Criminal Appeal No. 9 of 2025

IN THE COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
BEFORE JUSTICE JUAN WOLFFE
CASE NO. 9 OF 2024

Dame Lois Browne-Evans Building
Court Street, Hamilton HM12
Bermuda
Date: 19/11/2025

Before:

THE RT HON SIR CHRISTOPHER CLARKE, PRESIDENT

THE RT HON DAME ELIZABETH GLOSTER DBE, JUSTICE OF APPEAL

and

THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

Between:

THE KING **Appellant**

-v-

RONALD FORDE **Respondent**

Ms. Cindy Clarke of the Department of Public Prosecutions for the Appellant
Ms. Elizabeth Christopher for the Respondent

Hearing Date: **12 November 2025**
Date of Judgment **21 November 2025**

Gloster JA:

Introduction

1. This is the judgment of the Court. On 12 November 2025 the Court heard an application for leave to appeal by the Crown ("the Applicant" or "the Crown") under section 17A of the Court of Appeal Act 1964 against the sentence imposed in this matter ("the Application"). So far as relevant, section 17A provides that the Crown may, with leave of the Court, appeal against a sentence imposed by a judge of the Supreme Court upon the ground that "*it is manifestly inadequate".*

2. Ms Cindy Clarke, Director of Public Prosecutions, appeared on behalf of the Applicant. The Respondent to the Application, Ronald Forde ("the Respondent"), as appears from the circumstances described below, was unrepresented at the hearing of the Application and appeared in person. At his sentencing hearing, however, he had been represented by Ms Elizabeth Christopher of Christopher's attorneys. At the request of the Court, Ms Christopher attended the hearing of the Application.

3. At the end of Ms Clarke's submissions in support of the Application, the Court informed the Respondent that it did not require to hear from him on the substance of the Application (although it had heard from him in person in relation to the procedural chronology of the matter). The Court then proceeded to dismiss the Application and to refuse the Crown leave to appeal against sentence. It stated that it would give its reasons for its decision at a later date. This judgment sets out those reasons.

Procedural history

4. On 6 November 2024 the Respondent pleaded guilty to the following offences: (i) luring of a young person by a person in a position of trust, contrary to section 182EA of the Criminal Code Act 1907 (the "Criminal Code") (Count 1 on the Indictment); (ii) sexual exploitation of a young person by a person in a position of trust, contrary to section 182B(l)(a) of the Criminal Code (Count 2); and (iii) accessing child pornography, contrary to section 182H of the Criminal Code (Count 4).

5. On 14 March 2025 the Respondent was sentenced by Wolffe J ("the Judge") to 3 years' imprisonment for the luring offence (Count 1); 4 years' imprisonment for the sexual

exploitation offence (Count 2); and 2 years' imprisonment for the accessing child pornography offence (Count 4). The Judge ordered that the sentences on Counts 1 and 4 were to run concurrently with each other but that the 4 years sentence on Count 2 was to run consecutively to the 3 years sentence on count 1. Accordingly, the total sentence to be served by the Respondent was one of 7 years imprisonment with time in custody to be taken into consideration. The Judge also ordered that the Respondent's name was to be entered on the Sexual Offenders Register.

6. On 3 April 2025, the Director of Public Prosecutions gave notice of the Application "*on the ground that the sentence imposed by the Judge was manifestly inadequate*". That notice was served on Christopher's and the Respondent informed this Court that he had learnt about the Application sometime in April 2025.

7. On 4 April 2025, Christopher's, on behalf of the Respondent, filed notice of application for leave to appeal against sentence under section 17(1)(c) of the Court of Appeal Act 1964. However, by a letter dated 18 June 2025 personally sent by the Respondent to the Court, he indicated that he wished to withdraw his application for leave to appeal and on 7 July 2025 signed the formal notice to that effect.

8. The Respondent informed us that, between 14 June 2025 and 5 November 2025, there had been no communications between Ms Christopher and himself. Ms Christopher appeared to accept this as correct.

9. By letter dated 13 September, the Respondent informed the Registry that he no longer had legal representation and requested that all correspondence relating to the appeal be directed to him personally. It appears that the Registry confirmed receipt of that letter.

10. On 17 September 2025, when Ms Christopher and Mr Adley Duncan, Counsel in the DPP's office, were present in the Court of Appeal in relation to directions being given in relation to certain other matters, the Acting Registrar of the Court of Appeal informed Mr Duncan and Ms Christopher that, since both were present in court, she proposed to make directions in relation to the hearing of the present appeal (although it does not appear to have been appreciated that no appeal could proceed prior to leave having been granted by the Court of Appeal). Nonetheless, on that date the Acting Registrar, with

the agreement of counsel, made an order ("the 17 September Order") in the following terms:

> *"**UPON HEARING** Counsel for the Appellant, Mr Adley Duncan, and Counsel for the Respondent, Ms Elizabeth Christopher*
>
> ***IT IS ORDERED** as follows:*
>
> *1. The Appellant's written submissions shall be filed and served on or before 3 October 2025.*
>
> *2. The Respondent's written submissions shall be filed and served on or before 17 October 2025.*
>
> *3. The Appeal shall proceed in the November 2025 Session with a time estimate of half a day.*
>
> ***DATED** this 17th day of September 2025."*

11. Although Ms Christopher informed us that she did not have any instructions from the Respondent to appear at the hearing on 17 September, it is clear from the recital to the order, as quoted above, that she certainly gave the impression to the Acting Registrar and to Mr Duncan that she was indeed instructed to appear on behalf of the Respondent for the purposes of the hearing. Unfortunately, Ms Christopher failed to inform the Respondent that such an order had been made and, in particular, that the Respondent's written submissions had to be filed and served on or before 17 October 2025 and that the so-called "appeal" was to proceed in the November 2025 session. Ms Christopher accepted before us that "*it would have been appropriate to have so informed*" the Respondent. Not only was it clearly "*appropriate*" for her to have done so, it was her professional obligation to have done so in circumstances where, irrespective of whether she had been formally instructed by the Respondent at that time, she had in fact appeared on his behalf at the hearing on 17 September 2025 and agreed to an order for directions which affected him and, indeed, imposed obligations on him.

12. On 6 October 2025 the Registry served the 17 September Order on the Crown and on Ms Christopher. Having received the Order, Ms Christopher did not demur from the recital in the 17 September Order or contact the Registry to suggest that she had not in fact formally been representing the Respondent at that hearing. The 17 September Order was not served on the Respondent personally, no doubt because the Registry assumed that Ms Christopher was representing him.

13. On 8 October 2025 Ms Clarke emailed the Court, copying Ms Christopher, saying that she hoped to finalise her submissions on behalf of the Applicant by close of business on 9 October 2025. She also confirmed that she had not been provided with the record of appeal and nor had one been uploaded to the Bermuda Cloud shared website. She also stated that if a record had not been prepared for the appeal, she would upload the necessary documents to the cloud by close of business on 10 October. That did not happen.

14. On 13 October 2025 the Acting Registrar for the Courts of Bermuda emailed Ms Clarke and Ms Christopher stating that a record of appeal had not yet been prepared but that

> *"if the matter can proceed without transcripts, we can ensure the Record will be prepared in short order and we can still look to accommodate the hearing in the upcoming November Session."*

15. On the same date (13 October 2025) Ms Clarke emailed the Acting Registrar and Ms Christopher stating that the Application could proceed without transcripts. Ms Christopher made no demur to this.

16. On 21 October 2025 the Acting Registrar emailed Ms Clarke and Ms Christopher with details of the SharePoint file to which documents could be uploaded and stating that "*it was anticipated that we will have the Record completed today*." In the event, unfortunately, that did not happen.

17. On 22 October, following a request from Ms Clarke, the Acting Registrar emailed Ms Clarke and Ms Christopher informing them that the Application would be heard on 12 November as opposed to 13 November. Ms Christopher made no demur to this.

18. It was only on 27 October, that, finally, the Registry uploaded the record of appeal onto the Cloud, although, according to a post it note on the Court File, a hard copy may have been sent to Ms Clarke and Ms Christopher on 21 October - but not to the Respondent. In accordance with its obligations under the Rules of the Court of Appeal for Bermuda ("the Rules"), the Registry should have completed the record of appeal much sooner. Order 3 rule 8 of the Rules imposes an obligation on the Registrar to prepare a record of appeal in a criminal case when he or she has received a notice of appeal or a notice

of application to the Court for leave to appeal. Thus Order 3 rule 8 so far as material provides:

> *"(1) When—*
>
> *(a) the Registrar of the Supreme Court has received a notice of appeal or a notice of application to the Court for leave to appeal or for extension of the time within which such notice shall be given; or*
>
> *(b) ……..*
>
> *the Registrar of the Supreme Court shall prepare the record of appeal in the manner hereinafter prescribed and forward to the Registrar five copies thereof, He shall also forward the original exhibits in the case as far as practicable and any original depositions, information, inquisition, plea, or other documents usually kept by him, or forming part of the record of the Supreme Court, together with the originals of any recognizances entered into or any other documents filed in connection with the appeal or application."*

It is to be emphasised that the Registrar's obligation to prepare a record of appeal arises not only where notice of appeal has been received, but also in circumstances where a notice of application for leave to appeal has been received; see also the definition of "*appeal*" as including an application for leave to appeal in order 1 rule 2. That obligation arises irrespective of whether leave to appeal is ever given.

19. In the present case, as already stated, the Registry received the Crown's notice of application for leave to appeal on 3 April 2025 and notice of the Respondent's intention to withdraw his cross-application for leave to appeal by letter dated 18 June 2025, and a formal notice to that effect on 17 July 2025 (to neither of which did he receive any reply). It is regrettable that, in those circumstances, and even after the 17 September Order was made, the Registry did not finalise the record of appeal until 21 October or 27 October.

20. On 27 October, the Crown filed and served its undated submissions in support of the Application. That date was 23 days later than the date fixed by the terms of the 17 September Order. That delay should not have occurred, particularly in circumstances where Ms Clarke had indicated on 8 October that she would have been in a position to serve and file the Crown's submissions by 9 October, irrespective of whether the record of appeal had been completed. It meant that the 14 days provided under the terms of

the 17 September Order for service of the Respondent's submissions technically ran until 11 or 12 November.

21. It is incumbent upon all parties strictly to comply with orders of this Court in relation to filing and service of submissions in relation to appeals. The importance of such compliance is not simply to afford a respondent sufficient time within which to prepare, file and serve his or her submissions, but also, importantly, to ensure that the Court's tight schedule for hearing cases in one of its three week sessions is not disrupted by applications for adjournments which are caused by unnecessary failure to lodge requisite documents in time and that the members of the Court have sufficient time to prepare.

22. Ms Christopher told us that she, or her office, received the Crown's submissions on 27 October 2025 but that she was outside the jurisdiction on holiday from 27 October to 7 November and did not have "*much access to Wi-Fi*".

23. Ms Christopher appears to have communicated with the Westgate Correction Facility by phone on or about 27 October to inform the prison staff that she would communicate by telephone with the Respondent on 28 (or possibly 30) October. In the event she did not ring the Facility on either 28 or 30 October 2025.

24. The Respondent told us at the hearing that he received the record of appeal on 28 October 2025 and attempted, without success, to call Ms Christopher on her cell phone on the same date. He informed us that it was upon receipt of the record of appeal that he learned, for the first time, that a hearing had taken place on 17 September, that Ms Christopher had apparently addressed the Court on his behalf on that occasion and that an order had been made requiring him, as Respondent, to file written submissions by 17 October 2025. He did not receive the Crown's submissions in relation to the Application at that time.

25. On 3 and 4 November 2025 the Acting Registrar enquired of Ms Christopher by emails as to when her submissions were going to be supplied in relation to another appeal before this Court. In response Ms Christopher wrote by email as follows in relation to the present case:

> *"This is one of four appeals, submissions in the third [sic]which is first up are almost complete- (Ronald Forde). Having reviewed the authorities and the ruling as well as rough transcripts I prepared, I do not think that formal transcripts will be necessary although in terms of additional documents we may supplement it with an additional document in the Supreme Court record which we filed in January before sentence and we may make a reference to the Supreme Court Record. ……..*
>
> *…..*
>
> *Ronald Forde should be completed by tomorrow morning.*
>
> *……*
>
> *I am abroad until Friday evening with better internet access than I had last week."*

26. On Thursday, 6 November, Ms Christopher sent a series of emails to the Respondent attaching the Record of Appeal (which he had already received separately from the Court on 28 October), the Applicant's submissions in support of the Application and draft submissions on his behalf which Ms Christopher had prepared. This was the first occasion on which the Respondent had seen these last two documents.

27. On Friday, 7 November, in response to a further enquiry from the Acting Registrar, in relation to the lodging of the Respondent's submissions in this case, Ms Christopher wrote to the Registrar in the following terms:

> *"We have drafted submissions in respect of the above but are still taking our client's instructions. As can be noted by the withdrawal of his own appeal, he has valuable, considered feedback on the way forward, my current instructions are to await his feedback. As we are the Respondent in the appeal, we do not expect that this would have much impact on the court. There was only one additional authority on a narrow point that I had been minded to add to the authorities already filed by the Crown.*
>
> *Because of the timing of the receipt of the record and Crown's submissions it has arrived at a time when communication is extremely difficult. We cannot just email voluminous material to our clients and the Prison truck refuses this past month to take documents to Westgate, something which will need to be addressed hopefully at a quadripartite meeting or communication between the courts, defence counsel, Legal Aid and the prisons."*

28. From what Ms Christopher and the Respondent told the Court at the hearing, it appears that, on 7 November, they communicated by email about the draft of the Respondent's proposed submissions and that, subsequently, either before or after the Respondent had, by email, sent Ms Christopher his own draft skeleton argument, which suggested certain

amendments to the submissions which she had drafted, the two spoke on the telephone. On Saturday, 8 November, and Sunday, 9 November, there were further telephone calls between the two of them, but agreement as to the content of the submissions could not be reached. As a result, on the evening of Sunday, 9 November, the Respondent terminated Ms Christopher's retainer.

29. On 10 November 2025 the Acting Registrar received a letter via email from the Respondent, bearing the incorrect date of 10 October, seeking an adjournment of the Application in the following terms:

> *"Re: Appeal No. 9 of 2025 The, King v. Ronald Forde (Respondent) Request for Adjournment and Clarification of Representation Status*
>
> *Dear Registrar,*
>
> *I write respectfully to bring to the Court's attention certain developments and misunderstandings that have arisen in relation to the above-captioned matter, and to humbly seek the Court's indulgence in granting an adjournment of the appeal currently listed for hearing during the present session.*
>
> *For at least 4 months, (May to October 6, 2025) 7 October 2025,* [In fact these dates as the Respondent told the Court at the hearing should have been stated as 14 June to 5 November*]. I had not received any correspondence or communication from Ms. Elizabeth Christopher, who had acted as my counsel of record in the proceedings before the Supreme Court and who subsequently filed a Notice of Appeal on my behalf. Ms. Christopher had previously advised me that, should I wish to withdraw the said appeal, I would be required to do so personally. Acting on that advice, and in the absence of any fresh Legal Aid certificate or private retainer, I formed the genuine and reasonable belief that she no longer acted for me in these appellate proceedings.*
>
> *Accordingly, by letter dated 13 September 2025, transmitted through the Intake Unit of the Westgate Correctional Facility, I informed the Registry that I no longer had legal representation and respectfully requested that all correspondence pertaining to the appeal be directed to me personally. I acknowledge with gratitude that the Registry confirmed receipt of that letter.*
>
> *I was therefore taken by complete surprise upon subsequently receiving, via the Facility, a document entitled "Record of Appeal", from which I learned, for the first time, that a hearing had taken place wherein Ms. Christopher appeared to have addressed the Court on my behalf, and that an order had been made requiring that I, as Respondent, file written submissions by 17 October 2025.*
>
> *Upon learning this, I immediately attempted to make contact with Ms. Christopher. Although she subsequently communicated to the Facility that she would call me on 30 October 2025, that call did not materialize. The only communication I received from her was on 7 October 2025[Again this should*

have been stated as 7 November 2025], during which she sought my permission to submit a document styled "Submissions of the Respondent." I granted permission in principle; however, as at November 9, 2025, subsequent attempts to reach consensus on the contents of that document have proven unsuccessful. Consequently, I believe, once again, that I am without counsel at this point.

In light of these unforeseen and regrettable circumstances, and out of utmost respect for the Court's process, I humbly request that the hearing of Appeal No. 9 of 2025 be rescheduled to the March 2026 session, to afford me sufficient time either to instruct new counsel or, should that not be feasible, to adequately prepare to represent myself.

1 respectfully pray that the Honourable Court will grant this request, or, in the alternative, kindly advise me of the procedural implications at this stage and provide such direction as the Court deems appropriate, given that the matter presently appears on calendar for this session.

I remain grateful for the Court's time, patience, and understanding.

Respectfully submitted,".

30. The Court has recited the extensive details of this procedural chronology because of its concerns that

(a) Ms Christopher failed to comply with her obligations as counsel acting on behalf of the Respondent to ensure that his case was properly presented to the Court in relation to the Application;

(b) Ms Clarke, on behalf of the Crown, failed to comply with the time limits imposed by the 17 September Order for service of the Crown's submissions in support of the Application (without any application for an extension); and

(c) the Registry, in breach of its obligations under the Rules ,failed to complete the record of appeal in good time.

31. In our judgment, Ms Christopher's failures lay in:

(a) her failure to communicate with her client, the Respondent, in the period from 10 June 2025 until 6 November 2025 in circumstances where, whatever the position in relation to the grant of legal aid, and her formal retainer, she must have been well aware of the Crown's Application and the serious consequences for the Respondent if leave to appeal were granted and, as a result, his sentence was increased;

(b) as already stated, her failure to communicate to her client, the Respondent, the details of the order dated 17 September 2025, the fact that she had purported to appear on his behalf on that date and the prescribed dates for service of the Respondent's written submissions and the date of the appeal, in circumstances where she well knew that this appeal was listed for hearing in the November 2025 Session; this also had the consequence that the Registry justifiably thought that she was appearing on his behalf and therefore did not serve documents on the Respondent personally;

(c) her failure to ensure that, if she was proposing to be away on holiday in the week before the date of the appeal, that she and her client, the Respondent, had suitable channels of communication, notwithstanding that she was on holiday, to ensure that his submissions were presented in time to the court; it was wholly unprofessional of her to assert, or rely on the alleged fact, that there was no possibility of Wi-Fi, email communication or telephone communication from her cruise ship; if that indeed were the case, which the Court doubts, it was clearly irresponsible of her to go on holiday at all in circumstances where she had commitments not only to this appeal, but also to a number of other appeals before the Court;

(d) subjecting the Respondent to the pressure of having to agree to, and draft, submissions over the short timeframe of the weekend of 7 to 9 November.

32. In this context it is important to remember that, since April 2025, the Respondent would have been aware that he was facing an application by the Crown to increase the sentence against him. Necessarily the absence of communication about the Application must have imposed an additional level of stress upon him.

33. Ms Christopher's conduct in relation to her representation of the Respondent falls to be criticised, notwithstanding that, in the event, it had no impact on the decision of the Court, since it dismissed the Crown's Application for leave to appeal and did so in the absence of any submissions from the Respondent in relation to the merits of the Application.

34. However, the Court also emphasises that the conduct of Ms Clarke in failing to comply with the time limits imposed by the 17 September Order for service of the Crown's submissions in support of the Application (without any application for an extension) and the Registry's failure, in accordance with its obligations under the Rules, to complete the record of appeal in good time, also fall to be criticised. These failures exacerbated the position and necessarily put Ms Christopher and the Respondent under increased pressure to complete the latter's submissions within a reduced timeframe.

35. The Court hopes that, in future, counsel acting for the relevant parties to an application for leave to appeal, or an appeal, and the Registry will take note of the Court's criticisms in relation to the procedural chronology of this case.

36. I turn now to consider the substance of the Application.

Summary of the evidence

37. The following summary of the evidence is adapted from the Summary of Evidence provided at trial and the Judge's sentencing remarks.

38. The victim is a fourteen-year-old girl, to whom, like the Judge, I shall refer as AB. She attended a high school in Bermuda. The Respondent started working at AB's high school in October 2023 as her English teacher and, in February 2024, began to tutor her at school during after-school hours.

39. On 28 February 2024, not long after the Respondent started tutoring AB, her brother allowed AB to use his cell phone. On 4 March 2024 the brother started to receive message notifications on his cell phone in relation to AB's Instagram account. He reviewed the messages and found them to contain sexually related texts, a nude photo of AB, and voice messages which sounded like the voice of an adult male. The messages also made reference to AB's school and the brother then suspected that the male voice belonged to that of a teacher at her school. AB's brother brought all of this to the attention of their parents.

40. On 5 March 2024, AB's parents questioned her about the messages and she confirmed that the male mentioned in the messages was the Respondent. AB's parents then reported the matter to her Principal's office at her school. AB was brought to the

Principal's office by her parents and siblings and the Bermuda Police Service (the "BPS") was called shortly thereafter to start an investigation. On the same date AB was interviewed by the police. In her interview she said that the Respondent "*is her significant other*" and that she had forwarded a semi-nude video of herself to him via Instagram.

41. The BPS reviewed the messages between the Respondent and AB; a sample of them contained messages as follows:

- From AB stating *"I love you goodnight*" and the Respondent responding *"I LOVE YOU TOO".*
- Between AB and the Respondent stating "*LAYING DOWN THINKING ABOUT US ON YOUR BED. DOGGYSTYLE.*" ...

  "*WE SHOULDN'T BE THINKING ABOUT F?$KING NOW" ... "YOU MAKING ME WANT YOU" ... '"AND 1 WOULD LOVE TO*

  DO YOU ON THIS BED. I ANT YOU NOW. AND SHE IS GONE."
- A message from AB stating "*want to see?"* to which the Respondent responded "*OF COURSE*". AB then sent a video depicting her on a bed in a kneeling position exposing her vagina.

42. In her interviews with the police on the 5 and 7 March 2024 AB stated that:

- The inappropriate conversations between her and the Defendant began sometime in February 2024.
- She and the Defendant would communicate via cell phones.
- She would call the Defendant "*Bae*" or "*Baby*".
- The Respondent told her that he would like her to be on his bed next to him and that they talked about them having sexual contact.
- Via Instagram she sent the Respondent the video of herself to which the Respondent replied "*you've got me hot this night*". When AB responded with the word *"hot?",* the Respondent said "*Yes. Can't wait to be inside so it can drip on me*". AB replied with a heart emoji.

- AB told the police that by these words the Respondent meant that he was going to insert his "*dick*" inside her.
- It was also during this conversation that: AB told the Respondent that she was laying down thinking about them on her bed "*doggy style* "; the Respondent said "*I will love to do you on this bed. I want you now, and she is gone*"; she said to the Respondent "*I want you now*", he replied to come over, and she responding to the Respondent *"I would love to*".
- This conversation took place before AB went to the Respondent's house.
- On 2 March 2024, after she had sent the video to the Respondent, she went to his house which led to the two of them kissing in his bedroom. At the time the Respondent's son was at home.

43. On 6 March 2024 the Defendant was arrested and his personal phone, personal laptop and work laptop were seized. He declined to be interviewed by the police that day and on the next day.

44. At the time of the offences the Defendant was thirty-eight years old. He is a Guyanese national with no previous convictions of like nature in this jurisdiction.

The Applicant's submissions

45. In her written submissions to this Court, Ms Clarke submitted in summary as follows:

(a) The issue before the court was whether the sentence imposed for the luring offence was manifestly inadequate.

(b) This Court has held that the term "*manifestly inadequate*" can be defined as when a sentence is:

> *"obviously inadequate – obvious to the appellate tribunal that the sentence is much too low and fails to reflect the feelings of a civilized society to the crime in question."*
>
> See *Plant v Robinson*, Criminal Appeal No.1 of 1983, judgment dated 30 June 1983.

(c) This appeal focuses on the offence of luring of a young person by a person in a position of trust, which is contrary to section 182EA of the Criminal Code. The maximum sentence for the offence is 15 years imprisonment.

(d) The present case was the first conviction in Bermuda for the offence. Currently, there is no local authority which sets sentencing guidelines for the offence of luring.

(e) The factual scenario of this case was exactly what Parliament sought to interdict. **There could be no worst case scenario for this offence**, save for the fact that there was a single victim. [Our emphasis].

(f) At first instance, the Crown proposed that the appropriate range of sentence for luring in the present case was between 10- and 12-years' imprisonment.

(g) The Crown accepted that the Judge correctly found at paragraph 13 of his sentencing remarks that:

> *"Parliament by setting the maximum sentence at 15 years imprisonment, intended for the luring offence to be treated in a similarly harsh manner as the sexual exploitation offence…. This is because in many factual matrices the exploitation would not have occurred but for some element of luring taking place first. In other words, it is often the luring which is the precursor conduct to the sexual exploitation or which facilitates the sexual exploitation (whether the sexual exploitation offence is completed or not.)"*

(h) This was a factual scenario where the content of the luring was in relation to full carnal knowledge of a 14-year-old girl student by her 38-year-old teacher and personal tutor.

(i) The severity of a breach of trust in a teacher student relationship was not to be taken lightly. Teachers were entrusted to educate and serve as role models for children, not sexualize them for their own purposes. The Respondent used his image and reputation with the school and church to strengthen his position of trust, which was a further aggravating feature. See *R. v. Bertrand Marchand*, 2023 SCC 26, a decision of the Supreme Court of Canada.

(j) The Judge was distracted into seeking to define "luring" over and above the elements of the offence prescribed, by Counsel for the Respondent. The exercise undertaken contributed to the error which resulted in the sentence being much too low and failing to reflect the feelings of a civilized society to the crime in question.

(k) The Judge fell into the error that the sentence for the luring offence had to be less than the exploitation offence; or that the level of exploitation that occurred was directly proportionate to the gravity of the luring.

(l) The fact that the exploitation did not amount to the acts described in the luring communication should not be considered a mitigating factor. However, it was conceded that this concern was not articulated in the list of mitigating factors recorded in the reasons.

(m) Additionally, there was no indication in the Judge's reasons as to how he calculated the starting point for the offence. The closest indication was that, in paragraph 33 of his sentencing remarks, he stated that the Defendant was entitled to a "*full 30% discount*", which would mean his starting point (taking into account the aggravating circumstances expressed) must have been between 4- and 5-years' imprisonment.

(n) Based on the facts of this case, that starting point was far too low to be allowed to stand without correction from this Court. See *R v Friesen* [2020] 1 S.C.R. 424, a decision of the Supreme Court of Canada.

(o) This was particularly so, because the offences which the Respondent was discussing with the victim carried a maximum period of imprisonment of 20 years for unlawful carnal knowledge and 25 years' imprisonment for sexual exploitation. The fact that his crimes were discovered before he had a chance to conclude his plans to any further degree should not mitigate his luring conduct. See *R v Legare* [2009] 3 R.C.S. 551, a decision of the Supreme Court of Canada.

(p) Some guidance could be gleaned from Canadian case law, in relation to their offence of luring a child, contrary to section 172.1 of their Criminal Code. The offence under Canadian law, however, carried a maximum term of

imprisonment of only 14 years; and a mandatory minimum sentence. Additionally, Canadian law did not have a separate offence if the circumstances were committed within a position of trust. See Criminal Code R.S.C., 1985, c. C-46.

(q) The recent Canadian case of *R v Fenton* provided a useful compendium judgment in relation to sentencing in respect of the offence of luring. See *R v Fenton*, 2025 ABCJ 122, a decision of the Alberta Court of Justice.

(r) Accordingly, the Applicant submitted that the Court should quash the sentence passed by the Judge and pass such other sentence as may be warranted in law in substitution therefor, for the reasons that the sentence was manifestly inadequate and, if it were allowed to stand, there would be a miscarriage of justice.

46. However, in her oral submissions to the Court, Ms Clarke, on behalf of the Applicant, accepted that it was necessary to look at the entire course of conduct and the totality of the sentence imposed for all three offences. She further accepted, contrary to the import of her written submissions, that, if the Judge had imposed a sentence of 7 years for the luring offence, concurrent with the exploitation offence, the Applicant would not have applied for leave to appeal against sentence. We consider that was a realistic stance for her to take. She emphasised that what the Crown was looking for in respect of the Application was a judgment of this Court: (i) which decided that the sentence for the luring offence in this case should have been greater; and (ii) which laid down guidelines as to the appropriate sentence for luring offences.

Discussion and determination

47. The Court dismissed the Application for leave to appeal for the following reasons.

48. First, where there is a single course of conduct resulting in charges for a number of offences, as here, then what matters is the total sentence for the total offending behaviour. Whether the sentences are expressed as consecutive or concurrent should not affect the aggregate sentence; because sentences that might otherwise be appropriate for stand-alone offences have to be moderated to ensure that the aggregate sentence is appropriate for the aggregate of the offending.

49. Second, in circumstances where, as here, the Crown has no quarrel with the totality of a sentence imposed by a sentencing judge, it is wholly inappropriate for the Crown to attempt to use section 17A of the Court of Appeal Act 1964 as a vehicle to obtain what is, in effect, an advisory opinion from the Court as to what would, or might have been, a different (and greater) sentence for one of the offences in respect of which a defendant was convicted, whether on his own guilty plea or after trial. Likewise, in the Court's view, it is illegitimate to use section 17A as a means of inviting the Court to lay down guidelines in luring cases, or indeed in relation to any other specific offence, where no increase in the totality of sentence is sought. Such an appeal, where there is going to be no increase in the totality of the sentence imposed on a defendant, inevitably has no prospect of success - or, put another way, achieves no legitimate public purpose. Of course, the position might be different in a case where an increased sentence on a specific count might have had different sentencing, or other, consequences for the particular defendant concerned. But that is not the case here.

50. In circumstances where, as the Crown accepts, there is no basis for the Court increasing the totality of the sentence so far as this particular Respondent is concerned, it is, in this Court's judgment, an abuse of process to use the section in an attempt to obtain guidance from the Court in relation to future offences. That is because, during the pendency of the Application for leave and the possible hearing of any further appeal, the Respondent was subject to a further criminal process and may well have been uncertain as to what the Application for leave to appeal, and any further appeal, meant for him in terms of the length of his sentence or any possible increase to it. Indeed, until oral submissions in this case, the Respondent might well have laboured under the fear that the Applicant was seeking an increase in the totality of his sentence.

51. The Court reaches that conclusion notwithstanding that the provisions of section 17A may be construed as wide enough to permit an appeal in relation to a sentence for a particular offence, irrespective of the totality of the sentences imposed for a series of offences. The DPP is given a discretion under section 17A as to whether to apply for leave to appeal. In circumstances where, even if leave were granted, such an appeal would make no difference to the totality of the sentence, or have any other consequences for a defendant, it is difficult to see how the exercise of such discretion to make such an application would ever be appropriate.

52. Third, and in any event, it is almost impossible to lay down guidelines or general rules in such cases, since they are all necessarily dependent on their particular factual circumstances. The decision and judgements in this case, whether at first instance, or on the Application to this Court, cannot, and should not, be used as a guideline in relation to the specific offence of luring.

53. Fourth, necessarily in cases of luring, one needs to look at the continuum of the *actus reus* - or in other words, the conduct of the defendant as a whole. Contrary to the submissions of the Applicant, in this particular case one cannot separate the facts of the luring offence from those of the exploitation offence. The fact that both the Respondent and the victim used highly sexualised language in their cell phone communications, suggesting a greater degree of anticipated sexual relations (i.e. actual sexual intercourse), cannot be regarded in isolation from what actually happened when the victim went round to the Respondent's home, when only consensual kissing took place. Despite the hyperbolic nature of the mobile phone communications (which is not unusual in cases of this sort), the evidence did not establish that the Respondent actually intended to have full sexual intercourse with an underage girl. When the opportunity presented itself, he did not do so.

54. Fifth one of the problems of the present case is that the Judge considered it appropriate to impose consecutive sentences in relation to the respective offences of luring and exploitation, as opposed to concurrent sentences. In future a better approach in a case such as the present might be to impose concurrent sentences in order to reflect the continuum of the criminal conduct.

55. Sixth, and in any event, it does not appear to us that an aggregate sentence of seven years can be regarded as out of line with the sentences to which reference is made in this Court's judgment in *Brangman v the Queen,* Criminal Appeal No. 7 of 2019, judgment dated 18 November 2019. Insofar as other cases on different factual matrices may be of any guidance, we refer to the case of *R v Cleveland Rogers* [2000] CA (BDA) 21 Crim cited at paragraphs 24 – 28 of *Brangman*. In that case the Respondent had pleaded guilty to one offence of unlawful carnal knowledge contrary to section 181 of the Criminal Code and three offences of sexual exploitation of young person contrary to section 182A (1)(a) of the Code. All the offences occurred over the course of one night. This Court increased the sentence of five years' imprisonment for the offence of

unlawful carnal knowledge imposed at first instance to one of 7.5 years. The victim was a few days short of her 14th birthday and the respondent was 46 years. He was in a relationship with the victim's mother at the time of the offence.

56. Seventh, we disagree with Ms Clarke's submission that "*There could be no worst case scenario for this offence, save for the fact that there was a single victim*." In our view, the present case, although obviously serious, cannot be characterised as a case than which there was "*no worst case scenario*". It is easy to imagine far worse cases and, in our view, such exaggerated language should be avoided.

57. Accordingly, we see no basis on which to conclude that either the totality of the sentences imposed, or the sentence in relation to the specific offence of luring, were manifestly inadequate.

58. Finally, we should say that we derived little, if any, assistance from the Canadian cases cited by Miss Clarke. These were cases decided under different legislative provisions and on their own particular facts. The Court does not encourage the citation of such authority unless it is clearly relevant to the issues under consideration in the case before it.

Disposition

59. As already stated above, for the reasons set out in this judgment the Court dismissed the Application and accordingly refused the Applicant leave to appeal against sentence. If, and insofar as, the Respondent has incurred any private costs or personal liability in relation to his retainer of Ms Christopher of and incidental to the Application, which he is liable to pay, the Applicant must indemnify him in respect of such costs.

Signed:

GLOSTER JA

HICKINBOTTOM JA

CLARKE P