

[2019] EWCA Crim 1496
2019/00871/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 31st July 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MR JUSTICE EDIS

and

HIS HONOUR JUDGE MARSON QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

PATRICK EDWARD BYRNE

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Mr P C Bown appeared on behalf of the Appellant

J U D G M E N T
(As approved)

LORD JUSTICE HICKINBOTTOM: I shall ask Mr Justice Edis to give the judgment of the court.

MR JUSTICE EDIS:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the victim shall during his lifetime be included in any publication if it is likely to lead members of the public to identify him as a victim of the offences concerned here.

2. The appellant, Patrick Byrne, is now 57 years old. He brings this appeal against sentence with the leave of the single judge.

3. On 7th February 2019, following a trial in the Crown Court at Derby, he was convicted of the offences which we shall shortly describe. He was originally sentenced on 13th February 2019 to a total term of eight and a half years' imprisonment. Having reflected on the matter, the sentencing judge caused the case to be re-listed on the following day, when he re-sentenced the appellant.

4. There were twelve counts on the indictment, all of which resulted in convictions. There were six offences of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003 (counts 1, 2, 5, 6, 9 and 10), and six offences of causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the same Act (counts 3, 4, 7, 8, 11 and 12). Concurrent terms of seven years' imprisonment were imposed on all counts, making a total sentence of seven years' imprisonment. The other usual consequences of convictions for such offences followed. Nothing turns on any of them.

The Facts

5. The appellant had been friends with the victim's grandparents, both of whom were by the relevant time now deceased. The victim was a vulnerable child. He had autistic traits and found communication difficult. He went to a special school and required a great deal of support from the people whom he was entitled to trust. The appellant had known him from a very young age through his friendship with the boy's grandparents, and knew all about those difficulties.

6. Between about 6th August 2006 and 5th August 2009 (the dates contained in the indictment), the appellant committed a number of sexual offences against the victim, who was at those times aged between 13 and 15 years. The offences involved the appellant masturbating the victim and inciting the victim to masturbate him. In the course of persuading him to participate in this activity, the appellant showed him pornographic material and also shared with him some alcohol. There was, therefore, found in the facts of this case an element of grooming and, we find, an element of targeting of this vulnerable victim. Ejaculation occurred on occasions by both parties and the offending took place repeatedly over a long period.

7. Eventually, in 2015, the victim reported the offending to the police. The appellant denied offending. Matters culminated in the trial, as we have said.

8. There was a Victim Personal Statement before the sentencing court, as there is before us. Given the victim's communication difficulties, it was taken by the Achieving Best Evidence procedure: that is to say, a discussion between a police officer and the victim was recorded, rather than the drawing up of a formal written statement. Even by the time that that took place,

namely January 2017, the victim was still expressing fear and concern. When asked what kind of things he thinks about in the context of this offending, he replied: "Just in case he comes up and finds me, wherever I am, cos obviously the internet is quite clever for finding people".

9. The appellant had two convictions which were very old and of a completely different kind.

10. There was no pre-sentence report before the court. Nor is there a pre-sentence report before us and we do not consider one to be necessary.

11. When sentencing the appellant, the judge observed that in evidence he had said more than once: "When he was 17 it was legal and so there was nothing wrong with what I did". The judge pointed out the appellant's age, relative to that of the victim, and the communication difficulties which we have described. He said that the appellant had shown no remorse and had committed the offences simply for his own sexual gratification. He referred to a piece of evidence which had emerged during the trial: that the grandparents had been so protective of their grandson that they were very concerned about letting him out of the house. The judge regarded this breach of trust, the appellant having been admitted into this small and troubled family unit, as a serious aggravating feature of the case. He referred to grooming, to the pornographic material and said that the appellant was "morally corrupt, devilish and devoid of any kind of kindness in relation to [his] treatment of [the victim]."

12. For guideline purposes, the judge said, correctly, that the offences fell within category 2A, because there was no penetrative sexual offending. There were the serious aggravating features to which we have already referred. He concluded that those aggravating features, taken together with the frequency and duration of the offending, required a substantial increase from the starting point for a single offence of that category, namely, three years' imprisonment. Having regard to the age difference and the vulnerability of the victim, the judge initially took the view, as we have said, that a sentence outside the category range which ends at six years was appropriate and imposed the term of eight and a half years' imprisonment to which we have referred. He corrected that, in our judgment sensibly, to a sentence of seven years' imprisonment on the following day.

13. In succinct and persuasive submissions, both in writing and orally, Mr Bown, who appears on behalf of the appellant before us this morning, submits that the judge overemphasised the aggravating features. He argues that the appellant should not have been characterised as "morally corrupt" or "devilish", when this case, so far as offending of this kind is concerned, is at the lower end of seriousness in terms of the character of the sexual activity itself. He submits that the correct sentence for these offences should have been within the category range for a single offence.

Discussion

14. We respectfully agree with counsel that the word "devilish" is often an unhelpful way to describe an offender in sentencing remarks. It suggests that the sentencer may have lost the sense of proportion which is essential to undertaking the task of sentencing properly. Strong, clear language is often appropriate. Euphemisms are unnecessary, but language of this kind, we think, crosses the line of what is appropriate and ought not to be used.

15. We have considered the submissions of Mr Bown with care, having regard in particular to the language which the sentencing judge used and also to the fact that he himself acknowledged, by reducing the sentence under the slip rule, that his initial reaction to it had been disproportionate. It appears to us, nevertheless, that each of these individual offences fell into category 2A, with a starting point of three years' custody. The range extends as high as six years

for a single offence. The task of the judge was to assess the increase which was required over and above the starting point of three years, to reflect the various factors which we have mentioned, in particular the number of offences concerned, the impact on the vulnerable victim, and the duration of the offending.

16. This is a familiar task for sentencing judges because, sadly, cases of sexual abuse of children involving multiple incidents are not uncommon. It is not a factor on which the guideline directly assists. Nor is it a factor which should be underestimated. The adverse consequences of years of abuse, creating a feeling of being trapped and of dread of the next occasion are obvious and serious. The Victim Personal Statement is evidence of their having existed in this case. This conduct blighted a young life for a period of years, and its after effects continue.

17. This is, of course, category 2 offending. But the culpability is particularly high because of the reasons we have already identified. All of those factors taken together mean that a sentence was required which was much longer than the suggested starting point for a single offence of this kind. After the adjustment which he made under the slip rule, we think that the judge arrived at a sentence which was proportionate to the offending and which cannot properly be described as manifestly excessive.

18. For those reasons this appeal is dismissed.

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