IN THE APPEAL COURT OF ST HELENA **SHCA 1, 2 & 3 of 2024**

In the matter of the Appeals of

[1] ROBERT ELLICK Applicant

-and-

THE ATTORNEY GENERAL OF ST HELENA

Respondent

-and-

[2] THE ATTORNEY GENERAL OF ST HELENA Appellant

-and-

[A] BROOKLYN FOWLER

Respondent

[B] LESLIE CLINGHAM Respondent

Mr Kemp appeared for the Attorney General

Mr Jackson appeared for the Applicant and Respondent A and B

Before: Sir John Saunders (President), Lady Drummond and HHJ Mayo DL (Justices) sitting in London on 3 June 2024

JUDGMENT OF THE COURT

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1. There shall be no reporting of anything that could lead to the identification of any person against whom a sexual offence has been committed.

2. We have heard all three of these appeals together as they raise a common issue and, while the decision on that one issue will not determine the result of the appeals, it will play a part. We propose to deal with that issue first as it raises an important matter of principle.

3. The background is this. On 28th November 2023 the Chief Justice issued a document entitled '***Guidance on imposing determinate prison sentences in St Helena and the application of Guidelines'*.**

4. For our purposes, the Guidance laid down that when imposing a sentence in St Helena by reference to the Guidelines issued by the Sentencing Council of England and Wales, the St Helena criminal courts must also have regard to prison conditions and release provisions that apply in St Helena. Within the section of the Guidance that sets out the background and explanation [at paragraph 11] the Chief Justice sets out the release dates for sentences passed in England and Wales and explains that from "28th June 2022 for some serious violent or sexual offences where the determinate sentence is 4 years or more the release date is the two thirds point. For other offences the release point will be at the halfway point".

5. The Guidance concludes 'Generally this will require an additional reduction of 25% from the sentence that would otherwise be passed by reference to the Guidelines'. What is not made clear expressly is whether the same discount will apply to sentences of over 4 years where prisoners in England and Wales serve the same proportion of their sentences as in St Helena.

6. As the two factors are taken together to reach that level of discount, it is not possible to determine from the Guidance what amount of discount is attributable to each factor. That is of significance because different arguments, and therefore potentially different conclusions, apply to each.

7. While we are satisfied that it is open to the Chief Justice to lay down Guidance such as this, if no other reason that it is important that a consistent approach is taken to these kinds of issues; it might be preferable if they formed part of a judgment on a case or cases so that there would be opportunities for advocates representing both the prosecution and defence to make representations. That is only a suggestion for the future which we think might be helpful to make sure that all the arguments are ventilated.

8. So far as the issue of a reduction for prison conditions is concerned, we are satisfied that the Chief Justice was entitled to set down a guideline mandating a reduction in prison sentences to reflect the conditions in HMP Jamestown which is the only prison on island. The prison is old and is currently overcrowded and that is affecting the conditions in which prisoners are being held. The conditions were the subject of

adverse reports from the Saint Helena Human Rights Commission and Overseas Territories Prison advisor in 2018. We have received a helpful report dated 12 February 2024 from Jay Kendall the Superintendent of Prisons which says that steps are being taken to alleviate the problems, most importantly by building a new prison. We do not criticise, nor do we intend any criticisms of those who run the prisons who we have no doubt are doing their best to improve the conditions of prisoners and contend with the problems that they have.

9. This court has already considered the issue of a reduction in sentence to reflect prison conditions in the appeals of **Caswell, Thomas and Williams SHCA 3/2023**.

At paragraph 13 onwards this Court said as follows:

> '*There is a ground of appeal which is common to all the Appellants and is the only one in the case of Mike Caswell. In the Judge's sentencing remarks he said this: "In relation to the length of the sentences that will be imposed the following matter is relevant. The prison cell certification of the prison was amended by the Governor on 6th October 2022. The capacity for male prisoners has been increased from 18 to 24 as a short term measure. The building of a new prison is a project that has been mooted for many years which has yet to come to fruition. There is funding available through the Economic Development Investment Programme and the tender process for design and build is due to start soon. The earliest date for completion is 2026 but given the past history of the prison project I cannot be satisfied that this is a timescale that will be achieved. Three of the defendants are facing very lengthy jail sentences and may well spend many years in the prison in the conditions which are currently in place. The male prison population is at present 20 and expected to be 21. Any figure above 18 is considered overcrowded. This means that there will in some circumstances be 4 men to a cell with no natural light and poor ventilation. Applying the principles in R v Manning and R v Fairclough I will of course have regard to the likely effect of the sentence upon all the defendants. However in relation to those who will receive very long sentences the impact of the conditions becomes more pertinent as they are unlikely to change in the near future and will have to be endured for quite some time'*.

At paragraphs 15 to 18 of the judgment it states:

> '*We consider that the Judge was perfectly entitled to take the prison conditions into consideration when deciding on the length of sentence. We have been assisted by and are grateful for an update on the conditions of detention at HMP Jamestown which is the prison for St Helena… We have also had the benefit of reading reports from the Human Rights Commission and the Prison Advisor as to the condition of the prison. It is clear to us, as has been accepted, that the condition of the prison is not good and is not up to the standard required in a prison at this time. Although we have had the benefit of reading this information, we do not have the same local*

knowledge of the Judge who clearly considered that the conditions should lead to a reduction in sentence. We defer to his local knowledge.'

10. The Attorney General does not seek to argue with the principle of making a deduction to reflect prison conditions but does suggest that in some ways, because of improvements, the prison regime compares very favourably with England and Wales. We could not reach that conclusion without hearing evidence, which we do not intend to do. We are not convinced that it would be of much if any relevance in any event. The obligation on the St Helena authorities is to provide humane conditions for its prisoners. If the local Judge takes the view that the authorities are not fully meeting that requirement, then it is open to him to reduce the length of sentence he would otherwise pass to reflect the fact that poor prison conditions will make the sentence more onerous. As we have already indicated, the Chief Justice in his guidance does not specify what the reduction would be to make allowance for the conditions, but we do think that, as a starting point, a percentage figure for the reduction is the correct approach. We are not suggesting that this should be fixed but will depend on all the other factors in the case.

11. Different considerations apply to the issue as to whether a discount should be applied when the Sentencing Guidelines of England and Wales are used in determining the appropriate starting point for sentence. No doubt unknown to the Chief Justice when he issued his guidance, this Court has given its opinion on this topic. In the appeal of **Tony Malcolm Thomas SHCA 10/2016** this Court in its judgment said this at paragraphs 4 – 7:

'*The sentencing Judge applied the Sentencing Guidelines for England and Wales in arriving at his sentences. The single Judge, when granting leave, invited submissions as to whether that was appropriate and whether, in applying them, the sentencing Judge should have discounted the guidelines to reflect the fact that prisoners sentenced to a determinate sentence in England and Wales are released at the half way point, whereas in St. Helena, prisoners serve two thirds of the sentence before being released. Having considered the submissions of counsel we are satisfied that it was appropriate for the Judge to apply those guidelines... There may be certain offences where local conditions in St. Helena would justify departure from the Guidelines devised for England and Wales. A Judge who regularly sits in St. Helena, such as the Chief Justice, is best able to identify the offences where that applies. It would then be for the Judge to explain in his sentencing remarks what it is about local conditions which has led him or her to depart from the guidelines. No-one is suggesting that the Guidelines should be followed slavishly whatever the circumstances of the case... Should the Judge have reduced the sentences to reflect the different early release provisions in England and Wales and St. Helena? The answer according to English law is clear. No court is permitted to take account of differing early release provisions. For example, under the new extended sentence provisions introduced in LASPO 2012, a prisoner is not eligible for release on licence until he has served two thirds of the period of imprisonment. If sentenced to an ordinary determinate sentence the*

prisoner would be automatically released at the half way stage. The Court of Appeal in the ***Attorney General's Reference (no. 27 of 2013) (Burinskas) [2014] EWCA Crim 334*** *said that that was not a matter which the Judge could take into account in fixing the appropriate term. The Court affirmed the decision of the Court of Appeal in* ***Round and Dunn [2009] EWCA Crim 2667*** *where Hughes LJ said at para 44 'the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is ..... a matter of principle of some importance'. We see no reason that the same principle should not apply to St. Helena. The legislature has determined that prisoners in St. Helena should serve two thirds of their sentence before being released and it is not for the courts to go behind that.'*

12. Until 2018, the Falkland Islands did discount sentences to reflect the fact that all prisoners there served two-thirds of their sentence whereas in England and Wales many served only half of their sentence in custody and the remainder on licence. In the case of **George Butler** SC/Crim/04/17 the Falkland Islands Chief Justice reviewed that principle and decided that the Falkland Islands should follow the case of **Thomas** and not discount.

13. One of the problems with discounting on this basis, which has become increasingly important, is that the rules in England and Wales as to the period to be spent in custody before a prisoner can be released on licence are constantly changing, often in response to political considerations.

14. We see no reason to change the view that we expressed in the case of **Thomas** and accordingly we rule that the part of the Chief Justice's guidance which deals with comparison of the early release provisions should not be followed because it was contrary to our decision in **Thomas** and not in accordance with the law as it is contrary to precedent.

15. That does not mean that the Courts in St Helena have slavishly to follow the England and Wales Sentencing Guidelines. Since 2005, there have been significant increases in the length of prison sentences in England and Wales ostensibly to deter potential criminals from committing particular types of crime. That may not apply to local conditions in St Helena and therefore the Courts may feel it is inappropriate always to apply the Guidelines but, whatever the reason, it needs to be remembered that (as has often been said in the Court of Appeal of England and Wales), the guidelines are simply that and not tramlines. Provided that reasons are given, this Court will not interfere with the sentences of Judges simply because they have deviated from the Guideline.

16. As a result of this decision, we recommend that that the Chief Justice should amend his Guidance in accordance with the terms of this judgment and make an assessment of the appropriate starting point for discounts to reflect prison conditions.

17. We turn now to the three individual cases that we have to consider.

Brooklyn Fowler

18. On 1 December 2023, Acting Supreme Court Judge Cooke ("the Judge") sentenced Brooklyn Fowler to 18 months imprisonment for an offence of sexual activity with a child contrary to s. 9(1) of the Sexual Offences Act 2003.

19. The Attorney General appeals on the ground that the sentence imposed was so lenient as to be one which no reasonable court, properly directing itself in law could have passed, by virtue of s. 265(6) of the St Helena Criminal Ordinance 1975. The power to increase sentences on appeal is different in St Helena from England and Wales. In England and Wales the Attorney General may apply for leave to appeal the sentence on the basis that the sentencing of a person is unduly lenient. The St Helena test is based on the Wednesbury unreasonableness test, in other words, was this a sentence which no reasonable Judge applying the law could impose. We are satisfied that in so far as the Judge followed the Guidance of the Chief Justice, that sentence did not correctly apply the law.

20. Fowler was tried on an indictment containing 9 counts. He had pleaded guilty before trial to count 6 which was an allegation of sexual activity with a child which was an alternative to Count 5 which was a charge of rape. Fowler was acquitted by the jury of all the other counts. So Fowler came to be sentenced for the sole count to which he had pleaded guilty and for which he got full credit of a third.

21. The offender was 22 at the time he committed this offence and the victim was 13; so 9 years younger. The offender's involvement with the victim began because he was having a relationship with her mother and he also became friends with her father. As a result, he spent a great deal of time at their home and this included spending time in the child's bedroom with the full knowledge of her parents who clearly trusted him. He and the child did a lot of things together including going dirt biking. The Judge sentenced the offender on the basis of what he had said in his interview, which was, in our view, the fair course to take in light of the jury's verdicts: what occurred was a short-lived penetration of the girl's vagina with his penis and that he withdrew when he realised that what he was doing was wrong.

22. The Judge attached no weight to the fact that the offender claimed that the intercourse happened because the victim came on to him. He was right to do so. The Judge said this of the relationship between the two of them:

> "*You would regularly be in your victim's room and would lie on her bed where you and she would watch videos on a telephone or do other activities that a 13 year old might engage in. You were seen as a brother*

figure to your victim and indeed you were saved as a contact in her phone under brother. This girl trusted you and you were a source of emotional support to her. Her parents trusted you to be around her and you spent time together in her bedroom with the door shut."

23. The Judge said that the victim had suffered many of the common effects of this sort of offending. The Judge applied the guidelines and assessed this as coming within category 1 for harm because of the penetration and between A and B for culpability. He had regard to the disparity in age but decided it was not sufficient to move culpability into category A completely. Having taken into account the offender's good character, he determined on a notional sentence of 3 years. He applied a 25% reduction to that to give effect to the guidance of the Chief Justice and then reduced the resultant sentence by a third to reflect the guilty plea. He arrived at a sentence of 18 months. As we have already ruled, whilst the Judge was correct to reduce the sentence by an amount to allow for the prison conditions, it was not in our judgment appropriate to reduce it further to reflect the differences between the early release provisions in St Helena and in England and Wales.

24. Because the Chief Justice's Guidance conflicts with our decision in **Thomas**, we find that the Judge did not correctly direct himself as to the law.

25. The Attorney General argues that the Judge should have put the offence in category 1A because of the difference in age between the offender and victim and, connected with that, the Attorney argues that the offence amounted to an abuse of trust in that the parents trusted him to be alone with their daughter in her bedroom and take her on trips.

26. The Attorney further complains that the Judge failed to attach sufficient weight to the psychological damage done to the victim by this offending which he says should have been treated as an additional aggravating feature. The Judge did accept that psychological damage had been caused but said that it did not go beyond the level of damage (serious though that might be) which frequently followed from this kind of offending which was already reflected in the sentence levels suggested in the Guidelines. The Judge in making that decision excluded the evidence of Samantha Williams (a Mental Health and Psychiatric Nurse whose report was only supplied to the Court on the day of sentence) because he was not satisfied that it would be fair to rely on it. We do not question that decision and in any event, we do not think there was any material difference between what she said in that report and was contained in the pre-sentence report.

27. In considering whether there was an abuse of trust which would move the offending into A rather than B, it is clear from the Sentencing Guidelines that 'abuse of trust'

has a very special meaning therein and is dealt with in one of the drop-down menus for Culpability in the guidelines. It reads:

> *'A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found. In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely. Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant.'*

28. In our view, the Judge was entitled to conclude, having heard the evidence, that the position of the offender as akin to a 'much older brother' did not make the offence an abuse of trust. The consideration of abuse of trust should not be seen in wholly black and white terms although it is clear from the guidelines that moving the sentence into another bracket should be reserved for offences which are clearly an abuse of trust. There was, in this case, a degree of breach of trust which did not amount to an abuse of trust within the meaning in the guidelines. While accepting that the Judge had the opportunity to assess the witnesses and their relative maturity because there was a trial, we do think that the sentence was lenient. The age difference chronologically is large and there was a breach of trust of sorts, even if it was not sufficient to bring the offence into category A on its own.

29. Stepping back, we do think that the appropriate starting point for sentence rests at the lowest end of the sentencing range for 1A namely 4 years or 48 months. We reduce that by 8 months to reflect the good character and age of the offender to 40 months. We have then applied a generous deduction of 15% for the prison conditions which reduces the term to 34 months, which we further discount by a third to yield a sentence of 22 months.

30. The effect is that we increase the original sentence of 18 months to 22 months imprisonment. This is a relatively small increase. It could have been more, but we have taken into account the effect on the offender of an increase in his sentence after he has started serving it.

31. We are not suggesting that the deduction of 15% is one which should be applied by the Chief Justice in any amended guidance he chooses to issue. He has much greater knowledge than we do of the prison conditions on island.

Leslie Clingham

32. Leslie Clingham was convicted after a trial of 2 offences of rape and 2 offences of indecent assault of the same boy with whom he had a familial connection. The offences were committed in 2001 or 2002. They were serious offences and applying the guidelines, Acting Supreme Court Judge Cooke sentenced the offender (then aged 64) to 58 months imprisonment on 15 December 2023. Applying the guidelines, the Judge took a starting point of 6 ½ years. He took into account the fact in reaching that starting point that the offender had not offended since 2002 and that he was 64 years old.

33. The Attorney General does not take issue with the starting point so it is unnecessary to go into the facts in any more detail. What the Attorney does complain about is that the Judge applied a 25 % discount to the starting point on the basis of the guidance note. The Attorney does take issue with any allowance being made because of the different release dates in England and Wales: for a sentence of over 4 years there would be no difference between the release dates.

34. It is difficult for us to know from the Guidance what the Chief Justice intended should have happened in this situation but, in any event, we have decided that it is not appropriate for the sentencing Court to make a deduction because of early release dates in these circumstances.

35. Accordingly, we do find that the sentence was unlawful in that it followed the Chief Justice's Guidance as opposed to our decision in **Thomas** which has to take precedence.

36. We return to the sentence before reduction selected by the Judge, namely 6 ½ years. To that, we substitute the reduction applied by the Judge of 25% by one of 15% to reflect the prison conditions alone. This yields a sentence of 5 years and 6 months.

37. In England and Wales there is a time limit of 28 days in which the Attorney General can make an application to the Court of Appeal for leave to review a sentence on the basis that it was unduly lenient. In St Helena there is no time restriction and indeed no requirement for the Attorney General to seek the leave of this Court to commence the review process. In our view there should at the very least be a time limit in similar terms.

38. Here, no application to this court to consider an increase in the sentence passed on this offender was made until he had served three months of it. We are persuaded by Mr Jackson that in the circumstances, we should allow a specific reduction in the increased term to represent the additional two months which the offender served in the reasonable belief that he would serve the sentence passed upon him in December 2023. Accordingly, this further allowance of 2 months reduces the increased term to 5 year 4 months.

39. The effect of these changes is to increase his sentence from 4 years 10 months to 5 years 4 months.

Robert Ellick

40. This is an application for leave to appeal against sentence out of time. On 7 October 2022, Acting Supreme Court Judge Cooke sentenced the Applicant to 12 years imprisonment for serious sexual offences on a child. The Applicant was sentenced in accordance with the sentencing guidelines and there is no issue with the sentence passed. We have looked at the sentencing exercise which was conducted by the Judge and we consider that there can be no possible criticism of it. As there is no criticism of the starting point adopted by the Judge we shall not go into the facts at all.

41. What is argued on the Applicant's behalf is that there should be a deduction of 25% in line with the Chief Justice's Guidance or alternatively there should be a reduction of 13% to ensure parity with other prisoners who are serving sentences in the same conditions.

42. In addition to the Guidance, the Applicant also relies on the fact that the same Judge on 24 March 2023 – five months after this Applicant was sentenced – expressly reduced the starting point on three Defendants in separate proceedings because of local prison conditions.

43. In passing sentence in that case, the Judge said this:

> *'In relation to the length of the sentences that will be imposed the following matter is relevant. The prison cell certification of the prison was amended by the Governor on 6th October 2022. The capacity for male prisoners has been increased from 18 to 24 as a short-term measure. The building of a new prison is a project that has been mooted for many years which has yet to come to fruition. There is funding available through the Economic Development Investment Programme and the tender process for design and build is due to start soon. The earliest date for completion is 2026 but given the past history of the prison project, I cannot be satisfied that this is a timescale that will be achieved. Three of the defendants are facing very lengthy jail sentences and may well spend many years in the prison in the conditions which are currently in place. The male prison population is at present 20 and expected to be 21. Any figure above 18 is considered overcrowded. This means that there will in some circumstances be four men to a cell with no natural light and poor ventilation. Applying the principles in* ***Manning and Fairclough****, I will of course have regard to the likely effect of the sentence upon all the Defendants. However, in relation to those who will receive very long sentences the impact of the conditions*

becomes more pertinent as they are unlikely to change in the near future and will have to be endured for quite some time.'

44. The Applicant argues that having reached that conclusion in that case, there is no reason why the Judge should not have treated him in the same way.

45. The application for leave to appeal is out of time. Time to appeal expired on 18 November 2022 so it is 416 days out of time. Counsel for the Applicant candidly explained to this court that advice had been sent to the Applicant after sentence to the effect that there was no arguable appeal against sentence. The sole trigger for this application was the publication of the Chief Justice's Guidance. It is argued that, because the prison conditions have not changed since the Applicant was sentenced, it would be unfair for him to be treated differently from those who have had the benefit of the Chief Justice's Guidance.

46. We have already decided that the recommendation by the Chief Justice for an allowance to reflect the different release dates should not be followed. In any event, counsel for this Applicant concedes that there is parity in his case between the release date on island as in England and Wales.

47. The Guidance issued by the Chief Justice was not intended to have retrospective effect. When sentencing guidelines are promulgated or amended, they do not apply retrospectively. We see no reason to change this rule in this case.

48. Application for leave to appeal is refused.

49. We make this observation. There is a power in St Helena to release a prisoner before two thirds of their sentence has elapsed. Consideration should be given to the exercise of that power in the cases of prisoners who may have suffered from prison conditions.

50. This power derives from Rule 48 of the St Helena Prison Rules 1999 (Early Release on Licence). These powers are vested in the Governor on recommendation of the Visiting Committee. We recommend that consideration is given to the exercise of those powers in relation to prisoners who have suffered poor prison conditions subject of course to the Governor's assessment of all other material factors.