

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 18/2017

IND. 16/2017

C#03761/2016

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

Ato Modibo Stephens

Appellant

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal**

Date of Hearing: Monday, 6 November 2017

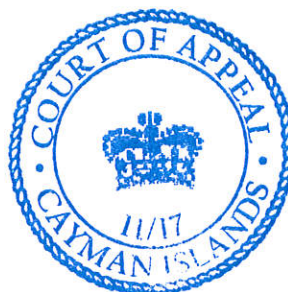
Appearances: Ms. Amelia Fosuhene (Brady Law) for Appellant / Ms. Cheryl M. Richards QC and Ms. Elisabeth Lees for the DPP

JUDGMENT

**Revised from transcript of oral judgment 6 November 2017 and Approved
Released 22 November 2017**

Sir Alan Moses, J.A.:

1. This is an application for permission to appeal against both conviction and sentence in respect of this appellant who was tried before the Grand Court by a judge sitting alone between the 27 July 2017 and the 3 August 2017. He was convicted by the judge on one count of the indictment that was count 4.
2. We say straightaway that we give permission to appeal against both conviction and sentence.



3. The charge of which the appellant was convicted was of misuse of an ICT network, contrary to section 90 of the ***Information and Communications Technology Authority Law*** (2011 Revision).

4. The issue on this appeal against conviction was as to the wording of those provisions. The provisions are:

"90(1). A person who knowingly uses an ICT network or ICT service to defraud, abuse, annoy, threaten or harass any other person is guilty of an offence".

5. The maximum period of imprisonment on conviction on indictment is one of two years.

6. The appellant was an athletic coach. One of those he was teaching was a girl between 14, and 15 years. During a lengthy period between 2015 and 2016, he sent a very large number of messages to her of a sexual nature. They were sent through a Digicel phone between June and July 2015 when the victim was 14 and November 2015 to February of 2016 when she was 15.

7. It is unnecessary, for the purposes of the appeal, to quote some of those messages but they have conveniently, and without argument, been summarised as messages sent by the appellant either asking for, or suggesting, that the young girl send nude or semi-nude photographs. They describe masturbation or sexual conduct or other sexual activity. A large number, at least 22, of the photographs were sent by the victim accompanying some of those messages. They were clearly intended, and had the effect of conducting, by the means of the phone, in a sexual relationship between the two. It goes almost without saying, but nevertheless must be underlined, that the relationship between the two was one of trust since the victim was dependent upon the appellant for the training and expertise that he was able to give her as an athlete. The messages, fortunately, were discovered by a parent.

8. The issue before the judge and the issue before us, is as to whether that course of conduct fell within the statutory provisions so that it could be said that the appellant knowingly used the ICT network to abuse the victim.
9. The argument before the judge, and reiterated skillfully before us by Ms. Fosuhene on behalf of the appellant, is that in the context of the words used, which we have already cited, this was not using the network to abuse the victim since all of the messages were of an enticing sexual nature without any pejorative remarks or insults and in those circumstances they could not be said to have been abusive "*of the victim*" to whom they were sent.
10. We disagree. It is vital, in looking at the context of the use of that ordinary word, to take into account the circumstances of the person to whom they were sent; thus, words which might not be regarded as threatening to one particular victim might well be regarded as threatening to a vulnerable victim. Similarly, messages of a sexual nature sent to an adult may be no more than a symptom or sign of affection, whereas sent to one who, in law, is not in a position to consent, they might well, in our judgment, amount to abuse. They are an aspect of ill treatment of a minor and in those circumstances, in our view, are properly to be regarded as words whereby the defendant uses a network to abuse the victim. He is sending words of an indecent sexual nature to someone, who is to be protected by the law, from their receipt.
11. For those reasons, we take the view that the judge was entirely right to reject the submission that the behaviour fell without the embrace of those particular provisions and in those circumstances we dismiss the appeal against conviction.
12. We turn then to the appeal against sentence. The judge passed a sentence of 18 months' imprisonment in circumstances which he made clear in his reasons for sentence. He intended to take into account, as he made clear in those reasons, the period of time during which the appellant had been in custody in the United

States. That was just under 12 months. He also took into account that the appellant had contested count 4 but, as the judge put it, had only contested it 'on the basis of legal advice'. The judge said he bore in mind the maximum sentence was one of two years' imprisonment and went on:

"I consider this towards the top end of the -- in fact if not at the very top end of the -- behaviour covered by count 4".

13. He then went on:

"The sentence I pass is one of 18 months' imprisonment. By my calculations you have already served the equivalent of that".

14. Ms. Fosuhene accepts that the sentence of 18 months' imprisonment for this course of conduct was not excessive. With that concession we agree. This was a very serious offence involving abuse of trust carried out over a very lengthy period, as we have described. However, the focus of this appeal is on the judge's intention. The judge, as we have recorded, said that he expected that the appellant had already served the equivalent of 18 months' imprisonment, having taken into account the period he had been in custody in the United States. In fact, as it turned out, he was wrong about that. He had failed to take into account revisions in the Conditional Release Law (2014), law 18 of 2014, contained within section 7. By section 7(1)(b):

"Prisoners serving a term exceeding one year, other than prisoners serving life, are eligible to be considered for conditional release on licence" --

15. Then these words which we emphasise:-

"after serving 60 percent of the sentence imposed by a Court."

16. In fact, therefore, the appellant was not eligible to be released straightaway but had to wait for the Conditional Release Board to consider his sentence after he had served 60 percent and the Conditional Release Board has, we understand, last week considered his position. The argument therefore advanced by Ms.

Fosuhene is that in order to be consistent with the judge's clear intention, a shorter sentence of 12 months should have been passed which would indeed have resulted in his release almost immediately. The question, therefore, for this Court is whether it ought to give effect to that apparent intention or whether, on the other hand, it ought to consider whether the sentence was excessive and not give weight to the administrative and statutory arrangements as to how that sentence should be served.

17. Guidance is to be found in a English Court of Appeal Criminal Division case. **R v Dunn** 2012 EWCA Crim. 419. In that case, an appellant had been ordered to serve a period of 15 years' imprisonment for rape but the judge had miscalculated the earliest period for release. He had said that he would be released after seven and-a-half years, subject to his progress in custody. As the Court of Appeal pointed out, that was not correct because if the judge had done what he had intended, there would have been an automatic release after seven and-a-half years. The appellant was therefore expecting that the Court of Appeal, to be consistent with the judge's intention, would reduce the sentence to allow for automatic release after seven and-a-half years.
18. The Court of Appeal said that as a matter of principle, a Court should not take into account the effect of different regimes for early release (see para 11) but it did consider whether nonetheless the sentence should be reduced in order to allow for the "*appellant's expectation*" as the Court of Appeal put it which had been raised by the judge in error. The Court of Appeal rejected that approach and took the view that the question of what was to happen and how, after the sentence was passed, and as to how the sentence was to be served, was not a matter to be taken into account by the Court of Appeal. Nevertheless, they took into account of the time when the parole board might consider his position and urged an urgent consideration as soon as it was possible after the seven and-a-half years had elapsed (see para 12).

19. We think this case powerful authority for the proposition which we have already advanced that the Court should not take into account future administrative arrangement relating to how the sentence passed by the Court should be served. Rather, this Court should focus on the essential question as to whether the original sentence was excessive. As we have said, it is not argued to the contrary and we do not think that it was. In those circumstances, the appeal against sentence is also dismissed.

The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

