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IN THE COURT OF APPEAL OF NEW ZEALAND CA.56/88

THE QUEEN

V

BRIAN JOHN EBBETT

Coram	McMullin J (presiding) Casey J Bisson J
Hearing	15 June 1988
Counsel	D.B. Mathias for appellant D.J.McDonald for Crown
Judgment	28 September 1988

JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

Brian John Ebbett was sentenced in the High Court to preventive detention for ten sexual offences to which he had earlier pleaded guilty in the District Court. There were four charges of unlawful sexual connection with boys, five charges of doing indecent acts upon boys between the ages of 8 and 11 and one of permitting one of those boys aged 8 to do an indecent act on him. He now makes application for leave to appeal against that sentence. Mr Mathias submitted on his behalf first, that the requirements of justice would be met by the imposition of a finite term of imprisonment rather than preventive detention; secondly that the sentencing Judge failed to give sufficient weight to the

periods of non-offending which followed the imposition of earlier terms of imprisonment; and thirdly that he placed too much importance on the need to protect society when in fact all the complainants had been consenting and the victim impact reports indicated that they had not been adversely affected by their experiences.

According to a summary of facts presented to the sentencing Court, in October 1987 Ebbett befriended a group of boys aged between 8 and 11 years. They all lived in the one district. Ebbett arranged with them that if they wanted to engage in sexual activity with him they were to meet him at the rear of the factory where he worked. The boys were to receive varying amounts of cash from Ebbett for doing so. Between 1 October 1987 and 4 February 1988 Ebbett took one boy aged 8 years to a bush area adjoining the factory. He there manually masturbated the boy. He gave him $10. In the same period he took another boy aged 11 years to the same area and manually masturbated him. He gave him $5. About that time he took another boy aged 9 years to the same area, placed his mouth over the boy's penis and orally masturbated him. He gave that boy $7. About the same time he met the first boy again in the same area and orally masturbated him. He gave the boy $10. Toward the end of January he took the second boy and the third boy to the Tepid Baths in Auckland. While in the spa pool he manually masturbated both boys. He gave the third boy $5. Late in January or early in February 1988 he met the first boy again

at the bush area adjoining his workplace. He orally masturbated him and paid him $20. About the same time he met a fourth boy aged 11 in the same area, manually masturbated him and paid the boy $10. On 5 February 1988 he met a fifth boy aged 8 in the same area, orally masturbated him and paid him $10. The next day he took that same boy to the Tepid Baths. He was seen there by a witness with his swimming trunks pulled down and exposing his penis. The fifth boy was orally masturbating him.

When interviewed by the police, Ebbett initially denied the offences but then said that he had a weakness for males and apologised for what he had done. No physical injury was suffered by any of the boys, nor have they so far exhibited any adverse psychological effects. And it is said that there has been no change in their normal pattern of behaviour.

Ebbett was convicted on 5 November 1945 on six charges of indecent assault on a male. He was sentenced to two years imprisonment on that occasion. On 22 December 1958 he was convicted on one charge of indecent assault on a male. For this he received a sentence of imprisonment for one year. On 16 October 1964 he was sentenced to one years imprisonment for inducing a boy to do an indecent act on him. On that occasion he was warned by the sentencing Judge that he had qualified for a sentence of preventive detention. On 21 October 1974 he was sentenced to one years imprisonment on each of two charges of indecent assault on a male.

The convictions on 16 October 1964 and 21 October 1974 are convictions for sexual offences within s.75(4) of the Criminal Justice Act 1985. The convictions prior to 16 October 1964 were not for sexual offences within s.75(4) because they were committed before the coming into operation of the Crimes Act 1961 and s.75(4) refers only to offences against the provisions of the 1961 Act.

Mr Mathias in his well prepared argument pointed out that 13 years had elapsed between Ebbett's conviction on 21 October 1974 for a sexual offence within s.75(4) and his conviction on the ten offences with which we are presently concerned. However, that is not to say that the earlier convictions are to be ignored when considering the sentence of preventive detention. They are still relevant in considering whether it is expedient for the protection of the public that an offender should be sentenced to preventive detention, which is the question to which s.75(2) is directed We think, too, that the force of the point is largely blunted by the fact that in the period of 13 years Ebbett was convicted on charges which have a distinct sexual connotation, although falling short of being sexual offences within s.75(4). Thus, Ebbett was convicted on 1 September 1978 for being a rogue and vagabond (a frequenting offence) and again on 18 January 1985 for doing an indecent act in public. As we have said what he did on those two occasions did not reach the stage of being a sexual offence within s.75(4), but his conduct is part of the stock in trade of men who prey on young boys by waiting near public lavatories where they can

more easily make the acquaintance of boys and exhibiting themselves with a view to attracting them. All too frequently such conduct is preparation for a more serious offence. His earlier convictions for similar offences - on 27 March 1968 for being a rogue and a vagabond (frequenting) and on 3 October 1969 and 3 September 1973 for similar offences - are also relevant as indicating a proclivity for sexual offending against young boys.

Mr Mathias referred us to a number of decisions of this Court relevant to the sentence of preventive detention. We do not specifically refer to these because there is no reason to reiterate what was then said. Moreover, to some extent these cases are merely illustrations of the application of s.75(2) to particular circumstances. As Mr Mathias rightly submitted, the crucial question is whether a sentence of preventive detention on Ebbett was expedient for the protection of the public. In that connection we note that in his report the probation officer said that, although Ebbett had received counselling over a long period of time from experienced probation officers, he had shown little motivation towards seeking professional help, repeatedly claiming that he had learnt his lesson and could deal with his problem unaided. And by way of explanation of the present offences, although reluctant to discuss them, Ebbett stated that when the opportunity arose he succumbed to the temptation. The probation officer described Ebbett as a timid and ineffectual man with a tragic history, unwilling to face the reality of his offending and thereby imposing a difficulty for himself

in addressing his problem, and lacking motivation and determination to cope with it.

At the end of the hearing we asked counsel for the Crown to obtain information about the circumstances of Ebbett's previous offending and an up to date psychiatric report. Counsel for the Crown has now filed a memorandum setting out the relevant information and attaching a report from Dr C.F. Whittington, a forensic psychiatrist. Mr Mathias has filed a memorandum in reply.

It appears that the circumstances in which the offences for which convictions were entered on 22 January 1958, 16 October 1964 and 21 October 1974 are in much the same pattern as those of the ten offences involved in this appeal. No information is available in respect of the convictions entered on 5 November 1945. And it is clear from the circumstances of the offences of being a rogue and vagabond for which convictions were entered on 27 March 1968, 3 October 1969 and 1 September 1978, that Ebbett was using the occasions which were the subject of those charges to further his relationships with young boys.

Dr Whittington in his report dated 22 August 1988 describes Ebbett as a homosexual paedophile of long standing who has demonstrated an intermittent propensity for paedophiliac activity. He opines that there is no cure per se for his deviancy but that a necessary first step for its arrest and total subjugation must be Ebbett's acknowledgment and

acceptance that he has a problem; that only then will he acquire the motivation and emotional receptiveness to be truly accepting of counselling and to bring about changes in his life. It seems that Ebbett has not yet reached that stage.

As we have said in a number of cases relating to the application of s.75, the imposition of a sentence of preventive detention rather than a finite one is a serious step. This is particularly so since the passing of the Criminal Justice Amendment Act (No. 3) 1987 which, inter alia, provides that an offender sentenced to preventive detention is not eligible for parole for ten years. But in circumstances of this kind we think that the Judge was entitled to take the view that the need to protect members of the public from Ebbett's offending could only be ensured by the imposition of preventive detention. The further information we have received confirms that from the time when he first committed the more serious sexual offences down to the present, Ebbett has maintained the same unhealthy interest in young boys even though on some occasions this interest has been only the subject of vagrancy charges under the Police Offences Act 1927.

The application for leave to appeal is dismissed.

Solicitors:

Davys Burton Henderson, Rotorua, for Crown