

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

COLIN FINNEGAN

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBER 18 of 2013)

Before: Morgan LCJ, Girvan LJ and Weatherup J

MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference from a total sentence of 11 years' imprisonment imposed by His Honour Judge Kerr at Belfast Crown Court on 27 November 2013. There is no issue in relation to various ancillary orders designed to inhibit any opportunity to re-offend. The offender was convicted on 16 and 17 October 2013 following a 12 day jury trial of 37 counts of indecent assault on a male contrary to section 62 of the Offences against the Persons Act 1861 ("OAPA"), 16 counts of gross indecency with a child contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968 and 5 counts of buggery with a boy under 16 years contrary to section 61 of the OAPA. Mr McGrory QC and Ms McKay appeared for the PPS and Mr Kearney QC and Mr O'Keefe for the offender. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The offender was born on 23 May 1969. The offences occurred over a period from January 1984 to November 1997 when the offender was aged between 14 years and 8 months and 28 years and 6 months. They involved five victims. One is unknown and the others are referred to for the purposes of this judgment as A, B, C

and D. The period of offending in relation to A was between January 1984 and January 1990. A was aged 10 to 15 years during that period and was 4 years and 8 months younger than the offender. Although the offender was 19 years old by the end of the latest period identified in the indictment during which the offences were charged against A, the offender was under 18 at the start of the period identified in each of these charges. In particular on count 2 the offender was convicted of buggery during the period from January 1984 to January 1988. He was 14 years and 8 months at the start of the period and 18 years and 8 months at the end of the period. The convictions for buggery of A on counts 31 and 32 were in respect of a period from January 1984 until January 1990. The conviction for buggery of A on count 33 was in respect of the period between January 1989 when he was 19 years and 8 months and January 1990. There were 11 indecent assault convictions and 6 gross indecency convictions in respect of A. The offence against the unknown victim related to an incident in which the defendant exposed another boy's penis to A at the scout camp.

[3] B was aged 9 to 15 years during the period of offending and was 8 years younger than the defendant. The offender was convicted of one count of buggery during the period from June 1986 until June 1993. The offender was, therefore, at least 17 at the time of the commission of the offence. He was also convicted of 13 counts of indecent assault and six counts of gross indecency in relation to this child. The timespan of all of these offences started when the offender was 17 and ended when the offender was aged between 19 and 24.

[4] C was aged 11 to 15 years and was 6 years younger than the defendant. The offender was convicted of six counts of indecent assault and four counts of gross indecency in relation to this child. The offending against this child occurred during a period when the offender was aged between 17 and 22. It follows, therefore, that this offending occurred at or about the same time as the offending against B and during the period of some of the offending in relation to A.

[5] D was aged 13 to 16 years during the period of offending against him and was 11½ years younger than the defendant. The offender was convicted of six counts of indecent assault which occurred over a period of four years when the offender was aged between 24 and 28. None of these offences was committed at the same time as the offences against the other children.

[6] The offences occurred in the Bessbrook area. The offender and complainants were associated with the Catholic Boy Scouts of Ireland attached to the local parish church. The offender committed sexual offences of a similar nature against all four complainants. Each said they had been befriended by the offender who was known to them as an older youth connected to the church scout group which met in a hall in the church grounds. Each described being taken on some pretext to the church hall. There was a similar routine where the offender started to touch them and persuaded them to touch him. They described both masturbating him and mutual masturbation. They described oral sex on them by him and, in all but D's case, were

encouraged to perform oral sex on him. The episodes normally resulted in ejaculation. Each also described being taken out in a van and later a car and masturbation taking place. A, B and C described similar activities in fields close to where they lived.

[7] The first offence of buggery was committed against A in the church hall. Despite A's reluctance and complaints of pain the offender forced himself on the victim. A described intense pain and said that he was bleeding afterwards. There were 3 further counts of buggery alleged to have taken place in the hall. Allegations of digital penetration were reflected in 3 counts. B also said he was subjected to buggery at the hall, that it hurt and, when he complained, the defendant persisted. He also recalled on one occasion being assaulted in the offender's brother's house which included simulated sex on the bed while unclothed. There were also incidents of assault in a caravan at the offender's house. C recalled assaults in a car park at the side of the offender's house and incidents of gross indecency in a derelict house. There was also evidence in his case of the use of alcohol and cannabis in connection with the assaults. Allegations by D of digital penetration were reflected in 2 counts. The offender denied his involvement in the assaults and continues to do so even after conviction.

[8] Victim impact reports made it clear that the offences had seriously impacted on the complainants' lives. Each had suffered long-term effects. The complaints included trauma, low self-esteem, acute anxiety, depression, profound feelings of stigma and shame, development of stammers, development of skin conditions, difficulties in social and emotional development or in relationships, flashbacks, and other signs of deep-rooted trauma. Some of the complainants availed of counselling and mental health services. The sentencing judge noted that in each case the trauma of the proceedings temporarily resurrected or increased the effects of the trauma on the complainants.

[9] A pre-sentence report noted the offender's difficult upbringing and educational experience, and a traumatic sexual assault when he was 8 years old. He denied having experienced confusion over his sexuality and denied being attracted to males until he was in his 20s since which time he had evidenced an ability to sustain a long-term relationship with an appropriately aged partner. He was adamant that he had never been attracted to prepubescent or adolescent boys. He had significant difficulties in seeing himself as either a sexually motivated or abusive individual and continued to wholly reject all aspects of the offending. He recognised no distortions in his thinking and did not accept he had issues that could be addressed. The prolonged nature of his offending indicated a persistent deviant sexual interest. As the abuse continued over a decade it would be impossible for the defendant to use his own youth or naivety as a reason for the behaviour. He was assessed as representing a high risk of re-offending although he had no relevant record but he was not assessed as posing a significant risk of serious harm, primarily

because there was no report of sexually abusive behaviour in the last 17 years and his access to children was now limited as a result of the ancillary orders.

The conclusions of the learned trial judge

[10] The learned judge described the following factors as representing a highly significant set of aggravating features when taken together, although not all of them featured in each offence:

- (a) this was a clear case of targeting victims;
- (b) as a senior scout and then scout leader the defendant abused a position of trust;
- (c) there were multiple victims;
- (d) there were repeated acts of sexual assault;
- (e) there was an increasing age disparity between the defendant and the victims;
- (f) there was ejaculation in nearly all cases; and
- (g) there was use of alcohol, and on one occasion marijuana, connected with the offending either as an inducement or depressant to encourage participation.

[11] Counsel for the offender submitted that the offender's youth at the time of offending should impact significantly on the starting point for sentencing. The learned judge considered that he was bound by the Court of Appeal's decision in R v ML [2013] NICA 27, in which the Court was sentencing a 22 year old who had committed offences against his sister when he was 13 or 14 years of age.

[12] It was further submitted that where the counts reflected a wide temporal period the sentencing court should sentence the offender as being at the youngest age pleaded. In addition, where alleged multiple acts of indecent assault or gross indecency occurred on the same occasion, sentencing should be on the basis that all of the separate acts alleged in the separate counts represented one single incident.

[13] The learned judge accepted that he should sentence the offender on the basis of the youngest age alleged in the indictment but noted that it would not affect the age disparity between defendant and victim. He considered that multiple sex acts are an aggravating factor, even when contained within one incident.

[14] The learned judge then undertook a detailed consideration of the starting points relevant to each type of offence in relation to each of the victims. In imposing the sentences he split the offences into 2 groups; those in which he was sentencing

the offender on the basis that he was under 18 years at the time of the commission of the offences, that is the offences against A,B and C, and those committed when he was over 18, that is the offences against D.

[15] He first considered the starting point in respect of the count of buggery against B. Taking the earliest date on the indictment B was 9 and the defendant was 17. The age disparity was greater than in the case of A, against whom the offence had already been committed at least once. Further, B had resisted, had been forced and was hurt physically. The learned judge considered the offence to be akin to rape. The Sentencing Guidelines Council in England and Wales, in its Definitive Guideline on offences under the Sexual Offences Act 2003 (April 2007), (“the Guideline”) suggested a starting point of 5 years for rape with 8 years where there were recognised aggravating features. Having regard to the defendant’s age the learned judge considered the appropriate starting point to be 4 years.

[16] He separately considered the starting point for the 4 counts of buggery against A. At the first date on the indictment the offender was 14 and the victim was 10. However, on the last count of buggery against A the offender was aged 19. As with B, the victim resisted and was physically hurt. The offence was repeated on at least three occasions for which the offender was convicted. The learned judge identified the higher starting point of 8 years and discounted this by 25% to 6 years. He imposed shorter terms on the other counts in respect of A,B and C. He made all of those sentences concurrent resulting in a 6 year term.

[17] In relation to D the learned trial judge noted that the age disparity was greatest in this case. The offences were committed as an adult. The breach of trust was greater. There was digital penetration for which the Guidelines suggested a starting point of 4 years’ imprisonment. In light of the aggravating features the starting point should be 6 years. The learned trial judge then discounted this to 5 years on each count concurrent with each other but consecutive to the concurrent 6 year terms imposed on the earlier counts resulting in a total sentence of 11 years.

The submissions of the parties

[18] Mr McGrory accepted that the learned trial judge was entitled to sentence the offender in respect of the offences against A,B and C on the basis that they had been committed at the youngest age pleaded in the indictment. He did not take issue with the starting point of eight years’ imprisonment in respect of the buggery count relating to A when the offender was an adult. He submitted, however, that even if the offender was sentenced as a 17-year-old in relation to the buggery count against B, the age disparity, the youth of the victim, who was then only nine years old, and the fact that this was in the context of a campaign of abuse justified a starting point of eight years imprisonment on that count also.

[19] Secondly, he submitted that the learned trial judge was entitled to approach the cases on the basis that he should impose concurrent sentences for the first group of offences and consecutive sentences for the offences against D. It was submitted, however, that having identified the starting point the learned trial judge then failed to increase it to represent the aggravating features. Further, although there were no mitigating features, the learned trial judge allowed considerable mitigation in the sentence imposed.

[20] Finally, it was submitted that a sentence of 11 years' imprisonment in the circumstances of this case where some of the offending was carried out as an adult and some as a child was unduly lenient having regard to the campaign of offending carried out over a lengthy period in relation to multiple victims.

[21] Mr Kearney submitted that although there were 58 convictions they related to only 24 specific incidents. Of those, 18 incidents were committed when the offender was a child. The offences committed as an adult included one incident of buggery against A, one series of indecent assaults in relation to A, one indecent assault on B and three incidents of indecent assault on D. The sentencing should reflect the number of incidents rather than the counts in respect of which he was convicted.

[22] Secondly, the jury were specifically advised that consent was not in issue in relation to the buggery counts. Mr Kearney submitted, therefore, that it was inappropriate for the learned trial judge to approach these as if they were rapes. Under the Guideline the starting point after a contest in the case of sexual activity with a child involving penile penetration is 4 years. It was this starting point, rather than the rape guideline, which should have been taken into account. In any event, the reduction for mitigation was within the learned trial judge's discretion.

Consideration

[23] Where an offender has been convicted after a trial it is for the trial judge to determine the factual basis for the sentencing. That factual basis must not contradict the verdict of the jury which may be explained only on one view of the facts. If there is a doubt, the offender is entitled to the benefit of it (see R v Tovey 14 Cr App R(S) 766). In this case, therefore, it was for the learned trial judge to come to a conclusion as to when the offences had been committed. He appears to have approached this task on the basis that he could not be satisfied that the offences charged against A, B and C were not committed within the period that the offender was a child. If he had been so satisfied in relation to any of the counts he would, of course, have been perfectly entitled to sentence the offender as an adult in relation to those counts.

[24] This was a historic sex case in which the offender was being sentenced on the basis that he was a child at the time of the commission of a significant number of the offences. This court has recently looked at the factors which should be taken into account in those circumstances in R v ML [2013] NICA 27. We consider, therefore,

that the primary considerations in this case are the culpability of the offender, the harm to the victims and the risk of harm from the offender in future. We also recognise that the approach to the sentencing of those who were children at the time of the commission of the offence is different from the approach for adults. The applicable principles were discussed in R v CK [2009] NICA 17 and R v Coyle [2010] NICA 48.

[25] The domestic and international provisions in relation to the sentencing of children are designed to ensure that, where detention of young people is necessary, it should be for the shortest appropriate time and the focus should be on rehabilitation away from recidivist offenders. It is for the court, however, to establish whether, in accordance with sentencing principles, such an outcome can be achieved in a particular case. In assessing the culpability of a young offender his age and emotional development are likely to be significant. The closer he is to the threshold of adulthood the more likely it is that the mitigation of youth will be diminished. That is consistent with the Sentencing Guidelines Council Definitive Guideline entitled “Overarching Principles – Sentencing Youths” at paragraph 5.2. We have said on numerous occasions that we often find assistance in the general factors taken into account in the compilation of these sentencing guidelines.

[26] That has a specific bearing upon the appropriate sentence to be imposed in respect of the buggery count against B. This offence was committed in the context of a campaign of offences against A, B and C. The learned trial judge concluded that this was a violent assault in which the victim resisted, the offender forced himself on the victim and the victim was physically hurt. The victim was only nine years old and the offence was committed in the context of a breach of trust. In our view the offender was very close to the threshold of adulthood and in these circumstances a sentence similar to that imposed in relation to A would have been appropriate. For the equivalent offence under the present legislation where the attack is non – consensual a starting point of 10 years is recommended by the Guideline for an adult offender.

[27] Mr Kearney rightly pointed out that consent was not an issue which the jury had to consider in the various buggery counts. He submitted that it followed that the learned trial judge should have applied the starting points contained in the Guideline for the offence of sexual activity with a child involving penile penetration on those counts. The starting point for that offence is 4 years instead 8 years for rape of a child between 13 and 16 and 10 years if the child is under 13.

[28] We reject that submission. The offences of buggery and sexual activity with a child involving penile penetration are separate offences which give rise to separate considerations. Buggery of children under the law which preceded the Sexual Offences (Northern Ireland) Order 2008 included the commission of the offence where the child ostensibly consented as well as the commission of the offence when the child resisted and force was used. In this case it was for the learned trial judge to

determine the precise circumstances in which the offence was committed in order to assess the degree of aggravation. His sentencing remarks plainly demonstrate that this was a case in which the children resisted, the offender forced himself on them and physically hurt them. In our view great care has to be taken in applying guidelines for offences contained in recent statutes to different offences contained in earlier statutes.

[29] The principal criticism made by the applicant concerns the discount for mitigation. In his sentencing remarks the learned trial judge noted that the offender was 44 years of age with no relevant record. He had a difficult childhood with a background of domestic violence and alcohol abuse. He was bullied at school and abused when 8 years old. He had become anxious and withdrawn since being interviewed in relation to these offences and had been taking alcohol as a result of which his mental health had deteriorated. He was not taking any medication in relation to this and there was no medical report. In our view these matters do not amount to material mitigation. In offences of this kind involving a campaign of serious sexual violence against and corruption of multiple children personal circumstances are unlikely to weigh heavily.

Conclusion

[30] We accept that this was a difficult sentencing exercise and that the learned trial judge was perfectly entitled to approach the sentencing by looking at the two categories of incidents as he did. We accept that the sentences identified by him, taking into account the aggravating factors, of eight years for the first group of offences and six years for the offences against D were entirely appropriate. We have also considered the totality aspect of this case. If this offender had been of full age when he committed these offences, we consider that an overall sentence of 18 years or more would have been appropriate for such a campaign of violence and corruption against these children.

[31] We are satisfied that a sentence of 11 years is quite insufficient to represent the culpability and harm connected with this series of offences even bearing in mind that some of the offences were committed when the offender was still a child. For the reasons given we do not consider that the learned trial judge should have allowed any discount for mitigation. If he had not done so he would have imposed an eight-year term in respect of the first series of offences and a consecutive six-year term in respect of the second set of offences resulting in a total period of 14 years. We are satisfied that this represents the appropriate sentence and accordingly that the sentence imposed was unduly lenient.

[32] The offender is entitled to have the issue of double jeopardy taken into account. We have decided that we should interfere with the sentence and do so by substituting for the sentence of 6 years on count 33 a sentence of 8 years. The effect of this is that the overall sentence is now 13 years, comprising eight years in respect of

the first set of offences, together with a consecutive term of five years in relation to the offences against D. The sentences should run from the date on which they were imposed and the offender is entitled to the benefit of any remand time.