The Court of Appeal for Bermuda

Criminal Appeal No. 16 of 2009

Between:

The Queen

Appellant

-and-

Melvin Martin

Respondent

Before : **Zacca, President**
Ward, J. A.
Auld, J. A.

Date of Hearing: **Monday, 14th June 2010**
Date of Judgment: **Wednesday, 16th June 2010**
Reasons for Judgment: **Monday, 9th August 2010**

Appearances: Mr. Rory Field & Ms. Cindy Clarke for the Appellant
Ms. Shade Subair for Respondent

Reasons for Decision

Ward J.A.

1. On 1st September 2009 the Defendant / Respondent was convicted on his own plea in Case No. 32 of 2009 of two offences of sexual exploitation, two offences of making child pornography and one offence of accessing child pornography. He was also convicted in Case No. 33 of 2009 of one offence of sexual exploitation, two offences of making child pornography, one offence of unlawful carnal knowledge and two offences of accessing child pornography.

2. On 24th November 2009 the Respondent was sentenced to a total of eight and one-half years imprisonment to be followed by a period of Probation for two years.

3. The Crown has appealed on the ground that the sentences imposed are manifestly inadequate.

4. In Plant (R) v Robinson Criminal Appeal No. 1 of 1983 manifestly inadequate was defined as obviously inadequate – obvious to the appellate tribunal that the sentence is much too low and fails to reflect the feelings of civilized society to the crime in question. It was also defined as obviously insufficient and a failure to apply right principles.

5. On 16th June 2009 we allowed the appeal and increased the total sentence to one of imprisonment for fourteen years. The Probation Order was vacated. We now give our reasons for so doing.

6. The Order we made was as follows:

> ***(16th June 2010)***
>
> *1. The application for leave to appeal is granted.*
> *2. The Appeal against sentence is allowed as follows:*
>
> *On indictment 32*
>
> *a. Counts 1 and 3 Sexual exploitation the appeal is allowed, the sentences are vacated and a sentence of 9 years substituted on each count and sentences to be concurrent to each other.*
> *b. On Counts 2 and 4, making Child Pornography, the appeal is allowed, sentence is vacated; a sentence of 3 years is substituted on each count, concurrent to each other but consecutive to counts 1 and 3. Probation order is vacated.*
> *c. On Count 5, which is accessing child pornography, the sentence of one year is affirmed and the sentence to be concurrent as ordered.*
>
> *On Indictment 33*
>
> *a. Count 1 sexual exploitation, the appeal is allowed, the sentence vacated; a sentence of 9 years substituted concurrent to all Counts in Indictment 32.*
> *b. Counts 2 and 4, making child pornography, the appeal is allowed, sentences are vacated; sentence of 3 years substituted concurrent to each other and concurrent to all other sentences in Indictment 32 and 33; Probation order is vacated.*
> *c. Count 3 which charge is Carnal knowledge; the appeal is allowed; the sentence of 2 years which was imposed is affirmed, but the sentence is to be*

consecutive to Counts 1, 2, 3, and 4 of Indictment 32 but concurrent to all other Counts in Indictment 32 and 33.
d. Counts 7 and 9 which is accessing child pornography, the sentences are affirmed, sentences to be concurrent as ordered.

The result of all this is that the Respondent will serve a total of 14 years. The reasons are to be put into writing at a later date."

7. The offences involved girls aged eleven to fifteen years. The Respondent was twenty-four years of age.

8. On 3rd June 2009 police officers executed a Search Warrant at the residence of the Respondent and seized a lap top computer connected to an external hard drive. Pornographic material was found on them and there were images of children under the age of sixteen years who could be identified and who were engaged in sexually explicit activity. The images were filed under various names and could be stored indefinitely. In some of them the Respondent could be seen committing sexual acts, including oral sex, on victims who were too young to give their consent. The Respondent was engaging in a systematic pattern of corrupting young girls. The grooming of young girls for future sexual intimacies must be strongly deplored and modern technology will permit the transference of these images via the internet.

9. In the western world, of which we are a part, child pornography is condemned in all civilized societies. It cannot be denied that there are precocious girls, but when they are discovered, society has a duty to protect them, even from themselves if necessary.

10. Heavy penalties are prescribed by the Legislature for the offences of which the Respondent stands convicted. For the offence of sexual exploitation the maximum penalty is imprisonment for twenty years. A similar penalty is prescribed for the offence of unlawful carnal knowledge. For making child pornography the maximum sentence is imprisonment for ten years and for accessing child pornography it is five years. Those heavy penalties indicate the seriousness with which the Legislature regards these offences and a clear message must be sent to the deviant members of society who might be tempted to commit similar offences.

11. In her sentencing remarks, the learned Judge recognized the contempt and abhorrence that society feels towards sexual offenders and that the principle of deterrence must be a factor in sentencing. In addition she stated that the community needs protection from the Respondent until he will have become able to control his impulses. She also seemed to accept that the sentencing range for the offence of sexual exploitation was imprisonment between nine and twelve years, for the offence of unlawful carnal knowledge between three and five years, for making child pornography between three and five years and for accessing child pornography between two and three years.

12. Having recognized the above ranges, for reasons which are not apparent save for the guilty plea, the age of the Respondent, his formerly unblemished record and the abuse which he was said to have suffered while young, the learned Judge deviated from the accepted range to an extent which rendered the sentences imposed manifestly inadequate. For three counts of sexual exploitation the Judge imposed concurrent sentences of imprisonment for seven years to be followed by a period of Probation for two years, for the offence of unlawful carnal knowledge imprisonment for two years concurrent, which could be regarded as merely a slap on the wrist, for making child pornography, imprisonment for eighteen months consecutive followed by probation for two years, and for three counts of accessing child pornography imprisonment for one year concurrent.

13. A sentence of imprisonment for seven years for three counts of sexual exploitation on the facts of this case was much too low and failed to reflect the feelings of society to the crime in question. A similar comment can be made concerning the concurrent sentence for making child pornography. The offence of unlawful carnal knowledge was of a different genre and the sentence should properly be consecutive.

14. We vacated the Probation Order as we do not think that a period of Probation after a long period of imprisonment will be of any benefit to the Respondent. In any event when the time shall come for release on parole, he will be subject to a measure of supervision. Any treatment which he will receive for his deviant behavior should be given while he is incarcerated and we recommend that it be started as soon as possible.

15. Finally, bearing in mind the totality principle, the sentence which we impose is one of imprisonment for fourteen years in the manner detailed above.

_____
Ward J.A.

_____
Zacca, President

_____
Auld J. A.