Neutral Citation No: [2024] NICA 24 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **KEE12467** ***ICOS No:*** **21/061665** ***Delivered:*** **09/04/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

DENNIS ALLEN

Appellant

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Mr Brendan Kelly KC with Mr Mark Barlow (instructed by Higgins Hollywood Deazley Solicitors) for the Appellant
Mr Gavan Duffy KC with Ms Suzanne Gallagher (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, O'Hara J and McFarland J

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

Introduction

[1] This is an appeal with leave of the single judge against sentence imposed by His Honour Judge Greene KC ("the judge") on 19 December 2022, in relation to 13 counts of serious sexual offending by the appellant against his half-siblings, Gordon Allen and Sara Allen (now Potter). Both victims have waived their anonymity. We have previously dismissed the appellant's appeal against conviction.

[2] The judge reached a total sentence of 14 years' imprisonment split equally between custody and licence made up as follows:

Count 1 Incitement to commit an act of gross indecency against Gordon Allen – 12 months' imprisonment.

Count 2 Indecent assault on a male against Gordon Allen – 12 months' imprisonment.

Count 4 Indecent assault on a male against Gordon Allen – two years' imprisonment.

Count 6 Buggery with a boy under 16 years against Gorden Allen – 14 years' imprisonment.

Count 7 Buggery with a boy under 16 years in relation to Gordon Allen – 14 years' imprisonment.

Count 8 Rape against Sara Allen – 14 years' imprisonment.

Count 9 Gross indecency against Sara Allen – 12 months' imprisonment.

Count 10 Indecent assault on a female – Sara Allen – 12 months' imprisonment.

Count 11 Indecent assault on a female – Sara Allen – 12 months' imprisonment.

Count 12 Rape against Sara Allen – 14 years' imprisonment.

Count 13 Indecent assault on a female – Sara Allen – two years' imprisonment.

Count 14 Rape against Sara Allen – 14 years' imprisonment.

Count 15 Rape against Sara Allen – 14 years' imprisonment.

Factual background

[3] The factual background of this case is set out in the previous judgment of this court when dismissing the appeal against conviction. In summary, Dennis Allen abused his half-brother for around two years and then abused his half-sister for around four to five years. The offending included attempted buggery, buggery and indecent assault of Gordon Allen.

[4] The offending against Sara Allen included four rape charges when she was under 16 years. This included a rape charge when she was five years of age. The other charges include inciting Sara to commit an act of gross indecency by encouraging her to masturbate him while he promised her something nice if she did it and threatened her not to tell anyone. Another indecent assault charge related to encouraging the complainant to give him oral sex and a further indecent assault charge related to the appellant giving the complainant oral sex. These offences happened regularly when Sara Allen was aged 6-7 years up to nine years of age.

[5] Dennis Allen was convicted of the above counts after trial before a jury. He was found not guilty by direction on other counts 3 and 5 and not guilty on counts 16 and 18. In addition to the sentence of imprisonment a disqualification order was made

against the appellant from working with children. A sex offender registration order was also applied, and the appellant was placed on a barring list.

This appeal

[6] The primary submission on appeal is that the judge erred in his calculation of the starting point of 15-19 years before he reached a 14-year sentence to reflect all the above offending. The specific point advanced is that all the offending save count 15 was committed when the appellant was under 18 and between the ages of 13 and 15½ approximately. Therefore, it is the appellant's case that the judge should have made a greater reduction for the fact that the offending in large part occurred when the appellant was in law a child.

[7] An ancillary point is conceded in respect of sentencing powers in relation to counts 1, 2, 4, 9, 10 and 11. The defence and prosecution both accept that the court had no power to impose a custodial sentence in respect of these counts. This point was raised before the sentencing judge in written submission but nonetheless the Crown Court erroneously imposed concurrent sentences of 12 months in relation to each of these counts save for count 4 where a sentence of 24 months was imposed. Section 73(2) of the Children and Young Persons Act (Northern Ireland) 1968 could not apply. Further, the appellant was under 16 years when counts 1, 2 and 4 were committed thus there was no power to order detention.

[8] In relation to counts 9, 10 and 11 the age of the appellant at the time of offending is not so clear. In his sentencing remarks the judge stated that the appellant was "no younger than 15 and a half years." Upon this court seeking the necessary clarification the prosecution confirmed that "on reviewing the grid supplied and assuming the principle that the defendant should have the benefit of the doubt as to any age range, barring any other evidence to the contrary, he would have to be sentenced on the basis of the lowest possible age on those counts which would be 15 and a half years old." Accordingly, we work on the basis that the court could not impose a custodial sentence for these counts.

[9] We point out that an application could have made to the sentencing judge to correct this error pursuant to section 49 of the Judicature (Northern Ireland) Act 1978. This provision allows an application in the rare case where an issue arises such as this to be made within 56 days. We have no doubt that if such an application had been made the judge would have adjusted his sentencing. We also remind practitioners of the authority of *R v Doak* [1998] NI 169 which is authority for the proposition that an application can even be made after the 56-day period if a sentence was ultra vires as that would avoid an appeal to this court to correct any error. Of course, in this case there was an appeal against other validly made sentences and so the procedural point is not so acute, and it does not change the final sentence.

Judge's sentencing remarks

[10] The judge's sentencing remarks correctly refer to the three elements of sentencing, namely culpability, harm, and risk. However, in this case the assessment of culpability was the main challenge. It is to the judge's analysis on this issue that we now turn.

[11] The judge was cognisant of the fact that most of the offending took place when the appellant was a minor. He, therefore, rightly in our view, chose count 15 as the headline offence because it could be definitively ascertained that the appellant was over 18 at the time that he committed this offence. This was an offence of rape. Accordingly, the judge applied the leading authority of *R v Kubik* [2016] NICA 3 to the rape charge. That case refers as follows:

> "Sentencing levels in rape cases in this jurisdiction were specifically addressed in *Attorney General's Reference (No 2 of 2004) (O'Connell)* [2004] NICA 15 where it was stated that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel in England and Wales in its 2002 guidelines – these are 5 years with no aggravating or mitigating factors and 8 years where a number of enumerated features are present. That approach was reaffirmed by this court in *Attorney General's Reference (No.3 of 2006) (Martin John Gilbert)* [2006] NICA 36. Where, however, there has been a campaign of sexual violence against one or more victims a sentence of 15 years or more is appropriate as the recent decision in *R v Ayton* demonstrates."

[12] The judge decided that the offending in this case was "clearly a campaign of rape … with aggravating factors that adjust the starting point from 15 years to one of 19 years."

[13] Further, the judge found that "culpability cannot be described as low in this case, but it is impacted to some degree by relative youth when some of the offending occurred. Its progression into adulthood means, however, that his culpability extends towards without quite reaching high."

[14] Next the judge comprehensively dealt with the issue of harm in the following terms:

> "It is clear that both victims have suffered greatly as a result of this offending. Gordon has re-experiencing of the offending on a regular basis which is lessened somewhat following his disclosures. He has described in evidence having buried these memories and there has been a consequential and significant impact on his mood since he

> came forward with his allegations. He has been assessed by Dr Patterson as having an adjustment disorder and is presenting symptoms of low mood, anxiety and panic are the product in the main of the abuse he suffered. The abuse to Gordon Allen from reading the victim impact statements and from hearing the evidence in court is therefore high.
>
> As regards Sara, there have been intrusive recollections, disturbing dreams and the avoidance of reminders of her experience. When she made her disclosures, this coincided with visits to her GP with low mood, anxiety and panic. She feels guilty at what she has put her parents through and avoids intimacy as this is a trigger for her. When she hears the defendant's first name, she becomes stressed. She too has been assessed by Dr Patterson as having an adjustment disorder and harm to Sara Potter arising from this offending from the victim impact statement and having heard her evidence is considered to be high as well."

[15] The judge then considered the risk of reoffending in relation to the appellant. He pointed out that the pre-sentence report identifies a medium risk of reoffending. There was evidence of what could be described as victim blaming. The appellant reported ongoing difficulties in relation to alcohol abuse, unsettled personal circumstances prior to his remand particularly regarding accommodation and a history of issues in relation to his mental health and emotional well-being. On the positive side the judge recorded that whilst he has not been convicted of any further offences of a similar nature, this offending was long lasting and for the reasons set out in the pre-sentence report he does not reach the threshold for an Article 26 disposal, so the risk he could pose could be adequately dealt with by a Sexual Offences Prevention Order ("SOPO") which was sought by the prosecution. Ultimately, we note that the judge did not actually make a SOPO.

[16] In his sentencing remarks the judge does specifically record that the appellant had no previous convictions for sexual offences and his past offending is not relevant. He also records that the appellant had the benefit of a registered intermediary at trial and that Dr Victoria Bratten assessed him as having a cognitive ability in the low average range and that he was prone to suggestibility. A further report from Dr Michael Curran was broadly consistent with Dr Bratten's assessment of his cognitive ability. The judge notes that since being remanded into custody the appellant became an enhanced prisoner. He also gained employment and signed up for a number of courses designed to assist in future employment when released from custody.

Relevant authorities

[17] This appeal focused on the application of three authorities, namely *R v ML* [2013] NICA 27, *R v Finnegan* [2014] NICA 20 and a subsequent case in England & Wales of *R v Nazir Ahmed et al* [2023] EWCA Crim 281. These cases are all of some assistance for different reasons we will explain.

[18] We begin by examining the case of *R v ML*. This was an appeal against a four-and-a-half-year custody probation order comprising one and half years' custody followed by three years' probation imposed on the appellant following his conviction on nine counts of indecent assault, two counts of gross indecency and one count of buggery on a female child. The offences occurred when the appellant was 13 or 14. The complainant, his sister, was aged 10 or 11. The appellant appealed his conviction raising the issue of doli incapax but that was dismissed.

[19] Following a hearing the Court of Appeal reduced the sentence on two indecent assault charges and the buggery charge to 12 months' imprisonment and made all sentences concurrent. The reasons for the decision are found from para [9] onwards. The court began by remarking that this was a difficult sentencing exercise. It reviewed the case of *R v Cuddington* [1995] 16 Cr App RS 246 and *R v Dashwood* [1995] 16 App RS 733. Further, the court reviewed a case in this jurisdiction of *R v Bateson* [2005] NICA 37. The conclusion and guidance can be found at para [20] of *R v ML* as follows:

> "[20] When assessing the appropriate sentence in an historic sex case for an offender who was a child at the time of the commission of the offence, we suggest that the following factors should be taken into account:
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> (i) The statutory framework applicable at the time of the commission of the offence governs the scope of the sentence which may be imposed;
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> (ii) The sentence should reflect the sentencing guidelines and principles applicable at the time at which the sentence is imposed;
>
> (iii) The primary considerations are the culpability of the offender, the harm to the victim and the risk of harm from the offender in the future;
>
> (iv) Where the offender was young and/or immature at the time of the commission of the offences that will be material to the issue of culpability. It is appropriate in considering that issue to consider what sentence would be imposed today on a child who was slightly older than the offender was at the time that he committed the offences;

(v) Despite the observations of this court in *Bateson* on the case of *Cuddington* the court should not seek to establish what sentence might have been imposed on the offender if he had been detected shortly after the commission of the offence. Those remarks were not material to the outcome in *Bateson* and were, therefore, obiter. Such an exercise is of no benefit in fixing the appropriate sentence as sentencing policy and principles may well have altered considerably in the interim;

(vi) The passage of time may often assist in understanding the long term effects of the offences on the victim;

(vii) The passage of time may also be relevant to the assessment of the risk of harm. If the court is satisfied that the offender has led a blameless life after the commission of the offences that will be relevant in assessing future harm;

(viii) The attitude of the offender at the time of disclosure or interview by police is significant. The offender at this stage will be of full age. In these cases the immediate acknowledgement of wrongdoing by the offender provides vindication for the victim and relief at being spared the experience of giving evidence at a criminal trial. Such an acknowledgement will attract considerable discount in the sentence."

[20] In *R v ML* the court clearly considered that the youth and immaturity of the appellant at the time of the commission of the offences made this a case of low culpability, but the harm was significant, and the appellant made the complainant endure the rigors of a trial. The evidence indicated that the appellant did not present a risk of harm to children or others in the future and the remarks of the learned trial judge in relation to his resuming his relationship with his children were entirely apposite. If he had faced up to his responsibilities at an early stage a non-custodial outcome may have been possible but in all the circumstances the court considered that a sentence of 12 months' imprisonment was appropriate.

[21] Next, we turn to another case from this jurisdiction which followed shortly after *R v ML*. This is the case of *R v Finnegan* [2014] NICA 20. This was a reference from a total sentence of 11 years' imprisonment after a trial. The offences occurred over a period when the offender was aged between 14 years and eight months and 28

years and six months. They involved five victims. It is of note in this decision that counsel for the offender submitted that the offender's youth at the time of the offending should impact significantly on the starting point of sentencing applying *R v ML*.

[22] The methodology that is approved in *R v Finnegan* is found in the conclusion section of the judgment paras [30]-[32]. Again, the court considered that this was a difficult sentencing exercise but that the trial judge was perfectly entitled to approach the sentencing by looking at the two categories of incidents as he did. The court considered the totality aspect of the case and said that if the offender had been of full age when he committed these offences an overall sentence of 18 years or more would have been appropriate for such a campaign of violence and corruption against these children.

[23] The court therefore found that a sentence of 11 years was insufficient to represent the culpability and harm connected with this series of offences even bearing in mind that some of the offences were committed when the offender was still a child. The court found that 14 years was an appropriate sentence before some further reduction for double jeopardy. This was a case where the court determined what an adult offender would have received and made a reduction for the fact that some of the offending occurred during a time when the appellant was below the age of majority.

[24] The final case we will discuss is *R v Ahmed*. This is a decision of the Court of Appeal in England & Wales. This case sets out some guidance for sentencing an adult for an offence committed when the person was a child. The approach favoured by the England & Wales Court of Appeal is found from paras [21]-[34] as follows:

> "21. We have reflected on those submissions. In our judgment, the applicable principles are clear. Those who are under the age of 18 when they offend have long been treated by Parliament, and by the courts, differently from those who are adults. That is because of a recognition that, in general, children are less culpable, and less morally responsible, for their acts than adults. They require a different approach to sentencing and are not to be treated as if they were just cut-down versions of adult offenders. The statutory provisions in force from time to time have frequently restricted the availability of custodial sentences for child offenders, whether by prohibiting them altogether for those below a certain age or, more commonly, by restricting on a basis of age the type and maximum length of custody in all but grave cases. All such provisions are in themselves a recognition by Parliament of the differing levels of culpability as between a child and an adult offender: that is one of the reasons why we are respectfully unable to agree with the distinction drawn in *Forbes*

> between cases where no custody would have been available, and cases where some form of custody (however far removed from modern sentencing powers) would have been available. There is, in our view, no reason why the distinction in levels of culpability should be lost merely because there has been an elapse of time which means that the offender is an adult when sentenced for offences committed as a child."

[25] At para [22] of *R v Ahmed* substantial reference is made to the Sentencing Code in England & Wales which does not apply in Northern Ireland. At para [26] reference is also made to the sentencing guidelines produced by the Sentencing Council including the Guideline to Sexual Offences – Sentencing Children and Young People.

[26] Of most use for our purposes is para [30] of *R v Ahmed* as this refers to cases of a hybrid nature where the offender has committed offences both as a child and an adult. That is the situation in this case. Para [30] reads as follows:

> "30. Lastly, where the offender has committed offences both as a child and as an adult, it will commonly be the case that the later offending is the most serious aspect of the overall criminality and can be taken as the lead offence(s), with concurrent sentences imposed for the earlier offences. In such circumstances the key considerations for the court are likely to be an assessment of the extent to which the offending as a child aggravates the offending as an adult, and the application of the principle of totality."

[27] The conclusion in *R v Ahmed* is found at para [32]. This differs slightly from the guidance given in Northern Ireland in *R v ML* and so we will set it out:

> "32. We therefore answer as follows the question posed at the start of this judgment:
>
> (i) Whatever may be the offender's age at the time of conviction and sentence, the Children guideline is relevant and must be followed unless the court is satisfied that it would be contrary to the interests of justice to do so.
>
> (ii) The court must have regard to (though is not necessarily restricted by: see (v) below) the maximum sentence which was available in the case of the offender at or shortly after the time of his offending. Depending on the nature of the offending and the age of the offender, that

maximum may be (a) the same as would have applied to an adult offender; (b) limited by statutory provisions setting a different maximum for an offender who had not attained a particular age; or (c) limited by statutory provisions restricting the availability of different types or lengths of custodial sentence according to the age of the offender.

(iii) The court must take as its starting point the sentence which it considers was likely to have been imposed if the child offender had been sentenced shortly after the offence.

(iv) If in all the circumstances of the case the child offender could not in law have been sentenced (at the time of his offending) to any form of custody, then no custodial sentence may be imposed.

(v) Where some form of custody was available, the court is not necessarily bound by the maximum applicable to the child offender. The court should, however, only exceed that maximum where there is good reason to do so. In this regard, the mere fact that the offender has now attained adulthood is not in itself a good reason. We would add that we find it very difficult to think of circumstances in which a good reason could properly be found, and we respectfully doubt the decision in Forbes in this respect. However, the point was not specifically argued before us, and a decision about it must therefore await a case in which it is directly raised.

(vi) The starting point taken in accordance with (iii) above will not necessarily be the end point. Subsequent events may enable the court to be sure that the culpability of the child offender was higher, or lower, than would likely have been apparent at the time of the offending. They may show that an offence was not, as it might have seemed at the time, an isolated lapse by a child, but rather a part of a continuing course of conduct. The passage of time may enable the court to be sure that the harm caused by the offending was greater than would likely have been apparent at that time. Because the court is sentencing an adult, it must have regard to the purposes of sentencing set out in section 57 of the

> Sentencing Code. In each case, the issue for the court to resolve will be whether there is good reason to impose on the adult a sentence more severe than he would have been likely to have received if he had been sentenced soon after the offence as a child."

Conclusion

[28] We have not been specifically asked to apply the *R v Ahmed* methodology to this case given that it is a hybrid case which involves a mix of offending which occurred when the appellant was a child and an adult. The principles articulated in *R v ML* are largely replicated in *R v Ahmed* in any event only with some nuanced divergence. For our own part we find the method of converting sentences from the date of offending into what they might be now to be challenging. We also point out that the *Ahmed* case relies heavily on the sentencing guidelines in England & Wales which do not apply Northern Ireland.

[29] This was a difficult sentencing exercise for any judge given the span of offending against two victims. Also, this was a historic case where the appellant had a clear record and where there was a considerable period of some 20 years between his last offending and his arrest for these offences. The appellant attended voluntarily to be interviewed in relation to the offences and was not arrested (although he was later arrested on a bench warrant when he failed to appear). All of that said, it is recognised by the appellant that a significant period of imprisonment was required.

[30] The core question in this appeal is how the sentence should reflect the fact that a large part of the offending occurred when the appellant was under 18. In that regard, we think that *R v ML* provides an effective template with a level of flexibility for any sentencing judge, and we endorse the principles established by that case for ongoing application in this jurisdiction.

[31] In a case where an offender has committed offences both as a child and an adult, we recommend that sentencing judges should first assess whether the bulk of the offending occurred whilst the offender was a child. If that is the case, as it was with this appellant, there is considerable guidance to be drawn from para [30] of *R v Ahmed* which we adopt. Applying that methodology the recommended approach is to determine an initial starting point based on the offence(s) committed when an adult, using that as the headline offence. That sentence can then be increased to take into account the offences committed when a child.

[32] If the bulk of the offences were committed as an adult, as in the case of *R v Finnegan*, then we see no difficulty with the approach favoured in that case of fixing a starting point for an adult offender based on the totality principle and then reducing it to take into account the offending which occurred when the offender was a child.

[33] In either scenario we refer to above it is possible to reach a final sentence which reflects the correct level of culpability and harm taking into account any mitigating factors, thereby reaching a sentence which is just and proportionate in a given case.

[34] The judge effectively adopted this methodology in the instant case as follows. The headline offence was rape of a child. From there we think that a judge can then aggravate the starting point based on the other offences that have occurred when the offending was as a child. This involves a method of elevating the sentence upwards. However there also be some discounting or allowance made for the fact that the additional offending occurred whilst a child. The sentencing guidance in England & Wales states that such a reduction should be a half to two thirds. This is a broad rule of thumb which we adopt with the caveat that any reduction should be applied flexibly. In this case we consider that a half is the right amount.

[35] Applying these principles to the case at hand, we consider that the judge was right to choose a headline offence, which was count 15. Then, applying *R v Kubik* this was clearly a higher starting point rape case as it was rape of a child. There has been no real argument in this appeal that such a rape would attract a sentence of at least eight years.

[36] The difficulty arises from there because the judge described the offending as a campaign of rape and effectively elevated the starting point to the range that would apply if all of the offending had occurred when the appellant was an adult. We can see why he chose to take this course as there was a course of conduct which spanned childhood and adulthood. However, superficially attractive as that may be such an approach simply does not fully reflect the difference between childhood and adult culpability. Therefore, we do not think that the judge was correct to say that this was a campaign of rape leading to a higher bracket as applies to consistent adult offending.

[37] In fact most of the offending perpetrated by the appellant was when he was a child. That is why the appellant argues for a greatly reduced custodial sentence. The submission made by Mr Kelly was that the overall sentence in this case should have been much lower in the region of four to six years' imprisonment in total. We firmly reject this submission. Such a sentence would not reflect the justice of this case. In our view, it would be wrong to reduce the sentence as substantially as the appellant submits. This remains very serious offending against two victims who will suffer lifelong harm. However proper account must also be given to the fact that his culpability was lower when a child.

[38] Applying the methodology that we have suggested the judge would have had to add a further period of imprisonment to the eight years on the headline rape to reflect the other offending that occurred whilst the appellant was a child against two victims. We consider that the correct figure to represent the additional offending was in and around six years to reflect totality and the fact that there were two victims. That brings the sentence to 14 years.

[39] However, an allowance then must be made for the fact that this additional offending all occurred when the appellant was less culpable because he was a child. That is the law which we think the judge has not properly applied. We would therefore reduce the figure of six years by half which leads to an overall sentence of 11 years.

[40] We will therefore quash the sentences imposed by the judge on counts 6, 7, 8, 12, 14 and 15 and substitute a sentence of 11 years. The sentence on count 13 will remain at two years to run concurrently.

[41] We have read the additional submissions that we invited to address the other counts which we discuss at paras [7]-[9] herein. As we have intimated in these paragraphs of our judgment it is unfortunate that this matter was not dealt with at the trial court as it should have been. There is agreement between the prosecution and the defence that the sentences of imprisonment on counts 1, 2, 4, 9, 10, and 11 should be quashed. We will therefore substitute absolute discharges on each of those counts. This as we have said makes no difference to the overall sentence in this case given that the sentences were concurrent.

[42] We conclude by affirming a custodial sentence of 11 years' imprisonment for this offending. Our final word is for both victims who have suffered greatly because of this offending and who are to be commended for their bravery. We understand that no sentence can fully repair the pain and damage caused by such sibling abuse, however, the sentence we have imposed fully vindicates their position and it is a public record which we hope provides some solace and deterrence to others.