In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 22

FIONA MILLER
(Police Sergeant)

Appellant

-v-

JOSHUA CROCKWELL

Respondent

-and-

CRIMINAL APPEAL 2012: NO. 24

JOSHUA CROCKWELL

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT
(In Court)

Date of Hearing: August 17, 24, 2012
Date of Judgment: September 7, 2012

Ms. Elizabeth Christopher, Christopher's, for the Appellant
Ms. Susan Mulligan, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. On February 27, 2012, the Respondent in the Crown appeal against sentence was convicted before the Magistrates' Court (Worshipful Khamisi Tokunbo) of one count of sexual exploitation of a girl under the age of fourteen years in June 2010 contrary to section 182A of the Criminal Code. On May 8, 2012, the Respondent was sentenced to fifteen months' imprisonment suspended for two years combined with a two year probation order. The sentence was subject to intense public criticism in the media (and especially the blogosphere). On May 16, 2012, the Informant appealed the sentence on the grounds that it was manifestly inadequate.

2. On May 18, 2012, the Defendant in the Court below appealed his conviction on the grounds that:

    (a) the Learned Magistrate failed to consider the admissibility of "verbals" uttered by the Defendant upon arrest notwithstanding an application to exclude such evidence;

    (b) the Learned Magistrate's findings as to whether the "verbals" were uttered were unreasonable;

    (c) The verdict was unreasonable and ought not to be supported.

3. As the Defendant's counsel was not ready to proceed with the appeal against conviction when the appeal was first listed for hearing, arguments on the Crown's sentence appeal were heard before those for and against the appeal against conviction. This was pursued to avoid wasting Court time in relation to cross-appeals listed to be heard together in circumstances where it seemed obvious that each appeal would have to be fully considered in any event. However, the appeal against conviction will be considered before the appeal against sentence in the present Judgment.

Appeal against conviction

4. The only particularized grounds of appeal related to statements made by the Appellant/Defendant to a police officer after his arrest and before he was formally interviewed at a time when it was common ground that the relevant Code of Practice under the Police and Civil Evidence Act ("PACE") was not yet in effect.

5. Without any apparent warning to opposing counsel or the Court prior to the day of the resumed appeal hearing, the Appellant's counsel made further complaint about: (a) the failure of the Judgment to explain why the Appellant was disbelieved, and (b) the failure of the Judgment to expressly record that due regard had been paid in assessing the Appellant's credibility to his previous good character.

The admissibility point

6. At the commencement of the appeal I described this point as not obviously strong. After receiving the benefit of full argument, I find the point to be wholly

unmeritorious for two principal reasons. Firstly, no proper objection was made in the Court below; and secondly, no coherent legal grounds were articulated to support the complaint that the relevant evidence ought to have been excluded.

7. Ms. Christopher, one of Bermuda's most able and experienced criminal advocates, never advanced any objection which required adjudication by the Learned Magistrate at trial. Such objection as was half-heartedly raised amounted to what in cricketing parlance would be described as a "stifled appeal". No indication of any objection was given before Detective Constable Dill's examination or cross-examination commenced. It was raised in re-examination when Ms. Mulligan sought to neutralize the cross-examination by eliciting the fact that the contents of the informal interview after caution were put to the Appellant in the course of the formal interview so that he had an opportunity to comment on the accuracy of the officer's informal record.

8. According to the transcript (at page 36), the point was first raised by counsel in this way:

> "*…I would submit that the whole interview was improperly done. I somewhat object to it, but this court's the judge…*"

9. After Ms. Christopher and Crown Counsel attempted to assist the Learned Magistrate to clarify the nature of the objection (that the police officer's notes of the informal interview were not shown to the Appellant and signed by him) and the unusual stage at which it had been raised, he commented (transcript page 41) as follows:

> "*…that's all for argument. If you want to go there, that's all for argument.*"

10. The Court appears to have accepted the submission by the Appellant's counsel that it was acceptable procedure for the Court in a judge-alone trial to hear evidence said to be inadmissible as part of the trial without a *voir dire* and, by implication, determine admissibility at the end of the trial. So the Learned Magistrate appears to have logically assumed that if serious objection was taken to the admissibility of the informal interview, the matter would be addressed in closing submissions at the end of the trial.

11. I find that no need for a Ruling arose on the objection mentioned but not advanced in any meaningful sense in the course of re-examination of the arresting officer. A legal basis for the inadmissibility of the evidence had not even been identified at this point.

12. Was the Learned Magistrate required to deal with the objection when he came to consider his final judgment? According to Ms. Christopher, closing submissions were advanced by way of written submissions only. This fact is confirmed by the Appeal Record[1]. The '*Submission for the Defendant*' makes no reference to the admissibility point which formed the centrepiece of the appeal.

[1] Page 230 (page 23 of the typed hearing notes).

13. I find that at the end of the trial, the admissibility of the verbal statements made by the Appellant to the arresting officer was not an issue which the Learned Magistrate was required to consider and give a formal ruling on. The issue was never properly raised.

14. The grounds of appeal based on this objection were barely raised in a more convincing manner on appeal. It must be appreciated that the Appellant agreed that he said what the officer says he said, but disagreed with the order in which they appeared in his notes. What the Appellant said did not appear on its face to be an admission having regard to the fact that the only significant issue in dispute was whether he had reasonable grounds for believing that she was older than fourteen. The Learned Magistrate recorded the exchanges before accurately stating as follows:

> "*The Defendant accepted that these exchanges occurred between him and the officer but says not in that order…*
>
> *On the evidence before the Court the prosecution has satisfied me so that I feel sure there was no reasonable cause to believe that [the Complainant] was 14 years or older. That evidence includes the physical stature and development of Durham, and the absence of any finding that she looked* [14] *or older when dressing up or because she hung with older boys and girls.*
>
> *I am also satisfied so I feel sure that the Defendant did not himself believe* [the Complainant] *was* [14] *years or older.. He was told her age by her when they first met when he asked her and therefore knew she was under 14 years, though I am not sure he told her he was age 16. Furthermore, I believe the Defendant's responses to police after arrest and under caution further illustrates his knowledge that* [the Complainant] *was a very young girl under 14 years of age, (when he referred to her as 'forward and little light-skinned girl').*"

15. So the Court relied upon what the Appellant admitted he voluntarily told the officer (in terms that professed his innocence) as further evidence that he knew the true age of the Complainant. This was relied upon by the Learned Magistrate after he had already found that he was satisfied that the defence was not available based on (a) the evidence of the Complainant; (b) the stature of the Complainant at trial (over a year after the offence) and (c) taking into account photographic evidence of her "dressing up".

16. Against this innocuous background and without any relevant supporting authority, Ms. Christopher submitted that this evidence ought to have been excluded in the Court's discretion on the grounds that it was unfairly obtained. The unfairness complained of was the fact that the Appellant was not afforded the opportunity to review and initial the arresting officer's notes of the informal post-arrest interview. It was impossible to comprehend in what sense the way in which the informal interview took place was unfair in light of the fact that:

    (a) the disputed order in which the Appellant's statements were made had no apparent bearing on the adverse findings made against him in the Court below;

(b) the Appellant was given an opportunity to comment on the contents of the informal interview in the course of the subsequent formal interview; and

(c) what the officer did was not alleged to have been in breach of any identified and applicable rule of law or practice[2].

17. When pressed to identify the legal principles which governed the discretion to exclude the interview which it was contended ought to have been applied, the Appellant's counsel agreed that the following provisions of PACE governed the exclusionary application:

> "***Exclusion of unfair evidence***
> *93. (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*
>
> *(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.*
>
> *(3)This section shall not apply in the case of proceedings before the Magistrates Court inquiring into an offence as examining magistrates.*" [emphasis added]

18. Section 93(1) of PACE doubtless merely codifies an older common law exclusionary rule which was applied by this Court to exclude confession evidence obtained following an unlawful arrest combined with a failure to inform the defendant of his right to legal advice in a case where the prosecution evidence depended upon the confessions alone in *R-v-Osborne and Cann*, Criminal Jurisdiction 1994: No. 62, Ruling dated March 22, 1996 (Meerabux J-unreported).

19. Ms. Mulligan submitted that the Appellant's statements after caution, not said to be involuntary, did not amount to confessions in any event. In other words, (a) there was no need for proof that they were voluntary and (b) their evidential weight was far from pivotal in the Crown's case. I agree. In *Hasan* [2005] UKHL 22, the House of Lords answered the following question in the negative:

> "*Whether a 'confession' in section 76 of the Police and Criminal Evidence Act 1984 includes a statement intended by the maker to be exculpatory or neutral and which appears to be so on its face, but which becomes damaging to him at the trial because, for example, its contents can then be shown to be evasive or false or inconsistent with the maker's evidence on oath.*"

[2] The way the informal interview was conducted might well now entail a breach of the applicable PACE Code of Practice.

20. While the categories of unfairness which potentially engage the discretion to exclude evidence in criminal cases can never be closed, in my judgment the complaint advanced in relation to the informal interview comes nowhere close to constituting even arguable grounds for excluding the evidence in question. The power to exclude evidence which is strictly admissible on discretionary unfairness grounds is an exceptional power which is rarely exercised by the Court, save in cases of obvious and serious prejudice to the fairness of criminal proceedings.

Criticisms of the approach to credibility

21. Two criticisms were advanced for the first time in the course of the hearing at which the Appellant's counsel indicated she was appearing on a *pro bono* basis. These were essentially that:

    (a) the Learned Magistrate ought to have given some explanation as to why he rejected the Appellant's evidence;

    (b) the Learned Magistrate ought to have considered more fully the Appellant's case that the complainant was lying; and

    (c) the Learned Magistrate ought to have expressly indicated that he had taken into account in assessing the Appellant's credibility his previous good character.

22. Ms. Mulligan submitted that it was difficult to see what more the Learned Magistrate could have done to explain the findings he reached having regard to the fact that this was a case where the only issue was whether the Defendant's defence of reasonable grounds for believing that the Complainant was over fourteen raised reasonable doubts as to his guilt. Crown Counsel pointed to the following aspects of his Judgment:

    (a) "*I have now had the opportunity to fully review all the evidence in this case together with the written submissions of Counsel and the applicable authorities*" (the submissions of counsel made reference to the Appellant's previous good character);

    (b) the doubts expressed about the Complainant's testimony that the Appellant told her he was sixteen was likely based on Ms. Christopher's effective cross-examination on this issue and was entirely understandable;

    (c) the Learned Magistrate set out explicitly the competing evidence on the central issue and why he preferred the Complainant's version. He stated of the Appellant's version: "*I do not think he has been honest*".

23. I accept entirely the submission advanced by Ms. Christopher that this Court may in appropriate cases draw its own inferences from the evidence disclosed by the record and reject the findings of the trial judge where they are not supportable: *Robinson-v-Commissioner of Police* [1995] Bda LR 64 (Ground, J). Needless to say, the cases when an appellate court interferes with primary findings of fact on issues such as credibility made at first instance will be rare. This will only occur when, in the words

of Ground J (as he then was) in *Robinson* (at page 3), "*that court goes demonstrably astray*". That case was a rare instance of the conclusions made not being supported by the evidence in the context of a protracted trial the fairness of which was compromised by delay.

24. In the present case no complaint was made about delay although the overall time the trial took was less than ideal (there were five hearings commencing on July 18, 2011 before judgment was delivered on February 27, 2012). Realistic estimates should always be set for trials requiring more than a single day's hearing so that they can be listed to run, save for unforeseen contingencies, over consecutive days until conclusion. But the Judgment produced in the present case at the end of the day was unimpeachable and the findings reached, as disappointing as they may be to the Appellant, cannot be disturbed by this Court as they are supported by the evidence.

25. Further, the requirements of section 21 of the Summary Jurisdiction Act 1930 that every judgment "*shall contain the point or points for determination, the decision thereon and the reasons for decision*" were amply met in all the circumstances of the present case. The Appellant's submission to the contrary, based on the requirement that a judge expressly direct a jury on good character, is rejected: this was a trial before a legally qualified judge alone. Bearing in mind the Appellant's relative youth, the narrow ambit of his defence and the fact that this type of offence is often committed by persons of previous good character, it was not essential that express mention be made in the Judgment that good character had been taken into account in assessing the credibility of the Appellant.

Summary: disposition of appeal against conviction

26. For the above reasons, the appeal against conviction is dismissed.

Appeal against sentence

27. In her 'Submissions of Appellant Sentence Appeal', Ms. Mulligan distilled the grounds of appeal set out in the Notice of Appeal into the following two broad grounds of appeal:

    (a) the offence warranted an immediate custodial sentence and no exceptional circumstances which were required to justify suspending a custodial sentence existed in all the circumstances of the present case;

    (b) the Learned Magistrate erred in failing to have regard to the Victim Impact Statement.

28. The appeal against sentence must be dealt with primarily on the basis of sentencing principles which were in force at the date of sentence. To the extent that fresh guidelines are required to deal with such cases, such new guidelines cannot be used to invalidate a sentence which was not manifestly inadequate having regard to the law in force when the sentence was passed.

The appropriate sentence and grounds upon which suspension can be imposed

29. The offence for which the Appellant was convicted is punishable under section 182A (1) in terms of maximum penalty as follows:

> "*(aa) on conviction on indictment to imprisonment for twenty years;*
>
> *(bb) on summary conviction to imprisonment for five years.*"

30. Although the offence of sexual exploitation of a young person was created in 1993 with a maximum penalty on summary conviction of five years imprisonment, the maximum penalty on conviction on indictment was increased in 2006 from fifteen to 20 years[3]. The sentencing tariff for the relevant offence has thus been the same for almost 20 years at the Magistrates' Court level.

31. The governing general statutory sentencing principles are found in the following sections of the Criminal Code:

> "***Purpose***
> *53. The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives—*
>
> *(a)to protect the community;*
>
> *(b)to reinforce community-held values by denouncing unlawful conduct;*
>
> *(c)to deter the offender and other persons from committing offences;*
>
> *(d)to separate offenders from society, where necessary;*
>
> *(c)to assist in rehabilitating offenders;*
>
> *(d)to provide reparation for harm done to victims;*
>
> *(e)to promote a sense of responsibility in offenders by acknowledgement of the harm done to victims and to the community.*
>
> ***Fundamental principle***
> *54. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*
>
> ***Imprisonment to be imposed only after consideration of alternatives***

[3] Criminal Code (Amendment) Act 2006.

55. (1)A court shall apply the principle that a sentence of imprisonment should only be imposed after consideration of all sanctions other than imprisonment that are authorized by law.
(2) In sentencing an offender the court shall have regard to—

(a)the nature and seriousness of the offence, including any physical or emotional harm done to a victim;

(b)the extent to which the offender is to blame for the offence;

(c)any damage, injury or loss caused by the offender;

(d)the need for the community to be protected from the offender;

(e)the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence;

(f)the presence of any aggravating circumstances relating to the offence or the offender, including—

(i)evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors;

(ii)evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim;

(g)the presence of any mitigating circumstances relating to the offence or the offender including—

(i)an offender's good character, including the absence of a criminal record;

(ii) the youth of the offender;

(iii) a diminished responsibility of the offender that may be associated with age or mental or intellectual capacity;

(iv) a plea of guilty and, in particular, the time at which the offender pleaded guilty or informed the police, the prosecutor or the court of his intention so to plead;

(v) any assistance the offender gave to the police in the investigation of the offence or other offences;

(vi) an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding;

(vii) a voluntary apology or reparation provided to a victim by the offender."

32. The Criminal Code contains the following provisions governing the suspension of sentences of imprisonment:

> "***Suspended sentence of imprisonment***
> *70K (1)If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances.*
>
> *(2) A court shall not make an order under subsection (1) if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence.*
>
> *(3) Before making an order under subsection (1) the court shall explain to the offender in ordinary language his liability under subsection (5) if during the operational period he commits in Bermuda an offence for which he is sentenced to imprisonment.*
>
> *(4) A court making an order under subsection (1) shall specify a suspended sentence that corresponds in length to the sentence of imprisonment that it would have imposed in the absence of power to make an order suspending the sentence.*
>
> *(5)Where an offender whose term of imprisonment has been suspended under this section is convicted of a further offence which is committed during the operational period and for which he is sentenced to imprisonment, the court which sentences the offender for the further offence shall order that the suspended sentence shall take effect unless it is of the opinion that it is unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the further offence.*
>
> *(6) Where a court decides under subsection (5) that it would be unjust for a suspended sentence to take effect, the court shall—*
>
> *(a)order that the suspended sentence—*
>
> *(i)take effect with a substitution of a lesser term of imprisonment; or*
>
> *(ii)be cancelled and be replaced by any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or*
>
> *(b)decline to make any order referred to in paragraph (a) concerning the suspended sentence.*

(7)Where pursuant to subsection (5) or subsection (6) a court orders that the suspended sentence shall take effect, the sentence shall commence on the date of the making of that order.

(8) Where a court imposes a suspended sentence for one offence, the court may also impose suspended sentences under subsection (1) for other offences for which the offender has appeared for sentence, so long as the total period of all suspended sentences to which the offender is subject does not exceed 5 years from the date of the commencement of the first such sentence, and, where two or more suspended sentences are imposed on an offender, the sentences shall be served concurrently.

(9)For the purposes of any Act conferring rights of appeal in criminal cases any order made by a court under this section shall be treated as a sentence passed on the offender by that court for the offence for which the suspended sentence was passed."

33. Section 70K(1)-(2) make it clear that:

    (a) a suspended sentence of imprisonment is nevertheless a sentence of imprisonment;

    (b) the Court has a broad discretion to suspend a sentence of imprisonment under subsection (1) "*if the court is satisfied that it is appropriate to do so in the circumstances*";

    (c) the only precondition for exercising the discretion to suspend (imposed by subsection (2)) is that the "*court shall not make an order under subsection (1) if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence*".

34. The Appellant's submissions to the effect that exceptional circumstances were required to justify suspending any immediate sentence of imprisonment which the Learned Magistrate would otherwise have imposed find no support in these statutory provisions. It is clear from the report of *R-v-Okinikan* [1993] 2 All ER 5 at 8d-g, that in the United Kingdom the Criminal Justice Act 1991 section 5(1)[4] gave "*statutory force to the principle that a suspended sentence should not be regarded as a soft option, but should only be imposed in exceptional circumstances*".

35. This statutory restriction on the power to suspend sentences of imprisonment no longer exists in the United Kingdom as another case placed before the Court by Crown Counsel, *R-v-Carneiro* [2007] EWCA Crim 2170, makes clear. Toulson LJ (giving the judgment of the English Court of Appeal described the proper approach to the decision to suspend a sentence of imprisonment in the following terms:

[4] Substituting the provisions of section 22(2) of the Powers in Criminal Courts Act 1973.

> "*[15] There is no absolute embargo on a judge suspending a sentence for an offence of this kind if there is proper ground to do so, nor is there any statutory requirement that there should be exceptional circumstances. However, once it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediate custody, there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency.*" [emphasis added]

36. Ms. Christopher submitted that this is the test applicable to the discretion to suspend a sentence of imprisonment which applies under Bermudian law. I agree, subject to one important *caveat*.

37. The courts may set down sentencing guidelines for specific categories of cases which mandate the imposition of immediate custodial sentences save in exceptional cases. Such guidelines have been laid down in relation to, *inter alia*, offences involving serious violence in cases such as *R-v- Johnson* [2004] Bda LR 63 (CA). It is true that such cases can be read as suggesting, more broadly, that exceptional circumstances are always required to justify suspending a custodial term. But in my judgment such an interpretation of those cases is not supported by a straightforward construction of section 70K of the Criminal Code; nor is it supported by more recent and highly persuasive English Court of Appeal authority.

38. Accordingly, I find that the suspension test found in section 70K(1) of the Criminal Code-whether "*it is appropriate to do so in the circumstances*"- is not a rigid test at all but depends on the circumstances of the case. If the offence is one for which an immediate custodial sentence is the only appropriate sentence irrespective of standard mitigating circumstances, then exceptional circumstances are required for suspending the expected sentence. Thus in *R-v-E* [2008] EWCA Crim 91, the English Court of Appeal found that for offences in relation to which a custodial sentence was "*inevitable*", exceptional circumstances must be found to justify a suspension (paragraph [18]). If, on the other hand, the offence falls into the category of offence where an immediate custodial sentence is appropriate (but not essential) and the sort of sentence which ordinarily would be imposed, then "*there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency*": *R-v-Carneiro* [2007] EWCA Crim 2170.

39. The bar for what constitutes "*good reason*" may be lower still if the sentencing judge determines that an immediate custodial sentence is appropriate for a particular offender in circumstances where there is no established sentencing tariff according to which an immediate custodial sentence would "*ordinarily*" be imposed at all. Ms. Mulligan for the sentencing appeal Appellant was bound to concede that she had found no judicial precedents capable of supporting an established practice of imposing immediate custodial terms on offenders under 21 years of age at the time of committing offences similar to that for which the Respondent was convicted. Three cases involving sentences for similar offences were cited in the Court below and on appeal. This Court upheld a sentence of three years imprisonment imposed following a trial in the Magistrates' Court for an offence under section 182B(1)(a) of the Code committed by a 55 year old man trusted by the victim's parents against a victim "*in a particularly vulnerable position*": *Wheatley-v-Taylor* [1998] Bda LR 32 (Meerabux J). Where a similar offence was committed by a teacher in relation to a pupil, this

Court (taking into account a guilty plea in the Magistrates' Court) reduced a three year sentence of immediate imprisonment to an immediate custodial term of fifteen months: *Talbot-v- Cox* [2003] Bda LR 44 (L.A. Ward CJ) The Chief Justice commented in *Talbot* (at page 2): "*The nature of the offence and the serious breach of trust demanded a custodial sentence and the only question really was how long".* Both of these cases were placed before the sentencing judge.

40. Also cited at the sentencing hearing was *Taylor-v-Smith* [1999] Bda LR 63, a case where the defendant was an uncle-in-law of the victim and was convicted (of touching her vagina whilst driving) following a trial. He was sentenced to probation for two years with counselling and this Court dismissed the Crown's appeal against sentence, taking into account the fact that the defendant had since conviction lost his Government job. L.A. Ward CJ concluded (at page 2) as follows:

> "*I have read the judgment of the Learned Senior Magistrate…He has taken into account all the relevant factors and came to the conclusion that in the circumstances of this case the correct sentence is one of probation with counselling. I cannot say that the sentence is wrong in principle or manifestly inadequate.*"

41. Accordingly, the guidelines for sentencing in sexual exploitation of young persons under the age of 14 cases previously laid by this Court and which the Learned Magistrate was requested and required to follow may be summarised as follows:

(a) where the offence is committed by a trusted mature adult against a particularly vulnerable victim or by a person in a formal position of trust, an immediate custodial sentence may be imposed irrespective of whether the conviction takes place on the basis of a guilty plea or following a trial;

(b) however, even where the offence is committed by a far more mature and trusted adult who is convicted following a trial, the Magistrates' Court may properly impose a non-custodial sentence if the offence is "*at the lower end of the scale.*"

42. It is self-evident that no identified guidelines have ever been laid down by the Bermudian courts supporting the view that where an offence is committed by a young adult at an age (less than 21) when Parliament has prescribed a special defence not available to older offenders, an immediate custodial sentence is required irrespective of the gravity of the offence and other mitigating circumstances. That the age of the offender is a material consideration in assessing the gravity of an offence of contravening section 182A(1) of the Criminal Code as Ms. Christopher submitted may be demonstrated by referring to the following special defences which are available to persons of certain ages:

> "***Age and consent in certain cases***
> *190. (1)Where an accused is charged with an offence-*
>
> *(a) under section 182A; or*

(b) under section 182B; or

(c) under section 323 or 324 or 325 or 326 in respect of a complainant under the age of sixteen years,

it is not a defence that the complainant consented to the activity that forms the subject matter of the charge.

(2)Notwithstanding paragraph (a) of subsection (1), where an accused is charged with an offence under section 182A, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused—

(a) is under the age of sixteen years; and
(b) is less than three years older than the complainant; and
(c) is neither in a position of trust or authority towards the complainant nor a person with whom the complainant is in a relationship of dependency.

(3)No person under the age of fourteen years shall be tried for an offence under section 182A unless he is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a relationship of dependency.

(4) It is not a defence—

(a) to a charge under section 182A, that the accused believed that the complainant was fourteen years of age or older at the time the offence is alleged to have been committed; or

(b) to a charge under section 182B, or, where on a charge under section 323 or 324 or 325 or 326 it is alleged that the complainant consented to the activity that forms the subject-matter of the charge, to a charge under the said section 323 or 324 or 325 or 326, as the case may be, that the accused believed that the complainant was sixteen years of age or older at the time the offence is alleged to have been committed,

unless the accused proves that he had reasonable cause to have, and did in fact have, that belief at the time:

Provided that a defence shall not be available by virtue of this subsection—

(aa) in any circumstances, to an accused who was twenty-one years of age or older at that time; or

(bb)if an accused has once availed himself of such a defence to a charge under any of sections 182A, 182B, 323, 324, 325 and 326, ever again to that accused.

(5) Notwithstanding subsection (4), it is not a defence to a charge under section 182A or 182B or 323 or 324 or 325 or 326 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if the complainant was in fact under fourteen years of age at the time the offence was committed.

(6)Except as otherwise expressly stated, it is immaterial, in the case of any of the offences constituted by the foregoing provisions of this Part or specified in subsection (1) of this section committed with respect to a complainant under a particular age, that the accused did not know that the complainant was under that age, or believed that the complainant was not under that age."

43. For an accused who at the time of the offence was under 21 years of age, although consent can never be a defence, reasonable grounds for believing that the complainant was fourteen years old or more is a defence. For persons above 21 years of age, no such defence exists. Persons under sixteen years of age and not in a special position of trust or responsibility and not more than three years older a complainant can additionally raise consent as a defence to a charge under section 182A of the Code. The legislation contains a carefully calibrated legal regime according to which the strictest levels of criminal liability are reserved for persons of 21 years and older with the result that the conduct of such offenders is legally defined as being more serious in terms of gravity.

44. This was the basis on which the trial before the Magistrates' Court and the appeal were argued and the only defence which was raised at trial. I averted to the fact that the age of 21 was specified at a time when the age of majority was 21 in the course of the appeal hearing but failed to actually review the provisions of the subsequent Age of Majority Act 2001. Having done so it appears to me to be strongly arguable that the age "twenty-one" in section 182A should now be read as "eighteen". Section 6 of the Age Of Majority Act 2001 globally amended all pre-existing statutory references to 21 years of age and replaced them with 18 years of age, save certain specified exceptions set out in the First Schedule to the Act which does not preserve the reference to "twenty-one" in section 190(4) (aa) of the Criminal Code. The only doubt arises because section 7 of the 2001 Act as read with the Second Schedule expressly amended sections 181(2), 182(4) and 184(1)(a) to replace age 21 with age 18 without expressly amending section 190(4)(aa) in like terms.

45. It is difficult to discern any rational basis for excluding section 190(4)(aa) which now contains the only purported reference to age 21 in the entire Criminal Code. The result is that the defence available to the less serious offence under section 182 (4) (with a maximum penalty of 15 years imprisonment) is more limited than the defences available to the more serious offences under sections 182(A) and (B) where the maximum penalties are 20 and 25 years' imprisonment. Although in my view this must have been an oversight, the doubt can only probably be resolved by Parliament expressly amending section 190(4)(aa) as it is not entirely clear that section 6 of the 2001 Act was intended to replace "twenty-one" with "eighteen" in that specific

provision. Since doubts in penal legislation must be resolved in favour of the accused, counsel and the Learned Magistrate were probably right to assume that the 20 year old Defendant was entitled to the benefit of the defence under section 190(4)(aa).

Did the Learned Magistrate err in law or in principle in suspending the Respondent's sentence of imprisonment?

46. In summary, the Learned Magistrate in sentencing an offender who was under 21 at the time of the offence and not in a position of trust in relation to the Complainant was not dealing with circumstances where an immediate custodial sentence was either (a) essential; or (b) the usual penalty imposed for similar offences. There was no need to find the existence of "exceptional circumstances" or even to find "*good reason…for the sake of consistency*".

47. However, having decided that the offence warranted a sentence of imprisonment, he could only exercise the discretion to suspend under section 70K(1) of the Code if he was satisfied that it was "*appropriate to do so in the circumstances*". The relevant discretion, in the particular circumstances of the case before the Magistrates' Court, was a comparatively flexible one.

48. Nevertheless the Learned Magistrate found "*special circumstances*" justifying a suspension in a case which involved "*the kind of offence that warrants a custodial sentence-a sentence to reflect society's disapproval and to deter Defendant and others who might engage in such behaviour*". He appears to have accepted the Crown's submissions to this effect even though no precedent was cited for imposing a custodial sentence on an offender of such comparative youth who not broken any trust. He also took into account:

    (a) the Respondent's belated apology in Court which was not reflected in the Social inquiry Report ("SIR");

    (b) the fact that the offence was at the lower end of the gravity scale;

    (c) the fact that the Respondent was 20 years at the date of the offence (Ms. Christopher submitted below that offenders of such youth are rarely incarcerated for such offences);

    (d) the fact that the SIR indicated that there was a low risk of reoffending;

    (e) the existence of family and Church supported together with the risk of his losing his job.

49. Ms. Mulligan was correct to submit that all of these factors were essentially ordinary general mitigating circumstances and not "exceptional circumstances". However, in my judgment based on a proper construction of section 70K(1) of the Code and in the absence of any basis for finding that an immediate custodial sentence was the established and expected standard penalty for an offence of the type and gravity in question, it was properly open to the Learned Magistrate to suspend the fifteen month

sentence of imprisonment which he considered to be appropriate in the circumstances of the present case. In doing so, he rejected Ms. Christopher's submission that a custodial sentence was not required but accepted her alternative submission that any such sentence ought to be suspended. It is also true that the belated apology cast doubt on its sincerity. However, in terms of looking at the extent to which the Respondent might be said to have acknowledged the appropriateness of his actions, Ms. Christopher was right to point out that although her client did not plead guilty, his defence was not based on a denial that the relevant sexual act took place. I agree that this distinguishes the present case from those when the trial involves making out the complainant to be a complete liar. In such cases the trauma to the victim flowing from the trial process must be far greater and the concern that the defendant is unable to acknowledge and likely to be incapable of modify his behaviour in the future will always be far higher.

50. In *Kirby-v- Durham* [1989] Bda LR 1 (a burglary case), the Court of Appeal for Bermuda made what appears to have subsequently become an almost ritual incantation that "*courts should not, as a general rule, suspend a custodial sentence otherwise than in exceptional circumstances*" (at page 7). No reasoned basis for this conclusion appears in the Judgment[5]. It may well be, as Ms. Christopher speculated, that this notion was derived from English case law based on English statutory provisions then in force which contained a positive requirement that suspension be conditional upon the existence of "*exceptional circumstances*". What I consider to be the operative part of this decision and binding upon me is the following analysis (at page 6 of Sir Alastair Blair-Kerr's Judgment) of what the applicable provisions of the Bermudian Criminal Code actually say. It is notable that in the context of the offence of burglary, which does not necessarily attract an immediate sentence of imprisonment, the Court of Appeal in *Kirby and Durham* (at age 6) adopted a very flexible approach to what constituted "exceptional circumstances". Based on this reasoning, the factors taken into account by the Learned Magistrate as a basis for suspending the sentence of imprisonment he imposed were manifestly admissible considerations:

> "*So far as the statute is concerned, within the parameters of subsection (1) of section 56A, the discretion of the court is not fettered in any way. But in practice, it is only in exceptional circumstances that a court should consider suspending a sentence. On the other hand, we do not think that it would be helpful if we were to attempt to enumerate the circumstances in which courts of law should consider suspending such a sentence. The defendant's age, the fact that he is a first offender are, of course, factors to be considered. The court may consider that the offence is of a 'one off' nature, and that it is highly unlikely that the defendant will get involved in further criminal activity. Some extreme emergency in the family of the offender may have occurred, and the court may be disposed to suspend the sentence as a pure act of mercy.*" [emphasis added]

[5] As I have noted above, it is self-evident that where the offence in question is one for which an immediate custodial sentence would generally be the required sentence, exceptional circumstances for departing from the norm may be justified in the interests of consistency in sentencing.

51. In my judgment the sentence imposed in the present case was not manifestly inadequate for the reasons complained of by the Appellant and this ground of appeal fails. In reaching this conclusion, I am guided by the following statement of LA Ward CJ in *Taylor-v-Smith* [1999] Bda LR 66 as to the meaning of the term "*manifestly inadequate*" in section 4A of the Criminal Appeal Act 1952:

> "*14. The term "manifestly inadequate" has been judicially considered many times in the Court of Appeal. In Plant (R) v Robinson Criminal Appeal No. 1 of 1983 it was held that manifestly inadequate means 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. Another meaning was obviously insufficient because the judge had acted on a wrong principle or had clearly overlooked, or undervalued, or overestimated, or misunderstood some salient feature of the evidence. It is a failure to apply right principles.*
>
> *15. Whether we adopt expressions such as "unduly lenient" or "falling outside the range of sentences which the judge, applying her mind to all the relevant factors could reasonably consider appropriate" found in the Australian authorities cited, we are of the view that the interpretation given to the phrase "manifestly inadequate" in a long line of Bermudian cases is correct and no useful purpose would be served by attempting to redefine it."*

52. It might be thought that, based on the post-sentencing public reaction to media reports of the punishment imposed, that the sentence might be said to be manifestly inadequate in that it was "*much too low and fails to reflect the feelings of civilized society to the crime in question*". However, Ms. Mulligan very properly conceded that any assessment of the feelings of civilised society based on events occurring after the sentencing hearing in question could only be taken into account for the purposes of setting guidelines for future cases[6]. It would in most cases be incompatible with judicial independence for the sentence imposed in a particular case to be materially affected by popular sentiment about the case in question. As the '*Guidelines for Judicial Conduct for the Judges of the Supreme Court of Bermuda and the Magistracy*' state:

> "*[61] Judges must determine cases before them according to law without being deflected from that obligation by desire for popularity or fear of criticism.*"

The failure to consider the Victim Impact Statement

53. After Crown Counsel had addressed the Court on sentence, Defence counsel had mitigated and the Respondent had addressed the Court personally, Crown Counsel attempted to tender Victim Impact Statements (from the Complainant and her mother) to the Learned Magistrate which ought ideally to have been filed with the Court the

[6] No need to consider Ms. Christopher's interesting submission, that the public condemnation the Respondent has received since the sentence was imposed should be taken into account in exercising any discretion to increase the penalty, arises in connection with this ground of appeal.

day before the sentencing hearing. The Learned Magistrate declined to consider the Statement on the following grounds[7]:

> "*Court is not prepared to receive Victim Impact Statement at this stage of proceedings when prosecution have made submissions on sentence, produced written submissions and made no reference to a Victim Impact Statement until after Defence Counsel mentioned* [its] *absence before concluding her submission.*
>
> *The Court itself was under the impression that no Victim Impact Statement existed since none was filed with the Court.*
>
> *It would be wrong and unfair in the circumstances of how this has been handled by the Crown to now receive it at this stage…*"

54. Ms. Mulligan freely admitted that the way the Statements were produced was due to inadvertence on counsel's part. A more junior member of the DPP's Office was deputizing for her at the sentencing hearing while Ms. Mulligan was involved in a long-running Supreme Court trial. However, the Appellant's counsel submitted in support of this ground of appeal that any prejudice to the Defence would have been minimal and that the Statements ought to have been taken into account. The Defence could have applied for time to consider them and an opportunity to further address the Court.

55. Despite Ms. Christopher's best efforts to defend the course the Learned Magistrate adopted, I find that he adopted the wrong approach. Having regard to his Report to this Court pursuant to section 13(1) of the Criminal Appeal Act 1952, however, I have considerable sympathy for him having regard to the difficulties that undoubtedly confronted him that day. In summary:

    (a) the Statements were produced at the most inappropriate and inconvenient time;

    (b) in addition to the oversight in terms of the failure to tender the Victim Impact Statements at the appropriate time, the submissions by the Crown on sentence included inaccurate assertions as to the findings made on guilt[8]; and

    (c) the Learned Magistrate had a full list of other matters to deal with after the sentencing hearing in question making extending the hearing to take into account the late Prosecution material an unpalatable option.

56. That said, taking into account the Victim Impact Statements (provided they were produced at some point before sentence was handed down) as an important statutory

[7] Appeal Record page 254; Judge's Notes page 34.

[8] This was due to the fact Ms. Mulligan did not attend the Magistrates' Court for judgment when no written judgment was handed down. Her colleague attended and relayed a note of the Court's findings which was then further translated into sentencing remarks presented in writing to the Court. The fine details of the findings made following the trial were, perhaps unsurprisingly, lost in translation.

requirement having regard to the fairness of the proceedings from the Complainant's perspective. Section 63 of the Criminal Code provides as follows:

> "***Victim impact statement***
> *63. (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 69 in respect of any offence, the court shall consider any statement made by the victim or by the prosecution on behalf of the victim describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.*
>
> *(2) A victim impact statement shall be in written form and shall be filed with the court.*
>
> *(3) At the request of a victim, the court may instruct the clerk of the court or registrar to read the statement into the record in open court.*
>
> *(4) Where the victim impact statement discloses confidential or sensitive information or material that may cause embarrassment or distress to the victim or his family, the court may direct that the statement be dealt with in camera.*
>
> *(5) The prosecutor shall notify the victim as soon as a date has been set for sentencing as to the date fixed for sentencing and the right of the victim to make a victim impact statement.*
>
> *(6) The clerk or registrar of the court shall provide a copy of the victim impact statement, as soon as possible after a finding of guilt, to the offender or counsel for the offender and the prosecutor.*
>
> *(7)As soon as practicable after a finding of guilt and in any event before sentence, the court shall inquire of the prosecutor or a victim of the offence whether the victim has been advised of the opportunity to make a victim impact statement.*
>
> *(8) For the purposes of this section, "victim", in relation to an offence—*
>
> > *(a) means the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence; and*
> >
> > *(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.*"

57. Section 63(1) creates a mandatory obligation to consider a victim impact statement. The section also makes it implicitly clear that such a statement if prepared must be filed with the Court in sufficient time to enable it to be supplied to the defendant

before the relevant sentencing hearing (subsections (2), (5)-(6)). It is also clear that the Court has a duty to inquire after conviction of the parties whether consideration has been given to a victim impact report. Finally it is also seems apparent[9] that a victim in relation to a crime does not include the custodian of a child unless the child is incapable of making the statement herself (subsection (8)).

58. The dominant function of the cited statutory provisions is to give victims a voice. Prior to the late 19th century in England, criminal defendants could not even give evidence in their own defence. The next hundred years or so were primarily concerned with ensuring the rights of the vulnerable accused against the "all powerful" State. By the end of the 20th century, however, a consensus emerged that the pendulum had swung too far in favour of the accused and the need to give greater recognition to victims' rights. This consensus gave birth to section 63 of the Criminal Code.

59. Although the potential scope for victim impact statements to be used is wide, their import is clearly greater in some cases than in others. The field of sexual offences, particularly where the victims belong to a traditionally vulnerable and legally discriminated against class (such a women and children), is an emblematic area for heightened scrutiny of the fairness of the entire trial process for the victim. Accordingly, when there is a collision of interests between procedural good order and the need to ensure that justice is both done and seen to be done from the perspective of the female child victim of a sexual offender, the interests of the victim must prevail.

60. Accordingly, and despite the fact that the glitches which afflicted the Prosecution's presentation at the sentencing hearing on a busy morning would be irritating to any judge (save perhaps a judicial saint), I find that the Learned Magistrate erred in failing to take into account the Victim Impact Statement from the Complainant herself. The governing consideration in all legal proceedings is ensuring a fair hearing for all. Although this fact may often be obscured by the adversarial nature of legal proceedings, judges and counsel as officers of the court have shared duty to assist each other in the common endeavour to ensure that justice is both done and seen to be done. The most able of judges and lawyers are guilty of potentially serious oversights from time to time. Judges are human beings not machines. Where it is possible for inadvertent errors to be corrected, the erring judge or lawyer should normally be entitled to expect that the other key participants in the proceedings will assist by helping to correct the error as soon as possible after it has come to light.

61. This principle is easy to overlook in the heat of battle especially when correcting the error will cause disruption to the natural order of proceedings. When I refused to permit a defendant to change his plea because the application was made an inconvenient juncture which would have required a trial to be aborted half-way through, the Court of Appeal held that I had erred in placing procedural convenience ahead of substantive justice: *Daniels-v-R* [2006] Bda LR 36 at paragraphs 12, 15. It was this sort of case management error which occurred in the present case save that it did not impact on guilt and innocence and merely affected the conduct of the

[9] This point was not addressed in argument, but seems clear on the face of section 63(7). I do not rule out the possibility that in some cases it may be appropriate to consider close family members of the formal complainant to be a victim in their own right.

sentencing hearing. It remains to consider whether this error of law is so significant as to vitiate the entire sentencing process.

62. I did not understand the Appellant's case to be put any higher than that the Victim Impact Statements ought to have been taken into account. Be that as it may, I would not find that the contents of the Statements (in particular that of the Complainant herself) would by themselves render an otherwise lawful sentence manifestly inadequate.

63. Ms. Mulligan conceded that it was not possible for her to positively assert that the Complainant had suffered permanent emotional damage from the incident. The Statement revealed the sort of impact which might reasonably be expected from an incident such as the offence which occurred. Nor did counsel invite the Court to set aside the sentence on the grounds of this procedural error and remit the matter for re-hearing. Stretching out this matter further would not be an attractive result for either the Complainant or the Respondent to the present appeal. Accordingly I simply declare that this ground of appeal was made out but make no further order. In this regard I also take into account Ms. Christopher's submission that because the present case happened to attract unusually intense public attention at the post-sentencing stage. The public humiliation the Respondent has suffered in a small community will likely serve as a further deterrent over and above the sentence received: *R-v-Ewanchuk* 2002 ABCA 95 at paragraph 65.

64. Nevertheless, some further ancillary remarks are necessary with a view to formally acknowledging the failure of the proceedings below to adequately give voice to the victim's perspective at the sentencing stage in this respect. Had the Complainant's Victim Impact Statement been received as it ought to have been, it could have been read out at the sentencing hearing. This could have had more than symbolic significance for the victim herself. If the remarks had been published, they could have inspired other victims to report or recover from similar offences and possibly helped to educate the respondent and other potential perpetrators of similar offences about the consequences of their offending. It therefore seems appropriate to set out below what the Magistrates' Court was intended to hear:

> "*When I was sexually* [assaulted] *I kept it to myself for almost a year before I told my parents because I was afraid how they were going to react. I kept crying every day. I told them nothing was wrong. I didn't sleep that well because of the types of nightmares I was having. I was scared that he would send one of his friends and tell them to do something bad to me or my family.*
>
> *The court experience was scary and even though my name was not revealed in the news people still find out it was me and I had embarrass*[ing] *moments about what they were saying. It* [a]*ffected me so much that I had to go to* [counselling] *at teen services and I had to see the [counsellor] at my school regularly.*
>
> *This experience has made me less trusting of boys, their actions like negatively saying things that would hurt me. I've now chose to hang around better people and share my problems with my parents and now*

> *focus on my sports and my school work. I've put all this behind me and I want Joshua to stay away from me and let me live my life.*"[10]

65. Secondly, it is important to clarify that, media reports in the aftermath of the sentencing hearing to the contrary notwithstanding, the Learned Magistrate did not suggest or imply that the Complainant was in any way to blame for encouraging the commission of the offence. What the record memorializes the Court as actually saying on the topic of mutual attraction was this:

> "*Clearly there was a mutual attraction between you and the young lady but you ought to have known better and known that she was off limits for any type of sexual contact.*"[11]

66. As the entire tenor of the Learned Magistrate's sentencing remarks make clear, it is ordinarily wholly irrelevant to the gravity of an offence of exploiting a young person committed by an offender too old to avail himself of a defence of consent how attracted to each other the protagonists were[12]. As the Learned Magistrate himself pointed out earlier in his sentencing remarks[13]:

> "*This is a serious offence. The law/legislation is designed to protect young girls from men who would do this kind of thing to them and indeed to protect young girls from themselves.*" [emphasis added]

67. When the sentencing remarks are viewed as a whole, it is impossible to fairly say that the Learned Magistrate displayed any insensitivity to the Complainant or failed to appreciate the policy underlying section 182A of the Criminal Code. It is for this reason, no doubt, that the Crown made no complaint about this minor blemish in the sentencing remarks but did challenge the propriety of the refusal to consider the belatedly tendered Victim Impact Statements.

Conclusion: Crown appeal against sentence

68. For the above reasons, the appeal against sentence is dismissed.

Sentencing guidelines for future cases

69. Ms. Mulligan invited the Court to consider laying down sentencing guidelines for similar offences in the future which took into account the strong public reaction to the perceived leniency of the sentence imposed in the present case. This submission was advanced in the alternative to deal with the contingency, foreshadowed in the course of the hearing, that the Crown's sentence appeal was dismissed because the sentence

[10] Crown Counsel's approval for this quotation was sought before the present Judgment was finalized. Where brackets appear, spelling errors have been corrected.
[11] Appeal Record page 255; Judge's Notes page 35.
[12] As is mentioned below, however, the Sentencing Council for England and Wales opine that even where consent is not legally available because of the youth of the victim, if the disparity of age is not that great (or the offender is very immature), factual consent may be a factor to be taken into account.
[13] Appeal Record page 254; Judge's Notes page 34.

imposed could not fairly be found to be inconsistent with existing sentencing standards.

The need for caution in allowing sentencing policy to be influenced by popular sentiment

70. Modern courts operating in societies governed by the rule of law must walk a fine line in developing sentencing policy. The courts must seek to ensure that sentences adequately reflect the reasonable expectations of the community without becoming hostage to the worst instincts associated with 'mob' or 'street' justice. The sentencing principles laid down by Parliament in the Criminal Code must be applied in a way that does not discriminate against any of the parties to the proceedings, including defendants, on any of the grounds prescribed by section 12 of the Bermuda Constitution and international human rights conventions applicable to Bermuda such as the European Convention on Human Rights.

71. Section 53 of the Criminal Code provides that: "*The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society…*" The guidelines that follow were enacted in 2001 as part of a comparatively new Government's Alternatives to Incarceration programme.

72. From an English perspective, they may be seen as simply codifying the common law. From a Bermudian law perspective, however, these statutory provisions ought properly to be viewed as an attempt to make a decisive break with Bermuda's historical legal past in which the criminal justice system had displayed an unhealthy enthusiasm for (at worst) and casualness about (at best) the incarceration of Bermudian men of African descent, both during and after the slavery era. This history of legalized discrimination will be revisited again below in considering the appropriate modern sentencing approach to sexual offences against young children whose formal legal rights have also not traditionally been recognised. Notwithstanding these historical ruminations, of course, Bermuda's modern sentencing regime nevertheless unequivocally dictates that whoever commits sufficiently serious offences must inevitably expect to receive sentences of immediate imprisonment.

73. When regard is had to public sentiment on matters of sentencing, nevertheless, the courts must filter public outbursts through a lens that is shaped by the modern legal constructs which govern the application of the rule of law in Bermuda today. The need for caution in paying heed to public sentiment, particularly that which is articulated not in a reasoned and objective way but in a highly emotive reflex manner can be demonstrated simply by reference to the reaction to the sentence imposed in the present case. The sentence and/or the sentencing remarks were attacked by some for failing to adequately reflect modern notions of child protection and it was argued that the sentencing judge should be removed from office for, in effect, making a single unpopular decision. This was a 'mediaeval' style response to a supposedly 'old fashioned' sentencing process. In the early days of Bermuda's history, judges were appointed "subject to good behaviour"; which meant, in theory at least, that they could be removed at the Governor's whim for making an unpopular decision. Those

days are long gone and are wholly inconsistent with the right to an independent court now guaranteed by section 6 of the Bermuda Constitution[14].

74. For my part, therefore, while sentencing policy can never properly be oblivious of the way sentences are likely to be perceived by the citizens whom the courts are designed to serve, unconsidered public reaction to particular sentences should be treated with extreme care. Because popular conceptions of the function and role of sentencing may not yet have fully imbibed the underlying philosophy of our late 20th century Constitution and the early 21st century sentencing principles set out in the Criminal Code.

Correct approach to sentencing for offences of sexual exploitation of young persons committed by offenders over the age of 18

75. With those cautionary remarks about the dangers of permitting sentencing policy to be overly influenced by uninformed public sentiment which is inconsistent with the modern legal principles which govern the courts, I now turn to the question of what sort of tariff should apply to offences under section 182A of the Criminal Code when prosecuted in the Magistrates' Court. I will assume for present purposes that the upper age limit prescribed for any special defences is 18 (and not 21) by virtue of the operation of the Age of Majority Act 2001.

76. The need for this consideration arises primarily from the fact that this Court appears never before to have considered the appropriate sentencing approach save in relation to cases where the offenders were both substantially over 18 and in positions of trust. Even then, the approach was somewhat unclear because a non-custodial sentence in one case was upheld despite a not guilty plea and the absence of even any belated symbolic remorse. The need for revisiting the appropriate sentencing approach for sexual offences against child victims also arises because the passage of time. The last time this Court reviewed a sentence imposed for this offence by the Magistrates Court was in 2003. In the interim, public awareness of and sensitivity to the extent to which child sex abuse is a problem which society as a whole (including the criminal justice system) has not adequately dealt with has increased in significant terms.

77. As Ms. Mulligan submitted, the starting point for assessing the gravity of the offence created by section 182A of the Code is the maximum sentence Parliament has imposed. Terms of 20 years for conviction on indictment and 5 years for conviction summarily are indicative of an offence which is very serious indeed.

78. In terms of the antecedents of the offence, section 182A is said to be of Canadian origin. But section 153 of the Canadian Criminal Code creates a somewhat different offence, more akin to section 182B of the Bermudian Criminal Code in that a breach of trust must be proved. Moreover, the Canadian offence of sexual exploitation of a "young person" applies to victims under 16 years of age. Further, the maximum

[14] There is a serious discrepancy between the security of tenure constitutionally provided to judges of the Supreme Court of Bermuda and the status of magistrates whose only formal security of tenure is the same as that enjoyed by public servants. It might be argued that the right to a hearing before an 'independent' court guaranteed by section 6 of the Constitution is infringed to this extent in relation to trials before the Magistrates' Court. It is to be hoped that the Governor would in practice extend the same security of tenure to magistrates which is enjoyed by judges at higher court levels.

penalty for the Canadian offence is 10 years imprisonment if convicted on indictment and 18 months on summary conviction; however a minimum mandatory sentence of one year and 90 days in each case. However, the same penalties are imposed in Canada under section 151 of the Criminal Code for the more analogous (to section 182A) offence of sexual interference with a person under the age of 16 years.

79. Although section 182A does not require the accused to be in a position of trust, the title of the offence signifies that exploitation is an implicit element of the offence applying as it does to victims of less than 14 years of age who would be considered by most in modern terms to be "children" in emotional and psychological terms, irrespective of their physical level of development. Indeed for the purposes of many other sections in Part X of the Code, "child" is defined by section 176A as meaning "*a person under the age of sixteen years*". But to the extent that the offence does not require any proof of "exploitation" in the narrow breach of trust sense, the offence is substantially similar to what in England and Wales would simply be called a "sexual assault".

80. However, the gravity of the offence is clearly quite different when the offender in question is younger than 16 and has a defence of consent available, over 16 but under 18 (with no defence of consent but a limited defence of belief on reasonable grounds that the child was over 14) or over 18 in which case no special defence is available where the essential facts of the offence are made out. Offenders who are below the age of majority are always subject to a distinctive sentencing approach. The position of offenders younger than 18 falls outside of the scope of the guidelines which follow.

81. In my judgment the Sentencing Council of England and Wales Guidelines on the sexual offences Act 2003 can serve as a useful general guide to Bermudian judges in relation to the range of sentences which are appropriate where the relevant offences are substantially the same under local and English or British law. This is because the modern sentencing principles recently codified in our own Criminal Code are heavily influenced by English sentencing law and practice. Our criminal law culture has long been heavily influenced by the system of law in force in England and Wales, with increased commonality in terms of overarching fundamental rights and freedoms principles since the incorporation into United Kingdom domestic law the European Convention on Human Rights upon which Chapter 1 of our Constitution is substantially based. The Sentencing Council is comprised primarily of judges with representation from civil society, established under the Coroners and Justice Act 2009 (UK) and has the following objects according to the council's website[15]:

    - *promote a clear, fair and consistent approach to sentencing;*
    - *produce analysis and research on sentencing; and*
    - *work to improve public confidence in sentencing.*

82. Ms. Christopher rightly cautioned against blindly following the Sentencing Council Guidelines because the different structure of the Sexual Offences Act 2003. The need to exercise great care to ensure the relevance of overseas precedents should never be forgotten. Following these Guidelines is also not entirely straightforward because the

[15] www.sentencingcouncil.org.uk.

summary sentencing jurisdiction has in recent years been increased in Bermuda way beyond the jurisdiction enjoyed by British summary courts. In addition, there may be a need to have regard to the fact that a special defence is provided to young adults of less than 21 if my strong provisional view that the age "twenty-one" in section 190(4)(aa) must now be read as "eighteen" is wrong.

83. Nevertheless, brief reference to those Guidelines confirms the need for greater clarity in terms of the local sentencing approach at the Magistrates' Court level. Section 7 of the Sexual Offences Act 2003 (UK) creates an offence of sexual assault on a child under 13 years old, which governs conduct broadly similar to that prohibited by section 182A. However, the maximum penalty for conviction on indictment is merely 14 years while the maximum penalty on summary conviction is six months imprisonment. This suggests that only the most trivial offences will be prosecuted summarily and so the Magistrates' Court Sentencing Guidelines (UK) will be of little assistance here. Our summary maximum sentence is just over 1/3rd of the UK Crown/High Court maximum.

84. The following general statements of principle about this type of offence must, in my judgment, be applicable to Bermuda:

> "***The harm caused by sexual offences***
> *1.10 All sexual offences where the activity is non-consensual, coercive or exploitative result in harm. Harm is also inherent where victims ostensibly consent but where their capacity to give informed consent is affected by their youth or mental disorder.*
>
> *1.11 The effects of sexual offending may be physical and/or psychological. The physical effects – injury, pregnancy or sexually transmitted infections – may be very serious. The psychological effects may be equally or even more serious, but much less obvious (even unascertainable) at the time of sentencing. They may include any or all of the following (although this list is not intended to be comprehensive and items are not listed in any form of priority):*
>
> - *Violation of the victim's sexual autonomy*
> - *Fear*
> - *Humiliation*
> - *Degradation*
> - *Shame*
> - *Embarrassment*
> - *Inability to trust*
> - *Inability to form personal or intimate relationships in adulthood*
> - *Self harm or suicide…*
>
> *…2.16 All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either*

deliberately without the victim's consent or without giving due consideration to whether the victim was able to or did, in fact, consent.

2.17 Notwithstanding paragraph 2.11 above, there will be cases involving victims under 13 years of age where there was, in fact, consent where, in law, it cannot be given. In such circumstances, presence of consent may be material in relation to sentence, particularly in relation to a young offender where there is close proximity in age between the victim and offender or where the mental capacity or maturity of the offender is impaired…"

85. I agree that the closer the age of the offender is to the victim, the more possible it generally will be to view the level of "exploitation" as being diminished and to take into account as a mitigating factor the factually consensual nature of an encounter even where legal consent is not possible. The older the offender is in relation to a victim of less than 14 years old, the more serious the offence will likely be and the more irrelevant any supposed "consent" on the victim's part will be. There will always be a need for judges to examine the facts of particular cases with scrupulous objectivity and to avoid making pat 'politically correct' judgments about the gravity of offences even if the publication of such reasoned judicial assessments may on superficial analysis be misunderstood.

86. The Guidelines set out a list of suggested sentencing ranges based on the nature of physical contact involved in the assault. At the top of the list of seriousness is contact of a kind which occurred in the present case and the starting point in terms of tariff is 5 years imprisonment with a range of 4 to 8 years. At the bottom of the list (for a victim of under 13) the starting point is 26 weeks custody and the range is 4 weeks to 18 months. These guidelines assume an adult first time offender who has pleaded not guilty. It might be said that the fact that the UK offence applies to a lower age limit (by one year out of 14) is more than offset by the fact that the maximum penalties in Bermuda are roughly 35% higher at the Supreme Court level than the UK maximum.

87. Taking all of these factors into account, the only appropriate sentence for an adult (18 and over) offender with no previous convictions, convicted following a trial in the Magistrates' Court of an offence of sexual exploitation of a young person under the age of 14 (even without any aggravating breach of trust involved), would in my judgment be an immediate custodial sentence. Exceptional circumstances would be required to justify suspending such a custodial term, even more so for imposing a non-custodial sentence. The starting point, before any mitigating factors are taken into account, would be a Magistrates' Court sentence of roughly 1/3rd of the starting point suggested by the UK Sentencing Council Guidelines, which follow a highly logical sliding scale based on the gravity of the acts involved in the offence.

88. Adopting what has been described in the England and Wales guidelines as a zero tolerance approach to such offences is consistent with the emphasis Bermudian law currently places on the legal rights not just of victims of crime generally but the legal rights of children in particular. In our early legal history, the law gave scant recognition not just to slaves, but to women and children as well. The notion that conduct which caused minor physical harm but significant emotional and/or psychological harm to legal "non-persons" such as children (and other second class

citizens) could be punishable as a crime was for many years as inconceivable as the idea that a man could walk on the moon. The law sanctified rather than condemned coercive relationships in which the powerful were permitted, more or less, to treat human beings under their control as their personal property.

89. Against this legal historical background, Section 182A of the Criminal Code in entitling a sexual offence against under 14 year old children as "sexual exploitation" (a highly value-laden term) was making a conscious break with a past in which the mistreatment of children (like other traditionally discriminated against social groups) had undoubtedly been trivialized. Section 182A enacted with effect from July 1, 1993 formed part of a suite of provisions designed to protect children from sexual abuse of various forms. As far as section 182A is concerned, it did not criminalise conduct which was not previously prohibited; rather it modernised the law.

90. These provisions must also be viewed as giving effect in Bermudian domestic law to international legal obligations assumed on our behalf by the United Kingdom Government. On November 20, 1989, the United Nations Conventions on the Rights of the Child was adopted, entering into force on September 2, 1990 generally and ratified by the United Kingdom on December 16, 1991. The Convention was extended to Bermuda on September 7, 1994[16]. Articles 19 and 34 of the Convention provides:

> " *Article19*
>
> *1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
>
> *2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement....*
>
> *...Article 34*
>
> *States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

[16] www.fco.gov.uk.

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials."

91. So the public sentiment which Ms. Mulligan invited the Court to have regard to in formulating (for the first time) guiding principles for sentencing in future section 182A of the Criminal Code cases involving adult offenders happens to be broadly consistent with:

    (a) the gravity of the offence as defined by Parliament;

    (b) general sentencing principles as defined by Parliament (which while encouraging the use of incarceration as a last resort implicitly require it for serious offences);

    (c) persuasive sentencing principles established for similar offences in England and Wales;

    (d) Bermuda's obligations under the UN Convention on the Rights the Child entered into on our behalf by the United Kingdom Government.

Summary: correct approach for sentencing first time adult offenders in Magistrates' Court for offences under section 182A of the Criminal Code

92. In summary, having regard to a fresh analysis of the correct approach to sentencing adults convicted under section 182A of the Code following a trial, the required sentence is a sentence of immediate custody save in exceptional circumstances, even if the adult offender is comparatively young and of previous good character.

93. The gravity of the offence, before aggravating factors such as luring and premeditation and mitigating factors such as a plea of guilty are taken into account, should be ranked using the Sentencing Council for England and Wales Guidelines be determined by reference to the degree of intimacy of the sexual interaction which took place. As the suggested sentencing ranges are based on Crown Court and High Court sentencing powers, the tariff should be divided by roughly one-third. The starting point would be, at the top of the scale 18 months imprisonment; at the bottom end the starting assumption would be an immediate custodial sentence of around 8 weeks.

Conclusion

94. The appeal against conviction is dismissed. The complaints about the inadmissibility of the contents of the informal interview of the accused and the way in which the Court dealt with the issue of credibility are rejected. The Learned Magistrate

delivered a carefully reasoned Judgment and the findings which he reached were properly open to him on the evidence before the trial Court.

95. It was assumed by counsel and the Court at trial and in the course of the hearing of the present appeals that because the Defendant was 20 years old at the time of the offence, he had a defence under section 190(4)(aa) of the Criminal Code based on reasonable grounds for believing that the Complainant was over 14 years of age. It is strongly arguable that this defence was not available to the Defendant at all because section 6 of Age of Majority Act 2001 amended section 190(4)(aa) of the Code and replaced "twenty-one" with "eighteen". However, as section 7 of and the Second Schedule to the 2001 Act explicitly replaced all other references in the Criminal Code to age 21 with age 18 perhaps omitting the defence to sections 182A (and the more serious 182B) by accident, there is room for doubt as to the legislative effect (if any) of the Age of Majority Act 2001 on section 190(4) (aa) of the Criminal Code, a doubt the Defendant in the present case was entitled to benefit from. It is to be hoped that the unsatisfactory uncertainty as to the scope of this age-based defence will be cured by legislative action as the failure of section 7 of and the Second Schedule to the Age of Majority Act 2001 to expressly change "twenty-one" to "eighteen" in section 190(4)(aa) of the Criminal Code appears to be simply an oversight in what is essentially an avoidance of doubt provision.

96. The Crown's appeal against sentence was mainly based on the ground that the Learned Magistrate erred in law and /or principle by suspending the sentence of imprisonment which he determined was appropriate in the absence of exceptional circumstances for so doing. This complaint is rejected because:

    (a) there is no statutory limitation on the unfettered discretion to suspend sentences of imprisonment under section 70K(1) of the Criminal Code;

    (b) an offence under section 182A was not at the date of sentence recognised as a category of offence for which the requisite sentence was an immediate sentence of imprisonment either generally or (in particular) where the offender was under 21 years of age;

    (c) the suspended sentence imposed was not manifestly inadequate having regard to the fact that non-custodial sentences had (absent exceptional circumstances) been imposed by the Magistrates' Court in the past for similar offenders; and

    (d) it is not the function of this Court in its appellate jurisdiction to retrospectively alter the reasonable expectations a criminal defendant has at the beginning of his trial of the likely sentencing principles which will be applied to his case.

97. The Complaint that the Magistrates' Court erred in declining to receive the Victim Impact Statement (which was admittedly submitted long after the appropriate time for so doing) is upheld. The irritation of the Learned Magistrate that reception of the Statement at that stage might have held up waiting litigants or necessitated an adjournment was entirely understandable. However, in my judgment the need for the

victim of a sexual exploitation offence to be given a voice in the sentencing process trumps any administrative and/or procedural inconvenience which the late reception of Statement would likely have occasioned to the Court on an extremely busy day. This procedural error, standing by itself, was not sufficiently serious to justify setting aside the sentence and directing a rehearing of the sentencing process altogether. The Statement in question, while documenting that the offence caused the Complainant considerable distress, also gave some basis for hope that she will get over the incident in the fullness of time. Most significantly, its contents did not include any unusual or atypical material likely to have impacted on the level of sentence eventually imposed.

98. The Crown invited the Court to revisit the appropriate sentencing principles for the benefit of future cases, taking into account in part the strong public response to the perceived leniency of the suspended sentence imposed on the Defendant in the present case. This invitation was accepted despite the need to carefully balance the sometimes conflicting dictates of the need for judges to exercise their functions independently according to law and the need for the sentencing process to engender public confidence in the rule of law. In the present case the Court was satisfied that, having regard to carefully calibrated sentencing guidelines for similar offences developed in England and Wales, there was an objective need for the sentencing approach to offences under section 182A of the Criminal Code to be clarified and fortified to emphasise the seriousness of such offences and the importance of strengthening the protections for the rights of sexual exploitation victims of under fourteen years of age.

99. Adults charged summarily with offences under section 182A, including offenders of previous good character, should in future cases receive an immediate sentence of imprisonment unless there are exceptional circumstances justifying suspending the custodial sentence or, indeed, imposing a non-custodial sentence.

Dated this 7th day of September 2012 _____

IAN R.C. KAWALEY CJ