The Court of Appeal for Bermuda

CRIMINAL APPEAL No 1 of 2015

Between:

MALIK ZUILL

Appellant

-v-

THE QUEEN

Respondent

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

Appearances: Ms. Elizabeth Christopher, Christopher's, for the Appellant
Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **19 March 2015**

JUDGMENT

Kay, JA

1. This appellant pleaded guilty to two offences of unlawful carnal knowledge contrary to section 181(1) of the Criminal Code. On 11th February 2015 he was sentenced by Justice Greaves to 12 months' imprisonment for each offence both sentences to run concurrently, followed by three years' probation. He now appeals against those sentences.
2. The factual background can be stated quite shortly.

3. The appellant was seventeen (17) at the time of the offences. He had only recently reached his seventeenth birthday. The complainant was fourteen (14), but she was very nearly fifteen (15).
4. They were unknown to each other before December 2013. The initial contact between them came via social media and was initiated by the appellant. There were Facebook communications on more than one occasion and later a cell phone conversation, the appellant having discovered the complainant's cell phone number. They did not meet until a Friday in January 2014. That was a day when she was not at school because of a break in the examination schedule. They arranged to meet and had a brief conversation, but nothing untoward took place. They continued to communicate via social media on a daily basis. There were conversations about the basis of their relationship in which the complainant expressed reluctance about developing an intense relationship and expressed herself too young for sexual activity at that stage.
5. Eventually, on the 24 January 2014, they arranged to meet and a physical relationship developed. There is some dispute about the precise stages along the way to their physical intimacy, and it is one of the complaints advanced by Ms Christopher on behalf of the appellant that the judge sentenced on a basis which was closer to sexual assault then consensual carnal knowledge.
6. We do not believe that to be so because it seems to us that the sentencing remarks of the judge imply an acceptance of a consensual act or acts, albeit in circumstances we shall describe in a little while in more detail, but without stating or accepting the entire account of the complainant. Be that as it may, on 24th January the two of them met and they went to a place where there would be privacy. That was done at the very least at his instigation and in that place sexual intercourse took place.
7. Five (5) days later the appellant communicated with the complainant again and asked to meet her after school. She had to check with her mother to see whether she was required for an event that evening. It turned out that she was not, and they arranged to meet. Again the location was chosen by the appellant

and it resulted in his taking her to a place of privacy where for the second and last time sexual intercourse took place, this time in an abandoned house.

8. They separated and later that evening, the complainant, when attending Kingdom Hall of Jehovah Witnesses in Pembroke where she worshipped, told two of the elders what had taken place. This led to her mother being involved, the complainant being interviewed by the police, and eventually the arrest and interview of the appellant. In interview, his answers were ones of total denial. He denied even knowing the complainant or having met her in any way whatsoever and he put forward an alibi. Consistent with that when he was first arraigned in court he entered not guilty pleas to all counts. At that stage, he was charged not only with the offences of carnal knowledge but also with alternative counts of sexual assault.
9. Eventually, however, and no doubt having regard to the DNA evidence which had been obtained, as the time for trial approached he changed his pleas to guilty and was sentenced as we have indicated.
10. In the course of sentencing, the Learned Judge referred to the age of the complainant and said "girls must be protected from themselves, because although they think they do, in reality, they know not what they do".
11. He referred to her as having been "duped" into a place where a sexual act was committed against her and yet she allowed herself to be duped a second time by the same person.
12. Although he said he was accepting the facts outlined by the prosecution as we have said and consistent with the language to which we have just referred, it seems to us that the facts he was accepting were ones based on consent. He also referred to the documentation before him and made specific reference to "the young ages of both the victim and the defendant".
13. The appeal is advanced by Ms Christopher on a bold basis. Her primary submission is that the appellant ought not to be sent to prison at all but ought to have received simply a conditional discharge or, more probably, a probation order.

14. We say at once that we find that part of Ms Christopher submissions to be unrealistic. We are entirely satisfied that these offences crossed the custody threshold. We have had regard to the authorities referred to by the attorneys on both sides. We do not find any of them to be on all fours with the present case. Very often they are concerned with a man of older years and or a girl younger than the complainant. And very often they are concerned people, particularly defendants, with a worse criminal history than this appellant who had no previous convictions.
15. However, one point that we take with confidence from all those authorities is that these offences properly attracted a sentence of imprisonment and there were no real grounds for suspending that sentence.
16. We turn now to what are identified as mitigating factors in the case so as to see whether the length of the sentence can be described as manifestly excessive. As we said, the appellant pleaded guilty but he did not do so when first arraigned. His initial not guilty pleas were consistent with his earlier interview denials. There is no evidence of real remorse, because we note that the appellant told the author of the Social Enquiry Report "he accepted limited responsibility for his offending behaviour. He feels no remorse and in fact stated I'm not sorry but I feel like I messed up". In these circumstances whilst he deserves some credit for pleading guilty it would inevitably be significantly less than full credit.
17. Next there is the question of his previous good character. It is a fact that he has such good character, at least in the sense of having no previous convictions and that has to be taken into account.
18. Third is the question of his mental state. The judge had before him, as have we, reports from a psychiatrist and a psychologist as well the Social Inquiry Report. We have an updated letter from the psychologist although it does not add very much to the previous reports.
19. In brief the appellant was manifesting moderate depressive systems, when seen by the psychiatrist and there is good reason for accepting that these have root. not in his predicament as a young man facing the criminal justice system for

the first time, but in issues of unresolved grief arising out of an earlier bereavement and a feeling of abandonment and rejection by his father. That he has these disadvantages is beyond dispute. It is also necessary for a sentencing judge to take them into account, but in our judgment they were not of such gravity, as would by themselves or even in combination with the other mitigating factors save this appellant from custody. The latest letter from the psychologist refers in general terms to the phenomenon whereby an individual already vulnerable to depression will exhibit an increase in the number or severity of depressive symptoms when incarcerated. But, as she adds, negative psychological impact can be mitigated by access to mental health services whilst in custody.

20. For these reasons we think the appellant's moderate depression, whilst relevant is not of large significance.
21. Finally we come to the point which seems to us the most important one on this appeal; that is the age of the appellant. Although he is now eighteen (18), at the time of the offences he was just past his seventeenth birthday. This means this is not a case of a much older man taking advantage of a fourteen (14) year old girl. He was more than 2 years older than her and he was still of an age where his youth was an important factor when considering his sentence.
22. On the other hand, this is not a case of two teenagers of approximately equal age and experience simply exploring sex for the first time on an equal basis. Not only is he two years older; he was far more experienced in sexual matters than she was. She was a virgin.
23. He had or had had a twenty-three (23) year old girlfriend. Talking of sex, he told the author of the social enquiry report "I had a girlfriend from the start I was already doing a pack".
24. Indeed, it seems that it was a possibility that he was the father of a two year old child. Also whilst we approach this case on the basis that the sexual intercourse on both occasions was consensual, it seems to us that it only occurred after a degree of persistence by the appellant and of acquiescence on the part of the complainant.

25. To that extent we believe that our assessment is the same as that of the judge and that that was what he meant when he used the word "duped". The relationship between them was described in raw terms by the appellant to the author of the social enquiry report. "I asked her if she would let me screw her. She replied 'I don't know'. I asked her if I was cool if I fuck her. After I asked two more times, she said 'cool', because I was her so called boyfriend that's what she believed. I only wanted one thing – pussy - and I told her that but she caught feelings and it went deeper, I told her I love her, I didn't really, I just said that".
26. That is an unpleasant description of the relationship which emphasises the lack of equality and reciprocity between the parties even though in a legal sense consent was ultimately forthcoming.
27. We have also had regard to the victim impact statement and note consequent misfortunes which befell the complainant as a result of her encounters with the appellant.
28. Notwithstanding these matters of concern, we have come to the conclusion that the appellant's age is something for which he was not given sufficient credit by the judge. We think that a sentence of 12 months' imprisonment was simply too long and was to that extent manifestly excessive for a person of his age. There are, as we have just been at pains to explain, some aggravating features which erode some of the credit to which he was entitled by reason of his youth, but nevertheless, as we have said we are satisfied that 12 months was too long.
29. What we propose to do in relation to each of these offences is to quash the sentences of 12 months' imprisonment and to substitute in each case sentences of 8 months' imprisonment. Time spent on remand will continue to count. The sentences will of course remain concurrent. With regard to the Probation Order, it seems to us that there is every reason to impose a Probation Order in addition to the sentences of imprisonment.
30. We observe that the judge rejected the Social Inquiry Report suggestion that the appellant represented only a moderate risk of reoffending. The facts of the case as we have outlined them and the appellant's attitude towards them made

rejection of that risk assessment entirely understandable and in our judgment correct.

31. However there remains the issue of the duration Probation Order. We think there is some force in Ms Christopher's submission that on top of the custodial sentence, the Probation Order, which contains a punitive element, is longer than it need be. Accordingly we shall reduce the duration from three years to two years. We therefore allow this appeal to the extent that we have indicated.

Signed

Kay, JA

Signed

Baker, P

Signed

Bell, JA