

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT**

**CICA (Crim.) No.10/2014 and No 19/2014
(Ind 48/13 C# 05598/2013 McLean) and (Ind 71/13 C#06888/13 Douglas)**

BEFORE

THE RT HON SIR JOHN CHADWICK, PRESIDENT

THE HON ELLIOTT MOTTLEY, JUSTICE OF APPEAL

THE RIGHT HON SIR BERNARD RIX, JUSTICE OF APPEAL

BETWEEN

H.M THE QUEEN

Respondent

and

RANDY MCLEAN

Appellant

AND BETWEEN

H.M.THE QUEEN

Respondent

and

RON CHRISTOPHER DOUGLAS

Appellant

Heard 4, 6 November 2014

**Appearances: Laurence Aiolfi & Fiona Robertson of Samson & McGrath for
Mclean & Douglas. Laura Manson Crown Counsel for the Director of Public
Prosecutions.**

JUDGMENT: 21 November 2014

Revised from transcript and Approved – released 27 February 2015

No details are to be reported in the press which might identify the child in the proceedings R v Ron Christopher Douglas, CICA (Crim) No 19/2014. A reporting restriction remains in place.

Sir John Chadwick, President:

1. On 25 October 2013 Randy Michael McLean pleaded guilty to defilement of a girl under the age of 16 years contrary to section 134(1)(b) of the Penal Code (2010 revision). On 24 April 2014, he was sentenced by Justice Henderson to a term of imprisonment of five years and four months. He seeks to appeal to this Court against that sentence on the grounds that it was manifestly excessive.
2. On 14 February 2014 Ron Christopher Douglas pleaded guilty to two counts; the first of which was, again, a charge of defilement of a girl under the age of 16 years contrary to section 134(1)(b) of the Penal Code. On the 3rd of June 2014 he was sentenced by Justice Quin to a term of imprisonment of four years and eight months. He, too, seeks to appeal to this Court against that sentence; again on the grounds that it was manifestly excessive. He also pleaded guilty to a second count, under which he was charged with possession of an indecent photograph of a child contrary to section 228(A) of the Penal Code. On that count he was sentenced to eight months' imprisonment to run concurrently with the sentence of the first count. There is no appeal against the sentence imposed in respect of the second count.
3. As I have said in each case the offender pleaded guilty. That led, in each case, to the judge deducting a full discount of one third from the sentence which he would have imposed had there been a trial following a not guilty plea. In the earlier case (McLean) Justice Henderson held that the appropriate sentence following a trial would have been eight years. In the latter case (Douglas) Justice Quin held that the appropriate sentence following a trial would have been seven years. The difference between

eight years in the earlier case and seven years in the later case was attributable to different aggravating and mitigating circumstances in the two cases; which included, in particular, (i) the factor that in the earlier case (McLean) the offender had a previous conviction for an offence of defilement; (ii) the factor that in the later case (Douglas) the offender, although of previous good character, was found to have abused a position of trust which Justice Quin described as “a very serious aggravating factor”. But, in each case, the judge started from the position that a tariff sentence under the Chief Justice’s 2002 statement on tariffs and guidelines was five years.

4. The relevant paragraph in the 2002 statement, under the general heading “As regards sexual offences”, is in these terms:

“If the victim is over 12 but under 16 years of age the law prescribes a maximum penalty of seven years. The Courts regard all sexual offences as very serious and all too prevalent. While the actual age of the girl within each category and the circumstances of the offence will always be important considerations, the basic tariff here will be five years where the offender had no reasonable cause to believe or did not in fact believe that the girl was above the age of 16 years”.

It can be seen from that paragraph that, in 2002, the maximum penalty for the offence was seven years’ imprisonment. Since 2002, the maximum sentence has been increased to 12 years; but the guideline has not been altered. It is, we think, appropriate to consider whether the basic tariff should be adjusted upwards in the light of subsequent change in the maximum sentence now prescribed by the law. It is anomalous that when the 2002 guidelines were promulgated, the tariff sentence of five years represented a much higher proportion of the maximum sentence that could then be imposed than is now the case.

5. We have been referred to the position under the guidelines issued by the Sentencing Guidelines Council in England and Wales. The comparable

offence in England and Wales is that under section 10 of the Sexual Offences Act 2003. The maximum sentence that can be imposed in respect of an offence under that section is 14 years' imprisonment. That is slightly higher than the maximum sentence that can now be imposed in this jurisdiction under section 134 1 B of the Penal Code.

6. Under the version of the Sentencing Council Guidelines which has been in force since 1 April 2014 - that is to say, since just before the sentences were passed in the present cases - the recommended approach to the sentencing task in cases of this nature is by four steps: (i) to determine the offence category by reference to both harm and culpability; (ii) to identify the starting point and the category range; (iii) to identify aggravating and mitigating factors; and (iv) to take account of any potential deduction for a guilty plea.
7. In each of the present cases it's accepted that the offence category under the Sentencing Council Guidelines would be category 1A; that is to say, category 1 in relation to harm – “penetration of the vagina or anus using body or object” - and category A in relation to culpability which includes "an abuse of trust and a significant disparity in age". A category 1A offence would indicate “a starting point of five years with a range of between four and ten years”. That represents an increase over the pre-2014 guidelines; which would have indicated a starting point in this type of case of four years with a range of three to seven years.
8. The Sentencing Council Guidelines provide the following assistance: (i) the starting point applies to all offenders irrespective of plea or previous convictions; (ii) the second step allows for further adjustment for aggravating or mitigating features; but (iii) a case of particular gravity, reflecting multiple features of culpability or harm, could merit an upward

adjustment from the starting point before further adjustment for aggravating or mitigating factors. So in a case where there is both a significant disparity in age and an abuse of trust, the starting point would be subject to an uplift from five years imprisonment. Further, the guidelines emphasise that there are a number of additional factual elements providing the context of the offence and factors relating to the offender; and that it is necessary to identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, recent or relatively recent convictions are likely to result in an upward adjustment: indeed in some cases, having considered these factors, it may be appropriate to move outside the identified category range. Mitigating factors in this context include no previous convictions or no relevant recent convictions, remorse, previous good character and/or exemplary conduct.

9. In the McLean case, Justice Henderson drew attention to the important feature that the defendant had a previous history of this type of offence. In the course of his sentencing remarks he said this:

“Mr. McLean has a previous history for the same type of offending. In 2006 he had sexual intercourse with a girl under the age of 16. He was convicted in 2008 of that offence and given what can only be described as a lenient sentence on that occasion, the sentence imposed was imprisonment for two years but it was suspended. He was ordered to do 50 hours of community service which (as the judge said) it would appear he completed it in a satisfactory manner.”

10. The judge went on to observe that at the time of this act of intercourse, Mr. McLean was 30 years of age. He said this:

“This is not one of those cases where the perpetrator and the victim are close in age. Neither is it one of those cases where they could be described as having been engaged in a boyfriend/girlfriend relationship. This is a case of an adult man preying upon a young

girl.”

And he concluded:

“So I have before me a man who is facing his second conviction for defilement of a girl under the age of 16. He is entitled to credit for the fact that he pleaded guilty at a reasonably early opportunity and the Crown has accepted that they are content that he receive the full measure of discount for having done so. The tariff suggests a term of imprisonment for five years; but the tariff, of course, is speaking of a first offence. This is a second offence. In my view, in all the circumstances my starting point for this second offence would be a term of imprisonment of eight years. With that I would deduct one third and therefore I arrive at a sentence of 64 months which equals five years and four months”.

11. There is no doubt, in my view, that Justice Henderson was correct in treating the previous conviction as a seriously aggravating factor justifying a substantial uplift from a tariff starting point of five years. It is said on behalf of the appellant that the judge went too far in that respect; and that he should have adopted a starting point of five to six years. In particular it is said that he should have taken into account, as a mitigating factor, the age of the victim, who was in her 16th year: that is to say, she was aged between 15 and 16.
12. In the Douglas case, Mr. Justice Quin drew attention to the abuse of trust which was a feature of that case. The defendant was in a position of trust as a coach to a sports team in which the complainant participated. The judge said this in the course of his sentencing remarks:

“First, this is not a case in which the defendant and the victim are similar in age. It is not a case where two young people are in a virtuous friendship which ends in sexual intercourse. The defendant was a mature older man and what is important is that he was acting in a supervisory capacity.

Second, the abuse of the privileged position of trust this defendant held as a coach in this case is a very serious aggravating factor. The defendant was a coach for a team of young girls. There should be no

safer haven for children, especially one for girls to spend productive and recreational time while learning a skill then by learning and playing for a young girls' football club. This defendant, by his actions, has transformed the environment of a young girls' football club into a place that parents now view with some apprehension and fear. The girl and her parents were entitled to consider that the young girls' football club was a safe environment for girls to play football and have fun. The sports coach is the very person to whom the children look for protection and guidance.

The 31 year-old defendant has abused his position of trust for his own selfish sexual gratification.”

13. Justice Quin went on to say that the abuse of the young victim’s innocence was serious:

“This was a girl of 13. The victim may have viewed the defendant with some affection because of the companionship he provided in their discussion, but he was a father of children himself and a father of a child who is the same age as the victim. He should have realised fully how impossible it would be that there could be anything right, proper, moral or legal about a sexual relationship with this young girl.”

14. In those circumstances, the judge reached the conclusion that the proper starting point in that case was seven years; that is to say, the starting point was substantially higher than the five years indicated as the basic tariff (both in the 2002 Chief Justice's statement on tariffs and guidelines and, now, in the Sentencing Guidance Council’s observations). Again, it is submitted that, in raising the starting point from five years to seven years, the judge went too far.
15. We were referred to a number of reported decisions. Those included, in the jurisprudence of England and Wales, *R v Hayley* [2010] 1 Crim App R (S) 105, *R v Nache* [2010] 2 Crim App R (S) 106, *R v Nickle and Wright* [2013] 1 Crim App R (S) 41 and *R v Pierce* [2013] 1 Crim App R (S) 54. In my view, those decisions are of limited assistance to a judge seeking to

determine an appropriate sentence in this jurisdiction. First, they were decided under the former guidelines in England and Wales, which were lower than they have since become and lower than the Chief Justice's tariff in his statement of 2002. And second, they were decided in a jurisdiction in which the attitudes of the public to this type of offence, at least prior to the 2014 guidelines, seem to have been rather different to the attitude of the public in this jurisdiction.

16. In this jurisdiction, as is clear from the 2002 guidelines, defilement of a girl between the age of 12 and 16 is regarded as a serious offence with a starting point of at least five years. In those circumstances it cannot be said that the judge, either the McLean case or the Douglas case, erred in treating the appropriate starting point as substantially in excess of five years; as I have said, in the one case a starting point of eight years and in the other a starting point of seven years. In each case there was a seriously aggravating factor. In the first, there was the history of convictions for similar offences; and, in the second, there was the feature of a serious abuse of trust.
17. In my view, there is no basis upon which this Court should regard either of these sentences that were imposed after a full reduction of one third as being manifestly excessive. Indeed, it seems to me, they were probably about right. Accordingly I would dismiss these appeals.

Elliott Mottley, Justice of Appeal :

18. I agree.

Sir Bernard Rix, Justice of Appeal :

19. I agree.