In the Supreme Court of St. Helena

Citation: SHSC 9/2023

Criminal

Appeal against Sentence by the Attorney General

Attorney General

-v-

Trystan Thomas

Ruling dated 13th July 2023

The Chief Justice Rupert Jones

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. This is my ruling on the appeal made by the Attorney General ('the AG', 'the Appellant' or 'the Crown') to the Saint Helena Supreme Court pursuant to section 244(1)(c) of the Criminal Procedure Ordinance 1975 ('the CPO').
2. The Appellant argues that the sentence imposed on Trystan Thomas, the Respondent, on 25 May 2023 by the St Helena Magistrates' Court - six months' imprisonment suspended for two years - was so lenient as to be one which no reasonable court, properly directing itself in law, could have passed.
3. Mr Dykes appeared for the Appellant and Mr Scott appeared for the Respondent at the hearing which took place by remote video technology on 30 June 2023. I am very grateful to them both for the quality of their written and oral submissions.
4. I acknowledge that this was a difficult sentencing exercise for the Magistrates' Court to conduct, as acknowledged by the parties. Ultimately, I will not be interfering in the Court's sentence, given the high threshold that has to be satisfied.

Procedural points

Defective Notice of Appeal

5. The first point to be considered is Mr Scott's submission that the appeal, including the notice or petition of appeal, was procedurally defective.

6. He relies on the requirement under section 244(2) of the CPO that the AG institute the appeal or consent to it being instituted: '244(2) An appeal on the ground mentioned in subsection (1)*(c)* may not be instituted except by or with the consent of the Attorney General.'

7. He submits that the requirement has not been satisfied in this case. He observes that the Notice of Appeal filed on 7 June 2023 was drafted and submitted by Crown Counsel, the Crown Prosecutor. Where the Appeal is not brought by the Attorney General, the Ordinance requires the Appeal to be instituted by or with the consent of the AG.

8. He submits that at the time of filing the Notice of Appeal, no such consent had been obtained. This was brought to the attention of Crown Counsel and the Supreme Court at the time of filing but was not remedied.

9. He contends that the Appellant having filed an amended Notice of Appeal dated 21 June 2023, signed by the Acting AG, purports to correct the earlier defective document. He submits that the Notice of Appeal remains defective as it appears that the AG's signature has been obtained administratively only and that the AG has not considered the merits of this appeal; as such the amended Notice of Appeal is of and in itself defective.

10. Thus, he argues the appeal is therefore defective.

11. I reject the argument.

12. There are two separate questions to consider. The first is the procedural requirement for the petition or notice of appeal itself and the second is the substantive requirement to institute the appeal.

13. In relation to the procedural requirement in the petition of appeal itself, I am satisfied that the Crown has complied with section 245 (2) and (3) of the Criminal Procedure Ordinance: **'(2)** When the appellant is represented by an advocate or is the Crown Prosecutor, the petition must contain particulars of the matters of law or of fact in regard to which the Magistrates' Court is alleged to have erred. **(3)** A petition of appeal by the Crown Prosecutor must be presented and signed by the Crown Prosecutor.'

14. It is undisputed that the Crown Prosecutor did sign the Petition of Appeal in this case. I also accept that this has been the standard practice for appeals by the Crown in St Helena

in the recent past. The question is whether that this suffices by way of written evidence of the AG's consent. I return to future practice below.

15. In relation to the second substantive question, it is also undisputed that, at a minimum, the appeal requires the AG's consent to be instituted by virtue of section 244(2).

16. The real question is whether it was obtained in this case and what form it is required to take.

17. Nonetheless, the consent of the AG must be given before the appeal is instituted by the Crown Prosecutor filing the notice of appeal – it is insufficient for it to be obtained afterwards given the consent is as to the 'institution'. An appeal may not be instituted under s. 244(1)(c) except by or with the consent of the AG. I agree with Mr Scott that the signature of the AG could not have retrospective force. If the original filing on 7 June 2023 had not been properly instituted, the Appellant would now be out of time for filing the Appeal and would therefore have to apply for leave to appeal out of time. The AG had not done so in writing at any stage but Mr Dykes made an oral application during the hearing in the event I rejected his primary submission.

18. Fortunately for him, I accept his primary submission. I accept that the AG's consent was obtained orally in this case before the appeal was instituted. Mr Dykes submits that this took place by virtue of a conversation he had with the AG who agreed to the appeal being pursued. He accepts there was no email or other written record to evidence the AG's consent.

19. I take Mr Dykes at his word, there being no reason to doubt that an officer of the court would be telling the truth on such a matter. I also accept that section 244(2) does not require the consent be obtained or presented to the court in writing, only that it be obtained. The written procedural requirement is that required by section 245(3) – that the prosecutor sign the petition.

20. The Ordinance implies that the involvement of the AG in deciding whether or not to appeal a sentence **is not** simply an administrative task of obtaining the AG's signature. I agree with Mr Scott that it is important to consider the safeguards that the legislature decided were appropriate to build in to a prosecutor's right of appeal. The safeguard to obtain the consent of the AG is more than a mere administrative requirement.

21. The legislature anticipated that the AG had to consider the grounds for appeal and decide for him/herself whether s/he considered the sentence to be so lenient that no reasonable court, properly directing itself in law, could have passed and as such whether there is merit to an appeal.

22. The legislative safeguard is to ensure against police or prosecutors harbouring a disappointed expectation in relation to the length of sentence, which would lead to them

bringing an unarguable, vexatious or bad faith appeal. The importance of requiring the AG to consider the matter and decide for him/herself whether the sentence was 'so lenient' cannot be understated.

23. Therefore, I also observe and direct that the following practice should be observed in future to avoid there being any question as to whether the AG's consent has in fact been obtained for an appeal to be instituted. In future, the AG must at the time of instituting an appeal under section 244(1)(c) or consenting thereto, make a written record of this decision. Thereafter, this written record of the AG's consent should be provided to the Court and parties at a minimum (and it may be preferable if the AG signs the notice of appeal in addition to the Crown Prosecutor.)

24. In conclusion, I have decided in this case that the appeal was not defective in the AG's consent was obtained before the notice of appeal was filed on 7 June 2023. On that basis it was not made out of time and leave to appeal is not required. I therefore do not need to address the arguments except to observe that, if a formal application had been made in writing for the purposes of section 247 of the CPO, I would have given leave on the basis that: the amended notice instituted on 21 June 2023 was only 13 days out of time; the original notice, was served within the 14 day time period for an appeal; the Crown had followed the former usual practice; and had not acted with bad faith.

Factual Background – the conviction and sentence

25. On 25 May 2023 the Respondent was sentenced to 6 months imprisonment, suspended for 2 years. This followed a guilty plea to an offence contrary to s.13 of the Sexual Offences Act 2003 (sexual activity with a child committed by a child or young person under 18). He was charged under s.13 because at the time of his offending he was under 16 years of age. However, he was in fact 20 years of age at the time of conviction and sentencing.

26. The Respondent was convicted and sentenced at the Magistrates' Court in St Helena rather than on indictment at the Supreme Court. He was not committed for sentence to the Supreme Court. The maximum sentence for this offence in England, as provided by s.13, is six months imprisonment on summary conviction (at the Magistrates' Court) or five years on indictment. However, section 241 of the Criminal Procedure Ordinance allowed for the St Helena Magistrates' Court to impose the higher of the maximum sentences available (the maximum of five years available on indictment) because this was not in excess of its jurisdiction pursuant to section 19(5) of the Magistrates' Court Ordinance.

27. Had the Respondent been 18 years old at the time of his offending, the offence would have been charged contrary to s.9 of the 2003 Act – Sexual Activity with a Child. The maximum sentence for this offence is 14 years imprisonment.

28. The facts of the case were set out in the sentencing notes submitted to the Magistrates' court, by the prosecution and defence and are not repeated in any detail.

29. The Respondent fully admitted that when 16 years old he had both vaginal and oral penetrative sexual intercourse with the victim, a 14 year old girl, in the early hours of 10 February 2019.

30. The basis of the Respondent's guilty plea was that:
Sexual intercourse was never forced upon the complainant, and at all times she consented to what happened that night.
Mr Thomas did not supply any alcohol to [the 14 year old girl].
Mr Thomas did not book the hotel room.
Mr Thomas did not ejaculate.

The Magistrates' Court ruling on sentence – sentencing remarks

31. Relevant extracts of the ruling on sentence are as follows:

32. Factually this is a very serious matter. You have provided a basis of plea and do not dispute the prosecution version of events.

33. At the beginning of the incident your victim was unsteady on her feet and told you that she was not feeling well, you say that you did not recognise her intoxication which may well be right but she communicated to you that she felt unwell and you carried on despite that by removing her clothing. She was covering her breasts with her arms and had crossed her legs but you pulled her arms away and moved her legs apart. You penetrated her vagina firstly with your finger and then your penis. You caused her to bleed and she told you it hurt yet you still carried on.

34. You then placed her on a stool and penetrated her again and during this her head banged against a wall. You then sat on the stool and continued the sexual intercourse during which you hit her. After that you required her to suck your penis and you held her head while doing that.

35. You have heard the impact statement which is chilling. On the fourth anniversary of this event this girl tried to kill herself. This was not a situation of two young people engaging in experimentation but one where you were older, knew that she was unwell and reluctant yet carried on with no regard for her wellbeing. The incident lasted quite some time. Parliament still allows periods of imprisonment of up to 5 years for this offence, despite the fact that you were 16 at the time.

36. We will of course apply the overarching guidelines for sentencing children and young persons and the guidelines for sentencing children and young persons for sexual offences. This was a sustained incident that involved penetrative activity where severe psychological harm was caused to your victim. This offence falls fairly and squarely within those where a custodial may be justified.

37. There was deliberate humiliation in terms of hitting her during sexual intercourse and having her put your penis in her mouth when it was covered in her blood. You also knew full well that she was underage by quite some margin. In your favour is your lack of previous convictions at the time.

38. There appears on the face of it to be a conflict between the adult guideline and the young person guideline for sentencing sexual offences, the latter guideline being the one we have to consider to enable us to establish what sentence you would likely have received were you before this court aged 16. Step one for sentencing young people contains matters that are taken into account in step 2 for adults, for example severe psychological harm (which is present here) can bring the offence within the highest category for youths but not

adults. The same is true for sustained incidents which this was. Yet the youth guideline allows the sentencer to take into account the adult guideline in the very last paragraph.

39. However the adult guideline is based upon an offence that carries up to 14 years where this offence carries a maximum of 5 years. That being said you fall within the top bracket for sentencing on the youth guideline due to the severe psychological harm and the sustained nature of the incident, which are not matters that bring this into category A for culpability on the adult guideline. The other matter that has become apparent over time is the devastating impact of what you did, which may not have been fully appreciated when you were 16. This enables this court to be sure of the extent of the harm caused, whereas 4 years ago it may not have been so certain.

40. Were you an adult at the time you offended then this would be a case falling within category 1B on the basis of penile penetration with no factors in A for culpability. With the aggravating factors of severe psychological harm, humiliation of your victim and length of time the incident took with the mitigating factors of your lack of previous convictions and age the sentence would fall towards the top end of that category.

41. Whichever way this is looked at the custody threshold is passed by quite some margin, the harm you caused this girl is something she will have to live with for many years to come. We can detect very little empathy with your victim or appreciation of the gravity of what you did.

42. …

43. Given the seriousness of this offence it is the view of this court that a sentence of custody is clearly warranted. Taking into account your chronological age at the time of the offending, maturity, emotional and developmental age at the same time as well as the aggravating and mitigating factors present the appropriate custodial term in your case is 9 months

44. …

45. Applying credit for plea the sentence will be one of 6 months imprisonment suspended for 2 years

Legal Framework on appeal to the Supreme Court from the Magistrates' Court

46. Section 244(1)(c) of the Criminal Procedure Ordinance provides:

> **<u>Right of appeal against acquittal</u>**
>
> **244**. (1) The prosecutor may appeal to the Supreme Court against a decision or determination of the Magistrates' Court on any of the following grounds, namely:
>
> … (c) that the sentence imposed was so lenient as to be one which no reasonable court, properly directing itself in law, could have passed.

47. I will refer to this test as a sentence which is 'unreasonably lenient', but I recognize this is shorthand. As Mr Scott rightly warned me, the section provides for a high threshold and the Supreme Court should not interfere with the sentence of the Magistrates' Court lightly but only if this threshold is satisfied. I summarised the test in the appeal case of *AG -v- Wheeler and Wheeler 2022* at paragraph 131 in relation to an appeal against acquittal:

> *131. The threshold for finding that the Court made a finding that no reasonable court properly directing itself could have reached is very high. The prosecution must*

establish that the factual finding of the Court was perverse, irrational or Wednesbury unreasonable- that the Court made a finding that was not within a reasonable range available to a properly directed tribunal on the evidence before it. It is not a matter of this court deciding that it may have reached a different conclusion on the evidence.

48. It is not enough for me simply to disagree with the sentence and consider that I would have passed a higher sentence than the one passed. I am not to approach this statutory threshold as if I were sentencing afresh.

49. Likewise, the concept of an 'unduly lenient' sentence in English law is not helpful and section 36 of the Criminal Justice Act 1988 on an Attorney General's reference is not the relevant provision for me to apply.

Submissions on sentence

50. Mr Dykes, for the Appellant, submitted orally that, on the facts of this case, a sentence of 6 months' imprisonment was so lenient as to be one which no reasonable court, properly directing itself in law could have passed. His representations were based primarily on the length of the custodial term.

51. He referred to the respective sentencing notes in respect of the convoluted mechanics that are to be applied when sentencing a defendant who was a juvenile at the time of offending. However, he submitted that it was clear that there was an acceptance on the part of the defence in the case that the custody threshold was passed when following youth guidance.

52. As such – the appropriate "adult" guidelines to consider, when assessing length, were indeed those in place for an s.9 offence. He accepted, as the Magistrates' pointed out, there is some difference between the s.9 adult offence with a maximum sentence of 14 years' imprisonment, and the s.13 youth offence, which carries a maximum sentence of 5 years (roughly a third of the adult sentence).

53. Mr Scott submits that this sentence was not one that was unreasonably lenient and the appeal should be dismissed.

The grounds of appeal considered

<u>Categorisation</u>

Whether the offences should have been treated as culpability A on the adult guidelines

54. The Magistrates' Court had to consider the youth guidelines (Sexual offences - sentencing children and young people). It also had to consider the adult sentencing guidelines for a section 9 offence (but adjust them from the maximum of 14 years to the maximum term of five years for a section 13 offence).

55. It properly considered both sets of guidelines as part of the sentencing exercise but correctly recognised that the youth guidelines were the 'overarching' ones (paras 6 and 8 of its ruling).

56. The Court was right to observe that the custody threshold was clearly passed – the youth guidelines suggested a custodial sentence may be justified where, as in this case, there was a sustained incident and severe psychological harm cause to the victim. That brought it into the top category on the youth guidelines – see paragraph 9 of the sentencing remarks.

57. The Court properly observed the relationship between the adult and youth guidelines at paragraphs 8 and 9 of the sentencing remarks, including the slight differences between the approaches suggested by the two.

58. The last paragraph of the youth guidelines reads:

> Where a custodial sentence is **unavoidable** the length of custody imposed must be the shortest commensurate with the seriousness of the offence. The court may want to consider the equivalent adult guideline in order to determine the appropriate length of the sentence.
>
> If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range.

59. The Magistrates' Court therefore rightly went on to consider the equivalent adult guidelines. When considering the adult sentencing guidelines, it was universally accepted that, in terms of Harm, this was a Category 1 case as there was penile penetration, not only of the victim's vagina, but of the mouth.

60. The question then was whether it would have been correctly categorised as Culpability B as an adult offence, which was the basis which the Magistrates' Court took into account when passing its final sentence.

61. Mr Dykes submits that the Court should have sentenced this case as equivalent to a Culpability A offence on the adult guidelines. He submits that the facts of this case were particularly unpleasant. Those facts were accepted by the defence. It was agreed that the victim was not "coerced" into having sexual intercourse, however, what followed was an experience that a 14 year old girl should never have been subjected to.

62. Paragraphs 3 to 7 of the Court's ruling make clear the court acknowledged there were many aggravating features to the offending.

63. Mr Dykes submits therefore that, given the facts of the case as they were accepted, and the number of aggravating features, this was a case where the court should have properly

sentenced as if it were an adult category 1A offence. Even *if* the Court considered the case fell within 1B on the adult guidelines, considering the aggravating features, this was a case that would have merited upward adjustment beyond the 1B category range.

The submissions made to the Magistrates' Court before sentencing

64. At this point it is worth considering the submissions made to the Court prior to sentencing.

65. The prosecution's submissions as to why this was a category A case on the adult guidelines were as follows:

> In terms of culpability the Crown submit that the court should assess this as a category A case. Many of the aggravating features outlined mirror those referred to in the youth guidance. However, for reasons as outlined above, the Crown ask the court to consider this as a case where there had been a significant degree of planning and that there had been alcohol involved. The court are also asked to consider this as a case where TT targeted ES at a point where was particularly vulnerable and point to the circumstances of the offending. Whilst there was no ejaculation ES was caused to perform oral sex whilst TT penis was covered in her own blood.
>
> If the Crowns submission finds favour and the court were to consider this a 1A case the appropriate starting point, given the guilty plea, would be in the region of 3 years and 9 months as an adult. Given the balancing of aggravating and mitigating features it is submitted that this would be the appropriate "adult" sentence. Guidance makes clear the court should sentence at half to 2 thirds.

66. The Magistrates' Court did not accept the prosecution's submissions that this was a category A case for culpability on the adult guidelines, deciding that there were no features present which fell within Culpability Category A (see para 9 of the ruling set out above). Although not expressly stated, it must have agreed with the submissions of the defence that alcohol was not given to the victim by the Respondent to facilitate the offence and there was no significant degree of planning.

67. The defence sentencing note included the following submissions on those issues:

> 7.The prosecution note at para 16 addresses what it states is the role of alcohol. The prosecution position is that ES was "clearly impacted by drink". The defence position is that he was not present when the girls were drinking alcohol but he knew that they had been. He did not supply them with any alcohol. He was at the time unaware of how much each girl had to drink. It is also evident that no one else present that night is drunk especially the other girls in her company. Perhaps importantly as a 16 year old boy (his 16th birthday was 5 weeks before the allegation) and with little experience of alcohol and how it might affect different people he was not capable of determining how drunk ES was. What he can say is that he is in agreement with the evidence that ES was talking normally at the time. It is his position that although there is evidence from the girls that in their view Ella was drunk – they also describe her as "speaking normal" [see AJ page 3 line 12].

8.There is other evidence the Court can properly consider when determining exactly what TT ought to have known in relation to ES's "drunkenness" on the night. Mr Miskell is present minutes after the event, he is suspicious and one might attribute to him as a Detective Chief Inspector of the Police Force a level of judgment on how the girls presented to him that evening. He makes no mention of ES being noticeably drunk especially when seeing her in the company of the other 3 girls. His statement was written the next morning. In addition to this the defence would ask the Court to consider the contemporaneous notes of DC Balme served by the prosecution. The notes of her conversation that evening with ES start at page 5 and run for 5 pages. We can therefore assume ES was in the company of DC Balme for some time. Relevant to this evidence again the absence of DC Balme raising any concern that ES as "clearly drunk" something that might have been worth noting considering the efforts made by the girls to deny they had been drinking that night. Finally there is also the evidence of ES mother who attends to collect her daughter and describes seeing ES for the first time that night as "quiet and subdued" [SS pg 1 last paragraph] and having taken her home that night makes no mention of ES being "clearly drunk".

9.The defence position is that ES may well have felt the effects of the alcohol she had consumed that night. And that this may well have affected her judgement. It may well have been the "vehicle" as why her inhibitions were lowered that evening. However the evidence of the prosecution supports the position that ES was capable of masking the affects the alcohol, of talking normally even though feeling drunk. Her drunkenness was not something TT as a 16 year old boy identified as an opportunity or as the prosecution put it "as a vehicle that allowed this offending".

10.It is submitted on behalf of Mr Thomas that this is not a case where there is a significant degree of planning. The time spent with ES was not planned. The evidence of an earlier hotel booking by Brandon simply supports the contention that 3 boys and 4 girls were planning on getting together that night.

Sentencing Guidelines

11.In sentencing the defendant the court will have regard to the definitive guidelines for S9 sexual offences for guidance.

12.It is submitted that when the basis of plea is considered that the defendant's offending would fall into Category 1B.

13.The prosecution note argues that Culpability should be set at A. The Guideline identifies 16 different factors which either individually or cumulatively may take a case into Category A. They advance the argument that there was a significant degree of planning, (the earlier booking) and potentially a significant disparity in age (the age gap being more significant at that age).

14.It is submitted that the booking of the room does not evidence any significant degree of planning and the age gap of 2 years (TT himself having only recently turned 16) is not sufficient to engage the statutory culpability factor of "Significant disparity of age).

15.In the absence of any of the 16 factors identified in the Guideline this is a 1B offence. It has a starting point, after trial, for an adult over 18 years is of 1 years' custody and a range of High Level Community Order to 2 years' custody.

Discussion and Analysis

68. I am satisfied that the Court's view that the offence would be Category B on the adult guidelines was not a decision that no reasonable court could have made. Whether or not I would have come to the same view does not matter.

69. These are my reasons.

70. The Appellant submits that the Court erred in law when deciding that this would not be a Culpability Category A offence for an adult. Mr Dykes submits there were features present which fell within those listed under Category A.

71. The first point relied on by the prosecution was that the Court was wrong to find there was no significant degree of planning such as to exclude this from constituting a Culpability A offence for an adult.

72. Mr Dykes submitted that there had been a "significant degree of planning". He did not accept the defence submissions and argued that the boys were not invited the party: this was a party for a 14 year old girl; the girl's parents did not know that the boys were going to , or had , booked a room; and the evidence is clear the reaction of the parents was one of surprise when they became aware the boys had booked a room and were at the hotel.

73. He pointed to the fact that the Appellant had sought to initiate sex with the victim and was "knocked back". He contended that it was clear the Appellant had wanted sex. The fact the boys had, under the noses of the parents, managed to book a room so they could be close to the girls was indicative of their intentions. The boys would not have booked a room in a hotel on a small island near to their homes had they simply sought to share some birthday cake.

74. In opposing the appeal, the defence submitted that there was no planning: the "boys" booking a hotel room (the room was not booked in the Respondent's name) was in order for them to, effectively, join "the party".

75. In my view, the true position may fall between the competing submissions - that the Appellant may have attended the party hoping to have sexual intercourse and it was his intention in advance, even if he did not book the hotel room for such a purpose or make any other advance plans. Therefore, there may have been a degree of planning to the boys' attendance.

76. I also consider that it would have been helpful if the Court had explained its reasons for rejecting the prosecution's submission on this point.

77. However, the Court was entitled to find it was not a significant degree of planning for the reasons submitted by Mr Scott before me and in paragraph 10 of his sentencing note to the Magistrates' Court. I therefore do not accept the Crown's submission that the Magistrates' Court was unreasonable in concluding that the aggravating feature of 'significant degree of planning involved in the offence' was absent. The Court was entitled to conclude that there was a degree of planning but not such as to bring the case within the aggravating features for Culpability A.

78. Second, Mr Dykes submits that drink was involved in the offence and that the Court noted this in its ruling. Mr Dykes submits that, without doubt, the alcohol that lowered the victim's inhibitions, even if the Respondent did not ply her with drink. Again, the prosecution asked the Court to consider that this could be seen as use of alcohol on the victim to facilitate the offence such as to constitute an aggravating feature falling within Culpability A.

79. Again, it might have been helpful if the Court had explained its reasoning for rejecting the argument. However, I accept that the Appellant did not provide alcohol to the victim, rather he exploited the fact she was drunk. Therefore, while this is an unattractive feature, it was not unreasonable for the Magistrates' Court to decide it did not constitute 'Use of alcohol/drugs on victim to facilitate the offence' such as to fall within the statutory aggravating features for the purpose of Culpability A.

80. The Court's decision that these two aggravating features were absent was not unreasonable, it was entitled to accept the defence submissions.

81. Next the Crown, as per the sentencing note submitted for the Magistrates' court, submitted that the fact the defendant was of the age of consent, 16, and the complainant was 14 does represent a "significant disparity in age". Mr Dykes argued that the Appellant had crossed an appropriate age threshold and this represented a significant disparity in age.

82. Again, I do not accept that the Court was unreasonable in rejecting this as an aggravating factor – there was only a two year age difference. The Magistrates' Court was entitled to find there was not a significant disparity in age such that this does not merit inclusion in Culpability A. It was not unreasonable to decide this aggravating feature was absent.

83. Finally, Mr Dykes submits that there was, "specific targeting of a particularly vulnerable child". He relies on the Court's ruling *"At the beginning of the incident your victim was unsteady on her feet and told you that she was not feeling well... she communicated to you that she felt unwell and you carried on despite that by removing her clothing"*. He also further highlights that the victim was 14, drunk, and alone in a hotel room with the Respondent. He submitted that the Court should have accepted in these circumstances that the victim was, at that time, particularly vulnerable.

84. Mr Dykes did not accept the defence submission that the victim was not vulnerable as there was a police officer and his wife in a nearby room who she could have roused for help.

85. Again, whether or not I would have come to the same conclusion, the court was entitled to find that there was no specific targeting of a particularly vulnerable child. While the victim was undoubtedly made vulnerable by virtue of her age and alcohol it was not unreasonable to decide that she was not 'particularly' vulnerable (for example she had no other mental or physical disability or illness that was highlighted). It was entitled to accept the defence submissions.

86. I am satisfied that the decision that this would have been a Category 1B offence for an adult was not so unreasonable that no reasonable Court, properly directed, could have made it.

87. In rejecting each of these four aggravating features, I am satisfied that the Court was entitled to decide that the correct categorisation for this offending for an adult in relation to the section 9 offence would have been Category 1B (High level community order – 2 years' custody) rather than Category 1A (4 – 10 years' custody).

88. Therefore, I am satisfied that the Court was reasonably entitled to find none of the aggravating features was present as set out in the adult guidelines (and as similarly reflected in the youth guidelines). This means it was reasonable to conclude the sentence did not fall in the top category for the adult s. 9 offence or youth s. 13 offence.

<u>The approach to sentencing taking into account this would have been a category 1B offence for an adult</u>

The Crown's submissions

89. Mr Dykes submitted that even if the offence was correctly categorized as Culpability 1B for an adult, the number of aggravating features took the appropriate sentence beyond the maximum for the range of 2 years' imprisonment. He argued that the appropriate sentence for an adult would have been up to 3 years and 9 months (just shy of the bottom of the range for a 1A offence of four years' imprisonment).

90. At step 2 of the section 9 adult guidelines, where the court are guided to aggravating features, it is made clear that *"in some cases, having considered these factors, it may be appropriate to move outside the identified category range".* The guidelines are not rigid and state: *The table below contains a* ***non-exhaustive*** *list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.*

91. In the instant case Mr Dukes referred to both the Crown's own sentencing note, and the Magistrates' written ruling. Mr Dykes submitted that the list of aggravating features in the guidelines are "non-exhaustive". The following aggravating features were present in this case:

- Severe psychological harm. Indeed, so severe in this case that it was referred to as "chilling" by the Magistrates, who had heard ES read her won VPS (copy attached). She had sought to take her own life on the 4th anniversary of this offence.
- The complainant was drunk, unsteady on her feet and had made clear she had not been feeling well.
- Whilst there was no ejaculation the fact that the complainant was caused to perform oral sex when her own blood covered the defendants penis is a significant.
- The victim had made clear that she was in pain.
- The sex was forceful and the victim's head banged on a wall.
- There was degradation and humiliation caused by the slapping and the oral sex as previously described.
- The incident was sustained.
- The location of the offence, and the timing, are of relevnence here. The complainant was assaulted at a time where she was alone in a hotel room at night.
- Whilst there was no STI the complainant suffered a UTI as a result of the activity and sought medical attention.
- There was clearly little remorse shown , and little empathy shown to the complainant.

92. Mr Dykes noted that the Magistrates' Court accepted that this case fell "towards the top end" of Category 1B – see the remarks at paragraph 10. The top end would give a sentence of 2 years.

93. However, Mr Dykes submitted the combination of aggravating features should take the sentence outside of the category range. He submitted that the appropriate adult starting point in these circumstances would have been in excess of 2 years. Further, he argued that the Court did not make clear why, given the aggravating features of the case, it did not consider upward adjustment outside of the category range. He submitted that, in this case, the guidelines were applied "mechanistically". He submitted that the appropriate sentence for an adult was anywhere from two years to three years and 9 months.

94. Further, Mr Dykes argued the youth reduction had been applied too rigidly in this case. When it reduced the sentence to take account of a s.13 youth offence, it should have taken note the "half to two thirds" approach was only a "rough" guide.

95. Mr Dykes inferred that the Court clearly found these facts meritorious of a custodial term of 12 to 18 months were the Respondent an adult. That, in his submission, would have been unreasonably lenient bearing in mind the facts and aggravating features of the case.

Discussion and analysis

96. I agree that there were a significant number of aggravating features to this offence. I particularly bear in mind that the bottom range for Culpability Category 1A for an adult does not start until 4 years and there is a gap of two years between the top of category 1B (two years) and bottom of 1A (four years).

97. Some courts may have taken the view that the appropriate sentence for the Respondent's offending as an adult would have been at the top or beyond the range for Category 1B (eg. 2-3 years).

98. Therefore, I accept that the Magistrates' Court sentence may be viewed as generous.

99. However, I am not satisfied that the Magistrates' Court sentence is so lenient that it could not reasonably have been passed.

100. The Court was reasonably entitled to find that the sentence passed for an adult would have been 'towards the top' end of Category 1B as it stated in its ruling. Towards the top of the range (from community order to years' imprisonment) may be 18 months imprisonment. While this would be generous for an adult, it is not beyond the bounds of reasonableness.

101. The ultimate difficulty is that the Court was not simply conducting an exercise of applying the adult guidelines. It had to start with the youth guidelines, then take into account the adult guidelines and then apply the case law on reducing adult sentences for youth.

102. The youth reduction (applying half to two third to the adult sentence) is properly explained in the guidelines. It accords with the authorities: the approach that should be taken to determine the appropriate length of sentence for youths (or those who were at the time of offending such as in this case) when considering adult guidelines. The Court of Appeal in *R v KH [2023] EWCA Crim 147* stated*:*

> *"If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range"*

103. Mr Dykes submitted that the court placed too much weight on the Respondent's age at the time of the offending, reducing the sentence significantly to reflect the fact that he was 16, yet also commenting that he was "not immature in comparison with other 16 year olds and neither did you suffer from limited emotional development , poor mental health or learning disabilities".

104. Yet I do not accept the Court placed too much weight on the Respondent's youth – it was entitled to apply a discount of up to one half from the adult sentence. Indeed, I also note that the maximum sentence for a s.13 youth offence is 5 years' imprisonment rather than 14 years for an adult s.9 offence (which would otherwise imply a discount of up to two thirds on the adult sentencing).

105. It may have been preferable if the Magistrates' Court had gone on to explain how it got from 'towards the top end' of Category 1B for an adult (para 10 of the sentencing remarks) to a conclusion of 9 months imprisonment (para 13 of the remarks) applying the youth reduction. It may have been preferable if the Court had broken down its calculation as I have done by specifying the sentence it would have passed 'towards the top of the range' for an adult (up to two years). It may have been preferable if it had stated this was 18 months' or 2 years' imprisonment and it had then applied a discount of half based on the Appellant's age. This approach would have explained the sentencing calculation more clearly. Nonetheless, ultimately it was also applying the youth guidelines and had to look at all the aggravating and mitigating factors. It was not required to be completely mechanistic or arithmetical in its approach.

106. The Court reasonably identified that the sentence should be towards the top of the range available for an adult offence categorised as 1B and while I may have found it to be at or beyond the top of this range, this is simply a difference of judgment.

107. I reasonably infer, as Mr Scott submitted, that the Magistrates' Court started at 18 months' imprisonment and then halved this to 9 months to allow for the Respondent's age (although this is not purely an arithmetical calculation).

108. Applying a discount of one third to a sentence of 9 months gives a sentence of six months as imposed and explained at paragraphs 13 and 15 of the sentencing remarks.

109. The same result would be arrived at by starting with an adult sentence of two years' imprisonment (the top of the Category 1B range), halving it to 12 months to allow for youth, then applying a third discount to arrive at 8 months and then reducing by a further couple of months to allow for other mitigation: such as a lack of relevant convictions, positive character references and passage of time before sentencing.

110. While the Court may have made it more explicit the way it calculated the sentence as above, and while 18 months' imprisonment for an adult or even two years (the top of the Category 1B range) may be generous, I am not satisfied that it was so unreasonably lenient that no court could have passed it. Applying the youth reduction for the Respondent, this would equate to 9 to 12 months' imprisonment before a reduction for a guilty plea and other mitigation reduced it further.

111. In conclusion therefore, while six months' imprisonment may be viewed as generous, it was not so lenient that it was outside a reasonable range of sentences that could be imposed on the facts of this case. The Court acted reasonably in increasing the sentence as it did to reflect the numerous aggravating features, to apply the deduction from the adult guidelines based on the Respondent's age at the relevant time (as per *KH*), to allow credit of one third

to reflect his early guilty plea and to take account of other mitigation in further reducing the sentence of imprisonment.

Suspending Sentence

112. The court gave reasons at paragraph 14 of its sentencing remarks for suspending the sentence:

> 14.We move on to consider if this sentence could be suspended or a meaningful non-custodial sentence could be imposed. We do not consider that a community service order meets the justice of the case and probation feel that there is no work that they could do with you, which is an indication that you have no defect in reasoning that needs to be addressed and makes it abundantly clear that you must have known what you were doing was very wrong. In relation to suspending the sentence we find that this is a course open to us given your age now, the passage of time and your youth at the time of the offending.

The Crown's argument

113. Mr Dykes argued that the Court was unreasonably lenient in suspending the sentence.

114. He noted that paragraph 14 of the Court's ruling addressed the reasons why the sentence was suspended. The Court referred to "the passage of time" and "age at the time of offending". Mr Dykes argued that the "passage of time" should not be seen as a reason to suspend a sentence. Indeed, all guidance points to sentencing in parity with the sentence that would have been imposed at the time. As such to use the passage of time a reason to suspend contradicts the well-known sentencing approach in *R* v *Ghafoor.*

115. He contended that the fact age was referred to again seems at odds with the Court's comments that there was nothing setting him aside from any usual 16 year old and that he was "not immature" compared to other 16 year olds.

116. Mr Dykes relied on paragraph 12 of the sentencing remarks " *..you have no excuse for this behaviour which was far beyond anything that could be considered acceptable by any person of any age".* The court also took the view, at para 14, "*probation feel there is no defect in your reasoning that needs to be addressed and makes it abundantly clear that you must have known what you were doing was very wrong".* The court also reminded the Respondent that (at para 5) "*Parliament still allows periods of imprisonment of up to 5 years for this offence, despite the fact you were 16 at the time".*

117. Mr Dykes therefore submits that, given that age was given as a reason for suspending the sentence, it appears that regard had already been given to the age of the offender in assessing the seriousness of the offending. Further, the court made clear to the Respondent that his age did not excuse his behaviour. Yet, when it came to passing sentence the court, in contradiction of its assessment of seriousness and the numerous critical comments about the Respondent's behaviour, went on to suspend sentence, giving age as one justification for doing so.

118. He also noted in the ruling that Mr Thomas was "from a good family". It is unclear if this impacted on the court's decision making, but the fact that the Respondent's family are well known and respected local businesspeople had clearly been in the Court's thoughts.

119. In conclusion, Mr Dyke's submitted that the reasons given for suspending sentence were contradictory to the dim view and assessment the court took of the offending behaviour.

Discussion and analysis

120. I am not satisfied that suspending the sentence was so unreasonably lenient that no reasonable court could have done so. I am satisfied that the Magistrates' Court did not act unreasonably when reaching the decision to suspend.

121. The Magistrates' Court acted reasonably in suspending sentence on the facts of this case. It was entitled in law to suspend the sentence (it was less than two years' imprisonment). It was entitled to take into account the comments in the Pre-Sentence Report as to the impact of custody on the Respondent, the personal mitigation available to the Respondent as addressed above, and the 4 years which had passed since the offence.

122. It was reasonably entitled to rely on the three reasons at paragraph 14 of the ruling (youth at the time of offending and sentencing and passage of time between the two). The court was entitled to consider these factors not simply when considering the length of the term of imprisonment but also in relation to suspension. This did not constitute inappropriate double counting in the sentencing process.

123. Suspension of imprisonment was therefore reasonably available to the Court. It matters not whether I would have taken the same course and whether or not suspending the sentence may be viewed as generous.

Conclusion

124. I therefore dismiss the appeal. The sentence of six months' imprisonment, suspended for two years, was not outside the range of reasonable sentences or unreasonably lenient.

125. The sentence, including the other orders which have not been challenged, is confirmed.

126. On one view, the Respondent is fortunate not to have been sentenced to immediate custody. Should he breach the terms of the suspension then that is what will occur – this sentence will be activated and he will be sentenced for any new offence in addition.

127. This Court concludes by expressing its sympathy to the victim for the distress she has suffered. Nothing I have said above should

be seen as reducing or minimising the very serious impact upon her of the Respondent's harmful offending.

Rupert Jones, The Chief Justice

13th July 2023