

9/3/10

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Criminal Appeal No. 23 of 2009
(Indictment No. 43/08)
C#04751/2008**

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

GIFFORD CLAYTON HARLEY PRENDERGAST

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that GIFFORD CLAYTON HARLEY PRENDERGAST having sought leave to appeal against *his* Conviction & SENTENCE passed upon *him* by the Grand Court on the 24th day of September, 2009 as set out below:

Indictment # 23/09

**Indecent Assault on a Male – Count 1
5 years imprisonment on each count.
All sentences are concurrent.**

**Indecent Assault on a Male – Counts 2-8
Same as above**

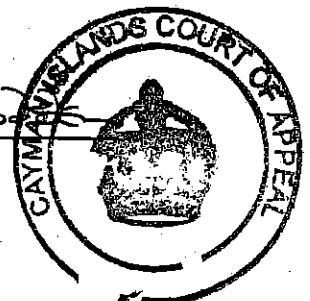
**Indecent Assault on a Male – Count 9
Charge dismissed on 17th September 2009**

The Court of Appeal has finally determined the said appeals, and has this 26th day of November, 2009 given judgment therein to the effect following:

- 1. The appeal and the Crown's cross-appeal is dismissed.**
- 2. Sentence affirmed**
- 3. Transcript of oral judgment to be released.**

Dated this 9th day of January, 2010


Registrar



IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

APPEAL NO. 23/09
IND NO. 43/09
C#04751/08

BETWEEN:

GIFFORD CLAYTON ARLEY PRENDERGAST

Appellant

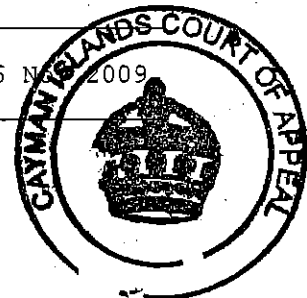
and

HER MAJESTY THE QUEEN

Respondent

BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE MOTTLEY, J.A.

Reasons for Judgment delivered orally on 26 November 2009



APPEARANCES:

On behalf of the Appellant:

H. Hamilton, Q.C.
Ms. K. Reid

On behalf of the Respondent:

Ms. K. Gunn

Judgment (Forte, J.A.)

1 THURSDAY, NOVEMBER 26, 2009

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3

JUDGMENT

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5 FORTE, J.A. (Orally):

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This is an appeal by Gifford Clayton Arley
7 Prendergast against sentence on an indictment
8 which charged him on nine counts, on eight of
9 which he was convicted. Mr. Hamilton abandoned
10 the appeal against conviction at the
11 commencement of this hearing so the appeal
12 remains only against sentence. The appellant
13 was sentenced to five years on each count to
14 run concurrently.

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Before us Mr. Hamilton argued that that
sentence is manifestly excessive. Before
dealing with the arguments in that respect, it
would be appropriate to outline the facts in
the case, and a convenient starting point in
relation to that is provided by Mr. Justice
Henderson who tried this case in the Grand
Court.

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The eight counts collectively describe a
course of conduct which occurred from May
1st, 2006 until April 30th, 2008 although

Judgment (Forte, J.A.)

1 Henderson, J. says that the evidence disclosed
2 that the period covered 18 months in all. It
3 should be said at this time that
4 Mr. Prendergast, the appellant, stood in loco
5 parentis to the victim, a boy who was at the
6 time of these offences aged between 12 and 13.
7 The appellant is not the boy's biological
8 father, but he was very much a father figure to
9 the boy. The boy, calling him "daddy", spent a
10 great deal of time in his company and depended
11 upon the appellant in a variety of ways.

12 Throughout this period of time, the
13 appellant manipulated the young boy and exerted
14 a minimal amount of force to engage the young
15 boy in homosexual acts. The appellant and the
16 victim engaged on a number of occasions in
17 mutual oral sex and mutual masturbation always
18 at the instance of the appellant.

19 At the time of the trial, the appellant
20 was 36 years of age, a mature man throughout
21 the period of time.

22 The learned judge described a number of
23 sexual acts occurring on different days
24 amounting to between 50 and 100 times.

25 He recorded that a mild degree of physical

Judgment (Forte, J.A.)

1 force was used on a handful of occasions
2 although for the most part the appellant
3 exerted what the boy rightfully called "mental
4 force". After some initial resistance, the boy
5 acquiesced in this behaviour.

6 At the hearing, the question of sentencing
7 surrounded a discussion about the application
8 of the Sentencing Guidelines Council in the
9 United Kingdom with reference to the Sexual
10 Offences Act 2003 in the United Kingdom. It
11 was pointed out that in that country the
12 starting point for offences such as this was
13 five years. The learned judge, however, dealt
14 with that, and I quote from his reasons.

15 "I remind myself that the
16 maximum penalty is higher in the
17 United Kingdom than it is in
18 this jurisdiction. The maximum
19 penalty in the United Kingdom
20 for sexual assault is 14 years,
21 while in the Cayman Islands the
22 maximum for indecent assault is
23 ten years. I must respect that
24 difference and take it into
25 account to the benefit of the

Judgment (Forte, J.A.)

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defendant."

In the end, the learned judge arrived at a starting point of four years. Mr. Hamilton has chosen to challenge that starting point. He has referred us to many cases out of the United Kingdom in which the sentences were much lower than the five years to which this appellant has been sentenced. We, however, find that none of those cases are helpful, all of them dealing with acts which bear no resemblance to the degree that exists in the facts in this case.

It is interesting to see how the learned judge dealt with the sentence, and I am going to quote him again because I think it is very relevant to our conclusion.

"As I have said, there are present in this case some aggravating factors. The defendant's position of trust and influence, which was considerable and which endured throughout the entire period over which the offences were being committed, is a major

Judgment (Forte, J.A.)

1 factor I must take into account.
2 In addition, there were many
3 repeated offences committed over
4 a considerable period of time.
5 There was some minimal degree of
6 force used, particularly at the
7 beginning.

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9 "I consider that the lower
10 maximum penalty in the Cayman
11 Islands should lead me to accept
12 a lower starting point for my
13 sentence calculation. A term of
14 imprisonment for four years
15 would be an appropriate starting
16 point for this offence."

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18 Having said that, the learned judge, as I
19 have done, dismissed the application of the
20 cases cited to him from the United Kingdom on
21 the same basis that we are now dismissing those
22 cases.

23 What did he take into account in
24 determining the correct sentence in this case?
25 I am going to quote him again.

Judgment (Forte, J.A.)

1 "I take into account what has
2 been said by counsel for the
3 defendant, and I note
4 particularly that some 26 pages
5 of character reference letters
6 have been received from members
7 of the community who were
8 motivated to write and support
9 the defendant at this time. I
10 do place some weight on those
11 and I do think they should, to a
12 certain extent, serve to reduce
13 what might otherwise be the
14 appropriate sentence. However,
15 the aggravating factors are of
16 considerable significance and
17 outweigh to a substantial degree
18 any mitigating effect derived
19 from the defendant's good
20 reputation in this community."

21
22 Now, what were those aggravating
23 circumstances that the learned judge found? I
24 will quote him again.

25 "At sentencing I have been

Judgment (Forte, J.A.)

1 presented with a short victim
2 impact statement from the boy
3 who is now 15. He says that,
4 during the sexual assaults, he
5 used to feel confused, mad in a
6 way, depressed and 'I pretty
7 much lost respect for myself.'
8 He added that during this period
9 of time his grades declined
10 badly. I have no reason to
11 doubt those assertions."

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13 Then the learned judge says this:

14 "At page nine of the guidelines,
15 [that is the guidelines to which
16 I referred, the Guidelines
17 Council in the United Kingdom]
18 under the heading 'Factors
19 Indicating Higher Culpability',
20 that is to say aggravating
21 factors, the guidelines' authors
22 list, amongst other things,
23 deliberate targeting of
24 vulnerable victims, abuse of
25 power and abuse of a position of

Judgment (Forte, J.A.)

1 trust. Those last two elements
2 are particularly relevant here."
3

4 With that statement we entirely agree.

5 He continues.

6 "At page ten under the heading
7 'Factors Indicating a More Than
8 Usually Serious Degree of Harm',
9 the authors point to repeated
10 assaults on the same victim,
11 which is what I have before me.
12 The eight counts to which I have
13 referred earlier are specimen
14 counts."
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16 The learned judge was there emphasising
17 what he accepted as aggravated circumstances in
18 this case. With those comments we agree.

19 Mr. Hamilton though says that the position
20 of trust lost its strength because the young
21 boy had admitted that he was interfered with by
22 two other persons in the past. We cannot agree
23 with that. We agree with what the learned
24 judge says. The defendant's position of trust
25 and influence which was considerable and which

Judgment (Forte, J.A.)

1 endured throughout the entire period over which
2 the offences were being committed is a major
3 factor which he took into account. I reiterate
4 that, having cited it before, because of the
5 importance we put on the question of the trust
6 that this young boy had in a person who he had
7 placed in the position of his father, not
8 having a father of his own.

9 Having said all of that, we come to the
10 conclusion that this was a well-reasoned
11 judgment by the learned trial judge arriving at
12 what we think is the appropriate sentence. We,
13 however, would like to say that while it might
14 appear to be lenient and could easily, given
15 the factors in this case, have been more, we
16 cannot come to the conclusion that it is unduly
17 lenient. We, however, find that the term of
18 five years for offences such as this is, in
19 fact, an appropriate sentence. We agree with
20 the learned judge's conclusion, though we do
21 not like the term "starting point", we prefer
22 to say that sentences should be in the range of
23 four to five years, with an additional increase
24 depending on whether there is aggravated
25 circumstances or not.

Judgment (Forte, J.A.)

1 In the event therefore we cannot find any
2 fault with the judgment of the learned judge.
3 The appeal is therefore dismissed.

4 CHADWICK, P.: The appeal and the cross
5 appeal.

6 FORTE, J.A.: So is the cross appeal.

7 CHADWICK, P.: The sentence below is
8 affirmed.

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Certified correct to the best of my skill and
ability, dated the 3rd day of December 2009.

Karen Woon Sam

