The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos 20 & 21 of 2014

Between:

MILTON RICHARDSON

Appellant

-v-

THE QUEEN

Respondent/Appellant

-v-

MILTON RICHARDSON

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Michael Scott, Browne Scott, for Mr. Richardson
Ms. Cindy Clarke and Ms. Maria Sofianos, Department of Public Prosecutions, for the Queen

Date of Hearing: **10 March 2015**

Date of Decision: **20 March 2015**

Date of Reasons: **26 March 2015**

REASONS

PRESIDENT

1. The appellant, Milton Richardson was convicted of 4 counts of sexual exploitation whilst in a position of trust contrary to section 182B(1)(a) of the Criminal Code. We dismissed his appeal against conviction and also dismissed the Director of Public Prosecutions' appeal against sentence. These are our reasons. We refer

throughout to Milton Richardson as the appellant notwithstanding that the Director of Public Prosecutions has appealed against his sentence on the ground that it was manifestly inadequate. The victim, C, was a boy of 11; the appellant was 47. The offences occurred on two separate occasions. The conviction was in the Magistrates' Court before Worshipful Khamisi Tokunbo. He imposed a total sentence of 18 months. The appellant appealed against conviction and sentence. The matter came before the Chief Justice. He dismissed the appeal against conviction and allowed the appeal against sentence reducing the total from 18 months to 12 months and leaving the 2 year period of probation to follow, that had also been imposed by the magistrate, undisturbed. The probation order includes a provision that he should not have unsupervised care of any minor during the probation period.

The Appeal Against Conviction

2. The prosecution's case was as follows:-

C testified that he had been a member of De Boys Day Out Club since he was six years old and the club was run by the appellant. On Saturday, January 19, 2013, C and other boys were driven to various places in the appellant's van. The appellant at some point offered to take C to lunch. C's brother got permission from their mother for C to go to lunch with the appellant, and he and the appellant did so travelling on the latter's bike. After lunch the appellant took C back to the Club where they were alone. The appellant said that he and another boy got to do more things because they did not tell his mother everything. The appellant invited C into his bedroom to watch television. Whilst sitting next to C on his bed, the appellant kissed C several times on the cheek, once on the ear (leaving saliva) and twice on the mouth. During the incident C further testified that the appellant said "*I love you so much"* and asked "*Had enough love?"* C also testified:

> *"I felt weird…As he was doing this he was moaning. He put his tongue in my mouth. I closed my teeth so he wouldn't put his tongue all the way in my mouth. After that I asked to call my momma. I called her because I wanted to go*

home-I was scared…Defendant told me if my mom asked tell her I was just playing with boys because I was…"

C then referred to an incident the previous week where the appellant invited him to go for a walk by the seaside to get fish, he took him through some trees to a spot where there was a mattress, approached C from behind and kissed him on the cheek and neck. Under cross-examination C insisted he was telling the truth and explained why he did not tell his mother about the first incident: *'Didn't tell mom I was uncomfortable when I went home after fish because I liked the defendant. I didn't want to get him into trouble.'* He denied making up the allegations to get more attention from his father and denied that he had made up the entire fish incident.

3. The Defence case was as follows: -

   The appellant in his evidence-in-chief accepted that on 19 January 2013 C came into his bedroom while he was watching television. He admitted: *'Skylarking-tickling-just acting silly-making noises roaring.'* He admitted telling C he loved him and said that was not unusual as he loved him like a son. He admitted kissing C on the cheek, denied moaning and described the accusations as ""filthy and disgusting." As to the seaside incident, he admitted kissing C on the cheek but denied kissing C on the neck. Under cross-examination, the appellant sought to explain the allegations C was making as the result of pressure by his mother, whom he suggested had various challenges which he had previously been sympathetic about. He stated that during the recorded meeting with C's mother and her husband he was shocked and had a headache, and did not respond more fully to the allegations because he decided to just let C's mother talk. He stated that he suffers from chronic fatigue syndrome. He accepted that he might have kissed the side of C's mouth, but implied that this was accidental. He insisted his motivations were purely affectionate. He also admitted that he kissed C on the cheek by the sea but denied other aspects of C's evidence."

4. The Magistrate believed the prosecution's witnesses, including the victim, and disbelieved the appellant. He said the boy's mother was on good terms with the

appellant and that there was no reason for her to encourage her son to make false allegations against him.

5. The Magistrate made the following findings:

- The appellant told the victim that another boy got to do more things because he did not tell his mother everything.
- The appellant told the victim that if his mother asked to say he'd been playing with other boys.
- The appellant made a moaning noise while kissing C.
- On 5 January 2013 the appellant kissed C on his neck.
- On 19 January 2013 the appellant kissed the victim on his neck, ear and mouth and then put his tongue into the victim's mouth.
- Then on 5 and 19 January 2013 the appellant also kissed the victim on the cheek.
- That the kissing was accompanied by words such as "I love you so much" and "have you had enough love."
- The appellant was in a position of trust.
- The appellant's attraction to the victim was more than innocent or normal and the kissing was for a sexual purpose.
- The victim was at the material time a young person.

The Chief Justice found that the Magistrate's judgment was unimpeachable and dismissed the appeal against conviction.

6. Mr. Michael Scott, who appeared before us for the appellant, made a renewed attempt to introduce fresh material before the Court having had an application to adduce further evidence rejected at an earlier hearing. The new material related to information held by the Department of Family Services. It quickly became apparent that this material added nothing to the application put before the Court the previous week and that had it been put before the Court then its introduction

would have been rejected on the same basis, namely that of lack of relevance and failure to impact on the outcome of the case.

7. That left the following ground of appeal which is drafted in the notice of appeal in the following terms: -

> "That the Honourable Chief Justice erred in law and misapplied the law to the facts, which led to miscarriage of justice, the facts relied on by the Honourable Chief Justice in R –v- Conrad were distinguishable in a material particular from the facts at trial in that the Appellant made no admission of kissing on the lips, and he denied trying to force his tongue in to the mouth of complainant and in Conrad the Appellant admitted kisses on the lips. The greater context in which the kisses occurred in the case at bar and Conrad were also distinguishable see paragraphs [6] and [7] of R –v- Conrad judgment."

8. The appellant was vigorously cross-examined before the magistrate, it being suggested he was lying and fabricating his evidence, but the magistrate was most impressed with him as a witness saying: -

> "I must say, for his age (C) was an excellent witness and probably the best child witness ever testifying before me in public court proceedings dealing with sensitive and personal issues. He was an innocent child that told the simple truth, and had no reason to lie or falsely implicate this Defendant whom he liked and trusted."

On the other hand the Magistrate was most unimpressed with the appellant. He said:-

> "I found the Defendant's dramatically contrasting demeanour and verbal responses to the allegations when first confronted by the mother on 21st January 2013 and when testifying here in Court, extremely alarming and incredible. If, as he said in Court, that he was shocked, felt a sense of betrayal and the allegations are false, filthy and disgusting, surely he felt that way when he was first confronted. I do not accept his explanation that he did not out rightly deny them and express outrage, or that he was just allowing the mother to ramble on, because, inter alia, he was feeling awful that day – unwell with a terrible headache."

9. The Magistrate had a good opportunity to assess the credibility of the appellant and the victim. He was most unimpressed with the former and impressed with

the latter. The outcome of this case turned on whom the Magistrate believed and one of the matters that the Magistrate regarded as relevant on this was things that the appellant said in evidence that were never put to C or his brother in cross-examination, the implication being that he was making things up in the course of his evidence.

10. In our view there was ample evidence on which the Magistrate could conclude that the appellant's attention to the victim was more than innocent and normal and that the kissing and use of his tongue was for a sexual purpose. The Chief Justice was correct to conclude the Magistrate's findings could not be impeached and we dismissed the appeal against conviction.

The Appeal Against Sentence

11. The Magistrate imposed a sentence of 18 months' imprisonment comprised of 9 months on the first count and 18 months concurrent on the other three counts followed by 2 years' probation including a condition that he did not have unsupervised care of any minor for that period. The Chief Justice reduced the sentence to a total of 12 months' imprisonment comprised of 6 months concurrent on counts 1 to 3 and 6 months consecutive on count 4. He did not adjust the probation order to follow. The Director of Public Prosecution appealed against that sentence on the ground that it is manifestly inadequate. The Chief Justice described the sentence imposed by the Magistrate as "an eyebrow raising three times the maximum sentence suggested for a single offence in the 'Sentencing Guidelines for Sexual Offences Tried in the Magistrates' Court ("the Guidelines"). The Learned Magistrate had said when imposing the sentence: -

> *"…This case was one that involved the Defendant using his mouth to kiss the boy about the neck, ear and mouth. The most aggravating aspect being the attempt to put his tongue into the boy's mouth and leaving saliva or wetting the boy's mouth.*
>
> *In my judgment these facts together with the prevalence of these offences in this Court require the Court* [to] *depart from the range…suggested in the guidelines…"*

12. The Chief Justice said the case afforded an opportunity for his Court, subject to any further decision of the Court of Appeal, to lay down binding guidance as to how the Guidelines should be interpreted and applied.

13. The introduction to the Guidelines says they have been developed by the judiciary after consultation with wide ranging bodies that they are intended to serve as a guide to sentencing judges and others interested in the sentencing process in relation to sexual offences. They are inspired by the England and Wales Sentencing Guidelines Council's Sexual Offences Act 2003 as regards general principles or approach but adapted to take into account Bermuda's distinctive legislative context and that unlike the England and Wales Guidelines they have no statutory underpinning.

14. The first point we wish to make is that the Guidelines are just that, a helpful guide to the appropriate sentence in each case but sentencing is an art and not a science and the sentence has to be tailored in the individual case to take account of all the aggravating and mitigating factors. There are dangers in adopting an over mathematical approach. No two cases are identical.

15. Paragraph 18 of the Guidelines which is in the section headed : Sentencing Ranges and Starting Points provides:

> "Typically a guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a first time offender who has been convicted after a trial (i.e. the guideline sentence will be subject to an appropriate discount for a plea of guilty…)".

The paragraph then refers the reader to note 4 at the bottom of the page which is in these terms: -

> "The approach adopted in these Guidelines has generally been to follow the suggested starting points and sentencing ranges in England and Wales for equivalent offences tried on indictment reduced by an amount roughly proportionate to the difference between the maximum sentences e.g. where the English maximum penalty is 15 years imprisonment and the Bermudian summary maximum is 5 years, the suggested sentence will be 1/3rd of that recommended for England and Wales subject to an appropriate adjustment where the Bermudian Supreme Court sentencing power is materially different. The Bermuda maximum sentence for sexual

> assault is 20 years compared with only 10 years in England for victims over 14 and 14 years for victims under 14 years of age."

16. The Chief Justice referred to this note in his judgment. The maximum sentence for sexual exploitation contrary to section 182(B)(1)(a) in the Code is 25 years with a 5 year maximum in the Magistrates' Court. The maximum sentence was increased from 20 years to 25 years in July 2006. He identified the relevant guideline on page 9 of the Guidelines as:

> "contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia…)"

17. Ms. Clarke, for the Director of Public Prosecutions, submits that the relevant guideline does not reflect the mathematical approach described in the note to paragraph 18. Had it done so it would have indicated a higher sentence. She says the maximum sentence for sexual assault and sexual exploitation of a child under 13 in England and Wales is 14 years imprisonment (see sections 7 – 10 of the Sexual Offences Act 2003). Her argument runs thus. The maximum sentence for sexual assault of a child under 13 in England and Wales is 44% lower than for the equivalent offence in Bermuda, 14 years against 25 years. The England and Wales Guidelines for a category 2 offence (touching the naked genitalia) Column A (abuse of trust) have a starting point of 4 years custody and a range of 3 – 7 years custody. The Bermuda equivalent (see page 9 of the Guidelines) suggests a starting point of 12 months custody with a range of 4 – 16 months custody. She then says she follows the Chief Justice's rationale and divides 14 by 2.8 to arrive at 5 years so obtain the Bermuda Magistrates' Court's maximum. Accordingly the range would then become 12. 8 months – 30 months. However, because of the 44% difference between the maximum sentences in the two jurisdictions the starting point would need to be 24.6 months and the range 18.4 to 43.2 months. So, she submits, the guidelines for these offences are more than 12 months less than appropriate.

18. Ms. Clarke then turns to the specific guideline relevant to the present case. The equivalent England and Wales guidelines is that on page 39 of their Guidelines and she submits that the present case would come into Category 3 Column A

because of the abuse of trust aspect with a category range of 26 weeks to 2 years and a statutory point of one year. Inevitably .there is questions of judgment into which category and column an individual case falls and we think that this case would more appropriately fall into Category B with a starting point of 26 weeks and a range between a high level community order and 1 year's custody. Ms. Clarke continues that the Guidelines show a starting point of 12 weeks custody with a range of 1 week to 6 months custody if the victim is under 14. Dividing the England and Wales starting point of 1 year (52 weeks) by 2.8 gives 18.6 weeks and applying the same calculation for the range gives 9.3 to 37 weeks. Further adjustments for the 44% difference because of the difference in the maximum sentences available in the court's jurisdiction leads to be a starting point of 26.8 weeks and a range of 13.4 to 53.3 weeks. All this leads to Ms. Clarke's conclusion that the Guidelines are over 50% lower than had the footnote to paragraph 18 been applied as she submits it should have been.

19. In our judgment Ms. Clarke's argument puts too much precision into a footnote which is making no more than a general point of comparison. In the first place the footnote refers to the approach being generally followed. Secondly the adjustment mentioned to reflect the difference in sentencing power when it is materially different in the two jurisdictions is referred to as "*an appropriate adjustment*" a phrase that is general rather than specific and reflects a judgment on the part of the person making the adjustment. What matters is the Guidelines rather than how the figures in them were reached. There are also dangers in attempting specific cross matching between Bermudian and England and Wales offences to find an appropriate comparable. Also, it is the case that when sentencing in Bermuda, greater attention is often paid to the maximum penalty available than when sentencing in England and Wales.

20. Our approach to sentence in the present case is to start with the relevant Guidelines where the range is 1 – 6 months custody if the victim is under 14. But this was a bad case and the offences occurred on two quite separate occasions. The victim was only 11; there was breach of trust, a degree of premeditation, the age difference and the absence of a guilty plea. The only mitigating factor was the appellant's previous good character. In our judgment the total sentence

imposed by the Magistrate was the appropriate one. We would, however, have imposed concurrent sentences of 6 months on the first 3 offences with a consecutive sentence of 12 months on the count involving the tongue in the mouth. However, bearing in mind that the appellant has already served the sentence imposed and the element of what is sometimes called double jeopardy, it would not be right to send the appellant back to prison to serve a further 6 months Accordingly, the sentence of 12 months with two years' probation to follow passed by the Chief Justice remains undisturbed and the Director of Public Prosecutions' appeal against sentence is dismissed.

Signed

Baker, P

Signed

Kay, JA

Signed

Bell, JA