IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 22/16
(Ind. 20/117/16 & 72/16)
C5596/15/ 6368/15

HER MAJESTY THE QUEEN

Appellant

- and

Michell Anderson Gamboa-Garcia

Respondent

BEFORE:

The Rt Hon Sir Bernard Rix, Justice of Appeal
The Hon John Martin, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

Appearances: Patrick MoranD/DPP& Eleanor Fargin Crown counsel/Lee Halliday-Davis (Brady Law) for the respondent

---

JUDGMENT

Revised from transcript of oral judgment 18 November 2016 and Approved
Released 13 January 2017

RIX JA:

1. This is the application of the Crown to appeal against the sentence handed down on Mr. Michell Anderson Gambao Garcia of a total of 12 years' imprisonment imposed on him by Mr Justice Mettyear on the 31st of August 2016.

2. The Crown's application is made pursuant to Section 30(1) of the Court of Appeal Law 2011 on the ground that the sentence in question was "unduly lenient".

3. The judge had to sentence the defendant, and here the Respondent, on two indictments and a further series of serious offences which had been committed for sentence.

4. **We should have said before commencing that this judgment, and we say it now, that the two young victims of the offences should not be identified or anything be done to seek to identify them, and their identities are protected by the law.**

5. The offences fall into these three parts: Indictment 17 of 2016 concerned two rapes and six indecent assaults against a girl of 15 years at the time of the offending which all occurred in December 2014, essentially on two separate days divided by something like two weeks, or thereabouts. The offences committed for sentence concerned two offences of gross indecency with a child, a child of only five years old, and seven counts, one of which was rolled up, of taking an indecent photograph of that child. Those offences were all committed on the tenth of September 2015. It was as a result of that child immediately telling her parents what had happened that led to the arrest of the Respondent to the investigation, to the interrogation of his phone. That interrogation led to the third area of sentencing, charged under Indictment 72 of 2016, which consisted of six counts of the possession of child pornography and two counts of the distribution of child pornography.

6. The counts of possession embraced something like a thousand photographs in all, most of them in the lowest category, of category C, but some 154 or 5 relating to category A involving penetrative sex. The counts of distribution involved, in one case, a single image, and, in the other case, of a video and an image.

7. The details of the offending are well summed up in the sentencing remarks of Mr Justice Mettyear, which we will read into this judgment. He said:

> "You pleaded guilty to the following matters that were committed to the Grand Court for sentence by the Summary Court. There were taking images, indecent images of a child, seven of those, and the basis of plea which you tendered was that there were a total of between 20 and 25 such images. The images were indecent and no doubt obsessing, but thank goodness they were low-level indecency compared to some of the stuff one sees in the courts.

You also pleaded guilty to two offences of gross indecency. Those offences, all of them, took place on the same day … and concerned the same child … a child born [in] 2009 …. The offences were committed in gross breach of trust.

On the day in question the defendant was working inside the child's home doing work as part of his employment on an air-conditioning unit. Her mother was downstairs and the defendant was upstairs in the master bedroom. This lively, intelligent, and no doubt inquisitive child innocently walked into the room where the defendant was working. He persuaded her, by pretending it was all in play, to take off her clothing and pose in certain ways. He photographed her, he licked her vagina and he licked her anus. …. Thank goodness the child had the bravery and good sense to tell what had happened, first to her nanny and then to her mother. Her mother called the police and her husband and had the courage to block off the defendant's vehicle so it couldn't get away had he tried to do so.

To the police, the defendant denied [the child's] truthful allegations. What happened on that incident was every parent's nightmare. This child and her parents, who suffered greatly as set out in the victim impact report, which I have read in full, and all as a result of the defendant's depraved conduct. ….

The defendant's telephone was examined and the photos I have already referred to were found. More significantly still the examination revealed more offending and that now appears in Indictment 17/16 and 72/16.

The indictment 17/16 alleges a series of very serious sexual assaults. The victim was [a girl] born [in] 1999. She and the defendant had known each other since about 2011.

The offences against her were committed on the 9th of December 2014 and the 28th of December 2014. There are two counts of rape and six counts of indecent assault. There had been some kissing and cuddling between the two in the past, but she had rejected his request for full sex. [She] does not recall the offences taking place and had no idea what had happened until the police informed her. On each occasion [she] was drunk or drugged into oblivion. The defendant began the offending in a car and then continued in a house where they both were staying.

Overall, on the first occasion he raped her vaginally, sucked her breasts, put his penis in her mouth. On the second occasion he licked her anus,

penetrated her vagina with his finger and her anus with his thumb and finger and vaginally raped her. She was 15 [albeit we add nearly 16] at the time. The defendant's pleas were on the basis that the defendant believed she was 16. The Crown rightly did not seek a Newton hearing on that issue and therefore I have to proceed on the basis that he did believe that she was 16 at the time. To make matters worse, the defendant filmed and photographed his despicable behaviour.

In her victim impact report [she] said that she felt betrayed. She thought of the defendant as her only friend and 'like a brother'. She has a continuing problem with anger and with sleep. She feels ashamed even though she has in fact nothing to be ashamed of.

The defendant was born on the 16th of January 1990. He has no previous convictions. I have read the very detailed Social Inquiry Report dated the 11th of January 2016. It appears that he had a miserable and unhealthy upbringing, but nothing that happened to him can possibly justify the behaviour demonstrated by him in this case.

The report overall makes grim reading. It is apparent he is addicted to pornography and, to a degree, the subjugation of women. He is rightly assessed as posing a high risk of reoffending.

In mitigation, Ms. Lee Halliday-Davis said everything that could possibly be said on his behalf. She pointed out that he is still young, only 26, that he has no previous convictions, that he has a good work record and seemed to behave himself to begin with when he came here from Columbia, and that he pleaded guilty to the offences alleged against him.

I accept all that she said but, in a case as serious as this, personal mitigation doesn't count for very much".

8. The judge then went on to explain his sentencing. He said that for the two rapes and the six indecent assaults under Indictment 17 of 2016, a total sentence of nine-and-a-half years' imprisonment should be served. That was made up of concurrent sentences of nine-and-a-half years on the two rapes; concurrent sentences of five years' imprisonment in respect of the four indecent assaults which involved penetration either with the penis in the mouth or with finger and thumb; and that for the other indecent assaults concurrent sentences of two-and-a-half years were imposed.

9. The judge explained those sentences by saying that he started in accordance with the 2002 Chief Justice's Guidelines of the Cayman Islands at ten to twelve years, that he aggravated and mitigated -- he said that he gave very little for

mitigation -- up to 14 years, and then he arrived at a final sentence of nine-and-a-half years by reason of the plea of guilty. Strictly speaking, the nine-and-a-half years was very slightly less than a full one third discount for the plea of guilty, but that was adjusted by the way he dealt with other sentences that he had the deal with.

10. Turning to the offences against the five-year-old girl. He said that he would have imposed concurrent sentences of four years after a trial for the two counts of gross indecency and that those sentences would have been higher but for considerations of totality. As a result of the pleas of guilty, those sentences were reduced to two-and-a-half years, slightly more than one third, but it balances out exactly the consequence of reducing the 14-year sentence to nine-and-a-half years on the Indictment 17 of 2016. He also imposed a two-and-a-half-year sentence on the plea of guilty for the taking of indecent photographs of the five-year-old girl. So that all those sentences committed for sentence were concurrent sentences of two-and-a-half years, but consecutive to the nine-and-a-half years on Indictment 17 of 2016.

11. Finally turning to the counts of pornography on Indictment 72 of 2016, he said that he would have imposed a sentence of three years' imprisonment after a trial. In error, he did not go on to state that he would impose a discounted sentence of two years following the pleas of guilty, but he must have intended to do so.

12. All those sentences on those nine counts were concurrent with themselves and concurrent with the other sentences on Indictment 17 of 2016 and the sentences committed for sentence. Thus, he arrived at a total sentence of 12 years on the pleas of guilty, on the basis that he would have imposed a total sentence of 18 years for all those sentences if they had followed a trial.

13. Now, on this application, Mr. Moran submits that the judge had gone seriously wrong essentially by not imposing a sufficiently high sentence to recognise the seriousness of the sentencing of these offences against the five-year-old child; and, secondly, by not sentencing the pornography either seriously enough in itself, and also in not making it consecutive to the other offences against the young girl and the child. Mr. Moran's submission was that in effect the judge almost got it right so far as the rape and indecent assault offences against the young girl were concerned. His submission would be that the judge should have sentenced to 15 years after a trial and to ten years on the pleas of guilty, those

ten years being not materially different from the judge's sentence of nine-and-a-half years. But Mr. Moran submits that the judge went seriously wrong in sentencing the offences against the child to only four years after a trial where Mr. Moran submits that seven-and-a-half years ought to have been imposed, leading to a sentence of five years on a plea of guilty, and that the judge ought to have sentenced the pornography offences in a similar way — that is to say, on the basis of a sentence of seven-and-a-half years after a trial, reduced to five years on the pleas of guilty, and in this way, Mr. Moran's submissions would take a total sentence on a plea of guilty to 20 years, namely ten years plus five years plus five years, reflecting a total sentence after a trial of 30 years.

14. Mr. Moran then accepted that that was beyond what considerations of totality would require and it might be thought somewhat arbitrarily, after the logic previously displayed in his submissions, reduced his 20 years to 14 to 15 years on the plea of guilty on the basis of totality.

15. Now, if those submissions were valid, such a sentence of 14 to 15 years would not be, in itself, all that materially different from the judge's sentence of 12 years, but the way that Mr. Moran puts it is that having started with a total sentence of 20 years on a plea of guilty, the reduction to 14 to 15 years, out of consideration for totality, reflects the inevitable conclusion that in sentencing to only 12 years the judge had gone beyond that range of reasonable sentences, in all the circumstances, which a judge has to be shown to have done in order to come within the rationale as laid down in these courts and in the courts of the United Kingdom to support an uplifted sentence on appeal at the request of the Crown on the basis of undue leniency.

16. Ms. Halliday-Davis, on behalf of the Respondent, submitted more simply that the judge, in his careful sentencing remarks, had properly taken into account all the considerations in question, the many aggravating circumstances, which the mere recitation of the facts of the offending themselves indicate that he had carefully considered the requirements of totality, and had come to the conclusion that 18 years after a trial and 12 years on a plea was the correct sentence as a matter of totality.

17. In our judgment, we see, to a certain extent, the force of Mr. Moran's submissions that, in themselves, the offending against the little girl and the offences of pornography were serious offences which could well have merited

sentences higher than those imposed by the judge. In the case of the little girl, we do not think if those offences had stood by themselves this court would, on appeal, have reduced a sentence of, let us say, six years. Similarly, we understand that a sentence of only three years after a trial for the pornography offences, bearing in mind that in the Cayman Islands possession of pornography has a maximum sentence of 15 years, five years higher than the maximum in the United Kingdom, and that for the offence of the distribution of pornography the maximum sentence in the Cayman Islands is 25 years. And bearing in mind those matters, we could well visualise that the judge might well have sentenced the pornography offences on the basis of the sentence of more than three years after trial, and, in other circumstances, might well have wanted, as perhaps he did in this case, have sought to make of those sentences to some extent a consecutive sentence. Although, depending on all the circumstances in the case, he might well have had to reduce the sentence that he would wish to give for the pornography in order to make of them a consecutive sentence.

18. Nevertheless, having said that, we do not make those observations on the basis on which Mr. Moran submitted that we should. In other words, by reference to the Attorney-General's Reference (No. 28 of 2010) in *R. v. Michael Anthony Charnley*, EWCA (Crim) 1996, 1 Cr.App.R.(S) 58, where although the Court of Appeal Criminal Division of England and Wales spoke entirely justifiably of the great seriousness of the making of pornographic images in that case, the equivalent possessing of pornography in these Islands, emphasising the seriousness of them, and the need in that case of a consecutive sentence, to render the sentences in those cases -- which all concerned pornographic images -- a just sentence, nevertheless, in our view, the structure of our case is very different. Not only are the pornographic images in our case vastly fewer in number, and the serious category A ones also very different in number from those which obtained in the *Charnley* case, but our case is concerned with the still more serious physical offending against young girl and the little child, and what is important in our case is to reflect adequately the seriousness of that offending. It is only if there is room left for a consecutive sentence for the pornography offences that one should make those sentences consecutive.

19. The conclusion to which we have come is that although the judge might well have sentenced somewhat more severely than he did, taking individual sentences by themselves, he might well have concluded, as Mr. Moran has submitted, that the offences against the 15-year-old girl merit a total of ten, rather than nine-and-a-half years. He might well have concluded that the sentences taken by themselves against the little child merited more than the four years down to two-and-a-half years, which he imposed. He might well have considered that the pornography deserved more than three years. But he had to make room

for each of those sentences and to make sense of each of those sentences. Would it have been right to reduce the sentences in cases of rape and gross indecency against the young girl and the little child in order to squeeze in a year or two in respect of a consecutive sentence in respect of the pornography, a sentence which itself would not have done adequate justice to the seriousness of those pornography offences?

20. In the end, the judge considered that he had to weigh the seriousness of the sentences which he imposed to adequately reflect the grave seriousness of the offences against the young girl and the little child. We think that he was right to come to that conclusion and we think that any extent to which still higher sentences might well have been imposed in those cases do not cross the boundary of demonstrating, as the Crown has to, that he has sentenced outside the range which was legitimate to him as in all the circumstances of the case.

21. For those reasons, therefore, we decline to accept the Crown's submissions. However, we give the Crown permission to appeal, albeit the appeal is dismissed.