

A

KELLY v HM ADVOCATE

No 2
9 August 2000

L J-G Rodger, Lord Allanbridge
and Lord Caplan

FRANCIS KEVIN KELLY, Appellant — *Gilbride*
HER MAJESTY'S ADVOCATE, Respondent — *McCreadie, A-D*

B

Justiciary — Sentence — Sex offender — Whether a finite sentence comprising a custodial term and an extension period was preferable to a discretionary life sentence — Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), sec 2¹ — Criminal Procedure (Scotland) Act 1995 (cap 46), sec 210A²

C

The pannel pled guilty at the High Court at Dundee to a charge of breach of the peace by masturbating and exposing his private member to a female complainer and to a charge of assaulting another female complainer by placing his hand over her mouth, pulling her to the ground, compressing her mouth and nose with his hand, compelling her to lie face down on the ground, lifting up her clothing, handling her buttocks, seizing hold of her and further compelling her to take him to a particular house and going into the house with her, all to her injury. On 4 June 1999 the sentencing judge (Lord Cowie) imposed a sentence of life imprisonment and, in terms of sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, ordered that a period of three years six months be served by the pannel in custody before the provisions of sec 2(4) and 2(6) of the Act should apply to him. The pannel appealed against sentence to the High Court of Justiciary. The pannel argued that, instead of imposing a discretionary life sentence, the sentencing judge could and should have imposed an extended sentence in terms of sec 210A of the Criminal Procedure (Scotland) Act 1995.

D

E

¹Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides, *inter alia*, that: "(1) In this Part of this Act "designated life prisoner" ... means a person ... in respect of whom the court which sentenced him for that offence made the orders mentioned in subsection (2) below. (2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the designated life prisoner as soon as he has served such part of his sentence ("the designated part") as is specified in the order, being such part as the court considers appropriate taking into account — (a) the seriousness of the offence, or of the offence combined with other offences associated with it; (b) any previous conviction of the designated life prisoner; and (c) where appropriate, the matters referred to in paragraphs (a) and (b) of section 196(1) of the 1995 Act. (4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a designated life prisoner on licence ... (6) where this subsection applies, a designated life prisoner may, subject to subsection (7) below, at any time require the Secretary of State to refer his case to the Parole Board."

F

G

²Section 210A of the Criminal Procedure (Scotland) Act 1995 provides, *inter alia*, that: "(1) where a person is convicted on indictment of a sexual or violent offence, the court may, if it — (a) intends, in relation to — (i) a sexual offence to pass a determinate sentence of imprisonment or (ii) a violent offence, to pass such a sentence for a term of four years or more; and (b) considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender, pass an extended sentence on the offender. (2) An extended sentence is a sentence of imprisonment which is the aggregate of (a) the term of imprisonment ("the custodial term") which the court would have passed on the offender, otherwise than by virtue of this section; and (b) a further period ("the extension period") for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above. (3) The extension period shall not exceed, in the case of — (a) a sexual offence, ten years; and (b) a violent offence, five years."

H

I

Held (1) that the point of the extended sentences which had been introduced by sec 210A was to provide additional protection for members of the public from offenders who had committed violent or sexual offences. Where such a finite sentence can provide the necessary protection, Parliament's intention must have been that a finite sentence should be preferred to an indefinite life sentence (p 14E–H); and (2) that in the present case, since Parliament had now provided the mechanism of an extended sentence, the imposition of a life sentence was excessive, and in the circumstances an appropriate sentence was a custodial period of seven years and the maximum extension period of ten years (p 15B–D); and appeal allowed.

A

B

FRANCIS KEVIN KELLY was charged at the instance of Colin Boyd QC, Her Majesty's Advocate, on an indictment the libel of which is sufficiently set forth in the opinion of the court.

The cause came to trial in the High Court at Dundee when the pannel pled guilty. The sentencing judge, Lord Cowie, adjourned the diet in order to allow the accused's agents to obtain a psychiatric report. On 4 June 1999, the sentencing judge imposed a sentence of life imprisonment.

C

The pannel thereafter appealed to the High Court of Justiciary by note of appeal against sentence.

Case referred to:

O'Neill v HM Advocate 1999 SCCR 300; 1999 SLT 958

D

The cause called before the High Court of Justiciary, comprising the Lord Justice General (Rodger), Lord Allanbridge and Lord Caplan for a hearing on 21 and 22 June 2000.

At advising, on 9 August 2000, the opinion of the court was delivered by the Lord Justice-General.

OPINION OF THE COURT — [1] The appellant is Francis Kevin Kelly who pled guilty at the High Court at Dundee on 7 April 1999 to a charge of breach of the peace by masturbating and exposing his private member to a female complainer; he also pled guilty to a charge of assaulting another female complainer on the same day by placing his hand over her mouth, pulling her to the ground, compressing her mouth and nose with his hand, compelling her to lie face down on the ground, lifting up her clothing, handling her buttocks, seizing hold of her and further compelling her to take him to a particular house and going into the house with her, all to her injury. The sentencing judge, Lord Cowie, adjourned the diet in order to allow the accused's agents to obtain a psychiatric report. On 4 June 1999 the sentencing judge imposed a sentence of life imprisonment from that date and, in terms of sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, he ordered that a period of three years six months be served by the appellant in custody before the provisions of sec 2(4) and 2(6) of the Act should apply to him. In imposing that sentence the sentencing judge decided not to backdate it. In reaching this decision he had in mind the fact that at the time of the offences the appellant had been on licence and his licence had been recalled on 3 February 1999 after he had spent 51 days in custody on remand. In presenting the appeal counsel did not challenge the sentencing judge's decision not to backdate the sentence.

E

F

G

H

[2] When the appeal first called before this court on 11 January 2000 counsel submitted that, instead of imposing a discretionary life sentence, the sentencing judge could and should have imposed an extended sentence in terms of sec 210A of the Criminal Procedure (Scotland) Act 1995. Under subsec (4) of that section, before passing such a sentence, the court must consider a report by a relevant

I

A officer of a local authority about the offender and his circumstances. The court therefore continued the appeal pending the preparation of a social inquiry report addressing specifically the desirability of passing such an extended sentence. We now have that report.

[3] The narrative of the offences to which the appellant pled guilty shows that they are both offences against women and that they are of an explicitly sexual nature. The second of the two offences is clearly a serious assault which, even without any background, would require to be visited with an appropriately heavy sentence both to punish the appellant and to protect the public, in particular women. But, of course, the offences are not to be seen in isolation. In August 1988 the appellant was convicted of assault on indictment in the sheriff court at Airdrie. Professor Cooke's report shows that the assault was on a young female. The appellant had been drinking heavily and tried to get the young woman to masturbate him. He was sentenced to 18 months detention. In February 1991, this time on indictment in the sheriff court at Glasgow, the appellant was convicted of two charges of assault and robbery. Again, these offences had a sexual element since they both involved robbery of a prostitute in a dispute about payment for her services. In June 1995 the appellant was convicted of assault and robbery in the High Court at Edinburgh and was sentenced to four years imprisonment. This offence had no sexual element. It was while he was on licence under this sentence that the appellant committed the present offences. The reports from Professor Cooke which were available to the sentencing judge indicated that there was a high risk that the appellant would reoffend in a sexual manner. Indeed he was concerned that the appellant might progress to more serious offending. In a supplementary report Professor Cooke indicated that there was difficulty in predicting the outcome of treatment and he therefore considered that several years of treatment would be necessary to provide the best chance of a successful outcome.

[4] In presenting the appeal counsel submitted that, whereas previously a discretionary life sentence might have been the only appropriate way to deal with a case like the present, by inserting sec 210A into the 1995 Act, Parliament had provided the courts with a new type of sentence which was indeed tailor-made for such cases. It appears to us that there is force in that submission, since the whole point of extended sentences is to provide additional protection for members of the public from offenders who have committed violent or sexual offences. Where this type of finite sentence can indeed provide the necessary protection, we consider that Parliament's intention must have been that a finite sentence should be preferred to an indefinite life sentence. Such extended sentences comprise two elements, the custodial term and the extension period. The prisoner must serve the appropriate period of the custodial term, just in the same way as with any other determinate sentence. So, if, for instance, the prisoner is sentenced to four or more years imprisonment, he may be released after serving one-half of his sentence and must be released after serving two-thirds of the sentence. On his release, the prisoner does not remain subject to a licence merely during the balance of the custodial term; rather, he remains subject to a licence until the end of the extension period. The effect is that, if he offends during that period, his licence may be recalled and he will be liable to serve the balance of the custodial term. Bearing in mind the way in which such sentences operate, we turn to consider whether it would be appropriate to impose an extended sentence and, if so, for what periods.

[5] In the social enquiry report which we obtained from Dundee City Council it is said that the appellant presents a serious risk of re-offending and that there

is a high risk of harm to any potential victim. The report points out that the need to earn release under a life sentence may motivate a prisoner to undertake the sex offender programmes, whereas there might be less motivation where the offender knew the date for his release. We would observe, however, that the possibility of earning release after serving one-half of a sentence would also provide an incentive, if one were needed, to undertake such programmes.

[6] It appears to us that, since Parliament has now provided the mechanism of an extended sentence, the imposition of a life sentence in the present case can properly be regarded as excessive. But, although an extended sentence would be an appropriate disposal, none the less, in view of the appellant's previous convictions, the custodial period must indeed be substantial. As we noted, the sentencing judge designated three and a half years as the minimum period which should elapse before the appellant could be considered for release on parole. The judge refers to the guidance given by this court in *O'Neill v HM Advocate* and it is therefore apparent that he considered that an appropriate determinate sentence for the offences would have been seven years. In the light of the nature of the second offence to which the appellant pled guilty and in light of the previous convictions which we have described, we see no reason to disagree with that view. We therefore consider that the custodial period should be seven years.

[7] Furthermore, the assessments in the reports by Professor Cooke and the social work department make this a case where a lengthy extension period is appropriate in order to provide additional protection for the public. In view of the uncertainty about the prognosis we consider that we should select the maximum extension period of ten years.

[8] In the result we shall allow the appeal, quash the sentence of life imprisonment and substitute an extended sentence. In doing so, we shall impose a custodial period of seven years and an extension period of ten years.

THE COURT allowed the appeal, quashed the sentence of life imprisonment and substituted an extended sentence.

Crown Agent

A
B
C
D
E
F
G
H
I