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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JEFFREY ANDERSON

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

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Mr MacCreanor QC with Ms Walsh (instructed by the PPS) for the DPP
Mr Lyttle QC with Ms Herdman (instructed by John J Rice and Co Solicitors) for the Defendant

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Before: Morgan LCJ, Treacy LJ and Scoffield J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference under section 36 of the Criminal Justice Act 1988 by the Director of Public Prosecutions in respect of sentences imposed by His Honour Judge Miller QC at Downpatrick Crown Court on 3 July 2020 when, in respect of convictions on one count of sexual assault, contrary to Article 7(1) of the Sexual Offences (Northern Ireland) Order 2008, two counts of voyeurism, contrary to section 67(3) of the Sexual Offences Act 2003, nine counts of voyeurism, contrary to Article 71(3) of the Sexual Offences (Northern Ireland) Order 2008 and one count of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861, an overall determinate custodial sentence of three years, suspended for three years, was imposed.

Background

[2] The sexual offences covered the period from April 2005 to August 2013. The offending began when the defendant was 14 and was detected shortly after his 23rd birthday. In September 2013 the police investigation commenced, when a female

alleged that the defendant had copied topless pictures of her without her permission and shown them to a mutual male friend. A warrant was granted and a number of items were seized during a search of the defendant's home, including computers and video recorder cassettes.

[3] The defendant was arrested and interviewed on 22 September 2013. He said that the female had allowed him to use her computer to send an email at a time when they were close friends. He admitted copying the topless images which had been in a file on the computer. He said that he put the images on a pen drive without her knowledge, kept them and used them for sexual gratification. The female was a young adult when the pictures were taken. The defendant denied showing these pictures to anyone else but that was plainly untrue since his disclosure was the reason for his detection. In a further interview on 7 January 2016 he was unable to explain why images of this female had ended up on a movie file on his computer and he claimed that he had not seen this file before.

[4] He told officers during the first interview that he had been recording females since he was 17 and that he had recorded a number of girls, some with their consent and others without consent. He said that he would have recorded on an iPad which he concealed at times in his kitbag or behind a book. He admitted that he then used the recordings for sexual gratification. Three of the females were named at that stage. He said they would not have known they were being recorded. His computer was submitted for examination.

[5] The defendant was again interviewed on 11 August 2015. By this stage police were in receipt of a large amount of material from his computer. This included video footage of females using the bathroom and females engaged in sexual acts with the defendant. The footage typically lasted between one and 30 minutes. Seven of the females identified provided statements of complaint.

[6] On this occasion the defendant raised for the first time the suggestion that he had recorded the females because he had an erectile dysfunction medical condition, as a result of which he contended that he would perform better sexually if he was being recorded. He suggested that he had not been adequately represented at the earlier interviews. He was at that time being investigated in respect of charges of rape which were subsequently not pursued. He denied in the strongest terms that he raped anyone. He also stated that the various recordings were not viewed by him and were not recorded for the purpose of obtaining sexual gratification. He now accepts that this was untrue.

[7] He was shown footage of the female who was the subject of the first complaint in the shower and accepted that this was recorded without her consent. He said that he had consensual sexual intercourse with another female following an evening socialising in 2012. He was shown footage of this incident which he agreed he had recorded without her consent. He said that he might have watched the footage again to see if he performed. The recording of this female is of her exposed

pubic area which he proceeds to touch at a time when she seems to be asleep and not in a position to consent. That gave rise to the sexual assault count. There was subsequent consensual activity with this female which was also recorded.

[8] He recorded another female in her underwear as she was engaged in sexual activity with him. This was done without her knowledge or consent. The footage lasts approximately 18 minutes and shows the female performing oral sex upon him and sexual intercourse. He stated that they had been in a relationship.

[9] There is a recording of a further female in the shower. She was 17 at the relevant time and did not know that she was being recorded. A further female was recorded using the toilet and had not consented to the recording. He identified a further female whom he had recorded without her consent in the shower alone in 2011. Another female was recorded in 2011/12 engaged in sexual activity with him, including her masturbating him. He made no comment in respect of footage of other unidentified females.

[10] The defendant was interviewed for a third time on 7 January 2016. By that stage a further female who was aged 14/15 at the relevant time was identified who had been recorded without her permission. He stated that this was experimental. He claimed that he had not watched the footage again. The recording was of them performing oral sex upon each other.

[11] There was VHS footage of the defendant engaged in penetrative sexual activity with another female when they were both aged 15/16. They were outside in a wooded area near his house. He said that the female did not know initially that she was being recorded but saw the light on the camera and asked him about it. He showed her the camera and pretended to try to play back the footage. Nothing appeared on screen and she accepted that it was not working. Sexual activity resumed thereafter. The entirety of their sexual encounter was in fact recorded and retained. He repeated the lie that he had not recorded the footage to her several times thereafter.

[12] He also accepted that he had recorded and retained a number of Skype conversations with another female who had been in a state of undress wearing her underwear the time. She had not agreed to any recording. She had just turned 17.

[13] He was interviewed again in May 2016. Another female had been identified. She had been in a relationship with the defendant. The footage depicted the female and the defendant engaged in sexual intercourse. The female had been recorded twice at different angles. During this interview the defendant suggested to police that there had been a conspiracy against him involving these females.

[14] The assault occasioning actual bodily harm charge arose from an incident in October 2015 when the defendant was being investigated in respect of the sexual assault matters. He bumped into a female with whom he had had a previous sexual

relationship. Later in the evening they had consensual sexual intercourse in the defendant's car but during this he bit various parts of her body, particularly around her leg, and continued to do so even after she told him to stop. At one stage he had his arm around her neck and she struggled to breathe. She sustained a number of bruises to her legs. She remained with the defendant in the car consensually for a number of hours after sexual intercourse had ceased. The incident was reported to police in February 2016.

[15] He first appeared at the Magistrates' Court on 28 January 2016. Committal papers were served in November 2016. The committal was contested and each of the complainants was required to attend. One complainant became distressed when she was shown for the first time footage which the defendant was going to play in full in court. Committal resumed in November 2017. The defendant opposed applications for special measures in respect of the complainants. One of the complainants was excused because she was pregnant but the others all had to give evidence and were cross-examined on the basis that the complainants were engaged in a conspiracy and that there was no non-consensual activity. The original judge had to recuse herself and the defendant was eventually committed on 25 November 2019.

[16] He made a No Bill application on 30 January 2020 in respect of some counts and pleaded not guilty. He was re-arraigned on 18 May 2020 when he pleaded guilty to all of the counts which are the subject of this reference. The prosecution did not proceed with the rape counts.

Victim Impact

[17] The victim impact was helpfully described by the learned trial judge. There are statements from 10 of the complainants and a victim impact report by Dr Paterson in respect of one complainant. The twelth complainant declined to make a victim impact statement. Each complainant tells a similar story. The defendant portrayed himself as someone with an easy confidence and one experienced in sexual matters. Whereas each complainant accepts that she had a consensual relationship with the defendant, a common theme pervades their accounts with allegations of the defendant behaving in a coercive and controlling manner. In each case acts of intimacy, which they thought they were sharing with the defendant, were in fact subverted by him as a means of achieving recurring gratification. The fact that this extended to the recording of several victims in the toilet only exacerbates what was already a gross invasion of privacy.

[18] The embarrassment and disgust at finding out what the defendant did was exacerbated in each case by the fact that the defendant chose to contest this case throughout prolonged committal proceedings lasting over three years. This only added to the anxiety experienced by each complainant and the undermining of their individual sense of confidence and well-being. Many discuss the impact upon their mental welfare, having to confront years after the event what had been done to them. The knowledge that the defendant had subverted these relationships for the

purposes of self-gratification and the fear that he not only retained these videos but may have shared them with others adds immeasurably to this disquiet. As more than one victim observed, while there may be more serious offences in the canon of sexual crime, this does not diminish the impact upon the complainant, for whom the damage caused has not diminished with the passage of time.

The Defendant

[19] The defendant is a 30 year old single man. He achieved three A-levels at school and intended to pursue a theatre studies course with a view to a career in musical theatre. He entered a number of national television competitions and subsequently has had some success performing locally and abroad. He is currently employed in his father's advertising agency writing jingles.

[20] The pre-sentence report indicates that the defendant suffered from Balanitis as a child, as a result of which he required two surgical procedures on his penis. As a consequence there is evidence that he has developed a psychosexual erectile dysfunction. He attended his GP when aged 19 on two occasions and embarked on a course of Viagra which was helpful. He suggested that the making and viewing of these recordings assisted in achieving arousal.

[21] The author of the pre-sentence report found that there was only limited awareness of the pain, hurt and discomfort he has caused his victims. His explanations for his actions centred on his needs rather than the rights of these many and several young women, although it was noted that he asserted unreserved remorse in his plea. That sits rather uneasily with his attitude in interview in August 2015 and the conduct of the proceedings prior to his plea, when the emphasis appeared to be centred on him as a victim because of his medical condition and because of the conspiracy he alleged against him.

[22] A medical report prepared on his behalf excluded any personality disorders. There were a number of references which emphasised his talent as a musician and his general good presentation. It was emphasised on behalf of the defendant that this offending commenced when he was a teenager developing an understanding of sexuality and that that distinguished it from many similar cases. The trial judge found some merit in that submission and we agree. It is clear, however, that his offending escalated with evidence of recording on two devices and he accepted in the medical report prepared on his behalf that he knew that what he was doing was wrong by the time he reached his 20s.

[23] He was assessed as having a medium likelihood of general reoffending within the next two years. That took into account evidence of planning and premeditation, risk-taking behaviours, lack of responsibility and self-control and an established pattern of sexual offending. In terms of sexual recidivism he was assessed as being in the moderate to high category. He did not pose a significant risk of serious harm by the commission of further serious sexual offences.

The Trial Judge's Conclusion

[24] The learned trial judge accepted the aggravating factors identified by the prosecution, namely:

(i) There were multiple complainants and the offending occurred over a period of many years.

(ii) Four of the complainants were under 18 at the time of the recording, although in two of those cases the defendant was also under 18.

(iii) These were mainly recordings involving moving images as opposed to still images and involved penetrative sexual activity.

(iv) There was escalation in offending with the use of two devices, transfer of footage between devices, editing and collation of images involving the production of a movie file.

(v) Some of the images were disclosed to other persons. The disclosure was made when the defendant was an adult.

(vi) There was significant abuse of trust in what was supposed to be a loving and intimate environment.

(vii) For all of those reasons there was an inevitable significant impact upon the victims.

[25] There were mitigating factors taken into account by the judge, as follows:

(i) The impact upon the defendant of his early childhood physical and psychological difficulties. The earlier offending can properly be described as the immature activity of a 14 or 15 year old boy.

(ii) The defendant's previous clear record.

(iii) Evidence of remorse and insight into his offending. In our view, the evidence for this prior to his plea was unconvincing.

(iv) The lapse in time since his arrest in 2013.

(v) The pleas of guilty.

[26] The judge considered that in respect of the totality of the offending the starting point in a contested trial would lead to a sentence of not less than four years. The pleas of guilty came after protracted legal arguments and delays at committal

stage. He recognised that some of the more serious allegations were not pursued by the prosecution. He also took into account the impact of the pandemic and allowed the defendant credit of 25% suggesting a sentence of three years. No one has taken issue with that analysis.

[27] The judge went on to state that the most recent offence occurred five years ago and some of the offending occurred upwards of 15 years ago. When the offending began the defendant was in law still a child, although in respect of most of the offences he was a young adult. The judge considered that in light of those factors he should take the exceptional course of suspending the sentences.

Consideration

The suspension of the sentence

[28] In our view the issue of delay needs to be put in context. The reason why these offences were not prosecuted earlier was because the defendant had been able to conceal his criminal conduct. When interviewed, he did not disclose the identity of all his victims. This required extensive investigation by police given the number of victims involved. Even after charging more victims were identified. We accept, therefore, that the delay in committal until November 2016 was explicable in the circumstances and did not arise from any default on the part of the prosecuting authorities.

[29] The delay in prosecuting the allegations was at least in part due to the way in which the defendant conducted his defence. He was entitled to conduct his defence in that way but he cannot also then claim mitigation as a result. We accept, however, that the period of three years spent on committal was unacceptable. We appreciate that the judge involved may have had other responsibilities or difficulties and we make no specific criticism of the judge; but the passage of time of this length cannot be excused in these circumstances. The committal should have been completed within one year.

[30] We accept that the sentencing judge was entitled to make some allowance for the defendant's youth in relation to the offending. The allowance for the offending in the latter years could only have been modest. In his own medical report the defendant accepted that he knew that he was behaving immorally.

[31] We agree with the learned trial judge that in an offence of this kind, where detection is inevitably difficult because of the offender's concealment and the potential harm caused potentially significant, an appropriate prison sentence should not be suspended unless the circumstances are exceptional. The circumstances upon which the learned trial judge relied were delay and youth. Youth was of marginal importance in assessing the sentence for the later offences.

[32] The judge did not identify a period for which he considered the prosecution responsible for delay but we accept that a period of two years during committal can be taken into account. The overall delay was a factor which the judge considered in coming to his sentence. The judge relied on delay again on the issue of suspending the sentence. It is important not to parse sentencing remarks as if they were to be strictly construed like statutes but the weight to be given to the issue of delay in suspending the sentences ought to have been diminished to some extent by the reference to the passage of time in coming to the custodial term. In our view, the analysis of the issues of youth and delay indicates that neither alone nor together were they sufficient to establish exceptional circumstances. This was a case which required an immediate custodial term and we have little hesitation in concluding that the suspension of the sentence was unduly lenient.

Discussions between Judge and Counsel

[33] It was submitted on behalf of the defendant that, even if the court came to the view that the sentences were unduly lenient, the court should not interfere in light of discussions in the judge's chambers which had occurred prior to the sentencing exercise. It is common case that junior counsel for both the prosecution and the defendant had a discussion with the judge in chambers on 7 February 2020 in advance of the sentencing hearing. The defendant at that stage had entered pleas of not guilty to all charges. The judge made a note of the discussion as follows:

> "Proposal: – Crown will drop all the rape charges but add a count of AOABH (this is to reflect bruising to leg but in context of "rough sex").
>
> Crown will also drop the "making images" charges.
>
> D will plead to the voyeurism charges and the sexual assault charge.
>
> Clear that D had significant psychosexual issues.
>
> That multiplicity of offences; premeditation and allowing "friend" to view images amount to serious aggravating features.
>
> But – last offence was in 2013 – even youngest IP was 17 years and all were in consensual relationships with the D.
>
> Raised culpability but lower harm.
>
> No previous convictions

> Custody threshold passed but provided – he makes full, frank and upfront acknowledgement of guilt – admits need for remedial work; is not found to be dangerous and all IPs on board – then
>
> Either suspended sentence or (if considering no more than 12 Months) – ECO 100 hrs and 3 yrs probation
>
> In Court – Previous timetable for argument revised. Review 6 March 2020
>
> Court to be notified by 5 March 2020 if any significant developments."

[34] The Code of Conduct for the Bar of Northern Ireland approved on 6 March 2003 provides:

> "16.24 It is always and has been the practice in Northern Ireland that counsel should have ready access to the trial judge but no discussion between counsel and the Judge should take place unless the opposing counsel is present or having had reasonable notice, has declined to be present.
>
> 16.26 In criminal matters counsel for the defence should only in very exceptional circumstances and with the permission of the judge inform the client or give the client to understand that there has been a discussion of any aspect of the case with the trial judge and must never say or suggest to the client that which counsel knows is in the judge's mind or purport to quote what the judge has said in private."

[35] That approach was criticised by Lord Bingham in *Re McFarland (Compensation)* [2004] 1 WLR 1289 when he observed that the occasions when counsel may properly discuss the case with the trial judge otherwise than in open court, in the presence of the defendant, are rare. Occasions when counsel may properly withhold the fact or the gist of such a discussion from his client are rarer still. He expressed the hope that the Bar might consider a change of the rule and he pointed to the corresponding English rule which suggested that the judge should (subject to one exception) never indicate the sentence he is minded to impose, the exception being that a judge was permitted to say, if it be the case, that whatever happens whether the accused pleads guilty or not guilty the sentence will take a particular form.

[36] The approach to such discussions had been considered by this court in *Attorney General's Reference (No 3 of 2000) (Rogan)* [2001] NI 366, some years prior to Lord Bingham's comments in *McFarland*. Recognising that the frequency of such meetings, the more ready access by counsel to the judge and the more free discussion about sentence that obtained in Northern Ireland might erode the primacy of the principle of open justice, the court laid down the following rules of practice to govern discussions in chambers:

> "1. There should be freedom of access for counsel to judges, but that does not mean freedom to discuss matters which can perfectly well be discussed in open court. The basic principle is that access to the judge is to enable matters to be discussed which cannot be referred to in court without creating some difficulty.
>
> 2. Inquiries about possible sentences should not be entertained by judges unless they are genuinely necessary to permit counsel to advise their clients on their course of action, e.g. if considering pleading guilty to a lesser charge.
>
> 3. Where they think it proper to give an indication of the type of sentence which they propose to impose, judges should be cautious about how specific they are. It is rarely advisable to do more than state whether the sentence will take a particular form, whatever the plea, or indicate in general terms how seriously the court views the case.
>
> 4. A full and where possible verbatim note should be made of all discussions in chambers, preferably by a shorthand writer. Where this is not practicable, the judge should take a full note or ask counsel to take a note and furnish it for agreement."

[37] Further guidance, after the decision of the House of Lord in *McFarland*, was given by this court in *Attorney General's Reference (Nos 6-10 of 2005) (Rooney and others)* [2005] NICA 44:

> "1. The judge should only give advance indication of sentence when this has been requested by the defendant. He should not otherwise offer such an indication but he may, where he is satisfied that to do so would not create pressure on the defendant, remind counsel in open court of the defendant's entitlement to seek an advance indication of sentence.

2. All applications for advance indication of sentence, if they do not take place in open court, should be conducted in court in an 'in chambers' hearing with the defendant and advocates for the prosecution and the defence present.

3. The judge may refuse to give an indication of sentence and should refuse if he considers that to do so would create pressure on the defendant to plead guilty. Alternatively, he may postpone the giving of an indication until such time as he considers it appropriate to do so.

4. The judge should not indicate his view of the maximum possible level of sentence following conviction by the jury.

5. An indication should only be given where there is an agreed factual basis on which the plea of guilty is to be made. The judge should not give an indication on a basis of hypothetical facts. Where there has been a dispute on the facts, the judge should refrain from giving an indication until that dispute is resolved and an agreed, written basis of plea has been furnished. If relevant material that might affect the judge's decision as to the advance indication is outstanding the judge should postpone giving an indication until that information has been obtained.

6. The judge should treat the application for a sentence indication as a request to indicate the maximum sentence to be passed on the defendant if he were to plead guilty at the stage that the application is made.

7. An indication, once given, will be binding on the judge who gives it or on another judge who carries out the sentencing exercise provided that there has not been a material change in circumstances between the time of giving the indication and the time that sentence is to be passed. In this context a material change in circumstances would arise, for example, by the receipt of information which alters the basis on which the indication was given. Generally, this should not happen (see 6 above). The judge who gives the indication will also be the sentencing judge unless exceptional circumstances arise.

> 8. If a defendant is given a sentencing indication and fails to enter a plea of guilty after a reasonable opportunity to consider his position in the light of the indication, it will cease to have effect. In any event where, after the indication has been given, it is not acted upon before the trial resumes, it will no longer have effect.
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> 9. The advocate who appears for the defendant is responsible for ensuring that his client is fully advised on the following issues: (a) he should only plead guilty if the plea is voluntary and he is free from any improper pressure; (b) the Attorney General will remain entitled to refer an unduly lenient sentence to the Court of Appeal; (c) any indication given by the judge is effective only in relation to the facts as they are then known and agreed; (d) if a 'guilty plea' is not tendered after a reasonable opportunity to consider it, the indication ceases to have effect.
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> 10. It is the duty of the prosecutor to ensure that the judge is in possession of all material necessary for him to give a properly informed indication. If there is a dispute as to the basis on which the proposed plea is to be made, the prosecutor should make the judge aware of this.
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> 11. The prosecutor should draw to the judge's attention any relevant guideline cases and, where they exist, any minimum or mandatory statutory sentencing requirements.
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> 12. Where an advance indication has been given by a judge, he should provide a summary of the application in his sentencing remarks."

[38] The guidance in *Rogan* represented a considerable diminution in the access of counsel to the judge on sentencing matters and clearly was intended to create a change of culture. It is also clear, however, from subsequent cases that the guidance was not being universally applied. That was the context for the decision in Rooney, which was intended to extend the opportunity for the defendant to understand the approach that a judge was taking to the offence by increasing access prior to sentencing.

[39] It does not appear that there was a specific request made in advance to the judge to discuss sentencing in chambers in this case, although the judge appears to have been ready to deal with any such request. The discussion began in relation to

the charges to which a plea might be offered. The judge was familiar with the background to the case having fairly recently dealt with the No Bill application. The indication given by the judge was qualified by uncertainty as to future events, including as to whether the defendant would be found to be dangerous and whether all the injured parties were "on board." This reference to the injured parties may have been to their attitude to the proposed reduction in the charges: we do not understand it to be a reference to the injured parties being content with a particular sentencing outcome (although the judge's note could be read in that way). In any event, this was not an indication of the maximum sentence that might be passed on a plea of guilty at that stage, given its qualified nature and dependence on certain conditions being satisfied in the future.

[40] The defendant was not present during this discussion. Defence counsel did not advise the defendant at any time that the DPP remained entitled to refer an unduly lenient sentence to the Court of Appeal. Prosecuting counsel considered that she could only consult with those complainants who would be affected by any change in the charges and that she could not discuss the case with other witnesses. None of them, therefore, were on notice of the content of the discussions.

[41] Prosecution counsel also indicated that as a result of earlier discussions with the defence she knew that it was highly unlikely that the defendant would plead guilty if immediate custody were inevitable. Following the discussion in chambers she advised police and those instructing her that there was the potential for sentencing options. She was of the view that there was no basis for informing anyone that a sentence other than immediate custody was inevitable.

[42] Defence counsel appears to have accepted in chambers that if the defendant was found to be dangerous a custodial sentence would be inevitable. It follows, therefore, that when the defendant pleaded guilty he could not be sure that he would receive a non-custodial outcome. The prosecution had consulted with the victims on the charges and did not give any indication that there was a problem with the course suggested by the trial judge. Once the pre-sentence report concluded that the defendant did not satisfy the dangerousness provisions, the defendant would have been confident that a non-custodial outcome would be achieved and he had not been alerted to the entitlement of the DPP to intervene.

[43] There are a number of relevant decisions in England and Wales in respect of the effect of judicial indications. In *Attorney General's Reference (No 40 of 1996)* [1997] 1 Cr App R (S) 357 the defendant pleaded guilty to actual bodily harm, false imprisonment and having a firearm with intent to commit an indictable offence after an indication was given by the trial judge that the sentence would be five years. On the reference the defendant argued that, where an indication as to sentence was given and subsequently a plea was tendered, the court should be slow to increase the sentence. The court took account of the fact that it was a reference, that the defendant was being sentenced for a second time and that there was an indication

given by the judge but considered that this did not preclude the court from increasing the sentence to six years.

[44] *R v Goodyear* [2005] EWCA Crim 888 was a case in which the Court of Appeal gave guidance as to the circumstances in which a judicial indication can be given, similar to that issued in this jurisdiction in *Rooney*. The court indicated that it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements and second, where it applies, to remind the judge that the entitlement of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected. If, however, prosecuting counsel has indicated support for the indication given, the question whether the sentence should nevertheless be referred to the court as unduly lenient and the decision of the court whether to interfere with and increase it will be examined on a case-by-case basis in light of everything said and done by counsel for the Crown.

[45] The issue was also addressed by this court in *Attorney General's Reference (No 8 of 2004) (Dawson and others)* [2005] NICA 18. In that case counsel for the prosecution and the defence had discussed with the judge in chambers the substitution of a lesser charge. The judge indicated that he was not minded to impose a custodial sentence. The prosecution were aware that the defendant would not plead to the lesser charge if he faced a custodial sentence. The prosecution did not express any view about the appropriate sentence, nor was any indication given of a possible reference.

[46] The court indicated at paragraph [44] that where an indication is given by the trial judge as to the level of sentencing and that indication is one which prosecution counsel considers to be inappropriate, or would have considered to be inappropriate if counsel had applied their mind to it, they should invite the attention of the court to any relevant authorities. It then considered the effect of a failure to do so:

> "We do not consider, however, that the failure of the prosecution to inform the judge of those authorities or to make submissions as to their effect precludes the Attorney General from making an application under section 36. The omission of counsel cannot be allowed to impede the proper functioning of that provision where justice demands that the sentence be reviewed. But, as Lord Bingham has said, where a judge has given an indication as to sentencing, this is an important matter to be taken into account – not as a matter that would preclude an application being made but as a factor that should influence the exercise of our discretion whether to accede to the application."

[47] In that case the offender asserted that he had a viable defence available. In the circumstances of that case the court said at paragraph [46]: –

> "But here it appears at least possible that prosecuting counsel knew that a plea of guilty to the lesser charge was being made solely on the basis that the offender would not receive a sentence involving immediate imprisonment. In those circumstances the silence when the judge indicated that a non-custodial sentence might be passed is much more significant than where there is a mere failure to draw to the attention of the judge relevant guideline cases. In the latter case silence on the part of the prosecutor does not contribute to the decision of the offender to plead guilty. By contrast, where, to the knowledge of the prosecutor, the basis of the plea of guilty is that the offender will not be sent to prison and the judge indicates that this is the outcome that he has in mind, if prosecuting counsel remain silent, it may more readily be said that such silence contributes to the offender's decision to plead guilty."

[48] Returning to the present case, there were a number of divergences from the advice in *Rooney*. Firstly, the defendant was not present for this discussion. This is an important part of the defendant's trial. The guidance in Rooney makes it clear that the defendant should be present for any discussion about sentence. There is no explanation for his absence. He was on bail and could easily have attended. This discussion should not have taken place in his absence.

[49] Secondly, the sentence was conditional on, among other things, a finding of dangerousness. We can well understand the difficulty posed where the pre-sentence report which will be highly material in relation to the question of dangerousness is not available. In this case it was conceded that if there was a finding of dangerousness a custodial sentence was inevitable. This position is not catered for expressly in the *Rooney* guidance. Many judges may choose to decline to give an indication in those circumstances but the judge was entitled to proceed on the basis that a finding of dangerousness would have constituted a change of circumstances as a result of which the indication of a sentence not involving immediate custody would no longer appropriate (consistent with paragraph 7 of the *Rooney* guidance, set out at paragraph [37] above).

[50] Thirdly, it is of considerable importance that the defendant in this case was not advised of the possibility of a reference. *Rooney* makes clear that the obligation to convey that information in an appropriate case falls upon defence counsel. The possibility of a reference obviously can be critical to whether or not a plea is entered. There is no explanation as to why that did not occur in this case. In light of this we consider that the guidance in *Rooney* should be supplemented to require the prosecution in any case where an indication of sentence is sought to advise the judge and the defence if the sentence is referable. This is in addition to the obligation

falling upon the defence. The provision of a judicial indication as to sentence cannot, of itself, preclude the Director of Public Prosecutions from exercising his statutory power, in the public interest, to refer to this court a sentence which he considers to be unduly lenient. This should be clearly understood by all concerned.

[51] It was submitted on behalf of the defendant that he had made clear that he would not plead to any offence if the outcome was a custodial sentence. In the event, he did plead at risk that there would be a finding of dangerousness; but the circumstances suggest that such a finding was unlikely. The position of the defendant was also known to junior prosecuting counsel, as she has indicated in an affidavit that as a result of discussions with the defence she knew that it was highly unlikely that the defendant would plead guilty if immediate custody were inevitable.

[52] Junior prosecuting counsel did not expressly approbate a sentence which did not involve immediate custody but in light of the particularity of the trial judge's identification of sentence she ought to have appreciated that such an outcome was highly likely. She would also have been aware that the defendant was highly likely to rely on the indication in entering his plea. In those circumstances, the prosecution should have drawn to the attention of the judge and the defence that the sentence was referable. The failure to do so, and the consequent (although separate) failure on the part of defence counsel to advise their client as to this possibility, added to the misleading picture given to the defendant.

Conclusion

[53] The evidence before us indicates that the defendant was not willing to plead guilty to any offences unless he was confident of an outcome which avoided immediate custody. The indication from the learned trial judge was sufficient to give that confidence. He should have been advised of the risk of reference before being re-arraigned. Even if defence counsel failed in their duty to advise him, prosecution counsel should have raised the matter with the judge and the defence to ensure that there was no misunderstanding.

[54] That a careful note was prepared by the judge of the discussion in chambers has been extremely helpful. It has avoided the need for us to seek to resolve issues of fact which seem to be in contention on the affidavit evidence provided by the counsel involved in the case below, or for us to hear oral evidence from them. If judges and practitioners adhere to the guidance set out in *Rooney*, parties can seek judicial guidance on sentencing prior to a plea but it is important that there is transparency in the sentencing remarks to indicate that such an approach has occurred and that the outcome of the discussion is revealed. Where a discussion falling short of a *Rooney* indication occurs – for instance, as to whether the sentence must or must not take a particular form – as the guidance in *Rogan* indicates, a full note should be made (ideally a *verbatim* note but, failing that, a judicial note, ideally agreed by counsel).

[55] Each case of this kind has to be considered on its facts. In *Dawson* the defendant disclosed that he had a viable defence. In the present reference, there was a strong prosecution case. There is, however, overwhelming evidence for the proposition that this accused pleaded guilty because he was confident as a result of the discussion with the judge in chambers of avoiding immediate custody. If he had been advised of the possibility of a reference that may well have altered his position.

[56] In the exercise of our discretion we must also bear in mind that this is a case with a history of significant delay, that the defendant has already been sentenced and that he has now embarked on recovering his place in society. In those circumstances, although not without a degree of reluctance, we consider that we should not interfere with the sentence.

[57] We grant leave for the reference but dismiss the application. If those representing defendants wish to continue to have access to a judge in advance of sentence they must strictly adhere to the guidance set out in *Rooney* and this case. In particular, where such a discussion has taken place it must be disclosed in the judge's sentencing remarks. Adherence to the principle of open justice requires nothing less.