[72/2016]

Birmingham J.

Mahon J.

Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Bill Kenneally

Appellant

JUDGMENT of the Court delivered on the 22nd day of February 2018 by

Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence under appeal is a cumulative sentence of 14 years and two months imprisonment imposed on 19th February, 2016. The cumulative sentence was made up of ten individual sentences of 17 months, each directed to run consecutive to the others. The sentences were in respect of counts of indecent assault committed against ten complainants and related to events that occurred between January, 1984 and December, 1987 at the time when the complainants were teenage boys, aged between 13 and 17 years. The appellant contends that the sentences imposed were grossly excessive and disproportionate, submitting that the trial judge manifestly failed to approach the question of sentencing and the need to impose sentences in accordance with the constitutional requirement of proportionality in an appropriate manner and in a manner which afforded adequate weight to the particular and unique circumstances of the prosecution and what it is contended are very significant mitigating factors which existed in respect of the appellant.

2. It must be said that there are a number of unusual features of the prosecution and the current appeal. Those features relate to the scale and nature of the offending but also to the circumstances in which untoward activity on the part of the appellant came to light and what followed on from that.

3. The Director accepts that the sentence imposed in this case was indeed a very lengthy one but says that the offending involved was on an extraordinary scale. In those circumstances she says the sentence cannot be seen as unduly severe, if regard is had to the scale and seriousness of the offending involved, with particular reference to the large number of injured parties who were abused and the fact that the abuse was repeated, persistent and premeditated and that it has had a devastating impact on victims. She points to the fact that the abuse occurred in circumstances where the appellant was in a position of authority vis-à-vis the victims because of his involvement in their sporting activities, and that the offending involved extensive exploitation, grooming and predatory conduct leading up to the abuse. She says that the accused also engaged in a calculated strategy to manipulate and control the injured parties which not only rendered them powerless and in fear of him during the time of the abuse but also rendered many of them incapable of revealing the abuse for many years thereafter.

4. The appellant says that his reaction when indications of untoward conduct on his behalf first emerged, in admitting wrongdoing, seeking counselling and assistance, withdrawing from his sporting activities and cutting himself off from contact with children is very striking to the extent of being quite exceptional.

5. Having regard to the fact that there are aspects of the case which both sides say set it apart from other cases which the courts have dealt with, it is necessary to say something more about the factual background.

6. So far as the details of the offending are concerned, this occurred at a time when the appellant was in his mid-thirties. The Director points to the fact that in almost all cases the abuse of an injured party was repeated and in some instances involved frequent abuse persisting over the course of the three-year period 1984 – 1987. The Director says that while the pattern of abuse revealed included sexual touching and masturbation of a type which is not unusual in cases of this sort, that the abuse here went very much further than is usual. It did, it is accepted, fall short of anal penetration but included incidents of oral penetration, many incidents when an injured party was required to masturbate the appellant to the point of ejaculation, numerous incidents of the appellant requiring teenage boys to tie him up or handcuff him when he was naked and then to masturbate him and included repeated incidents of sexual humiliation of the boys themselves. In many instances they were restrained by handcuffs or ropes. In some cases the tying up took place in outdoor locations. It sometimes involved the accused taking photographs of the boys with a Polaroid camera and then using the instantly developed photographs to coerce or blackmail the boys into silence and into complying with further abuse. The Director points to the fact that the abuse was preceded by extensive and pre-meditated efforts at grooming. This involved the appellant deploying a range of inducements likely to be of interest to young teenage boys. He was a basketball coach in a club where some of the boys were involved and was also known to them as a coach or organiser of tennis and soccer. He utilised this to befriend, socialise with and access the boys. The appellant as an older person and car owner was in a position to supply transport for the boys to sporting and other outings. He frequented placed where young people hung out to drink. There and elsewhere he provided the boys with very considerable amounts of alcohol. He kept alcohol in the boot of his car for this very purpose. He himself did not consume alcohol. He provided the boys with cigarettes, he brought them on trips in the car, brought them fast food and showed some of them pornographic movies as a prelude to the abuse. He bought some of them soccer kits and also gave them sums of money as part of this exercise. The sums in question would have been seen as relatively large amounts for young people to have in the 1980s. It is appropriate to refer to what the Court was told about the abuse of each individual complainant.

7. The summary that follows is taken from the written submissions filed on behalf of the Director.

(i) Complainant no. 1 – A.B.

• Counts on indictment: 1 – 22 inclusive

• Period of offending: November, 1984 – December, 1986

• Age at time of abuse: 14 – 17 years

• Victim impact evidence given in Court

• The appellant began to socialise with A. and some friends. As a practical joke, at one stage, they smeared the appellant's car with Sudocream. The appellant decided to "punish" them by initiating the abuse. He had them come to his house and to strip. He gave them soccer kits to wear. He blindfolded A. By tying wire from an exercise bar in the house to A.'s shorts and around A.'s legs the appellant imposed excruciating pain on A.'s genitals until A. took off his shorts. The appellant then took a photograph of A. and squeezed his testicles to make him smile in the photograph. The abuse later progressed to involving penile penetration of the injured party's mouth. The appellant also required A. to perform oral sex on him and to masturbate him. He assaulted A. in the car on occasions and that also included oral penetration. On one occasion, as part of the process of exercising control over the boy, the appellant abandoned A., who was then 14 years of age, in a dark wood on a winter's night having handcuffed him to a tree fully clothed. On another occasion, A. and other boys were required to handcuff the appellant to his bed and to masturbate him to ejaculation. The appellant would pay A. money. On occasion he would threaten A. with the photograph taken on the first day, waving it in his face, threatening him that if he told anyone that he had a picture available in order to show that A. had enjoyed it. The abuse proceeded on an almost weekly basis for three years.

In his victim impact evidence A. told of all the difficulties he had forming relationships in later life, how he felt dirty all the time and how he was constantly showering to remove stains of the abuse. He put on a happy outer surface but felt wholly inadequate. His studies suffered which caused great difficulties in his home. He felt very alone carrying the secret of the abuse. The abuse meant that A. lost control of his life. During the abuse he was always under the appellant's control. If he did not meet the regime put in place for him he would be threatened with unspecified punishment at some point in the future, leaving A. tortured about what would happen. Part of the exercise of controlling the boy meant that the appellant would beep the horn of his car every time he passed A.'s house and then if he beeped it twice A. would have to leave the house and go with the appellant. He was conscious of the constant threat posed by the photos. The appellant supplied drink to A. who would drink in order to numb the pain of the abuse. He later became depressed and was ultimately diagnosed with depression in his 20s. He still takes anti-depressants and undergoes counselling in order to deal with the effects of the depression and the impact of the abuse.

(ii) Complainant no. 2 – C.D.

• Counts on indictment: 23 - 37 (inclusive)

• Period of offending: October, 1984 – July, 1988

• Age at time of abuse: 12 – 15 years

• No victim impact statement was provided.

This was another case that arose out of the Sudocream prank and the abuse that C. was subjected to arose from the fact of being "punished" for the incident. It included masturbation in a manner similar to that visited upon A.B. He was regularly abused, often in the appellant's car which was parked at a rural location at a lay-by picnic area for this purpose. The appellant gave C. beer and later gave him money. C. began a practice of drinking to deal with the abuse, on occasions drinking before or after incidents. The abuse included an attempt by the appellant to orally penetrate C. but this was refused. On one occasion the appellant tied C. to a tree in a forest with his pants down.

(iii) Complainant no. 3 – E.F.

• Counts on indictment: 38

• Period of offending: 1985

• Age at time of abuse: 14 years

• Victim impact evidence given in court.

• E. was brought on trips by the appellant in his car along with other boys. He was given alcohol in the appellant's house. It was the practice of the appellant to sit in a chair in the sitting room, open his trousers and require E. to masturbate him to ejaculation. The appellant would give sums of money, IR£10 or IR£20 notes. The abuse lasted for up to two years and stopped when E. attended boarding school. In the course of victim impact evidence E. described how the appellant groomed him and abused him. He described how his teenage years and his early twenties are "a bit of a blur". He suffered depression. He felt tainted. He suffered sleep deprivation and nightmares/flashbacks. He began drinking heavily and he suffered mood swings along with bouts of depression which impacted on his married life and his relationship with his children. He described how the sense of guilt and shame brought on by the abuse overwhelmed him and how on occasion he came close to having a complete breakdown.

(iv) Complainant no. 4 – G.H.

• Counts on indictment: 39 – 46

• Period of offending: January, 1986 – December, 1987

• Age at time of abuse: 15 – 17 years

• Victim impact report prepared.

• In this case the appellant was G.'s basketball coach. Grooming here involved trips to Tramore seaside resort to buy chips. An incident involved the appellant remaining in the shower while G. was also showering naked and the appellant paid IR£20 in respect of that. G. was required to perform masturbation on the appellant in the car when other boys were present and each of the boys took turns in masturbating the appellant. They were given cans of beer. On occasions in the woods the appellant removed duct-tape and a flash lamp and rope from the back of the car and the boys were required to tie the appellant's hands behind his back and to masturbate him to ejaculation. On occasion the appellant tied G. around a tree with his pants around his ankles. The appellant photographed G. naked on two occasions. G. gave up playing basketball in order to bring the abuse to an end.

In his victim impact statement G. described the awful memories of the abuse and that they never went away, how he isolated himself from his friends, how he felt ashamed, how it took away his confidence as a teenager and he described how then and later on he always tried to block it out. He became ill a couple of years after the abuse which was ultimately diagnosed as linked to the trauma that he had experienced during his youth and he was diagnosed with depression. He engaged in self destructive behaviour.

(v) Complainant no. 5 – I.J.

• Counts on indictment: 47 – 51 (inclusive)

• Period of offending: June, 1986 – July, 1987

• Age at time of abuse: 13 – 14 years of age

• Victim impact statement prepared which was read in court.

• This was another occasion where the complainant and appellant met through the basketball club. I. was among the boys who were brought for fast food by the appellant. The appellant provided alcohol to I. and drove him around in his car. The appellant paid him IR£70 and then sought to reclaim the debt by having I. allow himself be abused. He required I. to masturbate him when there were other boys present at the time. He was along with another boy required to tie the appellant to the bed and to masturbate him to ejaculation. They were in their school uniforms at the time and it was the morning of I's Junior Cert exam. On another occasion the boys were required to tie the appellant to a tree and to masturbate him to ejaculation. I. described how there was a pattern that whichever boy was in the passenger seat of the car when they went on trips was the one selected to be abused on that occasion.

(vi) Complainant no. 6 – K.L.

• Counts on indictment: 52 – 54 (inclusive)

• Period of offending: January, 1987 – December, 1988

• Age at time of abuse: 13 – 14 years of age

• No victim impact statement.

• Contact with the appellant came about through the involvement of K. in a Sunday soccer group and also his involvement in tennis. On the journey back from a tennis match the appellant parked his car down a quiet laneway and required the boys to take off pants and underwear. This was the first time that K. had found himself in such a situation but he complied with the request of the appellant because other boys were doing so. On a latter occasion when at the appellant's house K. was told to remove underwear and the appellant assaulted him by touching his testicles and then K. was directed to masturbate the appellant. On this occasion K. was paid IR£7. On occasions, he was required to tie the appellant to the bedpost and required to perform oral sex on the appellant and masturbate him. He was naked and the appellant took a photograph of him. He was present while assaults were perpetrated upon other boys.

(vii) Complainant no. 7 – M.N.

• Counts on indictment: 55 – 60

• Period of offending: July, 1986 – April, 1987

• Age at time of abuse: 13 – 14 years

• Victim impact evidence in court.

• M. first became aware of the appellant as someone who provided alcohol to his friends when they attended discos in the tennis club. The appellant abused him in his car on occasions. On one such occasion he was paid IR£17. He was given a Manchester United strip by the appellant who also supplied him alcohol. The appellant showed him pornographic movies. On an occasion when he needed money for a school trip, M. and a friend called to the appellant's house where they were offered IR£67 if they would engage in sexual activity with the appellant. They were required to go upstairs and M. was handcuffed to the headboard and tied by the feet and then the appellant then went on to abuse him. He was then offered extra money in the amount of IR£17 in order to perform oral sex on the appellant which he did in the presence of the other boy. In the victim impact statement, M. described how the abuse gave rise to an overwhelming sense of shame and how it isolated him from family and friends. He began drinking alcohol, developing alcohol difficulties, but ultimately managed to end his habit with the help of Aiséirí and Alcoholics Anonymous. M. does not hold the appellant responsible entirely for his alcoholism but feels that the abuse was a contributory factor to his developing alcoholisms.

(viii) Complainant no. 8 – O.P.

• Counts on indictment: 61 – 63

• Period of offending: August, 1986 – September, 1987

• Age at time of abuse: 13 – 14 years

• No victim impact report prepared.

• The abuse involving O. began when he lost a bet that he had with the appellant. When he offered to pay money in respect of the bet the appellant instead required him to remove his clothing. O. was another who was given alcohol. In incidents in the appellant's car he had to masturbate the appellant. There were occasions at the appellant's residence when the appellant handcuffed O. to the bedpost and tied his feet. The appellant abused and then photographed O. in this position. Oral sex was also a feature. Abuse stopped when O.'s mother raised some concerns about him travelling in the car with the appellant.

(ix) Complainant no. 9– Q.R.

• Count on indictment: 64

• Period of offending: August, 1987

• Age at time of abuse: 13 or 14 years of age

• Victim impact report prepared.

• Q. got to know the appellant after becoming involved in the tennis club and soccer. The appellant also used to hang out in an area where young people would drink from time to time and the appellant supplied the young people with alcohol. Q. started going on short spins in the car with the appellant and other boys. Q. was experiencing problems at home and was absenting himself from school and the appellant suggested that his house in Waterford was a safe haven and that Q. could go there. The front door of the house was left open for this purpose. While visiting the house on one occasion Q. was handcuffed and suspended from an exercise pole and assaulted. He was paid IR£37. In his victim impact report, Q. told of how he had a constant sense that the appellant, his attacker, was waiting for him in a car to take him away and as a result he would at the age of 13 alter his route to make sure that he was always in the company of others.

(x) Complainant no. 10 – S.T.

• Counts on indictment: 65 – 71

• Period of offending: January, 1984 – December, 1986

• Age at time of abuse: 13 years of age

• Victim impact report was prepared and read into evidence.

• Contact here started when S. began playing soccer and met the appellant who offered him a lift to the Vinery, an area where young people tended to hang out. The appellant supplied him with alcohol. On occasions in his house, the appellant played pornographic movies for him and for others to watch. He was provided with new soccer shorts and told to remove clothing and wear only the shorts. He experienced being blindfolded and handcuffed. The appellant refused S.'s request to remove handcuffs. The appellant tied twine through an exercise bar and through S.'s hands and through the shorts and the appellant then raised the string causing S.'s legs to rise off the ground and inflicted pain in the genital area. S. found himself hanging there with his testicles and penis exposed. The appellant photographed him requiring S. to smile for the purpose of the photo. When, at a later stage, S. asked to be given the photo, the appellant declined, saying that he was keeping them in a box in his room. S. felt unable to tell his parents about the incident that evening because he had been drinking. S. had later car trips with the appellant and other boys when one or more were abused. Initially S. refused to participate in this activity but he was threatened with the naked photograph of the earlier incident being disclosed. He participated and was paid IR£17. In his case the abuse continued for a year.

S. now lives abroad. The victim impact report read into evidence in relation to him recorded how as a young child he was completely under the appellant's control and was scared of the appellant. The abuse left S. feeling lost and helpless and he continued to feel that way for 20 years. He descended into years of alcohol abuse, addiction to sex and gambling. He suffered deep emotional pain and sustained emotional scars which took decades to address.

Untoward matters came to light

8. In December 1987, the appellant became aware that a complaint had been made of sexually inappropriate behaviour on his part with a teenage boy, U. In a response to that information the appellant attended at the Garda Station in Waterford where he met with and was interviewed by two senior Gardaí, an inspector and a superintendent. The appellant made verbal admissions in relation to misconduct towards U. It seems that the Gardaí requested that he undertake not to have any further contact with boys and that he would seek professional help from a psychiatrist. The appellant in consequence of this removed himself from various sporting activities in which he had been involved, removed himself from the company of boys and sought professional assistance from a consultant psychiatrist. It is said that he desisted entirely from offending and that there followed a period of almost 30 years when there was no offending. There matters rested until Gardaí attended at the appellant's home in December, 2012, following a complaint. In conversation with Detective Garda Keating he made admissions at that stage. He was subsequently arrested and at that stage for the most part adopted a position of "no comment". One of the Gardaí who was dealing with the appellant in the post-December 2012 period made reference to a Dr Nicholas Bankes, a specialist in the area of sex offending. As a result, the appellant made contact with Dr Bankes and Dr Bankes was a witness at the sentence hearing, confirming that the appellant had taken up the suggestion of the Garda, had made contact with him and had engaged with him over the course of the period from April, 2013 to the sentence hearing. Initial risk assessment by Dr Bankes put the appellant at low to medium risk of reoffending. As a result of engaging in weekly sessions over a two-year period Dr Bankes felt that the risk of reoffending had by that stage been reduced to very low.

9. In the course of the sentence hearing the letter or statement of apology that Mr Kenneally had prepared was read into the record by his counsel. The plea in mitigation focused on the fact that an early plea of guilty had been entered referring to the fact that when the Gardaí called to his home with a search warrant that the immediate response from Mr Kenneally was to indicate that he was assuming that this related to historic matters that had occurred 20 – 25 years previously. The defence referred too to the response in 1987 when the family of U. indicated that untoward activity had taken place but without making a formal complaint and how in the

aftermath of a meeting with the Gardaí the then-accused, now-appellant, had engaged with a consultant psychiatrist. Counsel also urged that regard should be had to the fact that a number of the offences were overlapping in the sense that a number of persons were present and said that while that did not diminish the effect of each one, it did mean that the consecutive element of the offences was less.

The judge's approach to sentencing

10. The judge adjourned the sentence hearing overnight to consider what he had heard. The following day the judge delivered his prepared sentencing remarks which were detailed and considered, running to some 13 pages of the transcript. It referred to the facts of the offence, to the personal circumstances of the appellant, that he was 65 years at the time of the sentencing, that he had worked as an accountant in Waterford city and, as the judge described it, "came from a relatively privileged background". At the time of the offending he was working, was single and living at home.

11. The judge quoted from each of the six victim impact reports that had been presented. One of the criticisms made by the appellant of the sentencing process is that it was over-fixated with the position of the victims and became an exercise in vengeance on their behalf. The judge pointed out that sexual assault on a minor aged under 17 now carried a maximum sentence of 14 years but he was obliged, even though he saw this as anomalous, to deal with the case as if the maximum sentence for each individual offence was two years. He identified the factors present which aggravated culpability. In that regard he instanced the intensity of abuse, the nature of the offending conduct and the degree of suffering inflicted on each of the victims. He said that the offences involved in all cases masturbation and in some cases oral sex which placed the intensity of the abuse at the upper end for indecent assault. He referred to the predatory conduct that led to the abuse, explaining that by that he was referring to exploitative grooming. He referred to a third aggravating factor as being the strategy put in place designed to leave the victims powerless and degraded, referring in that context to the fact that a number of the victims had referred to having been photographed while naked. He explained that he felt that the photographs had been taken not for later gratification but to instil a fear of exposure and as a form of insurance against disclosure. A fourth aggravating factor that he identified was the persistence of abuse, the fact that victims were repeatedly and frequently abused over a number of years. He saw the fifth aggravating factor as the number of victims involved. He stressed that he was only dealing with ten individuals, even though the admissions made by the appellant to Gardaí in December, 2012 suggested that the number may have been double that. The judge saw a sixth aggravating factor as the group participation, the fact that the presence of other boys was used to normalise what a new boy was being subjected to and referred to the use of the paraphernalia of restraint, handcuffs, duct-tape, orange twine and some contraptions as a seventh aggravating factor. The judge said that while senior counsel for the appellant in his submissions had indicated that there was no violence used, and while it was indeed the case that Mr Kenneally had not been charged with aggravated sexual assault, what some of the victims disclosed was certainly violence in the context of a charge of indecent assault. A still further aggravating factor identified was the use of alcohol as was the payment of money, amounts varying from IR£7 to IR£67.

12. The judge said that he was of the view that the offences were ones which fell within the very upper range of gravity for indecent assault. Accordingly, in what he saw as unusual and perhaps artificial circumstances of how the maximum sentence came to be restricted to two years imprisonment, he felt that the maximum sentence of two years imprisonment was warranted on each count. So far as the mitigating factors are concerned, he instanced the guilty plea which he saw as a significant factor. He referred to the fact that Mr Kenneally had been very publicly shamed and was experiencing social isolation and would be shunned by the local community. He referred to the absence of previous convictions and that since the informal interview in 1987 until the matters that the court was concerned with came to light in 2012, he had not come to Garda attention. The judge then indicated that having regard to the mitigating factors he was giving an allowance of seven months off each two-year sentence leaving a net sentence of 17 months on each count but then made the counts consecutive, resulting in the aggregate sentence of 14 years and two months.

13. As indicated, the appellant is highly critical of the approach to sentencing by the Circuit Court judge. On his behalf it is said that the judge erred both in the manner in which the sentence was constructed and imposing a sentence which in all the circumstances was grossly excessive and disproportionate. It is said that the judge failed, indeed manifestly failed, to approach sentencing in accordance with the constitutional requirement of proportionality and that he failed to afford adequate weight to the very significant mitigating factors which were present. It is said that the mitigating factors that were present were very significant certainly, but almost unique in that the appellant had ceased offending back in 1987, changed his lifestyle so as to cut himself off from contact with young boys and sought professional help. It is said that the sentencing process was skewed by the judge's preoccupation with the position of the victims which manifested itself in him having regard to the extent of the harm caused to the victims, almost to the exclusion of all other factors and moreover was evidenced by an obvious desire that the victims would feel that they had been well served by the sentencing process. It is said that such was the dominant influence that the victims had had, that the whole exercise became one that could be seen as vengeance or retaliation for the victims rather the imposition of a sentence that was just and proportionate.

14. The DPP, on the other hand, said that yes, the sentence of 14 years and 2 months was a very lengthy one but that the offending which gave rise to the sentence was on an extraordinary scale. The Director says that the judge's approach to sentencing was a careful and considerate one. She rejects the criticisms of the judge's approach to sentencing as unduly mathematical or mechanical and says that the approach was an entirely rational and appropriate one which has resulted in a just and proportionate sentence.

Discussion

15. At the outset, the Court would draw attention to the fact that the judgment provides far greater detail in relation to the nature of the offending than would normally be the case. The Court experiences some degree of discomfort in departing from its normal practice and setting out details of the offending to the extent that it has in this case, but it has found it appropriate and indeed necessary to do so in order to indicate the nature, extent and scale of the offending here. Courts are not infrequently called on to deal with cases of sexual offending where there are very disturbing features present. However, the combination of factors that are present in the present case makes it a very unusual one indeed, if not in fact unique. While this Court has had to deal with some truly appalling cases, it is hard to think of any case where the same combination of factors were present. That is not to say that the Court has not had to deal with cases that were as serious, or even more serious, or which lacked the mitigating factors that were present here. That would quite simply not be true. It is however true to say that the combination of factors such as the multiplicity of complainants, the duration of offending, the nature of the offending, the individual acts being very serious and in a number of cases involving conduct which today might well be charged as s. 4 oral rape, the grooming that was a feature, including the offers of money and gifts such sports gifts, the use of photographs as a means of enforcement and the manner in which he gained access to and influence over his victims is quite exceptional. Even that list is not comprehensive and a review of his interaction with individual complainants will disclose a number of other factors that were present.

16. It is true that there are factors present by way of mitigation. Most significant is the fact that a plea of guilty was entered. The

pleas entered were consistent with and a logical follow-through on admissions made by him when first confronted by Detective Garda Keating. Also relevant is his reaction in 1987 when the allegations by U emerged, his admissions at that stage, his change in lifestyle and his engagement with a consultant psychiatrist. Nor can sight be lost of the fact that he came forward for sentence as a 65 year old man in respect of conduct in which he had engaged between 1984 and 1987. The factors present by way of mitigation were significant and they were required to be addressed when selecting a sentence. However, notwithstanding the mitigating factors that were present this was a case which demanded a very significant sentence.

17. The actual sentencing process in which the judge engaged in the Circuit Court was shaped by his belief, it was a common belief of all involved in the case, that the maximum sentence in relation to an individual sentence was two years, the law in this area having become confused and uncertain until the matter was clarified by the Supreme Court in the case of *DPP v. James Maher* [2016] IESC 31.

18. The sentence eventually arrived at was based, first of all, on the conclusion that the offending in respect of each individual complainant merited a sentence, before mitigating factors were applied of two years imprisonment. He then considered what should be allowed by way of mitigation in respect of the sentence in respect of each individual complainant with the outcome that we have seen. Finally, he decided that this was a case where consecutive sentences were appropriate. On behalf of the appellant, it is submitted that if the judge had decided that this was a case where entirely concurrent sentences would have been appropriate, and it must be said it would have been a very surprising outcome indeed had he so concluded, this very probably would have seen this Court invited to address the appropriateness of that approach by the Director. However, counsel for the appellant submits that the fact that entirely concurrent sentences were not imposed did not mean that it followed that all the sentences had to be consecutive. The judge did not, it is submitted, consider the possibility of grouping the complainants and, it is said there were several ways this could have been done and then make the sentences within the group concurrent while allowing for consecutive sentences between groups. In the Court's view, the culpability here was so grave and the harm caused so serious that consecutive sentences cannot be seen as inappropriate. Undoubtedly, the judge's mistaken belief as to the maximum sentence available contributed to the sentence being structured in the way that it was. However, even if the judge had realised that higher penalties were available in respect of individual counts and individual complainants, there was still much to be said for approaching sentence on the basis of relatively short periods of imprisonment in relation to each of the individual complainants but making those relatively short sentences consecutive to each other. The Court does not believe that the judge erred in concluding that the offending in respect of each complainant merited a sentence of two years imprisonment. Neither does the Court believe that the judge erred in deciding to deal with the question of mitigation by reducing the individual sentences of two years by seven months in each case. The Court has already indicated that it feels that this was a case where consecutive sentences were appropriate and so the Court is of the view that the sentence arrived at as a result of that exercise of 14 years and two months was not an inappropriate one. However, the Court feels that at that stage it would have been appropriate for the judge to step back and address the sentence that he had arrived at by reference to the totality principle. In a situation where the judge did not expressly undertake that exercise, the Court has found it necessary to do so. We have concluded that the sentence arrived at while severe, and indeed while certainly at the upper end of the available range, was not so severe as to constitute an error in principle. The Court has said repeatedly that the mere fact that the Court might have imposed a somewhat different sentence at first instance or that individual members of the Court might have done so had they been the sentencing judge does not provide a basis for intervening.

19. In the Court's view the sentence imposed here, while perhaps at the very outer limit in terms of severity, did not fall outside of the available range. In the circumstances the Court will dismiss the appeal.