In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2021 No: 25

BETWEEN:

THE KING

And

MALEKE MARTIN

RULING ON SENTENCE

Section 182B(1)(b) of the Criminal Code (sexual exploitation of a young person while in a position of trust)- Section 182C of the Criminal Code (showing offensive material to a child)- Section 70 P requirement to serve at least half of prison sentence and order post-release Supervision Order

Sentencing Hearing Dates:	Monday 27 March 2023
Date of Ruling on Sentence:	Tuesday 11 April 2023
Counsel for the Crown:	Ms. Cindy Clarke, the Director of Public Prosecutions
Counsel for the Accused:	Ms. Elizabeth Christopher, Christopher's

RULING of Shade Subair Williams J

Introduction

1. The Accused, Mr. Maleke Martin, appears before the Court for sentence, having been convicted by the unanimous verdict of a jury of 12 on 9 December 2022, to two counts of sexual exploitation of a young person while in a position of trust and one count of showing the same child offensive material.

2. His sentence hearing was held in this Court on Monday 27 March after which I reserved to provide this ruling.

Summary of the Facts

3. The Complainant in this matter is now a 9 year old female who was sexually exploited by the Accused when she was 6 going on 7 years of age. At that time the Accused was 23 years old. I will refer to the Complainant as "the Child".

4. The Accused was a 19 year old when he first met the Child who at that time was all but 3 maybe 4 years old. He and the Child's mother "the Mother" formed what she, the Mother, perceived to be a close and sincere friendship, so much so that they came to cohabit at her residence. This living arrangement was also motivated by the Mother's need for support and assistance following a serious road traffic accident which left her wheel-chair bound for an extended period of time.

5. So, in August 2020, the Accused was living at the Mother's house (rent-free) with her spouse and the Child. As the Accused himself told this Court during his evidence on the stand, this cohabitation took on the form of family dinners at the table and family time in the main upper part of the house above the Accused's living quarters which was at the base of a stairwell where the laundry machines were located.

6. However, as time progressed, the Defendant started withdrawing more and more from the family unit and spending time downstairs in his own living space. At trial, when the DPP questioned Mr. Martin during cross examination as to why that was, he said:

   "*I, myself, personally, like to be alone- so I usually go home, play play-station- don't come back outside*"

7. However, despite his claim to want to be alone, the Child was sleeping in his bed with him every weekend. Mr. Martin himself told this Court under oath:

"*On the weekend she could stay as long as she wants- she would spend pretty much all day...If I was there- I was on YouTube on my phone watching Netflix- sometimes she would come down and play PlayStation*"

8. During this entire period the Mother was vulnerable in that she was in a wheelchair and so was unable to climb down those steps to get to Mr. Martin's living space. In this way, the Defendant was isolating and grooming this 6 year old Child in the lead up to the sexual acts which he later perpetrated on her.

9. Additionally, Mr. Martin took advantage of opportunities to be in the Child's presence when she was naked and bathing or getting dressed. This emboldened him to show her the pornographic footage displayed on his phone. In recounting this, the Child told this Court that the Accused held the phone while she saw "boobs" a vagina and "a boy shaking his noodle". The showing of this material was deliberate and calculative as the Child told this Court that Mr. Martin instructed her not to tell anyone about this. Again, this occurred while the Defendant was alone downstairs in his living space with the Child who was unprotected by her immobile mother or any other parent or adult.

10. So, the Child slept in the Defendant's bed with him every weekend. She would sleep in nothing but her panties. This was a 6 year old girl sleeping with a 23 year old man.

11. The sexual act to which Count 1 refers is as follows: the Defendant incited the Child to touch his penis with her hands which were covered in socks. She told this Court that she did so as his "noodle" "dribbled".

12. Not satisfied to leave it there, on that same occasion, the Accused placed his penis in the middle of the Child's vagina. This is the offence of sexual exploitation under Count 2. In trying to provide some detail, during the video recorded evidence, the Child said "*he had like a hump on his back*" and she was laying down on his bed as this occurred. When asked how this made her feel, the Child replied "*it felt weird*" and she shook her head as if to shrug away the image and memory of it.

Analysis:

Maximum Penalty

13. The offence of sexual exploitation while in a position of trust carries a maximum penalty of twenty-five (25) years of imprisonment pursuant to section 182B(1)(aa) of the Criminal Code. This *maxima* increased from 20 years to 25 years by amendments which took effect on 18 July 2006, as observed by the Court of Appeal in *Pernell Brangman v R* Criminal Appeal No. 7 of 2019.

14. The maximum sentence for the offence of showing offensive material to a child is 10 years imprisonment under section 182C.

Previous Case Law

15. The Court of Appeal in *AB v R* [2017] Bda LR 60… In that case the Appellant, who had no previous record, was convicted after trial by jury on two counts of sexual exploitation on his daughter of 7-8 years in age. The first act consisted of violent sexual intercourse whereby the Appellant used a wooden stick to hit his daughter on the left side of her forehead when she complained of the physical pain of the intercourse which resulted in her bleeding. On the second occasion, the Appellant had sexual intercourse with her again which led to further bleeding. The appeal to the Court of Appeal was against conviction alone. This Court was informed by Counsel that the sentence imposed by the trial judge was 10 years imprisonment when the statutory maximum penalty was 20 years imprisonment.

16. In *Terrance Caines v R* [2010] Bda LR 18 the Appellant, who had assumed a father-figure role over the complainant with whom he lived, was sentenced to five years imprisonment on each the four counts of sexual exploitation for which he was convicted after a jury trial. Those sentences were concurrent. At trial, the Court had heard evidence of inappropriately intimate letters written by the Appellant to the Complainant. The first act of sexual exploitation consisted of the 9 year old Complainant touching the Appellant's penis for about two seconds while he stood in front of her with her genitals exposed. The second incident involved the Complainant rubbing her vagina on the Appellant's condom-wrapped penis for up to five minutes until he ejaculated. The third and fourth sexual acts were similar in nature to the second act of the Complainant rubbing her vagina on the Appellant's condom-wrapped penis for up to five minutes until he ejaculated. These sentences were imposed by the trial judge when the statutory maximum penalty was 20 years imprisonment. The sentence was not appealed.

17. In *Reid v R* the Complainant was the Appellant's daughter. After trial by jury, the Appellant was given concurrent sentences of 4 years imprisonment on each of his four convictions for sexual exploitation. When the Complainant was13 years old, the Appellant called her into his study so that he could massage her breasts with his hands and squeeze her bottom. He went further in his sexual pursuit by rubbing his penis against her clothing. After the Complainant turned 14 years old, the Appellant directed her to remove her clothing and to wait for him in the bed. He came to her with a condom on his penis, used his fingers to open the lips of her vagina, and then laid on top of her, rubbing his penis on her vagina until he ejaculated. On the next occasion, the Appellant forcefully used his finger to insert his daughter's vagina.

18. The Court of Appeal was concerned with an appeal against sentence for charges of sexual exploitation in *Pernell Brangman v R* Criminal Appeal No. 7 of 2019. The Appellant in that case was the step-father of the Complainant who was sentenced to 10 years imprisonment on

the first count of sexual exploitation, the subject of which was oral sex performed on the Complainant by the Appellant. The Complainant was 11 years old when she performed oral sex on the Appellant, that being the offence on the second count for which he was sentenced to 11 years imprisonment. The evidence which the Court of Appeal took to be accepted by the jury was that the act of oral sex would occur at least twice a week. (Count 3 related to the offence of unlawful carnal knowledge of the Complainant when she was a girl under the age of 14. On that count the Appellant was sentenced to 12 years imprisonment)

19. The President of the Court of Appeal stated in the judgment of the Court listed the five aggravating factors to be:

    (i) The age of the child
    (ii) The fact that the applicant was in a position of trust
    (iii) The fact that the crimes occurred in her home which should have been a place of safety
    (iv) The 20 year age difference between the Appellant and the Complainant
    (v) The fact that the unlawful carnal knowledge occurred despite the victim's resistance

20. The other aggravating factors identified by the trial judge were as follows:

    (i) The fact that the acts were committed on more than one occasion and
    (ii) The fact that Mr. Brangman got bolder in his sexual misconduct culminating in inserting his penis into the child

21. The only mitigating factor in *Pernell Brangman v R* was the Appellant's clean record.

22. In sentencing Mr. Brangman, the learned trial judge, the Hon. Mr. Justice Carlisle Greaves, was misled by Counsel into believing that the applicable maximum sentence was 25 years imprisonment when it was in fact 20 years imprisonment. The cases to which Greaves J was referred were post-amendment cases. On that Clarke P stated [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.*"

23. Before dismissing the appeal against sentence on the complaint that the sentences were manifestly excessive, the Court of appeal cited, *inter alia*, *R v Cleveland Rogers* [2015] CA (Bda) 21 Crim, where the Respondent pleaded guilty to one count of unlawful carnal knowledge and three counts of sexual exploitation of a young person who was days short of 14 years of age while the Respondent himself was a 46 year old man. All of these offences

occurred over the course of one night. On of the aggravating factors identified by the Court of Appeal in that case was the fact that the offences occurred at night while the victim was asleep in her own bed in her own house. The Court also recognized that while Mr. Rogers had a record of previous offences, they were mostly committed prior to the turn of the millennium and were not of a sexual nature. The only mitigation was his late guilty pleas which both the judge and the Court of Appeal agreed merited a 15% discount. This resulted in a sentence of 7 ½ years imprisonment which turned significantly of the particular circumstances of that case. Contrasting *R v Cleveland Rogers* from the facts in *Pernell Brangman v R*, the Court of Appeal observed that in the former case the Complainant was considerably younger and that the Appellant's sexual conduct formed a pattern of increasing sexual oppression over a period of time far beyond the one-night timeframe which occurred in *R v Cleveland Rogers*.

The Appropriate Range for a Custodial Sentence

24. Part IV of the Criminal Code requires this Court to have regard to the purpose and principles of sentencing. I have considered the objectives of sentencing under section 53 and the fundamental principle stated under section 54 that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

25. As a matter of statutory obligation, I considered all lawful sanctions other than imprisonment as the Court is required to do under section 55 of the Criminal Code. However, only a custodial sentence is appropriate in this case. That was accepted by both the Prosecution and the Defence.

26. This Court is also duty bound to have regard to and to give proper weight to the nature and seriousness of the offence, including the physical or emotional harm done to a victim. In this case, a Victim Impact Statement ("VIS") was produced by the DPP on behalf of the Child and I have had particular regard to the emotional harm caused to the Child as a result of the Accused's criminal conduct. (At the sentencing hearing this Court was informed that the Child was being subjected to various forms of psychological and emotional assessments).

27. VISs from the Mother and the Child's father were also filed and I have carefully read both of those statements. The following portions of the Mother's VIS are worth reciting:

"*As I am sure anyone could imagine, this has been a very difficult time for myself, my family and* [the Child]. *I cannot even begin to explain the pain this has caused myself emotionally and mentally.*

Never in a million years did I think someone so close to me and my daughter would betray us in such a horrible way. Someone my daughter saw as her favorite uncle and someone I saw as my brother...

...

I beat myself up daily for what has transpired. I barely get any sleep and ever since this trial has started because I am up continuously asking myself, how, what, and why? How can you do this to my innocent little girl? What could I have done better to protect her and keep her safe from such a monster? Why was I unable to see what was [happening] and keep her safe? Mentally, I have been struggling with all this. There are days that I am so depressed that I cannot move or eat. There are days that my anxiety is so high that I am afraid to let my daughter out of my eye sight. Some days I am afraid to send her school because I am unable to see her and therefore, I cannot protect her. There are days I find it difficult to be around my daughter and look her in her sweet face because I don't want to cry in front of her. Sometimes I have to separate myself from her because so much anger and rage would build up inside my head and my heart that looking at her makes me want to burst out into tears. I feel like crap because I did not protect her.

You took away normality in my life."

28. In this case, I find the following factors to be aggravating:

    (i) The age of the Child who was only 6 years old, just short of 7 years when the offences were committed;

    (ii) The 17 year age difference between the Accused and the Complainant

    (iii) The fact that the Accused was in a position of trust and had presented himself as someone worthy of being known as the Child's favorite uncle, particularly since that Child did not have the benefit of living under the same roof as her father at a time when her mother was vulnerably wheel-chair stricken;

    (iv) The fact that these sexual crimes occurred in the Child's home where she should have been sheltered and protected from the criminal exploits of any offender; and

    (v) The Accused's predatory isolation of the Child from her mother and the rest of her family, particularly during the weekends that the Accused was grooming the Child for the offences which later occurred. Such isolation was also in the form of the secrecy which the Accused imposed on the Child.

29. While I was assisted by some of the case law to which I referred, I must keep in mind that most of those cases were sentenced before Parliament increased the maximum sentence from 20 to 25 years of imprisonment for cases of sexual exploitation. Clearly, it was the Legislature's intention that child sex offenders should be punished more severely than they were pre-amendment. The assistance that this Court derived from the previous case law is not nullified.

That previous case law assists in illustrating the kinds of factors which make one case more serious than the other. That comparative exercise is a guidance tool which may be used to establish the ranging degrees of the gravity of an offence. While this Court may be guided by the previous cases from Courts of this jurisdiction, I am bound by any reasoning settled by the Court of Appeal as the Court of superior jurisdiction.

30. In this case, when looking at the offences as a whole, Mr. Martin perversely attempted to teach a 6 year old girl sexual desire and sexual curiosity by showing her the pornographic imagery displayed on his phone. From the Child's evidence, which was plainly accepted by the unanimous verdict of the jury, that footage depicted not only both male and female genitalia but also male masturbation.

31. This was either preparatory or in aid of the Defendant's sexual pleasure when he incited the Child to touch his penis with her hands while he ejaculated. For that offence, under Count 1, I find that the appropriate starting point, without regard to any mitigation, is 15 years imprisonment.

32. For the offence to which Count 2 applies, whereby the Accused placed his penis in the middle of the Child's vagina as she laid down on his bed, I find that the appropriate starting point is 18 years of imprisonment.

Mitigation

33. Against those starting points, I must credit the Accused for any mitigation available to him.

34. In this case, the Accused cannot rely on the mitigation of a guilty plea or any expression of remorse. I have read the Social Inquiry Report which was authored by Probation Officer, Mrs. Mia M. Bean. From that report, it is evident that the Accused has not only refused to express any remorse but has also attempted to portray himself as a victim of his purportedly good deeds. When asked if he would do anything differently if given the opportunity to go back in time he stated that he would not have helped the Mother as he claims to have done. His position is that he has been wrongly convicted for offences he did not commit.

35. So, the only mitigation is his previous clean record.

The Section 329E Report before the Court

36. On 9 December 2022, this Court ordered the remand of the Accused for assessment under section 329E of the Criminal Code. A Psychological Risk Assessment Report dated 17 January 2023 and authored by Dr. Emcee C. Chekwas was subsequently produced ("the Report").

37. I have considered the Report placed before the Court and accept the recommendation for a risk management plan which would include the imposition of a post-release Supervision Order under the direction of this Court.

38. It is also noted that Dr. Chekwas has recommended that the Accused be submitted for a future psychological review within the first 12 months of his custodial sentence. Whether or not the Accused's volunteers himself for any such assessment while he is under the jurisdiction of the Commissioner of Prisons will likely be a matter of interest to the Parole Board.

Conclusion

39. On Count 1 I sentence the Accused to 13 ½ years imprisonment.

40. On Count 2 I sentence the Accused to 16 years imprisonment.

41. On Count 3 I sentence the Accused to 6 years imprisonment.

42. These sentences are to run concurrently to one another.

43. By law, a prisoner is entitled to apply to the Parole Board for release on licence after having served one-third of his sentence of imprisonment. In this case I direct, pursuant to Section 70P of the Criminal Code, that the Accused serves no less than half of his sentence prior to being considered eligible to apply for parole. That means that he must serve at least 8 years of his custodial sentence before being eligible to apply for release on licence.

44. I do so having had regard to the circumstances of the commission of this offence and the character and circumstances of the offender. That being the case, I am satisfied that such a direction is necessary as it may likely serve as a general deterrence to other potential offenders who may be inclined to sexually prey on such young children. In making that order, I also satisfied myself that the expression of the Bermuda community's denunciation of this criminal behavior is so strong that no lesser penalty could be reasonably understood.

45. This Court is empowered under section 329E(4A)(a) to make a Supervision Order, post-release if satisfied, on receipt of the Report commissioned under section 329E, that there is a substantial risk that the offender will reoffend. As earlier stated, I have considered the Report, particularly where Dr. Chekwas shared a table presenting various indicators for risk of future sexual exploitation of a young person [5.1]. I consider his conclusion that the Accused presents a moderate risk of future sexual exploitation to be substantial, particularly since he was able to form this conclusion, notwithstanding the "limited evidence" on which he was able to rely on.

I also note that Dr. Chekwas observed the presence of the following highly relevant factors for Mr. Martin, tabled on pages 6 and 7 of his report:

(i) Sexual violence history: psychological coercion in sexual violence;
(ii) Psychological adjustment: Extreme minimization / Denial of sexual violence;
(iii) Psychological adjustment: Attitudes that support or condone sexual violence; and
(iv) Mental Disorder: sexual deviance

46. I also take into consideration the age of the Accused who turned 26 just over one week ago, having been born on 31 March 1997. In 8 years from now, if released on licence he will be a 34 year old man. At that age one may reasonably expect for him to possess sexual desires and to pursue sexual activity. In my judgment, given the nature of this offence and my findings, he must be closely supervised for an extensive period of time, particularly where it concerns any opportunities he may have to form any relationship of trust in proximity to a child.

47. Accordingly, the Accused shall be the subject of a 15 year period of supervision upon his release pursuant to section 329(4A) (a) of the Criminal Code which in the case of sexual offenders permits me to order a supervision period of 10 years or more. This is a fundamental measure which is put in place to protect other children who may otherwise fall prey to sexual predators who think they can simply serve their time in prison as part of the expense for the opportunity to reoffend.

48. Finally, I note that in the case of *R v Pernell Brangman*, the trial judge directed the Defendant's name to be added to the Sexual Offenders' Register. The DPP in this case has called for a similar order to be made. Where any such power is vested in this Court to do so, I similarly direct that Mr. Martin's name be entered on any such record.

Dated this 11th day of April 2023

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE