In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 34 of 2018

BETWEEN:

THE KING

-and-

CAHLII SMITH

Before: **The Hon. Justice Mark Pettingill, Assistant Puisne Judge**

Appearances: Mr. Adley Duncan for the Prosecution
Ms. Elizabeth Christopher for the Defendant

Dates of Hearing: 11th, 23rd & 25th January 2024
Date of Sentence: 31st January 2024

SENTENCE

Blackmail x2 – Making Child Pornography x3 – Distributing Child Pornography x1 – Accessing Child Pornography x1

PETTINGILL AJ:

On the 4th of July 2023, the Defendant was convicted by a Jury on the Indictment for the following offences:-

Counts 1 and 2. Blackmail, contrary to section 355 of The Criminal Code.
Counts 3, 4 and 6. Making Child Pornography, contrary to section 182F (1) of The Criminal Code.
Count 5. Distributing Child Pornography, contrary to section 182 F (2) of The Crimianl Code.
Count 7. Accessing Child Pornography, contrary to section 182 H (1) of The Criminal Code.

1. This was a significant and serious case involving the blackmail of children, the making of child pornography, distributing child pornography and accessing child pornography.

The Jury returned unanimous guilty verdicts on all Counts on the indictment after a lengthy trial in which both victims, now young adults, gave evidence. The evidence was compelling that it was the Defendant who had committed the offences. The initial Defence filed alleged hacking of his computer which later shifted to someone else personally accessing his computer at the studio and using it for the nefarious purpose of child pornography. Other than speculation there was nothing by way of evidence to support this. The proposal that the Defendant carried around a large weighty lap top he claimed was for the purpose of charging his small I-Pod was nonsensical and clearly rejected by the Jury as evidently was the Defence that it was someone else using his computer for the criminal activity.

2. Candidly, the circumstances and facts associated with these crimes reflect any caring parents worst nightmare, particularly in the modern age of social media which is often used for criminal purposes for the most wicked and deplorable of crimes related to the exploitation of young children in using them in the making of pornography to satisfy the wanton and perverted lust of depraved individuals. The fact that right thinking people hold this type of criminal conduct in such a high degree of abhorrence is what clearly drives perpetrators to make use of the internet and social media to hide from justice and commit these types of offences. Social Media is in this regard a troubling social problem, Juducial Notice is duly taken of law makers in the United States currently moving legistlation enititled *Kids On Line Safety Act 2023* which sets out requirements to protect minors from online harms.

3. The level of manipulation and methodology used in committing the offences against the young girls in this case is deeply concerning to the Court and the sentences must reflect the abject revulsion of society in addition to the need to send a clear and unequivocal message that our children must be protected and that these types of crimes will attract the appropriate maximum sentences allowed by the law as it currently stands. In that regard many right thinking people may well consider that the current legislated penalties are simply not robust enough.

4. In assessing the correct sentence in this case the Court must consider the appropriate starting point with regard to the range of sentence. *The Queen v. Melvin Martin (2009) CA Bermuda Crim App. No.16* is particularly informative. In that case the Court of Appeal increased the original sentence of 8 ½ years handed down in the Supreme Court, it is of note after a plea of guilty, to a total sentence of 14 years. Ward J.A stated :-

> "*In the Western World, of which we are a part, child pornography is condemned in all civilized societies. It cannot be denied that there are precocious girls, but when they are discovered, society has a duty to protect them, even from themselves if necessary.*"

The latter comment is a significant feature in the case of *Martin* because the facts of that case reflected sadly that the two young ladies involved were technically "willing" participants in the offences committed by the 24 year old culprit.

5. In the case at Bar it is unequivocally accepted that the two young female victims were simply not willing participants, they were absolutely not precocious, were loving children, good students from good families with all the types of dreams and aspirations that young people of that age can have. They were manipulated by the Defendant into committing sexual acts against their will which was sapped by his blackmailing scheme. Whilst it must be correct that there can be no mitigation whatsoever for alleged precociousness on the part of a child victim as legally they can absolutely not consent to any sexual activity, this Court takes the view that the abuse of unwilling children in coercing or threatening them into participating in pornography must be seen as an aggravating feature of a case and reflected in the overall sentence. The Crown adopted that position in its response to the Court. Despite the fact that the exploitation count in *Martin* carried a maximum sentence of 20 years I nonetheless take the view that the facts of this case are worse.

6. The offence of Blackmail contrary to *section 355 of the Bermuda Criminal Code 1907* states:-

> 355 (1) *A person is guilty of blackmail if, with a view to gain for himself or another or intent to cause loss to another, he makes any unwarranted demand with menaces…*

The maximum sentence stipulated by law for conviction on indictment is 14 years.

Counsel for the Crown and the Defence spent a significant amount of time considering the appropriate sentencing range for the offence of blackmail and the Court is grateful for the fulsome manner in which they approached the subject. Not surprisingly there were not cited authorities involving the blackmail of children for pornographic gain.

7. The most compelling aspect for the Court as relates to this count is that it was perpetrated on young girls in order to obtain their unwilling participation in the production of child pornography. It is accepted that this is the first case of this ilk to be prosecuted in Bermuda where the victims were indeed children. Consequently, I take the view that the count of blackmail in circumstances such as were revealed in this case must invite a sentence at the upper end of the range particularly as the "*menacing*" ultimately related to the threat of exposing the acts that the young girls were being forced to commit, to their parents and the public. The fact that these acts related to repeated acts of sexual activity and pornography is only more of an aggravating feature. The significant disconcerting element of the offence is the use of the internet and WhatsApp messages to perpetrate the offences. This is truly disconcerting to the public and is reflective of the dangers of the unsupervised use of social media by children and the ability of criminals to use false accounts and pseudonyms to hide from detection.

8. In all the circumstances as set out above the Court is of the view that the sentencing range for blackmail must be at the upper end of the legislated maximum of 14 years and I take the view that nothing less than 10 years imprisonment is acceptable. The young victims were both subjected to an ongoing campaign over a number of months with significant

planning and manipulation involved. It is beyond refute that both victims suffered at the time and the psychological harm to them has been enduring which was clear from their *vive voce* evidence given at the trial (now as courageous young women) and their victim impact statements which the sentencing court obviously must bear in mind.

9. Turning to the offences related to the making and distribution of child pornography. The Defendant exploited the relationship he had as a mentor to the young girls who had dreams of music careers in a large part under his direct guidance and stewardship. He took advantage of this relationship in order to manipulate the victims and on their evidence did nothing to assist them when they brought the issues of blackmail and forced sexual activity to his attention. Clearly the relationship was such that they believed the Defendant would potentially assist them when in fact he was the director and producer of the whole sordid affair as the Jury clearly felt sure on the evidence.

10. With regard to Counts 3, 4 and 6 on the Indictment of which the Defendant was convicted for the making of child pornography the statutory maximum is 10 years. In the case of *Martin* the Court of Appeal substituted an original sentence of 18 months with 3 years concurrent on each count. Given that facts of this case, and accounting for the conviction after a full trial and the fact that the Court finds the circumstances to be more aggravating, I take the view that the appropriate sentence must sensibly be 7 years to run concurrently with Counts 1 and 2.

11. Turning to Count 5 related to distributing child pornography, again the statutory maximum is 10 years imprisonment. The Crown submits that this count reflects conduct which has caused the most harm to the victims as revealed in their impact statements. Mr. Duncan for the Crown submitted:-

> "*Releasing the nude images of the victims, including images that depicted them in sexual activity with each other, was an extension of the violation of the victims dignity that began with their blackmail"*
>
> *"the distribution of child pornography reflects a high degree of intentionality, and therefore a high degree of criminal culpability, and represents an escalation of offending behavior that began with blackmail and increased with making child pornography.* "

The Court adopts this particularly cogent submission and agrees that this aspect of the case must attract a condign punishment reflective of the intentional and malicious public release of the images once the Defendant's scheme had run its iniquitous course. The Court considers a sentence of 9 years on Count 5 to run concurrent with counts 1- 6 is warranted.

12. The final Count 7, on the Indictment, accessing of child pornography, which carries a maximum sentence of 5 years relates to 106 images of child pornography and 89 videos of child pornography recovered from the Defendant's lap top. The majority of the videos

on the accepted measuring scale of 1-5 seriousness for child pornography (5 being the most depraved and offensive) were a level 4. The level of videos recovered in this case were far more extensive than those in the case of *Martin* (were a 1 year sentence was affirmed) and involved younger children and more depravity downloaded from peer to peer networks which consequently impacts on the pornographic commercial demand for the sexual exploitation of children. The Court considers that nothing less than a 3 year sentence is warranted on this count.

13. I take the view that *section 57(3) of The Criminal Code* is applicable in this case and consequently I rule that count 7 should be consecutive to the other counts as it does not form part of the general criminal enterprise in relation to count 1 to 6 and should accordingly be punished separately.

14. For all of the reasons and considerations above I make the following findings:

Counts 1 and 2 Blackmail. The pellucid distinguishing feature of this case is that involved children for which there is no submitted authority. The Court considers this to be a significant aggravating feature and considers that the range of sentence should be between 9 and 11 years particularly as the menaces and gain related to the production and threatened distribution of child pornography. The Court determines that the public interest demands a sentence of 10 years not only taking account of the punishment aspect of sentencing but to serve a appropriate consequential deterrent to others that would attempt to use the means of social media to blackmail a child for the purpose of sexual exploitation.

Count 1 and 2: 10 years imprisonment, those counts to run concurrently.

Counts 3, 4 and 6, Making of Child Pornography. These counts carry a maximum penalty of 10 years imprisonment. The method of manipulation and the impact psychologically on the young female victims is clearly aggravating. *Martin* was a plea of guilty involving two victims in different circumstances and carried a sentence of 3 years. The Court considers in the current case the correct range should be between 6 to 8 years after trial and conviction. I conclude a sentence of 7 years for all the reasons stated is appropriate, concurrent with Counts 1 and 2.

Count 5, Distirubting Child Pornography which carries a maxium sentence of 10 years. This arose as a result of the Defendant releasing publicly the offending images of the young girls after blackmailing them and gaining what he wanted. The appropriate range for this offence in the circumsatnces must be 8-10 years after conviction and I impose a sentence of 9 years concurrent with the other counts.

Count 7, Accessing Child Pornography which carries a maximum sentence of 5 years. Bearing in mind the sentence in *Martin* of 1 year after a plea the Court considers the appropriate range after trial for this level of accessing child pornography to be 2-4 years. For all the reasons stated above the sentence will be one of 3 years to run consecutive to the other sentences imposed.

Total sentence on all counts is 13 years imprisonment.

Having arrived at total sentence and considered all of the relevant aggravating factors I know turn to any mitigating features of the case and cinsider any reduction to the foregoing sentence.

15. I have considered the Social Inquiry report issues on September 1st 2023. It is noted that the Defendant had a “poor attitude” towards the offences and indeed continued to express his innocence and put forward his defences which were rejected unequivocally by the Jury after a full trial. He did express empathy for the victims for suffering some “horrible things” but this is hardly mitigating in that he fails to take responsibility for any of it. The Court finds little assistance from the finding of the report.

16. There is a significant matter of concern that does arise with regard to the length of time that it took for these offences to be prosecuted and the delay in bringing a charge for some three years after the complaints were made. Ultimately the trial did not commence for some 8 years after the initial complaint and bearing in mind Covid interruptions and challenges encountered by the Defence this is still unsatisfactory in the circumstances and warrants some reduction on the total sentence imposed. Of course it is unsatisfactory that the victims had to wait as long as they did for the matter to be concluded.

17. I do have some regard for Ms. Christopher’s submission that the Defendant was on bail the entire time having been initially arrested at the age of 22 and now being a 30 year old man ,avoided any further criminal conduct during that time. The fact that he was a young man at the time of the offences is also a consideration.

18. Consequently, I take the view that a reduction in sentence by two years for the reasons stated above is legally appropriate. Therefore the total sentence shall be one of 11 years imprisonment and I so Order.

19. The Court has a significant concern that with the proliferation and use of social media by young people these types of offences are at risk of increasing given the ability for culprits to hide their identities and create false accounts. It is often the case that offenders who are prosecuted have no previous records and do not take accountability for their actions.

I Order the following;

1) That the Defendant Cahlii Smith is sentenced to **a total of 11 years imprisonment.**

2) In accordance with *section 329 FA (2) of The Criminal Code 1907* the Commisioner of Police is ordered to enter the name of the Defendant Cahlii Smith, his photograph and home address onto the Sex Offender Register.

3) That the Defendant Cahlii Smith, comply with all the requirements of *section 329 FA (2) of The Criminal Code* during the period of registration in reporting to the Risk Management Team.

Dated the 31st day of January, 2024

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The Hon. Mr. Mark Pettingill
Assistant Puisne Judge of the Supreme Court of Bermuda