

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2 **CRIMINAL SIDE**

3 **INDICTMENT Nos.: 43, 48 and 49 of 2019**

4
5 **THE QUEEN**

6
7 **V.**

8 **MM**

9 **JT**



10
11
12 **Appearances:**

Mr. Scott Wainwright for the Prosecution

13 **Mr. Martin Rutherford Q.C. instructed by Mr. Alex**
14 **Davies of McGrath Tonner for the Defendant MM.**

15
16 **Mr. Rupert Wheeler of Samson Law for the Defendant**
17 **JT**

18
19 **Before:**

Justice Cheryll Richards Q.C.

20 **Sentence Hearing:**

4th March 2021 and 7th April 2021

21 **Sentence Judgment:**

7th April 2021

22
23 **HEADNOTE**

24 ***Criminal Law – Defilement – Section 134 of the Penal Code (2017 Revision),***
25 ***Indecent Assault - Cayman Islands Sentencing Guidelines– Principles on Sentencing –***
26 ***Young Offender - Custody threshold.***
27

28 **SENTENCE JUDGMENT**

1 1. Section 12 of the **Youth Justice Act** (2019 Revision) states:

2 “12. (1) In relation to any proceedings in any court, such court may direct
3 [and this court so directs] that-

4 (a) no published report of or comment on the proceedings shall
5 reveal the name, address or school, or include any
6 particulars calculated to lead to the identification, of any
7 young person concerned in the proceedings, either as being
8 the person by, against or in respect of whom the
9 proceedings are taken, or as being a witness in the
10 proceedings; and

11 (b) no picture shall be published as being or including a
12 picture of any young person so concerned in the
13 proceedings.

14 (2) Whoever publishes any matter in contravention of subsection (1) is
15 guilty of an offence and liable on summary conviction, in respect of
16 each such offence, to a fine of five thousand dollars or to
17 imprisonment for six months.

18
19 For the avoidance of doubt: An order pursuant to s.12(1)(a) and (b) above is herein made
20 – with the consequences set out in s.12(2) to follow should there be a breach of this
21 Order.

22
23 2. Section 31 of the **Criminal Procedure Code (CPC)** (2019 Revision) deals with the

24 “Anonymity of complainants in rape etc. cases and states:

25 “31. (1) After a person is accused of a rape [etc.] offence, no matter likely
26 to lead members of the public to identify a woman as the woman
27 against whom the offence is alleged to have been committed shall
28 be published in a written publication available to the public or be
29 broadcast, except as authorised by a direction of the court.”

30



1 For the avoidance of doubt: It is the Court’s view that the charges of Defilement and
2 Indecent Assault fall within this section of the law by virtue of the use of the word “*etc.*”
3 and therefore I herein make an order in the terms of the wording of s.31(1) of the *CPC*
4 as above. The names of the Defendants are also anonymized for this judgment in order
5 to protect the identity of the complainants.

6 3. MM and JT the Defendants, are before the Court for sentencing following upon their
7 convictions by Jury trial on the 17th September 2020.



8
9 4. MM was convicted of three counts of Defilement of two girls, both under the age of 12
10 years. He was also convicted of two counts of Indecent Assault of a girl under the age
11 of 12 years. The particulars are as follows:

12
13 a. First Count: That he, on a date unknown between the 25th day of July 2015 and the
14 24th day of July 2018 within the jurisdiction of the Cayman Islands, unlawfully
15 defiled Child J, a girl under 12 years of age.

16
17 b. Second Count: That he, on an occasion other than in count one, on a date unknown
18 between the 25th day of July 2015 and the 24th day of July 2018 within the
19 jurisdiction of the Cayman Islands, unlawfully defiled Child J, a girl under 12 years
20 of age.

21
22 c. Third Count: That he on a date unknown between the 25th day of July 2015 and the
23 24th day of July 2018 within the jurisdiction of the Cayman Islands, indecently
24 assaulted Child J, a girl under 12 years of age, by inserting his penis into her mouth.
25

1 d. Fourth Count: That he on an occasion other than in count three, on a date unknown
2 between the 25th day of July 2015 and the 24th day of July 2018 within the
3 jurisdiction of the Cayman Islands, indecently assaulted Child J, a girl under 12 years
4 of age, by inserting his penis into her mouth.

5
6 e. Fifth Count: That he on a date unknown between the 3rd day of September 2016 and
7 the 2nd day of September 2017 within the jurisdiction of the Cayman Islands
8 unlawfully defiled Child H, a girl under 12 years of age.

9
10 5. The Defendant JT was convicted of three counts of Indecent Assault of the said two
11 girls. The particulars of the offences are as follows:

12
13 a. Eleventh Count: That he on a date unknown between the 3rd day of September 2016
14 and the 3rd day of September 2018, within the jurisdiction of the Cayman Islands,
15 indecently assaulted Child H, a girl under 12 years of age, by inserting his penis into
16 her mouth.

17
18 b. Twelfth Count: That he on a date unknown between the 25th day of July 2015 and
19 the 24th day of July 2017 within the jurisdiction of the Cayman Islands, indecently
20 assaulted Child J, a girl under 12 years of age, by inserting his penis into her mouth

21
22 c. Thirteenth Count: That he on a date unknown between the 25th day of July 2015 and
23 the 24th day of July 2017 within the jurisdiction of the Cayman Islands, indecently
24 assaulted Child H, a girl under 12 years of age, by inserting his penis into her mouth.



1 **THE FACTS**

2 6. The case for the prosecution at trial was that between 2014 and 2018 the two girls, ‘J’
3 and ‘H’ were residing in a house in an area of George Town. They would visit a
4 neighboring yard on the opposite side of the road from where they lived. This was the
5 yard of their young friends where they would go to play and pick fruit from the trees.
6 The Defendant MM and his nephew, the Defendant JT were also resident at that
7 premises. MM is the uncle of one of the friends. On various occasions, at a time when
8 the victim J was 9 or 10 years old and the victim ‘H’ was 7 or 8 years old, the Defendant
9 MM. sexually assaulted them both by way of intercourse and placing his penis into their
10 mouths. This happened at what HC described as a “hideout”, a small shed in the yard of
11 this property.

12
13 7. With respect to JT, the victim ‘H’ describes the incidents as follows:
14 Count 11 and 12.

15 *“At first I was sucking his balls and one of the twins was sucking J’s balls and then*
16 *had me switch and they were touching me. They didn’t touch my private part, they*
17 *just made me suck their balls.”*

18
19 8. She said it happened, more than once with JT.



20
21 9. J’s evidence was that it first happened with MM when she was 8 or 9 years old and
22 thereafter with JT.

23 10. J’s date of birth is July 2007. She was between the ages of eight and eleven years at the
24 time of the offences. H’s date of birth is September 2009. She was seven or eight years
25 old at the time of the offences.



1 **THE PENAL CODE**

- 2
- 3 11. By s.134 of the *Penal Code*, the maximum penalties for Defilement of a girl under 12
- 4 years is 20 years' imprisonment.
- 5
- 6 12. By s.132 of the *Penal Code*, the maximum penalty for Indecent Assault is 10 years'
- 7 imprisonment.

8 **SOCIAL INQUIRY REPORT– MM**

- 9
- 10 13. The Department of Community Rehabilitation (DCR) has provided a Social Inquiry
- 11 Report (**SIR**) on the Defendant MM which is dated 26th October 2020.
- 12
- 13 14. He is 47 years old with an antecedent history of some 43 previous convictions. None of
- 14 these are for offences of a similar nature. They include several convictions for Burglary,
- 15 drug possession and use, as well as for offences of Wounding and Assault Causing
- 16 Actual Bodily Harm. Under previous responses to supervision in the community, the
- 17 Probation Officer reports instances of recall by the Parole Board.
- 18
- 19 15. As a child he posed behavioral challenges. He self-reports that following the removal of
- 20 one of his kidneys, his behaviour changed and he began getting into fights while at
- 21 middle and high school. He was expelled from school in year 11 for assaulting the
- 22 principal. Due to his health challenges and frequent absences from school due to
- 23 hospitalisations, he left school with literacy challenges.
- 24
- 25 16. Between the ages of 25 and 36 he was an active user of cocaine. He says that he has,
- 26 since 2014, following release from Prison, endeavored to turn his life around and says
- 27 that he has been able to achieve and maintain sobriety. He has received assistance from

1 the Drug Rehabilitation Court (DRC) and was admitted for Residential treatment at
2 Caribbean Haven Residential Centre.

3
4 17. The Report also states that whenever he is in the community, he has been gainfully
5 employed in the construction industry and also does fishing for a living and as a hobby.
6 His employer, a cousin of his, describes him as a hardworking man and good at roofing
7 and says that he generally turns up for work on time.

8 18. He also has a good report from the Prison where he is presently incarcerated in respect
9 of a Burglary offence. He is described as generally calm and respectful to officers and
10 his fellow inmates. He works on the maintenance team at the Prison and is regarded as
11 “not someone to incite violence” at the Prison. He poses no security risks.

12
13 19. He was assessed using the LS/CMI Risk/Need Assessment tool. This assesses the
14 general risk of re-offending and is not specific to sexual offences. His overall risk of re-
15 offending was assessed as high, with three of eight criminogenic factors, companions,
16 criminal history and pro-criminal attitude/orientation being assessed as very high.

17
18 20. The Probation Officer notes that his offending behaviours commenced during
19 adolescence and as he progressed into adulthood they became more frequent and
20 pervasive. His specific Risk/Need factors include factors which can potentially increase
21 his risk level including:

22
23 a. Clear problems of compliance;



24
25 b. Anger management deficits.

26
27 21. He was further assessed using the Risk Matrix 2000 tool in order to determine the
28 probability of re-offending as it relates to sexual offences. This is described as a tool

1 which cannot predict who will or will not re-offend but can tell whether someone has
2 similar characteristics to a group of offenders who have a higher or lower rate of known
3 re-offending. Using this tool the Defendant was assessed as being of medium risk of
4 sexual re-offending. Medium risk offenders should receive more treatment and
5 supervision than low risk offenders but are not at the priority level for treatment and
6 supervision.

7
8 22. The Officer states that there are no sex offender treatment programmes available at the
9 community level and thus the DCR would not be able to offer rehabilitative services
10 within the community. Included in the Officer's recommendations are recommendations
11 for treatment if a custodial sentence is imposed. These include:

- 12
13 a. Completion of the Support My Success Programme (SMS) which targets sex
14 offending behaviours and seeks to restructure cognitive distortion.
15
16 b. Individual counselling with the Forensic Psychologist as part of sentence planning
17 rehabilitative process.

18
19 **SOCIAL INQUIRY REPORT– JT**

20 23. There were multiple attempts made by the DCR to complete interviews of the Defendant
21 JT for the preparation of a report. There were occasions when he did not attend for
22 interviews at scheduled times. This led to a delay in this sentencing exercise. The Report
23 provided by DCR is dated 11th February 2021.



1 24. The Defendant is 19 years old. He has no previous convictions. He graduated from High
2 School in 2017 and is currently enrolled at a local college where he is pursuing a course
3 in electrical installation. He was employed in the water sports industry and is in regular
4 employment in a family business.

5
6 25. His academic reports indicate that he had behavioural issues in the later years at school.
7 The Defendant does not feel that these reports reflect the entirety of his schooling.

8
9 26. He was injured in a motor vehicle accident in June 2020 when he sustained tears in
10 several tendons in his leg.

11
12 27. Interviews with his aunt provided information that at around age 12 years old after he
13 began to visit the address in question she noticed a change in him. He had been living
14 with his paternal grandparents in another district other than George Town until the above
15 age. Thereafter, he moved back to the home of his parents in George Town. It is her view
16 that what he is today is directly a product of his negative environment. She describes
17 him as having a misguided and negative approach to authority and loyalty to family
18 members. She expresses her belief that he was a child himself and did not know any
19 better than what he had learned through his environment.

20
21 28. He was assessed using the LS/CMI Risk/Need Assessment tool. His overall risk of re-
22 offending was assessed as medium. Of the eight criminogenic factors considered, he was
23 assessed as very high with respect to one factor, pro-criminal attitude and orientation.

24
25 29. The Risk Matrix 2000 tool for sexual offences could not be used to assess him due to his
26 age at the time of the offending.



1 30. The Probation Officer notes that he is not amenable to counselling, supervision or
2 treatment for sex offences as he denies the offences and shows no victim empathy or
3 understanding of the effect on the victim. She also states that throughout the series of
4 interviews with him it is very clear that he is a very young person who is also quite
5 immature.

6
7 31. She records that there is difficulty in making a community-based recommendation for
8 him because of his denial and lack of access to community-based sex offender treatment
9 programmes.

10 She further states that should the Court impose a Suspended Sentence Supervision Order
11 (SSSO), the DCR will be able to address his criminal thinking and explore sexual
12 offending on a one-to-one basis with him. Should a sentence of imprisonment be
13 imposed the recommendation is that he participates in the SMS programme at the Prison.
14

15
16 **CAYMAN ISLANDS SENTENCING GUIDELINES**



17
18 32. The Defendant MM falls to be sentenced for 2 counts of Defilement and 2 counts of
19 Indecent Assault against J and one count of Defilement against H.

20
21 33. The Cayman Islands Sentencing Guidelines detail general principles for sentencing and
22 specific guidelines for these offences.

23
24 34. There is general guidance as to the aims of sentencing, assessing the seriousness of an
25 offence, the custody threshold and the principle of proportionality. The Court reminds
26 itself of this guidance in approaching this case including that, in sentencing an offender,
27 the Court has to balance a number of competing interests and objectives and to tailor the

1 punishment to the individual circumstances of each offender, while ensuring that it is in
2 line with the seriousness of the offence. The Court should consider which of the aims
3 which govern the sentencing process will be best served by the sentence to be passed.
4 The aims which are set out in the *Alternative Sentencing Act* 2008 include deterrence,
5 punishment, rehabilitation and restitution. The Guidelines also provide that a custodial
6 sentence should not be passed unless the offence is so serious that no other sentence can
7 be justified for the offence. Custody should be reserved for the most serious offences.
8 Even where the custody threshold is passed, custody can still be avoided in light of
9 personal mitigation or if there is suitable community intervention which would meet the
10 aims of punishment and rehabilitation.



11 **DEFILEMENT**

12 35. Under the specific Guidelines, for the offence of Defilement, in respect of Category 1
13 Harm there are four factors including particular vulnerability due to extreme youth and
14 or personal circumstances. Category 2 Harm would be indicated if the Harm Factors in
15 Category 1 are not present.

16
17 36. The Prosecution submits that this case is one of greater harm because of the extreme
18 youth of the victims. Counsel submitted that while it is difficult to argue extreme youth
19 in the case of J, it was arguably present in the case of H who was seven or eight years at
20 the time of the offence.

21
22 37. The Defence submit that the matter properly falls into Category 2 harm. It is argued that
23 s.134(1)(a) of the *Penal Code* which carries a higher maximum sentence has an age
24 range from birth to under 12 years of age and that H's age is above the median age of
25 the range for children covered by this section.

1 38. The Prosecution relies on the English case of *R v KC*.¹ In that case, three offences of
2 sexual assault occurred when the victim was between 7 and 8 years of age. The Appellant
3 argued that while the victim could be described as vulnerable, there was no evidence that
4 she was particularly so. It was also argued that age 7-8 is not extreme youth and that
5 extreme in the context of offences involving children under the age of 13 years had to
6 be viewed as referring to the lower end of that age range. Counsel for the Crown in that
7 case while accepting the thrust of this argument, contended that a child aged 7 or 8 years
8 was “*on the border of extreme youth.*”

9
10 39. The Appellate Court declined to express a firm view but tended towards accepting the
11 arguments of the Appellant’s Counsel and did not consider the case one of extreme
12 youth. In that case there were a number of other factors which were indicative of
13 particular vulnerability.

14
15 40. In the instant case, this Court accepts the submissions of the Defence on the issue of
16 extreme youth. It is not considered that the age by itself is sufficient for the victim ‘H’
17 to be categorised as particularly vulnerable in the context of these circumstances and of
18 this offence which relates specifically to children under 12 years. There being no other
19 applicable factors, the conclusion is that this is Category 2 Harm.

20
21 41. Culpability A under the Guidelines includes the factors of grooming behaviour used
22 against the victim, offender acts together with others to commit the offence and
23 deliberate isolation of the victim. Culpability B would apply where the factors in
24 Culpability A are not present.



¹ 2019 EWCA Crim 1632

1 42. Additional aggravating factors include the presence of others, especially children, and
2 any steps taken to prevent the victim from reporting the incident.

3
4 43. The Prosecution submits that with respect to Culpability, the offences fall into category
5 A. The submission is made on the basis of three matters. Firstly that during at least one
6 of these instances, JT and another were also present. Secondly that there is evidence of
7 grooming, in that, MM is said to have given one of the victims \$10.00 to say nothing
8 about what had happened. Thirdly the Prosecution submits that there is evidence of
9 deliberate isolation, in that, the victims were lured into a shed where the incidents took
10 place.

11
12 44. Counsel for the Defence submits that this offence falls into Culpability B for the
13 following reasons. That the act of grooming by definition involves preparation for a
14 particular purpose and in this context would involve activities prior to the act itself. 'J'
15 was asked in her ABE interview whether she had been given anything to do any of these
16 things. She replied no, just money to be quiet, sometimes \$10.00 by the Defendant MM.
17 The evidence thus suggests post activity rather than preparation for the activity. The
18 Court accepts the submissions of the Defence on this point.

19
20 45. The Defence also submit that there is no evidence of deliberate isolation of the victims.
21 Deliberate isolation would require isolation from others (parents, carers or others) for
22 the purpose of committing the act. The evidence is that they would visit their friends in
23 the yard where the incident took place and would pick fruit from the trees near to the
24 shed.



1 46. Counsel submitted that the circumstances are akin to those in the case of *R v CH*², where
2 the trial Judge noted the evidence that the Respondent and the victim used to play
3 together in the shed where the activities occurred. There was nothing untoward in their
4 being in the shed prior to the incident.

5
6 47. In the Court's view the circumstances here are somewhat different from the referenced
7 case. There is limited evidence of the girls being inside the shed in the usual course.
8 They were regularly in the yard and outside the shed. The evidence is that they were
9 called into the shed by one or other of the Defendants. Nevertheless in my view it is
10 difficult to ascribe the term deliberate isolation to a shed in a yard which, on the
11 evidence, was a multiple occupancy property with children and people coming and going
12 throughout the course of the day.

13
14 48. As to the presence of others at the time of the offence, the Defence initially submitted in
15 written submissions that the evidence was conflicting as to the presence of other girls at
16 the time of the offending and that the Court should be wary about acting on such
17 conflicting evidence. In oral submissions there was a concession that the factor of the
18 presence of others has resonance. Counsel agreed that there was evidence of people
19 being in the shed together and committing different sexual acts behind at least one
20 screen. Counsel submits that if it fits into Culpability A, it is at the very bottom which
21 really means at the top end of culpability B.



² 2020 EWCA Crim 1736

1 49. A review of the evidence of both ‘J’ and ‘H’ indicates that they were saying in their ABE
2 interviews that other young girls were present and or other males at the time of sexual
3 activity. The difficulty is that it is not clear to me that it can be said to have occurred on
4 every single occasion and matching the particular occasion to the particular count of the
5 Indictment is not straightforward. For example at page 25 of J’s interview, she was
6 asked, who was there when he (meaning MM) got on top of you? She replied, W was
7 outside with M (another young girl) and M (a second young girl) and them.

8
9 50. She was asked: Okay the time on the couch who was there? She replied no one.

10
11 51. ‘H’ was clearer. Her evidence was that ‘J’ was there when it happened i.e. assault by
12 MM. However there is the account given by ‘J’ which in areas was different. Given the
13 difference in sentencing levels, the better course where there is a difference in accounts
14 and in the absence of specificity is to accord the Defendants’ the benefit of the doubt.

15
16 52. The conclusion is that the offence of Defilement falls into Culpability B.

17
18 53. The starting point for Category 2, Culpability B is 5 years custody with a range of
19 sentence of between 3 and 7 years.

20
21 54. One aggravating factor is the steps taken by MM to prevent the victims from reporting
22 the incident by giving them “hush money.”

23
24 55. The presence of this factor would serve to increase the sentence by 6 months to one of 5
25 years and 6 months or 66 months.



1 56. Account is taken of all that has been said about MM in mitigation by Counsel on his
2 behalf and in the SIR.

3
4 57. The Defendant has no relevant previous convictions. He has had challenges in his
5 childhood and struggled with education and health issues with his kidneys. He has been
6 gainfully employed when not incarcerated and while in prison works on the maintenance
7 team and has been productive.

8
9 58. In the past he has struggled with addiction issues, but more recently he is said to be drug
10 free and appears to have made earnest efforts to turn his life around.

11
12 59. When all these matters are taken into account, the sentence of 66 months would be
13 reduced to one of 58 months' or 4 years' and 8 months'.

14
15 **INDECENT ASSAULT**



16
17 60. There is agreement between the parties that this offence would fall into Category 2 Harm
18 due to the touching of naked genitalia.

19
20
21 61. None of the factors in Culpability A are present, so this offence falls into Culpability B.
22 The starting point for Category 2 B is 4 years' custody. The aggravating and mitigating
23 factors are the same as outlined above.

24
25
26

1 62. From a starting point of 4 years' or 48 months', the sentence is increased to one of 4
2 years' and 6 months' or 52 months' in respect of the aggravating factor of steps taken to
3 prevent the reporting of the offence. Mitigating factors would serve to reduce this
4 sentence to one of 44 months'.

5
6 63. In considering whether the custody threshold has been passed in this case, consideration
7 has been given to the personal circumstances of the Defendant and to whether there is
8 suitable community intervention which would provide a sufficient restriction by way of
9 punishment while addressing rehabilitation issues. The serious nature of the offence is
10 an important factor. The Guidelines provide that the offence of Defilement potentially
11 covers a wide spectrum of conduct and that in assessing seriousness the Court will
12 consider in particular the age gap between the offender and the girl, that is, the greater
13 the age gap the more serious the offence is likely to be. In this case the Defendant MM
14 was almost more than five times the age of these young girls at the time of the offending.

15
16 64. Given the nature of the offending and in all the circumstances, these are offences of a
17 most serious kind. They are ones in which the custody threshold is firmly passed and a
18 custodial sentence is unavoidable.



19
20 **CONCURRENT/CONSECUTIVE SENTENCES**

21 65. Paragraph 6 of the Cayman Islands Sentencing Guidelines with respect to concurrent
22 and consecutive sentences provides as follows:

23 ***“6.1 Concurrent Sentences***

24 *It is wrong in principle to impose sentences to run consecutively where those*
25 *offences, though distinct in law, arose out of a single act so that the overall*
26 *criminality for the offender can be represented by concurrent sentences.*

27 *Concurrent sentences will ordinarily be appropriate where:*

28 *Offences arise out of a related incident or facts*

1 d. Total Sentence: 87 months’ or 7 years’ and 3 months’ imprisonment.

2 A. In effect this is a total sentence at the top end of category 2 B.

3 B. Time served is to be deducted.

4 C. During incarceration he is to participate in the treatment programmes as
5 recommended by the Probation Officer.



6 **SENTENCE OF JT**

7 68. At the time of the offences, this Defendant was between 14 and 17 years old. Both the
8 Prosecution and the Defence agree that he should be dealt with as a young person. This
9 is a submission which I accept, reflecting as it does the clear direction from the Cayman
10 Islands Court of Appeal (CICA) in the case of *Wright v R*³.

11
12 69. In that case the appellant was 16 years old at the time of the offence and 18 years at the
13 time of conviction and sentence, the Sentencing Court recognized his age as a mitigating
14 factor, but did not apply the provisions of the *Youth Justice Act* (2005 Revision) ruling
15 that it was only applicable if the accused was under 17 at the time of conviction. The
16 Appellate Court held that the Grand Court should have used the sentence it would have
17 passed at the date of the offence as the starting point for the appellant’s sentence. The
18 Court further held that:

19 *“This would be a powerful factor because, even though the offender had passed an*
20 *age barrier after the commission of the offence, the policy considerations for*
21 *sentencing young offenders would still apply, i.e. the emphasis on rehabilitation and*
22 *the acceptance that youths were less responsible for their actions than adults. The*
23 *court should then have considered if there were any factors which were powerful*
24 *enough to warrant passing a higher sentence, although it would only be very rarely*
25 *that it would need to consider passing a sentence higher than the maximum it could*
26 *have passed on a young offender (R. v. Ghafoor, [2003] 1 Cr. App. R. (S.) 84,*
27 *applied). At the time he committed the offence, the appellant would have fallen under*
28 *s.20 of the Youth Justice Law. The offences were of a type to which a custodial*
29 *sentence could be applied by virtue of s.20(3) and Schedule 1, para. 3 to the Law,*

³ 2012 CILR Note 15

1 *but the court would only pass such a sentence if it was satisfied that the gravity of*
2 *the offence made it appropriate for the individual offender and that no other*
3 *sentence was suitable for him.”*
4

5 70. The Cayman Islands Sentencing Guidelines for Sexual Offences provide that these
6 Guidelines apply only to adult offenders and that:

7 *“Where a Court is sentencing a youth, in taking account of these guidelines and*
8 *adjusting them to reflect the youth of the offender, it will consider the welfare of the*
9 *young person, the age of the child or young person (chronological, developmental*
10 *and emotional), the seriousness of the offence, the likelihood of further offences*
11 *being committed and the extent of the harm likely to result from those further*
12 *offences.”*
13

14 71. The Guidelines go on further to say that a young person or child is likely to be dealt with
15 less severely than adults as they are not likely to have the same experience and capacity
16 as an adult to understand the effect of their actions.

17
18 72. The Prosecution submitted that in assessing Culpability, the Court should consider
19 relevant factors including the extent to which the offences were planned, the role of the
20 defendant if the offences were committed as part of a group, the level of any force used
21 and the awareness of the defendant of their actions and consequences. Further that in
22 assessing harm, the Court should consider the level of any physical and psychological
23 harm to the victims including any harm that was intended to be caused or could
24 foreseeably have been caused.



1 73. The Prosecution has drawn to the Court's attention the case of *R v RB JS and HG*⁴ in
2 which the English Court of Appeal approved the approach of applying the adult
3 guidelines to youth offenders but with a reduction of between one half to two thirds of
4 the adult sentence.

5
6 74. Defence Counsel disagrees with this suggested approach and submits that this can have
7 no meaningful application to the Cayman Islands because the sentencing levels in the
8 two sets of Guidelines are different and the local Guidelines provide for the approach to
9 the sentencing of young offenders.

10
11 75. It is noted however that the Cayman Islands Guidelines specifically refer to adjusting
12 the adult guidelines to reflect the youth of the offender.

13
14 76. Defence Counsel stated that the Defendant's age at the time of the offences is a
15 significant factor in this case. He is presently 19 years old. At the time of the offences,
16 he was, in respect of Count eleven, between 15 and 17 years old, and in respect of Counts
17 12 and 13, he was between 14 and 16 years old.

18
19 77. Counsel urged that as there was no evidence of the precise date for each offence the
20 Court should give him the benefit of the doubt and sentence him on the basis of his
21 youngest possible age in respect of each Count. This submission is accepted and the
22 suggested approach adopted.

23
24 78. Counsel also made the following summary submissions:



⁴ 2020 EWCA Crim 643

- 1 • The Defendant was himself at risk during the period of the offending, he was
2 not properly supervised and was a product of his negative environment;
3 • He is currently in his second year at a local college;
4 • He is employed in a family-owned construction business;
5 • He is enterprising and ambitious and wishes to start a trade and business school
6 for young people;
7 • He has a bright future ahead of him.



8
9 81. The starting point in respect of the sentencing of JT is the *Youth Justice Act*. This
10 requires the court to consider various methods of sentencing. It is only if the court is of
11 the opinion that no other methods are suitable that the court may sentence an offender to
12 a term of imprisonment.

13
14 82. This Court has considered the Defendant's welfare, immaturity, age, personal
15 circumstances and the circumstances of the offending. It is accepted that there is the
16 indication that he himself was not properly supervised by adults with the underlying
17 implication being that the adults to which he listened led him down the wrong path. But
18 this Court must also consider the nature of the offending, the possible impact upon the
19 young girls, who would have been at least 4-5 years younger than he was at the material
20 time.

21
22 83. While there is no evidence of the actual impact upon the victims, account must be taken
23 of the harm which could foreseeably have been caused. It was clear during the evidence
24 of 'H' in particular of the significant emotional impact upon her of what had occurred.

25

1 84. The Court considers these offences to be serious, involving as they do assaults upon
2 young children. In the Court’s view, JT qualifies for a custodial sentence under
3 paragraph 6(2) of the Schedule to the *Youth Justice Act* in that the offence of which he
4 has been found guilty is so serious that a non-custodial sentence for it cannot be justified.
5 The Court also holds the view that only a custodial sentence would be adequate to protect
6 the public, in particular young girls, from serious harm from him.

7
8 85. While the Law and the Guidelines set out the broad approach to sentencing of children
9 there are no guidelines specific to children as in the United Kingdom. The Guidelines
10 with respect to sexual offences, paragraph 16, as stated refers to adjusting the adult
11 guidelines to reflect the youth of the offender. How should this adjustment be made? I
12 consider that there is helpful guidance in the cited case of *R. v. RB and others* which
13 applies the principles in the UK’s *Definitive Guideline: Sentencing Children and*
14 *Young People*.



15
16 86. The Court stated:

17 “23. *In giving such guidance, we emphasise that we are only concerned with*
18 *cases in which the judge, having followed the principles set out in the*
19 *Children guideline, has concluded that a custodial sentence is unavoidable*
20 *and that it is appropriate to consider the appropriate sentence for an adult*
21 *offender in accordance with the approach indicated at paragraph 6.46 of*
22 *the Children guideline.*

23
24 24. *In such circumstances, we agree with what was said in R v D as to the*
25 *importance of considering the actual sentence which would be passed on an*
26 *adult offender. Where this a relevant definitive guideline, the judge must*
27 *consider, in accordance with step 1, the appropriate offence category and*
28 *starting point. The judge must then, at step 2, adjust that starting point*
29 *upwards or downwards to reflect aggravating and mitigating features of the*
30 *offence and any matters of personal mitigation which will not be taken into*
31 *account when making a reduction on grounds of youth.*
32

1 25. *However, in respectful disagreement with the decision in R v D, we are*
2 *satisfied that the judge should next consider the appropriate extent of the*
3 *reduction on grounds of youth, and only thereafter go on to make such*
4 *further reduction as is appropriate to reflect a guilty plea. To make the*
5 *decisions in that sequence is in our view consistent with the general*
6 *approach of the Sentencing Council’s guidelines. It follows that we agree*
7 *with the approach taken in this regard in R v Armsden-McClennan, R v*
8 *Payne and R v Peters.”*
9

10 87. It is proposed to follow this approach for the purpose of arriving at a calculation of what
11 the appropriate custodial sentence should be for JT.

12
13 88. I have considered the submissions made as to determining the offence Category and
14 Culpability. There is agreement that the offending falls within Category 2 Harm because
15 of the kind of touching which occurred.

16
17 89. As to Culpability, there is no evidence of a significant degree of planning. There is some
18 evidence that he was on one occasion in the company of others but again the specificity
19 as to which Count this applies is unclear.

20
21 90. The conclusion is that the matter properly falls into Category 2 B.

22
23 91. Category 2 B has a starting point of 4 years’ custody and a sentencing range of 3 – 7
24 years for an adult.

25
26 92. There are no clear aggravating factors which justify increasing the sentence from the
27 starting point.



1 93. The Court takes into account the mitigating factors. These include the significant fact
2 that the Defendant has no previous convictions, the welfare issues which were attendant
3 upon his upbringing, the fact that he is enrolled in education, his continued employment
4 and all that has been said about him.

5
6 94. From a starting point of 48 months', the mitigating factors would reduce the sentence to
7 one of 30 months'. A discount is applied for his youth, noting his observed immaturity
8 even at this age. The approach of this Court to this offence is as if sentencing a 14 or 15
9 year old. A discount of one half of the notional adult sentence is applied for a sentence
10 of 15 months' custody.

11
12 95. How are these to run in respect of each offence?



13
14 96. Paragraph 7 of Schedule 1 of the *Youth Justice Act* provides that the court shall have
15 the same power to pass consecutive sentences of detention under the schedule as if they
16 were sentences of imprisonment.

17
18 97. The sentence is considered in light of the totality of the offending as detailed in the three
19 counts. The offending involves two assaults against one victim and a further assault
20 against another.

21
22 98. The sentence of 15 months imprisonment is imposed in respect of each count. In respect
23 of Counts 11 and 13 which relate to victim 'H', they are to run concurrent to each other.
24 Six months of the sentence in respect of the second victim 'J', Count 12 is to run
25 consecutive to the sentences on Counts 11 and 13 for a total sentence of 21 months'
26 imprisonment.

1 99. I have given consideration to whether a sentence of immediate imprisonment is
2 unavoidable. Note is taken of the fact that the Defendant is at medium risk of re-
3 offending, his young age at the time of the offending, the absence of proper adult
4 guidance and supervision, his schooling and ongoing good efforts at developing himself.

5 I consider that the sentence can properly be suspended with a supervision order. The
6 DCR has indicated that it will make efforts at his rehabilitation by offering him one on
7 one counselling.

8
9 100. The sentence of imprisonment is therefore suspended for 24 months' with a supervision
10 order.



11
12 **SEXUAL HARM PREVENTION ORDERS**

13
14 101. The Prosecution made an application for Sexual Harm Protection Orders (SHPOs) in
15 respect of each Defendant. The Order was not opposed in respect of the Defendant MM
16 save that issue was taken with respect to some of the proposed terms.

17
18 102. The Order was opposed in respect of the Defendant JT. The matter was adjourned for
19 the proposed draft orders to be reviewed and for further submissions. Counsel on his
20 behalf argued that the legal test under s.45A of the *Penal Code* was not made out in that
21 the imposition of a SHPO is not necessary in his case. Counsel also submitted that even
22 if it could be said to be necessary some of the proposed terms were not. Counsel relied
23 on a number of English cases and highlighted *dicta* which provides guidance.

1 103. In *R v NC*⁵ which dealt with the previous regime of such orders, the English Court of
2 Appeal identified the essential questions as being:

- 3
- 4 • Is the making of an order necessary to protect the public from sexual harm
- 5 through the commission of scheduled offences?
- 6 • If some order is a necessity, are the terms imposed nevertheless oppressive?
- 7 • Overall, are the terms proportionate?

8
9 104. In *R v Parsons*⁶ the Court stated the principles as follows:

10 *“At the outset, we underline the following: (i) first, as with SOPOs, no order should*
11 *be made by way of SHPO unless necessary to protect the public from sexual harm*
12 *as set out in the statutory language. If an order is necessary, then the prohibitions*
13 *imposed must be effective; if not, the statutory purpose will not be achieved. (ii)*
14 *Secondly and equally, any SHPO prohibitions imposed must be clear and realistic.*
15 *They must be readily capable of simple compliance and enforcement. It is to be*
16 *remembered that breach of a prohibition constitutes a criminal offence punishable*
17 *by imprisonment. (iii) Thirdly, as re-stated by R v NC, none of the SHPO terms must*
18 *be oppressive and, overall, the terms must be proportionate. (iv) Fourthly, any SHPO*
19 *must be tailored to the facts. There is no one size that fits all factual circumstances.”*
20

21 105. Counsel submitted that a SHPO ought not to be made just in case⁷. Counsel reviewed
22 the facts of this case in support of his contention that an order is not necessary. In
23 summary that:

- 24 i) JT is currently 19 years old.
- 25
- 26 ii) There is no evidence that he has engaged in any offending behaviours since
- 27 these offences. He is now a young man. The most recent offending is some



⁵ [2017] 1 Cr. App. R. (S) 13

⁶ 2019 1 W.L.R. 2409

⁷ R. v. Franklin [2019] EWCA Crim 1080

1 4 ½ years old. The absence of any further offending means that he has left
2 this type of behaviour behind.

3
4 iii) The necessity for a SHPO must be viewed in the context of his immaturity
5 at the material time.

6
7 iv) There is no compelling evidence as to risk.

8
9 v) It would be disproportionate to impose a SHPO on him as a young man. He
10 will feel the consequences of it more than a mature adult.

11
12 106. Consideration has been given to all the submissions made as well as to the findings of
13 the DCR. MM is assessed as being at medium risk of sexual re-offending. JT was not
14 assessed due to his age but is said by the Officer to be not amenable to counselling,
15 supervision or treatment for sex offences and as showing no victim empathy or
16 understanding of the effect on the victim. He is described as immature and young and as
17 requiring treatment or counselling to address his criminal thinking. I am satisfied on a
18 balance of probabilities that given the very serious nature of the offending involving as
19 it does sexual harm of a repeated nature to two young children, and the circumstances of
20 both Defendants that they each present a risk of sexual harm to children and that SHPOs
21 are necessary for the protection of children against this risk.



1 107. The CICA has recently provided guidance in the case of *Leandro Solomon v R*⁸ in
2 respect of the framing and terms of such orders. Following this guidance and accepting
3 the submissions of Defence Counsel with respect to a number of the proposed terms as
4 requiring omission or redrafting, Orders are accordingly made in amended form.

5

6 **Dated this the 7th day of April 2021**



7

8 **Honourable Justice Cheryll Richards Q.C.**
9 **Judge of the Grand Court**

10

⁸ Criminal Appeal 2 of 2020 (Ind. 16/2019)