



In The Supreme Court of Bermuda
APPELLATE JURISDICTION
2025: No. 21

BETWEEN:

THE KING

Appellant

-v-

CS

Respondent

JUDGMENT

Date of Hearings: 27th and 29th August and 16th September 2025

Date of Judgment: 13th October 2025

Appearances: **Mr Karim Nelson and Mr Audley Quallo**
Counsel for the Appellant
Mr Paul Wilson
Counsel for the Respondent

Reporting Restriction

The Respondent in these proceedings is charged with a “sexual offence” within the meaning of section 329C(10) of the Criminal Code; specifically an offence under Part X. Pursuant to section 329C(6), therefore, “no matter likely to lead members of the public to identify him as the person against whom the accusation has been made shall be published in a written publication available to the public, or be broadcast” at this time. This judgment has been anonymised accordingly.

JUDGMENT of Richards J

Introduction

1. This is a prosecution appeal brought under section 4(1)(a) of the Criminal Appeal Act 1952 (“**the CAA**”). On 25th April 2025, the Learned and Worshipful Magistrate, Ms Auralee Cassidy (“**the Magistrate**”) delivered a judgment in respect of Information 23CR00381, which contained a single count in the following terms:

“On a date unknown between the 21st day of July, 2016, and 1st day of August 2018, in the Islands of Bermuda, for a sexual purpose, touched directly with your genitals the mouth of [X], a young person

Contrary to Section 182A of the Criminal Code”

The Facts

2. In summary, the facts as alleged by the prosecution were that X and the Respondent were neighbours. The Respondent’s sister and X were friends. They and other children from the neighbourhood would occasionally congregate at one of the homes in the neighbourhood. On the occasion in question, they had done so at the Respondent’s home in order to watch a movie. X alleged that, during that movie, there came a time when she and the Respondent were left alone together in the living room – the other children present having gone into the kitchen to make popcorn. The Respondent then exposed his penis, covered them with a blanket and instructed her to play with it. She did so, initially with her hand. He then instructed her to suck on it, which she did. She said it tasted sour.

The Offence of Sexual Exploitation

3. Section 182A of the Criminal Code reads as follows:
 - “(1) A person who—
 - (a) for a sexual purpose touches, directly or indirectly, with a part of the body or with an object, any part of the body of a young person; or
 - (b) for a sexual purpose invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of

any person, including the body of the person who so invites, counsels or incites and the body of the young person,
is guilty of an offence and is liable—

(aa) on conviction on indictment to imprisonment for twenty years;

(bb) on summary conviction to imprisonment for five years.

(2) “Young person” in this section means a person under the age of fourteen years.”

4. Although the Information did not identify which paragraph of section 182A(1) the offence was said to be contrary to, the particulars clearly indicated that it was the form of the offence created by paragraph (a). Given the facts alleged by the prosecution, it seemed to me that it might have been more appropriate to have pleaded the charge contrary to paragraph (b). Mr Nelson (who initially appeared for the Appellant on this appeal) submitted that, even though that approach may have been “cleaner”, the charge as laid was still supported by the evidence. This issue does not appear to have been canvassed in the court below. I invited further submissions on it (and other issues) and heard them on 16th September 2025. Unfortunately, Mr Quallo, who was then appearing for the Respondent was not aware of my hope for assistance on this particular point. Happily, however, Mr Duncan (who was not appearing on this matter, but was also present in courtroom on that occasion) was able to look for and very rapidly find an authority of some considerable assistance (something I had attempted unsuccessfully myself). The Court is very grateful to him.

5. In *Sears*¹, the Court of Appeal of Manitoba had occasion to consider a conviction contrary to section 151 of the Canadian Criminal Code, which then read:

“Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.”

6. The facts were that a 12-year-old girl had asked the defendant if she could give him sexual favours in return for money. He agreed and she subsequently performed an act of fellatio on

¹ (1990), 66 Man.R.(2d) 47 (CA)

him in exchange for \$10.00. Helper JA (with whom Huband and Twaddle JJA agreed) said as follows:

“The accused submits that a grammatical analysis of section 151 precludes a conviction when the accused is not the primary actor or instigator of the sexual contact. He argues: (1) section 151 contemplates only the accused being the toucher, the active party; (2) in this case the accused did not suggest the sexual interaction and did not perform any sexual act; (3) because he was a passive party and the complainant was the active touchor, no offence was committed under section 151. On the facts of this case, I cannot agree with that submission.”

Later Helper JA continued:

“In reading this section as a whole, it is clear that an accused who intends sexual interaction of any kind with a child and with that intent makes contact with the body of a child "touches" the child and is guilty of an offence. The section addresses not the instigator of the sexual conduct but rather the adult who for his or her own sexual purposes makes contact, whether as a primary actor or not, with the body of a child.

The accused attempts to support his interpretation of section 151 by reference to the section which follows it in the Code. The significantly different wording of section 152 is of no assistance to the accused. Section 152 deals with one who for sexual purpose invites, counsels or incites a child to touch another person, and in this context it is contemplated that the child will be the actual or potential touchor. The wording of section 152 is necessary to include the situation where the accused is not the person who has the physical contact with the child as well as the situation where there has been no touching but merely a suggestion or invitation for such conduct. The offence in section 152 is the inviting, counselling or inciting of the young person to have sexual contact with either the accused or a third person. Since the offences described in sections 151 and 152 are markedly different, the word "touch" is used differently in the two sections. The objective of both sections, however, is to provide protection to children and the sections are to be interpreted in light of that objective.”

7. In my judgment this reasoning applies with equal force to the interpretation of section 182A(1)(a) and (b) of Bermuda's Criminal Code. It was, therefore, perfectly appropriate for the Information in this case to plead the form of the offence created by paragraph (a). Mr Wilson, very properly, accepted the force of *Sears* upon seeing it and, in fairness to him, the responsibility for this detour is more mine than his.

The Trial

8. During the trial X's account of the incident was challenged extensively by the defence. Her credibility and the reliability of her evidence were questioned. The defence pointed to what they alleged to be various shortcomings and inconsistencies in X's evidence, which they contended indicated that she was being untruthful and had lied. The defence did not call any factual evidence, but they did seek to adduce a number of medical reports, prepared in relation to the Respondent, during cross-examination of the officer in the case. These reports spoke to aspects of the Respondent's mental capacity and cognitive functioning. They were asserted by the defence to be relevant as background. Following arguments about admissibility the Magistrate ruled:

“...the medical reports are relevant and it's for the court to attach or apportion the relevant weight when weighing the evidence in this case.” (original emphasis)

9. When admitting the reports, the Magistrate did not say precisely how she considered them to be relevant. In any event, she should not have treated these reports as exhibits produced during the evidence of a police witness. They were not relevant to any aspect of that witness's evidence, as demonstrated by the fact that there was virtually no cross-examination about them, apart from seeking to confirm their existence. If the court was properly satisfied of their relevance and the Crown was not seeking to cross-examine any of their makers, they should have come in as expert evidence as part of a defence case.
10. Exactly which reports were admitted and when is also a little unclear. Three reports are included in “Exhibit 2”² (Dr Johnson Okoro, 17th October 2023; Janet Brendlinger, 6th January 2009 and Dr Lisa Reichenbach 22nd January 2009). A further three reports appear

² Pages 24 – 42 of the Record of Appeal

later in the Record³ (Dr Tracy Grant, 11th August 2017; Dr Laura Murphy, 2nd August 2023; Martina Rao, 7th January 2009). The Magistrate's notes⁴ indicate that the 2017 report also came in at the time that "Exhibit 2" was admitted. Others may have come in subsequently. However, they do not appear to have been presented as part of a defence case because the Magistrate's notes record that Counsel then appearing for the Respondent indicated that he was not presenting one⁵.

The Magistrate's Judgment

11. The Magistrate's judgment makes clear that she accepted X's evidence to the criminal standard and rejected the attack made on her credibility. The first 45 paragraphs of it and particularly paragraphs 38 to 45 read as though she was going to find the Respondent guilty. However, she concludes with the following (paragraph 46):

"...the Court accepts the medical evidence that the Defendant has mental impairment of such a nature that it detracts from his ability to have the *mens rea* to commit this offence."
12. With respect, it is not entirely clear to me what this was intended to mean. Read literally it means that she found the Respondent's ability to have the *mens rea* to be impaired or reduced. She may have meant to convey a determination that he lacked the ability altogether, but did not actually say so. Alternatively, she may have meant to convey a doubt as to whether he had formed the *mens rea* on this particular occasion. The use of the present tense is also problematic; what mattered was not whether the Respondent could have and had formed the *mens rea* at the time of the Magistrate's decision, but whether he could have and did at the time of the offence (several years ago).
13. The Magistrate sought to enunciate the elements of the offence at the start of her judgment. In doing so, she paraphrased the statute slightly inaccurately, but she did state the *mens rea* component, without explicitly identifying it as such. The Respondent must be proved to have

³ Pages 68 - 82

⁴ Page 123

⁵ Page 140

been acting “for a sexual purpose”. The Magistrate did not identify precisely what evidence led her to the conclusion that the Respondent’s mental impairment was such that he could not or may not, on this occasion, have been acting for a sexual purpose. She had before her the six reports listed in paragraph 10 above. These reports were prepared predominantly for educational purposes. They speak in terms of intellectual functioning “*in the moderately to mildly impaired range*” and “*moderate cognitive impairment*”. They also note the presence of Attention Deficit/Hyperactivity Disorder. Only one of the reports (the most recent) was prepared in the knowledge of what the Respondent was alleged to have done. It was not, however, prepared for the purpose of assessing his ability to have acted as alleged (i.e. at the time of the alleged offence) for a sexual purpose. It was prepared for the purpose of assessing his fitness to plead, which is an entirely different question (both qualitatively and temporally). The other reports simply do not (and in some cases *could* not, since they were prepared years earlier) address the question whether the Respondent did (or could) have acted as the Magistrate found he did for a sexual purpose.

14. Thus it does not appear to me that the medical evidence that the Magistrate had before her provided a proper foundation for the conclusion that the Respondent was incapable of, or otherwise did not on the relevant occasion, touch X for a sexual purpose. There was also other evidence that was capable of bearing on this question, as the Magistrate appeared to preface in her earlier ruling on the admissibility of the expert evidence (where she spoke about weighing it). Further at paragraph 38 c. of her judgment she observed that:

“The Defendant has medical documents showing a mental impairment of an academic nature along with an attention disorder, however, he has been seen to consume alcohol and drive a vehicle.”

With respect, this appears to me to be a more accurate statement of the limitations of the medical evidence in this case. It is not, however, a complete recitation of the other evidence that might be thought relevant to whether the Respondent had, on this occasion, acted with a sexual purpose.

15. For the Respondent, Mr Wilson has argued that “*The Crown did not object on any other basis than to say that its position was that the documents were not relevant... the Crown*

even conceded that there would be no need to call any expert evidence to give testimony in relation to the documents or what was said therein. In no uncertain terms the Crown confirmed that if the court rules that the medical documents are relevant, it would have no objection. Consequently the Crown cannot now say that a ground of its appeal is because the medical documents were erroneously admitted into evidence. The time for objecting has passed, and at the time, the Crown conceded that its only issue with admitting the documents was relevance.” I am unable to accept this submission. The Crown was – and still is – saying that the documents were not relevant and were therefore inadmissible. The fact that they did not seek to challenge the substance of the evidence if, contrary to their view, the court saw fit to admit it (as it did), cannot preclude them from seeking to challenge that determination on appeal⁶.

Error of Law Alone

16. Pursuant to section 4(1)(a) and 19(1) of the CAA, I may only interfere with the Magistrate’s decision on the ground of a wrong decision in law. If there had been medical evidence properly admissible for the purpose of determining whether the Respondent was able to and did act as alleged for a sexual purpose at the time of the offence, then I do not think I could properly have interfered. It would be for the Magistrate, acting as a tribunal of fact, to weigh that evidence and any contrary evidence (whether medical or otherwise) and make a finding, applying the criminal standard of proof.
17. Although the basis upon which she found the medical evidence to be relevant, and so admitted it, was not explicitly stated, the use to which the Magistrate ultimately put the evidence was one which exceeded its scope. The evidence was not relevant in that way and was, therefore, not properly admitted for that purpose. In the absence of some other basis for admitting it, it was improperly admitted. If it was somehow properly admitted on some other unstated basis, the Magistrate misdirected herself as to its relevance. That was a wrong decision in law, which entitles me to set aside the dismissal of the information.

⁶ Although the Crown might have been forgiven for insisting on at least one report writer being called, so that they could have him/her confirm that he/she had not assessed or expressed any view as to whether the Respondent was capable of acting for a sexual purpose at the relevant time.

18. In argument Mr Nelson drew attention to section 41 of the Criminal Code, which creates the “defence” of insanity. He sought to characterise paragraph 46 of the Magistrate’s judgment as an imperfect attempt to apply the law of insanity to the case. I am not clear that that is what the Magistrate was trying to do, but Mr Nelson was correct that the medical evidence before her was not capable of establishing that the Respondent was insane at the time of the offence.

Disposal

19. Having decided to set aside the dismissal of the Information, I have a number of options. I could:
- (i) do nothing more;
 - (ii) remit the matter to the Magistrate with a direction to convict the Respondent or otherwise to proceed in accordance with law; or
 - (iii) order that the matter should be retried before another Magistrate.
20. The parties are agreed that (iii) is not an appropriate course. Mr Wilson says that, if a retrial occurred, *“the medical reports – which are clearly relevant – would be sure to be adduced and correctly allowed into evidence. Accordingly, there is an extremely high likelihood that the Respondent would be acquitted, again.”* Despite the confidence with which this submission is advanced, I reject it. For the reasons given above, the medical reports are not relevant, should not have been admitted and ought not properly to be admitted if the matter were retried. Mr Nelson’s objection to a retrial is that X would again have to give evidence. I share his view that that would not be in the interests of justice in all the circumstances.
21. Until the case of *Sears* was brought to my attention, I was seriously considering not remitting the matter on the basis that the evidence had not in any event supported a conviction for the form of the offence that was pleaded in the Information. Having been referred to *Sears*, however, I am satisfied that it did. Nevertheless, I have seriously considered vindicating the Crown’s appeal by ruling as I have, but stopping there. The Court of Appeal did something

similar in *Taahir Augustus*⁷. However, that was in effect a sentence appeal; their Lordships were invited to say that a conditional discharge imposed in the Magistrates' Court should be set aside and a formal conviction entered instead. The defendant had entered a guilty plea. Here, the effect of doing nothing would be to leave the question of guilt in limbo. I do not regard that as a satisfactory outcome in all the circumstances of this case.

22. It will be a rare case where a Magistrates' findings of fact are such that it will be possible for this Court to say, on the basis of an error of law, that the decision should not merely be set aside, but actually reversed. In this case, however, the Magistrate did not say (as she could have done) that, even if she had been sure about the *actus reus*, she had a doubt about the *mens rea*. She carefully analysed X's evidence and rejected the extensive criticisms that had been made of it. She explicitly found that "*the Crown has met the evidential burden of beyond a reasonable doubt that the alleged conduct was committed against X by the Defendant was of a sexual nature*".
23. It is for this reason that I believe I can properly say that, if she had not improperly admitted the medical evidence or misdirected herself as to its relevance, the Magistrate would have been bound to have concluded from the evidence that the Respondent, in committing the acts she found proved, must have been acting for a sexual purpose. In my judgment, no reasonable magistrate could have concluded otherwise on the facts as she found them to be. If I had not reached this conclusion, I might have remitted the matter to the Magistrate with a direction to exclude the medical evidence from her consideration and to make a fresh determination on the issue of *mens rea*.
24. Since Mr Nelson made it clear that, in the event of the matter being remitted to the Magistrate, he would be inviting her to consider imposing a conditional discharge, I will not direct her to convict the Respondent. My direction is instead for her to enter a finding of guilt. She should then consider whether to discharge the Respondent (absolutely or conditionally) or to convict and sentence him in some other way.

⁷ [2024] CA (Bda) 8 Crim

25. If I thought I had the jurisdiction to do so, I may have considered whether I should impose a conditional discharge myself. Having considered the CAA, however, I do not believe that I have that power. I have not, therefore, applied my mind to the test set out in section 69 of the Criminal Code and should not be taken to be expressing any view about it. That assessment will be a matter for the Magistrate.

Conclusion

26. The appeal is allowed, the dismissal of the information is set aside and the matter is remitted to the court of summary jurisdiction with a direction to enter a finding of guilt and thereafter to proceed according to law.
27. The course which the Magistrate took in this case was not urged upon her by either party to the proceedings⁸. Judges are entitled to act *sua sponte*, but they should always be cautious when doing so, particularly when, as here, very experienced Counsel were appearing for either side. If the Magistrate had telegraphed how she thought the medical evidence potentially to be relevant, that may have prompted Counsel further to assist her. Alternatively, once she had formed the preliminary view that it might be appropriate to dispose of the case in the way that she did, the Magistrate could have sought and obtained the assistance of Counsel on the issue that was troubling her⁹. If she had done so, this appeal may not have been necessary.

Dated this 13th day of **October 2025**


THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE

⁸ The medical evidence is barely mentioned in defence trial counsel's written closing submissions, which instead offer a lengthy and detailed exegesis of the Complainant's evidence.

⁹ If I had not sought and obtained such assistance, I may have ruled differently (and wrongly) in ignorance of *Sears*.