Supreme Court of Newfoundland and Labrador, Court of Appeal
R. v. English
Date: 1994-07-20

David Orr, for the Appellant;

Wayne Gorman, for the Respondent.

(1991 No. 153, 1992 No. 9)

July 20, 1994.

[1] STEELE, J.A.: The appellant was one of a number of Irish Christian Brothers having positions of authority at Mount Cashel Orphanage in St. John's and, in loco parentis, shared responsibility for the care of some 200 boys from 1973 to 1976. He was convicted of fifteen assault and sexual abuse offences and sentenced to 13 years' imprisonment in total. This appeal is from those sentences.

[2] The appellant was charged with 12 counts of indecent assault, five counts of gross indecency and two counts of assault causing bodily harm. In a trial before a judge and jury he was convicted on nine counts of indecent assault, two counts of gross indecency and two counts of assault causing bodily harm. He was acquitted on two charges of indecent assault and one charge of gross indecency. The jury was unable to agree on its verdict on one count of indecent assault and on two counts of gross indecency. A second trial before a judge and jury was held with respect to these three counts and the appellant was convicted of one count of gross indecency and one count of indecent assault.

[3] The appellant appealed the conviction in both trials but the appeal from convictions in the second trial has not been brought on for hearing. On the hearing of the appeal of the conviction in the first trial, this court set aside the convictions for gross indecency with respect to R.O. and W.B. (**R. v. English (E.)** (1994), 111 Nfld. & P.E.I.R. 323; 348 A.P.R. 323; 84 C.C.C.(3d) 511 (Nfld. C.A.)). By virtue of the structuring of the sentences, the totality of the sentences imposed was not reduced by the quashing of the two convictions.

[4] The appeals from the sentences in both trials were heard together.

[5] The following are the sentences imposed in the first trial and it will be noted they fall into three separate groups:

Group A

R.O.	s. 156 (Indecent Assault) 6 years
R.O.	s. 157 (Gross Indecency) 4 years*
G.C.	s. 156 (Indecent Assault) 6 years
R.C.	s. 156 (Indecent Assault) 4 years
S.E.	s. 156 (Indecent Assault) 4 years
R.O.	s. 156 (Indecent Assault) 4 years
D.T.	s. 156 (Indecent Assault) 4 years

Group B

J.W.	s. 245(2) (Assault, Bodily Harm) 1 year
A.W.	s. 245(2) (Assault, Bodily Harm) 1 year

Group C

F.S.	s. 156 (Indecent Assault) 4 years
I.P.	s. 156 (Indecent Assault) 4 years
W.B.	s. 157 (Gross Indecency) 4 years*
W.B.	s. 156 (Indecent Assault) 5 years

(* Convictions set aside on appeal)

Within each group the sentences are concurrent but the sentences forming a group are consecutive making a total period of incarceration of 12 years.

[6] The sentences imposed following the second trial are:

G.B.	s. 157 (Gross Indecency)

		5 years
L.R.	s. 156 (Indecent Assault)	6 years

The sentencing judge ordered that the sentences imposed on the appellant in respect of the G.B. and L.R. convictions be served concurrently with the sentences under Group C. As the maximum sentence in Group C was five years, the sentence of six years for the offence against L.R. added one additional year and increased the aggregate of the sentences by both judges from 12 years to 13 years. The sentencing judge in the second trial expressly stated that that was his intent.

[7] The transcript of the trials contain vivid narrations of the nature and seriousness of the offences. I will only briefly identify the offence in respect of each individual complainant giving rise to a conviction, my source being the short description by the trial judge.

[8] The offences against R.O. involved indecent assault and gross indecency. While the complainant was in his bunk in the dorm the appellant fondled his genitals and placed his penis between the boy's legs, ejaculating after motion simulating intercourse. The other incident involved the appellant grabbing the complainant by the neck and hair and attempting to have anal intercourse. The gross indecency conviction was set aside on appeal as the facts sustaining both charges were the same.

[9] The offence against G.C. of an indecent assault involved several incidents: firstly, fondling the boy's genitals and kissing him on the mouth and inserting his tongue in his mouth. The evidence was that it "happened almost every night". Another incident occurred in the swimming pool area with the appellant putting the complainant in a closet and pulling down his trunks and inserting his finger in the complainant's rectum. The complainant was about eight or nine years of age. A third incident was when the appellant grabbed the complainant by the crotch and pressed his genitals against the boy's behind.

[10] The offence against R.C. was indecent assault that had the appellant fondling the complainant's genitals on occasions during a six month period and a second incident when the appellant dried the boy's genitals after a shower.

[11] The offence involving S.E. was indecent assault arising from separate incidents. The first incident was the appellant compelling the boy to touch his back and genitals; the second was when the complainant was forced to put his hand between the appellant's buttocks; and the third incident was the appellant fondling the boy's genitals while in bed.

[12] The offence of indecent assault against I.P. involved two incidents: firstly, when he was sitting in the appellant's lap, the appellant having his hand inside the boy's clothing fondling his private parts; and secondly, in the hallway by the monastery foyer when the appellant had his hands inside the clothing fondling the boy's genitals. The complainant was also obliged to fondle the appellant inside his clothing. The complainant said that the fondling was constant during his entire stay at Mount Cashel.

[13] The offence involving R.O. was an indecent assault when the appellant fondled the boy's genitals awaking him from sleep.

[14] The indecent assault against the complainant D.T. involved the appellant pulling down the boy's pants and fondling his genitals in a classroom.

[15] The offence against J.W. was assault causing bodily harm. The first occasion was when the complainant received a severe beating. The appellant rolled up his sleeves and started swinging. The complainant was knocked down and in the course of the beating received a broken finger when stepped on. The boy attempted to protect his face with his hands. The second incident was referred to as the "name calling incident" when the complainant was getting ready for school. His shirt was torn off as the appellant was swinging at him. The boy was hit in the head, chest and arms and kicked in the legs with skin torn and marked.

[16] There were other occasions when the complainant was struck across the back with a belt.

[17] Another count in the indictment involved A.W., the offence being assault causing bodily harm. The assault that caused the injury was a severe beating with a strap striking him on the hands and back. The trial judge described the incident as being "hit wherever he could be hit".

[18] The indecent assault against F.S. occurred when he was 10 year old. The first incident occurred when he was sitting in the appellant's lap with the appellant's hand inside the clothing fondling the boy's genitals. Another incident has the appellant fondling the boy's genitals in the hallway and compelling the boy to fondle the appellant's private parts. The boy testified that the fondling was constant from the moment he entered the orphanage. He attempted suicide.

[19] The appellant was convicted of counts of gross indecency and indecent assault against W.B. The first incident occurred one week after arrival at the orphanage when the

boy was 13 years old. The complainant was grabbed by the appellant with the appellant placing his genitals in the boy's hands. A second incident was in the appellant's car after a religious service at the Basilica. The appellant tried to force the complainant's face onto his genitals (oral sex) while in the car in the parking lot. The appellant undid the boy's clothing. The appellant eventually ejaculated. The third incident was when the appellant placed his hands under the bed sheets and fondled the complainant's genitals.

[20] The foregoing is not an attempt to fully describe the offences against the various complainants. Hopefully, the scant depiction of each offence will not unwittingly portray a false impression of trifling sexual and physical abuse. The volumes of evidence graphically describe the offences revealing the serious and repugnant nature of the crimes and the inevitable trauma endured by the young boys. The evidence reveals only too clearly the disastrous consequences.

Powers Of Court Of Appeal

[21] The powers of the Court of Appeal on an appeal against sentence is expressed in s. 687 of the **Criminal Code**:

> "687(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal
>
> "(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court."

This section of the **Code** requires the Court of Appeal on hearing an appeal against sentence to consider the fitness of the sentence imposed by the sentencing judge unless it is one fixed by law. The court may vary the sentence within legal limits or dismiss the appeal affirming the sentence imposed at trial.

[22] As mentioned, the **Criminal Code** requires the Court of Appeal to consider the fitness of the sentence imposed. **Tremeear's Criminal Code** (1974), at p. 1075 refers to **R. v. Simmons** (1973), 13 C.C.C.(2d) 65 (Ont. C.A.) with the comment that on an appeal against sentence, the appellant court should only find the sentence not fit if it appears the trial judge erred in principle or if the sentence is manifestly excessive or inadequate. In

Simmons the Ontario Court of Appeal was of the view that it is the court's duty to re-examine both fact and principle and pass upon the fitness of the sentence imposed.

[23] In **R. v. Morrissette** (1970), 1 C.C.C.(2d) 307 (Sask. C.A.) at p. 312, Culliton, C.J.S., refers to the following statement by Martin, J.A., in **R. v. Finlay** (1924), 43 C.C.C. 62 (Sask. C.A.) at p. 65:

> "Parliament, by enacting that an appeal may be taken by an accused person against the sentence imposed upon him, must have intended that the accused was entitled to have the opinion of the Court of Appeal after a consideration of all the circumstances connected with the case; it must have intended that the Court of Appeal should modify such sentence, if, in their opinion, it should be modified. The Court of Appeal can only exercise its best judgment after a careful consideration of all the circumstances, and, will always remember that the trial judge, having seen the accused and heard the witnesses, has an advantage in reaching a conclusion as compared with a court which has not, a circumstance which cannot be lightly regarded."

[24] The cases and legal texts affirm that the primary purpose of the criminal law, and the sentencing process in particular, is the protection of society. A critical stage is the sentence hearing and the imposition of a fit and proper sentence. Principles of sentencing have evolved (and continue to evolve) that assist and guide the sentencing judge. On the facts and in the circumstances on this appeal, at least three of the. entrenched principles of sentencing come to the fore: proportionality, disparity and totality.

Three Principles Of Sentencing: Proportionality, Disparity And Totality

[25] Ewaschuk, **Criminal Pleadings and Practice in Canada** (2nd Ed.), paragraph no. 18:0550 in defining the "proportionality principle" states that the punishment imposed for a particular offence must be proportionate to the crime and the offender, i.e., it must not be excessive but must relate to the seriousness of the crime and to the moral blameworthiness of the offender.

[26] In **R. v. McGinn** (1989), 75 Sask.R. 161; 49 C.C.C.(3d) 137 (C.A.) at p.142, Cameron, J.A., of the Saskatchewan Court of Appeal speaks of the necessity for proportionality in sentencing:

> "The second of the notions inherent in maintaining the integrity of the administration of justice, namely, proportionality, calls upon the courts to impose sentences proportionate to the seriousness of the offence, the harm involved, and the degree of culpability or responsibility of the offender. And so we have to have regard for such mitigating or aggravating circumstances as may be present in each case."

[27] In **Sentencing** (3rd Ed.), Ruby appears to prefer the term “appropriate to the offence” rather than “proportionality”. At p. 24 he comments that the basic notions of fairness demand that the sentence, since it is imposed on an individual, must be one that is primarily and essentially appropriate to the offence committed. This means proper consideration of both the nature of the crime and the particular circumstances of its commission.

[28] Proportionality in sentencing entails a full awareness of the seriousness of the crime and the need for deterrence, remembering nonetheless that reason, impartiality and a sense of balance as between the offender and the offence are imperative elements. Disparity in sentencing (or perhaps more accurately, avoiding disparity in sentences) is a different notion, one that is injected into the sentencing process to preserve and ensure fairness by avoiding disproportionate sentences as between convicted persons where essentially the same facts and circumstances indicate equivalent or like sentences. Cameron, J.A., in **McGinn** at p. 143 expresses the disparity principle as follows:

> “As for equity in sentencing we have to be careful to avoid disparity, that is warrantless or irrational variations in sentences for the same or a similar crime committed in the same or similar circumstances. This has prompted the courts to work their way, over time, and wherever reasonably possible, toward ranges of sentences for this offence or that; and then to sentence within those ranges, moving up or down the range as the presence or aggravating or mitigating circumstances suggest. This does not mean, of course, that sentences must invariably fall within the range, when one exists. From time to time, extraordinary circumstances present themselves, justifying departure at either the low or the high end of the range. And so rational variations both within and without the range are not only permissible, according to the variation in circumstance, they are necessary to achieve justice. But remaining within the range in the absence of the extraordinary is equally necessary to attaining justice, for otherwise disparity sets in.”

[29] Proportionality and disparity in sentencing are principles that usually arise on the most sentencing hearings. Where, however, the indictment contains multiple counts and two or more convictions result in consecutive sentences, the total of the sentences (imprisonment) imposed may well assume consequences never contemplated by the sentencing judge. The Law Reform Commission **Working Paper 11 on Imprisonment and Release** (1975), at p. 25, discussing consecutive sentences, made the following comment that explains the risk when consecutive sentences are imposed:

> “If the law makes provision for consecutive sentences, there is a risk of extremely long sentences cumulating in individual cases. Unless some limits are imposed, such sentences may not meet the objectives of separation or denunciation as already

described. In addition long consecutive terms would run counter to the principles of justice, humanity and economy."

[30] **Ruby,** at p. 38, describes the purpose of the totality principle and the duty of a sentencing judge when consecutive sentences are imposed:

> "The totality principle requires an assessment of the total impact of the sentence being imposed in relation to the serious ness of his conduct and the impact upon the offender. As the English Court of Appeal has said in **Bocskei** (1970), 54 Cr. App. R. 519:
>
> > 'When consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.'
>
> "The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate 'just and appropriate'…"

[31] This court has on occasion explained the need to blend consecutive and concurrent sentences arising from multiple convictions to attain a totality properly reflecting an appropriate punishment, one in keeping with the principles of sentences. In **R. v. Crocker (B.J.)** (1991), 93 Nfld. & P.E.I.R. 222; 292 A.P.R. 222 (Nfld. C.A.) at p. 227, Good-ridge, C.J.N., explains the position this way:

> "The imposition of fit sentences for each of several offences may result in a total term of imprisonment so lengthy as to be unrealistic or disproportionate to the conduct of the accused. Where there are multiple convictions and sentences, the sentences must be added together to see whether they are, in totality, excessive. If they are, it becomes necessary to determine what term of imprisonment is not excessive and to make some of the sentences imposed concurrent to each other, but only for the purpose of achieving a proper totality.
>
> "In summary, consecutive sentences should be imposed unless there is a valid reason not to do so. Each sentence should be an appropriate one for the offence. Concurrent sentences may, but are not required to be, imposed where multiple convictions arise out of several offences which constitute a single criminal adventure, and may also be imposed to achieve proper totality for multiple convictions."

Analysis

[32] It would not be an entirely reliable result to place too great an emphasis on a comparison of the terms of imprisonment of the other Mount Cashel Christian Brothers and the disposition received by the appellant. While some offences bear similarity others are more shocking and there are offences that are less serious. The culpability of each accused is different. With that cautionary reminder, it might still be helpful to review the number of convictions and sentences imposed on the other Christian Brothers from Mount Cashel to see if the result suggests that the appellant's punishment was inordinately

severe. It must be noted, however, that some of these sentences are under appeal. The following are the names of the other convicted Mount Cashel Brothers, the number of convictions, the date of sentence and the total of each sentence:

Accused	No. Of Convictions	Date Of Sentence	Sentences
Joseph Burke	4	91/06/28	2.08 yrs.
Douglas Kenny	7	92/04/14	5 years
Allan Ralph	10	92/02/09	6 years*
Stephen Rooney	6	91/05/22	6 years
Harold Thorne	4	91/06/03	6 years
Edward English	15	1991	13 years

(*Increased from four years to six years by the Court of Appeal.)

I will refer to this compilation shortly.

[33] There is not much that is favourable or positive that can be offered on behalf of the appellant; there are few if any factors that benefit his cause. His crimes were serious; he had more victims and convictions than any of the other accused from the Mount Cashel affair; I am not aware of any mitigating factors; there was no guilty plea and no apology or any expression of remorse. In his relatively short term at the Mount Cashel Boys Orphanage in St. John's (approximately 2½ years) he succeeded in wreaking havoc on the lives of his charges. The boys were young, many already suffering emotional problems from various forms of family disruption. His breach of duty - breach of trust - was of a most flagrant nature. These submissions by the Crown are acknowledged.

[34] It is difficult to determine if the sentences imposed are fit and proper sentences, that is, whether they are proportionate to the seriousness of the crime and the appellant's culpability yet not unnecessarily punitive. It seems however, that the individual sentences are at the higher end of the range. The sentencing judges imposed very stiff sentences. As we shall see, it is the totality of the sentences that becomes the critical question.

[35] In my opinion there is merit in the argument of counsel for the appellant that the sentences are disproportionate. I am not in a position to assess the appropriateness of the sentences of the other Christian Brothers convicted of the same offences. However, on correlating the number of convictions and prison terms given, and notwithstanding the appellant's greater number of convictions, it is apparent that there is disparity in his

sentence. Even with the lack of mitigating factors, it is clear that the appellant was treated more harshly than his associates at the same institution for the same offences.

[36] As pointed out by **Ruby,** referring to the decision of the English Court of Appeal in **R. v. Bocskei (A.)** (1970), 54 Cr. App. R. 519 it is the final duty of the sentencing judge when consecutive sentences are imposed to ensure that the totality of the consecutive sentences is not excessive. When considering the totality of consecutive sentences it is not possible to measure or ferret out an excessive sentence by any mathematical calculation or formula. Nevertheless, considering the nature of the crimes, the culpability of the. appellant, the lack of mitigating factors and the appellant's position of trust, it is my opinion that the sentence of 13 years' imprisonment (totality) is excessive.

[37] The **Criminal Code** requires a Court of Appeal on hearing an appeal from sentence to consider the fitness of the sentence and empowers the court on finding it not fit to vary it within the limits prescribed by law. As a general rule the appellate court should only find a sentence not fit if it appears that there was an error in principle or if the sentence is manifestly excessive or inadequate. In my opinion, the individual sentences exacted by the trial judges tended to be at the maximum end of the scale; that there is disparity in the sentences handed the appellant when considered in the context of the punishment given the other Christian Brothers; finally, and perhaps of most concern, in reflecting upon the sum punishment assessed the appellant, it is evident that the trial judges omitted to take into full consideration the totality of the sentences levied against the appellant making the period of incarceration manifestly excessive. The sentence (13 years) is a good example of the risk that consecutive sentences will often result in an excessive period of imprisonment and at variance with the principles of justice.

[38] For these reasons, I conclude that the sentence imposed is not a fit sentence. The trial judge erred in principle and by doing so forged an excessive term of imprisonment. I would vary the sentences so that the result is a total period of imprisonment of 10 years. This can be achieved by reducing certain sentences under Group A, Group C and the two sentences imposed by the second trial judge.

[39] I have already expressed the view that most of the sentences are at the higher end of the range and that the sentencing judges imposed "very stiff sentences". That being so, it is possible to reduce certain sentences whereby each remains a fit sentence, one that is proportionate to the crime and the offender.

[40] Accordingly, therefore, under the heading of Group A the sentence of six years in respect to the charge of indecent assault against R.O., is reduced to five years. The term of six years imposed for indecent assault in respect to G.C. is reduced to five years. Under Group C, the term of five years in respect to the indecent assault against W.B., is reduced to four years. As to the' sentences imposed in the second trial in respect to G.B. and L.R., the terms of five years and six years respectively are reduced to four years each. The result is that under Group A the term of imprisonment is five years, under Group B the term is one year (unaltered) and under Group C, including the concurrent sentences imposed at the second trial, the term is four years. Groups A, B and C, (Group C including the two concurrent terms following the second trial), are all consecutive. In the result therefore, the total period of incarceration is 10 years.

[41] I would allow the appeal and reduce the sentences as indicated above, making a totality of 10 years' imprisonment.

Appeal allowed.