THE COURT OF APPEAL

Birmingham
Mahon J.
Edwards J.

177/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Peter Kennedy

Appellant

Judgment of the Court (ex tempore) delivered on the 16th day of December 2014, by Birmingham J.

1. In this case the appellant appeals against the severity of a sentence that was imposed upon him in the Circuit Court on the 8th July, 2013. The sentence that is the subject of the appeal is one of ten years imprisonment, which was backdated to the 26th December, 2011.

2. The appellant was before the court for sentencing in respect of 27 counts of indecent assault. The sentence was imposed on one count with all the other counts taken into consideration. The counts that were on the indictment and to which the appellant entered pleas related to eighteen complainants and covered a period of offending that stretched between 1968 and 1986.

3. With one exception, all of the complainants were school boys and some of the complainants were related to him. In other cases, his contact with them was through contact with their family in his role as a priest serving in various, and ministering in various parishes around the country.

4. The court had before it a number of victim impact reports and eight reports were read to the court and one further report was handed in. These reports showed that there had been a profound impact on victims and that some of those who were abused in their teenage years were continuing to experience the effect of that abuse now many years later at a time when they were in middle age and upper middle age. In some cases the effects manifested themselves in difficulties in parenting, difficulties in bonding with their own children, in other cases in difficulties in forming relationships and so on.

5. A brief summary of the facts are as follows. Between the years 1968 and 1986, the Appellant committed a number of offences of indecent assault on a total of eighteen complainants. The circumstances of the offences for each complainant were largely similar and involved a situation where the Appellant was alone with a given complainant and would carry out one, or more, of the following acts: rub the complainants' leg and groin area, touch the complainants' genital area, place the complainants' hands on the Appellant's genitals, force the complainants to masturbate him, attempt to force the complainants to perform oral sex or, on one occasion, attempt to put his penis into the complainant's anus. The offences occurred, for the most part, in circumstances either where the Appellant had been invited into the family home of a complainant or in situations where the Appellant would have spent some time driving a complainant around in his car, giving him sweets, and, in some cases, money, alcohol, and cigarettes, before or after the offences occurred. The Appellant, on a number of occasions, threatened the complainants with the wrath of God in order to stop them telling their parents or other parties about the said offences.

6. The appellant, when he came before the court for sentencing, was 74 years of age. It is of some significance that there is available to the court a report from the Granada Institute dealing with contact with that body in 2000; and there was also contact at an earlier stage back in 1995 with Stroud, which as the court understands it is a facility run by a religious order which seeks to offer assistance to members of the religious community who have experienced difficulties. It was apparently established first to deal with people with alcohol problems but in time evolved to offering support to those who had offended or been tempted to offend in a sexual context.

7. In terms of the circumstances of the appellant, he has been out of ministry since 1986 and he applied for and was laicised in 2002. He spent a period of time in England working as a taxi driver and on the underground, and then moved to Brazil. In Brazil he taught English, but it was stressed on his behalf that he taught English to adults and not to children.

8. We have three arguments that were made in support of the contention that the sentence imposed was one that cannot stand and ought now to be interfered with. The first is that there is criticism of the trial judge for adopting what was described as a global approach to sentencing and there has already been reference to the fact that the sentence that was imposed was imposed in respect of one count with all the others taken into consideration. The judge when sentencing was conscious or had to be conscious of the fact that the maximum penalty had altered during the period of offending and that some offences carried very much greater maximum sentences than others and the greater availability of a maximum sentence was not necessarily related to the gravity of the individual offences. The trial judge dealt with this by saying the following:

> "What I am going to do is, I am going to sentence on one count, but take into account all of the remaining counts and all of the facts given in evidence and I am going to sentence on count 4, that is a particular count, and what I am going to do in relation to the count is that I am going to impose upon him a term of imprisonment of ten years in the matter and sentencing globally in relation to all the counts and obviously I could go through each particular count and impose a particular shorter sentence and run them consecutively, but for convenience I am going to impose a ten years sentence on count No. 4. Obviously that is the maximum sentence that can be imposed on that count, but it is to reflect all of the counts that are on the Bill of Indictment and it is to reflect the facts as had been opened to me in the case. Does everyone understand what I have done?"

9. The approach of the judge is criticised and it is said that one of the difficulties with it is that it makes it impossible, or certainly very difficult, to identify what mitigating factors were taken into account and to what extent the various factors that were at play in relation to sentence were taken on board.

10. The court's view of that is that the reference to this approach being taken "for convenience" is perhaps a somewhat infelicitous one and it might well have been better, and indeed would have been better, if in sentencing the judge had identified particular offences which he regarded as being particularly grave and identified the factors that he saw as being of particular relevance in respect of particular offences or groups of offences.

11. It is the situation that the trial judge was faced with eighteen complainants and offending that spanned an eighteen year period. If he was to look at the individual charges on the indictment and impose a discrete sentence in respect of each of the charges, it is clear that the question of consecutive sentences would have had to have arisen and it might well be that such an approach would not necessarily have inured to the benefit of the appellant.

12. Certainly if one just looks at the basic facts of eighteen complainants and a period of offending that spanned eighteen years, then it would seem that if individual sentences were imposed and where appropriate, they were made consecutive, that a sentence of the same order as the one that was decided upon would undoubtedly have arisen for consideration. Indeed it might well be that if an attempt was made to sentence individually, that a signficantly longer final sentence would be arrived at and the question would then have been whether it was necessary to mitigate that sentence to take account of the concept of totality and proportionality.

13. The courts view is that while a differently structured sentence was certainly possible that there is nothing inherently wrong with the approach that was taken which was to say that what was required was to identify what was the appropriate sentence to be served.

14. That leaves for consideration the two other arguments that are made on behalf of the Mr. Kennedy at this stage. They relate to his age at the time when sentence was imposed and the fact that there has been a significant period of non-offending. It does seem that there has been no offending and nothing untoward since 1986 and that is obviously a matter of considerable significance. It is though the situation that both the period of non-offending and the appellant's age were matters to the fore at the sentencing hearing that took place. The trial judge dealt with the question of the period of non-offending by saying that counsel for the defence also points out as being an important factor that since 1986 the accused has not, it seems, committed any further offences. The learned sentencing judge observed as follows:

> "I can take it then that he has reformed himself and that he is no longer much of a threat to society. I also have to take into account to some degree that he may have been treated differently, and I am adding the word differently, if brought to the court in the 60s, 70s and 80s. To some degree I take that into account."

15. Again with specific reference to the fact that at the time of sentencing, Mr. Kennedy was 74 years of age, in that regard the trial judge quoted submissions made to him suggesting that he would have to think about the question does the court impose a sentence on Mr. Kennedy that will in all likelihood result in him dying in prison. He went on to say:

> "Again the wording is not the happiest, but that is probably not too an important a matter, but I have to sentence him, I have to sentence him justly and I have to sentence him in relation to established law and the law as handed into me by counsel and the established principles of law."

16. Undoubtedly the age of a person being sentenced is a relevant consideration and it was a matter that the court was obliged to have regard to. In the view of this Court the learned sentencing judge did have regard to that consideration. Obviously the sentence of ten years imprisonment backdated to December 2011 was a substantial sentence and obviously a sentence of that duration for somebody in their mid 70s does mean that a significant proportion of the years that in the ordinary way are left of them are going to be spent in custody. The court was conscious of that, as the court was conscious of the fact that there had been a very significant period of non-offending. The court took the view that there had been significant rehabilitation and that that period of non-offending meant that, as the judge put it, Mr. Kennedy had reformed himself and that he was no longer much of a threat to society.

17. The sentencing court though was left in a situation of a pattern of offending over a prolonged period, a pattern of offending that involved no less than eighteen complainants and understandably felt that only a very significant sentence could meet the situation. It was the case there had been an early plea in respect of eight complainants and that was obviously to the credit of Mr. Kennedy. So far as the other complainants are concerned, a trial date was sought, but in advance of the trial, some two weeks before the trial, it was intimated that a plea would be forthcoming.

18. The trial judge summarised matters in this way. He said that Mr. Kennedy had behaved in a fiendish fashion, he left a path of destruction behind him and one could not but be absolutely filled with sadness on hearing the victim impact reports. He referred to the long term effects his behaviour has had on these boys, who are now men, and to the way it has affected their lifelong relationships and so forth, and to the fact that he has destroyed the innocence of eighteen young boys. It seems to the court that these observations well summarise the situation.

19. Counsel on behalf of the DPP posed a question to the court in a rhetorical fashion when she asked whether, in respect of offending over an eighteen year period involving eighteen complainants, it could be said that a sentence of ten years was not one that was available to the sentencing court.

20. This Court has to answer that question by saying that the sentence was one that was available to the sentencing court, and that it was one that was within the range, and well within the range, of the sentencing options that were available to the court. In the circumstances the court can find no error of principle and will therefore dismiss the appeal.