IN THE SUPREME COURT
CRIMINAL APPEAL

Case Number SC/CRIM/01/13

Between:

DAVID REGINALD THOMAS

Appellant

V

REGINA

Respondent

Representation:

Appellant: Christopher Hudson, counsel, instructed by Mark Neves, Falkland Islands Legal Services

Respondent: Peter Horgan, counsel, instructed by the Attorney General

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Judgment

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1. On 16 January 2013, after a trial lasting 6 days before a locum Senior Magistrate, the appellant, David Thomas, was convicted of three specimen charges of sexual touching of a girl under the age of 13 years, contrary to s.7 Sexual Offences Act 2003 and one charge of sexual grooming, contrary to s.15 of that Act. He was sentenced to a total of 6 years imprisonment. He appeals against both conviction and sentence. This is not a rehearing. In this appeal I have to consider whether the convictions by the Senior Magistrate were unsafe, and whether the sentences that she passed were manifestly excessive.

2. The girl, who cannot be identified and who I shall simply refer to as the child, was aged 10 years at the relevant time and lived with her mother and stepfather, 6 year old sister and a 12 year old girl who lived with them in a three bedroom house. The girls

usually shared one bedroom, the mother and stepfather shared another, and a lodger the third. Sometimes the appellant, then aged 38, would stay in the house at the weekends. He was brought up to believe that he was the half brother of the child's mother, although they subsequently discovered that he was no blood relation. However, he was regarded as family, and was known to the children as uncle.

3. The essential allegations came to light in August 2012 when the 12 year old told a school friend that something was going on between the appellant and the child when they were in the same bed in the children's bedroom. It is submitted on behalf of the appellant that the 12 year old's experience as to sexual conduct was very limited, and was based on what she had seen when channel hopping on the television, and that she had wrongly construed things that she said that she had heard, namely kissing and heavy breathing, as constituting sex. The Senior Magistrate considered her to be a careful and truthful witness who said when she was not sure and did not try to exaggerate, accepting that it was dark and that she did not see anything. However, she was resolute in her evidence, including in cross-examination, that she had heard the appellant call to the child to come down from her bunk and that 5 minutes later she had heard kissing coming from the mattress that the appellant was using in the girls' bedroom. The child accepted that sometimes she and the appellant kissed and the 12 year old could have heard this. The appellant admitted that he would kiss and hug the child when they were in bed together, but said that he only kissed her on the cheek or hand. As the Senior Magistrate pointed out in her judgment, it was not alleged that the two girls had discussed the case, and I consider that she was entitled to find that the 12 year old was both truthful and reliable in her evidence that the appellant had called the child down to his bed and that thereafter she heard noises which sufficiently concerned her that she told her friend, and repeated this when asked about it by the child's mother. Further, I consider that the Senior Magistrate, having so found, was also entitled to hold that this evidence was consistent with and supportive of the child's allegations, and that the inconsistencies between their evidence were inconsequential.

4. Turning now to the child herself, she was interviewed twice by the police, both before and after being taken into care, and denied that anything had taken place. A guardian was appointed and on an occasion in September 2012, some 7 weeks after her first two interviews, the child revealed to her that the appellant had squeezed her vagina when they shared the same bed. Thereafter the child was interviewed by the police for the third time and repeated her allegations.

5. Although it was submitted before the Senior Magistrate that the third interview should have been excluded under s.105 Criminal Justice Ordinance, which empowers the court to exclude evidence if, having regard to all the circumstances, it considers that its admission would have such an adverse effect on the fairness of the proceedings, that submission is not repeated before me. However, it is submitted that the evidence called at the trial established that the child was an unreliable witness, and that her evidence should not have been accepted by the Senior Magistrate. Mr. Hudson, counsel for the appellant, advanced this submission on a number of bases.

6. Firstly, he submitted that the first two police interviews were far too long and that during them the interviewing officer made suggestions to the child that conveyed to her that the officer believed that something had happened and that, if the child told the truth, she should reveal it to her.

7. I, like the Senior Magistrate, had an opportunity of watching the films of the child's ABE interviews, and was able to observe how each the interview was conducted and for how long, how the child was questioned and how she reacted to that questioning. The Senior Magistrate accepted that the interviews were long but, having appropriately directed herself as to how to approach the evidence of this young child, considered that the child coped well and was not put under inappropriate or undue pressure. I agree. Clearly in the first two interviews the child felt able to maintain her denials. The Senior Magistrate, unlike myself, had an opportunity to see the child when she was cross-examined upon these interviews and other matters raised in this appeal, and to observe her reaction and demeanor when questioned, which are very important when assessing

credibility and reliability. This gave her a huge advantage over an appeal judge. Having done so, she found the child to be an extremely compelling witness in what she said, the manner in which she spoke and how she dealt with the matters put to her in cross-examination, which was age appropriate but convincing. She found her to be spontaneous, articulate and forthright and, where appropriate, shy and embarrassed. She concluded that the child's denials in the first two interviews were explained by the fact that she simply was not, at that stage, ready to tell the police what had happened, although she did hint at it. In the first interview, when asked if she wanted to write down what had happened, she said that she wanted to see her mummy first, and in the second interview she said that she did not want to tell the truth because then the people she loved would get into trouble. In her evidence the child gave an indication of what was going on her head at this time. There is no doubt, as she said on many occasions, that this 10 year old felt that she loved the appellant and she subsequently stated that she had promised him not to tell. She felt guilty and afraid. She wondered if he was going to wander around with no one doing anything. She was worried, having told her mother, who had not then done anything about it, that she would be cross with her if she told anyone else. All of these matters would explain the denials in the first two interviews.

8. It was further submitted that, at the very least, the first two police interviews left the child in no doubt that the police were convinced that something had taken place between her and the appellant, and that the child was intelligent enough to have realized that this was why she and her sister had been taken into care. After living with their grandparents for seven weeks they were homesick and wanted to return home, and when she had a meeting with the guardian at the end of September, who had told her she had special powers and could influence what happened to children, it was submitted that the child decided to make false allegations against the appellant in order to try to get home.

9. Mr. Horgan, counsel for the prosecution, pointed out that these suggestions never progressed beyond suggestions, because when they were put to the child, they were rejected, and here I consider that it is important to note how it was that the child came to make her allegations.

10. After the child and her sister were taken into care an experienced social worker from England was appointed as their guardian and guardian ad litem. This meant that one of her tasks was to advise the court as to where and with whom they should live in the future. She went to see them at their grandparents on three occasions, when nothing was said about the appellant. On 29 September 2012, her last day on Island, the two children were brought to Stanley so that they could spend some time with her. She took them to the guide fair at the Town hall and then to the house where she was staying to give them some lunch. When the girls were playing with pens and paper in the kitchen, the guardian incepted an exercise designed to ascertain their attachments and with whom they felt safe. It involved drawing a tree with a heart at its centre, upon which they would write the names of those they loved and felt safe, and some distance away they drew a desert island upon which they were asked to put the names of people they did not like. The child told her that she wanted to put the appellant on the desert island, and whispered that she wanted to tell her something but did not want her sister to hear. She took the guardian by the hand and led her into an adjoining boiler room. She was upset. She asked the guardian to write things down. This she did at the child's dictation, and the resulting document, at pages 218 and 219 of the trial bundle, comprises contemporaneous and compelling evidence. The document includes a stick diagram of a girl indicating that the appellant had played with her privates, and other words which she asked to be written down made clear that he had hurt her, made her feel guilty and afraid, and that she had wanted him to stop getting in her bed.

11. The guardian said that at that stage, because the child was concerned about not being believed, she told her that it may be the case that it had happened to other little girls that he had known, although she gave no details. The child said that she had found that very shocking but she felt a little bit happier as she felt like she was not the only one. However, by that stage the child had given her account and Mr. Hudson, in his submissions before me, did not persist with allegations that this revelation had been the cause of the child making her allegations. Nor did he suggest that the Senior Magistrate

was unable to put this previous conviction out of her mind when determining her verdicts.

12. However, the guardian was challenged in cross-examined on a number of bases. It was suggested that she had deliberately tried to put herself into a position to investigate the alleged crimes. This she firmly rejected, saying that such was no part of her remit. It was suggested that she prompted the child and put words in her mouth. This she denied and said that this would be against her code of ethics. She was asked why, once it was clear that the child wanted to talk about the appellant, she had not immediately terminated their conversation. She explained that in her role as guardian she could not say to a child who wanted to speak to her that you cannot tell me anything else. If she had, the child would have felt let down. Further, it was put to her that she had manipulated the child, and traded on the fact that she was homesick and wanted to go home, and that was why she had said she had special powers and knew who to speak to make things better for children. However, when the child and her mother were pressed on the desire to get home quicker, this was all but rejected. The mother explained that the time when she was sent to her grandparents coincided with the school holidays and so would not have seemed strange to her.

13. The Senior Magistrate heard and was able to judge how the guardian dealt with these suggestions and, having done so, was sure that she did not seek to obtain information about the appellant from the child or put words in her mouth and did not seek to manipulate her in any way. Further, she was satisfied that the child, who was articulate and sensible, understood the guardian's role and realized that making up allegations about the appellant would not help her to get home. These assessments are ones that the trial judge makes based on what she sees and hears, and I have no reason to consider that they were not properly or reasonably made.

14. The child's account as to the form that the assault took, once she disclosed it, namely the squeezing of her vagina with his hand, was maintained throughout her evidence, including under cross-examination. She made no attempt to enlarge or

embroider this allegation when asked about other touching either by her or him. It is argued that her assertions that her vagina hurt from the time he first did it, and on occasions during the seven week period after her removal from her home, after which a doctor's examination revealed nothing, calls into question her credibility. If this was an invention one wonders why this child, who said that she was worried that he might have put something inside her, was so insistent that she should be examined by a female doctor.

15. The child told the police from the beginning that she would on occasions sleep in the same bed as the appellant, usually having asked her mother first. In this she was supported by the evidence of her mother and the 12 year old. The appellant did not give evidence but, when interviewed, accepted that he would on occasions share the same bed as the child, although denied that this happened in the girls' bedroom or that anything untoward had happened. However, there was clear evidence of opportunity.

16. There was also evidence of disposition, which the Magistrate was entitled to and did take into account as supporting the child's evidence. His texts, in which he repeatedly said how much he loved her, and his numerous calls to her mobile, including late at night and in the early hours of the morning, far exceeded what would be expected from a normal avuncular relationship between a 38 and 10 year old. Some of the calls lasted for almost an hour. In addition, items relating to the child, including some photographs of the child, that he had taken without permission, were found at the place where he lived.

17. A central plank of this appeal was based on the fact that the prosecution called the mother to give evidence and that she, in contradiction to the evidence of the child, denied that the child had told her that anything had happened when she asked her on 8 August 2012. As she was not questioned about this either by the prosecution or the Senior Magistrate, it is submitted that the latter was not entitled to reject that evidence and to prefer the evidence of the child. Although it was submitted, for the first time in the perfected grounds of appeal, that, had the defence realised this was a live issue it could

have considered calling evidence from the father and/or stepfather of the child, both of whom were present when the child asserts she told her mother on 8 August, this submission was not pursued in oral argument before me, as Mr. Hudson accepted that both the father and stepfather had been spoken to and he could not assert that he would have wanted to call them as witnesses.

18. The child's evidence that she had told her mother was challenged in cross-examination on several occasions, and the contradiction between the two witnesses was patent. Her response to those challenges, which the Senior Magistrate considered would have caught the child out had she been lying, assisted her in being sure that the child had told her mother. Those challenges were followed by re-examination, during which she reiterated that she had told her mother about 6 pm on 8 August before the first police interview. The child had told the police that, when she told her mother, the latter had said that she would be safe next time the appellant came as she would put him in a separate bed. The child, under cross-examination, said that her mother had asked her whether anyone had touched her privates and she had said yes. The word "privates" was subsequently used by the child to the guardian. It is accepted that the 12 year old had told the mother that something had happened between the appellant and the child, and yet the mother did not report the matter on that day, or the next day when before the police arrived in the evening of that day.

19. The Senior Magistrate contrasted her assessment of the mother as a witness with that of the child. She found the mother to be hesitant and nervous. The mother admitted that, after her conversation with the child, she had telephoned the appellant and told him that the child had said that something had happened, but asserted that this was a white lie to test the appellant.

20. The Senior Magistrate was able to consider all of this evidence when determining where the truth lay. She was, as a jury would have been, entitled to accept or reject all or part of a witness's evidence, and to prefer the evidence of the child on this point over that of her mother, having heard them both give evidence about it and made her assessment of

them as witnesses. She was under no obligation, and it could be argued it would have been inappropriate for her, to enter into the arena and cross-examine either the child or the mother, where their evidence was in conflict. She was under no duty to disclose how her mind was working prior to delivering her verdicts, having heard all of the evidence. The defence was not entitled to assume, because the mother was called by the prosecution, and because the Senior Magistrate did not cross-examine her, that she had accepted everything she had said, particularly when there was other evidence from the main witness in the case which was directly contrary to it. I therefore reject the submissions in relation to the mother's evidence.

21. The case against the appellant was a strong one and, having considered all the submissions that have been made, and the evidence contained in the transcripts, statements and documentary exhibits, and the judgment of the Senior Magistrate and the reasons that she gives for her verdicts, I have no reason to suspect that those verdicts are unsafe, and this appeal against conviction is dismissed.

22. In his submissions as to sentence, Mr. Hudson accepted that the ancillary orders, such as the placing of the appellant on the sex offenders register, were entirely appropriate but argued that a total sentence of 6 years imprisonment was manifestly excessive. He relied heavily on the guidelines of the Sentencing Council of England and Wales for this type of offence committed on a girl under the age of 13. They advise that, for a person of good character convicted of one such offence after a trial the starting point is 2 years imprisonment with a range of 1 – 4 years depending on the circumstances of the particular case. He submitted that the guidelines had made sentencing essentially a mathematical exercise. Accordingly, a 25% uplift from the 2 years starting point was appropriate to reflect the number of offences which, although difficult to quantify, probably had not reached double figures. Then there should be a further 25 % uplift to reflect the familial aspect of the offences and yet another 25% uplift because of the breach of trust, resulting in a total 75% uplift from the 2 years, resulting in a sentence of 3½ years. He accepted that there was no evidence of remorse or contrition. He submitted that the previous conviction for unlawful sexual intercourse with a 15 year old girl when

he was aged 19 did not impact greatly on the sentence. He argued that the fact that the appellant had to serve his sentence away from his family and friends in Saint Helena was a mitigating factor, and this, together with the fact that a prisoner in the Falklands has to serve two-thirds of a sentence, unlike a sentence in England and Wales, where one half of the sentence is served before release on licence, should result in a 25% discount from the 3½ year sentence, making the appropriate sentence one of 3 years. He went on to submit that the sentence of 6 years was equivalent to an 8 year sentence in England, and involved serving 2 years more than someone receiving the top of the guideline range. This was wholly disproportionate having regard to the offences committed which, albeit serious, comprised touching by the hand without coercion or threat, and yet the sentence imposed was nearer to that appropriate to penile rape or sexual assault where there had been digital penetration.

23. Mr. Horgan, in seeking to assist the court, reminded me that the essential considerations in sentencing are the culpability of the offender and the degree of harm caused, which includes the impact on the victim. The guidelines are not rigid, and the sentencing process must allow for flexibility and variability. Sentencing in each case has to be determined on its own particular facts. The need to deter others from acting in a similar fashion is a relevant consideration. Particular circumstances may make it appropriate for a sentence to fall outside the range. In relation to familial child offences, the age and vulnerability of the victim, and the age gap between the child and the offender are relevant factors. The guidelines advised that the starting points for familial child offences should be between 25% and 50% higher than those for generic child sex offences where the child was aged 13 or over and under 16. In relation to a single offence of penile rape of a child under 13 the starting point is 10 years with a range of 8 to 13 years, and for digital penetration the starting point is 5 years with a range of 4 to 8 years and these offences are only triable on Indictment.

24. The Senior Magistrate in her sentencing remarks stated that she had considered the guidelines in which the starting point and ranges were for a man of good character convicted of one offence after a trial. Although she accepted that the appellant's previous

conviction was a long time ago he had received a 2 month prison sentence for sexual intercourse with a girl aged 15, who had a child as a result. He was, therefore, not a man of previous good character. She took into account that he had lost his job, and that he had little family or friends on Island who would visit him during his sentence. She also accepted that the offences could have been more serious. However, the offences were specimen offences and the sexual assaults had taken place over some 8 weekends, and had only ceased when the 12 year old had voiced her concerns.

25. She considered that the effects on the child and her family to have been devastating and had involved the child at the age of 10 being taken away from her home and her school. With the agreement of both counsel I was informed that the child continues to live with her grandparents and that the family court proceedings are continuing, and so it is now 9 months since the child was removed from her home. I also note that the guardian stated that the child continues to have a high level of anxiety connected to the abuse she has suffered. The Senior Magistrate considered, in my view justifiably, that the impact of the offending on this little girl will have been considerable.

26. The Senior Magistrate stated that she was aware that two thirds of the sentence would have to be served, and that she had to have regard to the totality of the sentence. She considered the sexual assault offences had been significantly aggravated by the appellant using this 10 year old's genuine and strong affection for him to his advantage, encouraged by sophisticated and determined grooming. The degree of culpability was high, and I consider that the she was entitled to consider the sexual charges to be at the top end of the sentencing bracket. She then pointed out that the guidelines took no account of the significant abuse of trust here by a 38 year old uncle type figure, who was trusted by the family to the extent that he was permitted to sleep in the same room and on occasions in the same bed, as this 10 year old girl. That naivety and trust which, no doubt, would be incomprehensible to many parents, was something that he was willing to take advantage of, and I consider that the Senior Magistrate correctly described this as an appalling breach of trust. As a result she considered that the appropriate sentence, having had regard to its totality, was one that exceeded the top of the guideline range. This, if it

was justified, she was entitled to do, and the Court of Appeal of England and Wales has often emphasized that the guidelines are precisely that, and that particular circumstances may make it appropriate for a sentence to fall outside the range.

27. It is not argued that the Senior Magistrate was not entitled to rely on all of the factors that she referred to when sentencing, but rather that she attributed to them too much weight. I do not agree. I consider that her approach to her sentencing task was correct and clear. To take advantage of the love and affection of this 10 year old, and the naivety and complete trust of her mother, so as to be able to repeatedly squeeze the child's vagina for his own sexual gratification, and then to get the child to promise not to tell, added significantly to the seriousness of what were already serious offences. Indeed, when the new offence of sexual assault with a child under 13 was introduced by the Sexual Offences Act 2003, it imposed a maximum sentence of 14 years imprisonment as opposed to 10 years for the generic sexual assault offence, in order to underline the gravity of committing such offences on children of a young age. The age gap here was one of 28 years, and generally the greater the age gap between offender and victim, the greater the sentence should be. All of the children who live in these Islands, including those whose living conditions involve multiple occupation, must be protected, and it should be clearly understood that those who are disposed to commit these offences can expect, when they are caught and brought to justice, to be dealt with severely.

28. I do not consider that the guidelines have rendered sentencing an essentially mathematical exercise. The court has to have regard to all the circumstances of a particular case and, having done so arrive at a total sentence which is appropriate and proportionate. I consider that the Senior Magistrate did precisely that. I do not consider that the sentence she imposed was manifestly excessive and the appeal against sentence is also dismissed.

Christopher Gardner QC
Chief Justice
9 May 2013