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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

GEORGE HENDRY

REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NI) ACT 2002)

Mr David McNeill (instructed by the PPS) for the Prosecution
Mr Sean O'Hare (instructed by Flynn & McGettrick & Co Solicitors) for the Appellant

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Before: Keegan LCJ, Treacy LJ and Rooney J

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

The complainant has waived his right to anonymity. We have also determined that the respondent should not have the benefit of anonymity.

[1] This is a reference by the Director of Public Prosecutions for Northern Ireland under Section 36 of the Criminal Justice Act 1988 as amended by Section 41(5) of the Justice (Northern Ireland) Act 2002. By this reference leave is sought to challenge as unduly lenient the effective sentence of two years' imprisonment suspended for three years imposed in respect of three counts of indecent assault on a male, contrary to section 62 of the Offences Against the Person Act 1861. The challenge was to both the period of imprisonment and to the judge's finding of exceptional circumstances underpinning his decision to suspend.

[2] At the hearing the issue was narrowed to whether the sentencing judge was entitled to conclude that there were exceptional circumstances allowing him to suspend the sentence. Following submissions this court requested a comprehensive expert report dealing with the respondent's physical and mental health issues as well as the impact of a custodial sentence. On foot of this request the court was

furnished with a report from Dr Curran, consultant psychiatrist. His report supplemented the medical evidence that was before the trial judge and contained in the book of appeal.

Background

[3] The defendant George Hendry was arraigned on 18 March 2020 and pleaded not guilty. The trial, partly because of Covid ultimately proceeded between 15 February and 25 February 2022 before His Honour Judge Ramsey KC and a jury sitting at Newry Crown Court. The jury convicted the respondent of all three counts of indecent assault.

[4] Having presided over the trial, the judge did not require written submissions on sentence from either prosecution or defence counsel. He heard oral submissions on sentence from both counsel on 20 May 2022. In his reserved judgment, passed sentence on 1 June 2022. He sentenced the defendant to 12 months' imprisonment on counts 1 and 2 and two years imprisonment on count 3. All sentences were made concurrent to each other, and all were suspended for 3 years.

The Offences

[5] This is a case concerning historic sex offences committed over 40 years ago. The offences were committed in 1979 or 1980 at a children's home in east Belfast, the Palmerston Reception and Assessment Centre. The complainant was admitted to Palmerston children's home on 19 November 1979 when he was 11 and he lived there until the end of October 1980, after he had turned 12. The respondent was a deputy manager at the home and was 37 or 38 at the time.

[6] In 2018 the complainant, then aged 49 years and living in England, was having problems at work resulting from mental health issues. He attributed these to the abuse which was the subject matter of the indictment. He also became involved in a dispute with an acquaintance who had also been the victim of a sexual assault. These problems triggered the disclosure in this case. The complainant first disclosed the abuse to his manager at work, knowing that the manager's partner was a police officer. As a result, he was given advice which led him to make a report to Sussex Police on 5 June 2018. On 4 July 2018 he recorded an Achieving Best Evidence video and formally made the allegations in the case.

[7] The complainant said that he had been sexually assaulted on three occasions by the respondent at Palmerston children's home where he had been taken into care after his parents divorced and his family life broke down. He said that at first it was a frightening experience to live in the home but then, for a while, it seemed like the staff at the home cared for him.

[8] The first incident (Count 1) took place when the respondent called him into his office at the back of the home for something he had supposedly done wrong.

Inside the office the respondent sat him down and talked to him. The respondent asked him "*Do you know what happens to naughty boys?*" He replied, "*Yes, George, they get punished.*" The respondent put the complainant over his knee and spanked him on the bottom 6-7 times. The complainant said it was "*really bizarre*" because he would squeeze his bottom after each blow. He didn't understand what the respondent was doing. The respondent then sent him away to his bedroom.

[9] The second incident (Count 2) took place a few weeks later when the respondent again called the complainant into his office. This time he didn't really spank him. He just squeezed his bottom without hitting him hard. The respondent sent him away with a warning that if he told anyone his punishment would be worse.

[10] The third incident (count 3) occurred after another few weeks when the respondent again called the complainant into his office over some supposed wrongdoing. This time he asked the complainant to take his trousers down and lean over the desk. The complainant then felt something going inside his anus. He didn't know what it was but didn't think it was a penis because it was smaller. It might have been a thumb. It went in for a short period of time, somewhere between ten seconds and a minute. Afterwards he was sent to bed again. He describes himself crying himself to sleep that night (Count 3).

[11] The respondent was interviewed about the allegations on 24 October 2019. He said that he had been a senior houseparent at Palmerston for 5 years from the age of about 36. (This would have approximately covered the years 1977 to 1982, including the period when the complainant was there.) He said he did not remember the complainant and adamantly denied sexually abusing him. He maintained this stance through trial and to the author of the pre-sentence report [PSR].

[12] The respondent has convictions for indecent assaults of a similar (though less serious) nature committed during the same period at the same children's home against 7 other boys. These offences were committed between 1978 and 1981. He pleaded guilty to them on 17 September 1982 and, from our standpoint at this remove, he was unfathomably sentenced to an absolute discharge by the Resident Magistrate.

[13] The respondent's position at trial was that he had entered these pleas on a limited basis which excluded sexual motivation but in circumstances which right-minded people would consider indecent. He claimed to have smacked the boys on their naked bottoms after they all came out of the shower. There was no evidence of a formal basis of plea on the 1982 police file and the DPP and court files were unavailable. However, the witness statements of the complainant boys all alleged indecent assaults on different occasions, which was inconsistent with the respondent's account of smacking them all together.

[14] The defence opposed the admission of these convictions at trial. Following legal argument, the judge admitted them in evidence. For the purposes of sentence, they were offences committed contemporaneously to the instant offences, but the convictions were entered subsequently. The prosecution took the position that these convictions were not an aggravating feature of the case, but neither could the defendant claim good character as a mitigating factor. We will proceed on that basis.

[15] The complainant gave evidence at trial by ABE video and, by his own choice, was cross-examined in open court.

[16] In a victim impact statement, he described how his life was severely affected by the abuse.

Mitigation

[17] The defendant is now 81 lives alone in a house he owns and has no family. He is socially isolated.

[18] The PSR found that the respondent did not pose a risk of serious harm. It also refers to his troubled upbringing in which he himself was the victim of physical and sexual abuse. The respondent's formative years were also clearly highlighted in the expert report furnished by Dr Judith O'Neill, Consultant Psychiatrist. A prominent feature of these years is the miserable and harrowing background of his time in care from infancy to 16. It is truly shocking. This background is described in detail in her report as follow:

> "**Personal History**
>
> 2.1 Mr Hendry is a 78 year old man. He tells me that he was born on 14 December 1941 in a workhouse in Richhill, Co Armagh. His mother worked as a servant in "the big house" and she became pregnant. He does not know the identity of his father. As his mother was not married, George was taken into care at about one year old. He was taken to the Sisters of Nazareth on the Ravenhill Road in Belfast, where he resided between 1942 and 1952. He was initially in the 'babies' home' where there were about 6-8 cots per room and he was looked after by nurses and nuns, and then he moved to the big house, Nazareth Lodge, where he shared a dormitory with around 10-12 other boys. He remembers that it was very cold there. The boys were dressed in shorts.
>
> 2.2 George reports that he was a bed wetter, until he was about 8 years old. He thinks this was because the building was so cold, but he acknowledges it may have

been due to nerves or anxiety. He recalls feeling frightened of the staff; he was physically beaten regularly, every couple of days. He was beaten due to the bedwetting. He witnessed other boys being beaten by the staff. He recalls being made to wash the stairs and polish the floors as a punishment. He recalls that the nutrition was poor and that there was no emotional support. He recalls that he was 'very nervous' in the home.

2.3 He attended school. He reports that he was physically beaten for producing poor handwriting. He found it difficult to write, due to feeling fearful. He was better at Maths. He recalls that the nuns were very harsh in the classroom.

2.4 He did make some friends there, he recalled going out for walks and being taken on some day trips. He was taught how to sing. He reports that he coped by having support of the other boys there. He did not have any family visiting him and he remembers feeling sad when the other boys had visitors. He recalled how some local volunteers came to visit him and take him out on day trips and this did help his confidence. He recalls being given sweets or being taken to 'the pictures.'

2.5 When he was due to leave Nazareth Lodge, he was brought along with the other residents to a large room where 14 of the boys were selected to be moved to a children's home in Kircubbin, and 24 of the boys were selected to be taken to Australia. George was selected to go to Rubane House, Kircubbin. He said that many of his friends were selected to go to Australia and he can remember them leaving on a bus with their luggage, and he never heard from them again.

2.6 George was moved to Rubane House in Kircubbin. He recalled that the first few months there were quite good, relatively positive and it felt homely. Thereafter, he was moved to a smaller dormitory of 5 boys and 'things went downhill.' The dormitory was next door to one of the bedrooms of a brother 'who took a shine to me.' George was asked to become his helper, to clean and tidy his room. George told me that the brother began 'putting his hands on my private parts and he gave me money afterwards.' This happened typically every two or three days. George recalls being made to lie down on the bed

and being touched in a sexual way by the brother. He reports that this went on for about three years, before the brother moved on. George told me that he thought this was 'the norm.' He did mention it to the other boys and they told him to be careful and he recalls that he found it very upsetting.

2.7 George recalls being given cold showers, physical beatings, very poor quality of food while he was in Rubane House.

2.8 He was then moved to 'the big house' which was down a dark lane. He and four other boys went there to sleep at night. He remembers feeling frightened walking to it in the dark. He would go straight to bed, often cold and wet from having walked there. He reports that the brother in that house 'made us strip naked and looked at us.' He told them that this was to check their physical health and he did it every couple of months. George recalls feeling humiliated and degraded by this. He found it upsetting and he said 'you daren't show it.'

2.9 At school, the brothers were harsh and he reports that he was physically beaten. He was beaten on the hand or beaten with a strap. He reports that one of the brothers would often rub his inner leg also.

2.10 He remained in Kircubbin until he was about 16 years old. He recalls that he and the other boys were made to pick potatoes locally, but the brothers took the money so that they couldn't save up. The food they were given was poor, perhaps just bread and butter for dinner. He recalls that he saw other boys being stripped naked and sexually assaulted. He said 'the brothers were all over them ... it was awful.'"

The respondent left care at the age of 16 without qualifications.

[19] The respondent has complex, significant and extensive medical issues summarised by Dr Curran as a constellation of medical complaints. He describes these in detail in his report including benign prostatic hypertrophy resulting in an indwelling catheter, recurrent urinary tract infections, angina complicated by atrial fibrillation, a history of past myocardial infarction, difficult to control hypertension.

[20] Dr Curran notes that the respondent has led a fairly hermetic lifestyle. He refers to the respondent's description of a very unhappy upbringing in care where he was repeatedly subject to physical, emotional and sexual abuse.

[21] Dr Curran's professional opinion is that:

> "if a custodial disposal is directed [the respondent] is more likely than other[s] …to find himself decompensating psychologically and there is a possibility of increasingly depressed affect presenting …SPAR procedures might be immediately implemented at least in the short term and prison staff so advised in advance."

[22] He also notes that particular provision may also be required given the respondent's accounts of confinement namely that:

> "Because of all the abuse I suffered in childhood these same experiences have left me with a fear of confined spaces – at night I was left frightened in my bedroom. To this day I have to keep the windows and door open at night even if it is cold outside."

Submissions on sentence to the Crown Court

[23] Prosecution and defence counsel made oral submissions to the judge at the plea hearing on 20 May 2022. It was common ground between the parties and with the judge that child sexual offences of this nature crossed the custody threshold and – in the absence of exceptional circumstances – must be met with deterrent sentences. We agree.

[24] We also agree that the relevant **aggravating features** in this the case are as follows:

(a) Grooming behaviour, in that the abuse escalated from spanking to squeezing the buttocks to digital penetration of the anus;

(b) Abuse of trust, in that the defendant was a deputy manager of the children's home (the age gap between the defendant and Mr Marshall being in the region of 26 years);

(c) Mr Marshall was vulnerable. He was 10 or 11 year old and had been placed into what ought to have been a place of safety after being removed from his natural family;

(d) Some degree of planning, in that the defendant selected Mr Marshall from the communal area and took him to a private office to commit the abuse; and

(e) The threat after the count 2 incident that his punishment would be worse if he told anyone.

[25] Defence counsel's plea in mitigation before the sentencing judge focussed on the respondent's difficult childhood together with the cumulative effects of his many medical issues. He argued that the combined effects of all these elements could be treated as 'exceptional circumstances' that would allow the judge to suspend the otherwise inevitable prison sentence. In support of these submissions, reliance was placed on the psychiatric report of Judith O'Neill, the GP report (in the form of a letter) and a discharge letter from the Mater Hospital. This material has now been supplemented before us by the report from Dr Curran which specifically addresses the potentially serious adverse mental health impacts of immediate custody.

[26] In response to the medical evidence and the claim of exceptional circumstances the prosecution set out in an email its position as follows:

> "… sexual offences against children are offences which on the authorities call for deterrent sentences, with the potential for such sentences to be suspended only in the presence of highly exceptional circumstances. Every case obviously turns on its own particular facts, but sadly a disturbed childhood in which the offender was himself subject to sexual abuse, advanced years at the time of sentence, a degree of ill health consequent on old age, and an absence of offending in later life are all features which are relatively common in these cases."

[27] The prosecution behaved very properly in drawing these contentions to the attention of the sentencing judge. It was important that they did so.

Sentencing Hearing

[28] In his sentencing remarks the judge described the case as "disturbing and disquieting." Importantly the judge accurately identified and adopted the aggravating features set out above. He found that there was a "grave breach of trust" and that the respondent could receive no credit for a guilty plea or remorse, as neither were present in this case.

[29] He correctly set out that the respondent had to be sentenced according to the current sentencing practice rather than practice at the time the offences were committed, and that the custody threshold was clearly passed.

[30] So far as personal mitigation was concerned, the judge referred to his own knowledge and experience derived from sitting on a compensation tribunal which dealt with claims for abuses that took place in the homes where this respondent was

raised and repeatedly abused. He described it as a "harrowing picture of his experience as a child… which no doubt impacted him in years to come."

[31] The judge concluded with words to the following effect:

> "This is a very difficult case… I have agonised for some length. I was impressed by the resilience of the complainant and the manner in which he gave evidence. I was [also] moved by the sad and lonely life you [the respondent] have led. I will pass a sentence which is an act of mercy… I find there are exceptional features, namely your history, background and health…"

[32] The judge did not specify what his starting point would have been before personal mitigation was taken into account. He passed the following sentences:

(a) Count 1: 12 months' imprisonment suspended for 3 years.

(b) Count 2: 12 months' imprisonment suspended for 3 years.

(c) Count 3: 2 years' imprisonment suspended for 3 years.

[33] The judge also made a sexual offences protection order, a barring order and applied the statutory notification requirements. No issue arises in relation to these ancillary orders.

Length of custodial terms

[34] There was no dispute that the respondent's sexual offending against a vulnerable child, in grave breach of the trust reposed in him as a children's home deputy manager, clearly passed the custody threshold: *R v Millberry & Ors* [2003] 2 Cr App R (S) 31; in this jurisdiction *Attorney General's Ref (No. 2 of 2002)* [2002] NICA 40 at para [22]; and *R v Kerr*; *Attorney General's Ref (No. 4 of 2005)* [2005] NICA 33 at paras [23] and [24].

[35] The respondent denied the offences, and was convicted on all counts, the most serious of which was count 3. In the pre sentence report ("PSR") he continued to deny the offences. As the judge correctly recognised no issue of credit for pleas or remorse therefore applied.

[36] The judge also correctly recognised that all of the aggravating factors set out above applied.

[37] In *R v SG* [2010] NICA 32 at para [13], the Court of Appeal held that in cases involving the sexual abuse of children:

> "…the culpability of the offender will be the primary indicator of the seriousness of the offence. It will also be necessary to take into account the age and vulnerability of the victim, the age gap between the child and the offender and the youth and immaturity of the offender."

The judge took into account all of these factors.

[38] We were referred to *R v Bell, David (DPP's Appeal)* [2021] NICA 5. In that case, which also involved a breach of trust, the appellant had abused the victim over a protracted period of time when he was between 5 and 10 years old and the most serious abuse consisted of penile penetration of the victim's mouth. The prosecution acknowledge these factors make that offending more serious than the instant case. On the other hand, the prosecution say that the victim in that case, whilst younger than the complainant, arguably did not have the same vulnerability of having been recently taken into care. In *Bell* the Court of Appeal at para [15] stated that a range of 5 to 8 years would have been commensurate with the offending in that case, before applying a discount for personal mitigation and remorse and then according credit for guilty plea.

[39] The prosecution also drew our attention to *R v AB* [2015] NICA 70. At para [50] the Court of Appeal held that a sentence of 3 years 6 months following a trial was proportionate to the offence of digital penetration of an under 10 year old girl by a 19 year old who was effectively her cousin. The offence charged was under Article 13 of the Sexual Offences (Northern Ireland) Order 2008 and it carried a maximum sentence of life imprisonment as opposed to the 10 year maximum for the section 62 offence charged in the present case. However, the prosecution drew our attention to the consideration that the facts of that case do not include the aggravating factors of breach of trust, an age gap as wide as in the defendant's case, a victim who was vulnerable to the extent that the complainant was vulnerable, or a threat made if the victim tried to report what had happened.

[40] We emphasise and reiterate in the clearest possible terms that this court needs no persuasion that in cases such as the present personal mitigation will ordinarily carry little weight. However, the variable strength and impact of mitigation still has a role to play, the weight to be attached to it being for the trial judge, properly applying the relevant principles. Those principles recognise that there are clear public policy reasons why personal mitigation should weigh lightly in the scales in cases like these. Sentencing for sexual abuse of young children involves deterrence, and any personal mitigation factors must ordinarily be set against and made subservient to that aspect of the policy context.

[41] The judges who regularly try these cases are well aware of the public policy objectives and the guiding principles in play. The jurisprudence recognises that personal mitigation is a matter which can be taken into consideration when assessing whether exceptional circumstances exist: *DPP's Reference (No 7 of 2013)*

(Kevin Brannigan) [2013] NICA 39. So, even in cases like this, there is still a judicial assessment to be made.

[42] Those who are best placed to make these judgments are the experienced Crown Court judges who regularly hear these trials and sentence defendants whether after a plea or a contested trial. The Court of Appeal will not lightly interfere with the considered judgments of experienced criminal judges who are the primary decision makers. They have the advantage of having observed the demeanour of the parties and the witnesses throughout the trial. They usually have the advantage of long experience of similar cases. On a reference the prosecution have a high threshold to cross. It is not sufficient to establish that a particular sentence was lenient: they must establish that it is "unduly" lenient.

Suspension of sentence

[43] Article 23 of the Criminal Justice (Northern Ireland) Order 1996 inserted subsections (1C) and (1D) into section 18 of the Treatment of Offenders Act (Northern Ireland) 1968. Those subsections would, if enacted, have created a requirement that the judge find exceptional circumstances before imposing a suspended sentence upon a defendant. Article 23 has never been brought into force, but this court has held that where a court would normally be required to pass an immediate custodial sentence (for example, because of the need for deterrence, or to mark society's condemnation of certain behaviour) then it should carefully enquire into the circumstances of the offence to see whether a suspended sentence could be justified on the basis of exceptional circumstances.

[44] In relation to the judicial assessment of "exceptional circumstances", albeit in a somewhat different context, the court in *R v Rehman & Wood* [2006] 1 Cr App R (S) 77 stated at para [11] that 'it is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional.' [this approach was followed in this jurisdiction in *R v Corr* [2019] NICA 64 at para [41]]

Test to be applied by the court of Appeal when finding of exceptionality challenged

[45] The role of this court in relation to the judgment of the trial judge was considered in *Dixon* [2013] EWCA 601 and in *R v Rehman & Wood*. In *Dixon* Sir John Thomas stated that "whether (the) exception is applicable" is within "an area of judgment that must be left to the sentencing judge." In *Rehman & Wood* at paragraph [14] Lord Woolf CJ stated that:

> "Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, (the Court of Appeal) will not readily interfere."

[46] No issue of statutory construction arises in this case. The requirement for exceptional circumstances to justify suspending a sentence was a development promulgated by decisions of this court. The development was plainly an attempt to lay down a principled framework. Unsurprisingly, there was no attempt to define what constituted exceptional circumstances. The primary decision is left to the judgment, experience and good sense of the Crown Court judges who routinely hear these cases.

[47] Lord Bingham in *R v Kelly* [1999] 2 All ER 13 at 20, in the context of statutory construction, said:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[48] The judge found exceptional circumstances based on the defendant's very difficult upbringing and the fact that he was abused as a child himself, his state of physical and mental health and his age.

[49] The prosecution submit that these cannot properly have amounted to exceptional circumstances for the following reasons:

- It is proper for a sentencing court to have sympathy for a defendant with a troubled background of this nature, including the hardship involved in growing up in the care system and experiences of sexual abuse as a child himself. There could be no argument if the learned judge had simply accorded it due weight as a mitigating factor when determining the length of the custodial term. However, the experience of the courts in dealing with child sexual abusers is that a significant number of such offenders were themselves victims of sexual abuse in their youth. It is respectfully submitted that a circumstance that occurs so frequently cannot realistically be regarded as exceptional.

- As to age, a sentencing court is entitled to show a limited degree of mercy to an offender of advanced years because of the impact that a sentence of

imprisonment can have on him. An offender's diminished life expectancy, his age, health and the prospect of his dying in prison are factors legitimately to be taken into account in passing sentence, but only in a limited way because they must be balanced against the gravity of the offending, including the harm done to victims, and the public interest in setting appropriate punishment for very serious crimes. The focus of the court is on the extent to which a custodial sentence will be more onerous for an older prisoner as compared to a younger, fitter offender. In that respect it is important to have reports to engage with and consider such issues: *DPP's Ref (No 1 of 2018); Vincent Lewis* [2019] NICA 26 at para [19] and *R v KT* [2019] NICA 42 at para [43]. In this case there was no evidence before the court specifically addressing the question of how a prison sentence would be more difficult for the defendant than for a younger prisoner.

- The evidence of the defendant's physical and mental health is set out at paras [19] to [21] above. Although he suffers from a number of ailments, his physical health is not particularly poor for a man of his age, and he is able to live independently. Dr O'Neill effectively refuted the suggestion that he suffers from any diagnosed mental illness; her report also casts some doubt on the self-reported social isolation that the PSR writer describes.

[50] In summary, the prosecution contend that there was nothing in the defendant's mitigation to distinguish him from very many other offenders in historic sexual abuse cases and his circumstances could not have been capable of amounting to exceptional circumstances and it was unduly lenient to suspend the sentences.

Consideration

[51] Though very attractively and persuasively presented by counsel for the prosecution we do not accept that the prosecution has established that the judge has acted outside the area of judgment that must be left to the sentencing judge. Nor has it been established that the judge was in, the words of Lord Woolf, "clearly wrong."

[52] A finding of exceptional circumstances is a matter of judicial discretion/ assessment, applying the relevant principles, with which the appellate court will be slow to interfere. Such a finding is a question of degree, assessment, balancing and judgment. If, of course, the judge has not applied the correct principles his decision will be vulnerable.

[53] In this case the judge was particularly well placed to exercise this discretion following a week-long trial during which he had the advantage of seeing and hearing the complainant and respondent give evidence. Following his conviction, the case was adjourned to enable the preparation of a PSR and a victim impact report. This was followed by a sentencing hearing where counsel for each of the parties made detailed oral submissions. Furthermore, the court was provided with detailed evidence regarding the applicant's history, background and health

difficulties. The judge then reserved his decision to consider the submissions made and the authorities referred to.

[54] In accordance with the authorities the judge adopted a holistic approach in his finding of exceptional circumstances and considered that the collective impact of the relevant circumstances made the case exceptional. These were all matters the judge is entitled to take into consideration when assessing whether exceptional circumstances exist.

[55] The overarching submission of the PPS is that the sentence of two years imprisonment was unduly lenient and, in particular, that the trial judge's finding of exceptional circumstances could not properly have amounted to exceptional circumstances. We reject those submissions.

[56] We have not been persuaded that the sentences imposed fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate bearing in mind that sentencing is an art, not a science, and that the trial judge is particularly well placed to assess the weight to be given to the various competing considerations. Furthermore, as previously observed, a finding of exceptional circumstances is a matter of judicial discretion/assessment with which the court will be slow to interfere.

Approach to a Reference

[57] As to the ultimate question of whether the sentence imposed was *unduly* lenient the Court of Appeal has in a number of cases given guidance on how lenient a sentence must be for it to be unduly so, making it plain that the test is a high one and that Section 36 was not intended to confer a general right of appeal on the prosecution. Taylor on Appeals 2nd Ed states:

> "13.56 The court has stated on a number of occasions that the purpose of the Section 36 regime is to allay widespread public concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.
>
> 13.58 However, whilst the determination of the appropriate sentence requires a reference to guideline cases, it also has to be remembered that sentencing is an art and not a science and that the trial judge is well placed to assess the weight to be given to various competing considerations. Moreover, leniency of itself is not a vice and the Court of Appeal with not interfere in

> an exceptional case. The demands of justice may sometimes call for mercy."

[58] The judge hearing this case considered it an exceptional case and considered that the demands of justice called for mercy. This was plainly a difficult decision over which, to use his own word, he 'agonised' for some time. We do not consider that this assessment was wrong for the reasons we have given. In addition, for the avoidance of any doubt we have had the benefit of Dr Curran's report which supports the judge's conclusion. We also remind ourselves that this court in *AG Reference (No 2 of 2002)* [2002] NICA 40, cited with approval the observations of Lord Lane CJ in the case of *Attorney General's Reference No 4 of 1989* (1989) 11 Cr App R (S). These remarks concern the proper approach to an application for a review of sentence:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject respondents to the risk of having their sentences increased — with all the anxiety that this naturally gives rise to — merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.
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> The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the respondent or

> detrimental to others for whose well-being the court ought to be concerned."
>
> Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence."

[59] The penultimate para above refers to what is usually referred to as 'double jeopardy'. Thus, when the Court of Appeal increases a sentence under the reference procedure its practice has often been to allow some discount on the sentence it would consider appropriate because of an offender having to wait before knowing if the sentence is to be increased [see the Discussion in Blackstone [2023] at para D28.5].

Conclusion

[60] Applying the approach set out above, we conclude that whilst the sentence imposed may be regarded as lenient, it cannot properly be characterised as having been unduly so, which is the test we have to apply. This is a high threshold. It has not been established that the sentences fell outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate. It was "within" the area of judgment that must be left to the sentencing judge. The judge was not "clearly wrong" in identifying exceptional circumstances.

[61] We grant leave but dismiss the reference and affirm the sentence.