

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL SIDE**

3  
4 **SCA: 0010 of 2021**  
5

6  
7 **ELBERT VALENTINE MCFIELD**

8  
9 **v.**

10  
11 **REGINA**



12  
13 **Appearances:**

**Appellant in Person**

14 **Mr. Neil Kumar for the Respondent**

15 **Before:**

**Justice Cheryll Richards Q.C.**

16 **SCA Hearing:**

**18<sup>th</sup> June 2021**

17  
18 **Oral Decision Delivered:**

**18<sup>th</sup> June 2021**  
19

20 **HEADNOTE**

21 ***Criminal Law – Indecent Assault contrary to s.132 (1) of the Penal Code (2019***  
22 ***Revision).*** – *Convicted in the Summary Court following his plea of guilty - Appeal*  
23 ***to the Grand Court (pursuant to s.165 of the Criminal Procedure Code (CPC))***  
24 ***against Sentence.***  
25  
26  
27  
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29 **SUMMARY COURT APPEAL JUDGMENT**



1           1.       This is an appeal against a sentence of 18 months’ imprisonment which was imposed by  
2                   the Summary Court on the 7<sup>th</sup> April 2021. This was for the single offence of Indecent  
3                   Assault contrary to s.132 (1) of the *Penal Code* (2019 Revision). The maximum penalty  
4                   for this offence is 10 years’ imprisonment. A sexual harm prevention order (“SHPO”)  
5                   was also made for a period of 5 years following the Appellant’s release from prison.

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7           2.       The Appellant was convicted following his plea of guilty to the said offence which he  
8                   entered on the 3<sup>rd</sup> November 2020. The particulars of the offence as amended are that  
9                   he, on a date between the 21<sup>st</sup> day of August 2019 and the 28<sup>th</sup> day of August 2019, at  
10                  an address on Grand Cayman, did indecently assault “DB”, a female person, by touching  
11                  her breasts and vaginal area.

12  
13          3.       By notice of appeal filed on the 13<sup>th</sup> April 2021, the Appellant, for this appeal against  
14                  sentence, relies on a single ground of appeal which is stated as follows:

15                                   *“I think the sentence that was imposed on me was too harsh and excessive, so*  
16                                   *therefore I am asking the judge to be more lenient with me.”*  
17

18  
19          4.       The facts are summarised in the Sentencing Notes of the learned Magistrate. The victim,  
20                  DB, was at the material time, the stepdaughter of the Appellant. She was a minor, of 15  
21                  years of age. During the night while she was asleep in bed at home. She was awakened  
22                  by the Defendant who had entered the bed, underneath the covers and was touching her  
23                  breasts and vagina over her clothing. The victim called for her mother and immediately  
24                  reported the matter to her.

25

1 5. The Appellant was arrested on the 16<sup>th</sup> September 2019. He was later charged and first  
2 appeared before the Summary Court on the 10<sup>th</sup> March 2020. He was arraigned on the  
3 28<sup>th</sup> July 2020 and entered a plea of not guilty. Two trial dates had been set in the matter.  
4 On the third trial date of 3<sup>rd</sup> November 2020, he pleaded guilty. He appeared to retract  
5 this plea in the course of interviews for the preparation of a Social Inquiry Report (SIR).  
6 On the initial sentencing date, the matter was adjourned for him to obtain the assistance  
7 of a new attorney and for possible arguments as to vacation of plea. Following the  
8 appointment of new Counsel, he maintained the plea of guilty.

9  
10 **THE SENTENCE**



11  
12 6. At the sentencing hearing in the Summary Court, the Prosecution submitted that the  
13 offence was one of lesser harm and higher culpability and falls into category 3A of the  
14 ***Cayman Islands Sentencing Guidelines*** for the relevant offence. The Defence did not  
15 disagree. The Summary Court noted that there was no evidence of any lingering harm to  
16 the victim and no particular fear of the Appellant on her part. As to culpability, this was  
17 a breach of trust - given the relationship between the Appellant and the victim. The Court  
18 therefore concluded that this was properly a category 3A offence. The recommended  
19 starting point is 2 years' imprisonment with a sentencing range of 1 to 5 years.

20  
21 7. The learned Magistrate considered the aggravating and mitigating factors and concluded  
22 that there was nothing significant either way to shift the 2 year starting point. The Court  
23 stated:

24 *“The offence took place at night whilst the complainant was asleep in bed. The*  
25 *Crown highlights the location as an aggravating factor.*  
26 *The only mitigating factor is that the Defendant has no relevant previous*  
27 *convictions. As noted before there is a lack of remorse.”*  
28



1 **THE CRIMINAL PROCEDURE CODE (2019 REVISION)**

2  
3 8. This appeal is brought pursuant to s.165 of the *Criminal Procedure Code* (2019  
4 Revision). This states:

5 “165. (1) Save as hereafter in this Code provided, any person who is  
6 dissatisfied with any judgment, sentence or order of the Summary  
7 Court in any criminal cause or matter to which that person is a  
8 party may appeal to the Grand Court against such judgment,  
9 sentence or order either by motion on matters of law or fact (or  
10 both) or by way of case stated on a point of law only as hereafter  
11 provided: Provided that in no case shall the complainant appeal  
12 from a decision dismissing a complaint except by way of a stated  
13 case on a point of law.”  
14

15 9. The powers of the Court on the hearing of appeals are set out in s.181 of the *Code*:

16 “The court may adjourn the hearing of the appeal, and may, upon the  
17 hearing thereof confirm, reverse, vary or modify the decision of the  
18 Summary Court, including the passing of some other sentence (whether  
19 more or less severe) or remit the matter to the Summary Court for retrial,  
20 or may make such other order in the matter as it may think just, and may,  
21 by such order, exercise any power which the Summary Court might have  
22 exercised, and such order shall have the same effect and may be enforced  
23 in the same manner as if it had been made by the Summary Court: Provided  
24 that the court may, notwithstanding that it is of the opinion that the point  
25 raised in the appeal might be decided in favour of the appellant, dismiss the  
26 appeal if the court considers that no substantial miscarriage of justice has  
27 actually occurred.”  
28

29 **THE SUBMISSIONS**

30  
31 10. The Appellant appeared in person. By way of submissions he provided a hand-written  
32 letter which he read out to the Court. It states:

33 “I Elbert McField humbly approach this court and submit this application  
34 regarding my plea for the reduction of my sentence in which I feel is  
35 excessive after taking all the circumstances into consideration. First of all I  
36 submit that I rendered an early guilty plea after careful consideration of my  
37 position, I am a family man who has four biological children and have  
38 stayed away from the courts for six years. I am self-employed with a  
39 business license for Elite Janitorial Services. I have no sort of conviction



1                    *for this conduct and I am 56 years old. I also wish to submit that I have been*  
2                    *in custody for the past two months and have attended programs related to*  
3                    *my mistakes. I am sincerely remorseful for my actions and throw myself*  
4                    *before this court begging mercy regarding the 18 months imprisonment. I*  
5                    *feel that the sentence is harsh based on this being my very first offence for*  
6                    *this. I also feel that the sentence judge could have been more lenient after*  
7                    *taking my guilty plea into consideration and not putting the courts into*  
8                    *wasting time. I am asking this court to reduce my sentence based on all the*  
9                    *circumstances. Whatever the decision maybe I will gratefully accept.”*

10  
11            11.        The Prosecution in reply drew the Court’s attention to the case of *Edwards (H.A.) v. R.*<sup>1</sup>

12                    In respect of appeals against sentence, the Grand Court held therein that an appellate  
13                    court “*should only vary a sentence imposed if it was found to be unjustified in law,*  
14                    *founded upon a wrong factual basis, based upon matters which should not have been*  
15                    *taken into account, or manifestly excessive or wrong in principle.”* An appellate court  
16                    should not change a sentence by a small amount in order to suit its own view of the facts.

17  
18            12.        In the instant case, the Prosecution identified the relevant questions for the Court’s  
19                    consideration as follows:

- 20                    i.        Did the Sentencing Court improperly characterise the offending conduct as  
21                    category 3A?
- 22                    ii.        Was inadequate weight given to the Appellant’s good character and personal  
23                    circumstances?
- 24                    iii.        Did the Court err in identifying the location of the offending conduct as an  
25                    aggravating factor?
- 26                    iv.        Was the appropriate reduction given for the guilty plea?
- 27                    v.        Did the Court fall into error in not suspending the term of imprisonment?
- 28                    vi.        Are the terms of the SHPO necessary, unoppressive and proportionate?
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<sup>1</sup> 2001 CILR 334



1 13. The Prosecution submitted that the offence was properly characterised by the Sentencing  
2 Court as one of high culpability for the reason set out above.

3  
4 14. It was also submitted that the learned Magistrate specifically took into account the  
5 Appellant's lack of previous convictions as a mitigating factor and performed the  
6 appropriate balancing exercise with the aggravating factors of the case.

7  
8 15. With respect to the location of the offence as an aggravating factor the Prosecution  
9 submitted that sexual offences that occur in a victim's home where they have a right to  
10 feel safe are particularly egregious and call for the proper application of the 'location  
11 factor'.

12  
13 16. The reduction of 25 percent for the guilty plea was said to be a generous one - this, given  
14 that the plea was on the day of trial and followed two pre-trial interviews of the victim  
15 who was present at Court to give evidence.

16  
17 17. It was also submitted that the offence is a serious one justifying an immediate term of  
18 imprisonment and that in light of the nature and seriousness of the offence the SHPO  
19 was necessary for the protection of the public and cannot be said to be oppressive or  
20 disproportionate.

21  
22 18. In the course of the arguments this Court raised a two-fold inquiry as to whether the  
23 personal circumstances in mitigation had been properly considered by the learned  
24 Magistrate and as to whether the learned Magistrate appeared to refer to and consider a  
25 single factor in mitigation rather than to consider all the personal circumstances of the  
26 Appellant as a whole.

27

1 19. Counsel submitted in response that the learned Magistrate had carried out the balancing  
2 exercise and had found that the aggravating factors and mitigating factors balanced each  
3 other such that there was no movement from the starting point. Counsel submitted further  
4 that there were no other personal circumstances that stood in the Appellant's favour  
5 which could be reasonably regarded as mitigation.

6  
7 20. Counsel also submitted that given the level of discount afforded on the guilty plea, the  
8 ultimate sentence arrived at cannot be regarded as manifestly excessive or wrong in  
9 principle.

10 **DECISION**



11  
12 21. There appears to be no error with respect to the categorisation of the offence under the  
13 relevant *Guidelines*. For this offence the *Guidelines* provide for a starting point of 2  
14 years' imprisonment with a sentencing range of 1- 5 years.

15  
16 22. The single aggravating factor is that the offence was committed at night while the victim  
17 was asleep in her own bed. The submission of the Prosecution that, this it is the very  
18 place that the victim is entitled to feel safe, is accepted. This factor would justify  
19 increasing the sentence from the 2-year starting point.

20  
21 23. As to mitigating factors, consideration has been given to whether inadequate weight may  
22 have been afforded to the overall personal circumstances of the Appellant. The  
23 Sentencing Court referred to one mitigating factor, (paragraph 11 of the learned  
24 Magistrate's Sentencing Note). There was no reference to considering the Appellant's  
25 circumstances as a whole and the matters outlined in the SIR, including the background  
26 history detailed therein as to his childhood and other traumatic circumstances.



- 1        24.    The Appellant is 56 years old, has been gainfully employed in the past and now operates  
2            a business. He has no relevant previous convictions and has had no involvement with  
3            the law for 6 years since 2014. All of these could have been taken into account by the  
4            learned Magistrate as composite factors.
- 5  
6        25.    The difficulty that this argument faces is that even if more weight is given to all the  
7            circumstances taken together, the Sentencing Court would have been entitled to adjust  
8            the sentence significantly upward in view of the weight of the aggravating factor.
- 9  
10       26.    In this Court's view this aggravating factor could properly have attracted an uplift on the  
11           upper end of some four to six months from the starting point.
- 12  
13       27.    After taking into account the overall mitigating factors, it is very likely that the sentence  
14           would have come down to the same point reached by the learned Magistrate or very  
15           close thereto.
- 16  
17       28.    The plea of guilty was not entered at the first reasonable opportunity. Two trial dates had  
18           been set. This was the third trial date. The victim attended Court and was ready to give  
19           evidence. Nevertheless the Appellant received a discount of 25%. The recommended  
20           discount as per the *Guidelines* where the plea is offered at the door of the Court as this  
21           plea was, is 1/10<sup>th</sup>. It is correct that the appellant received what can be described as a  
22           generous discount.
- 23  
24       29.    Given all of the circumstances, while this Court may have taken a slightly different route  
25           in arriving at the sentence, it cannot be said that the final sentence imposed is manifestly  
26           excessive or wrong in principle. This was a serious offence committed by a person in a

1 position of trust who offered a late guilty plea. He was not therefore entitled to the full  
2 discount.

3  
4 30. The Appellant does raise, possibly new circumstances as to his level of remorse. At the  
5 time of sentencing based in part on the SIR, the learned Magistrate noted that there was  
6 a lack of remorse. The Appellant in his submissions states that he has been in custody  
7 for the past two months, has attended programs related to his mistakes and is sincerely  
8 remorseful for his actions. This is material arising post-conviction. There is nothing  
9 exceptional about it, such that it should be taken into account as an additional mitigating  
10 factor.

11  
12 31. With respect to the SHPO, it is of note that the Appellant was assessed as at medium risk  
13 for sexual crime re-offending and at high risk of re-offending for non-sexual crimes. The  
14 nature and circumstances of the offending are such that the SHPO is necessary for the  
15 protection of the public and proportionate to the offending. It cannot be said to be  
16 oppressive.

17  
18 32. The appeal against sentence is dismissed and the sentence of 18 months' imprisonment  
19 is affirmed. The imposition of the SHPO is also affirmed.

20  
21 **Dated this 18<sup>th</sup> day of June 2021**

22 

23 **Honourable Justice Cheryll Richards Q.C.**  
24 **Judge of the Grand Court**  
25