Neutral Citation No: [2019] NICA 42 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **STE11024** ***Delivered:*** **04/09/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

KT

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (NUMBER 2 of 2019)

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Before: Stephens LJ, Treacy LJ and Keegan J

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

Introduction

[1] We have anonymized this judgment as the Sexual Offences (Amendment) Act 1992 requires, referring to the offender as KT particularly in order to protect the identity of a child who was the victim of a previous sexual offence committed by the offender. Some of the specific details have been withheld. Other details such as dates are factually incorrect but are included so that the issues and the sequence of events even though inaccurate can be followed. We draw the attention of anyone hearing or reading this judgment to the prohibition on identifying any of the victims.

[2] 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. The Director submits that the failure by the sentencing judge ("the judge") to activate two previous suspended sentences and to impose a third suspended sentence was unduly lenient. He does not submit that the periods of imprisonment imposed on the offender (albeit suspended) were unduly lenient. The offences in relation to which the judge imposed sentence included two offences involving sexual exposure which offence is in this jurisdiction an indictable only common law offence. On that basis the sentences imposed for those offences can be referred to this court under section 35(3)(b)(i) of the Criminal Justice Act 1988.

The Director also sought to refer the sentences for two breaches of a Sexual Offences Prevention Order ("SOPO") to this court. The offence of breach of a SOPO is an offence triable either way so it does not fall within section 35(3)(b)(i). Furthermore the offence is not an offence of a description specified in an order made under section 35. However, the sentences imposed for the offences of breach of a SOPO and the failure to activate the two previous suspended sentences are also capable of being referred to this court as they are treated as being passed in the same proceedings as the sentences for the offences involving sexual exposure – see section 36(3) of the Criminal Justice Act 1988 and section 10(2) of the Criminal Appeal (Northern Ireland) Order 1980. Those sections mean that the sentences for all of the offences passed in the same proceedings are referable to this court provided at least one of the offences dealt with comes within the scope of Part IV of the Criminal Justice Act 1988. That is illustrated for instance in the judgment of Hutton LCJ in *Attorney General's Reference (No.2 of 1993)* [1993] 5 NIJB 71 where theft (an either way offence not coming within the scope of Part IV) was looked at along with the offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861 (which did come within the scope of Part IV).

[3] The hearing of the reference was adjourned for a period of two months to enable the offender to obtain medical notes and records together with medical reports in relation to his and his wife's physical and mental health. At the subsequent substantive hearing of the reference, we admitted in evidence the medical evidence obtained by the offender together with statements from the offender's daughter-in-law and daughter. We granted leave to challenge, as unduly lenient, the non-activation by the judge of two previous suspended sentences and the imposition by the judge at that time of a further suspended sentence of 12 months' imprisonment suspended for two years in respect of two offences involving sexual exposure committed approximately three months apart together with conditional discharges for breaches of a SOPO contrary to section 113 of the Sexual Offences Act 2003 committed at the same time. At the conclusion of the hearing we determined that the two previous suspended sentences ought to have been activated and the further suspended sentences and the conditional discharges should not have been passed. We quashed the sentences imposed by the judge and taking into account totality and double jeopardy we passed a total effective 3 year custodial sentence (one year in custody and two years on licence). We stated that we would give our reasons later which we now do.

[4] Ms Walsh appeared on behalf of the prosecution and Mr O'Donoghue QC and Mr Molloy appeared on behalf of the offender. We are grateful to counsel for their assistance.

Factual Background

[5] The offender is an elderly married man who is the primary carer for his elderly wife of fifty plus years. He had a positive employment record throughout his working life and had no criminal convictions until 2011 when he was in his seventies. Since then he has a highly relevant record for numerous sexual offences involving children. He has not responded to previous disposals involving probation, fines and suspended sentences. Instead he has demonstrated a continuing propensity to commit and has continued to commit offences involving young children particularly pre-pubescent female children in whom he has a deviant sexual interest. It is a feature of his offending that on occasions he has committed further offences within a matter of months of sentences being imposed on him. It is also a feature that on occasions there have been gaps between his offending of some one to three years. That is relevant to the assertion that since his last offending in 2018 there have been no further offences for a period of approximately one year so that the court could have confidence that the risk of reoffending had diminished. However, past experience demonstrates that a gap of one year is not a reliable indicator as to whether the offender presents a high risk of reoffending. Rather the pre-sentence report places him in the high priority category for supervision and intervention.

[6] We will set out the previous convictions together with the two previous suspended sentences before setting out the factual background to the offences committed on two dates in 2018.

[7] On two dates in 2009 the offender committed four offences of sexual activity with a child under 13. He was convicted of those offences in 2011. The sentence imposed was three years' probation together with a SOPO which was in the following terms:

> "Frequenting or loitering inside or outside places associated with child centered activities such as schools, playgrounds, amusement arcades or other places which by their nature are likely to attract or be frequented by children or young people without prior notification to and approval from his DRM (designated risk manager)."

By virtue of those convictions the offender was subject to the notification requirements known as the sex offenders' registration.

[8] The background to those offences was that during 2010 the offender entered a police station with a family member who reported that he had inappropriately touched that family member's daughter. The offender confirmed this was correct and made admissions to touching her between the legs stating that he had done this about 5 or 6 times. He stated that he had first done this about a year previously when he had touched her over her clothing with the palm of his hand. He further

stated that he had put his hands inside her pants and rubbed her bottom. He also admitted that when his young female relation had stayed at his address, he would touch her in that manner on each occasion and this had most recently taken place on a date in early 2010. He also admitted to taking his young female relation's hand and placing it over his genitals on the outside of his clothing. The young female relation, at an achieving best evidence ("ABE") interview, stated that the offender had put his hands down her trousers and had touched her. She also stated that he would secretly do this by putting his hand under the bed covers so her siblings did not know.

[9] The experience of appearing in court and being sentenced for these offences in 2011 had little impact on the offender as, within six months, he had committed a further sexual offence involving children which was then followed some three months later by further sexual offences. Not only were those further offences committed within close temporal proximity to sentence having been imposed but those further offences were in breach of the SOPO and were committed whilst the offender was on probation.

[10] The background to the further offences committed within six months of the 2011 sentence involved an incident at public place A where witnesses had seen the offender walking in front of children or being near to children whilst masturbating himself. He was also seen to expose his genitals towards children as they walked past him on four occasions whilst purportedly drying himself with a towel. When police arrived the offender had left the scene but his car registration details had been recorded. The offender was interviewed on the same date, accepted being present at public place A but denied the allegations regarding his behavior.

[11] It has not been possible to obtain the factual background to the further offences committed within the subsequent three months.

[12] The events referred to in paragraphs [9] – [11] led to convictions on two counts of an adult engaging in sexual activity in the presence of a child under thirteen, one count of exposure and two counts of breach of the SOPO. On a date in 2012 fines were imposed by the Crown Court ranging between £25 for breaches of the SOPO to £250 for the offence of exposure.

[13] There was then a gap in offending for a period of some three and a half years until 2015 when the offender committed a further sexual offence involving children. That further offence was the start of a series of sexual offences involving children committed on five separate dates throughout 2015.

[14] The first offence in this series was involving sexual exposure. This related to the offender grabbing at his penis at public place B within close proximity to children. On two further dates he committed the offences involving sexual exposure in the same manner but on this occasion at public place C. On a further date he was seen by security staff carrying out similar activity at public place C and on this

occasion his activity was captured on CCTV from which it was apparent that he actively sought out children and waited until no adults were paying attention when he would then grab and squeeze his penis over his trousers but would stop when an adult came into view. It was also apparent from the CCTV that he carried out this behaviour in front of both young boys and young girls under the age of about 8 years old but he appeared to express more interest in female children. It also appeared from the CCTV that he would try to attract the attention of the children.

[15] The events in this series led to convictions on eight counts of an adult engaging in sexual activity in the presence of a child under thirteen, three counts of committing an offence involving sexual exposure and ten counts of breach of the SOPO. The Crown Court imposed an effective overall sentence of imprisonment for two years suspended for three years.

[16] In the meantime prior to the sentence referred to in paragraph [15] being imposed the offender committed a further offence involving sexual exposure involving children and a further breach of the SOPO. The facts in relation to that offence were that a husband and wife were at public place D with their three children when the wife observed the offender touching his groin area through his trousers in their full view. She had an eight year old daughter with her who had severe learning difficulties but it was thought that she was oblivious to what was going on.

[17] Again the experience of appearing in court had little impact on the offender as, within nine months of being sentenced, he had committed a further breach of the SOPO although it has not been possible to obtain the details of this further offence.

[18] The offence involving sexual exposure outlined at paragraph [16] was not, but the offence referred to at paragraph [17] was, committed during the operational period of the suspended sentence imposed by the Crown Court as detailed at paragraph [15]. However, at court in 2017 rather than activating the earlier suspended sentence, a further suspended sentence of one years' imprisonment suspended for two years was imposed for the offences outlined in paragraphs [15] and [16], respectively.

[19] We will now set out the factual background to the offences committed on two dates in 2018.

[20] The offences committed on the first date in 2018 were an act of sexual exposure and breach of the SOPO. They occurred at public place E which has a restaurant area and a separate play area for children. Between 3pm and 4.30pm a member of staff was serving a lady with a young female child of around five to six years old at the till area. The member of staff noticed the offender put one of his hands in his coat pocket and begin to rub up and down over his crotch area quite slowly. She formed the view that he was rubbing his penis over his clothing and pleasuring himself towards the child. She believed that this went on for a few

minutes until she finished serving the lady. The lady and the child were unaware as to what had occurred.

[21] The offences committed on the second date in 2018 of committing an act of sexual exposure and breach of the SOPO also occurred at public place E.

(a) At midday the offender came into the restaurant, he bought a cup of coffee and then scanned the restaurant for a place to sit. He walked past empty tables and sat at a table next to a woman and a female child of around 5 to 6 years old. The offender positioned himself so he was adjacent to the woman but diagonally opposite and facing the child. He sat with his legs wide open and slouched in his chair. He then stared at the child for approximately 30 minutes only moving his gaze when a member of staff walked past. When the woman and child left the offender moved away a few seconds later. He then left the restaurant.

(b) At around 2 pm the offender who had returned to the restaurant was sitting at a table that needed to be cleared when there were clean tables available. On a table next to him was a lady with a toddler whom the witness thought may have been a little girl. The offender stared at the child and left about 45 seconds after the lady and the child left.

(c) At around 3 pm the offender ordered a cup of coffee when a man with a young boy and a young girl came into the restaurant. The young girl was about 7 years old and was wearing a school uniform. After ordering a coffee the offender turned to scan the room and walked past 6 or 7 free tables and sat at a large table near to where the man sat with the two children. The offender turned to face this table, he slouched down in his chair, he stared at the children, he opened his legs very wide and he rubbed up and down the inside of his leg from the top of his thigh down to his knee before proceeding to rub his hand over his crotch area. He blew heavily out of his mouth whilst squinting his eyes. It is estimated that he did this for some 20 minutes and at one stage he had slouched down so much he looked like he was going to fall off his chair. Once the man and the two children left the offender left seconds later.

[22] The offender was arrested and at interview he denied committing any offence.

(i) As far as the events on the first date in 2018 were concerned his initial response was to say that if he had rubbed himself he would not have done it through a coat. However, he then stated that he did not touch

himself at all but rather the witness was "completely up the left about it."

(ii) As far as the events on the second date in 2018 were concerned whilst admitting being at public place E for a period of time he denied staring at the children, denied touching himself and denied being sexually attracted to the young girl in a school uniform.

[23] The offender pleaded guilty at arraignment to the offences referred to at paragraphs [19] – [22]. A pre-sentence report was prepared and the offender was sentenced by the judge on a date in 2019.

The offender's circumstances

[24] We have set out some of the circumstances at [5].

[25] The offender had a good work record and a stable family life with no criminal convictions until he was in his seventies. On that basis we entertained concerns as to whether the offending was an aspect of loss of control through dementia. However for the purposes of this reference we were provided with the medical records which contained a report dated 10 August 2018 from Dr Min Chew in the Psychiatry of Old Age Team which stated that there was no evidence of mood, psychotic or dementia illness affecting the offender's judgment or thinking. That was also the opinion of Dr Dynan who was retained on behalf of the offender.

[26] The offender when interviewed by the probation officer in relation to the pre-sentence report admitted the offences. When he was asked what motivated his sexual offending behaviour he stated that he believed the child victims may have got some satisfaction from his behaviour which led to his own arousal. He stated that he now accepted that this was improbable and to the contrary his behaviour had the potential to cause harm to the children. He was explicit in stating that he would never intentionally harm a child and stated that he now understands the necessity for him to consider the consequences for victims and others close to him at the pre-offending stage as opposed to post offending.

[27] The offender acknowledged to the probation officer that he has a sexual attraction to female children which, by way of fantasy, would facilitate him when masturbating in private. The probation officer considered that the offender's account demonstrated a number of offending factors that were also present in his previous sexual offending against children and are not uncommon to men who commit similar offences. They included a deviant sexual interest in pre-pubescent female children, distorted thinking, child abusive attitudes and impulsivity resulting in poor decision making and consequential thinking.

[28] The probation officer noted that the offender remained subject to PSNI notification requirements. However the probation officer stated that given the

nature and persistence of the offending behaviour the offender was to be referred back to Public Protection Arrangements Northern Ireland with a recommendation that his level of risk be raised from Category 1 offender to Category 2 offender. That is, "someone whose previous offending, and/or current behaviour and/or current circumstances present clear and identifiable evidence that they could cause serious harm through carrying out a contact sexual or violent offence."

[29] We have considered a medical report dated 10 June 2019 prepared by Dr Dynan, Consultant Physician/Geriatrician, in relation to the offender's wife. It is apparent that she suffers from numerous conditions including gout, osteoarthritis, atrial fibrillation, hypertension and chronic kidney disease to name but a few. She has had numerous falls with recurrent symptoms of dizziness. She frequently requires assistance on the stairs due to pains in her knees due to arthritis and in her feet due to gout. She recounted to Dr Dynan that the offender occasionally helps her by accompanying her up the stairs behind her when ascending and in front when descending. She also recounted to Dr Dynan that she relies on her husband for some aspects of housework. She described frequent symptoms of dizziness which tended to occur when she gets out of bed or attempts to stand up from the toilet. Dr Dynan was of the opinion that she was at significant risk of falls. He was also of the opinion that the offender does probably function as an informal carer for his wife including meal preparation, accompanying her to the shops, hospital appointments, housework, occasional assistance on the stairs and a supportive presence in the house to assist her from getting off the floor if she sustains a further fall. Dr Dynan was of the opinion that the degree of caring required was not as intense as it would be for individuals with more profound disabilities but that the offender is nevertheless helping to maintain her living in the community relatively independently without input from health and social services support.

[30] We have also considered a report from Dr Dynan dated 10 June 2019 in relation to the offender. Dr Dynan noted that the offender reported a history of post-traumatic stress disorder and he found a number of ailments such as psoriasis, hearing impairment, intermittent dizziness and mild chronic obstructive pulmonary disease which meant that the offender had some shortness of breath on exertion. On examination the offender was bright, alert and fully co-operative and there was no evidence of dementia. He did not appear depressed. Dr Dynan considered that the offender did not appear to have any particularly active medical problems at present. Rather he was able to assist his wife with a number of activities of living in addition to accompanying her to the shops and functioning as her driver.

[31] There is also a report from Dr Bownes, Consultant Forensic Psychiatrist dated 23 October 2016. The offender had been diagnosed as suffering from post-traumatic stress disorder, chronic anxiety, depression and personality change arising from his exposure to various disturbing experiences. This had led to his medical retirement after which and with the passage of time his symptoms had improved so that he no longer avoided certain social situations though he continued to experience anxiety symptoms. He had not sought any professional advice or treatment for symptoms

related to his diagnosis of PTSD for years and his General Practitioner did not know that he had it. The offender denied that he had any worries or problems regarding his ability to cope with everyday stressors or social situations though this had to be seen in the context of a stoical personality.

[32] We have considered statements from the offender's daughter and daughter-in-law. We consider that the offender is a carer for his wife and that his wife requires care. We also consider that assistance could be obtained from other sources including from the offender's daughter and from social services so that there will be no severe or drastic consequences for the offender's wife whilst he is in custody.

The judge's sentencing remarks

[33] In summary the judge stated that this was a sad and somewhat troubling case in which the offender had lived a blameless life until his seventies. The judge considered that on three of the counts there were triable issues which the offender had abandoned by pleading guilty. He identified two important factors which enabled him to take a merciful view. The first was that the children and the parents were unaware of the offending. The second was that the offender had suffered from post-traumatic stress disorder which had led to his medical retirement. The judge also referred to the offender keeping out of trouble for 12 months whilst on bail. In summary these were the circumstances which led the judge to impose a suspended sentence and not to activate the two previous suspended sentences.

Statutory provisions and sentencing guidelines in relation to the offence of breach of a SOPO

[34] Section 113(3) of the Sexual Offences Act 2003 ("the 2003 Act") provides that where a person is convicted of the offence of breaching a SOPO, "it is not open to the court by or before which he is convicted to make, in respect of the offence, an order for conditional discharge …." The judge erred in law as to his powers of sentencing by imposing conditional discharges for the two offences of breach of the SOPO. In accordance with the provisions of section 36(1)(a) and 36(2)(a) of the Criminal Justice Act 1988 this means that the sentence in respect of those offences was unduly lenient.

[35] Section 113(2) of the 2003 Act provides that the maximum sentence (a) on summary conviction is imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both and (b) on conviction on indictment, the maximum imprisonment is for a term not exceeding 5 years.

[36] The offence of breach of a SOPO when committed in conjunction with another offence should always be treated as a separate offence for which a separate sentence should be imposed either by way of a consecutive sentence or when imposing concurrent sentences by taking the breach into account as an aggravating feature in

determining the sentence for the primary offence. In that way when imposing a concurrent sentence the offender does not escape punishment entirely by subsuming the sentence for the breach offence into the penalty imposed for the primary offence but bearing in mind the totality principle to ensure that the total sentence is proportionate to the overall offending behaviour.

[37] The purpose of section 113(3) of the 2003 Act is to emphasise that breach of a SOPO requires a penalty. In that way the integrity of SOPOs are maintained for the benefit of the public and the offender.

[38] At the time that the offender was sentenced in 2019 he had 14 previous convictions for breach of a SOPO and the custody threshold had been passed on two previous occasions when suspended sentences of imprisonment had been imposed.

[39] We consider that the imposition of conditional discharges for the offences of breach of the SOPO was not only wrong in law but also failed to reflect the gravity of those offences particularly given the numerous previous convictions. The custody threshold had been passed on the two previous occasions and it was still passed on this occasion in relation to both of these offences even if they had not been committed in association with other offences.

Sentencing guidelines in relation to the offences of committing an act involving sexual exposure

[40] The offence involving sexual exposure is an indictable common law offence, punishable by unlimited imprisonment and/or an unlimited fine.

[41] In *R v Millberry & Ors* [2003] 2 Cr App R (S) 31 it was stated that in assessing the gravity of an individual offence there are broadly three dimensions to consider. The first is the degree of harm to the victim; the second is the level of culpability of the offender and the third is the level of risk proposed by the offender to society. Those three dimensions were approved by this court in *Attorney General's Reference (No 2 of 2004) (Daniel John O'Connell)* [2004] NICA 15 and *Attorney General's Reference (No 3 of 2006) (Michael John Gilbert)* [2006] NICA 36. We consider that it will always be necessary to consider any individual case as a whole taking into account the three dimensions to which we have referred.

[42] The offences in this case involved young children and in that respect we refer to the guidance of this court in *Attorney General's Reference (No. 2 of 2002)* [2002] NICA 40, *Attorney General's Reference (No. 4 of 2005) (Martin Kerr)* [2005] NICA 33 and *R v QD* [2019] NICA 23. We repeat that this remains the approach to sentencing in relation to sexual offences involving children.

Guidelines in relation to the extent to which allowance to be made for old age of offender

[43] The offender is in his eighties. The English Court of Appeal in *R v Clarke* [2017] EWCA Crim 393 reaffirmed the principle established in a number of cases that the court is always 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 an offender of that age*. The principle is that an offender's diminished life expectancy, his age, health and the prospect of his dying in prison were factors legitimately to be taken into account in passing sentence, but only in a limited way since they had to 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 will be on the extent to which a custodial sentence will be more onerous, compared to a younger, fitter offender and in that respect it is important to have reports to engage with and consider such issues. This court in *Director of Public Prosecution's Reference (Number 1 of 2018) Vincent Lewis* [2019] NICA 26 applied that principle in this jurisdiction. We would add that ordinarily as in *Vincent Lewis* by the time very old offenders fall to be sentenced, the questions of rehabilitation, dangerousness and further offending are unlikely to be significant. That is not applicable in this case as is apparent from consideration of the offender's criminal record, the medical evidence and the pre-sentence report. In this case there is a significant risk of reoffending and a need for rehabilitation.

Guidelines in relation to the activation of suspended sentences

[44] The power to activate a suspended sentence is contained in section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 ("the 1968 Act") with the substitutions effected by Article 9 of the Treatment of Offenders (Northern Ireland) Order 1989.

[45] Section 19(1) of the 1968 Act provides that "where an offender is convicted of a subsequent offence punishable with imprisonment in the case of a person aged twenty-one years or over, and the offence was committed during the operational period of a suspended sentence … and either he is so convicted by or before a court having power … to deal with him in respect of the suspended sentence …, then, unless the sentence or order has already taken effect, the court shall consider his case and deal with him by one of the following methods …" The first of those methods is "(a) the court may order that the suspended sentence … shall take effect with the original term unaltered." Other methods are then set out at (b)–(d) but section 19(1) continues that "a court shall make an order under paragraph (a) unless the court is of the opinion that it would be *unjust to do so* in view of *all the circumstances*, including the facts of the subsequent offence and where it is of that opinion the court shall state its reasons" (emphasis added). The terms of section 19(1) mean that it is "the Court's duty to adopt method (a), by ordering the suspended sentence to take effect, "unless the court is of opinion that it would be unjust to do so in view of all the circumstances, …" see the judgment of this court given by Lowry LCJ in *R v Law* [1973] Lexis Citation 43. If the court does not adopt method (a) then it has a duty to state its reasons.

[46] This court has also considered the principles to be applied in *R v Andrew Larmour* 19/04/1991, *R v Samuel Brown Lendrum* (1993) 7 NIJB 78, *Re Price's Application* [1997] NI 33 and *R v Colin Hughes* [2003] NICA 17.

[47] In *R v Alan Alfred Price* Carswell LCJ stated:

> "… I want to make it clear from this Court that suspended sentences are meant to have effect."

He went on to state that:

> "… suspended sentences should be generally applied in full, unless there are circumstances which indicate that there should be a reduction."

In *R v Samuel Brown Lendrum* Hutton LCJ stated that:

> "The fact that an offence committed during the operational period of a suspended sentence is of a different character from the offence for which the suspended sentence was imposed is not in itself a ground for not activating the suspended sentence."

In *R v Colin Hughes* Carswell LCJ when considering the totality principle stated that:

> "If the sum of the two sentences makes for a total which would have been unjustifiable as punishment for the original offence plus the instant offence, then the suspended sentence could properly be put into operation for a shorter period."

[48] These are the principles which should continue to be applied when considering the question as to whether to activate a suspended sentence and if so for what period. We would emphasise that the effectiveness of and the public confidence in a suspended sentence as a deterrent is undermined unless there is compliance with the duty set out in section 19(1) of the 1968 Act. That duty means that both the offender and the public know that a suspended sentence is a real sword of Damocles rather than a paper tiger.

Discussion of the *R v Millberry* dimensions

[49] In relation to the offences involving sexual exposure outlined at paragraphs [19] – [23] there was no evidence that any of the children were aware of what had occurred. This means that in relation to the first dimension identified in *R v Millberry & Ors* namely the degree of harm to the victim, there was no harm to the children though there was obviously upset to the witnesses who saw what the

offender was doing. Any consideration of the degree of harm has also to take into account the harm that the offences might foreseeably have caused. However, the degree of harm actually caused or foreseeably likely to have caused would not have been significant given that the children were accompanied by adults.

[50] The second dimension is the level of culpability of the offender which is ordinarily determined by the extent to which the offender intends to cause harm. The worse the harm intended, the greater the offender's culpability. However, sexual offences are somewhat different in that the offender's intention may be to obtain sexual gratification, financial or some other result rather than to harm the victim. Where the activity is in any way non-consensual, coercive or exploitative, the offence is inherently harmful and therefore the offender's culpability is high. Planning an offence makes the offender more highly culpable than engaging in opportunistic or impulsive offending. In this case we bear in mind that the offences did not involve any physical contact with the children which is a significant factor diminishing the harm intended. However, we consider that the offender positively disregarded the harm which he knew might have been caused to the children which knowledge had been emphasised to him by his previous convictions and the sex offenders' courses which he had undertaken. We also consider that these offences involved a degree of rudimentary planning in that he chose a location and chose where to stand or sit so that the offences were not opportunistic but rather he deliberately committed the offences in order to obtain sexual gratification. On that basis we consider that there is a not insignificant degree of culpability.

[51] The third dimension is the level of risk proposed by the offender to society. The probation officer in his pre-sentence report stated that the Stable 2007 and Risk Matrix 2000 provided a composite assessment which placed the offender in the high priority category for supervision and intervention though he was not assessed as posing a significant risk of serious harm "at this stage." In considering pre-sentence reports in relation to a significant risk of serious harm it is important to bear in mind the observations of this court in *R v Loughlin (Michael) (DPP Reference No 5 2018)* [2019] NICA 10 in relation to the need for care in the assessment of dangerousness even where the probation assessment is that the offender is not assessed as posing a significant risk of serious harm. The concentration should be on the statutory test not on the test adopted by the probation service. In this case we note that the first offences committed by the offender in 2009 involved actual physical contact with a young child so the context is that he not only fantasises about pre-pubescent females but has physically interfered with one. Such sexual physical abuse is deeply psychologically damaging to victims with the potential for long term adverse effects. We also note that the pre-sentence report contains a recommendation that the level of risk of the offender is of someone whose previous offending, and/or current behaviour and/or current circumstances present clear and identifiable evidence that they could cause serious harm through carrying out a contact sexual or violent offence. We consider that the offender poses a significant risk to society. We emphasise and agree with the PBNI assessment that there is a high priority for supervision and intervention.

Aggravating features

[52] We consider that the following aggravating features are present:

(a) Relevant criminal record;

(b) Planning and pre-meditation;

(c) As concurrent sentences are being imposed then the second offence involving sexual exposure is an aggravating feature;

(d) As concurrent sentences are being imposed and the primary offence is an offence involving sexual exposure then the two offences of breach of the SOPO are aggravating features.

Mitigation

[53] We have given consideration to the following points in mitigation:

(a) The offender pleaded guilty at arraignment though he denied the offences at interview;

(b) The offender's age though only to the most limited extent as the medical evidence is that whilst he has some ailments there is nothing presently of any substance that would mean that a sentence of imprisonment would have a greater impact on him than on a younger fitter individual;

(c) The offender's role as the primary carer for his wife and her plight whilst he is in custody, see *Attorney General's Reference (No.1 of 2006) Gary McDonald, John Keith McDonald and Stephen Gary Maternaghan* [2006] NICA 4 at [38]–[41]. However, we consider that her plight is to be seen in the context that despite previously appearing in the criminal courts the offender continued to put at risk his role as his wife's carer by reoffending so that he repetitively failed to place any weight on the plight of his wife. We also consider that alternative arrangements can be made for her care.

(d) The offender's personal circumstances including his PTSD though these are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 at paragraph [15]; *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 at paragraph [37] and *R v Keith McConnan* [2017] NICA 40 at paragraph [49].

[54] It can be seen that the most significant mitigating feature which should be taken into account is the plea of guilty.

Consideration

[55] In relation to the sentences imposed for breaches of the SOPO we have concluded at [34] and [39] that those sentences were unduly lenient.

[56] Next we consider the non-activation of the two previous suspended sentences and the imposition of a third suspended sentence. There was no issue as to the length of the periods of imprisonment but rather the issue was as to whether it was unduly lenient not to have activated the two previous suspended sentences and whether it was unduly lenient for the sentence of 12 months imprisonment to have been suspended. If the two previous sentences were activated and if the 12 months imprisonment was imposed then the total sentence would be one of 4 years and 6 months so this raises an issue as to totality.

[57] The duty under section 19(1) of the 1968 Act is to activate previous suspended sentences in full unless it is *unjust* to do so *in all the circumstances.* This means that there is an obligation to consider *all the circumstances* before deciding not to activate a suspended sentence in full and that a court should only not do so if it would be unjust.

[58] In this case the judge identified one of the circumstances as the first of the *R v Millberry* dimensions which was the degree of harm to the victims finding that the parents and the children were unaware of the offending. However, consideration of the other *R v Millberry* dimensions would have led to the conclusion that there was a not insignificant degree of culpability on the part of the offender and that the offender proposed a significant risk to society such as to require a high priority for supervision and intervention. There is no supervision and intervention in a suspended sentence. A consideration of the other *R v Millberry* dimensions could not have led to any significant weight being attached to the first dimension. The most compelling circumstance was the need to protect young children from a paedophile.

[59] The judge also relied on the offender's PTSD but that feature of his personal circumstances cannot carry any significant weight in mitigation. The final reason relied on by the judge was that the offender had remained out of trouble for 12 months whilst on bail. However, he has previously reoffended after gaps of some 1-3 years so that this could not be any reliable indicator of a decrease in the risk of reoffending. Furthermore, the pre-sentence report contained clear evidence of a serious risk of reoffending and a significant risk to society. The first of these two reasons ought to have carried little weight and we consider that the second reason was incorrect.

[60] The statutory duty when considering activation of a suspended sentence is to follow method (a) unless it is unjust to do so in all the circumstances. We consider that in all the circumstances it would not be unjust to activate the two previous suspended sentences. We consider that it was unduly lenient not to have done so and that it was also unduly lenient to suspend the further sentence of 12 months imprisonment.

[61] We have given anxious consideration to the question of totality. If all the sentences were activated in full that would have led to an overall determinate custodial sentence of 4 ½ years. On the basis of totality we consider that the range ought to have been in the region of 3 ½ to 4 years. That then leaves the issue of double jeopardy.

Double jeopardy

[62] Morgan LCJ in giving the judgment of this court in *R v Loughlin (Michael) (DPP Reference No 5 2018)* at [35] stated that:

> "… double jeopardy can arise in respect of PPS references depending upon the circumstances of the case. That will particularly be so where the effect of the reference may be to return an offender to custody who has already served the sentence or to impose a longer sentence on an offender who is already participating in a pre-release scheme. We do not accept that double jeopardy operates to reduce the appropriate sentence where the offender is serving a substantial custodial sentence and the only issue is whether it should be increased."

[63] The offender was not in custody so we consider that double jeopardy should be taken into account in this case. On that basis we consider that the appropriate sentence is a determinate custodial sentence of 3 years.

The licence period

[64] The relevant provisions in relation to the division of a custodial sentence as between the custodial and licence periods are contained in Article 8 of the Criminal Justice (Northern Ireland) Order 2008. The custodial period shall not exceed one half of the term of the sentence. This means that the licence period has to be at least one half of the term of the sentence. There is discretion to make the licence period longer than one half but in order to do this the court must address the statutory objectives contained in Article 8(5). In this way the duration of the licence period is dependent upon an assessment of the effect of probation supervision in protecting the public from harm from the offender and preventing his commission of further offences, see *R v Gary McKeown, Director of Public Prosecution's Reference (Number 2 of 2013), R v Han Lin* [2013] NICA 28 at [31] and *R v Somers & another* [2015] NICA 17 at [25].

[65] We have given anxious consideration to the issue as to whether the licence period should be longer than half the term of the sentence. We note that the offender has had periods where he has not reoffended including over the last 15 months so that during those periods he has been able to use internal and external controls. We also note that this will be the first time that the offender has been subject to a prison sentence so there will be an impact on the offender of a period in custody together with the impact of a real threat of a return to custody during his licence period if he fails to comply with his licence condition or with the terms of his SOPO. In our estimation these impacts will reinforce the resolve of the offender not to reoffend which will increase the efficacy of probation work whilst on licence. We note that the offender has a high priority for supervision and intervention and that a period of two years on licence is required to ensure completion of that work. We consider that in all those circumstances two years offence focussed work will assist in protecting the public from harm from the offender and will assist in preventing commission of further offences. We set the licence period at two years in order to facilitate this work.

[66] We make conditions of his licence that (a) the offender is to attend and participate in any assessments and/or treatment as deemed necessary by his Designated Risk Manager to address his offending behaviour and (b) that he is to comply with the terms of his SOPO. The offender should anticipate that *any* breach of these conditions may well lead to the revocation of his licence and his recall to prison and he should also anticipate that if he commits any further offence whilst on licence that it is highly likely that revocation and recall will occur, see *Re Mullan's Application* [2007] NICA 47 and *Hegarty (Neil) v The Department of Justice and The Parole Commissioners for Northern Ireland* [2019] NICA 16.

Conclusion

[67] We exercise our discretion to quash the sentence that was passed on the offender by the judge and in place of it activate the two previous suspended sentences and pass a sentence so as to achieve an effective total determinate custodial sentence of 3 years (1 year in custody and 2 years on licence).