re-sentenced as 18 months' custody also concurrent (as it is the specimen of count 3), counts 7 and 9 are re-sentenced as 21 months' custody each consecutive to each other and all previous counts, count 12 is reduced to 18 months' custody consecutive to previous counts with the probation element removed, and count 15 receives an 18 month custodial element consecutive to all previous counts, with a three-year probationary period attaching to this offence. The revised sentence table is as follows:

		Total
Counts 1-3, 5	18 months, all concurrent	18m
Count 7	21 months consecutive	39m
Count 9	21 months consecutive	60m
Count 12	18 months consecutive	80m
Count 15	18 months consecutive, 3 years' probation	96m, 3 years' probation

[31] Also, as regards the maximum sentences in cases of this nature, for the benefit of practitioners, we reiterate the dicta of the Court of Appeal in *R v Scarlett and Burke* [2019] NICA 45 at [20]-[21] as follows:

> "[20] It is common case that the sentence imposed on Burke in respect of the first count involved an error on the part of the judge. In passing, he cannot be faulted for this as the matter was clearly not drawn to his attention. The first count recites that the indecent assault occurred between 1 October 1989 and 1 October 1991. The maximum sentence of two years imprisonment was increased to 10 years on 3 October 1989 by the Treatment of Offenders (Northern Ireland) Order 1989. The principle which this engages was stated by the English Court of Appeal in *R v Orlando* [1992] 13 Cr. App. R. (S) 306, at 308, in the following terms: "… Where the particulars of the indictment as in this case under Count 3 embrace a period both before and after the operative date [i.e. the date when the statutory maximum sentence was increased] … and where in particular the nature of the evidence before the court is such that it is impossible to identify with certainty whether the act in question was indeed perpetrated before or after that date, then the judge is obliged to conclude that his powers are limited to those in force prior to that date." *Orlando* was a case involving indecent assaults under the English statutory regime and the particular issue concerned the operative date of Section 3(3) of the Sexual Offences Act 1985. The decision in *R v Strait* [1997] 2 Cr. App. R. (S) 309 is to like effect (see especially page 311).
>
> [21] While there would appear to be no comparable decision in this jurisdiction, we can identify no reason why this principle should not apply in the present case. While neither of the aforementioned English cases provides any elaboration of substance, its rationale must

> surely be, as observed by Deeny LJ in argument, that the onus rests on the prosecution to prove all of the ingredients, including the date, of each offence alleged in the indictment and to do so beyond reasonable doubt."

[32] Finally, as Ms Cheshire helpfully said, it would be better practice for prosecutors to offer different counts on an indictment when a period of offending covers a change in law as to maximum sentences. That would avoid the issue that has arisen here.

Conclusion

[33] On an overall view this sentence was not manifestly excessive, and the procedural error is not fatal for the reasons we have given. The total sentence remains intact. We simply alter the sentences on each count and make them consecutive as suggested by the prosecution. Accordingly, we refuse leave and dismiss the appeal.