# The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2014: No. 214**

**In the Matter of Section 15 of the Bermuda Constitutional Order**

**AND**

**In the Matter of Indictment No. 2 of 2014**

Between:

**KRISTOPHER DYLAN GIBBONS**

Plaintiff

**-v-**

**THE ATTORNEY GENERAL**

Respondent

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**Appearances:** Dantae Williams, Mussenden Subair Limited, for the Plaintiff
The Attorney General's Chambers, for the Respondent

**Date of Hearing:** **5th May 2014**

**Date of Judgment:** **17th September 2014**

## REASONS

1. An Originating Summons for Judicial Review to declare the statutory provisions of section 190 of the Criminal Code Act 1907 (hereinafter referred to as "the Criminal Code") unconstitutional as it pertains to sexual offences committed by persons over 21 years old or older, was filed on 21st April 2014. An Amended Originating Summons was filed on 30th April 2014. The amended application, in the grounds upon which relief is sought, added section 6 of the Bermuda Constitution Order 1968 (hereinafter referred to as "the Constitution") which guarantees, *inter*

*alia*, the right to a fair hearing. On the 5th May 2014, the Court heard the parties to the application and summarily dismissed the Plaintiff's application. Here are the reasons.

2. Prior to this actual hearing, without filing the requisite documentation, on 9th April 2014, Counsel for the Plaintiff made an oral indication, after the commencement of a criminal trial, that he was going to bring a constitutional application before the Court. It was not entertained by the Court as the Court had no proper application before it; nor had Counsel alerted the Attorney-General's Chambers or the Department of Public Prosecutions to the potential argument nor had he provided them any documentation which would have been the appropriate Court etiquette. This was not an application where the Respondent would be ambushed and not be notified appropriately.

3. The initial application sought a declaration that the statutory provisions which govern age and consent under section 190 of the Criminal Code, as it pertains to sexual offences alleged to be committed by persons 21 years of age and older, were unconstitutional.

4. Counsel for the Plaintiff stated that the basis for this declaration lay in section 1(a) of the Constitution wherein Counsel alleged that particular section was breached. Section 1(a) of the Constitution guarantees that every person is entitled to fundamental rights and freedoms of the individual, namely life, liberty, security of the person and the protection of the law. It states the following:

> "1. *Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex,* ***but subject to respect for the rights and freedoms of others*** *and* ***for the public interest****, to each and all of the following, namely:*
>
> *(a) life, liberty, security of the person and the protection of the law;…*
>
> *the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and*

*freedoms by any individual does not prejudice the rights and freedoms of others or the public interest…"* [my emphesis]

5. The starting premise is that all citizens are abiding by the laws of the land. If that be the case, then it is correct that there will be certain fundamental rights and freedoms afforded to all. It cannot be that the laws of the land are one-sided in protecting one element of society and not another. If one is perceived as not abiding by the laws of the land, another set of rights become operational. There is now a contravention of the laws of the land as it affects a particular person(s); the rights and freedoms afforded that person(s) are then scrutinized and become subject to section 6 of the Constitution. Section 6 (1) and (2) of the Constitution says:

   *"(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

   *(2) Every person who is charged with a criminal offence-*

   *(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*

   *(b) shall be informed as soon as is reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;…*

   *(g) shall when charged on information or indictment in the Supreme Court, have the right to trial by jury…"*

6. Parallel to our Constitution is Article 6 of the European Convention on Human Rights ("ECHR") of which our Constitution mirror, states as follows:

   *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly*

*necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
    - *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
    - *(b) to have adequate time and facilities for the preparation of his defence;*
    - *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
    - *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
    - (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in the court*.

7. After the accused were arrested for what is deemed to be a serious criminal charge against a child, the Plaintiff, along with three (3) other co-accused, were all afforded legal representation, a trial within a reasonable period of time and had a judge and jury presiding over matters until conclusion of the same. Section 6 of the Constitution as well as Article 6 of ECHR was followed to the letter of the law.

8. The Plaintiff, along with the three (3) other co-accused, were charged with serious sexual assault contrary to section 325(1)(d) of the Criminal Code. Section 325(1)(d) is considered a serious offence in this jurisdiction which must be tried on indictment before a judge and a jury. The Plaintiff was arraigned together with the other three (3) co-defendants on 2nd January 2014 with a trial scheduled to begin on 7th April 2014, all of whom pleaded not guilty to the charge. This

application (some three (3) months after the arraignment of the Plaintiff) was filed on 21st April 2014 with an assigned hearing date of 5th May 2014. Again this was considered a reasonable time allocated to hear this application. The Plaintiff had legal representation at the time of the arraignment as well as the same legal representation for this application. Where is it shown on these facts that there a denial of the Plaintiff's constitutional rights as laid out in section 6 of the Constitution or for that matter Article 6 of the ECHR? In the circumstances presented, I cannot see any breach of the Plaintiff's rights.

9. All of the court procedures connected with someone being charged with an indictable offence, from when the Information was laid to the arraigning of the offender to the setting a trial date for the same offence, were well and truly executed within a reasonable period of time. For the sake of calculation of the time, it amounted to within six months: from the arrest to when the Information was placed in the Magistrates' Court to the arraignment in the Supreme Court and then three (3) months thereafter to the actual trial start date. The actual trial commenced some nine months after the date of the alleged sexual assault. Sections 6(1) and (2) of the Constitution were hereby followed and as expeditiously as was possible in the circumstances. Article 6 of the ECHR was also followed within what is deemed a reasonable period of time.

10. Should bail not be granted for an accused charged with a serious offence and until the trial begins, section 11 of the Constitution becomes important when it is deemed necessary to remove an accused person from free movement within the society. The accused is no longer free to move about as he pleases. Subsection 2 of section 11 clearly indicates that there is no breach of one's constitutional right to freedom of access in situations such as this as it states as follows:

> *"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-*
>
> > *(a) for the imposition of restrictions on the movement or residence in Bermuda or on the right to leave Bermuda of persons generally or any class of persons that are reasonably required-*
> >
> > > *(i) in the interests of defence, <u>public safety, public morality</u>* [my emphasis] *or public health; or*

*(ii) for the purpose of protecting the rights and freedoms of other persons,*

*except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;…"*

11. Who had been sexually assaulted - a 14 year old child. Who needed protection was a young and vulnerable 14 year old child. The authorities could not chance the 21 year old going and interfering with this young and vulnerable child who now became one of the main witnesses in a criminal trial. In the interest of public safety and public morality, it became necessary to restrict the movement of this accused. An accused charged with a serious public morality crime, i.e., a sexual assault against a child is just such a person whose movements in society need to be restricted until the completion of the criminal trial.

12. Once the formalities of attending Magistrates' Court were done, including a Long Form Preliminary Inquiry, the case was forwarded onto the Supreme Court for the next arraignment session and trial date set. Another opportunity afforded the Plaintiff prior to the criminal trial to test the evidence. As stated above, all of this done within months.

13. If Counsel for the Plaintiff was correct in his premise that there was a denial of the Plaintiff's rights per the Constitution, then the Plaintiff would not have been provided legal Counsel to present his case before a court; would not have had a criminal trial listed in less than six (6) months after being arraigned. It appears that the fundamental right of the Plaintiff of being "*afforded a fair hearing within a reasonable time by an independent ... court"* was done. Because the case involved not only the young child, it also involved three other young men, all of them <u>under</u> the age of 21 who were also locked up until the trial. It was just months after the arrest and the arraignment and <u>not</u> years as may be the case in other instances, that the actual criminal trial took place.

14. Section 38 of the Criminal Code states:

    "*Without prejudice to any provision of law to the contrary, any person who does any act or makes any omission under an honest and reasonable,*

*but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."*

Despite the fact that section 38 of the Criminal Code may afford a defence of mistake to some criminal acts, it is superseded by the wording in section 190 of the Criminal Code which clearly and specifically sets out the parameters of age and consent for younger men who engage in sexual activities with young girls. There is no mistake of fact afforded a man over the age of 21 years old when it comes to engaging in sexual activities, whatever they may be, with a young girl under the age of 16 years. One cannot advise a defendant that there is a defence of reasonable mistake as to the complainant's age where/when the law clearly prohibits that. That may amount to negligence on behalf of the one propagating such misleading and erroneous information to an accused. Section 190 of the Criminal Code clearly sets out the law of consent in respect of sexual offences concerning children and young people as well as possible defences for those defendants under the age of 21 years. Section 38 of the Criminal Code does not apply to sexual assaults; the defences come under section 190 of the Criminal Code.

15. Save for defences afforded in the specific sections of Part X of the Criminal Code (Offences against Morality), mistake of fact about the complainant young person's age is not applicable for an accused over the age of 21 years. Section 190 of the Criminal Code is there to protect both the victim and the accused. The law does permit in limited circumstances for an accused who is under the age of 21 years old engaging in sexual activities with a young complainant, to demonstrate that he had reasonable cause to believe and did in fact believe that the complainant was of or above 16 years. However, when there is such a vast gulf of years between the victim child and the accused (in this instance a difference of some seven (7) years); the accused is over the age of 21 years; the accused has not taken that extra step in confirming the age of the victim he is intending to engage in sexual activities or have sexual relations with that person, then the price of engaging in sexual activities with a young child complainant and failing to be properly informed of the age of the victim is imprisonment, if found guilty of engaging in those sexual activities.

16. Section 6(11)(a) of the Constitution states as follows:

> *"....(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—*
>
> *(a) subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;..."*

17. Section 190 of the Criminal Code creates a strict liability as regards age and consent in certain sexual cases as set out in the Code, this kind of sexual assault case being one of them. There is no contravention of Constitution in this regard if the accused is 21 years old and engaged in sexual activities where the child complainant could not consent and no provisions of section 190 of the Code affords him a defence.

18. The Court was referred to the Canadian Charter of Rights and Freedoms (the CCRF). Section 1 of the CCRF states as follows:

> "(1) *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

In that Canadian legislation, there is a defence of due diligence, i.e., *that the accused "...**took all reasonable steps to ascertain the age** of the complainant..."* [my emphasis]. Did the Plaintiff in this case take all reasonable steps to ascertain the age of the complainant? I think that neither that conversation nor that kind of research took place in the circumstances present at the time of the alleged assault. If it did and he heard what she had to say, he would have realized that he was in the presence of a young high school student; someone who for lack of a better phrase , was 'jail bait'.

19. Lord Kerr in R v. Brown at paragraph 39 of the Judgment states that:

> *"... young girls must be protected and, as part of that protection, it should not be a defence that the person accused believed the girl to be above the prescribed age. As Lady Hale said in para 46 of G 'When the child is under 13... [the accused] takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he*

*chooses to do…' If you have sexual intercourse with someone who is clearly a child or young person, you do so at your peril."*

20. In the case at bar, the young girl was 14 years old at the time of the sexual assault which is clearly less than the age of 16 years old as is the minimum age prescribed by law. R v. G was a case concerning a 15 year old having sexual intercourse with a 13 year old. It was held that:

> *"… It was established that the concept of 'private life' in art 8 covered the physical and moral integrity of the complainant, vulnerable by reason of her age, was worthy of respect. The state would have been open to criticism if it had not provided her with adequate protection and the state had attempted to do so by a clear rule that children under 13 were incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity… The word [rape] connoted a lack of consent but the law disabled children under 13 from giving their consent. In view of all the dangers resulting from under age sexual activity it could not be wrong for the law to apply that label even if it could not be proved that the child was in fact unwilling. Accordingly, … the prosecution, the conviction and the sentence had been both rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others…"*

21. Baroness Hale at paragraph 46 reminded us that:

> *"… there is not strict liability in relation to the conduct involved. The perpetrator has to intend to penetrate. Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust about a law which says that if he chooses to put his penis inside a child who turns out to be under 13 he has committed an offence (although the state of his mind may again be relevant to sentence). He also commits an offence if he behaves in the same way towards a child of 13 but under 16, albeit only if he does not reasonable believe that the child is 16 or over. So in principle*

*sex with a child under 16 is not allowed… The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger…"*

22. Although the above passages speak to the protection of young girls from rape (in our laws that is now codified as sexual assault or serious sexual assault, depending on the surrounding circumstances), our young girls here on this island need to be protected from preying sexual adult men, especially if the girls are under the age of 16 years. Even if there is no penetration and the outcome is that the adult male is aroused and seeks relief from the young girl who is said to agree to what is requested of her, it is still not an age appropriate activity for the young girl to engage in with an adult male over the age of 21 years.

23. Interestingly enough, Baroness Hale goes on to say at paragraph 47 that it would not "... *be controversial if the possessor of the penis in question were over the age of 16, certainly if he were an adult."* The message is clear in that it is an offence to have any sort of sexual activity with a child under the age of 16. The law may appear more forgiving with young accused under that age of 16 years engaging in sexual activities with other young females than the law is with men over the age of 21 years engaging in sexual activities with young females under that age of 16 years and more harmful, are those engaging in sexual activities with young females who are 14 years.

24. Under section 325 of the Criminal Code, where an accused over the age of 21 is charged with serious sexual assault, it is not a defence that the complainant consented to the activity that forms the subject matter of the charge. A defence <u>shall not</u> be available by virtue of section 190(4)(aa) of the Criminal Code in any circumstances to an accused charged with a section 325 sexual offence who was 21 years of age or older at the time. Further, subsection 6 goes on to say that

    *"… Except as otherwise expressly stated, it is immaterial, in the case of any of the offences constituted by the foregoing provisions of this Part or specified in subsection (1) of this section committed with respect to a complainant under a particular age, that the accused did not know that the complainant was under that age, or believed that the complainant was not under that age."*

25. How might the reasonable man in the street answer, when questioned, about adult males over the age of 21 years engaging in sexual activities with girls 14 years old? Unacceptable? Where does Parliament put its foot down to protect the weak and the vulnerable? Where does an accused adult begin to take responsibility for his/her actions? At what age is it no longer appropriate to use the defence that there was consent from a minor to a particular sexual act? Or that accused adult believed the young girl to be older?

26. In respect of certain sexual offences, the laws of Bermuda afford defences to defendants under the age of 21 years who engage in sexual conduct with young girls over 14 years old. Perhaps that may be less morally reprehensible because a younger person's behaviours are not thought out and are often times, rash and spontaneous. The older man may find himself in a situation where the best response is to walk away and instead he chooses to engage in sexual behaviours later found to be inappropriate and then want to blame someone else for his misfortune. Time to take responsibility for one's actions.

27. Parliament has carefully thought out the various ages of criminal responsibility and age of the victim in respect of morality offences. Some ages may seem arbitrarily set, others not. Whatever the case, the cut off age of 13 years or 14 years of the victim seems to be clearly set out. Twenty-one (21) years or older for an accused seems to be a determining point to cut off and be charged for sexual assault without the defence afforded a younger man under the age of 21 years.

28. Part X of the Criminal Code refers to offences against morality. Parliament set age thresholds to give defences to younger accused under the age of 21 years and no defences for accused over the age of 21 years. At the age of 21 years, a male cannot say and nor is it a defence afforded a male of that age, that a 14 year old girl consented to perform a sexual act with him or that he may have touched her in a sexual way and that she consented to being touched in that sexual way. Depending on the evidence presented to a Court, a defence of *"reasonable cause to have, and did in fact have, that belief at the time…"* about the age of the child complainant is afforded younger men under the age of 21 years; not over 21 years. Because such a defence is not open to someone over the age of 21 years, does that now make the provision of law unconstitutional? I

would say not. There are exceptions to aspects of the Constitution and this is one of them. Sexual activities with a young child complainant are not permissible.

29. The Age of Majority Act 2001 states in section 3 the following:

> *"Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years."*

30. On attaining the age of 18 years old, one is no longer considered a child. One cannot in one breath say that he/she is an adult at the age of 18 years old and in another breath look for protection for immoral behaviour over the age of 21 years old, something which Parliament has legislated on. In light of the passing of the Age of Majority Act 2001, it may be that Parliament now needs to reconsider the defence afforded those persons between the ages of 18 years and 21 years under subsection (4) of section 190 of the Criminal Code, if they are charged with certain sexual offences. No longer should a defence of reasonable belief concerning the age of the complainant exist for them.

31. Knowing and deliberate actions on the part of the Plaintiff to engage in a sexual act with a young child are not considered mistakes. The Courts are not inclined to change Parliament's laws; such laws are meant to demonstrate the wishes to the whole of society; such laws are meant to protect society and more so, when such laws are meant to protect the vulnerable younger ones from preying adults whose actions are deliberate and not unsuspecting/not by accident/not unknowingly engaging in such sexual acts.

32. At 21 years of age, one is deemed an adult as per the Age of Majority Act, fully engaging in adult ways and thoughts. One is no longer considered a boy engaging in boyish behaviours and pranks. Parliament intends that if one engages in adult activities, one also is responsible not only for one's actions and thoughts but also suffers the consequences of one's actions.

33. The Court is being asked to turn a blind eye to sexual offences which Parliament in its wisdom legislated as being unacceptable sexual behaviour between an adult and a child as well as to condone a sexual act(s) between a man and a child which is morally reprehensible; sexual acts

which should only be engaged in by consenting adults and not where one deemed to be an adult and the other - a child.

34. If one has the mistaken belief about someone's age, would it not be correct to ask that child outright what its age is rather than presume it to be something else based on some indirect information which, itself, has not been properly researched. If, when asked, the child then lies about her age, and looks to be the age that is asserted by her, then one might be a mitigating factor taken into consideration at the sentencing, if the adult is found guilty. The adult made a direct inquiry and was provided with an answer. It could then be shown that some effort was made to ascertain the age rather than to turn a blind eye to the fact and attempt to fall back on the excuse that one was mistaken about the age and now constitutional rights are being infringed.

35. Section 7 of the CCRF states as follows;

> *"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

36. As stated by Wilson, J. in Re B.C. Motor Vehicle Act,[1985] 2 R.C.S.:

> "*… Section 7 does not affirm a right to the principles of fundamental justice per se. Accordingly an absolute liability offence does not offend s.7 unless it violates the right to either the life, liberty or security of the person through a violation of the principles of fundamental justice. Section 1 of the Charter permits reasonable limits to be placed on the citizen's s. 7 right provided the limits are "prescribed by law" and can be demonstrably justified in a free and democratic society. If these limits are not imposed in accordance with the principles of fundamental justice, however, they can be neither reasonable nor justified under s. 1…"*

37. Society may not be abhorred about the unintentional and unknowing violation of a road traffic offence such as driving without a valid license. However, juxtaposing that type of offence with a

sexual assault involving an adult with a child, society will be abhorred by a 21 year old man touching, in a sexual way, a young girl under the age of 16 years. Most sexual assaults center on a deliberate action or intention seeking satisfaction/ sexual gratification in some way or the other. In accordance with section 6 of the Constitution, after hearing the evidence as led by the prosecution at trial, a properly directed jury could find sufficient evidence that the 21 year old committed a sexual assault on a young girl in accordance with our laws. The criminal trial afforded the Plaintiff falls well within the principles of fundamental justice.

38. The quote of the Chief Justice, provided to me by the Defendant in this action, in Miller (Police Sergeant) v. Crockwell [2012] BDA LR 56 at paragraph 50 seems to sum up the issue about age:

> *"For an accused who at the time of the offence was under 21 years of age, although consent can never be a defence, reasonable grounds for believing that the complainant was 14 years old or more is a defence* (to a charge of sexual exploitation). *For persons above 21 years of age, no such defence exists…The legislation contains a carefully calibrated legal regime according to which the strictest levels of criminal liability are reserved for persons or older with the result that the conduct of such offenders is legally defined as being more serious in terms of gravity."*

39. I also adopt the language used by Lord Hoffman in R v. G at paragraph 55 wherein he stated that: "*… the prosecution, the conviction and sentence were both rational and proportionate in the pursuit of the legitimate aims of protection of health and morals of the rights and freedoms of others."*

**Conclusion**

40. In conclusion, I dismiss this application and I rule that section 190 of the Criminal Code 1907 and more particularly, section 190(4)(aa), does not violate the Plaintiff's constitutional rights. Thus far, the Plaintiff has been afforded his constitutional rights throughout the criminal process. Costs are awarded to the Defendants, to be taxed if not agreed, unless it be shown that this action was covered by Legal Aid.

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C.A. Scott, A.J.