In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2020: 15

ROBERT SMITH

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

Appeal against conviction and sentence in the Magistrates' Court- Sexual Offences against a Child – Causing or Inducing a Child to Commit an Indecent Act - Sections 196(2) and 196(3)(a) of the Criminal Code (Pre-Amendment) – Indecent Assault against a Child - Section 330(1) of the Criminal Code (Pre-Amendment)

Date of Hearing:	15 January 2021
Date of Judgment:	19 February 2021
Appellant	Mr. Bruce Swan, Bruce Swan & Associates
Respondent	Ms. Maria Sofianos / Ms. Tiné Tucker for the DPP

JUDGMENT delivered by S. Subair Williams J

Introduction

1. The Appellant is an 86 year old male and a Bermudian national. He was tried, convicted and sentenced in the Magistrates' Court on an Amended Information (JEMS: 18CR00100) by Magistrate Craig Attridge for the following offences occurring 44 years ago against one of his family members who was then an 11 year old male child:

   Count 1

On a date unknown between 1 June 1977 and 30 June 1977, in the Islands of Bermuda, wilfully and without reasonable excuse caused or induced a child…to commit… [an] *indecent act with you, namely touch directly with his hand, your genitals.*
Contrary to section 196(3)(a) of the Criminal Code (pre-amendment)

Count 2
On a date unknown between 1 June 1977 and 30 June 1977, in the Islands of Bermuda, wilfully and without reasonable excuse committed an indecent act in the presence of a child…by masturbating in his presence, and intending for him to see that act.
Contrary to section 196(2) of the Criminal Code (pre-amendment)

Count 3
On a date unknown between 1 June 1977 and 30 June 1977, in the Islands of Bermuda, indecently assaulted John Tucker, a boy under the age of fourteen, by touching directly with your hands his genitals.
Contrary to section 330(1) of the Criminal Code (pre-amendment)

The Defence Statement at Trial:

2. Pursuant to section 5 of the Disclosure and Criminal Reform Act 2015 the Appellant filed a pre-trial Defence Statement dated 5 September 2018:

"*The Defendant denies all charges in the Information and maintains his not guilty pleas to them.*

The Defendant to the best of his knowledge and belief denies that the Complainant…stayed at his Knapton Hill apartment (or at any other apartment of his) as he is alleging – or at all – except that it is admitted that on infrequent occasions the Complainant visited his said apartment with other family members which visits were "family get togethers" and the Defendant prepared food for these family members and himself at his apartment on these occasions."

The Evidence

3. The Crown opened and closed its case on 25 September 2019. A total of three witnesses were called to give *viva voce* evidence for the prosecution, namely the Complainant, the Complainant's sister and Detective Sergeant 2304 Lennox Ince. On 2 October 2019 the trial resumed and the Defence called the Appellant as its sole witness.

The Complainant's Evidence

4. At trial, the Complainant told the Court that in June 1977 when his was 11 years of age, he spent approximately 6 weeks at the Appellant's lower apartment residence located in the Knapton Hill area. He described the Appellant's apartment as brown in colour

and provided some detail on the directions to the apartment and its interior lay-out. He said that the apartment consisted of one bedroom furnished with a king-sized bed, a bathroom, living room and a kitchen. He added that a hallway was accessible from the living room and that the hallway led to a bathroom on the left. He said that the bedroom was at the end of the hallway.

5. The Complainant's evidence was that he slept alongside the Appellant on the right hand side of the king-sized with his head at the foot of the bed. Approximately one week into his stay at this Knapton Hill apartment, the Appellant instructed him to remove his clothing and the Appellant proceeded to caress his penis. The Appellant was naked and used his own hands to fondle the Complainant's penis for about 5-10 minutes until he ejaculated. The Complainant also similarly stroked the Appellant's penis to the point of the Appellant's ejaculation. After both the Appellant and the Complainant ejaculated, the Appellant masturbated for a further half-hour or so in the Complainant's presence. The Complainant said that at some point he went to the bathroom to get a washcloth and wiped down his genitals.

6. The Complainant recalled accompanying the Appellant to some of the occasional painting jobs the Appellant did that summer. Under cross-examination he said that he knew he worked at the airport and after 1977 he worked at Hamma Galleries and at Devil's Hole. On other occasions the Appellant took the Complainant to other residences. He described the home of one of the Appellant's friends, "Al", which was located at the bottom of Tee Street on the South Shore side. He said the house was blue and in an isolated area.

7. The Complainant further recalled being introduced to another friend of the Appellant named "Sam". He said that Sam visited the Appellant's apartment one night and abruptly woke him (the Complainant) out of his sleep. The Complainant said that when he awoke, Sam was fondling him with his hands (Sam's hands) inside of the Complainant's shorts. The Complainant said that he fought Sam off of him and screamed out to the Appellant for help. However, the Appellant, who was sleeping on the living room couch, did not come to his aid. The Complainant said that Sam continued in his attempts to fondle the Complainant's penis while telling him (the Complainant) that he wanted to perform oral sex on him (the Complainant). At some point thereafter, prior to the Complainant waking up the following morning, Sam left the Appellant's residence.

8. The Complainant also shared that the Appellant showed him heterosexual pornography and coached him in the act of masturbation. Other times, the Appellant told the Complainant that he was no good, ugly and short for his age. The Appellant uttered other abusive remarks of this nature telling the Complainant that he would never amount to anything in life and that his family did not love him. The Complainant said this traumatized him and that he started to believe these statements to be true. He said that he remembered feeling confused, ashamed and hurt about all of these sexual acts.

9. The Complainant said that his interaction with the Appellant after that summer was strained and confusing. He said that he did not know how to act around him when he saw him again at family gatherings. The impact of all of this led the Complainant to fall prey to drug and alcohol abuse and an inability to commit in heterosexual relationships.

10. Since which, the Complainant has attained 14 years of sobriety and has been married for 13 years (as at 2019).

The Cross-Examination of the Complainant:

11. The Complainant was cross-examined about the relationship between his eldest brother ("the Eldest Brother") and the Appellant. The Appellant's Counsel put it to the Complainant that the Appellant was not doing any painting jobs in the summer of 1977 and that it was the Eldest brother who stayed with the Appellant that summer. The Appellant's case put during cross-examination was that the Complainant never spent any alone time with the Appellant. Refuting these suggestions, the Complainant maintained that he had experienced all that he described in his evidence in chief.

12. The Complainant also spoke about his cousin "the Cousin" and said that the Cousin would likely recall him staying at the Appellant's home in June 1977. When asked if he had shared this information, the Complainant clarified that he had not previously relayed that point about the Cousin's presence to the police. He said that he did, however, recently inform the prosecution about the Cousin and the fact that he was living overseas.

The Re-Examination of the Complainant:

13. During his evidence in re-examination the Complainant told the Court that he had met with the prosecutor on the Monday of that week (i.e. Monday 23 September 2019) and that he was unable to provide contact details for the Cousin.

Further Cross-Examination of the Complainant:

14. The Complainant told the Court that the Cousin came to stay with him and the Appellant a couple of weeks after his own arrival.

The Evidence of the Complainant's Sister

15. The Complainant's sister ("the Sister") told the Court that she recalled that the Appellant lived in the Knapton Hill area and that she also recalled the Appellant having attended some family functions.

16. On the Sister's evidence, the Appellant tried to contact her by both email and telephone after the Complainant reported these offences to the police. The subject-matter of the email was about this case and had been sent to her and other family members. She said that she does not recall when she last heard from the Appellant prior to this point. When she returned his call, the Appellant denied the allegations.

17. The Appellant also suggested to her that the Complainant had on previous occasion accepted payment from her for refurbishment services to her home but that he never provided these services in exchange for the payment received. The Sister's evidence was that she informed the Appellant that this was untrue but that the Appellant asked her to nevertheless state in writing that it was true.

18. The Sister explained to the magistrate that some twenty years prior she had some refurbishing done by someone other than the Complainant. She said that the Complainant did not do any such type work at her residence and that she never paid him any money to do so. She therefore refused the Appellant's request for her to say otherwise.

19. The Sister also told the Court that it was her recollection that boys would stay at the Appellant's residence and that she vaguely remembered the Complainant spending a summer there but would not recall if that was during the summer of 1977. She also said that the Eldest Brother spent time at the Appellant's house which was more likely for a weekend than the summer. She added that the Cousin also stayed at the Appellant's residence at some unidentified point. The Sister said that she would have been in her 20s and was no longer living at the family homestead during this time time-frame.

The Evidence of Detective Sergeant 2304 Lennox Ince

20. In evidence in chief DS Ince produced a record of the caution interview between the Appellant and the police. He was also cross-examined by Mr. Swan about his attempts to make contact with the Cousin. His evidence was that he made inquiries which led him to discover the region where the Cousin was living overseas. However, he had been unable to secure any contact details.

The Appellant's Evidence at Trial

21. The Appellant denied all of the allegations of criminal behaviour against him stating that they were all lies. He went so far as to deny that the Complainant ever stayed with him at his residence. He claimed that he had never slept with the Complainant, never masturbated with him and never had any other form of sexually indecent interaction with him. The Appellant also denied having told the Complainant that he was short and ugly and that he would amount to nothing in life. He said that he never told the Complainant that his family did not love him. When asked about a possible motive the Complainant would have to fabricate these allegations, the Appellant suggested that it

was because the Complainant was of the view that he (the Appellant) has [an abundance of] money.

22. The Appellant said that the only time he saw the Complainant was at family gatherings and that he was never alone in his company. He remarked that he did not like how the Complainant treated his family members (specifically his siblings) and spoke about his history of substance abuse. He agreed, however, that these points of criticism could not have applied to the Complainant when he was an eleven year old boy.

23. In relation to the evidence about the showing of pornographic video footage, the Appellant insisted that the Complainant had never watched any pornographic material with him. He said that at some point long after the year of 1977 he was selling pornography but he did not bring any of that pornographic material home. He later stated in his evidence under cross-examination that he kept pornographic magazines in one of his clothing drawers. When the prosecutor pointed to his previous statement to police he accepted that he said that there were one or two magazines lying around the house somewhere.

24. He further denied having taking the Complainant to see any of his friends at other residences. The Appellant accepted that he had a friend named Sam who lived in the Happy Valley area but maintained that he had never taken the Complainant there for a visit. The Appellant said in his evidence that Sam would visit his Knapton Hill residence on an average of once to twice a month. However, the Appellant also denied that Sam was ever at his apartment with the Complainant.

25. In relation to the Complainant's evidence about 'Al', the Appellant accepted that he had a good friend named Ellsworth Burgess who he referred to as 'El'. He accepted that he had told police during his caution interview that El lived in the only house at the bottom of Tee Street- just as the Complainant had described. However, the Appellant maintained that he never took the Complainant to El's residence.

26. The Appellant said that in 1977 he was working at the airport and denied that he was involved in any painting jobs at that time. However, he accepted that he was at some point doing painting side jobs. He could not recall what year he was painting but estimated that it was 6 or 7 years after he worked for Pan American Airlines. He agreed that it was likely that he painted during the summer season.

27. He described his relationship with the Eldest Brother as very good and said that the Eldest Brother had spent four summers with him at his residence. He said that he was not always home when the Eldest Brother was there but that he had his own copy of a key to the apartment. The Appellant also spoke favourably about his relationship with the Cousin and said that they played a lot of golf together but that the Cousin never overnighted at his place.

28. The Appellant denied having asked the Sister to state in writing that the Complainant took money from her for refurbishment services not rendered. He admitted however that he called her and spoke about the Complainant having taken money from her without offering any assistance.

29. The Crown sought to impugn the Appellant's credibility during the Appellant's evidence. When cross-examined on his previous statements made to the police that he had "never been alone with these children" he accepted that his statement to police was untrue as he had been alone with some of the children he was referring to. The Crown also recalled DS Ince to the stand to rebut the Appellant's evidence that he was threatened by the police and dragged out of his home for display in front of his neighbours.

The Crown's Application to Re-open its case to call the Cousin

30. At the close of the evidence and final submissions from Counsel on 2 October 2019, Magistrate Attridge adjourned the matter to 18 November 2019, having reserved his final judgment to be delivered on that date. Judgment was not delivered on 18 November as the learned magistrate received a written application from the Crown to re-open its case to call the Cousin as a witness.

31. A witness statement dated 6 October 2019 from the Cousin states, in its material parts:

"*I have been asked to comment on my relationship with my uncle ROBERT SMITH. I had a good relationship with UNCLE ROBERT and we would go fishing together at the docks or on the south coast. I also went bingo with him but my mother would always be with us.*

I have maintained contact with UNCLE ROBERT even after I moved to the UK about thirteen years ago. He has visited us in person a couple of times. Whilst growing up I can remember visiting UNCLE ROBERT with my family in order to have breakfast with him. This happened quite often.

The only time I ever stopped [stayed] *over with my Uncle ROBERT was when I was about 10 years old. My cousin* [the Complainant] *also stayed overnight. This happened during one summer and we stayed for 2-3 weeks.*

...[The Complainant] *and I were quite close in age so we had quite a lot in common and whilst we stayed at UNCLE ROBERT's I remember walking down to the CASTLE HARBOUR GOLF CLUB a lot where we would collect golf balls and then hit them into a banana patch.*

Whilst we were staying with UNCLE ROBERT we would sleep on the living room floor of his flat in SPANISH HEIGHTS. This apartment was a ground floor on bedroomed flat which was painted all white on the outside. I remember an avocado tree being right outside the living room. In order to get into the flat you would have to walk down some steps with the kitchen window being on your left hand side…[further detail provided about the inside outlay of apartment]*... During the 2-3 week stay I can't recall ever going in his bedroom. ...*

...During our stay with UNCLE ROBERT, [the Complainant] *and I would always sleep in the middle of the living room floor. UNCLE ROBERT provided us with blankets and pillows. My UNCLE ROBERT had a job with HAMMER GALLERIES at the time so for most of the week he would be at work leaving [the Complainant] and I to our own devices. ...ROBERT would come home from work and prepare some food for us. I don't remember what we did in the evenings or if he took us out for any trips due to how long ago it was.*

Whilst we were there I do recall UNCLE ROBERT having a friend called SAM coming ... [around] on a couple of occasions to speak to him when he had finished work. I do remember seeing him for a number of years after that and saw him with UNCLE ROBERT at parties. He always struck me as not a very 'chatty' person. I would describe SAM as dark skinned, about 5'10" tall, with short black hair and a stocky build.

I have also been asked to comment on my relationship with [the Complainant's eldest brother] *...although I saw him a lot when our families met up, because he was ... a few years older... we didn't hang out together outside of family get togethers. This was because he had his own circle of friends*."

32. Further to the 6 October 2019 witness statement the Cousin provided a second statement to police dated 23 November 2019. In that subsequent statement, the Cousin provided further details on the outlay of the Appellant's apartment. In part, he said:

"*The colour of the outside of the flat may have been a very light brown. In my previous statement I said it was white. However, on reflection it was a light brown colour which... ROBERT painted white at a later date just before he moved out*…

After I gave my previous statement I started to think about my stay with Uncle ROBERT more than I had done for a number of years. On reflection I think he was a painter / decorator at the time John and I stayed with him. I remember Uncle ROBERT having the smell of wood filler on his clothing when he came back to the flat and spoke with [the Complainant] *and I. I can't remember whether he worked for himself or a company. I now believe his job with HAMMER GALLERIES started after* [the Complainant] *and I stayed with him. I don't remember what position he held at this company.*

> *About 7:45pm on Saturday 2nd November 2019 I was at my home when the home phone rang in the living room and I answered it. I immediately recognised the voice as that of my Uncle ROBERT. He said "HI GEORGE, IT'S YOUR ROTTEN UNCLE".*
>
> *I hadn't heard from my Uncle ROBERT since I heard about the investigation involving* [the Complainant]. *I didn't know what to say to him and there was an awkward silence for a couple of seconds. Uncle ROBERT then started to talk about the investigation involving* [the Complainant]. *He told me that* "[the Complainant] *NEVER STAYED AT MY FLAT" and it felt like he was trying to influence me. Uncle ROBERT then went on to say that a couple of* [the Complainant]*'s sisters had said that he'd* [the Complainant] *never been in the flat. During the conversation I didn't say a lot to him and at one point I said "I DON'T KNOW" to him as I think he must know I've provided a statement but I didn't want to tell him outright. Uncle ROBERT also started to talk about his liver bleeding and that he needs an operation but the doctors have told him that if they operate he's likely to die. In my opinion he was trying to get my sympathy.*
>
> *In the end we both said goodbye and ended the phone call. The time was now 8:01pm and I remember looking at my watch to see how long I'd been on the phone. The phone call from Uncle ROBERT made me feel uncomfortable.*
>
> *Further to the above I also remember that my Uncle ROBERT said that [the Complainant] and his sister…were saying that I was "INVOLVED IN EVERYTHING" to do with the investigation. I'm not sure whether he meant that I was also a victim or an offender in the investigation involving him and* [the Complainant].

33. The application to reopen the Crown's case to lead this evidence from the Cousin was heard on 29 November 2019. The Defence opposed the application and Magistrate Attridge refused the application on the basis that the Crown had not established any proper or legally acceptable principle to be permitted to re-open its case [see paras 107-111 of the magistrate's written judgment].

Analysis and Decision

34. By an Amended Notice of Appeal dated 27 July 2020 (and filed in the Supreme Court on 17 November 2020) the Appellant pleaded seven grounds of complaint. Mr. Swan, on behalf of the Appellant, agreed that these Grounds of Appeal against conviction could be joined in two broader categories. He accepted that Grounds 1, 4 and 5 were inter-related and that Grounds 2, 3 and 6 were equally capable of collective consideration. Ground 7 is a complaint that the sentence passed was [manifestly] excessive.

35. Grounds 1, 4 and 5:

Ground 1

That his Worship C. Attridge should have granted a mistrial on the knowledge that the Crown failed to obtain a key witness statement that would have altered the Defence case.

Ground 4

That the Prosecutor did not seek to obtain all relevant and available evidence prior to the close of the evidential stage of the case

Ground 5

That the police were always aware of the existence and availability of the witness to give evidence

36. The Complainant stated in his evidence that he first informed the prosecution about the Cousin's short stay at the Appellant's apartment that summer of 1977 only two days prior to the start of the trial. This evidence was unchallenged by the Defence and the magistrate accepted this as a fact. Equally, the Complainant stated to the Court that he never mentioned any of this to the police. That too is unchallenged evidence. For that reason, neither the prosecution nor the police can be held responsible for not having taken steps to locate and contact the Cousin prior to the stage when contact was made.

37. Sensibly, no complaint or suggestion is made by the Appellant that delay occurred in the disclosure of the Cousin's witness statements after the witness statements had been prepared and provided to the prosecutor. Indeed, the Crown made an application to re-open its case on 29 November 2019 to lead this evidence. Fair to say, the Defence at this point had the opportunity to agree to the Crown calling the evidence of the "key witness" and the opportunity to cross examine that "key witness". Instead, the Defence objected to the calling of the Cousin. It is thus hardly open to the Appellant to now contend that the magistrate ought to have declared a mistrial of his own motion for a loss of opportunity for the Court to hear evidence from the Cousin. The fact of the matter is that the Defence did not want the Court to hear evidence from the Cousin as such evidence would not likely have undermined the Crown's case nor would it have likely assisted the Defence case.

38. For all of these reasons, I find that Grounds 1, 4 and 5 fail.

39. Grounds 2, 3 and 6:

Ground 2

That his Worship C. Attridge failed to correctly place weight that there was no collberation [sic] [corroboration] */ supporting evidence of the Prosecution*[']*s case.*

Ground 3

That there was no evidence that any reasonable Magistrate could have found the Appellant guilty of the offences charged.

Ground 6

That if the evidence was properly presented no reasonable trier of fact could have found the Appellant guilty.

40. The rules requiring corroboration in sexual offences was abrogated by section 327 of the Criminal Code (Sexual Offences) Amendment Act 1993 ("the 1993 Amendment Act). Section 327(a) of the 1993 Amendment Act expressly provided that corroboration is not required for a conviction. However, this does not appear to have been the position in 1977. In assessing the safeness of the conviction, I must keep in mind that the rules of evidence requiring corroboration in sexual offences likely applied to sexual offences committed in 1977 and that a judge would have been permitted if not duty-bound to instruct a jury (or a magistrate to direct him or herself) that it is unsafe to find the accused guilty in the absence of corroboration.

41. In this case the learned magistrate heard the live evidence of the Complainant. That evidence provided a detailed account of the sexual offences charged. There was no suggestion by the Defence at trial or by the Appellant's Counsel before me that the Complainant's evidence, if believed and accepted by the Court as truthful, would fall short of proving the charges before the Court.

42. The success of the Crown's case was entirely dependent on whether the Court believed and accepted (beyond reasonable doubt) the truthfulness of the Complainant's evidence. In the end, the Court determined that the Complainant was being truthful. This would have been aided by the magistrate's opportunity to observe and assess the Complainant's demeanour as he gave his evidence.

43. I would observe that in this case, the Appellant himself corroborated much of the detailed and background evidence given by Complaint. For example, the Appellant accepted that he had friends known by the names of 'Sam' and 'El'. He confirmed that his friend Sam would visit his Knapton Hill residence, notwithstanding his denial of the Complainant's presence. The Appellant also corroborated the Complainant's evidence that he would visit his friend 'El' at the only house at the bottom of Tee Street. He also corroborated the Complainant's evidence that he did odd paint jobs during one summer season. Further, it is notable that the Appellant never challenged the Complainant's detailed description of the interior and exterior areas of his Knapton Hill residence. It was thus reasonable to infer from all of this corroborated evidence that the Complainant's memory on these points was accurate and that he was also being truthful. More so, it was open to the Magistrate to find that the Complainant would not have otherwise known about these surrounding factual details without having spent the prolonged periods of time that he said that he spent with the Appellant when he was but a child.

44. This is a case where the magistrate preferred the evidence of the Complainant and found him to be a witness of truth. The Crown did not in such circumstances have to call any other evidence to assist the Court in believing and accepting the Complainant's evidence. With or without a warning under the archaic rule requiring a warning on corroboration, the magistrate would have been entitled and reasonable in finding that the Complainant's evidence was truthful. As the magistrate rejected the Appellant as a witness of truth, the Defence case did not succeed in undermining what was independently a strong and convincing case presented by the Crown.

45. In *Safiyah Talbot v Fiona Miller* [2020] SC (Bda) 40 App I stated [para 24]:

"*As a matter of general and established principle, this Court, in the exercise of its appellate jurisdiction, will be reluctant to go behind a magistrate's findings of facts drawn from an assessment of witnesses' oral evidence given at trial. This is because the magistrate, who would have had the sole advantage of observing the demeanour of those witnesses, is best positioned to evaluate the truthfulness of the evidence. It is with that logic that I would proceed with trepidation before interfering with findings of facts which were formed by the trial magistrate*."

46. In my judgment, there is no reasonable basis for this Court to disturb the factual findings drawn by Magistrate Attridge. Clearly, the evidence supported the convictions. For those reasons, Grounds 2, 3 and 6 must be dismissed.

Decision on Appeal against Sentence

47. I now come to Ground 7 which is a complaint about the sentences imposed. Although the Appellant has now served the full custodial term of the sentences passed by Magistrate Attridge, Mr. Swan has asked for this Court to find that the sentences imposed and served were manifestly excessive.

48. On Count 1 the Appellant was sentenced to 6 months imprisonment for the offence of wilfully and without reasonable excuse causing or inducing a child to commit an indecent act. This count refers to the Appellant's criminal responsibility under section 196(3)(a) of the Criminal Code (pre-amendment) for the Complainant's touching of his genitals. Section 196(1) and 196(3)(a) provided:

"*196 (1) In this section the expression "child" means any person under the age of fourteen years.*

…

(3) Any person who wilfully and without reasonable excuse-

> *(a)causes or induces a child to commit any indecent act with him or in his presence; …*
>
> *is guilty of a misdemeanour and is liable to imprisonment for a term not exceeding two years with or without a whipping.*"

49. Counsel for both sides submitted to this Court that the maximum sentence for this offence on summary conviction was 12 months. However, subsection (3) clearly imports a maximum period of 2 years imprisonment "*with or without whipping*". (Corporal punishment was abolished on 23 December 1999 under the Abolition of Capital and Corporal Punishment Act 1999).

50. Notably, section 196(3)(a) is classified as a misdemeanour offence. An indictable offence under current statute law is defined under section 3 of the Criminal Code to be "*treason, a felony or a misdemeanour, and includes any offence in respect of which an accused person is triable on indictment whether or not he is also triable summarily*." The term "misdemeanour" under the Criminal Code is employed to signify what is otherwise known as an "either-way offence" or a "hybrid offence". (The historical and contemporary position is that summary-only offences are enacted under the Summary Offences Act 1926.)

51. On Count 2 the Appellant was sentenced to 2 months imprisonment for the offence of wilfully and without reasonable excuse committing an indecent act in the presence of a child. This count refers to the Appellant's criminal responsibility under section 196(2) of the Criminal Code (pre-amendment) for the act of masturbating in the presence of the Complainant and intending for the Complainant seeing him in that act of masturbation. In 1977 section 196(1) provided:

> "*(2) Any person who wilfully and without reasonable excuse commits any indecent act in the presence of a child, intending the indecent act to be seen by a child, is guilty of a summary offence, and is liable to imprisonment for a term not exceeding twelve months*."

52. Thus the maximum sentence for an offence under section 196(2) on summary conviction in 1977 was 12 months imprisonment. Here the term "child" also refers to a child under the age of fourteen years as defined under subsection (1).

53. On Count 3 the Appellant was sentenced to 2 ½ months (i.e. 6 weeks) imprisonment for the offence of committing an indecent assault against a boy under the age of fourteen. This count refers to the Appellant's criminal responsibility under section 330(1) of the Criminal Code (pre-amendment) for the Appellant's touching of the Complainant's genitals. In 1977 section 330(1) provided:

"*330(1) Any person who unlawfully and indecently assaults any male person, is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment for a term not exceeding six months and on conviction on indictment to imprisonment for a term not exceeding three years, with or without whipping.*

Provided that if the male person assaulted is under the age of fourteen years the offender is liable to imprisonment for a term not exceeding five years, with or without whipping.

(2) It shall be no defence to a charge of indecent assault on a male person under the age of fourteen years to prove that he consented to the act of indecency."

54. Notwithstanding the proviso raising the maximum sentence to five years for a male person under the age of fourteen years, Counsel for both sides agreed that the maximum sentence on summary conviction for this offence was 6 months imprisonment. The proviso was thus construed to apply to conviction on indictment. I will proceed on that more plausible interpretation of the section.

55. The learned magistrate recorded his sentencing remarks in a written decision dated 27 July 2020. In the opening paragraphs of his remarks Magistrate Attridge said [paras 1-3]:

"*1. These are repugnant offences, involving the touching of genitalia and masturbation, committed against an 11 year old boy and further aggravated by the fact that they were committed by a person in a position of trust who also sought to undermine the complainant's self-worth, and aggravated still further by the fact that, unsurprisingly, the commission of these offences appears to have had a detrimental effect upon the complainant throughout the majority of his adult life.*

2. The defendant has shown no remorse and continues to disparage his victim's character in the Social Inquiry Report, and depicts him as motivated, in his complaint by money.

3. The defendant's convictions, following trial, for these quite heinous acts against a young child must be balanced however against his advanced age- 84 years- and his prior good character."

56. It was further noted by the magistrate that the "*current maximum for offences of this nature is five years on summary conviction*." I would specify here that the Appellant would likely be charged under section 182B of the Criminal Code had these offences been committed on 1 June 1993 or thereafter. Section 182B applies to an offender in a position of trust or authority who engages in a sexual act with a young person under the age of sixteen years:

"*Sexual exploitation of young person by a person in a position of trust*

182B (1) A person who, being in a position of trust or authority towards a young person or being a person with whom a young person is in a relationship of dependency—

(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 the 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…"

57. It should also be noted that on 18 July 2006 the sentencing powers of the Magistrates' Courts increased in respect of this offence from a maximum 12 month imprisonment term to one of five years.

58. Section 198(2) of the Criminal Code currently applies to acts of indecency involving children under the age of fourteen years. An offender who wilfully and without reasonable excuse commits an indecent act in the presence of a child will be liable to imprisonment for a term not exceeding five years on conviction by a court of summary jurisdiction.

59. Counsel referred me to a previous decision of this jurisdiction of Court in ***Milton Richardson v The Queen*** [2014] SC (Bda) 88 App, per Kawaley CJ. In that case the Appellant had been convicted on all four counts of sexual exploitation contrary to section 182B(1)(a) in respect of an 11 year old child. The acts of sexual exploitation which were committed while the offender was in a position of trust involved kissing the Complainant on the ear, neck and mouth areas. In the Magistrates' Court Mr. Richardson was sentenced to 9 months imprisonment on Count 1 and 18 months imprisonment on the remainder counts in addition to a probation sentence of 2 years.

60. The Appellant in *Milton Richardson* successfully appealed against the sentence imposed by the learned magistrate. This resulted in a reduction in the custodial portion of the sentence by Kawaley CJ from 18 months to 12 months imprisonment, leaving the term of probation undisturbed. On further appeal by the Crown against sentence, the Court of Appeal cautioned against over-reliance on sentencing guidelines [UK Sentencing Guidelines for Sexual Offences Tried in the Magistrates' Court ("the Sentencing Guidelines")] [para 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."

61. In outlining its sentencing approach the Court of Appeal held:

"*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 separate occasions. The victim was only 11; there was a 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 month 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*."

62. Having had regard to the Sentencing Guidelines [p.9], the starting point for the Appellant in this case should involve a sentence range of 12-16 months imprisonment. On very similar footing to the aggravating factors highlighted in the *Milton Richardson case*, it is to be noted that the Complainant in this case was only 11 years old and the Appellant not only breached his position of trust and authority over the Complainant but did so using clear grooming tactics and with obvious pre-meditation. Absent any mitigating factors, the appropriate sentence in this case would be 14 months imprisonment under section 182B of the Criminal Code. Factoring in the Appellant's previous clean record, I would accept that he would likely be sentenced to 12-13 months imprisonment if sentenced for his criminal acts under section 182B where the magistrate may sentence up to 5 years imprisonment.

63. On Count 1 the Appellant wilfully induced the 11 year old Complainant to touch his naked penis. For this he was sentenced to 6 months imprisonment. In 1977 the maximum sentence for an offence under section 196(3)(a) was 2 years imprisonment "*with or without whipping*". Broadly treating this maximum penalty as half of the 5 year maximum currently available, I find it was appropriate for Magistrate Attridge to have imposed 50% of the 12-13 month terms of imprisonment which would have likely been imposed under section 182B.

64. Count 2 referred to the deliberate act of masturbating in the presence of the Complainant. The maximum sentence for an offence under section 196(2) on summary conviction in 1977 was 12 months imprisonment. Applying the same pro-rating

methodology, I find that a sentence of 2 months imprisonment was not manifestly or at all excessive.

65. On Count 3 the maximum sentence which could have been passed on the Appellant in 1977 for touching the Complainant's bare genitals contrary to section 330(1) was 6 months imprisonment. On the facts of this case, this Court does not find a 6 week fraction of that maximum sentence to be excessive in any way.

66. As the offences in this case all occurred on the same night, I would accept that concurrent sentences were appropriately imposed.

Conclusion

67. For all of the reasons stated herein, the appeal against conviction and sentence is dismissed on all grounds.

Dated this 19th day of February 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE