In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 26

MILTON RICHARDSON

Appellant

-v-

THE QUEEN

Respondent

REASONS
(In Court) [1]

Date of Hearing: December 10, 2014
Date of Reasons: January 14, 2015

Mr. Michael J. Scott, Browne Scott, for the Appellant
Ms. Cindy Clarke, Deputy Director of Public Prosecutions (Litigation), for the Respondent

Introductory

1. On June 10, 2013, the Appellant was charged with four counts of sexual assault while in a position of trust contrary to section 182B(1)(a) of the Criminal Code in respect of a young person, C. The allegations were that on two occasions, firstly between January 5 and 12, 2013, he kissed C on the neck (Count 1), and secondly, on January 19, 2013, he kissed the ear, neck and mouth respectively of C (Counts 2-4). C was at all material times 11 years old.

2. The trial took place in the Magistrates' Court (the Worshipful Khamisi Tokunbo) on December 13, 16 2013 (Prosecution case) and February 14, 2014 (Defence case). Judgment was delivered on March 3, 2014 when the Appellant was found guilty on all four counts. On May 15, 2014, he was sentenced to 9 months imprisonment on Count 1 and 18 months' imprisonment concurrent on each of Counts 2 to 4, followed by 2 years' Probation including a condition that he should not have supervised care of any

[1] The Judgment was circulated without a formal hearing for handing down.

minor for that period. The total custodial sentence was an eyebrow-raising three times the maximum sentence suggested for a single offence in the '*Sentencing Guidelines for Sexual Offences Tried in the Magistrates' Court*' ("the Guidelines") at page 9.

3. The Appellant appealed to this Court against both conviction and sentence. In a judgment delivered on November 10, 2014, I dismissed the Appellant's appeal against conviction.

4. Following a hearing on December 10, 2014, I allowed the appeal against sentence by setting aside the cumulative sentence of 18 months' imprisonment for a series of offences committed on two occasions (and which might well have been charged as two rather than four counts), and substituted a cumulative sentence of 12 months' imprisonment. The 2 years' probation ordered to follow that custodial sentence was not disturbed. I now give reasons for that decision.

The sentencing decision

5. The following extracts form the sentencing remarks summarise the basis on which the Learned Magistrate imposed the sentences which he imposed:

> "…*This case was one that involved the Defendant using his mouth to kiss the boy about the neck, ear and mouth. The most aggravating aspect being the attempt to put his tongue into the boy's mouth and leaving saliva or wetting the boy's mouth.*
>
> *In my judgment these facts together with the prevalence of these offences in this Court require the Court* [to] *depart from the range ….suggested in the guidelines*… "

6. Ms. Clarke (who did not appear below) conceded that the Prosecution had encouraged the Learned Magistrate to effectively ignore the Guidelines issued by me administratively on December 2, 2013. However, she justified this by reference to their non- binding character, a point vindicated by paragraph 3 of the Guidelines themselves:

> "…*sentencing judges in the Magistrates' Court will continue to be formally bound by applicable legislation and judicial decisions of the higher courts*…"

7. The present appeal affords an opportunity for this Court, subject to any further decision of the Court of Appeal[2], to lay down binding guidance as to how the Guidelines should be interpreted and applied.

The Guidelines

8. The expressly articulated rationale underpinning the Guidelines is set out in their introductory paragraphs:

> "*1. There has been heightened public concern both locally and internationally in recent years about the way in which the criminal justice system deals with sexual offences, in particular sexual offences involving children. The statutory framework for dealing with such offences was substantially modernised by amendments to the Criminal Code in 1993, with further minor modifications since then. However, special interests groups have been active since then in campaigning that an appreciation for victims' rights keeps pace with the more firmly entrenched protections afforded to accused persons.*
>
> *2. Necessarily selective reporting of sentencing hearings in the Magistrates' Court, where the majority of sexual offences are tried, has occasionally resulted in unjustified and highly emotive criticism of sentencing judges. The internet age and the blogosphere have dramatically increased the scope for public debate and scrutiny of the sentencing process. It is accordingly now incumbent on the Judiciary to take proactive steps to ensure that the sentencing principles applicable to sexual offences are clearly understood, not just by judges and lawyers, but the wider public as well.*
>
> *3. The present Guidelines have been developed by the Judiciary after consultation with the Attorney-General, Bermuda Bar Council, the Commissioner of Police, the Director of Public Prosecutions, the Department of Child and Family Services, the Department of Court Services and special interest groups1. They are intended to serve as a guide to sentencing judges and all persons interested in the sentencing process in relation to sexual offences. The Guidelines are inspired by the England and Wales Sentencing Guidelines Council's 'Sexual Offences Act 2003' as regards general principles and approach but adapted to take into account Bermuda's distinctive legislative context…*"

9. The Guidelines have three core pillars which are relevant to the present case and will likely be relevant in most cases:

    (a) gravity is defined by reference to the nature of the physical acts in involved with penetration (involving genitalia) at the top of the gravity chart;

    (b) sentencing brackets or ranges are prescribed based on the gravity of the acts involved in the relevant offence;

[2] The Crown filed an appeal against the present decision after the hearing of the appeal against sentence and before the present Reasons were given.

(c) the sentencing starting points are intended to be assessed by reference to the nature of the physical acts involved, with the existence of mitigating or aggravating factors determining whether:

(i) a sentence at the lower, middle or upper range of the applicable sentencing range is appropriate, or

(ii) in exceptional cases where the impact of the aggravating or mitigating factors is unusually great, a sentence outside of the normal range is justified.

10. The sentencing starting points set out in the Guidelines are explicitly derived from the England and Wales suggested tariff for similar offences. As explained in paragraph 18 footnote 4:

> "*The approach adopted in these Guidelines has generally been to follow the suggested starting points and sentencing ranges in England and Wales for equivalent offences tried on indictment reduced by an amount roughly proportionate to the difference between the maximum sentences e.g. where the English maximum penalty is 15 years imprisonment and the Bermudian summary maximum is 5 years, the suggested sentence will be 1/3rd of that recommended in for England and Wales subject to an appropriate adjustment where the Bermudian Supreme Court sentencing power is materially different. The Bermuda maximum sentence for sexual assault is 20 years compared with only 10 years in England for victims over 14 and 14 years for victims under 14 years of age.*"

11. An unarticulated premise underlying my endorsement of the England and Wales sentencing tariff may be summarised as follows. Bermuda has historically adopted a more punitive approach to sentencing than England, despite the general trend of following English precedents in other areas both criminal and civil law. It is a notorious fact that Bermuda, largely in company with other New World ex-slave societies, is in the top 20 of the *Wikipedia* persons incarcerated per capita league table[3]. This strongly suggests that Bermuda' prosecutorial, judicial and social policies are not yet fully disengaged from a historical legal culture which privileged values of retribution over more restorative principles.

12. Every custodial sentence which is imposed involves a potential compromise of certain fundamental freedoms[4] protected by Chapter 1 of the Bermuda Constitution (in Bermuda) and the Human Rights Act 1998 (in Britain). The relevant fundamental

[3] http://eng.wikipedia.org/wiki/List_of_countries_by_incarceration_rate. Sixteen of the top 20 incarcerating territories are ex-slave societies.
[4] Most obviously freedom from arbitrary arrest or detention and freedom of movement.

freedoms flow from a common spring: the European Convention on Human Rights and Fundamental Freedoms. Bearing in mind that Bermudians are now British citizens with liberties defined by reference to the same international instrument as British citizens subject to the law of England and Wales, in my judgment Bermuda law, all other things being equal, should aspire to respect the right of liberty applying standards at least as favourable as those imposed by the courts of England and Wales. There of course be local differences which justify a more punitive approach in Bermuda based on, for instance, higher levels of prevalence of certain types of offences. As far as sexual offences are concerned, however, positive data would have to be adduced by the Crown to support a finding that such offences are, to a material extent, more prevalent in Bermuda than in England and Wales.

13. This high level analysis does not simply operate at an abstract academic or aspirational level wholly detached from the 'real world'. It finds implicit support in the sentencing principles Bermuda statutory criminal law and does not simply impose upon this Court a duty to adopt a 'modern' view of defendant's rights. It also requires this Court to consciously adopt a 'modern' view of victim's rights against a social and legal history in which such rights have often enjoyed very limited recognition. As this Court observed in *Crockwell* [2012] SC (Bda) 47 (7 September 2012), [2012] Bda LR 56[5], prior to the adoption of the *Guidelines*:

> "*70.Modern courts operating in societies governed by the rule of law must walk a fine line in developing sentencing policy. The courts must seek to ensure that sentences adequately reflect the reasonable expectations of the community without becoming hostage to the worst instincts associated with 'mob' or 'street' justice. The sentencing principles laid down by Parliament in the Criminal Code must be applied in a way that does not discriminate against any of the parties to the proceedings, including defendants, on any of the grounds prescribed by section 12 of the Bermuda Constitution and international human rights conventions applicable to Bermuda such as the European Convention on Human Rights.*
>
> *71. Section 53 of the Criminal Code provides that: "The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society…" The guidelines that follow were enacted in 2001 as part of a comparatively new Government's Alternatives to Incarceration programme.*
>
> *72. From an English perspective, they may be seen as simply codifying the common law[6]. From a Bermudian law perspective, however, these statutory provisions ought properly to be viewed as an attempt to make a decisive break with Bermuda's historical legal past in which the criminal justice system had*

[5] This case was cited by the Learned Magistrate in his sentencing judgment.

[6] It is respectfully suggested that the assertion by Collett JA in *R-v-Bascombe* [2004] Bda LR 28 at page 3 (on behalf of the Court of Appeal for Bermuda) that the sentencing code incorporated in sections 53 to 71 of the Criminal Code in 2001 "*is largely a codification of previous practice*" reflects an unduly compressed and rose-tinted view of applicable Bermudian legal history.

displayed an unhealthy enthusiasm for (at worst) and casualness about (at best) the incarceration of Bermudian men of African descent, both during and after the slavery era. This history of legalized discrimination will be revisited again below in considering the appropriate modern sentencing approach to sexual offences against young children whose formal legal rights have also not traditionally been recognised. Notwithstanding these historical ruminations, of course, Bermuda's modern sentencing regime nevertheless unequivocally dictates that whoever commits sufficiently serious offences must inevitably expect to receive sentences of immediate imprisonment.

73. When regard is had to public sentiment on matters of sentencing, nevertheless, the courts must filter public outbursts through a lens that is shaped by the modern legal constructs which govern the application of the rule of law in Bermuda today….

74. For my part, therefore, while sentencing policy can never properly be oblivious of the way sentences are likely to be perceived by the citizens whom the courts are designed to serve, unconsidered public reaction to particular sentences should be treated with extreme care. Because popular conceptions of the function and role of sentencing may not yet have fully imbibed the underlying philosophy of our late 20th century Constitution and the early 21st century sentencing principles set out in the Criminal Code."

14. Against this background, the Guidelines represent a considered attempt to introduce rationality, objectivity and legal modernity into the sentencing process with a view to achieving not just consistency in sentencing but also appropriate respect for victims' and accused persons' rights.

Application of the Guidelines to the facts of the present case

15. The Appellant was convicted following a trial of four offences arising out of essentially two incidents on separate dates. He was a person of previous good character. Each offence involved kissing; one involved attempting to insert the tongue of the Appellant into the victim's mouth. There was otherwise no intimate touching or sexual penetration involving the private parts of either the Appellant or the victim. No medical evidence was adduced to suggest that the victim suffered any exceptional degree of psychological harm. The main aggravating feature was an integral element of the offence itself, namely that the Appellant was in a position of trust.

16. On the other hand, as I observed in the course of the hearing, the offence was in my judgment aggravated by the fact that the club which the Appellant was running offered extra-curricular activities specifically designed to promote the healthy development of Black boys. The Appellant assumed a heightened degree of trust in supervising the 11 year old complainant in this case. The Appellant knew the victim's mother and it seemed clear that she entrusted her son to his care specifically with a

view to affording him an opportunity to have a positive male role model. The social enquiry report assessed his risk of reoffending as being in the medium range.

17. I found that that the facts of the present case clearly fell within the following sentencing range in the Guidelines for the offence of sexual exploitation of a child:

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Type/Nature of activity	**Starting point**	**Range**
Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)	***12weeks custody** if the victim is under 14* ***4 weeks custody** if the victim is aged 14 or over*	***1 week–6 months custody*** ***An appropriate non-custodial sentence.***

"

18. Because there were essentially two incidents of offending on two separate dates, I found that that the appropriate overall sentence was to impose two consecutive sentences of six months' imprisonment, which was at the very top of the applicable scale in the Guidelines. In fact I imposed six months imprisonment concurrent for each of counts 1 to 3 and 6 months' consecutive for count 4, in place of 9 months imprisonment for count 1 and 18 months' imprisonment concurrent for each of counts 2 to 4 inclusive. I did not disturb the 2 years' probation order, to commence upon his release, the conditions of which include the Appellant registering as a sex offender and being prohibited from being in the unsupervised company of any minors throughout that period.

19. Mr. Scott sought a more generous reduction of his sentence so as to result in his immediate release on the date of the appeal against sentence hearing, December 10, 2014. I rejected this plea, reducing the sentence by one third but imposing the most severe sentence that could be imposed consistently with my own Guidelines. Ms. Clarke sought to uphold the 18 months' custodial term, pointing out that 24 to 30 months' imprisonment followed by three had been sought below. I rejected Mr. Scott's submission that the basic offence was not aggravated in any way. On the other hand I saw nothing so exceptional in the circumstances of the offence and the offender to take the Appellant's case out of the applicable sentencing bracket altogether.

20. The Learned Magistrate relied on the facts of the case, which fall within the relevant range, as a purported justification for treating the case as falling outside of the range. As Mr. Scott submitted, this is circular reasoning. It is important to note that the Guidelines explicitly contemplate more serious forms of aggravation, none of which

were present. Examples of such factors include intimidation, abduction, the use of drugs or alcohol to facilitate the offence and the fact that the offender knows that he has a sexually transmitted disease. Accordingly, had it been proved that in kissing the boy the Appellant exposed the victim to the risk of infection with a disease, for instance, that would have been a serious aggravating factor justifying a sentence above the recommended generally applicable sentencing range.

21. While Ms. Clarke was correct to submit that the Magistrates' Court was bound to follow binding judicial precedents ahead of the Guidelines, she did not identify any such precedents which were binding on either the Magistrates' Court or this Court. She referred the Court to *Talbot-v-Angela Cox (WPC)* [2003] Bda LR 44, a case where a teacher pleaded guilty to sexually exploiting a 12 year old student in his care and was sentenced to 3 years imprisonment in the Magistrates' Court. L.A. Ward CJ reduced the sentence to 15 months' imprisonment. The touching in the *Talbot* case involved the offender touching the victim's penis. This was a higher sentencing bracket altogether where the starting point is potentially 12 months' imprisonment under the current Guidelines.

22. To the extent that *Talbot* would have indirectly suggested a sentence more severe than that indicated by the Guidelines for the present offences, I prefer the approach prescribed by the Guidelines and decline to follow that decision on the grounds that it is inconsistent with the current sentencing policy of this Court. It was impossible to ascertain from the unusually short judgment of Meerabux J in *Wheatley-v-Philip Taylor (PS)* [1998] Bda LR 32 (where a three year sentence of imprisonment was upheld by this Court for an offence which had "*some of the unpleasant aspects of*" a serious sexual assault), that the latter sentence had any relevance to the facts of the present case.

Conclusion

23. For the above reasons on December 10, 2014 I allowed the Appellant's appeal against sentence by quashing his aggregate sentence of 18 months imprisonment and substituting an aggregate sentence of 12 months' imprisonment, in respect of two incidents of sexual exploitation. The additional penalty of 2 years' probation to follow his release was not challenged and was not disturbed.

Dated this 14th day of January 2015, _____

IAN R.C. KAWALEY CJ