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

**INDICTMENT NO: 24 of 2019**

**REGINA**

**-v-**

**HENRY DAGALA JABINES**

Appearances: Ms. Nicole Petit of the DPP for the Crown
Mr. Crister Brady of Brady Law Attorneys for Defendant

Before: Hon. Justice Marlene I. Carter (Actg.)

Sentence Delivered: 3 October 2019

**HEADNOTE**

**Criminal law; Indecent Assault; Incident at Hotel; Aggravating Factor**

**Transcript of Oral Reasons for Sentence**

CARTER, J.

1. The facts in this case are not in dispute. Mr. Jabines [The Defendant] is before the court, having pled guilty to one count of indecent assault, contrary to section 145 (1) of the *Penal Code (2019 Revision).*

2. On the 26th of February 2019, the complainant went with his father to a hotel in Cayman Brac. They were there to pick up the complainant's mother, who was at a function at the hotel. While waiting, the complainant saw the defendant, who he had met previously and whom he knew through playing volleyball. The complainant acknowledged the defendant, who then carried on to the beach. The complainant continued to play on his phone while waiting on his parents.

3. Shortly thereafter, the complainant went into the bathroom because he was being bitten by mosquitoes. He sat in a stall and continued to play games on his phone. The defendant entered the bathroom about 10 minutes later. The defendant approached the complainant in the stall and closed the door to the stall. The defendant then proceeded to show the complainant a pornographic image on the defendant's phone. The complainant became concerned and suspicious, and the defendant then proceeded to reach out and squeezed the complainant's testicles through his trousers. The complainant stood up and told him to stop, pushed the defendant aside and came out of the bathroom stall. The complainant went directly to his mother in the conference room at the hotel and told her what had transpired. He also told his father, who confronted the defendant. The police were called to the scene, and the defendant was arrested.

4. The defendant was subsequently charged with two offences under *the Penal Code*, to which he initially pleaded not guilty on the 22nd of March 2019; however, on the 2nd of July 2019, on the date of trial, the defendant changed his plea to guilty to the first count on the indictment of indecent assault, which pleas were accepted by the Crown. This court will award him a 20% discount to his sentence for his guilty plea.

5. *The Cayman Islands Sentencing Guidelines* do not provide any assistance with regard to the exact offence of indecent assault as there are yet no guidelines relating to sexual offences as such. Similarly, the Chief Justice's statements on tariffs and guidelines for sentencing, as well does not treat directly with the specific offence for which this defendant is charged.

6. The Crown has referred the court to the *United Kingdom Sentencing Guidelines* in terms of what matters may be considered with a view to arriving at an appropriate sentence.

7. The court was referred to the *AG's Reference Nos. 91, 119 and 120 of 2002* where it was stated that:

> *"In determining the gravity of an offence of indecent assault or other sexual offence, the sentencing court should take account of the same general considerations as in the case of rape. Those are:*
>
> *(i) the degree of harm to the victim;*
>
> *(ii) the level of culpability of the offender; and*
>
> *(iii) the level of risk posed by the offender to society — the offender's age and the fact that the offender might only be a danger to the members of the family with whom he had the relationship would be relevant in determining whether there was a reduced risk of offending."*

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8. The Crown and the defence agree that a consideration of those guidelines and relevant adjustment for the fact that the maximum sentence for a like offence in England and Wales is 14 years, whereas the maximum sentence for indecent assault in this jurisdiction is 10 years, equates to an appropriate starting point of 8.6 months with a range of 18.5 weeks to 17 months' custody.

9. In this case, the Crown has offered that there were aggravating factors for the court's consideration. The Crown submitted that the court should consider that this was a case where there was an abuse of trust given the relationship between the defendant and the complainant in that they were both involved in the sport of volleyball and I believe they played on the same team.

10. The Crown also offered that the court should consider whether another aggravating factor could be that this offence was committed at a hotel, and that this factor could have negatively impact the confidence in the tourism industry as a result.

11. Counsel for the defendant did not agree that these should be aggravating factors within the court's consideration. Counsel offered that: *"It was only 'coincidental' that the incident occurred in the environs of a 'hotel', as the victim and the defendant were for all intents and purposes 'locals'..."*

12. Counsel went on that:

> *"This means that the implications and inferences, suggestive in that aspect of the Crown's submissions;* [that the place of the incident should be an aggravating factor] *respectfully does not support the notion of an adverse effect having impacted the Islands' tourism industry."*

13. I do not consider that the nature of the relationship here supports abuse of trust as an aggravating factor. It is usually the case that a much closer relationship between the parties is contemplated when abuse of trust is put forward as an aggravating factor; and although they were both on the same team, no facts have been offered to show that this defendant was, for example, a coach of the complainant or that he was particularly involved with the complainant during the course of them playing volleyball together to merit an abuse of trust argument.

14. I also find that the submission with regard to whether or not this offence was likely to negatively impact confidence in the tourism industry is not so strong that I should consider it as a separate aggravating factor in all the circumstances.

15. With regard to mitigating factors, what has been offered in support of this defendant is that he has previously been a man of good character. He has no known convictions or other antecedent history.

16. The court ordered a Social Inquiry Report and a Victim Impact Report for its consideration. Both of those are before the court.

17. The Social Inquiry Report details that this defendant, a Filipino national, had grown up and been educated in the Philippines up to high school level. The Social Inquiry Report detailed his background in terms of employment. He was obviously very constructive in terms of being employed from quite a young age in different jobs. He held a position at a local bakery in the Philippines as well as an appliance salesman for two years. He was also employed at a local supermarket there for over a year; and it was after he had gained a beautician licence in 2016, he moved to the Marshall Islands to work again as a barber; and the defendant moved to Cayman Brac in 2018 where he took up a similar position as a barber at a salon in Cayman Brac.

18. The Social Inquiry Report also detailed that the defendant enjoys quite good health. There are no mental issues for this court's consideration.

19. The Social Inquiry Report went on further to detail that since he has been incarcerated awaiting trial for this offence (this is in March of this year), the Defendant has done his best to keep as busy as possible. The report states and has successfully obtained employment as an office orderly. Further, the Social Inquiry Report goes on that he consistently attends programmes and classes, namely, Psychology Self Control, Prisoner's Journey, Information Technology, Business Administration, and Accounting. Also he attends church daily, reads his Bible and watches TV in his spare time.

20. It appears then that the defendant has been trying to avail himself of whatever self improvement courses he can while incarcerated.

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21. With regard to the defendant's attitude towards this offence, I accept that the Defendant has expressed genuine remorse. The Social Inquiry Report details that he stated to the probation officer:

> "*If I offended him* [meaning the complainant] *then I am sorry. God knows I came here to work. I really just want to go home. I took care of my name for 35 years, not to do foolishness. I want to say I am sorry because they must have felt offended. I don't want any enemies.*"

22. The Victim Impact Report is also before this court. The complainant expressed that he at first felt betrayed and angry for the first two weeks after this offence. He reports that he has been well supported by his parents and friends and teachers. He went on to state that he does not feel that this incident has had any long lasting impact on him, and he went on to say that the situation would have been more traumatic for him had the offender, namely, the defendant, forced him to engage in other sexual acts.

23. The complainant described that this offence has had an impact on his parents in their parenting style in that his parents, who are strict, have become even stricter and particular about his supervision. He stressed that he, for himself, has become even more aware of his surroundings, and while he's comfortable using the bathroom at school, he has taken measures not to use public bathrooms unless there are others present.

24. The probation officer stated that the complainant is not displaying any signs that he is struggling emotionally and as well that his parents have noted that he is not displaying any behaviours that would serve as an indicator that he is suffering from post traumatic stress disorder.

25. These are the matters that are before the court for its consideration. I have carefully considered them all. I have also considered precedents which the Crown has submitted, including among these the case of *R v Wayne Bellafonte*, Indictment 17 of 2013, which involved an assault on a female who was 15 years of age. This defendant tried to place his penis into the complainant's vagina and following a guilty plea was sentenced to a term of imprisonment of 1 year and 10 months.

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26. In the case of *R v Regal Jackson,* Indictment number 68 of 2007, the offending behaviour involved contact with the naked genitalia of the offender and another part of the victim's body. There was a further aggravating factor in that case in that the defendant had ejaculated. Following a guilty plea, the defendant was sentenced to a term of imprisonment of 2 years.

27. Taking into account all these factors, I accept that the starting point should be 8 and a half months in prison with a range of 18 and a half weeks to 17 months.

28. Defence counsel had submitted to this court that the court should consider whether this was not an appropriate case where the sentence should be, as he described it, a short, sharp, shock in composition, and part of that submission was centered around the fact that this was a case in which there was no touching of the naked genitalia of the defendant and as well the defendant's particular immigration status in that he is here on a work permit and would certainly be deported or not be allowed to remain on this island at the conclusion of this matter. The defendant has been in custody at this point since March of this year.

29. Taking a starting point of 8 and a half months; there are no aggravating factors which would cause me to uplift that starting point, as well there are no particular mitigating factors which would cause me to decrease that starting point significantly. In all the circumstances of this case, I consider that a sentence of 10 months' imprisonment is appropriate. I would recommend that the defendant is deported immediately upon the conclusion of that sentence, and that the time the defendant has spent in custody is to be deducted from the sentence imposed today.

Justice Marlene I. Carter
Acting Judge of the Grand Court

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