CASE NO SC/CRIM/05/18

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS
ON APPEAL FROM THE MAGISTRATES COURT

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 26 November 2018

Before:

JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

BETWEEN:

REGINA

Respondent

-and-

DOUGLAS HANSEN

Appellant

Stuart Walker (Crown Counsel) for the **Respondent**

Sarah Lindop (instructed by Falklands Legal) for the **Appellant**

Hearing date: 26 November 2018

Judgment

THE CHIEF JUSTICE:

Introduction

1. On 24 September 2018 the Appellant was convicted after a trial before Senior Magistrate Kushner of two indecent assaults and one offence of gross indecency. The offences were against three separate complainants and the three charges were tried together. The offences were:

> Charge 1: On a date between the 22 November 1977 and 22 November 1979 the defendant indecently assaulted a male child aged 8 or 9 years by placing his hand on the child's testicles.
>
> Charge 2: On a date between the 1 August 1984 and 1 August 1986 the defendant indecently assaulted a male child aged 9 or 10 years by placing his hand on the child's testicles.
>
> Charge 3: On a date between 1 April 1983 and 1 April 1986 the defendant committed an act of lewd, obscene and disgusting nature and outraging public decency by exposing his genitals to children.

2. The facts of Charge 1 were that AB was a child aged 8 or 9 years living in Stanley. At this time the Appellant was 43 years old. The Appellant would smile at AB when they passed each other in the street. AB enjoyed football and would go to the football pitch when matches were being played.

3. The Appellant played football and he would be present on such occasions. When the Appellant saw AB at football matches he would speak to him about the game and about the teams that they supported.

4. During this period, in the summer, on an afternoon when a football match was due to be played AB arrived at the football pitch early. The Appellant was present and asked AB to pass a football to him.

5. When AB did so the Appellant took the opportunity to indecently assault him. The Appellant put his hand between AB's legs and touched his testicles.

6. The facts of Charge 2 were that CD was around 9 years old. The Appellant was 50 years old at this time. CD lived with his family at the settlement at Fitzroy. There was an occasion when Fitzroy was hosting Sports Week, an annual event that attracted members of the community from all over the Falkland Islands. CD was walking past the cow sheds towards the racecourse. The Appellant approached him, they were alone and out of sight. The Appellant gave him some money. The Appellant then took the opportunity to indecently assault CD by touching his testicles over the boys

clothing. It only happened on one occasion and CD did not consider this a serious incident for him personally.

7. Charge 3; EF was aged between 7 and 10 years. The Appellant was between the ages of 49 and 52. EF used to regularly walk past the Appellant's house, which is located near to the Victory Bar. EF was walking past on one occasion and saw the Appellant stood in his garden behind a closed gate. The construction of the gate was slatted in style and the Appellant was stood close to the gate and had pushed his exposed penis through one of the gaps so that it was visible to those passing by. It was not erect.

8. The Appellant's defence is that these incidents never happened or if they did it is a case of mistaken identity. As can be seen these events are historic with the last offence occurring over at least 32 years ago. The Appellant was a man of good character and is currently aged 84 years old.

9. On 3 October he was sentenced to 6, 4 and 1 months imprisonment respectively all to run concurrently to each other. Thus a total of 6 months immediate imprisonment in total. He was also made the subject of a Sexual Harm Prevention Order ("SHPO") for a period of 5 years. He has presently served 2 months in custody (of the 4 months he has to serve after taking into account remission).

10. This is an appeal against all three convictions and there is an appeal against sentence and the imposition of the SHPO.

Grounds of Appeal

11. There were 11 grounds of appeal advanced which were somewhat overlapping. In summary the grounds were:

Conviction

11.1. the Senior Magistrate erred in not acceding to the submission of no case to answer on charges 1 and 2;

11.2. the Senior Magistrate erred in her analysis of the evidence in respect of all the charges;

11.3. the Senior Magistrate failed to give sufficient weight to the inconsistencies in the accounts given by AB on charge 1;

11.4. the Senior Magistrate failed to apply the appropriate safeguards in respect of the issue of identification on charge 2; and

11.5. the Senior Magistrate failed to give any or any sufficient weight to the good character of the appellant.

12. These grounds can be dealt with compendiously under the topics of submission of no case to answer, final determination and good character.

Sentence

12.1. The Senior Magistrate erred in finding that there as grooming present in the offences of indecent assault; that resulted in the wrong categorisation of those two offences;

12.2. the Senior Magistrate wrongly found that the appellant had masturbated in respect of the charge of outraging public decency;

12.3. in all the circumstances of the case the sentence imposed should have been suspended; and

12.4. the SHPO was unnecessary in all the circumstances of the case.

Submissions

13. The Appellant essentially relied on his written submissions supplemented by oral argument. In the event the Crown only needed to rely on their written submissions.

No case to answer

14. The Appellant submits that there were a large number of inconsistencies in the evidence from AB and that his evidence was vague and tenuous. It is said by the close of the evidence there were three accounts given by AB in three different forms; email, statement and ABE recording. In each of those accounts the way in which the touching was said to have occurred was different and the only matter of consistency was that the defendant had apparently touched his testicles for varying lengths of time over clothing.

15. In particular the Appellant relied on the fact that in his email on 8th October 2013 AB wrote:

"I think there was a match going on between Stanley and the Endurance and before the match there was Dougie, myself and a couple of other kids. Dougie would always muck about with us. We were down near the goal at the East end of the pitch near the stream, when Dougie started tickling me, I was faced towards the East end of Stanley and he groped my testicles with his right hand and clasped his hand around them This was for around 10 to 15 seconds, I couldn't believe it and as I looked around he smiled at me. I told him to get off and walked off. I felt thorough ashamed and didn't think I could tell anyone."

16. In his statement dated 6th December 2013 AB stated the following:

"This one time there was a match going on between Stanley and Endurance Ship. Before the match, Douglas, myself and a couple of us kids were down near the goalposts at the east end of the pitch near a stream when Douglas started to tickle me. I as facing towards the East end of Stanley when I went to pick up a ball and that's when he groped my testicles with his right hand and clasped his hand around them for a 10-15 seconds. I couldn't believe it and as I looked around to see if anyone else was looking, he smiled at me. I told him to get off. I then walked off. I felt thoroughly ashamed and didn't think I could tell anyone. As far as I'm aware no one else saw it. I told my mum at the time and she told me to keep away from him. It was never discussed again but I have been living with these memories for years now and I still feel angry that someone could do this to me."

17. In his ABE interview AB was asked how the incident was instigated. He said at page 12 of 19:

"Well, he just, erm he – I think I had a football, and he asked me to pass the ball. And as I was passing the ball over, he somehow moved behind me and then put his hand between my legs from the back."

18. He was asked what he meant by pass the ball, and he demonstrated handing the ball over. He continued:

"Yeah, and he said, 'Oh, I'll kick the ball to you.' But, erm, I think he might have been stood – and as I passed I think somehow I got to the side and he, and he put, he put his – I may have passed the ball to him, and as I was walking away he – yes that's right. As I was walking away he put his hand between my legs, from the back, and groped my testicles." There was then some discussion about whether anything had been said and he told the officer that the appellant had said "Did you enjoy that?" and he had replied, "No, I didn't. You shouldn't be doing that."

19. AB added that he had turned around and described that the Appellant had:

"a horrible look on his face that – you know, an inappropriate look." ... "looked like he was turned on by it." On Page 13 of 19 he was asked "what hand was between your legs? His Left hand. So, you actually saw him do that. And what about his other hand? Er, he had the ball in the other hand." ..."No, I didn't. I felt rubbish really. Yeah. Why didn't you tell anyone? I was scared, yeah, definitely scared and confused as well...." ..."Who was the first person you spoke to about it? My sister, yeah. What's her name? Sharon ...."

Final determination

20. This ground effectively repeats the complaints of the Appellant made at the close of the prosecution case concerning inconsistencies, and vague and tenuous evidence, with the addition of cross examination answers; but this time against the backcloth of a factual determination of beyond reasonable doubt rather than the half time test.

21. It is submitted by the Appellant that the Senior Magistrate misrepresented the evidence. The written grounds of appeal state:

> "It is submitted that she misrepresented the evidence. She referred to the statement being cut and pasted from the email and described the statement as being virtually word for word as per the email. This is an incorrect interpretation of the evidence as can clearly be seen from the two documents **[Ref Judgement transcript Page 4D, Page 5D-H, and Page 6A-B]. Page 144D, Page 145D-H and Page 146A-B.** She also made reference to the fact that in 2013 AB should have been ABE interviewed and that as he wasn't the system had failed AB **[Ref Judgement transcript Page 3F to Page 4B]. Page 143F to Page 144B.** However at no time did she make the same observations about the fact that Mr Simpson was not dealt with by way of ABE. The Senior Magistrate indicated that she had carefully scrutinised the evidence but then went on to deal with the complaint evidence attributing it to his sister which was entirely incorrect, describing him telling his sister as generally borne out **[Ref Judgement transcript Page 8B, Page 9E-H, Page 10A-B]. Page 148B, Page 149 E-H and Page 150A-B.** She dismissed the inconsistencies and misrepresented the evidence. In addition she made reference to some matters in the statement that had not formed part of the evidence. This forms the basis for the second ground of appeal. "

22. The Crown say that there was no misrepresentation of the evidence but in so far as there might have been they were inconsequential. They point out that the exchange regarding the sister was corrected. The Senior Magistrate in her judgment said:

> "As I have said, there are inconsistencies. For example, it might be regarded as an inconsistency of what he told his sister, although in fact it does not appear so, because his sister remembers something being said at the time, although it was in general terms, and that is the agreed facts. And if I can read that, let us check that I have got that right. Yes, and of the agreed facts of Carol, AB had said that there was a man who used to hang around the field and ask boys back to the house. AB had said that a male called Dougie Hansen was responsible for touching him on one of the occasions, but she does not know which incident this was.
>
> **MS LINDOP:** Your Honour, I am sorry to interrupt, but that is the wife, that is not the sister.
>
> **SENIOR MAGISTRATE:** Oh, I do apologise.
>
> **MS LINDOP:** Paragraph 7 is the sister.
>
> **SENIOR MAGISTRATE:** Yes, thank you very much. I will go back, then, on that.

23. The Crown go onto say:

> "The Senior Magistrate's comments about the witness statement being a near copy, or a "cut and paste" of an earlier statement must be read in context. The learned judge was setting out how the various previous statements had come to be made and the circumstances in which they were given as a precursor to assessing their relevance. If there is any error in interpreting the context of how the previous statements came to be made then it does not affect the safety of the conviction which was based on an assessment of the evidence that AB gave with the Senior Magistrate reaching the conclusion that she was sure that his evidence was accurate."

24. The Crown accepted that the Senior Magistrate made an error in relation to seeing a set of photographs. Mr Walker submits in his written submissions as follows:

> "The Senior Magistrate mistakenly referred to the complainant having seen a set of photographs **(see Tab 7 p.154 F).** This error was corrected in part shortly thereafter when the Senior Magistrate referred to the complainant not having seen some of the photographs **(see Tab 7 p. 155 D).** This error is minor, was partly corrected and has no bearing on the assessment of the complainant as a reliable and credible witness, which is the evidence upon which the conviction was based.

Good character

25. The appellant submits that the Senior Magistrate did not in her decision mention good character.

26. The Crown point out that the Senior Magistrate directed herself before verdict in the following way:

> "I have heard that the defendant is a man of good character, in the sense that he has got no criminal convictions, cautions or reprimands against him. Of course, good character cannot by itself provide a defence to a criminal charge, but it is evidence which I should take into account in his favour in the following way. In the first place, the defendant has given evidence, and as with any man of good character, it supports his credibility. This means that it is the which I should take into account in deciding whether I believe in his evidence. And in the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit these defences. I said these are matters to which I should have regard in the defence's favour. It is for me to decide what weight I should give them in this case."

27. And although it was not mentioned in the first part of her judgment she went on to say before sentencing:

> "**SENIOR MAGISTRATE:** Yes. Can I just add this, I think I (inaudible) a page on this in my notes, in fact, that I took into account the fact that he was of good character. That was very much within my reckoning as I directed myself on this particular matter; that there was nothing known about him. And I considered that very carefully, bearing in mind these charges which I looked at separately. So I think I just need to add that within my judgment."

Discussion

28. It is a matter of law whether the Senior Magistrate correctly determined if there was a case to answer. The test on such a submission is well known. In *R v Galbraith* [1981] 1 WLR 1039 at page 1042B, the court said the test was whether:

> " the prosecution evidence, taken at its highest is such that a jury, properly directed could properly convict upon it where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

29. The Senior Magistrate clearly directed herself correctly. She then said in relation to charge 1:

> " In respect of [AB] is different. It is right and it is accepted that there are inconsistencies. There are three accounts: one in an email, which has relatively recently come to light, a statement, and indeed the ABE interview. In respect of the email I should mention that he, or should say that that particular email was not put to [AB] so that he could explain it in any shape or form, and I state this because in these circumstances what is stated within the email has to be resolved in favour of the defendant, in these circumstances. So I take it that the accounts have differences, and a number of differences. However,

there are a number of similarities: the location, the timing, in the sense that it was at the time of a football match, and in fact the precise location, the east end of the pitch by the river, and the identification of the man who did it, coupled with the fact that it was over clothing, and the, and indeed the nature of it, in so far as it was a grope. The precise mechanism surrounding the assault does have inconsistencies, but having looked at the proper direction that I will be giving to myself, it is not the case that if properly directed I could not convict. It would, of course, be the case that having properly directed myself, that I will be considering with some care the evidence in this particular matter. I should add that of course there are further inconsistencies, or potential inconsistencies as to who he told, who [AB] told, and that again, on a proper direction to myself, I will be considering. So it is not such that the inconsistencies are there that within the context of Galbraith, it is not matters which should prevent the matter going forward towards, to a consideration of, if I say a jury, to myself as the Senior Magistrate and the arbiter of the facts at the end."

30. It is impossible to say that the Senior Magistrate made a mistake or erred in law. She correctly assessed that these matters were for the final determination of fact.

31. In relation to charge 2, the Appellant additionally relies on the identification issue. The Senior magistrate said:

" ...it is said by the defence that his evidence is vague, there was a lot of evidence which he did not know and could not clarify. However, equally, there are other matters about which he was, ostensibly, clear: the fact that he was alone, the location at the cowshed, the time when the incident happened, the speed of the conduct, if I can put it like, that there was handing over of money, albeit he could not remember precisely the nature of the money, and that the incident took place over a very short time. It is right, as is said by the defence, that he could not remember how he knew the defendant, but his identification was clear. It is right that, when I am evaluating the evidence at this stage, it is right that there is within the interview of the defendant a recognition that in fact he knew the family and he knew CD. And in fact, having looked back at my notes at what CD said, CD said that, "Everybody knew everybody," so whilst he may not have been clear precisely how he came to meet the defendant, he was certainly, for this stage, clear about the identification, although I will be directing myself more thoroughly about the nature of identification in the long run. So, one has a look, in terms of what is consistent and inconsistent, and balancing the inconsistencies which are there, against, as I said, the location, the time of year, the mechanism, the handing over of the money, the identification, that his is a matter which I consider, if properly directed, a jury or a Senior Magistrate could convict. That is not to say I will convict, it is to say that at this stage I do not consider it right to stop that particular charge going forward, within the terms of Galbraith."

32. The Senior Magistrate set out the *Turnbull* [1977] QB 224 direction in her legal direction and dealt with the issue of identification in her factual judgment. There is a material distinction between cases of identification by recognition and cases of identification of a stranger. The Court of Appeal in *Turnbull* at 228:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution .

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the

situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it did not need to be so if its effect is to make the jury sure that there had been no mistaken identification"

33. Therefore in cases of recognition as described by the Court of Appeal no supporting evidence is required for the matter to be left to the jury while in the case of identification of a stranger supporting evidence is normally required.

34. In the instant case I am satisfied that the Senior Magistrate was entitled to leave the matter to go to the tribunal of fact for decision.

35. When the final determination was reached of particular importance is that the Senior Magistrate came to findings of fact. The approach of an appellate court to a judge's findings of fact is well trodden ground. Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484 , 487-488, is the oft quoted starting point. He said:

"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

36. This approach was cited with approval in the recent Privy Council case of *In Chen v Ng (British Virgin Islands)* [2017] UKPC 27. Indeed in that case they also cited with approval what Lord Hoffman said *Biogen Inc v Medeva Plc* [1997] RPC 1, at page 45:

"The question of whether an invention was obvious had been called "a kind of jury question" (see *Jenkins L.J. in Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Co. Ltd. (1952) 69 R.P.C. 63, 70*) and should be treated with appropriate respect by an appellate court. It is true that in *Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370*[5] this House decided that, while the judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, were virtually unassailable, an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness. In drawing this distinction, however, Viscount Simonds went on to observe, at page 374, that it was "subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge". The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

37. This approach is trite law and applies in this jurisdiction. Indeed the Falkland Islands Court of Appeal said in *R v Alfred* [2018] COA-CRIM-0317, at [29]:

"It is not for us to substitute our view of the witnesses for that of the trial Judge. She had the opportunity to see and hear the witnesses. It is the function of a trial to test the evidence of the witnesses and to assess their credibility. The Judge was in a much better position that we are to assess the witnesses and decide where the truth lies."

38. It is clear from the Senior Magistrate's judgment that she meticulously and carefully considered all the inconsistencies and submissions of tenuous evidence that were urged by the defence. The Senior Magistrate saw the complainants give evidence and was in the best position to evaluate their credibility and reliability. I accept the Crown's submission that any errors were minor. She clearly directed herself correctly and therefore there is nothing about which this court can or should interfere in her decision.

39. Finally the complaint that the Senior Magistrate did not properly take into account the Appellant's good character is misplaced. True it is that it is not mentioned in the main part of her judgement. But it was dealt with correctly in her legal directions to herself and she added in which is still part of the judgment the observation that she had taken good character into account. There is nothing in this point.

40. Mr Walker for the Crown has helpfully reminded the court of the correct test in an appeal such as this. He says:

"12.A number of the grounds of appeal are based on how the Senior Magistrate assessed the evidence. It may therefore be of assistance to consider case law from England and Wales on the "safety test" to be applied where a ground of appeal contends that on the evidence there is some lurking doubt about the safety of a conviction. In *R v Cooper* [1969] 3 All ER 118 Widgery L.J, delivering the judgment of the Court of Appeal (EW), stated that the case before the court was:

> "a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere.
>
> ... (W)e are ... charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe...
>
> That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it".

13. The judgment in *Cooper* should be read in the light of the much more recent case of *R v Pope* [2012] EWCA Crim 2241. In *Pope* it was said that the application of the "*lurking doubt*" concept requires a reasoned analysis of the evidence or trial process, or both, that leads to the inexorable conclusion that the conviction is unsafe; and that it followed that it would only be in the most exceptional circumstances that a conviction would be quashed on this ground alone."

41. This approach is in my view correct.

42. Adopting the legal test, notwithstanding there may have been some minor errors on the Senior Magistrate's review of the evidence, I do not find there was any material irregularity in the course of the trial nor that the conviction is unsafe or unsatisfactory. There is no 'lurking doubt'. The appeal against conviction is dismissed.

Sentence

43. The Senior Magistrate placed the offending for charges 1 and 2 in Category 3A of the UK sentencing Guidelines on Sexual Offences. There is no doubt she was right to put the harm caused in Category 3. None of the harm factors identified in Category 1 and 2 of those guidelines were present.

44. There is a dispute as to the correct level of culpability. In my judgment this offending was on the cusp of culpability 3A and 3B. The finding of grooming which pushes the offending from Category 3B to 3A is disputed by the Appellant. However, the category range for the differing levels of culpability both include 26 weeks custody: the bottom of Category 3A and the top of Category 3B. As is so often said the guidelines are just that and offences are often in the grey area between categories. In my judgment it cannot be said that it was manifestly excessive or wrong in principle to put the offending in Category 3A.

45. The Senior Magistrate identified in her sentencing remarks the starting point for Category 3A as 1 year with a category range of 26 weeks to 2 years custody. It appears the Senior Magistrate determined a downward adjustment from the starting point to arrive at a determinate sentence of 6 months imprisonment for charge 1.

46. In any event the sentence of 6 months, 4 months and 1 month imprisonment cannot be said to be wrong in principle or manifestly excessive. Nor can it be argued that it was wrong to make them concurrent sentences.

47. However, I do think the Senior Magistrate has fallen into error on the approach to the suspension of that sentence. The Senior Magistrate does indicate that she considered the option of community sentences for all three charges but nowhere in the sentencing remarks does there appear any consideration of suspension of that custodial sentence. As the "Imposition of Community and Custodial sentences" guidelines issued by the Sentencing Council in the UK state: "Sentencers must consider all available disposals at the time of sentence". The Crown accepts it would not be right for this court to

simply assume the senior magistrate has properly considered suspending the sentence as obvious. It is therefore common ground that this court should reconsider this aspect of the sentence.

48. It is clear that suspension was being advocated by the probation service who say in conclusion to a most comprehensive report:

> "It is my preferred recommendation that the Court imposes a period of imprisonment that is wholly suspended with the following requirements attached:
>
> - suspended sentence order
>
> - probation supervision requirement for a period of 12 months
>
> - Prohibited activity requirement preventing Mr Hansen from attending sporting events where children compete or speculate."

49. I have also considered section 493(5) of the Criminal Procedure and Evidence Ordinance 2014. It states:

> "... an appellate court on appeal from that court must consider such a report in determining whether as different sentence should be passed on the applicant from the sentence passed by the court below."

50. Therefore I must take into account the conclusions and recommendations in the report of the probation service in the pre-sentence report. Moreover, on the day of the sentence the court, perhaps with the agreement of the probation service although that is not clear, reduced the risk that the Appellant posed to the community from high to medium.

51. I have considered the matter most carefully. The most important factor is that Mr Hansen, a man of 84, has been of good character for the last 30 years. Very many historic sex offences do not allow the imposition of a suspended sentence because the determinate term is more than 2 years. (No suspended sentence can be passed if the determinate sentence is more than 2 years). That is not the case here. I take into account the factor that good character should be accorded less weight the more serious the offending. (See *R v Forbes* [2016] EWCA Crim 1388 at [23].

52. The factors that weigh in favour of suspending the sentence are identified in the guidelines. In this case there is both a realistic prospect of rehabilitation and strong personal mitigation. This is explained in the pre-sentence report.

53. In all the circumstances I propose to follow the recommendation of the carefully argued probation report and suspend the sentence imposed.

54. It follows the appeal is allowed to the extent the sentence is to be suspended on the terms advocated by the probation service.

55. Finally I turn to the SHPO. It is trite law that such an order can only be made when it is *necessary* to protect the public from sexual harm from the Appellant: Section 321 of the Crimes Ordinance 2014.

56. Although the Senior Magistrate found that it was necessary I take the view that the fact that the offences took place over 30 years ago and the Appellant has not offended since points very strongly against it being necessary now for such an order to be made. It is a serious imposition on the life of the Appellant and such an order can only be made if strictly necessary. The condition in the suspended sentence order relating to not attending sporting events where children are present is sufficient in all the circumstances. I do not believe the SHPO is strictly necessary and in the circumstances allow the appeal against the imposition of the SHPO.

Conclusions

57. The appeal against conviction is dismissed. The appeal against sentence is allowed in so far as the custodial sentence will be suspended for 12 months on the terms advocated by probation and the SHPO is discharged.

CHIEF JUSTICE