In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2022 No: 01

BETWEEN:

R

v

ABC

RULING ON SENTENCE

Section 182B(1)(b) of the Criminal Code (sexual exploitation of a young person while in a position of trust)- Section 191 of the Criminal Code (incest)- Section 70 P requirement to serve at least half of prison sentence and order post-release Supervision Order – Consecutive Sentences

Sentencing Hearing Dates:	Wednesday 5 April 2023
Date of Ruling on Sentence:	Monday 17 April 2023
Counsel for the Crown:	Ms. Cindy Clarke, the Director of Public Prosecutions
Counsel for the Accused:	Mr. Charles Richardson, Compass Law Chambers

RULING of Shade Subair Williams J

Introduction

1. The Accused was convicted by the unanimous verdict of a jury of 12 on Monday 13 February 2023 on three counts of sexual exploitation of a young person while in a position of trust and two counts of incest.

2. His sentence hearing was held in this Court on Wednesday 5 April after which I reserved to provide this ruling.

Summary of the Facts

3. There are two Complainants in this matter. They are sisters insofar as they share the same mother, a non-Bermudian national.

4. In 2007 the mother (the "Mother") and the Accused were in an intimate relationship and lived together in a small one bedroom apartment. At that time, the elder of the two sisters (the "Sister") was 6 or 7 years of age and was living under the care of the Mother and the Accused. A year or so later in 2008, the Mother became pregnant with the younger sister who is the biological daughter of the Accused. I shall refer to that younger sister as "the Child" because she is still a child, being 13 years of age. Otherwise, I also refer to the Child as "the Daughter".

5. So, in 2008, while the Mother was expecting, the three of them moved into a larger two-bedroom house in Pembroke Parish. This coincided with an economic recession during which the Accused was rendered unemployed for the whole of 2008. During this period, the Accused became involved with a different woman (a Bermudian national) with whom he later married. However, in 2008 he spent most of his home-time with the Mother who worked tirelessly running a small housecleaning business during her pregnancy. She alone paid for the rent and expenses of the two-bedroom household.

6. The Accused's conviction under **Count 1** of the Indictment is a charge of sexual exploitation while in a position of trust. This refers to an occasion when the Sister came out of her room one night to look for a snack to eat in the kitchen. The Mother was in the room she shared with the Accused sound asleep. At that time the Sister was only 8 or 9 years old. The Accused, who was sitting at the living room table on his computer, intercepted her as she walked past him and caused her to sit on his lap. He then pulled her underwear to the side and inserted his fingers into her vagina.

7. The conviction under **Count 2**, another charge of sexual exploitation while in a position of trust, also relates to the Sister. This was another occasion at night when the Accused pushed her underwear to the side and tried to insert his penis into her vagina. He was successful to the

extent that the head of his penis entered her vagina. Again, this occurred while the Mother was in her room sleeping.

8. On **Count 3** the Accused was convicted for the final charge of sexual exploitation which relates to the Child, the Accused's biological daughter. This occurred somewhere between 6 and 11 years after the Sister had been sexually exploited.

9. By way of background, the Child had been living overseas before she came to Bermuda to live with her father, the Accused. By this time the Accused had married the Bermudian woman with whom he was living. The Accused also had a son who was living with him and his wife between 2016 and 2021.

10. While the Child was living in that household with the Accused, his wife and her brother, she was the victim of his sexual exploits. The offensive act under Count 3 refers to the Accused causing the Child to perform oral sex on him when she was 8 or 9 years old.

11. The Accused was convicted for incest under **Count 4**. These sexual acts to which Count 4 relate apply to the Accused having vaginal intercourse with the Child on three separate occasions. On the first occasion he did so on his bed where he otherwise slept with his wife. On another occasion the intercourse occurred on the kitchen floor beside a trash can and on a third example, the intercourse took place on the living room couch. This all occurred before the Child had experienced her first menstrual cycle. In her evidence at trial, she said that her father instructed her not to tell anyone about this.

12. The evidence under **Count 5**, the other charge of incest for which the Accused was convicted, relates to two separate occasions. On one of those two occasions, the Accused drove his daughter, the Child, to an outside location on the eastern end of the island on North Shore Road. There he engaged in vaginal intercourse with her. This happened immediately after the Accused attended a Parent–Teacher's meeting at the Daughter's primary school. The other occasion of vaginal intercourse occurred on Father's Day night after the Accused threw a party at his house. At the end of that night, he instructed the Daughter to accompany him on an excursion which started with him driving one of his inebriated friends home. After that he took the Daughter to an outside park where he again engaged in vaginal intercourse with her.

13. In describing these acts of vaginal intercourse, the Child told this Court that she experienced a lot of (physical) pain. The Crown also called medical evidence, which was clearly accepted by the jury, that the Child was examined and found to have vaginal tears which were consistent with having had vaginal intercourse.

14. The Accused was acquitted on Counts 6 and 7 which were charges of buggery and unlawful anal intercourse.

The Relevant Law:

Maximum Penalty

15. 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.

16. The maximum sentence for the offence of incest is 25 years imprisonment under section 191 of the Criminal Code. Counsel informed this Court that this *maxima* increased from 7 years imprisonment to 25 years imprisonment by amendments which took effect from 2019.

Previous Case Law

17. In *R v Maleke Martin* [2023] SC (Bda) 30 Crim. 11 April 2023, I was referred to many previous cases law outlining various sentences handed down for cases of sexual exploitation by a person in a position of trust. In my written ruling on sentence in that matter, I provided an outline on some of those cases which assist in illustrating the kinds of factors which make one case more serious than the other. In that case I also noted 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. I stated that it was evidently the Legislature's intention that child sex offenders should be punished more severely than they were pre-amendment.

18. In this case, the DPP cited the omnibus report from the Court of Appeal in *Pernell Brangman v R* Criminal Appeal No. 7 of 2019. In *R v Maleke Martin* this Court was invited to consider *Pernell Brangman v R.* In doing so I provided the following overview [18-23]:

"*The Court of Appeal was concerned with an appeal against sentence for charges of sexual exploitation in 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)*

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

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

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

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."

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."

19. The Court of Appeal also cited *Shannon Lawrence v R* [2016] CA (Bda) 20 Crim in its judgment in *Pernell Brangman v R*. In that case Mr. Lawrence appealed against conviction and sentence for one count of sexual exploitation while being in a position of trust and three counts of incest. After trial, Mr. Lawrence was sentenced to a total of 15 years' imprisonment comprising 3 years for sexual exploitation, 5 years on Count 2 for incest, 6 years on Count 3 for incest to run consecutively with Count 2 and 7 years on Count 5 for incest to run concurrently with Count 3.

20. The Complainant in that case was about 14 years of age when the sexual acts first occurred between her and her father, Mr. Lawrence. It was reported in the VIS that the sexual acts committed were unwelcomed and distressing to the Complainant. The count for sexual exploitation under section 182B(1)(b) of the Criminal Code referred to the oral sex Mr. Lawrence caused his daughter to perform on him.

21. Mr. Richardson invited me to find that the Court of Appeal, being dissatisfied with the adequacy of the then 7 year statutory maximum for incest, adjusted the sentence to align more with a higher maximum penalty. In doing so, he submitted that the Court of Appeal increased the sentence on the count of sexual exploitation and made it run consecutively to the final two counts of incest.

22. I do not accept that proposition. In the judgement of Bernard JA in *Shannon Lawrence v R*, with whom the full Court agreed, it is plainly so that the Court of Appeal dispassionately determined, having regarded the whole of Mr. Lawrence's criminal acts, that the final two counts of incest arose out of the same criminal activity, notwithstanding that those acts were spread over different periods of time. This was not a venture to defeat an inadequate statutory maximum; the appeal against sentence was allowed to reflect that the sexual exploitation charge merited a higher penalty than the 3 year sentence originally imposed (increased to 6 years) and to reflect that sentences for the acts arising out of the same criminal activity should run concurrently, leaving the order for consecutive sentences to apply to distinctly separate criminal activity. In allowing the appeal against sentence, the Court of Appeal substituted a 5 year term for each of the incest counts, thereby setting aside the trial judge's decision to progressively increase the sentences for the repeated acts of incest.

23. These orders had the effect of lowering the overall sentence from 15 years to 11 years imprisonment. The lowering of that sentence reflected the statutory maximum for incest. It did not ignore it, as is clear from the final paragraph of Bernard J's judgment [24]:

"This reflects in particular two matters. First, the appropriate total sentence for the Appellant's conduct as a whole, and second, that the maximum sentence for an offence of incest is currently only seven years."

The Appropriate Range of 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, Victim Impact Statements ("VIS(s)") were produced and I have had particular regard to the emotional harm caused to the Child and the Sister as a result of the Accused's criminal conduct.

27. In this case, I find the following factors to be aggravating in respect of the sexual exploitation charges against the Sister:

    (i) The age of the Sister who was only 8 or 9 years old when the offences were committed;

    (ii) The 22 year age difference between the Accused and the Complainant

    (iii) The fact that the Accused was in a position of trust;

    (iv) The fact that this criminal activity occurred more than once and escalated in gravity;

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

    (vi) The Accused's predatory isolation of the Sister via his bribery-type acts and the secrecy which the Accused imposed on the Sister.

28. The aggravating factors for the sexual exploitation and incest charges against the Child / the Daughter are as follows:

    (i) The age of the Child who was only 8 or 9 years old when the offences were committed;

    (ii) The 31 year age difference between the Accused and the Complainant

    (iii) The fact that the Accused was in a position of trust;

    (iv) The fact that this criminal activity occurred repeatedly (the Child's evidence was that the intercourse would occur regularly- in her words: "*today, tomorrow, a pause and then the next day- and then the next day after he didn't do it.*")

    (v) The fact that these sexual crimes occurred where the Child was supposed to feel at home where she should have been sheltered and protected from the criminal exploits of any offender (noting that on one such occasion the intercourse took place on the hard kitchen floor beside a trashcan); and

    (vi) The fact that the intercourse took place on occasions where the importance of the Accused's role as a father was highlighted e.g. Father's Day and the intercourse which happened after the PTA meeting

    (vii) The vaginal pain and injury that the Accused inflicted on the Child in his pursuit of intercourse

    (viii) The Accused's predatory isolation of the Child via his bribery-type acts and the secrecy which the Accused imposed on the Child.

29. In this case, when looking at the offences as a whole, it is evident that the sexual acts perpetrated by the Accused on the Sister form criminal conduct which is separate and distinct from the sexual acts committed against the Child. After all, the Child was not yet born when the Accused was exploiting the Sister. For that reason, I have no difficulty in finding that the counts which relate to the Sister should run consecutively to the counts which relate to the Child.

30. In determining the appropriate starting point for a custodial term, I have taken account of the maximum penalties, the previous case law, the facts and circumstances of this case and the aggravating factors. This is without regard to any mitigation.

31. For **Count 1** (inserting fingers into the Sister's vagina when she was only 8 or 9 years old), I find that the appropriate starting point is 16 years imprisonment. In my judgment, no lesser starting penalty is appropriate for an offender who inserts his fingers into the vagina of such a young child.

32. For the offence to which **Count 2** applies, whereby the Accused inserted the head of his penis inside of the Sister's vagina, I find that the appropriate starting point is 18½ years of imprisonment.

33. On **Count 3** (causing the Child to perform oral sex on him when she was 8 or 9 years old) the starting point is 17 ½ years imprisonment.

34. **Count 4** (which comprise multiple acts of incest on the child when the maximum sentence was 7 years imprisonment) attracts a starting point of 6 ½ years imprisonment, as unsatisfactory as that is to my personal senses.

35. The two acts of incest on the Child when she was between 9 and 11 years of age to which **Count 5** applies carries the maximum sentence of 25 years. Noting that the maximum penalty for incest as of 2019 more than tripled the previous 7 year maximum, I find that the starting point for this count can be no less than 20 years imprisonment.

Mitigation

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

37. In this case, the Accused cannot rely on the mitigation of a guilty plea or any expression of remorse. When given the opportunity to address the Court, he stated that he had nothing to say. Notwithstanding his convictions before this Court, the Accused maintains his innocence.

38. So, the only mitigation is that while he does not have a previous clean record, he has no previous convictions for sexual crimes.

A Supervision Order - The Section 329E Report before the Court

39. On Monday 13 February 2023 this Court ordered the remand of the Accused for assessment under section 329E of the Criminal Code. A Psychological Risk Assessment Report dated 2 April 2023 by Dr. Emcee C. Chekwas was subsequently produced ("the Report").

40. This Court is empowered under section 329E(4A)(a) to make a Supervision Order to take effect upon the release of the Accused from his custodial sentence, if satisfied, on receipt of the

Report commissioned under section 329E, that there is a substantial risk that the offender will reoffend.

41. Mr. Richardson stated that he and the DPP were agreed that the Report, as is, could not assist this Court. That said, Mr. Richardson also acknowledged that the Court would ultimately make its own assessment on the utility of the Report for the purpose of the proceedings. Having read the Report, I find that Dr. Chekwas' conclusion as to the Accused's risk of reoffending is of particular relevance to the question as to whether a Supervision Order is required in this case. In that portion of the Report, Dr. Chekwas stated [para 5.3]:

"*From the limited evidence I could gather from the case documents disclosed to me and evaluating his psychological profile, I concluded that given the nature of his current conviction and descriptions of the sexual acts he reportedly performed on the children, [the Accused] seems highly likely* [my emphasis] *to present a* ***risk for future sexual exploitation of young females under the age of eighteen in his unsupervised care, especially when he is in a position of trust. In the event of future sexual offending, his potential victims are likely to suffer significant harm***."

42. Dr. Chekwas listed the numerous indicators which elevated the Accused's risk of future sexual exploitation of young females. (See para 5.4 of the Report.) Having considered the whole of the Report, I am satisfied that there is indeed a substantial risk that the Accused will reoffend.

43. It is also noted that Dr. Chekwas recommended a risk management plan [5.7]. Whether or not the Accused's submits himself for any such plan while he is under the jurisdiction of the Commissioner of Prisons will likely be a matter of interest to the Parole Board.

44. However, as far as it relates to the making of a Supervision Order, I consider Dr. Chekwas' opinions to be of real assistance to this Court [para 5.8]:

"*...If* [the Accused] *receives a custodial sentence, it will assist the risk management plan process if his sentence includes a Supervision Order for after his release. Such Order is likely to assist handing him over from the custody team to the community team to continue any rehabilitation that started in custody. It should also assist his reintegration into the community... ...*"

45. Before accepting Dr. Chekwas' recommendation for a Supervision Order, I should also consider the age of the Accused when eligible for release on licence. While the Accused will no longer be on the lower end of the age-scale of a middle-aged man, he will not yet be of an elderly age so to reduce or render the need for a Supervision Order redundant. As I am satisfied that there is indeed a high risk of reoffending, particularly since these offences spanned over a

decade long, targeting two victims separated by a generation, a Supervision Order is not only appropriate but necessary.

Conclusion

Decision on Custodial Sentences

46. Balancing the appropriate starting points with the credit for which the Accused is entitled on account of the absence of any previous record for sexual offences, I find that the custodial portion of his sentence should be as follows:

47. On Count 1 I sentence the Accused to 14 ½ years imprisonment.

48. On Count 2 I sentence the Accused to 17 years imprisonment.

49. On Count 3 I sentence the Accused to 16 years imprisonment.

50. On Count 4 I sentence the Accused to 5 years imprisonment.

51. On Count 5 I sentence the Accused to 18 years imprisonment.

52. Looking at the whole of the Accused's acts, it is plain to me that counts relating to the Sister form one series of criminal acts and the counts in relation to the Child/Daughter comprise a separate series of criminal acts. I find that the counts of sexual exploitation and incest against the Child arose out of the same criminal activity even though those sexual acts were numerous and were committed over different periods of time. For those reasons:

    (i) Counts 1 and 2 shall run concurrently to one another.
    (ii) Counts 3, 4 and 5 shall run concurrently to one another.
    (iii) Counts 1 and 2, however, shall run consecutively to Counts 3, 4 and 5

53. That would bring the total sentence to 35 years of imprisonment. Before settling on the total sentence, I must of course have careful regard to the totality principle as the formation of a sentence is far more than a mere exercise of mathematics. In my judgment, such a sentence indeed reflects the seriousness of the offences committed. As I see it, to reduce the total years to be served on the custodial term would be to falsely and unfairly dilute the gravity of the offences perpetrated on these two separate and distinct victims.

54. As I recently observed in *R v Maleke Martin*, 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 the Accused in this case must serve no less than 17 ½ years of his custodial sentence before being eligible to apply for release on licence.

55. I do so having had regard to the Accused's character and circumstances and the circumstances of the commission of these offences. In this case, I am satisfied that an order under section 70P is necessary and serves as a general deterrence to other potential offenders who are tempted to sexually prey on such young children, as did the Accused. Additionally, I am satisfied that society's denunciation of this criminal behavior is so strong that no lesser penalty could be reasonably understood.

Supervision Order

56. The Accused shall be the subject of a 10 year period of supervision upon his release pursuant to section 329(4A) (a) of the Criminal Code which in the case of sexual offenders empowers this Court to impose a supervision period of 10 years or more. This is not designed to be punitive; it is a measure which is aimed to assist in the Offender's reintegration into society and his rehabilitation. More so, it is a measure which serves to protect other potential victims to whom the Accused may otherwise have unsupervised access within the first 10 years of his release.

Sexual Offenders' Register

57. Finally, I direct that the Accused's name be entered on the Sexual Offenders' Register.

Dated this 17th day of April 2023

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE