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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (Number 4 of 2005)
MARTIN KERR

Before Kerr LCJ, Campbell LJ and Hart J

KERR LCJ

Introduction

[1] On 19 November 2004, on arraignment, the offender pleaded guilty to five offences of indecent assault. He came before His Honour Judge Rodgers at Belfast Crown Court on 25 February 2005 and was sentenced to a three year probation order on each count. The Attorney General has applied to this court under section 36 of the Criminal Justice Act 1988 to have the sentences imposed quashed on the ground that they were unduly lenient. We granted leave on 30 June 2005 and the application was heard on that date.

Background facts

[2] On 23 June 1998 the offender pleaded guilty to thirty six offences of indecent assault and twelve of gross indecency committed against six boys between 1986 and 1996. A custody probation order was imposed by His Honour Judge Markey QC comprising two years' custody and two years' probation. The offences had taken place while the offender was sacristan and the leader of a boys' club at St. Peter's Cathedral, Belfast. The abuse took place at various locations including scout camp and the offender's home. The judge considered that the abuse "was towards the lower end of

the scale for behaviour of this irregular kind." He also observed that it was doubtful that the offender was a fully mature adult and the selection of the sentence was influenced by that consideration. It was also relevant that there were no victim impact reports and at the time of sentencing Judge Markey was not made aware of any particular problems experienced by the victims of the offender's crimes. Indeed the judge was informed by prosecuting counsel that there was no evidence that there had been a psychological impact on any of the boys.

[3] The offences that are the subject of the reference were committed during the same period as those for which Kerr was sentenced by Judge Markey. They were not uncovered at that time because the victim, M, did not complain of them until April 2003. It is not in dispute that, had these offences been uncovered at the time that the original prosecution took place, they would have been included in that prosecution and it has been a centrepiece of the case made on behalf of the offender that he would not have received any more severe penalty. The latter proposition appears to have been accepted by Judge Rodgers but it was challenged by Mr McCloskey QC, who appeared for the Attorney General, and it will require to be considered carefully for the outcome of the reference must depend fairly substantially on its validity.

[4] The present injured party, M, was born on 18 June 1980. He became a member of the offender's "Activity Club" at St Peter's Cathedral when he was aged around 10 years. Part of the activity organised by the club included swimming. While in the swimming pool the offender would nip M on the testicles, saying that there were crabs in the water. M thought this unusual behaviour and made efforts to get away but the offender would pull him back by the shorts. This occurred on approximately ten occasions. M found it to be more embarrassing than painful.

[5] Between the ages of twelve and fifteen M was an altar boy. During this time the offender began to invite M and other boys to his house and before long M was there every night. On some ten to fifteen occasions the offender placed an ornamental pebble down M's trousers against his testicles causing him discomfort and embarrassment. The offender affected to treat this behaviour as a joke. On other occasions he would nip M's nipples and chest and punch his arms. He also pulled M's underwear up very sharply and put him over his knee and slapped him. Sometimes he would ask M to sit beside him as they watched a video. As they did so Kerr would allow his head to come in contact with M's. Then he would

take M on to his lap and shake him up and down. The offender also assaulted M when he was carrying out duties as altar boy. He would nip his buttocks and called him as "heavy hammer". M believed that this was a reference to his penis.

[6] When he was thirteen years old, M went to Limerick with the offender and another boy. The offender frightened M by telling him ghost stories and persuaded him to share a bed with him and the other boy. During the night M awoke when he became aware of the offender leaning into his back and rubbing his groin against M's buttocks with his hand on M's hip.

[7] At the age of fourteen M went to Ballycastle with a group led by the offender. Again he shared a bed with the offender and another boy. During the night the offender rubbed his groin, through clothing and a sleeping bag, against M's buttocks. The same year on another occasion M returned to Ballycastle with the offender. During this trip the offender called M to his bed one night and asked him to nibble his ear and kiss his cheek.

The impact on the victim

[8] The contact that Kerr had with M became known to some extent among other boys and this led to his being ridiculed by other boys at school and in the neighbourhood. He was excluded from other social groups causing him to seek inclusion with the inner circle of boys who frequented the offender's home. This in turn led to his exploitation by Kerr with the consequent distress that this caused. In order therefore to distance himself from this situation the injured party eventually left activities connected to the offender. The events preyed on his mind as he grew older and he suffered from depression and post traumatic stress. He felt suicidal at that time and attempted suicide twice later in life. He also engaged in self harm.

[9] A victim impact report prepared by Roberta Lennox of Edgewater Counselling, dated 31 January 2005, details the progress of the abuse and its effect on M. He has been counselled by Ms Lennox from April 2003, having contacted her at that time because he could no longer cope with the effects of abuse. He told her that while the abuse was taking place he had held all adults associated with the Church in high esteem. Consequently he was unable to rely on his feeling that something was wrong about what was taking place. He was afraid that he would not be believed if he

confided in his parents. The offender would use the offer of sweets to deflect him from revealing what was happening. He felt blackmailed, manipulated and brainwashed into believing that he deserved the abuse or that it was what friends did together. The offender also threatened the injured party with expulsion from group activities should he report the abuse. Such were the feelings of insecurity from which he suffered that M had to grovel to remain included.

[10] The effects on M were considerable. His school work suffered and he was frightened to go home as the offender would often be there. He felt that his experience of abuse permeated everything, "his sense of himself, his relationships, his marriage, his work life." Ms Lennox assessed the effects on him to have been devastating. She reported that he was tortured by intrusive memories. He dreaded coming face to face with the offender. He suffered sleepless nights and nightmares where he dreamed that he was being chased by the offender. Ms Lennox' report continues:-

> "He has experienced depression, suicidal thoughts, low confidence and alienation. He said that he did not have a sense of fitting in anywhere in life, not with family nor peer groups, nor with work colleagues nor socially. His whole life seemed out of control and he could no longer recognise any of his feelings. He described a time when he would drink alcohol heavily in an effort to block out painful and intrusive memories of abuse."

The abuse also affected the injured party's sexual functioning and he developed problems with intimacy. His experiences adversely affected his relationship with his wife and put strains on his marriage.

[11] In the final section of her report Ms Lennox stated:-

> "…M has taken a huge leap of faith in exposing his experience of abuse to the PSNI. That took considerable courage for a man so low in self-esteem and confidence. In doing so he has managed to move through the shame and secrecy that kept him isolated. He has joined a courageous group of people who are no longer willing to suffer in silence. As a result, he has helped end child

> sexual abuse by breaking the silence in which it thrives. Hopefully through counselling, he will create a positive self-image and eventually feel proud and strong."

Personal background of the offender

[12] Information on this subject was obtained principally from a pre-sentence report of 23 February 2005 by probation officer, Mary McKee. She reported that the offender currently lives in hostel accommodation. He was brought up in west Belfast, and left secondary school at the age of seventeen. He became a caretaker at St Peter's Cathedral and organised the cub scouts. He was dismissed after 12 years when it emerged that he had abused five scouts in his care. He attended the Alderwood treatment programme but only engaged on a superficial level and did not fully address his offending behaviour. Having attached himself to another church, in 2003 the offender was encouraged to voluntarily engage with Probation. He attended the Community Sex Offender Group Induction Programme in October 2003 and made significant progress, taking responsibility for his offending and expressing victim empathy. He was assessed as requiring long term treatment which he commenced in August 2004.

[13] In interview with the probation officer, the offender acknowledged that his behaviour was unacceptable and that sexual gratification was his motivation. He accepted that he had groomed his victims. He expressed remorse for the emotional suffering that he had caused to the injured party and other victims. He said that he regretted that he had not been able to recognise earlier the damage he caused by his offending.

[14] The probation officer considered that Kerr continues to be at risk of re-offending and is judged to present a risk of harm to young children. That risk had been reduced due to his engagement with voluntary supervision, his willingness to address offending behaviour, to return to supervised accommodation, and because of ongoing and cooperation with agencies including the police. The probation report concluded that the offender, while expressing remorse, was aggrieved that these offences had not previously been dealt with in the earlier court proceedings. It was considered that this illustrated his limited understanding of the factors influencing disclosure of abuse. On this aspect of the case the report stated:-

> "Over the past 12 months he has developed an increased insight into his offending behaviour and has demonstrated his motivation to make change by co-operating with statutory and voluntary agencies in the community…In addition while he is subject to the Sex Offender's Register his behaviour will continue to be monitored by the multi-agency Masram panel."

[15] The changes made by the offender were considered to be encouraging but in order to reduce the risk of further offending he would be expected to continue treatment, remain in approved accommodation, gain a greater insight into victim empathy and the effects of abuse, develop coping strategies and self management skills. He was deemed suitable for statutory supervision and participation in the Community Sex Offender Group Programme. A three year period of supervision would be required for him to complete the programme.

[16] The offender's solicitor submitted a psychiatric report by Dr Helen Harbinson, consultant psychiatrist, dating from the 1998 convictions. Dr Harbinson did not feel that the offender needed treatment but suggested that he be supervised and directed by a "surrogate parent". She considered his risk of re-offending to be slight.

Judge's sentencing remarks

[17] In sentencing the offender for the present offences, Judge Rodgers said:-

> "…the simple question I have to ask myself at this stage is: Would the defendant have received a more severe sentence on that occasion [*i.e.* 1998] with 53 [counts] rather than 48, with 6 injured parties rather than 5? I have to say I believe the answer is no, he would not have. That is not to minimise the suffering of any victim, particularly

> the victim of today's offences. Therefore I am not looking at this…in isolation but in light of the sentence that was passed in 1998."

[18] The judge took cognisance of the investigating officer's statement in evidence that the new offences were of a less sinister character than some of those previously before the court and said that the earlier offences appeared more grave. It is not accepted by the Attorney General that the offences in the present case are less serious than the majority of those involved in the earlier prosecution but it is to be noted that some of those involved allegations of more serious sexual misconduct, including mutual masturbation.

Alleged aggravating and mitigating features

[19] It is submitted for the Attorney General that the following are aggravating features:-

(a) The number of offences;
(b) The protracted period during which they were perpetrated;
(c) The age and vulnerability of the victim;
(d) The abuse of trust;
(e) The element of grooming;
(f) The significant adverse impact on the victim;
(g) The offender's criminal record for similar offences.

It is accepted that the offender's guilty plea and expressions of remorse constitute mitigating features although it is to be noted that when first interviewed about these offences, the offender denied any involvement.

Recent sentencing in indecent assault cases

[20] In *AG's Reference (No 18 of 2004) (McKeown),* having pleaded not guilty at arraignment to twenty one counts of indecent assault on a female and four counts of gross indecency with a child, the offender pleaded guilty upon re-arraignment and was sentenced to a total of thirty-four months' imprisonment suspended for three years. There were three injured parties, all students at the offender's martial arts classes. The assaults spanned a period of two years and were committed on girls aged ten to twelve years. The touching was outside their sports clothing as they were exercising. The offender had no record and was a man of previous good character. In

an *ex tempore* judgment this court increased the sentence to 18 months' immediate imprisonment.

[21] In *R v Saunderson* (October 2004) the applicant had been convicted of eleven indecent assaults, having abused three young nieces over a seventeen year period. The assaults were very serious, including digital penetration. The applicant was sentenced to a total of twelve years' imprisonment consisting of two consecutive eighteen months sentences for offences committed against two victims when the maximum sentence was two years imprisonment and a nine year sentence for offences committed against a single victim after the maximum sentence had increased to ten years. The Court of Appeal dismissed the application.

[22] In *AG's Reference (No 15 of 2004) (Scorah)* (22 October 2004) the offender was sentenced to two years' imprisonment suspended for five years after trial in which he contested his guilt. The forty-nine year old offender had put his hands inside the pants of a fifteen year old babysitter as she slept with another child in a bed at his home. In an *ex tempore* judgment this court substituted a sentence of eighteen months' immediate imprisonment.

Sentencing guidelines in sexual offences against young children

[23] This court has repeatedly warned that sexual offences against young children will be met with severe punishment – see, for instance, *Attorney General's Reference (No. 1 of 1989)*. In *R v Lemon* [1996] NIJB 1, McCollum LJ, giving the judgment of the court said (at page 2):-

> "This court reiterates all that has been said in previous similar cases about the serious view which the court takes of indecent assaults on young girls, especially by those who are placed by relationship or circumstances, in a position of trust and influence. Any abuse of such trust must be treated severely and when it results in a sexual assault upon the child it is virtually inevitable that an immediate custodial sentence will follow."

[24] Naturally, the same holds true for sexual offences against young boys who, as this case graphically illustrates, are just as vulnerable to lasting damage as the result of the activities of sexual predators such as the

offender. In *A-G's Reference* (*No 2 of 2001*) [2002] NIJB 117 at 122 this court said:-

> "It is a prime function of criminal justice to impose condign punishment on those who attack vulnerable members of society, in order to deter others from following their example."

Conclusions

[25] The judge in the present case concluded that if the offender had been prosecuted for these offences at the same time that he was sentenced in 1998 he would not have received any more severe penalty. We cannot agree with that conclusion. This victim has suffered and continues to suffer considerably. In June 1998 Judge Markey was not provided with any material to suggest that the victims on that occasion were as severely affected. We consider it is entirely likely on this account that a much more substantial sentence would have been passed if this series of offences had been included in those that were dealt with by the learned judge in 1998. We certainly believe that a much heavier penalty would have been appropriate to reflect the significant psychological damage that was inflicted on this young man, the effects of which he continues to bear.

[26] For the Attorney General it was accepted, however, that the judge was entitled to take account of the fact that, had the offender been prosecuted in 1998 for the present offences, the sentence passed on the offender might have been influenced by the consideration that these offences would then have been part of a catalogue of charges and that the judge would have had to deal with the sentences by having due regard to the totality principle. We accept the correctness of this approach.

[27] Another consideration requires to be taken into account. If the offender were to escape the virtually inevitable sentence for offences of this type solely because of what might be regarded as the fortuitous circumstance that he was not prosecuted for these offences at the same time as the earlier offences, the sense of injustice that the victim has suffered is likely to be significantly increased. He is not to be faulted for not having reported the offences before he did. The trauma associated with the disclosure to the police that offences such as this have been committed on him must not be underestimated. It is clear from the victim impact report that he has undergone considerable emotional turmoil that has been

contributed to in no small measure by the ordeal of having to confront his memory of these offences in the context of criminal proceedings.

[28] It is clear from the decided authorities that, save in the most exceptional circumstances, a defendant pleading guilty to offences such as are involved here will face a significant custodial sentence. Mr P T McDonald QC for the offender did not suggest otherwise. The issue therefore arises whether the fact that the offender was not prosecuted for these offences in the course of the earlier proceedings can qualify as an exceptional circumstance. In our judgment it cannot. It is to be remembered that it was open to the offender to admit to these offences when he came under investigation for the earlier offences. Not only did he not do so, he denied involvement in these offences when first interviewed about them.

[29] We feel that it is also important to make clear that even if one concluded that the offender would not have been sentenced to a longer period of imprisonment had he been prosecuted in 1998 for the present offences, it does not automatically follow that he should not be sentenced to a period of imprisonment. Again, Mr McDonald accepted (in our view correctly) that this was so.

[30] In our opinion the appropriate sentence for the offender, taking account of all relevant factors, should have been in the order of two years' imprisonment. It follows that the sentence imposed by the judge was unduly lenient. We can discern no reason to exercise the discretion available to us not to interfere with the sentence. It must therefore be quashed. Two matters must be taken into account in mitigation of the period of two years' imprisonment. The first is that the offender is unlikely to have been sentenced to an extra period of imprisonment of this length beyond that imposed in 1998 had he been prosecuted for these offences then. The second matter is the effect of double jeopardy which, in Attorney General references this court has traditionally accepted, must serve to reduce the penalty that would otherwise be imposed. Taking these factors into account we consider that the period to which the offender must be sentenced is one of twelve months imprisonment.

[31] We have given consideration to the possibility of a probation order being made as part of the sentence. We have concluded that this is not appropriate. He has already undergone probation and has continued some programmes on a voluntary basis. He has benefited to some extent from

these and we have also taken that into account in our selection of sentence but it does not prompt us to the view that a probation order is suitable in his case. He must therefore surrender to custody within forty eight hours of today's judgment.