IN THE HIGH COURT OF JUSTICE ON ANITGUA & BARBUDA

EASTER CARIBBEAN SUPREME COURT

ANUHCR2016/0041

REGINA

V

MARTIN RICHARDS

APPEARANCES:

Mr. Adlai Smith for the Queen

Mr. John Fuller for the Defendant

2017 January 31

SENTENCE & CALCULATION OF REMISSION

Purpose

1 Morley J: The purpose of this judgment is to articulate a sentence for unlawful sexual intercourse with a girl aged 14, and how remission should fairly be calculated where there has been time served on remand.

Overview

2 On 24 January 2017, Martin Richards was sentenced to 'time served', being approximately 23 months, following a plea to a single count of unlawful sexual intercourse on 25 May 2014 with a female under the age of sixteen, then aged 14, contrary to section 6(1) of the *Sexual Offences Act 1995* on Antigua & Barbuda.

3 The plea had been entered on 23 January 2017, following a *Goodyear* indication[1], in which the correct sentence was assessed as being 30 months' imprisonment. At the time of offering the *Goodyear* indication, it was the expressed expectation of the Court, supported as correct by the Bar, both prosecuting and defending (respectively Crown Counsel Adlai Smith, and defence counsel John Fuller), that the proposed sentence would mean that the defendant would be released, subject to paperwork, straight away. This is because it was expected that he would only have to serve 2/3 of the 30 months before receiving remission, (assuming good behavior on remand), which would mean he would have been theoretically expected to serve 20 months. Having been on remand in custody since 18 February 2015, this means by 23 January 2017 he had served 23 months, and so in theory had served his sentence.

4 However, following the plea being entered, after the *Goodyear* indication, and before sentence was finally passed, attention was drawn by the gaolers in court to the advocates that the calculation by the prison of remission when a defendant has been on remand would proceed differently, and that Richards would have to serve more time. Formal sentence was adjourned to the next day, with a request for the attendance of Superintendent Albert Wade who is in charge of the prison.

5 On 24 January 2017, Supt Wade helpfully attended and gave evidence of how the prison would calculate remission. Although the prison calculates in days, he explained that the 23 months on remand would be deducted from the 30 months, leaving 7 months, which would then be adjudged the effective sentence, for which remission would be calculated at 2/3 of the 7 months, meaning Richards would have to further serve slightly more than 4 months. Therefore, before release, on the sentence of 30 months, Richards could expect to have served around 27 months. However, this means that a person having been on bail throughout would serve less, as the sentence of 30 months, all due to be served following sentence, would result in remission after 20 months, so that Richards would serve around 7 months more, simply by coincidental reason of having been remanded. Supt Wade expressly agreed this was 'unfair', as did prosecution and defence counsel.

[1] In accordance with ECSC CPR practice direction No.2 of 2015 of Periera CJ.

6 In the circumstances, to avoid the agreed unfairness, and to give effect to quick release, the sentence then passed on 24 January after hearing from Supt Wade was therefore adjusted from the 30 months expressed as the *Goodyear* indication, to 'time served'. Richards was released forthwith. The court said a written judgment would follow, being herein.

The Offence

7 As presented by the Crown, on Sunday 25 May 2014, the defendant, then aged 23, working as a bus driver for the Pilgrim Holiness Church in Golden Grove, drove home from church the complainant, SJ, then aged 14, with her little brother S, aged 5. She had known him for 3 months. They fell into conversation, and she agreed he could drive her a little off route. He began touching her leg as he drove, she pushed his hand away, he said he had been thinking about her in church, and he stopped the bus. He sat on a passenger seat, he pulled SJ onto him, he took off her panties, and he opened his zipper. S was present, and got out of the bus. The defendant inserted his erect penis into SJ's vagina, for about 5 minutes, not using a condom. She said she was 'not really fighting him, but was trying to get up off him'. The defendant then realized S was wandering off, stopped, it seems had not ejaculated, got S back into the bus, and drove them home. S reported to his mother that SJ had had sex, and there followed an attempt to get a reluctant SJ to make a complaint about the defendant, which eventually was recorded on 26 June 2014. In police interview on 18 February 2015, the defendant denied sexual intercourse had occurred.

8 Born on 9 December 1990, the defendant is now aged 26, and it was accepted had no previous convictions. He had been in custody since 18 February 2015.

Assessing the sentence

9 On 23 January 2017, a *Goodyear* indication was sought in respect of this offence, being pleaded as a single count of unlawful sexual intercourse on 25 May 2014 with a female under the age of sixteen, contrary to section 6(1) of the *Sexual Offences Act 1995* on Antigua & Barbuda. The case was opened, mitigated, and a judgment as to how to assess the sentence was offered in depth.

10 After the indication of sentence, the defendant pleaded guilty.

11 It must be clearly understood that sexual intercourse with a 14 year old girl is a serious criminal offence (except in very limited circumstances, which do not arise here). The complainant was a child. Children will be protected by the Courts. There was no violence. While there was no violence, and she said in fairness to the defendant she was 'not really fighting him', this does not diminish culpability.

12 Prison will usually follow sexual intercourse with underage girls, as such activity is generally so serious that only a custodial sentence can be justified. This is because deterrence as well as retributive punishment is appropriate, consistent with the sentencing principles established by Byron CJ in the leading case of *Desmond Baptiste v Regina 2004*[2].

13 For the *Goodyear* indication, the Court chose to be assisted by the UK sentencing guidelines as found at *Blackstones Criminal Practice* 2017 1st supplement at paragraph SG-106, for the similar UK offence of 'sexual activity with a child', contrary to s9 *Sexual Offences Act 2003*, then adjusted for the local law and norms. The maximum sentence for the index offence is 10 years. The offence was assessed as being in 'category 1A', with a starting point assessed of 4 years, being 48 months. An aggravating feature was an element of 'abuse of trust' in that the defendant was entrusted to drive SJ and her brother home, and by implication he was well aware, at 23, he should not attempt sexual activity, increasing the sentence by 6 months to 54 months. The primary mitigating feature was his good character, reducing the sentence by 9 months to 45 months. Full credit was allowed for his plea of guilty, being 1/3, reducing the sentence further to 30 months. Having already served 23 months on remand, and being entitled to remission of sentence after serving 2/3, which would be 20 months, it was expressly said, and agreed with the Bar, that the effect of the sentence should mean the defendant would be released subject to paperwork (and having been of good behavior) straight away.

[2] High Court Criminal Appeal No. 8 of 2003 Byron CJ. Delivered: 06/12/2004.

Assessing remission

14 As indicated above, formal passing of sentence was adjourned to 24 January owing to a conflict of calculation of remission between the Court and the Prison. Superintendent Wade from the prison gave evidence. His good faith is not in question. He made the point that full remission of 1/3 of the sentence is divided into 1/6 for good behavoiur, and 1/6 for having completed work. However, those on remand are not allowed to work. Therefore, it was suggested there must be a period in which they can work toward remission, which is why it was thought best to calculate remission as he did – namely, the time on remand is deducted from the sentence, and the balance is then assessed for 1/3 remission.

15 The Court (Morley J) visited the prison for 2 hours on 22 December 2016, being hosted by Supt Wade, and other officers. The prison is called '1735', as that is when it was ground first used for custody. The facilities appear to date back to the 19th Century. The prison staff do excellent work in very difficult circumstances. The prison seems in keeping with 1867 rather than 2017. Facilities are rudimentary. There is an outside bank of toilets into a pit under corrugated iron. The toilets are about 30m from the kitchens. The prison is overcrowded, holding at least twice as many as it should. Convicted prisoners were in small cells with often 2 or 4 inmates. The remand section in noticeably overcrowded, consisting of cells in an upstairs area where often nine inmates are held in a cell, with only six beds, in poor ventilation, for between 18-20 hours daily, with slopping out required into plastic buckets, lacking any privacy. The potential for the spread of disease is clear. Convicted prisoners are allowed out during daylight hours, and are therefore out of their cells for longer than the remand prisoners, (being at the time of judicial visit, 07.30 to noon), whose condition of incarceration is therefore harsher though they are unconvicted, being legally innocent. Owing to delays in the criminal justice system, some on remand are not dealt with for many years: one inmate had been on remand for 8 years, while it is not unusual to be on remand in these conditions for 3 years or more.

16 Against this background, it is particularly odd that the prison calculation of remand against remission (where time on remand is less than the whole sentence) should result in a remandee serving more time than a bailee, in what are harsher conditions.

17 By s 63A of the *Criminal Procedure Amendment Act 2014*[3] in the laws of Antigua & Barbuda, at its simplest it says:

> (1) Where a person has been remanded in custody … the number of days for the which the person was remanded … shall count as time served by the person as part of the sentence imposed by a Court.
> (2) The number of days for the person was remanded in custody … shall be credited by the Superintendent of Prison as time served by him as part of the sentence imposed by a Court.

18 By the Rules of the Prison, force order no 1 of 2015, rule 211 says:

> REMISSION Every prisoner sentenced to a term of imprisonment … shall become eligible for unconditional release when he shall have completed 2/3 of the said term of imprisonment.

19 By a memorandum from Supt Wade to prison staff, dated 6 April 2015, calculation of sentences was to proceed as follows:

> Step 1 The sentence imposed by the court is converted into days.
> Step 2 The time spent on remand is converted to days.
> Step 3 Remand time deducted from sentence imposed.
> Step 4 Remission calculated on balance of days remaining (if any) in accordance with rule 211.

20 It follows that at the prison, the remission point is being calculated ***after*** deduction of time on remand. However, the Court had expected the remission point to be conducted ***before*** the deduction of time on remand, meaning the steps should be as follows:

> Step 1 The sentence imposed by the court is converted into days.

[3] No. 17 of 2014.

Step 2 The remission point is calculated at 2/3 of the sentence in accordance with rule 211.

Step 3 The time spent on remand is converted to days.

Step 4 Remand time deducted from sentence imposed – inmate is then eligible for immediate release if he has served on remand more time than calculated at step 2.

21 Which is correct, the first approach or the second approach?

a. Under article 15 of the Constitution of Antigua & Barbuda, a defendant is entitled to 'a fair hearing'. A fair hearing in which a sentence follows means that the sentence must also be fair.

b. The Court is therefore of view that clearly the correct approach is the second approach. This is because the first approach is not fair.

c. The first approach is not fair because it will lead to those on remand serving more time than those on bail, and in harsher conditions, which all parties agree – being the prosecution, defence, and indeed Supt Wade in evidence – is 'unfair'.

d. The first approach being unfair, it follows it is in breach of article 15 of the Constitution and must cease.

22 As above, the point was made by Supt Wade that calculation of remission ordinarily consists of 1/6 off for good behavior and 1/6 off for good work, and that the second approach would not allow assessment of the good work, because remandees are not allowed to work.

a. However, there is nothing in the remission rules that have been offered to the court, notably rule 211, that means there can be no remission if there has been no work.

b. Moreover, the rule refers to unconditional release on serving 2/3.

c. In addition, it might be expected that 'poor work', like poor behavior, might lead to 'forfeiting' remission days. However, this is not the same as 'good work' leading to 'earning' days, as the remission days are already deemed earned by serving. Therefore not having worked would not mean remission has not been earned, nor can it be said to lead to forfeit as there was no work done to be assessed as poor to lead to forfeit. In other words, not having worked

on remand simply means there is no basis for the prison to consider forfeiting remission time for poor work.

d. Finally, self-evidently, it would be an additional unfairness to hold remission calculable only against good work by remandees, if they have not been allowed to work on remand.

23 The Court repeats that the good faith of Supt Wade is not in question, and observes he is doing an excellent job in difficult circumstances. The Court also thanks the gaolers in the courtroom for bringing this issue to the attention of the Court, and indeed to the Bar.

24 It is therefore ordered that calculation of remission against remand time proceed as per the second approach. As this judgment is declaratory of the correct approach, the sentences of all and any serving inmates who have spent time on remand should be recalculated.

Sentences of 'time served'

25 Finally, the Court wishes to offer *obiter* observations on sentences of 'time served'.

a. Sentences of 'time served' are a well-established sentencing option as part of practice before the High Court of Antigua & Barbuda.

b. However, the difficulty with such sentences is that on occasion they can lean toward being more 'an administrative tool' for effecting an immediate release where a remandee has been too long in custody, without being a formal evaluation of what should be the correct length of sentence. This means that consistency across sentencing can be lost.

c. Remandees too long in custody is a flaw in the criminal justice process, and efforts need to be redoubled to ensure trial occurs 'within a reasonable time', consistent with article 15 rights under the Constitution.

d. As a general rule, though there may be exceptions, as here, sentences of 'time served' should be avoided, and instead a formal calculation of sentence should be articulated.

The Hon. Justice Iain Morley QC

31 January 2017