



# The Court of Appeal for Bermuda

## CRIMINAL APPEAL No 18 of 2014

Between:

**THE QUEEN**

Appellant

-v-

**CLEVELAND ROGERS**

Respondent

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

**Appearances:** Ms. Karen King and Ms Nicole Smith, Department of Public Prosecutions, for the Appellant  
Mr. Dantae Williams, Mussenden Subair, for the Respondent

**Date of Hearing: 8 June 2015**

**Date of Decision & Reasons: 8 June 2015**

### REASONS

**Baker, P**

1. This is an appeal by the Crown on the grounds that the sentence imposed by Justice Simmons on the 16<sup>th</sup> of November of last year was manifestly inadequate.
2. The Respondent had pleaded guilty to one offence of Unlawful Carnal Knowledge contrary to section 181 of the Criminal Code and three offences of Sexual Exploitation of a Young Person contrary to Section 182(a)(1)(a) of the Criminal Code.
3. The offences all occurred on the 4<sup>th</sup> of December of 2013. The sentence passed by the Learned Judge was 5 years imprisonment for Unlawful Carnal Knowledge plus 3 ½ years imprisonment concurrent for the three offences of

sexual exploitation. A total therefore of 5 years imprisonment with the time spent in custody to be taken into consideration. The Judge also appears to have made an order that the Appellant's name should be on the sex offender register, but that does not appear on the Court's record at least as so far I have been able to ascertain. The victim was aged 13, just a few days short of her 14<sup>th</sup> birthday at the time and the Respondent was aged 46. The Respondent had a relationship with the victim's mother.

### **Facts**

4. On the evening of Tuesday the 3<sup>rd</sup> of December 2013, the Respondent was at the home of the victim which is in Pembroke Parish. He was there to socialize with the victim's mother. At some point during that evening the Respondent and the victim's mother engaged in sexual intercourse. In the early hours of the following morning, that is the 4<sup>th</sup> of December, the Respondent entered the bedroom of the sleeping victim. He proceeded to touch her breast and then pulled down her pants and inserted his finger into her vagina and eventually performed oral sex on her. The victim's mother entered the room during these events but did not realise that the Respondent was in the victim's bed as he was concealed under the sheets. After the mother departed, the Respondent then left the room. The victim at the time was asleep, thought she was dreaming. She did not fully realise what had occurred. A short time later the Respondent again entered the victim's bedroom and this time he placed his penis into her vagina and proceeded to have sex with her. It was at this time that the victim was fully awake and realised what was happening. Though the bedroom was dark she realised that the man having sex with her was the Respondent because she could hear the sound of beads and at the time the Respondent wore his hair in braids with beads at the end.
5. The victim was frightened and ran to her mother's bedroom to report what had occurred. She was a virgin at the time of the offence. She was immediately taken to King Edward VII Memorial Hospital and examined. The results of the examination revealed that penetration had taken place and there was a graze on the right side of the introitus which was consistent with penetration having occurred. The Respondent was arrested later in the day and maintained silence

when questioned. Subsequent DNA tests reveal that a positive DNA mixture originating from the Respondent, the victim and her mother, was found in the crutch of the underwear that the Respondent had been wearing that night.

6. We have read carefully a victim statement written by the girl and it is plain that these offences have had a very serious adverse effect on her and it will take her a considerable period of time to make a recovery which one can only hope will be a complete one.
7. The offence of Unlawful Carnal Knowledge can in reality only be described as the rape of a 13 year old child. Not only was she in no position by virtue of her age to consent but as a matter of fact, plainly she did not consent. The Crown charged the earlier three events as Sexual Exploitation. It seems to us that what is relevant in these circumstances is not so much the label of the offence or offences that were committed as the facts that actually occurred.
8. Furthermore we note, and this is not disputed, that the maximum penalty for Sexual Exploitation is 20 years imprisonment and for Unlawful Carnal Knowledge, likewise, 20 years imprisonment. The Crown submits that the sentence imposed by the Judge was manifestly inadequate. The appeal was originally advanced upon the basis that the sentence of 3 ½ years imprisonment for the three offences of Sexual Exploitation should have been consecutive rather than concurrent thus making a total of 8 ½ years rather than 5 years. Furthermore, there was no submission in the original grounds of appeal by the Respondent that there ought to have been an order under section 70(P) of the Criminal Code Act as amended. That it appears may have been an oversight because counsel in advancing the appeal submits that this court should impose such an order and that the Judge should have done so.
9. Furthermore, as Ms. Karen King for the Appellant advanced her appeal, it became clear that no doubt partly at the suggestion of the Court, she moved her position to arguing that the Court should concentrate not so much on whether it was appropriate to impose consecutive sentences but to look at the overall criminality that occurred on that night and the appropriate sentence for it.
10. The Court has been referred to a number of authorities. We are not persuaded that any of them is of great assistance with regard to the appropriate sentence

in the present case. The most pertinent of the authorities is to be the relatively recent case of *Miller –v- Crockwell* in which the Chief Justice had some general observations to make. He said at paragraph 84 referring to paragraphs 2.16 and 2.17 of the English Sentencing Guidelines:

“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 the 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 to avoid making pact ‘politically correct’ judgments about the gravity of offences even if the publication of such reason judicial assessments may on superficial analysis be misunderstood.”

11. The Learned Chief Justice in that case was referring to Sexual Exploitation but, his observations seem to us to have relevance also to Unlawful Carnal Knowledge which was the more serious of the offences in the present case.
12. Ms. King submitted that as far as count 1 was concerned, the appropriate range of sentence, that is for Unlawful Carnal Knowledge was 7-9 years in the circumstances of the present case and counts 2, 3 and 4, 5 – 7 years. We think that the correct approach is to start by looking at the totality of what happened on the night in question. We think that there are a number of aggravating circumstances in relation to what occurred:
  - I. First of all the offences occurred at night whilst the victim was asleep in her own bed in her own house.

- II. Secondly, there is the age disparity. She was under 14 and he was 46.
  - III. Thirdly, there was breach of trust in that the Respondent was in the house due to his relationship with the victim's mother.
  - IV. and fourthly, the Respondent returned to the Appellant's bed after being disturbed by her mother and then committed the offence of rape.
13. The Respondent has a number of previous convictions although most were in the last century and none were of a sexual nature. The only mitigation that we can detect is the relatively late plea of guilty which saved the victim and her mother from having to give evidence. The author of the social inquiry report detected little sign of remorse. The Judge said that there should be a discount of 15 percent of what otherwise would have been the appropriate sentence and we proceed upon that basis.
14. We have come to the conclusion that the appropriate sentence for Unlawful Carnal Knowledge in the particular circumstances of this case, and we emphasize those words, is one of 7 ½ years' imprisonment. We think in all the circumstances that the sentences in this case should be a concurrent albeit the Respondent went back and committed count 1 having earlier committed counts 2, 3, and 4. In these circumstances although a greater sentence than 3 ½ years' imprisonment would have been appropriate for the Respondent's conduct in relation to those counts, we have come to the conclusion that they should remain undisturbed at 3 ½ years which means that the total sentence imposed is one of 7 ½ years' imprisonment.
15. That leaves the question of whether an order should be made under section 70(P) of the Criminal Code as amended. Mr. Dantae Williams, for the Respondent, submits that such orders are ordinarily made only in the case of a repeat offender. We note that no such reference is made in the provision of section 70(P) itself. We have to consider the circumstances of the commission of the offence and the character and circumstances of the offender and these important words "that the expression of society's denunciation of the offence or the objective of specific or general deterrence requires", if those criteria are met

the Court can make an order that the defendant must serve at least half his sentence or 10 years, whichever is the less. This was a truly appalling series of offences and we think that the criterion of society's denunciation of the offence is plainly met and having taken into account all the matters in section 70(P) we think that this is a case where the Judge ought to have made an order and accordingly we make such an order. It may be that the Judge was never invited to make such an order so we make it clear that there is no criticism of the Judge. The appeal of the appellant is allowed. The sentence is varied to a total of 7 ½ years being 7 ½ years on count 1, 3 ½ years concurrent on each of counts 2, 3, and 4 and an order under section 70(P).

16. With regard to the sex offenders register, we make that order.

*Signed*

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Baker, P

*Signed*

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Kay, JA

*Signed*

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Bernard, JA