

2. The respondent pleaded not guilty and at trial two witnesses gave evidence, one of whom was the complainant, then aged six years. In summary the complainant's evidence is that the respondent carried her to his bedroom, removed her pants and licked her vagina with his tongue. The complainant cried and on hearing the noise her aunt came in and took the complainant out of the room.
3. At the conclusion of the trial the respondent was found guilty and convicted of the offence. As the complainant and respondent are related to each other the Court has used initials throughout to protect the identity of the child.
4. After hearing submissions from counsel the sentence imposed by Resident Magistrate Garo in the District Court was two years imprisonment with a deduction of 2 months. This was noted as being a total sentence of eighteen months imprisonment.
5. Subsequent to this matter being before the District Court in 2015, the *Crimes Act* 2016 was certified. The *Crimes Act* 2016 reviewed and updated the *Criminal Code* 1899. Many offences, including offending comparable to the matter before the Court now carry greater penalties than previously under the *Criminal Code* 1899.

RELEVANT STATUTORY PROVISIONS

6. Section 3 of *The Appeals Act* 1972

Appeal to the Supreme Court

"(3) Where the District Court has convicted any person in any cause, the Director of Public Prosecutions may appeal to the Supreme Court against the sentence passed on such person's conviction."

7. Section 216 of *The Criminal Code* 1899:

Indecent Treatment of Girls under Seventeen

"Any person who unlawfully and indecently deals with a girl under the age of seventeen years is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years.

If the girl is under the age of twelve years he is liable to imprisonment with hard labour for three years.

...

8. Section 7 of the *Criminal Procedure Act 1972*

Sentences which the District Court may pass

"The District Court may pass any sentence, and make any order, authorised by law for which provision is made in the *Criminal Code* or in any other written law:

Save that the District Court may not pass:

- (a) sentence of death;
- (b) sentence of imprisonment exceeding three years in respect of any one offence;
- (c) sentence of a fine exceeding three thousand dollars in respect of any one offence.

9. Section 116 of the *Criminal Procedure Act 1972*:

Contents of judgment

(1) Every judgment in the trial of a criminal cause shall, except as otherwise expressly provided by any written law, be written by the presiding judge or magistrate, or the magistrate having charge of the proceedings, as the case may be, in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding judge or magistrate, or the magistrate having charge of the proceedings, in open court at the time of pronouncing it:

...

(2) In the case of a conviction the judgment shall specify the offence of which, and in the case of an offence defined by the *Criminal Code 1899* or any other written law the section of the *Criminal Code 1899* or other written law under which, the accused is convicted and the sentence imposed. (emphasis added).

GROUNDS OF APPEAL

- 10. The appellant pleads an error in the sentence being 18 months imprisonment instead of 22 months imprisonment.
- 11. The appellant submits that the learned Resident Magistrate erred in her exercise of discretion in taking into account a matter of the respondent's personal circumstances (that being the recent death of the respondent's father) and subsequent reduction by two months to the sentence of imprisonment of two years.
- 12. The appellant submits that the sentence is manifestly lenient in all the circumstances of the case.

GENERAL PRINCIPLES IN SENTENCING

13. There are general principles adopted throughout the Commonwealth and neighbouring countries that guide decision makers when considering appropriate sentences.

14. Good practice includes consideration of diverse factors including:

- (a) mitigating and aggravating factors of the offence;
- (b) the circumstances of the offender;
- (c) the impact on the victim;
- (d) the prevalence of the offence in the community;
- (e) the rehabilitation of the offender;
- (f) protection of the public;
- (g) recompense to those affected.

The above list is not exhaustive but illustrative of well-established principles in this and other jurisdictions.

DISTRICT COURT SENTENCE

15. The Learned Magistrate's written sentence outlines the matters relevant to mitigation (first offender; 23 years of age; married with young children)¹ which would result in a reduction of any sentence and lists matters that aggravate the offending (family relation; position of trust; age of complainant; prevalence of offence in the community)².

16. The Learned Magistrate concludes:

"The maximum penalty that this court could impose of 3 years imprisonment. Taking into account the whole of the circumstances of your offending in this case, I am of the view that an immediate, punitive and deterrent custodial sentence is called for in this case. I sentence you to 2 years imprisonment."

I further note that you were due to be sentenced on the 30th October 2015 but it had to be adjourned because you had to attend the funeral of your late father who had recently passed away. This court acknowledges that this would be a difficult time for you personally as you are being sentenced. The Court therefore exercises its unfettered discretion to exercise mercy. I deduct 2 months from the sentence I would have imposed on you. I sentence you to 18 months imprisonment."³

¹ *R v ND*, Criminal Case 19 of 2015 para 3

² *Ibid* at para's 4 - 8

³ *R v N*, Criminal Case 19 of 2015 para's 8&9

CONSIDERATIONS

17. The appellant asks this Court to find that there was an error in the determination of the sentence in the District Court. The question of error and what comprises an error has been considered extensively over the years by Courts in sentencing appeals.
18. Lord Alverstone, Lord Chief Justice in *R v. Sidlow*⁴ said: “...the Court would not interfere with a sentence unless it was apparent that the judge at trial had proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence. It was not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less severe.”
19. The limitations regarding interfering with sentences outlined above was echoed by Lord Reading, Lord Chief Justice, in *R v Wolf*⁵: “With reference to the sentence, it is not the policy of this Court to interfere if its members are of the opinion that they would have given a less sentence, but only if the sentence appealed from is manifestly wrong.”
20. In considering minor changes to sentences, Lord Hewart, Lord Chief Justice, stated in *R v. Dunbar*⁶: “This Court does not make slight reductions of sentences. This Court only interferes on matters of principle and on the ground of substantial miscarriages of justice.”
21. Counsel for the appellant urged the Court to disregard the deduction of 2 months imprisonment and that the sentence be increased to 24 months.
22. When the matter was before the District Court the appellants sought a sentence ‘that is more than 9 months imprisonment’ in their written sentencing submissions⁷.
23. Counsel for the respondent drew the Courts attention to the maximum penalty available of three years and submitted that considering the level of offending and being mindful of the age of the child a sentence of 22 months imprisonment was appropriate, and the appeal should be dismissed.

DECISION

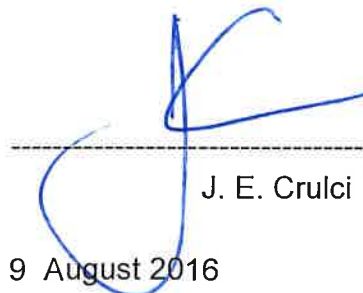
⁴ (1908) 1 Cr. App. R. 28 at 29

⁵ (1914) 10 Cr. App. R. 107 at 110

⁶ (1928) 21 Cr. App. R. 19 at 20

⁷ 28.10.2015, para 7.2

24. The Court notes that the sentence announced of 18 months was as a result of mathematical error, this is accepted by counsel for the appellant and respondent, and as such the sentence imposed by the District Court is 22 months imprisonment.
25. Offences charged under this section and comparable offences under the *Crimes Act 2016* vary so widely in circumstances of offending, complainant and offender circumstances that it is not practicable to issue guidelines as to appropriate sentence ranges in hypothetical cases.
26. The written judgment and sentence delivered by the Resident Magistrate is in accordance with the requirements of sections 7 and 116 of the *Criminal Procedure Act 1972*.
27. There is nothing before the Court to indicate that the sentence imposed in the District Court was decided on erroneous principles, was manifestly wrong, inadequate, or that there has been a substantial miscarriage of justice. The sentence of 22 months imprisonment stands.
28. The appeal is dismissed.


J. E. Crulci

9 August 2016

