IN THE GRAND COURT OF THE CAYMAN ISLANDS

CRIMINAL DIVISION

Cause No: 04721 of 2012
SCA No: 11 of 2013

BETWEEN: **HER MAJESTY THE QUEEN** **APPELLANT**

AND: **A.C.** **RESPONDENT**

IN OPEN COURT
THE 17TH DECEMBER 2013; JUDGMENT ON 10TH JANUARY 2014
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Michael Snape, Crown Counsel, for the Crown, Appellant
Mr. Ben Tonner of Samson & McGrath, for the Respondent.

JUDGMENT

1. The respondent is a 44 year old man and the father of a thirteen year old girl "KC". She is the victim of sexual offences committed by him and in respect of which he was sentenced in terms which are the subject of this appeal brought by the Crown, asserting that the sentence was unduly lenient and wrong in principle. This judgment given on the appeal is anonymised, including by the use of alphabet letters instead of the names of the respondent and the child, in order to protect the child.

2. During the hearing of the appeal, at the request of Crown Counsel Mr. Snape, I also directed, in relation to the proceedings and in keeping with section 12(1) of the Youth Justice Law (2005 Revision) as follows:

> *"No published report of or comment on the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the child, either as being the person in*

respect of whom the proceedings are taken, or as being a witness in the proceedings. And further, no picture shall be published as being or including a picture of the child."

For the avoidance of doubt this order applies also to any publication in relation to these proceedings that would reveal the identity of the Respondent such that publication of his identity could reveal the identity of the child. I am satisfied that these are appropriate orders to make in this case notwithstanding the wish that others might have to make publicly known the identity of the Respondent as a convicted sexual offender.

3. On 29th February 2012 KC attended on the counsellor at her school. She had been referred to him because of self-harm. She told the counsellor that she was stressed about something that had happened with her father when she was eight years old (some three years earlier) and that her father had "sexually harassed her". This led to a report being made to the police.

4. KC made a formal statement to the police on 4th June 2012 which led to the arrest of the Respondent on the 8th June 2012 on six different charges, including two for indecent assault upon her and one for insulting her modesty.

5. She had complained to the police of several incidences of sexual abuse and harassment inflicted upon her over the course of two years from January 1, 2008 to December 31, 2009, beginning when she was eight years old.

6. On his date for trial, in accepting his plea of guilty to the charges, the learned Chief Magistrate proceeded to sentence the Respondent on the basis of the following summary of the disturbing factual allegations which I quote from her reasons for sentence:

"The two most serious offences were the two counts of indecent assault which on the facts took place at different points in time. I agreed with the submission of Crown Counsel that the most serious of the offences was Count 2; the indecent assault wherein the Defendant used his fingers to make contact with the victim's genitalia. It is noted that the Defendant has always denied the insertion of his fingers into the child's vagina as the Crown alleged. This in no way minimized the serious nature of the other offences. These included the Defendant masturbating in front of the child and ejaculating on her, asking her for a "blow job" and playing pornographic videos for her including one of him having sexual relations with his girlfriend".

7. These repulsive acts of abuse of the child took place under different circumstances – at least once at the Respondent's residence, twice on Saturdays at his work place where he had taken the child when no one else was present, once at a local motel and once while in his car.

8. On each occasion the child had been given over into his custody for visitations arranged with her mother who has primary responsibility for her care and control and with whom she resides.

9. A Victim Impact Report dated 17 January 2013 prepared by the Department of Children and Family Services reported to the Court on KC's state of mind at that time. A significant finding of the report was that *"(KC) does not spend time contemplating the abuse, instead she finds herself thinking about how this situation has impacted her father and the possibility of him receiving a prison sentence".*

10. Having met with KC and discussed her case with her psychological therapist to whom she had been referred by her school, the author of the Victim Impact Report noted further as follows:

"Worker made contact with Mrs. Taylor Burrows of the Wellness Center to get an idea of (KC's) progress. She mentioned that she is

proud of the improvements made by her thus far. She said that she (has) had to work extensively with (KC) primarily on the issue of her feeling such immense remorse for her father. Mrs. Burrows noted that the reason for her showing such remorse for her father is because she is not receiving the needed support from her mother. She believes that if she had the level of emotional support from her mother she would be able to understand the magnitude of the abuse. Mrs. Burrows also mentioned that she is working with (KC) to help her understand that imprisonment (does) not have to be viewed as negative because her father can finally have some level of closure and also receive the needed help."

The Report concluded:

"It is not unusual in matters of this nature for a child who has experienced this type of trauma to feel remorse for their abuser; especially in this instance where the abuser is the father. It is possible that (KC's) feelings of remorse are stemming from the fact that she feels guilty for reporting the incident; and possibly blames herself. The focus is being directed towards her father, therefore forgetting that she is the real victim. Experience has shown that this can become an emotionally unhealthy situation for (KC). One can only wonder if she is genuinely recovering from this traumatic situation or is masking her true feelings. Based on the reports from the counselor this writer is hopeful that (KC) is making real progress."

11. Also presented to the court were a Social Inquiry/Antecedents Report and Psychiatric Report in respect of the Respondent.

12. Given the circumstances of the case and by reference to the current United Kingdom Sentencing Guidelines for Sexual Offences[1], the learned Chief Magistrate identified the following factors for consideration:

"Aggravating features of this case were:

(1) As her father, the Defendant abused his position of trust; and

[1] Issued by the Sentencing Guidelines Council pursuant to the Sexual Offences Act 2003 (the "Guidelines").

(2) *There was in my view a deliberate targeting of a vulnerable victim, she being only eight years of age.*

In considering whether there were any factors indicating a more than usually serious degree of harm I found the following:

(1) *The charges established repeated assaults on the same victim;*

(2) *There had been a serious psychological effect on the victim, who has already been identified as being particularly vulnerable.*

I will also comment on the mitigating factors in this matter.

(1) *The Defendant pleaded guilty to these charges albeit with some modifications.*

(2) *When arrested, the Defendant was cooperative with the police and made admissions in interview.*

(3) *The Defendant exhibited remorse apologizing to the victim and to the court.*

(4) *The Defendant had taken steps to address this situation by way of counseling and taking psychiatric medication.*

(5) *It was extremely relevant that the Defendant experienced parental neglect and abuse as a child. As a teenager, the Defendant was also subjected to an incident of sexual abuse. The Defendant had flagged this incident as affecting his school work and his ability to form and maintain successful intimate relationships. His counselor and the psychiatrist had identified in him, a high level of anxiety and a tendency to violence and suicidal ideation when angry. The psychiatrist recommended a combination of long-term psychotherapy along with medication*" [emphasis added].

13. The learned Chief Magistrate then proceeded in her analysis by having regard to the Social Inquiry/Antecedents Report, noting that it had assessed the Respondent as

being at a medium risk for reoffending in the future but noting also that there had been no reoccurrence of these types of offences since 2009 and further, that the Defendant had no antecedents for similar offences. She then noted the rather unusual development that:

> *" On the date on which sentence was due to be pronounced, a last-minute letter was submitted to the court by the Defendant's sister wherein she confessed that she used to sexually abuse the Defendant as a child and further that there was a family history of incest. That family member referred to speaking to the Defendant and being convinced that if he was sent to prison, he would commit suicide."*

14. The learned Chief Magistrate concluded on a sentence of nine months' imprisonment, three months of which she suspended for two years. The Respondent has since served the immediate term of imprisonment of six months and was released from prison on the 13th December 2013, four days before the date of the hearing of this appeal.

15. The Crown's criticism of the sentence is as to the methodology employed leading, as Mr. Snape submits, to a conclusion that is wrong in principle. He submits that although she arrived at the appropriate "starting point" of 18 months imprisonment for the most serious of the offences (count 2 for indecent assault), the learned Chief Magistrate then failed to take account of the aggravating factors which she identified, even while giving credit for the mitigating factors. This resulted, it is submitted, in an inordinately low and unduly lenient sentence of 9 months imprisonment (with 3 months suspended) for these very serious and harmful offences of sexual abuse.

16. Mr. Tonner for the Respondent disagrees. He points to further observations to be mentioned below (and in addition to those excerpted above) made by the learned

Chief Magistrate in the course of sentencing which he says reveal that she had in fact taken account of the aggravating factors. And, given all the circumstances of the case, six months' immediate imprisonment with three months suspended was not an unduly lenient sentence. At all events, submitted Mr Tonner, it would be cruel and unusual (a form of "double jeopardy") to require the Respondent to return to prison having served his term of imprisonment and so, even if I accept the Crown's argument, I should not increase the sentence by imposing a further term of imprisonment.

17. To see whether or not the criticism of her sentencing methodology is borne out, it is necessary to return to the reasoning of the learned Chief Magistrate. I quote from the transcript of her reasons for sentence, picking up immediately after her identification of the factors cited at paragraphs 12-13 above:

> "*While I took all of the foregoing into consideration I gave greater weight to the effect that all of these events (have) had and continue to have, on the complainant [emphasis added]. She exhibited emotional and psychological problems a few years after these incidents took place and it was this in fact which led her to finally confessing what had occurred to her mother. It was reported that the victim is experiencing guilt for having brought these matters to light and that she is upset that her father could go to jail. It was indicated in the Victim Impact Report that she did not want her father to go to jail.*
> *It was apparent to me that the young Complainant had not yet reached a stage where she realized that she was the victim and that she was not at fault for anything that had occurred. It was obvious that she required long term counseling in order to deal with the events that had occurred.*
> *It was my opinion that the only appropriate sentence was one of imprisonment. I used the UK Current Sentencing Guidelines for Sexual Offences; with adaptations because of the differing penalties for sexual offences between the two Jurisdictions. As such I agreed with the submissions of the Crown that the appropriate starting point for*

the sentencing for the worst offence, Count 2 of the Indecent Assaults; was 18 months imprisonment.

The term of 18 months imprisonment would be the sentence after a finding of guilt after a trial. With respect to the remaining offences I took a totality approach concerned in that which was appropriate for the entire set of offences.

The series of offences took place when the young victim was eight years of age. It was some three years later before she provided the relevant information which led to these charges being investigated and laid. Had the matter gone to trial, of necessity there would have been a situation where the court would have had to assess her credibility versus that of the Defendant.

The Defendant pleaded guilty to the offences although he had some differing versions on some of the facts. I considered that it was very important that the young Complainant had been spared the ordeal and trauma of testifying. I felt that this practice was to be encouraged and accordingly I was prepared to grant a significant discount for this. For the guilty plea I applied a discount of one-third.

Although it was bound up with his guilty plea, the Defendant's cooperation in making admissions in interview after arrest yielded him a further reduction in sentence. I therefore further reduced the sentence on Count 2 by three months resulting in a sentence of nine months of imprisonment."

18. She then proceeded to deal with what she regarded as the less serious offences, imposing lesser sentences for them to run concurrently with that on Count 2, which as noted above, she also further adjusted by suspending three months of the nine month term of imprisonment for two years. This aspect she explained in this way:

> "*During sentencing, I made the comment that as an act of leniency I would suspend three months of the Defendant's sentence. My concern was the reaction of the child victim who did not want her father to go to prison and who was expressing guilt in bringing about such an event. I hoped to lessen her anxiety by reducing the actual period of time that the Defendant would spend in prison. At the same time, should the Defendant reoffend during the period of suspension; the term held in abeyance could be reactivated.*"

19. Reducing a term of immediate imprisonment in that way so as to mitigate the impact of sentence not upon the offender but upon the victim who is a vulnerable person to whom he is closely related, is recognized as a legitimate exercise of the judicial discretion on sentencing[2]. It is, indeed, a peculiar aspect of this troubling case, that this vulnerable girl is not yet mature enough appropriately to grasp and come to terms with the abuse she has suffered but would blame herself, quite unfairly, for her father's predicament. That this is an ongoing concern even at the time of this appeal is evident from letters written by KC and her brother to the Respondent and which were presented to the court by Mr Tonner. From these letters, while it comes through quite clearly that there is a genuine bond of affection between both children and their father, it is also clear that there is the added emotional burden upon KC arising out of her concern to protect not only her relationship with her father but that between her brother and their father as well. She is clearly prone to blaming herself if he is further imprisoned for his offences committed against her. In the particular circumstances of this case, it must be accepted that these are powerful factors influencing a decision on the appropriate period of incarceration.

20. But it must also be accepted that such concerns could not by themselves justify a sentence which was unduly lenient to begin with, for failing to take account of the aggravating factors of the offence and which was therefore wrong in principle. Otherwise, sentences which impact indirectly upon vulnerable victims who are

[2] And has been so recognized by the courts before: see for instance, AG's Reference (No 4 of 1989) [1990] 1 W.L.R 41 per Lord Lane C.J. at 46. Although decided before the Guidelines were issued, the legal principles for which the case stands (to be further discussed below) have not been doubted, although the outcome on sentence on similar facts may now be different under the Guidelines.

closely related to their abusers would be deprived of their legitimate force as deterrence to further offending and as protection for the public, especially those who would be the victims of potential abusers. The issue must therefore be squarely addressed whether this sentence was unduly lenient.

21. The objective purpose of the Guidelines is that they serve as a guide for the identification of the appropriate starting point for sentence, even if adjustment may be required to suit the subjective circumstances of the particular case. In the result, their value is as guidance to the court in arriving at a sentence that appropriately balances the need for the rehabilitation of the offender with the need to deter further offences by him and other potential offenders.

22. As explained at paragraphs 3 -4 at page 18 of the Guidelines:

> *"The expected approach is for the court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a starting point from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence (beyond those contained within the column describing the type or nature of offence activity) to reach a provisional sentence. The sentencing range is the bracket into which the provisional sentence will normally fall having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range."*

23. Here the learned Chief Magistrate expressly identified 18 months imprisonment as the appropriate "starting point" for this category of offence by reference to the Guidelines. This, as she noted, required an exercise in assimilation having regard to the different penalties prescribed in the United Kingdom ("UK") and in this jurisdiction for such offences. Such an exercise has been implicitly endorsed by our

Court of Appeal as appropriately to be undertaken for the purpose of applying the UK Guidelines in this jurisdiction[3].

24. Having regard to the fact that the maximum penalties in the UK for this category of sexual offences are approximately 30 percent greater than in this jurisdiction and recognizing the Guidelines' "starting point" for offences of this kind in the UK as two years imprisonment for a first offender after conviction at trial, the starting point of 18 months already mentioned, was arrived at by the learned Chief Magistrate.

25. However, it was in her having apparently taken into account only the mitigating factors leading to the reductions in sentence from the starting point that her method bears out the Crown's criticism. In the "Summary of general principles" to the Guidelines item (ii) the following is stated:

> "*Starting points are based on a basic offence of its category.* (And in the footnote reference here it reads: *"A "basic offence" is one in which the ingredients of the offence as defined are present, and assuming no aggravating or mitigating factors"*). *Aggravating and mitigating factors that are particularly relevant to each offence are listed in the individual offence guidelines. The list of aggravating factors is not exhaustive and the factors are not ranked in any particular order... Where harm is inflicted over and above that necessary to commit the offence, that will be an aggravating factor."*

26. It follows from the foregoing, that having adopted the approach of the Guidelines (by identifying not only the starting point for the basic offence but also the mitigating and

[3] Gifford Prendergast and the Queen ; Crim. Appeal No. 23 of 2009, reasons for judgment delivered orally on 26 Nov. 2009,and even while the Court of Appeal concluded in that case: "We agree with the learned judge's conclusion, though we do not like the term "starting point", we prefer to say that sentences should be in the range of four to five years [on the facts of that case], with an additional increase depending on whether there (are) aggravated circumstances or not."

aggravating factors), it became incumbent upon the learned Chief Magistrate to take account of the aggravating as well as the mitigating factors.

27. Regrettably, while she did say that she took all factors into account (see her words first in emphasis at paragraph 17 above) it is not apparent from her reasons how she took the aggravating factors into account. Instead, it seems she discounted from the penalty for the basic offence (that is: down from 18 months imprisonment) giving significant credit for the Respondent's admission of guilt, apparent contrition, and "co-operation in making admissions at interview" but without taking account of the factors that aggravated the basic offence – the very factors that she had earlier identified in her reasons for sentence. Had she done so, one would have expected a higher starting point from which she would then have deducted for the mitigating circumstances; logically ending in a longer term of imprisonment.

28. Indeed, had the approach advised by the Court of Appeal in ***Prendergast***[4] been adopted and a range of appropriate sentences identified by the learned Chief Magistrate instead of the more precise "starting point", her sentence of imprisonment may well have been more appropriate. The advised approach would have involved reference to the decided cases for the identification of a range of sentence of ascending order of severity within which to place the present offences, after having regard to both the aggravating and mitigating factors. Such an approach would itself not have been inconsistent with the Guidelines as quoted above where they also recognize that a sentencing range may be used.

[4] Above at F.N. 2

29. But does a finding that the Guidelines appear to have been applied in an uneven manner necessarily lead to the conclusion that the sentence was unduly lenient and so, wrong in principle?

30. While due regard must be paid to the concerns that led the learned Chief Magistrate to reduce the sentence, it appears from an appropriate application of the Guidelines, that serious and repeated offences of such a sexually abusive nature against a child entrusted to one's care, should attract a significantly longer term of imprisonment than nine months.

31. A further point emphasized by Mr. Snape is that too much deference was paid to the circumstances of the Respondent himself, in particular to the history of abuse he had reportedly suffered as a child and confirmed to some extent by his elder sister's rather timely letter of *mea culpa*.

32. It is submitted that this concern may have been that which misled the learned Chief Magistrate into overlooking the aggravating circumstances.

33. At first glance there appears to be some force in that point, when her finding – noted also in emphasis by me at paragraph 12 above – that "*It was extremely relevant that the Defendant experienced parental neglect and abuse as a child*", is considered.

34. Given that the psychiatric report raised no issue about the Respondent's mental state, about his understanding of the nature of his offences or his fitness to plea (instead positively concluding that he is so fit); the relevance of his history of childhood abuse as a mitigating factor to the sentence for these offences is not readily apparent.

35. It is only fair to observe however, that any contrary impression to be taken from the learned Chief Magistrate's reasoning, must be regarded as recanted in light of the following later passage from her reasons:

> *"The Counselor's report and the Psychiatric report each spoke to the traumatic childhood of the Defendant and the incident of sexual abuse as a teenager which contributed to his decline. Those reports spoke of the Defendant's extreme remorse, contrition, depression, high anxiety, fear of going to jail and suicidal ideation. I have already mentioned the content of one of the letters from the Defendant's sister. Due to the foregoing I was strongly urged by Defence Counsel to* ***suspend any sentence in its totality.*** *Despite the foregoing I still held to the view that a sentence of immediate imprisonment was appropriate."*

36. My final impression from her reasons for sentence is that the learned Chief Magistrate, rather than being overly concerned by the Defendant's personal history in passing sentence, saw a distinct need, in the circumstances of this case, to cause the least possible harm to KC as the victim; being very concerned not to allow a sentence of imprisonment to unduly burden the conscience of the child for having reported her father's abuses of her.

37. As already noted, this is a legitimate approach but it is one which is to be sparingly and judiciously applied so as not to defeat the other equally legitimate objectives of deterrence and protection of the public.

38. In this regard also, my attention was directed by Mr. Tonner to the observations of Lord Chief Justice Lane in **AG's Reference (No 4 of 1989)** (above); speaking of the UK statutory provision (equivalent for present purposes to our section 165 of the Criminal Procedure Code (2011 Revision) under which the Crown through the Director of Public Prosecutions, exercises a right of appeal against sentence – and to a

case of serious sexual abuse of a minor in which a wholly suspended sentence of imprisonment had been imposed :

> *"The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient . It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.*
>
> *The second thing to be observed about the section is that, even where it considers that the* sentence *was unduly lenient, this court has discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned."*

39. I consider those pronouncements to be suitable for application by this court upon an appeal by the Crown pursuant to section 165 of the Criminal Procedure Code.

40. Applying the test identified by Lord Lane for intervention by an appellate court; I am compelled nonetheless to the same conclusion that the sentence here was unduly

lenient - falling outside the range of sentences which could be considered to be reasonable having regard to all the relevant factors.

41. With deterrence in mind as a relevant factor raised by the aggravating factors of the case (in particular the repeated targeting of a vulnerable victim who has been seriously harmed) a longer term of imprisonment was required. The aggravating factors of this case should have been applied at least to offset the mitigating factors. But it does not necessarily follow from this conclusion that the learned Chief Magistrate was required to impose a longer term of immediate imprisonment, being concerned as she was for the impact that doing so would have had upon KC. Nor am I compelled or persuaded to do so now, being mindful of the same concerns which still prevailed up to the time of the hearing of the appeal, as KC's letters reveal.

42. In having regard to such concerns now and in concluding that the further term of imprisonment to be imposed should also be suspended, one is reassured still to be in the company of Lord Lane in his conclusion on behalf of the Court of Appeal on the case then on appeal that (op. cit. ibid):

> "*In deciding to suspend the sentence in its entirety the judge did undoubtedly take what is a wholly exceptional course in this type of case. We have no doubt however that what principally motivated him to do so were the interests of the victim and the family as a whole. He had before him material on which he was justified in concluding that there existed in this case, to a quite unusual degree, the risk that V. would suffer further and perhaps more serious damage if her father went to prison. Additionally, he was justified in giving some weight, as he plainly did, to the fact that the family would be deprived of the offender's support, and all suffer hardship, if he were unable to continue to work... Even if, on the material before the judge, the sentence was unduly lenient, we have no hesitation in saying that, in*

the light of events since the trial and the additional information before us, this is not a case in which this court should increase the sentence."

43. I am also, as a secondary consideration, persuaded that it would be unduly harsh, and tantamount to a kind of "double jeopardy" in this case, to recommit the Respondent to prison now. The fact of the matter is that he has served the term of imprisonment imposed upon him and has so far complied with the other terms of his sentence. He continues to express regret for his offences and is expressly committed to undergo psychiatric and/or psychological counseling. In this latter regard, I consider it appropriate to express the view that the Respondent should be required to do so to the satisfaction of his counsellors before he might be allowed to be in the unsupervised custody of KC (or any other vulnerable child) again. Those responsible for KC may wish to consider obtaining a protective order of the Court to that effect. I also emphasize the importance to my reasoning that, should the Respondent reoffend within the term of the two years' suspension, he will be liable to imprisonment for a further period of twelve months, instead of the three months suspended by the learned Chief Magistrate. That such considerations and precautions could lead an appellate court to increase an unduly lenient sentence without re-imposing an immediate term of imprisonment is settled by our Court of Appeal in ***R v Duquesne-Eden***[5] where, among other things, it was held that:

> *"... the court would have to give a discount for double jeopardy of between 12 and 30%*[6] *because of the anxiety caused as a result of completing a non-custodial sentence before then being subsequently*

[5] 2009 CILR Note 22

[6] A discount which the Court of Appeal reconfirmed in principle in **R v M. Seymour** 2009 CILR Note 26, but explained was only to be given where the offender "has had no responsibility" for having been given the earlier unduly lenient sentence.

faced with imprisonment (Att. Gen's ref (Nos. 14 and 15 of 2006), [2007] 1 All E. R 718, applied) [(a fortiori, if the defendant had completed a custodial sentence)]. This, coupled with the fact that he had fully complied with the court order – quickly completing his community service and anger management course- and that it was over five months since the sentencing meant that in these exceptional circumstances, and in accordance with its discretion under s. 30(1)(d) of the Court of Appeal Law (2006 Revision), it would be appropriate to re-impose the earlier sentence given that it would be unjust to impose the immediate custodial sentence that should have been ordered."

44. For the foregoing reasons, the Crown's appeal against sentence is allowed. The sentence is increased to a term of imprisonment of 18 months, of which 12 months will be suspended for two years beginning from the 13th December 2013.

Dated 10th day of January 2014

Hon. Justice Anthony Smellie
Chief Justice