In the Supreme Court of St. Helena

Citation: SHSC 26/2021

Criminal

Sentence

Attorney General

-v-

Brian Henry

Sentence dated 7th October 2022

Duncan Cooke, sitting as an Acting Judge of the Supreme Court

Section 93 of the Welfare of Children Ordinance 2008 & Section 1 Sexual Offences (Amendment) Act 1992 apply to this ruling. Nothing may be published if it is likely or calculated to lead members of the public to identify any complainant or person under 18 involved in these proceedings

1. Mr Henry you have pleaded guilty at the first opportunity to an offence of indecent assault upon a 13 or 14 year old girl in either 1991 or 1992. Your basis of plea has been accepted by the prosecution in that you believed her to be 14 years old, that you and she had sexual intercourse with her consent after she asked you to take her to White Gate. At the time of the offence you would have been 23 to 25 years old
2. These proceedings have a very unfortunate history. You were arrested for this offence in 1992 shortly after the complainant made a statement. You were interviewed as the police were investigating an offence of unlawful sexual intercourse with a girl under 16 when they should have investigated you for rape given what the girl alleged. You admitted having consensual sexual intercourse with the girl but were not charged as the police felt that the time limit for prosecuting the offence had expired.
3. You were later charged with this offence in these proceedings and the prosecution indicated that they did not accept that the sexual intercourse was consensual. Instead of charging a rape they charged this offence of indecent assault with the intention of putting the matter before the court as one of non-consensual sexual intercourse. As you admitted consensual activity you entered a guilty plea and put forward a basis of plea making that assertion. As the prosecution did not accept this the matter was set down for a Newton hearing and the prosecution prepared a document detailing where they took issue with the basis of plea.
4. On the day before the Newton hearing the prosecution reviewed their evidence, which had not changed from the time that you were charged, and decided that they could not establish that the sexual activity was non-consensual and conceded that you should be sentenced on the basis of what you admitted in 1992

5. There is a very real problem here. This offence is better charged as an unlawful sexual intercourse with a girl under 16 but the prosecution are over 30 years too late to do that. This not a case of your actions, or inactions, leading to a delay in proceedings. Neither can this be put down to a late complaint, the fault for the delay lies squarely with the prosecution and your victim has every reason to feel let down by the police who must have compounded her anguish at what you did.
6. I have had a very helpful sentencing note from Mr Kemp and I agree with him as to the approach to be taken to sentencing. I will consider the sentencing guidelines for sexual activity with a child taking into account that these relate to an offence with a maximum a sentence of 14 years whereas the offence you face carries 10 years.
7. Mr Kemp asserts that this is a category 1A offence. It is clearly category 1 for harm as there is penetration of the vagina. The matter Mr Kemp suggests brings this matter within category A is a significant disparity in age. This has the impact of moving the offence from 1B which has a starting point of 1 year to category 1A which has a starting point of 5 years.
8. I do not believe that the disparity in age can be described as significant in the context of this offence. There is clearly a disparity but it is not sufficient to justify such a significant uplift in the starting point by 4 years. You were, after all, a peer of the victim's sister
9. There was though severe psychological harm to the complainant, however her statement is predicated upon the basis that the activity was non-consensual and upon a version of events in a 2017 ABE that is significantly at variance with her 1992 witness statement. It is also right that she was a victim of many men but you are just as responsible for the condition that the victim is in now as the other men. This girl was targeted by a group of men who clearly used her for their own sexual gratification without any thought as to the consequences. She was clearly vulnerable because of being targeted and you no doubt recognised that vulnerability in her. Whether this makes her particularly vulnerable having regard to the guidelines may be arguable.
10. However I am not sentencing in strict accordance with the guidelines and as a consequence the lack of a middle ground between 1A and 1B is less problematic. I simply have to sentence by measured reference to the guidelines. The observations in R v H [2011] EWCA Crim 2753 that Mr Henry has brought upon himself a differing sentencing regime by not admitting the offences at the time cannot apply, however this court cannot judge what sentence he would have received and so must apply current sentencing practice. I am required to have regard to the current guidelines which, it must be remembered, apply to offences committed after 6th April 2010. A measured reference to the guidelines does not mean a mechanistic application of them and I consider that the impact of R v H and R v Forbes and others [2016] EWCA Crim 1388 allows a degree of flexibility especially when one has regard to the differing maximum sentences between the guideline referred to and the offence to be sentenced.
11. Taking into account the severe psychological harm for which all the men are equally to blame I start this sentence at 3 years. I do this by a measured reference to the guidelines and by having regard to the different maximum sentences between the 2003 offence and the one you are being sentenced for. With credit for plea this is 2 years custody.
12. I now move onto the impact that the delay has on my approach to sentencing. You have not offended sexually in any way before this offence or since. You have moved on in your life and have a 14 year old daughter. You have a good work history and have a good job. You are assessed as being of low risk of serious harm to others. The

delay is something I must take into account and I will do this by further reducing the sentence to 18 months custody

13. I finally have to consider if there is a meaningful non-custodial sentence that could be imposed as an alternative and failing that whether the sentence could be suspended. I do not find that a community penalty is appropriate given the seriousness of what you did, it must be marked with a prison sentence. I have regard to the guidelines on suspending sentences which are based upon a regime that allows for conditions to be attached, which is not possible on St Helena. However I do not feel that you should be prejudiced by that. Having regard to your low risk of reconviction for a similar offence, your lack of relevant previous convictions and your family circumstances I am just minded to suspend the sentence
14. There will be an 18 month prison sentence suspended for 2 years.
15. In passing this sentence I am fully aware that it is unlikely to bring any comfort to your victim who is understandably very angry at you. This lady was let down appallingly in 1992 and the sorry history of how you came to be before this court some 30 years too late will likely have the impact of victimising her further.

Duncan Cooke, Acting Judge of the Supreme Court
7th October 2022