The Court of Appeal for Bermuda

CRIMINAL APPEAL No 15 of 2015

Between:

THE QUEEN

Appellant

-v-

MERRICK SEAMAN

Respondent

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

Appearances: Ms. Cindy Clarke, Department of Public Prosecutions, for the Appellant
Mr. Kenneth Savoury, Savoury & Associates, for the Respondent

Date of Hearing & Decision: **2 November 2015**

Date of Judgment: **2 November 2015**

EX TEMPORE JUDGMENT

PRESIDENT

1. This is an appeal in respect of which the Court granted leave out of time earlier this morning and involves the Crown appealing against a sentence that was imposed on the Respondent on the 30th of August 2011 by the then Chief Justice Ground. The sentence imposed was one of 8 years imprisonment on each count concurrently, the Respondent having been convicted of 4 counts of Sexual Exploitation.

2. The Crown appeal on the basis that the sentence imposed was manifestly inadequate. It is not the sentence of 8 years imprisonment of which complaint is made but the fact that the Learned Chief Justice did not on the same occasion make a supervision order.

3. The facts of the case can be very shortly stated. On the 16th of July of 2010, the Respondent sexually abused a 5 year old girl who was outside playing and was unknown to him at the time. We have been referred to the case of *Plant v Robinson*, [Criminal Appeal 1 of 1983] and it is plain that the Court has the power to interfere with a sentence on the basis that it is manifestly inadequate in circumstances such as the present when the Court did not add a supervision order to the rest of the sentence.

4. Turning then to the question of the supervision order, Section 329(E) provides:

> "Where a person is convicted of a serious personal injury offence, the Court shall, before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days in the custody of the Commissioner of Prisons."

That was done in the present case, and serious personal injury offence includes a sexual offence of the nature committed by the Respondent.

5. Section 329(E) continues that: -

> "The Commissioner of Prisons shall cause an assessment to be conducted by a qualified professional to determine if the offender constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence establishing (a) in the case of a sex offender (i) that the offender by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to

> control his sexual impulses and (ii) there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses....."

Those two criteria were both met in the present case. And the section goes on that the person charged with the conduct of an assessment under sub-section (2) is to report his findings and recommendations to the Court, and if the Court on receipt of the report under subsection (3) is satisfied that it would be appropriate to impose a sentence of 3 years or more for the offence for which the offender has been convicted and that there is a substantial risk that the offender will reoffend, the Court is, under sub-section (4)(d), to order the offender to be supervised in the community for such period not exceeding 10 years as may be specified in the order, and subject to such conditions as are so specified.

6. The criteria mentioned in subsection (4) were met. Indeed the sentence passed by the Learned Chief Justice was 8 years imprisonment and there was medical evidence including evidence from Dr. Farqahar and Dr. Kerry, that there was a substantial risk the Respondent would re-offend. In those circumstances all the criteria were met for the Chief Justice to make the appropriate Order under section 329(E)(4)(d).

7. Unfortunately, the Chief Justice's attention was not drawn to these provisions and it is, in our judgment, understandable that they should not have been in the forefront of his mind because he had a difficult issue to resolve in whether the case was one for a hospital order or one for a substantial period of imprisonment. It was in these circumstances that this, in our judgment important, aspect of the sentence, was overlooked and accordingly the sentence that in fact was passed was indeed manifestly inadequate.

8. We have been invited by Ms. Clarke for the Appellant to impose now a period of supervision in the community of 3 years. It seems to us that this is manifestly

in the interest not only of the public but also of the Respondent in the light of his offence and his history of problems of controlling his sexual behaviour.

9. Subsection (4)(d) also mentions the Court's power to impose such conditions as are specified. In our judgment, it is not appropriate at this stage to specify particular conditions other than to say that the Respondent should comply with the lawful requirements of the probation officer who is designated to look after him. This is obviously not an easy case for the probation service and at this stage it's not possible to say where it is likely the Respondent will be accommodated. His parents are elderly, they both have concerns about him and the risk of his re-offending and they are unable to accommodate him in their home. He has been under psychiatric care since he was a small boy and indeed continues to be under psychiatric care while he is confined at Westgate Centre.

10. When he is released in 2017, he will have to be accommodated somewhere and that is something that will no doubt be considered carefully by the probation service at the time. It remains only to thank Mr. Savoury who appeared in the Court below and has very helpfully appeared before us this morning and he accepts that there really is no basis upon which the Court should not impose the supervision order sought now by the Crown. Indeed he accepts that it is in his client's interest to do so. We're grateful to him for coming to Court and assisting with some background information.

11. The Crown's appeal is accordingly allowed as indicated.

Baker , P