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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **03/12/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

v

ANTHONY McLAUGHLIN

_____

Before: McCloskey LJ and Scoffield J

_____

Representation

Prosecution: Mr Philip Mateer QC and Ms Catherine Chasemore, of counsel (instructed by the Public Prosecution Service)

Respondent: Mr Kieran Mallon QC and Mr Stephen Mooney, of counsel (instructed by MacDermott McGurk Solicitors)

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McCloskey LJ (delivering the judgment of the court)

Preface

It is appropriate to highlight at the outset an unusual feature of this appeal against sentence, namely that one of the offences involved is the infrequently encountered one of sexual activity with a person having a mental disorder impeding choice, contrary to Article 43 of the Sexual Offences (NI) Order 2008 (the "*2008 Order*"). In this respect see further [27] *infra*.

Introduction and Reporting Restrictions

[1] The complainant and injured party is entitled to automatic lifetime anonymity by virtue of section 1 of the Sexual Offences (Amendment) Act 1992, as amended. As a result neither this judgment nor any other form of communication or publication should disclose her identity or any information from which she might be identified. In aid of understanding the context and in recognition of this prohibition it will suffice to record at the outset that the appellant is a male person who at the

time of the offending was in his 60s, while the injured party was aged between 20 and 30 years.

[2] Anthony McLaughlin ("*the appellant*") renews his application for leave to appeal to this court against his determinate sentence of three years' imprisonment divided equally between custody and licensed release, in respect of the following offences, to which he pleaded guilty:

(i) Sexual assault, contrary to Article 7(1) of the 2008 Order.

(ii) Sexual assault by penetration, contrary to Article 6(1) of the 2008 Order.

(iii) A separate count as per (ii).

(iv) Sexual assault with a person having a mental disorder impeding choice, contrary to Article 43 of the 2008 Order.

[3] The maximum sentences prescribed by statute for the three different offences noted above are the following:

(a) Article 7(1): 10 years' imprisonment.

(b) Article 6(1): life imprisonment.

(c) Article 43: life imprisonment or 14 years' imprisonment (in the circumstances of this case).

The Injured Party's Mental Disability

[4] This subject was addressed in two reports prepared by Dr Jennifer Galbraith, a Consultant Lead Clinical Psychologist. The first report was compiled some four weeks following the alleged offences, with the second following approximately six weeks later. These reports formed part of the evidence served in support of the prosecution case.

[5] The first appointment with Dr Galbraith was arranged –

> "*… to assess capacity to engage in the current investigation and, crucially, to provide a clinical opinion about her capacity to engage in a sexual relationship.*"

The report documents the interview carried out by the author, with the injured party's mother in attendance. It expresses the following professional opinion in commendably clear and concise terms:

> "*It is my confident opinion that* [the injured party] *does not have the capacity to engage in a sexual relationship. She could not predict possible dangers of going unaccompanied to meet a man she does not really know. She could not, in my opinion, consent to the sexual activity which allegedly took place.*"

In her follow up report, Dr Galbraith opined that the injured party understood the role of the police and the concepts of the arrest, prosecution and punishment of an offender. Dr Galbraith further opined that the injured party would be able to engage in the legal process with the support mechanisms of a registered intermediary and special measures.

Chronology of the Prosecution

[6] All of the offences were alleged to have occurred on 16 August 2017, in the course of a single transaction in the appellant's home and in his bed. One of the evidential features of the case is that the injured party's father and his female partner, having been alerted, travelled to the appellant's home where they came upon a scene wherein both the appellant and the injured party were naked on a bed and the appellant was lying on top of her. One of the consequences of this circumstance was that an immediate report was made to the police with the injured party and her father proceeding at once to the police station.

[7] Thereafter the landmark dates and events are the following:

(i) The appellant was arrested at once and interviews by the police followed.

(ii) Some three weeks later the injured party's father made a statement to the police.

(iii) Next the reports of Dr Galbraith were generated.

(iv) There were two separate ABE interviews of the injured party, in December 2017 and January 2018.

(v) Between September 2017 and September 2019 the police undertook a series of investigative steps, forensic and otherwise.

(vi) On 5 December 2019 the appellant was committed for trial.

(vii) On 10 January 2020 he was arraigned and pleaded not guilty to an indictment comprising nine counts.

(viii) On 7 February 2020, at a further listing of the case, a trial date of 18 May 2020 was determined. The court further acceded to the special measures application of the prosecution.

(ix) A hiatus of some seven months occasioned by the pandemic followed.

(x) Having made initial disclosure at the committal stage, on 31 July 2020 the PPS made a detailed response to a comprehensive request for further disclosure. This signalled the end of the disclosure exchanges.

(xi) At five further listings between September 2020 and January 2021 the case was adjourned to facilitate discussions between the parties' counsel, consultations with the appellant and a consultation with the injured party.

(xii) On 5 February 2021 the appellant was rearraigned, pleading guilty to the four counts noted above, with the other counts to "remain on the books."

(xiii) On 13 May 2021 the sentencing of the appellant was completed.

Sentencing of the appellant

[8] The foundation of the appellant's sentencing was the "Agreed Basis of Plea" document. It is appropriate to observe that the present case illustrates the value of this mechanism. This was obviously the product of care, attention to detail and good communication on the part of all counsel concerned.

[9] The following passages in this document are of particular note:

> "*It is agreed that this is a most difficult and unusual case in which to set out an agreed basis of plea on account of material received on secondary disclosure ….*
>
> *It was the accused who initially contacted the complainant on Facebook …*
>
> *There then followed a series of Facebook messaging during which the complainant forwarded to the accused images of her exposed genitalia retrieved by police from the accused's laptop ….*
>
> *The accused invited the complainant to his home …. where the admitted sexual activity occurred ….*
>
> *The accused by virtue of his guilty pleas acknowledges the extent of the sexual activity that was engaged in with the complainant and in circumstances where there existed concerns*

about the complainant's ability to consent and his not having a reasonable belief in her capacity to consent …

The prosecution in turn acknowledges the very real value in the guilty pleas entered due primarily to the fact that on the papers there existed a significant triable issue which … arguably may have called into question her willingness to provide oral testimony ….

In April 2018 the complainant [by a] *social media app … continued to display and send nude photographs to various males … directly …* [impacting] *on the question of what level of harm can properly be evidentially attributable to the index offending …*

The [secondary disclosure] *generated a 12 page synopsis with content clearly indicating highly sexualised behaviour on the part of the complainant with overtly sexual conversations, nude body images, nude videos and lengthy messaging with explicitly sexual references …*

Dr Galbraith at the time of her examination and assessment was unaware of [this] *content … and it remains a moot issue whether she would have altered her opinion if fully informed and, secondly, whether an independent expert retained by the defence may have offered an alternative assessment ….*

[The accused] *knew or could reasonably be expected to have known that she had a mental disorder and because of it she was likely to be unable to refuse* [ie to withhold consent] *….*

The court should view the level of harm to be attributed directly to the index offending is to be assessed as low."

[10] The framework for sentencing the appellant thus established and having conducted the customary plea in mitigation hearing, the Recorder of Londonderry prepared a detailed sentencing decision. As much of the content has already been rehearsed above, it suffices to highlight certain specific features:

(i) The distinguishing features of the four counts to which the appellant had pleaded guilty were noted.

(ii) The appellant's several medical conditions were specifically recorded – a stroke some years ago, chronic obstructive pulmonary disease, type 2 diabetes, chronic kidney disease, a degree of heart disease and depression.

(iii) The report of an educational psychologist was also highlighted. This recorded that specified aspects of the appellant's IQ were either average or extremely low, albeit describing him as "*articulate and knowledgeable*", concluding that he did not have a learning disability but did have "*an unusual cognitive profile which is probably related to the impact of strokes and TIAs over the past 11 years.*"

(iv) Having summarised the pre-sentence report, the Recorder then rehearsed the probation officer's opinion on the likelihood of the appellant reoffending, namely (per the report) "*… presenting a medium likelihood of reoffending … a risk to vulnerable adult females … not assessed as presenting a significant risk of serious harm to others …*"

[11] The kernel of the Recorder's sentencing decision is contained in the following passages:

> "*This is an exceptionally serious case in which a mature male deliberately took advantage of S who had a significant learning disability. The Defendant undoubtedly knew that she could not consent to the sexual activity. The Defendant deliberately invited her to his home and sexual activity occurred ….*
>
> *The Defendant has pleaded guilty and that has undoubtedly saved S from giving evidence in court and facing what would have been very difficult cross examination. The Defendant is entitled to very considerable credit for that and it is also clear that he is remorseful for what he has done ….*
>
> *The Defendant is a man who has considerable physical difficulties …*
> [Counsel] *suggests that this offending can, in all the circumstances, which he characterises as being unique, be met with a non-custodial sentence. I do not agree.* ***The crux of this offending is that the Defendant, in full knowledge of S's difficulties, engaged in sexual activity with her and that is unforgiveable.***"

The final sentence is highlighted for self-evident reasons.

[12] The sentencing methodology which the Recorder then devised was the following. The appellant was sentenced to two years' imprisonment in respect of the first three counts and three years in respect of the fourth count, to operate concurrently, giving rise to a determinate custodial sentence of three years' imprisonment, to be divided equally between custody and licensed release. Next, the Recorder opined that a sentence in the region of seven years' imprisonment would have been appropriate following a trial and conviction. This was followed by:

> "*After careful consideration credit is being allowed at close to maximum. The Defendant's age and medical problems amount to very significant mitigation as does, to a lesser extent, the ongoing Covid 19 pandemic which can make the serving of any sentence more onerous. Furthermore, it is not possible to ignore completely certain disclosed material but that does not take away from the factual matrix that sexual activity took place and the Defendant knew that S had profound difficulties. When all these matters are taken into account, the court feels that the appropriate sentences are as set out above.*"

[13] Some analysis of the Recorder's sentencing methodology is appropriate at this juncture. First, his determination of the frequently labelled "*starting point*" must be viewed in the context of the maximum sentences of imprisonment available, set out at [3] above. Second, there was no guidelines judgment of this court to weigh. Third, the Recorder did not mechanistically identify aggravating and mitigating factors in logarithmic fashion. He was under no obligation to do so. These features are clearly identifiable in the text of his sentencing decision. Fourth, the Recorder did not explicitly state that his determination of the seven year period took into account all of the aggravating and mitigating factors: the recommended approach is outlined in, for example, *R v Stewart (DPP's Reference number 1 of 2016)* [2017] NICA 1 at [26]. Nor did he deal with the issue of credit for the guilty pleas in a free standing way.

[14] However, correctly in our view, there was no complaint before this court that there was anything opaque about the terms in which the Recorder expressed himself. Nor was it suggested (again, correctly) that any double counting intruded. Furthermore, it was accepted – properly – that notwithstanding that the second and third of the four counts attract a maximum punishment of life imprisonment, the Recorder was at liberty to treat the fourth count (with a maximum punishment of 14 years' imprisonment) as the headline offence *in the circumstances of this case*. While a challenge to this approach had formed one of the three grounds of appeal, insofar as it was suggested namely that the Recorder erred in imposing a greater sentence in respect of this count than the second and third counts, it was not developed in the event. The focus of the oral presentation of the appeal was on whether the global sentencing outcome was sustainable, applying the manifestly excessive sentence touchstone

Consideration and Conclusions

[15] There is, in substance, a single ground of appeal namely that the sentences imposed are manifestly excessive. The centrepiece of this ground, as articulated by Mr Mallon QC on behalf of the appellant, is that the Recorder erred in failing to recognise the uniqueness of the circumstances of the admitted offending. This uniqueness, it was submitted, was constituted by the combination of the injured party's impaired mental condition and the reduced IQ and unusual cognitive profile of the appellant, as assessed by the educational psychologist. As formulated in the

grounds of appeal, the two further particulars of the appellant's case are an excessively elevated "starting point" and a failure to make adequate allowance for the appellant's health problems. These building blocks crystallised into the submission that the Recorder should have imposed a suspended sentence or, alternatively, a determinate sentence not exceeding two years' imprisonment.

[16] Against the background of everything rehearsed in [1] – [15] above, the contention that the appellant should have been punished by the imposition of a suspended sentence of imprisonment is manifestly unsustainable. The single judge, McFarland J, described it as "*devoid of merit.*" This court wholeheartedly agrees. While any inflexible prescription is to be eschewed, it is difficult to conceive of any case in which punishment for an offence under Article 43 of the 2008 Order will not entail an immediate custodial term of some substance.

[17] Elaborating on the foregoing, it is appropriate to reproduce what this court stated in *R v GM* [2020] NICA 49, first at [38] – [39]:

> *"[38] … statutory reforms have effected a veritable sea change in the prosecution and punishment of sexual offences. These developments (noted briefly above) began in the jurisdiction of England and Wales with the introduction of the Sexual Offences Act 2003 (the "2003 Act"). This is commonly regarded as the most significant overhaul of the law in this field since the Victorian era. The White Paper which preceded the new legislation contained the following passage:*
>
> > *'The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual Offences Act 1956 and most of that was simply a consolidation of 19th century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date.'*
>
> *The 2003 Act, which came into force on 01 May 2004, created over 50 offences and abolished a series of offences which had become increasingly archaic including incest, indecent assault, buggery, bestiality and gross indecency between men.*
>
> *[39] The jurisdiction of Northern Ireland followed suit soon after with the enactment of the Sexual Offences (NI) Order 2008 (the "2008 Order"), which came into operation on 02 February 2009. This measure mirrors closely its English statutory counterpart. The parallels between these two instruments are detailed in a helpful schedule in Sexual*

Offences Law and Practice (Rook and Ward 5th Edition) at 32.75 in a chapter written by His Honour Judge McFarland, the (then) Recorder of Belfast. This valuable treatise demonstrates inter alia that this major reform of the law of Northern Ireland preceded the devolution of policing and justice powers to the Northern Ireland Assembly via the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. This serves to emphasise the close alignment between the new statutory regimes in the two jurisdictions. The 2008 Order, in tandem with its English counterpart, namely the Sexual Offences Act 2003, represented the legislature's response to the growing prevalence of this kind of offending, the compelling need to protect the vulnerable, the necessity of greater deterrence and society's revulsion at this type of criminality."

And in a later passage at [42]:

"*In R v McCartney* [2007] NICA 41 *this court, addressing the issue of statutory increases in sentences in a different context (causing death by dangerous driving), approved the approach of the Court of Appeal in England and Wales in R v Richardson and others [2006] EWCA 3186 in these terms, at [31]:*

> "*The President of the Queen's Bench Division, Sir Igor Judge, identified the issue arising in the appeals as "the impact of the increased maximum sentences on the guidance offered to sentencers in Cooksley. At paragraph 4 he said:*
>
> > *'Statutory changes in sentencing levels are constant. In recent years, maximum sentences have been increased (for example, drug related offences) or reduced (for example, theft). In general, changes like these provide clear indications to sentencing courts of the seriousness with which the criminal conduct addressed by the changes is viewed by contemporary society. In our parliamentary democracy, sentencing courts should not and do not ignore the results of the legislative process, and as a matter of constitutional principle, reflecting the careful balance between the separation of powers and judicial independence, and an appropriate interface between the judiciary and the legislature,*

> *judges are required to take such legislative changes into account when deciding the appropriate sentence in each individual case, or where guidance is being offered to sentencing courts, in the formulation of the guidance.'*

Kerr LCJ continued at [32]:

> *"These observations echo what this court said in* ***R v Sloan*** *[1998] NI 58 at 63-4 when considering the then recent increase in the maximum penalty for dangerous driving:*
>
> > *'This substantial increase from five to ten years was Parliament's response to the growing carnage on the roads due to dangerous driving (previously described as reckless) which in turn is often due to excessive speed or driving when under the influence of drink or drugs. In taking this course Parliament was itself responding to a growing volume of complaints by members of the public whose friends and relatives were being killed or seriously injured in increasing numbers on the roads. In their turn the courts have been ready to play their part in trying to make the roads a safer place by imposing sentences which reflect the culpability of the driving and as was said by Roch LJ in A-G's Ref (No 30 of 1995) [1996] 1 Cr App R (S) 364 at 367 a proper sentence 'must now have in it elements of retribution and deterrence.'"*
>
> *We consider these passages to be of general application. The proposition that judicial sentencing must be compatible with the will of Parliament as expressed in legislation is, as a matter of constitutional law, incontestable."*

And finally, at [47]:

> *"It is appropriate to repeat: offences under Article 14 of the 2008 Order and sexual offending generally belong to a wide factual spectrum in which the circumstances may vary almost infinitely. In cases involving an egregious breach of trust and the most vulnerable and defenceless of victims - of which the present case is a paradigm illustration - the requirements of retribution and deterrence will resonate with particular strength. The personal circumstances of the offender, such as those which found some sympathy with the court in Lemon, are highly unlikely to attract any weight. In contrast the court will*

> *attribute appropriate weight to an acceptance of guilt or plea of guilty at the earliest opportunity, genuine remorse and concrete evidence of self-correction and reform. This is not intended to be an exhaustive list."*

[18] It is unnecessary to either expound or augment all that was said in *GM*. The sentencing of the appellant in the present case unfolded in the context of the "*veritable sea change in the prosecution and punishment of sexual offences*" effected by the 2008 Order. The sentencing decision of the Recorder bears all the hallmarks of giving full effect to the legislative intent underpinning these major reforms.

[19] Similarly, the alternative submission on behalf of the appellant quickly wilts and withers. The Recorder left no material evidence or considerations out of account. Nor did he permit anything of an alien nature to intrude. He made no factual error in his assessment of the evidence. Furthermore he explicitly engaged with those features of the sentencing matrix which are the life blood of this appeal.

[20] Analysed in this way, this appeal resolves to a challenge to the margin of appreciation, the discretionary area of evaluative judgement, of the sentencing judge. The best argument that the appellant can make in these circumstances – and it has been advanced forcibly – is that the sentence under challenge is manifestly excessive because the Recorder should have attributed greater weight to the factors summarised in [15] above.

[21] In every appeal against sentence where it is contended that the first instance judge attributed excessive weight to certain facts or factors or gave insufficient weight to others, this court will invariably be alert to the well established doctrine of the sentencing judge's margin of appreciation. This is a recurring theme of the jurisprudence of the Northern Ireland Court of Appeal, expressed in various ways. See in particular the recent decision of this court in *R v Ferris* [2020] NICA 60, [48] – [59] and at [58] especially:

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

[22] The effect of this doctrinal approach is that challenges of this kind will, in principle, be difficult to make out. This truism is illustrated in the present case in the passage from the Recorder's sentencing decision reproduced in [11] above. This passage exemplifies the differences between the position of the sentencing judge and that of this appellate court. In this case the sentencing judge had been absorbed in the prosecution of the appellant during an extensive period, reviewing the case frequently and noting the gradually unfolding developments. This court is not endowed with the nuanced insights and understandings which this protracted intimacy at first instance generates. The Recorder's margin of appreciation emerges with force in that passage wherein he robustly rejected the "uniqueness" contention of senior counsel for the appellant. The question for this court is not whether any member of this judicial panel would have done differently, to the advantage of the appellant. Rather the enquiry for this court is whether this assessment on the part of the sentencing judge entailed any identifiable error of legal principle or was the subject of any material error of fact or bears the hallmarks of the manifestly unsustainable, having regard to the totality of the sentencing matrix.

[23] This court concludes without hesitation that the sentencing decision of the Recorder comfortably withstands these various shades of scrutiny. In summary, there is nothing therein entailing any legitimate basis for intervention by this court. We would add that while the decision under challenge is that of the Recorder and not that of the single judge, the latter in our view is also similarly unimpeachable.

[24] Stated succinctly, the appellant callously lured a mentally disordered young lady to his home for the sole purpose of mercilessly exploiting her disability by subjecting her to sexual relations without her consent. The consideration that a full scale rape was not achieved is of minimal significance in the present case. This was carefully planned and executed predatory conduct of a repulsive and disgraceful kind.

[25] We would add that, in the opinion of this court, the sentencing of the appellant was as generous and humane as it could conceivably have been. A heavier sentence would probably have raised no eyebrows in this court, taking into account (a) the possible double counting in favour of the appellant, (b) whether the major slice of mitigation attributable to his personal circumstances was sustainable (see, for example *DPP References numbers 13 – 15 of 2013* [2013] NICA 13 at [11] and *R v McKenzie* [2017] NICA 29 at [35]) and (c) whether maximum credit for his guilty plea was tenable, having regard particularly to the "*in flagrante*" evidence against him and all that followed thereafter.

Omnibus Conclusion

[26] For the reasons given this court unhesitatingly affirms the decision of the Recorder, endorses that of the single judge and, accordingly, refuses leave to appeal.

A Footnote: Article 43 Prosecutions

[27] In response to a request from the court, the Public Prosecution Service ("*PPS*") has helpfully intimated that since the date upon which the 2008 Order came fully into operation, namely 2 February 2009, there have been 15 prosecutions, resulting in nine convictions. The remaining six cases comprise a mixture of acquittals, "left on the books" disposals and the uncompleted. Evidently there has been only one previous challenge in this court, resulting in a refusal of leave to appeal against a sentence of three years' imprisonment: see *R v Carleton* (ICOS 17/027447). This was a case of a predatory mature male in-patient sexually assaulting an extremely mentally vulnerable young lady in an adjacent hospital bed. The decision of the single judge includes the following passage, at [6]:

> *"The grounds of appeal, inter alia, contend that in R v Foronda [2014] NICA 17, the Court of Appeal "suggested" a starting point of two years imprisonment after trial for an offence of sexual assault by penetration. This is fallacious. Foronda was an appeal against conviction only in which the judgment of the Court says nothing about sentence. Precisely the same observation applies to R v JW [2013] NICA 6, also invoked by the Appellant."*

The ensuing renewed application for leave to appeal against sentence was dismissed by the plenary court. The symmetry between the sentencing in that case and that in the present case are striking.