Neutral Citation No: [2024] NICA 9 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12410** *ICOS No:* **23/002310** *Delivered:* **09/02/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

CD

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

Mr Neil Connor KC with Mr Richard McConkey (instructed by Holmes & Moffatt Solicitors) for the Respondent
Mr David McNeill (instructed by the PPS) for the Applicant

Before: Keegan LCJ, Treacy LJ and Kinney J

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

Introduction

We have anonymised the applicant's name to protect the identity of the complainant and so this will appear as the cypher CD. The complainant is also cyphered and referred to as T in this judgment. She is entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

[1] This is an application by the Director of Public Prosecutions ("the DPP") for leave to make a reference to the Court of Appeal under section 36 of the Criminal Justice Act 1988 as amended to review a two-year sentence of imprisonment imposed on the respondent on 29 September 2023 by His Honour Judge Gilpin ("the judge").

[2] The sentence was imposed following pleas of guilty in respect of two counts. Both were counts of sexual assault of a child under 13, contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008 ("the 2008 Order"). Two other counts were left on the books.

[3] The DPP now submits by way of a reference to this court that the sentence imposed of two years' imprisonment split between custody and licence was unduly lenient in this case. Several ancillary orders were also imposed including a five-year Sexual Offences Prevention Order ("SOPO"). No application is raised in relation to these orders.

Factual background

[4] The complainant in this case is a young child who is the daughter of the respondent's previous partner. The offences for which the respondent was sentenced were committed between 1 January and 2 August 2022, when the child who we shall call T for the purposes of this judgment was 10 or 11 years old and the respondent was 36 years old. The broad circumstances of this sexual offending are as follows.

[5] The respondent had begun to live in the family home with T and her mother from April 2020. On 2 August 2022, T contacted police via 999 to report that the respondent had touched her on her private parts.

[6] After the report of abuse T took part in an Achieving Best Evidence ("ABE") interview. During interview T told police that one day in January or February 2022 when she was 10 at around 7:30am she had been in her mother's bedroom with the respondent, her mother, and her younger sister. She said they were all lying down in the bed. She said her mother got up to make a coffee and her little sister left the room. T said that when she also went to leave the room the respondent stopped her. She then said that he began to touch her. This was described as a touch which was under her trousers and underwear and that "he got his finger and he just rubbed … rubbed it." T described the area that he touched as an area she used to go to the bathroom or the front part. She said this lasted for about 10 seconds, she felt weird and a tiny bit sore. T also said at interview that the respondent said it was their secret and not to tell anyone. T therefore did not say anything at the time when this occurred because she was too scared.

[7] However, T explained that this behaviour occurred on another occasion around July 2022 when a friend of hers had stayed over. They had made a den in their bedroom and were to sleep there that night. They were watching videos when at about midnight, an hour after everyone had gone to bed, they heard footsteps which they initially believed was T's mother. Hence, they pretended to be asleep. T then saw it was the respondent who had entered the room and, again, pretended to be asleep. He tried, on her account, to wake her up, but she continued to pretend to

be asleep. However, the respondent then took her out of the bedroom into a different room and closed the door.

[8] When in the other room T says the respondent told her to open her legs and then he began to touch her down her underwear. He touched her in the same place as he had touched her previously underneath her underwear which she said was sore. This incident is reported also to have lasted about 10 seconds.

[9] Afterwards T went back to her bedroom and told her friend what had happened. Her friend was scared in relation to this. A couple of days after the second incident T told her mother what had happened. When asked by her mother what had happened T said she could not tell her before because someone would get angry. Eventually she did explain to her mother what happened. The revelation to the mother did not result in any further action. In addition, the respondent became part of a discussion with T and her mother and spoke to her about lucid nightmares. He told her that they were not real and that she was safe. He gave T a ring and told her that it belonged to a pagan priest, that it was blessed, and it would keep her safe. T told police that her mother did not initially believe her and that she did not feel safe in her home. Therefore, T contacted the police herself.

[10] The respondent was arrested on 3 August 2022. He made no reply to the caution after arrest. He was interviewed under caution later that day and on 25 October 2022. During interviews the respondent confirmed that he had lived with the mother and her children for approximately three years. He denied that anything sexual had ever occurred with T, specifically denying her allegations. He said that she had a temper and was prone to make things up, that he was sure if she had seen something on YouTube or TV and had convinced herself that it had occurred. The defence statement is dated 8 March 2023 and includes a full denial.

[11] The progress of court proceedings is as follows. The respondent was arraigned on 22 February 2023 and pleaded not guilty to all the counts on the Bill of Indictment. On the day fixed for his trial, 27 March 2023, the respondent failed to appear, and a bench warrant was issued for his arrest. The respondent was arrested and remanded in custody. He was granted bail on 3 April 2023, but this was not perfected, and he remained in custody. On 5 July 2023, the respondent was rearraigned and pleaded guilty to two counts.

Judge's sentencing remarks

[12] We have had the benefit of thorough and comprehensive sentencing remarks in this case which are of high quality. We summarise the key features from the sentencing exercise that was undertaken as follows. Prior to sentencing the judge had the benefit of written submissions from counsel in the case. He also heard oral submissions from counsel. He had the benefit of a probation report which was filed. This pre-sentence report set out the respondent's history. It highlighted the fact that the respondent had mental health difficulties which escalated into suicidal ideation

and were apparent at the time when he did not attend for trial in March 2023. This resulted in an attendance at [X] Area Hospital. Subsequently, the respondent has been under special supervision under the auspices of supporting prisoners at risk (SPAR) in prison.

[13] The pre-sentence report states that the respondent took full responsibility for his offending and cited deep regret for committing the offences and "appears to appreciate the impact of his offending on the victim and her family." The report also states as follows:

> "The respondent presented as very uncomfortable when reflecting on his sexually abusive behaviour towards this child. Despite his discomfort, he engaged in the assessment process and although cited limited memory of the circumstances due to his drug use and poor mental health, he confirmed the specific instances of abuse occurred as described by the child. He recognised the circumstances were not an excuse for his actions and expressed what he had done was disgusting and sickening. He suggested that he is now struggling with his actions, seeing them as aberration of himself and recognises he now must live with what he exposed this child to. His sentiments of regret punctuated the interview, and he was observed to have good insight into the harm likely caused and the fall-out on the victim and her wider family circle, including his now ex-partner, the child's mother. He recognised how the victim was scared, betrayed and likely to have been confused by his actions. He took accountability and did not seek to discredit the child or diminish the seriousness of his actions."

[14] The report refers to the respondent as having no prior convictions and that there are no other pending matters. The opinion of probation was that the respondent was assessed as posing a medium likelihood of general reoffending using probation's assessment tool. He was not deemed to present as posing a significant risk of serious harm to the public.

[15] The court also had the benefit of a psychiatric report in relation to the respondent from Dr Michael Curran. This report sets out the mental health history of the respondent in some detail. It validates the fact that the respondent has had suicidal ideation in the past. The report opines as follows:

> "Perusal of the available GP notes and records confirm that the respondent has been previously plagued by episodes of fluctuating anxiety and depression and that he has been treated with psychotropic medications when

> in crisis. The respondent from his own accounts became more acutely depressed and suicidal thoughts came to the fore in March 2023. The respondent who may have had alcohol on board took himself up Y whereupon he inflicted a series of cuts to his body. When found by the searching PSNI officers, it was deemed that the respondent required both medical and psychiatric assessment in the casualty unit of Antrim Area Hospital where he remained over a period of two days before being discharged from their care. The doctor was asked to decide whether the respondent was fit to plead and decided that he was."

[16] In addition, a comprehensive victim impact report was filed by Dr [Z] in relation to T. This report sets out the impact of the incident on T. In that regard the expert refers to the emotional impact which she says has been significant in that T reported marked physiological reactivity and psychological distress when exposed to reminders of the sexual abuse. The report refers to persistent nightmares in relation to this. The report also refers to T having suffered in terms of her educational abilities and highlights some challenges with social interaction. The report ultimately concludes as follows:

> "It is my clinical opinion that the sexual abuse that T was subjected to by the accused, the respondent, has had a significant adverse impact on her overall well-being at a critical stage in development and is likely to leave a life-long imprint. This will potentially affect T at various points in her life, such as during relationships and sexual activities within these, developing friendships, giving birth, becoming a parent and going for medical examinations. Despite this, T has several protective factors that will hopefully provide some buffer to the impact of the abuse: her relationship with her mother and her father, the support from her two best friends, the counselling that she is accessing through Nexus on a weekly basis and the referral that the mother reports is being made to the local CAMHS team for future support. It is my clinical opinion that T may require a trauma focused evidence based psychological intervention, provided by a clinician who understands her social challenges, so that she feels able to express herself appropriately. T demonstrated remarkable strength and courage attending the victim impact appointment which was observably very hard for her. I hope that with the support of her family and various agencies she can begin to process the complex emotions and memories that she is

> experiencing and regain a sense of physical and psychological safety."

[17] Having the benefit of these materials and the submissions made the judge undertook the sentencing exercise in the following way. Firstly, he described the history of what had happened. Next, he referred to the relevant authorities in the area that had been highlighted by counsel, in particular two decisions of the Court of Appeal in *R v GM* [2020] NICA 49 and *R v QD* [2019] NICA 23. He referenced the fact that the Court of Appeal in the case of *GM* had said:

> "The task for the sentencing court in every instance will be to tailor the sentence which it considers appropriate, giving effect to the requirements of retribution and deterrence, in the fact sensitive context of each case."

[18] The judge also referred to the requirements that are articulated in *R v QD* that in a case of this nature there are broadly three aspects that the court should consider: the level of culpability of an offender; the degree of harm caused to the victim; and the level of risk posed to society.

[19] The judge then referred to the pre-sentence report. The judge made his own assessment that the respondent was not dangerous.

[20] Then the judge turned to the aggravating factors in this case. In this analysis he pointed to the fact that there is a significant disparity in age. He pointed to the fact that the offences were committed in circumstances that constituted a breach of trust because the respondent resided in the family home and had a caring role for the complainant. The judge then recorded the attitude taken by the respondent towards his victim when she confided in her mother, in that attempts were made to confuse or to manipulate the victim.

[21] Next, the judge turned to consider matters of victim impact. He referred in detail to the report of Dr [Z] in terms of the victim impact which she had described as significant.

[22] Finally, the judge referred to the position of the respondent. He reflected on the evidence he had received from Dr Michael Curran. He referred to the respondent's background in particular his fractured family life, and the death of his father which had a significant impact upon him. The judge also refers to the mental health issues that had been exhibited by the respondent. In terms of physical health, the judge records that the respondent was someone who was born with severe asthma but was otherwise physically healthy. He refers to reliance on alcohol and drugs. The judge also noted regret for the offending.

[23] The judge's overall conclusion reads as follows:

> "Taking all matters into consideration, the nature of your offending, the harm that you caused and your own personal circumstances, if you had pleaded not guilty and the jury had found you guilty, the sentence that this court would have passed on you would have been one of two and a half years in custody. However, you did in due course plead guilty. As I indicated, you denied matters at interview, and you pleaded not guilty at arraignment. You failed to turn up for your trial and a bench warrant had to be issued and a new trial date set. However, as I indicated in July of this year, you did plead guilty and by your plea, it is a vindication of your victim's account, and she has been spared the arduous process of having to give evidence."

[24] The judge then allowed a reduction of six months for the guilty plea and passed a global sentence of two years and a SOPO which he considered to be necessary in the circumstances of this case.

Arguments now made upon this reference

[25] Mr McNeill wisely focused his submissions in this case on two points. First, he said that the starting point chosen by the judge of two and half years was outside the appropriate range for offences of this nature. The submission made was that the judge did not provide an analysis of how he reached the starting point of two and a half years. The core emphasis of Mr McNeill was on the case of *R v GM* where a starting point of five years was approved by the Court of Appeal which led after a reduction for a plea to an ultimate sentence of three years and nine months. Considering the aggravating factors in this case the submission made by the prosecution was that the appropriate range for a global starting point in this case ought to have been in the region of five to seven years' imprisonment.

[26] The subsidiary argument related to credit for guilty pleas. Mr McNeill accepted that the respondent was entitled to some credit for his guilty plea. However, relying on the current guidance from *R v Maughan* [2022] UKSC 13 the submission was that the judge had given too generous a discount. In this case the judge allowed a 20% reduction and in argument in the reference in the circumstances it was submitted that the credit ought to have been in the region of 10-15%. All of that said, Mr McNeill realistically conceded that this reference would not have been brought on the grounds of the credit for the plea alone and it really concentrated on the issue of the appropriate starting point prior to reduction for a plea in cases of this nature.

[27] The defence argument was essentially that the reference is misplaced. In support of this Mr Connor maintained that the judge chose the right starting point considering the factual circumstances in this case and that the sentence could not be

described as unduly lenient. A point was raised that at the lower court submissions were made that have now been enhanced further to reach a starting point proposition of five to seven years and that *R v GM* must be read considering *R v QD* which opted for a much lower sentence. Therefore, the defence argued that *R v GM* is not a binding authority which automatically leads to a starting point of five years in a case of this nature. The respondent argued that the judge was acutely aware of the harm caused to the victim in this case and that he had considered all the aggravating factors along with the mitigating factors in this case to reach an appropriate sentence.

[28] In addition, the defence argued that the credit for the plea of guilty was appropriate in the circumstances of the case. Whilst the respondent did not attend court for his initial trial and an arrest warrant was issued, he clearly was very unwell at the time as evidenced by his suicide attempt the next day. Therefore, the defence argument was that the reduction was quite proper in the circumstances of this case. Finally, the defence referred to double jeopardy which it was argued is an important factor in this case as the respondent has no previous criminal record and this is his first time in a custodial environment.

[29] In reply to the central submission of the prosecution that the judge arrived at a starting point that was too low, the respondent submitted that the judge acted well within his discretionary remit and provided a carefully considered ruling in accordance with sentencing provisions.

Consideration

[30] As to the test for leave in a reference we repeat what this court recently said in *R v Sharyar Ali* [2023] NICA 20 as follows:

> "[3] The reference procedure does not provide the prosecution with a general right of appeal against sentence. Taylor on Criminal Appeals (3rd ed, 2022), helpfully summarises the applicable legal principles as follows:
>
> > '13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:
> >
> > (l) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.

(2) Leave should only be granted in exceptional circumstances and not in borderline cases.

(3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being 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.

(4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.

(5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'

(6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?

(7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted 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.

(8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy.'

[4] It follows from the above that there is a high and exacting threshold for a reference to succeed. The Court

> of Appeal when considering a reference must first decide whether to grant leave. The court must also decide whether a sentence is unduly lenient not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play."

[31] The point in this case is a net one. That is because both prosecution and defence counsel accept that the judge considered all relevant aggravating factors in this case. He also considered personal mitigation. He has made no error of principle. The simple question is whether the sentence falls outside the range of sentences which could reasonably be considered appropriate. This brings us to a consideration of several authorities in this area but principally two recent authorities of the Court of Appeal which we will discuss.

[32] Before doing so, it is timely to comment that offences of this nature are clearly serious and require condign punishment. The maximum sentence on indictment for the offences at issue is now 14 years' imprisonment. The current sentencing policy is obviously that appropriate sentences must reflect the gravity of the offence, the need to deter others, the obligation to protect the most vulnerable members of our society, and the grave public concern and revulsion aroused by this type of offence. These points of principle are not in dispute.

[33] Additionally, not in dispute, is the fact that sentencing in this area is extremely fact sensitive. That is why we agree and reiterate the point made by previous compositions of this court that it is difficult and unwise to set rigid guidelines for sentencing in this area. A sentencing judge will, in the course of daily work, come across very many different circumstances unfortunately which involve this type of offending and ultimately must, in weighing up all the relevant factors, settle upon a sentence which meets the justice of the case.

[34] The difficulty in this case seems to arise from a position taken by the applicant that the case of *R v GM* is effectively a binding precedent that in a case of this nature involving an Article 14 offence a starting point of five years should be imposed. We pause at this juncture to note that the reference expands this starting point up to seven years ostensibly based on the sentencing guidelines in England & Wales. This court has consistently stated that the sentencing guidelines in England & Wales are not binding upon it although they can be used as a guide to the identification of aggravating and mitigating factors.

[35] We do not think it is an impressive point in this reference that the prosecution has expanded the range post the hearing in this case. If anything, this approach detracts from the very straightforward way in which this case was presented before the judge. Specifically, we note that the prosecution opening submissions did not opt for the broader category now favoured by Mr McNeill. Mr Russell who was

prosecution counsel before the trial judge when providing submissions to the lower court was quite clear that *R v GM* was not on all fours with this case. In other words, he was not arguing that this was a binding precedent which would lead the judge into having to start at five years as was applied in that case.

[36] We state again, as we have before, that it is impermissible to reinvent a case within the structure of a reference.

[37] All of that said, there is another issue in this case with the case of *R v GM* that requires this court to provide some clarification. First, we deal with the facts of that case. This was a case involving an Article 14 charge against a father for sexual assault of his daughter who was aged four years and nine months on the date of the offending. The offence occurred in circumstances where the appellant in that case had his first overnight contact with his daughter. The father and daughter shared a bed. The following day the child complained to her great-aunt about the appellant's conduct the previous night. She described an assault on her vaginal area which hurt, and he would not stop. Following an immediate report to the police the child, in an ABE interview, described the assault both verbally and by motioning with her finger. The essence of the complaint was that the appellant had placed his finger in her vagina moving it back and forth and from side to side. The child had been in a nightdress at the time, she asked the appellant to stop and said it was sore.

[38] Of particular significance in *R v GM* was the medical evidence which comprised two reports compiled by Dr Alison Livingstone, a Consultant Community Paediatrician. The first was based on her assessment and examination of the child on the date following the alleged assaults. The findings on examination were bruising and abrasions in the outer genitalia. Dr Livingstone opined that the clinical findings were consistent with blunt force trauma caused by "forceful digital penetration or from a firm object such as with penile penetration. She considered, and excluded, the possibility of self-infliction expressing the opinion that the injuries were "more likely than not due to sexual abuse." Upon examination some three weeks later the abrasions had healed, and the bruising had resolved.

[39] The outworkings of the evidence in *GM* was that the appellant was initially committed for trial on the more serious charge of sexual assault of a child under 13 years by penetration, contrary to Article 13. However, this was reduced to an Article 14 charge and the initial count remained on the books. That was because the prosecution felt unable to establish the essential element of penetration to secure a conviction under Article 13. As the court noted in *GM* an offence under Article 13 is punishable by life imprisonment, while an offence under Article 14 is punishable with 14 years' imprisonment.

[40] At para [28] of *R v GM* the court does discuss the case of *R v QD*. However, this is really a recitation of facts rather than an analysis. *R v QD* was a reference where in an Article 14 charge a sentence of five months' imprisonment was imposed. This abuse was perpetrated on a child who was two years and seven months. The

assault was established based on ejaculation landing on the child. Also, in that case the respondent suffered from Whipple's disease which had caused quite significant physical disability.

[41] The ultimate disposition of the reference in *R v QD* is explained at para [32] of the judgment. The prosecution proposed a starting point of four years which it said was consistent with decisions of the Northern Ireland court in *R v AB* [2018] NIJB 77 and *R v M* [2015] NICA 56 and several authorities in England & Wales, in particular, *R v Teeter* [2010] EWCA Crim 1425 and *R v Moulding* [2010] EWCA Crim 1690. Emphasis was placed upon the harm that was occasioned to the very young child which the court referenced in detail at paras [51]-[55].

[42] In its analysis in *R v QD* the court began by indicating that none of the authorities it had received were comparable. It rejected the submission that the starting point ought to have been four years custody. However, the court referred to the fact that there would undoubtedly be harm to this child going forward within a family unit. The court reflected that a feature of the submission on behalf of the respondent was that there was no evidence that the victim suffered any harm from the offence. However, the court ultimately decided that the harm could be predicted in the future. This was also a case where there was a single incident and the court indicated that should not obscure the respondent's degree of culpability. Ultimately, the court decided that an 18-month sentence of imprisonment and a SOPO ought to have been imposed although that was not ultimately put into force due to double jeopardy. Therefore, the actual sentence imposed by the Court of Appeal was a twelve-month probation order.

[43] The primary message to take from these two cases is how the different factual circumstances have determined different outcomes. We reiterate this point that the outcome in each case will depend on the factual circumstances. Sentencing judges will be faced with a wide range of circumstances where this type of offending arises and should have the flexibility to impose a sentence which meets the criminal offending at issue.

[44] However, we also propose to clarify the law in this area for sentencing courts lest it be thought there is some inconsistency from the two appellate decisions which we have discussed as follows. First, it is correct as *R v GM* states that cases of *R v Caffery* [1991] unreported and *R v Lemon* [1996] are of considerable vintage and thus not of great assistance. Those cases were applicable when the sentencing regime was at a much lower level. Following a change in the law and an increase in the maximum sentence for this type of offence to 14 years the sentencing regime has obviously had to adapt. In addition, there is a greater appreciation within society of the harm this type of offending causes. In a case of this nature where there were two incidents of sexual touching on a child under 13, absent exceptional circumstances, an immediate custodial sentence will follow.

[45] A sentencer in cases of this nature must also consider culpability, harm, and risk. Cases of high culpability will usually involve abuse of trust and age disparity. High harm may pertain to a young child reflecting into the future or may be obvious to an older child, particularly a child in and around puberty. Single incidents do not reduce culpability; however, multiple incidents may increase the sentence. Risk will be heightened if there is repeat offending and a previous record. The risk assessment will usually lead to consideration of dangerousness and whether an extended custodial sentence is required and SOPO requirements. Therefore, the main tools to be applied by any sentencer are to carefully consider culpability and harm.

[46] To our mind the *R v GM* case came at the highest end of the range at five years, rather obviously, because this case was on the cusp of an Article 13 offence. The Article 13 offence is the more serious offence involving penetration and this case was clearly on the borderline of that. In the other relevant case of *R v QD* where the court reflected the high harm likely to be occasioned to a very young child a lesser starting point was applied of 18 months prior to any reduction for a plea. Again, we can see the method used to chose that starting point on a single incident which did not involve touching. Therefore, no inconsistency arises.

[47] It would not be appropriate for us to try and categorise these cases further for the very reason that they are so different and require sensitive handling and thought on the part of a sentencing judge. This judgment will however provide the necessary clarification that *R v GM* does not mean that five years should be the automatic starting point for a first offence.

[48] Applying the above analysis of the law to the sentence that has been referred we find as follows. First the judge, it seems to us, has implicitly decided that this is a case of high culpability and high harm. Why it is high culpability is clear given the abuse of trust, the age disparity, and the respondent's actions in effectively trying to gaslight the child into believing that she was having nightmares. The high harm is evidenced by the report from Dr [Z}. It is to the credit of this victim that she has displayed resilience and hopefully will recover but that does not dilute the fact of high harm. As to risk this is a respondent who has no previous convictions, who has shown remorse and who has some potential to be employed in society. We consider that this is not a case of high risk which required any finding of dangerousness or an extended custodial sentence and that the SOPO that was imposed for five years very adequately covers protection of the public in future.

[49] The real point of this appeal is that the judge, it is said by Mr McNeill, did not give enough weight to the aggravating factors and perhaps gave too much weight to the mitigating factors in this case. Mitigation will not count for a great degree in a case of this nature, however, it cannot be left out of account altogether. There would have been some mitigation in this case given the clear record and the respondent's vulnerability particularly his mental health vulnerability. We can see the rationale of Mr McNeill's argument if you pick a starting point of five years because then it is

hard to see how a judge could arrive at two and a half years and that there would have been a mistake made in terms of mitigation.

[50] However, we do not think, given what we have said about the distinction between this case and *R v GM* that the starting point before reduction should have been five years. To our mind, this case favoured a sentence in or about three years. With the application of some reduction for the guilty plea the final sentence should have been in the region of two and a half years. We do not consider that there is any merit in a further reduction on the amount given for the plea in this case as Mr McNeill suggests. This is an area of discretion very much within the purview of the sentencing judge. In this case the judge had a defendant before him who had experienced a mental health breakdown which explained his erratic actions and failure to attend court. We, therefore, consider that the judge was entitled to be generous and apply 20%.

[51] Therefore, it cannot be said that the sentencing judge, who was well placed to assess this case, has strayed beyond the range of reasonable sentences for a case of this nature. It follows that we are not satisfied that the sentence meets the very high threshold on a reference of being unduly lenient. Accordingly, we do not consider that the sentence is one that we should interfere with.

[52] We will grant leave for the reference given the issues that have arisen in relation to the application of the case of *R v GM*. However, we dismiss the reference based on the above consideration. In doing so, we trust that this case will clarify the approach to be taken in sentencing of this kind. These are cases that are coming before our court all too often. They require appropriate punishment to reflect the culpability of offenders and the harm to the victims which is now a recognised aspect of sentencing in this area. That is why in this case, on a first offence it was appropriate to impose an immediate custodial sentence of two years imprisonment.

Conclusion

[53] We grant leave and dismiss the reference. This means that the trial judge's sentence of two years immediate custody remains unaltered.