The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 7 of 2019

B E T W E E N:

PERNELL BRANGMAN

Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Bell, JA
Smellie, JA

Appearances: Vaughn Caines, Forensica Legal Ltd., for the Applicant; Cindy Clarke, Office of the Director for Public Prosecutions, for the Respondent

Date of Judgment: **18th November 2019**

EX TEMPORE JUDGMENT

Sentences of 12,11, and 10 years, to run concurrently, for offences of sexual exploitation of a young person and carnal knowledge – whether the sentences were manifestly excessive or wrong in principle – whether leave to appeal against sentence should be given.

CLARKE P:

1. This is the judgment of the Court.

2. This is an application for leave to appeal by Pernell Brangman ("the Applicant") against the sentences imposed upon him by the Supreme Court on 23 July 2019. On 12 April 2019 the Applicant was convicted by a unanimous decision of the jury in respect of two counts of sexual exploitation of a young person by a person

in a position of trust, and one count of unlawful carnal knowledge of a girl under the age of fourteen.

3. The sentences imposed on the Applicant were as follows: On **Count 3** – unlawful carnal knowledge of a girl under the age of 14 – he was sentenced to 12 years imprisonment. On **Count 1** – exploitation of a young person by a person in a position of trust – he was sentenced to 10 years. In respect of **Count 2** – a similar charge of exploitation – he was sentenced to 11 years. All three sentences were ordered to run concurrently.

4. On **13 September 2019** Simmons J refused leave to appeal. The Applicant sought leave to appeal to this court from that decision on the same day.

5. The case presented by the Crown, which the jury must have accepted, was this. The victim – AB - was the applicant's step daughter, he being married to her mother. During the summers of 1998 and 1999 when AB was 10 to 11 years old, and alone at her home, the Applicant would come there on his lunch hour. During these visits he would perform oral sex on her (the subject of Count 1) and get her to perform oral sex on him (the subject of Count 2). AB said that this would occur at least twice a week.

6. On one occasion during the summer of 1998 the Applicant had full sexual intercourse with the victim. That was the subject of Count 3. The victim told the Applicant that she did not want him to have sex with her as it would hurt. The applicant continued to have sex with her nonetheless even though she told him to stop and that he was hurting her. AB said that after a few minutes the Applicant did stop.

7. The Applicant would tell the victim that if she allowed him to perform these sex acts on her that he would buy her lunch.

8. AB did not tell anyone what had happened until 2011 when her best friend noticed peepholes in her bedroom door. AB told her mother about the holes and

her mother confronted the Applicant. He initially denied, but later admitted, cutting the holes there. AB then disclosed the full events and the Applicant moved out of the house.

9. No reports were made to the police at the time. It was only in September 2017 that AB reported the incidents after she had received counselling.

10. It is apparent that the case had a number of seriously aggravating features. The first was the age of the child – she was only 10 years old at the beginning. The second is the fact that the applicant was in a position of trust. The victim was his step daughter. The third is that these crimes took place in her home, which should have been, for the victim, a place of safety. The fourth is the difference in age between the victim and the Applicant - over 20 years. The fifth is that the unlawful carnal knowledge occurred despite the victim's resistance. The effect of all this was that the victim bore the burden of what she had suffered for over a decade before she revealed it to anyone; and it was only after counselling that she felt it possible to reveal it to the police.

11. Lastly, although it was entirely open to the Applicant to require the Crown to prove its case, the effect of his so doing was that the victim had to give evidence in public of that which she had undergone years before. The applicant did not himself give evidence at the trial. He can, thus, claim no mitigation for any plea of guilty. Further, in those circumstances his apology to the family, given upon the *allocutus*, has something of a hollow ring about it.

12. The Learned Judge – Greaves J – considered some 7 previous cases which were cited to him. Having done so he observed:

"*This is a serious offence…it is the taking of advantage of a very young child by a very grown man, and the sentences of these courts must always, in my opinion, demonstrate a firm resolve that this type of behaviour will not be tolerated*"

13. Having considered all the authorities placed before him, the Learned Judge considered that the appropriate starting point in respect of the offences of exploitation was 10 years' imprisonment. He identified only one mitigating factor – the Defendant's clean record. He identified the aggravating factors as including the Defendant's breach of trust; the fact that the offences were committed on more than one occasion; and the fact that the applicant got bolder in his sexual misconduct culminating in inserting his penis into the child. He expressed the view that the younger the child and the older the man the more severe the penalty should be.

14. In the light of these aggravating factors, he considered that the sentence for the carnal knowledge count should be 12 years and the sentences on Counts 1 and 2, 10 years and 11 years, respectively, Count 2 being more serious than Count 1. He ordered that the Applicant be added to the Sexual Offenders' Register.

15. The Judge sentenced the Applicant in circumstances where he described the maximum penalty for all three offences as 25 Years' imprisonment. In that he was in error, having been misinformed as to the position by both Counsel. At the time that these offences were committed the maximum sentence prescribed for each of them was 20 years. The relevant *maxima* were raised by amendments on 18 July 2006. The cases to which the judge was referred were cases which arose after the amendment.

16. We do not regard this misunderstanding as significant for the present purpose given the wide gap between the sentences in fact imposed and the maximum, whether the latter be 25 years or 20 years. Nor do we regard the cases decided when the maximum was 20 years as irrelevant for that reason.

17. In his written submissions to us, Counsel for the Applicant placed particular reliance on the following cases:

18. In **Milton Richardson v The Queen 2015** the Appellant was convicted on 4 counts of sexual exploitation whilst in a position of trust in the Magistrates

Court. The victim was a boy of 11 years. The Appellant was 47 years. The Appellant invited the victim into his bedroom to watch television and whilst sitting next to him in bed kissed the victim several times on the cheek, once in the ear and twice on the mouth. The magistrate imposed a sentence of 18 months, which was approximately 30% of the allowable maximum for the Magistrate's Court, which was 5 years. On appeal the Chief Justice reduced the sentence to one of 12 months' imprisonment, with 2 years' probation. On further appeal, this Court would, in fact, have imposed a total sentence of 18 months and only failed to do so because by the time the case came before the Court the Appellant had already served the sentence imposed. The Applicant relied on this case in support of the proposition that an appropriate sentence for the Applicant would have been one of 8.5 years to 9 years in total.

19. We cannot regard this case as of any assistance for present purpose. The facts of the offences were of a magnitude many times less than the facts of the present case. The appeal was a second appeal from the Magistrates Courts, where the powers of sentencing are much less than in the Supreme Court. The fact that the sentence imposed by the Magistrate was 30% of the maximum that he could impose on the facts of that case, provides no guidance as to the appropriate level of sentence in the present one.

20. The next case relied on was **Miller (Police Sergeant) v Crockwell** [2012] Bda LR 56, which concerned the sexual exploitation of a girl under the age of 14 years by an offender who was not in a position of trust and was himself under 21 years [46]. In the course of his judgment, Kawaley CJ said that modern courts operating in societies which are governed by the rule of law must walk a fine line in developing sentencing policy. They 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. Sentencing principles must be applied in a way which does not discriminate against any of the parties to the proceedings, including the defendant on any of the grounds prescribed by section 12 of the Bermuda Constitution and applicable international human right conventions.

21. At paragraph 73 of his judgment, the Chief Justice cautioned that 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; and resist paying heed to public sentiment, particularly that which is articulated not in a reasoned and objective way but in a highly emotive reflex manner. In paragraphs 76 -99 the Chief Justice provided an analysis of the appropriate approach to sentencing for offences of sexual exploitation of young persons committed by persons over the age of 18 years when prosecuted in the Magistrates Courts.

22. It is submitted, having regard to that case, that in the present case, the Learned Judge yielded reflexively to emotion.

23. We would not quarrel for a moment with the observations of Kawaley CJ. We cannot however accept that the judgment of the Learned Judge was somehow overborne by a surge of emotion. On the contrary he considered the case law cited to him and gave his reasoned decision by reference to the factors that he considered significant. The fact that he referred to the offence as serious, and to the need to demonstrate a firm resolve that this type of behaviour will not be tolerated, was entirely apposite.

24. In **R v Cleveland Rogers** [2015] CA (BDA) 21 Crim, the Respondent had pleaded guilty to one offence of unlawful carnal knowledge contrary to section 181 of the Criminal Code and three offences of Sexual Exploitation of a Young Person contrary to the section 182A(1)(a) of the Code. All the offences occurred over the course of one night. This Court increased the sentence of 5 years' imprisonment for the Offence of Unlawful Carnal knowledge imposed at first instance to one of 7.5 years. That sentence was a sentence imposed following a plea of guilty. The victim was a few days short of her 14th birthday and the respondent was 46 years. He had a relationship with the victim's mother. In that case this court was referred to a number of authorities but was not persuaded that any of them were of great assistance with regard to the appropriate sentence.

25. The Court of Appeal identified several aggravating circumstances, namely (a) that the offences occurred at night whilst the victim was asleep in her own bed in her own house; (b) the age disparity between under 14 years and 46 years; (c) the breach of trust given that the Respondent was in the house due to his relationship with the victim's mother; and (d) the Respondent's return to the victim's bed after being disturbed by the mother after which he committed the offence of rape. The Respondent had a number of previous convictions mostly in the last century and none of a sexual nature. The only mitigation was the late pleas of guilty for which the Judge and the Court of Appeal were content to give a 15% discount. The Court thought that *"in the particular circumstances of this case, and we emphasize those words*" the total sentence should be 7.5 years.

26. The Applicant submits that it follows from the decision of this Court in that case that, absent a plea of guilty, the appropriate sentence would have been some 8.75 years since a deduction of 15% from that figure would produce approximately 7.5 years (in fact 7.43%), whereas the applicant got 12 years.

27. The mathematical accuracy of this observation is undeniable; but we are not persuaded that it leads to a conclusion that the sentence of 12 years was excessive. First, the Court of Appeal in **Cleveland Rogers** was keen to indicate that its judgment was directed to the particular circumstances of that case. It was laying down no general rule. Secondly, the circumstances of **Cleveland Rogers** were substantially different. In the present case the child was considerably younger; and the offences were not committed on a single night but as part of a pattern of increasing sexual oppression. We would regard these factors as amply justifying an increase from 8.75 years to 12 years.

28. Moreover, we note that in **Cleveland Rogers** the Court of Appeal held that this was a case in which the trial judge should have made an order under section 70 P of the Criminal Code to the effect that the Respondent should not be eligible for parole until he had served half his sentence, and this Court made that order.

In practice that could mean that, the sentence in **Rogers,** being 8.75 years if there was no plea, **Mr. Rogers** would be eligible for parole after 4.375 years, whereas in the present case the Appellant would be eligible after four years.

29. In **Shannon Lawrence v The Queen** [2016] CA (Bda) 20 Crim, there was an appeal against conviction and sentence for one count of sexual exploitation and three counts of incest committed by a father against the 15-year-old daughter of his co-habitee. The Appellant was sentenced to a total of 15 years' imprisonment, comprising 3 years for sexual exploitation on count 1; 5 years for incest on count 2; 6 years for incest on count 3 to run consecutively with count 2; 7 years for incest on count 5, to run concurrently with count 3;

30. This was a case in which the same trial judge as in the present case, as the court put it, "*without doubt harboured strong feelings about the nature of the offences committed*" and expressed the view, with which this Court agreed, that the 7 year maximum for incest was inadequate, particularly having regard to the penalty for sexual exploitation which was 25 years. This Court dismissed the appeal against conviction, but partly allowed the appeal against sentence by increasing the sentence on the count of exploitation to 6 years to run consecutive to the counts of incest, which were reduced to five years for each count running concurrently, so as to vary the total from 15 years to 11 years.

31. This decision might be thought to be somewhat surprising in part. It was reached by reference to English authority to the effect that, as a matter of practice, sentences should be concurrent when they arise out of the same incident and that the problem, in such circumstances, is one of determining what is the appropriate sentence for the offences taken as a whole.

32. The potential for surprise is because in **Shannon Lawrence** the counts of incest arose out of the same criminal activity but these were spaced over different periods of time. It might be thought that this is not an example of counts arising out of the same incident. It is also material to note that the decision of the Court

was based on two matters (a) the total sentence for the Appellant's conduct as a whole; and (b) that the maximum sentence for the offence of incest was then only seven years. In the present case the maximum sentence at the relevant time was 20 years. In these circumstances we find this case of no real assistance.

33. We would add that we do not accept that **Shannon Lawrence** is accurately described as a case in which the Judge allowed his personal bias to influence his decision. What he was influenced by was, as this Court put it, "*offending of the most serious and vile nature*" and an inadequate statutory maximum.

34. The Prosecution drew the attention of the Judge to a number of other cases, all of which were decided after the amendment to increase the maximum sentence.

35. In **R v Wayne Hollis**, Criminal Appeal No 10 of 2008 the defendant pled guilty to having videotaped himself digitally penetrating the vagina of his step daughter. For that sexual exploitation he received a sentence of 12 years' imprisonment reduced to 10 years on appeal. The sentence in this case does not seem to us out of line with the sentence in that one.

36. In **Melvin Martin v R** [2010] Bda LR 54 the Defendant who was 25 years, was charged with sexual exploitation, unlawful carnal knowledge and child pornography. He entered guilty pleas and the Court of Appeal sentenced him to 14 years' imprisonment in all, observing that "*heavy penalties are prescribed by the Legislature for offences of which the Respondent stands convicted. These heavy penalties indicate the seriousness with which the Legislature regards these offences and a clear message must be sent to the deviant members of society who might be tempted to commit similar offences*". In relation to a 14-year sentence on a plea, the present 12-year sentence without a plea does not seem to us out of line. We note that the exploitation sentences were increased from 7 years to 9 years.

37. In **Jomar Caines v The Queen** [2015] Bda LR 6 a 35-year-old Appellant suddenly grabbed a 10-year-old boy and fondled him in the chest area in the

bathroom, He received 12 years' imprisonment upon guilty pleas to counts of sexual exploitation. This behaviour, if the summary of which we have received is correct, seems markedly less bad than the sexual exploitation that resulted in 10- and 11-year sentences in respect of the applicant.

38. In **R v Shuja Muhammed** Case No 5 of 2014 a 40-year-old Defendant, after a full trial on four counts of sexual exploitation whilst in a position of trust of a 7-year-old whom he kissed and groped in a bathroom was sentenced to 10 years' imprisonment. The sentences imposed in the present case do not seem in any way out of line with the sentences imposed in that case, because, even though the child in that case was younger, the exploitation was less severe.

39. In **The Queen v Michael Byron** Case No 36 of 2014, a 44-year-old man pleaded guilty to sexual exploitation and received a sentence of 6 years' imprisonment. He was alleged to have touched the vagina of a five-year-old and placed her hand on his penis. The sentence in the present case does not seem out of line with the sentence in that case either.

40. The prosecution has also drawn out attention to two cases decided before the increase in the maximum sentence. In **Andrew Hayward v R** 1997 CA 5 the Applicant was charged with three counts of incest, indecent assault and sexual exploitation. He was convicted and sought leave to appeal a 7-year sentence on the count for sexual exploitation. Leave was refused. The judgment is so short that it is of very little utility for present purposes. Further, it was reached at a time where the maximum penalty for incest was only 7 years.

41. In **White v R** [2005] Bda LR 59 a sentence of 25 years' imprisonment was reduced to 16 years in respect of an Appellant who had committed a series of sexual acts with 3 male victims over a period of 2 years. Complainant A was aged between 10 years and 12 years. Complainant B was 12 years and his complaint was in relation to one incident. Complainant C was 11 years and his complaint was in relation to all of the counts, save one. This Court looked at the totality of the matter, and recognized that these offences were not part of a continuous

course of conduct (as is the case with which we are concerned). This Court held the Judge to have been in error in passing maximum sentences for offences of sexual assault and sexual exploitation, and that the sentence of 25 years passed on one count was excessive for a single offence. The total sentence overall was reduced to 18 years.

42. The circumstances of that case were considerably worse than in the case before us, but comparison of the facts in the two cases and the respective sentences do not cause us to think that the sentences with which we are concerned are excessive.

43. We are not persuaded that the Learned Judge erred in some way in law in reaching his decision as to the appropriate sentence or that he disregarded any applicable principle. Nor are we satisfied that his sentence was manifestly excessive as being outside the range of sentences that a trial judge could properly impose on the applicant.

44. The Judge passed his sentences in respect of three distinct offences. He was right to do so. The Prosecution case was that the three offences were part of a continuous course of conduct, but the counts were not drafted in terms that they covered several actions over a course of time. We do not propose to lengthen this judgment by referring to the rules on the drafting of indictments. We would only observe that consideration needs to be given in future as to whether indictments can properly be drafted so as to contain more than one act in each count, and if so, the counts should make plain that that is what is being said.

45. The citation of previously decided cases is not without utility. But as was said in this Court in **Cousins v Kirby** Cr Appeal 33 of 1989, citing **Paul DeSilva v The Queen** Cr. App. 42 of 1985, "*the proper approach [is] not to take case by case arguing disparity but to decide whether right thinking members of the public knowing all the facts and looking at what had happened would conclude that something had goes wrong with the administration of justice and that a particular*

convicted person had been treated unfairly". The Court in that case did not think it ought to interfere unless the sentence was manifestly excessive.

46. We agree with this approach, and, since the sentences passed in this case do not appear to us to be manifestly excessive, we shall refuse the application for leave to appeal.

BELL JA:

47. I agree.

SMELLIE JA:

48. I also agree.

C.S.P.S.C.Clarke

CLARKE P

Geoffrey R. Bell

BELL JA

SMELLIE JA