SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 2000

BETWEEN:

WINSTON JOSEPH

Appellant

and

THE QUEEN

and

CRIMINAL APPEAL NO. 8 OF 2000

BETWEEN:

BENEDICT CHARLES

Appellant

and

THE QUEEN

Respondent

and

CRIMINAL APPEAL NO. 7 OF 2000

BETWEEN:

GLENROY SEAN VICTOR

Appellant

and

THE QUEEN

Respondent

Respondent

Before:

The Hon. Sir C.M. Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Joseph Archibald — Justice of Appeal [Ag]

Appearances:

Winston Joseph v The Queen
Mr. M. Foster and Mr. J. Walters for the Appellant
Ms. V. Charles for the Respondent
Benedict Charles v The Queen
Mr. K. Foster, Q.C. and Ms. I. Shillingford for the Appellant
Ms. V. Charles for the Respondent
Glenroy Sean Victor v The Queen
The Appellant in person
Ms. Willie-Trotman for the Respondent

2001: May 22;
September 17.
Re-issued: 31 October 2001

JUDGMENT

[1] **BYRON, C.J.:** During the appeal sitting in St. Lucia we had three cases where the sentences showed substantial inconsistency with each other. In the case of Winston Joseph the appellant had been convicted for unlawful carnal knowledge of a girl of 12 years old and sentenced to 8 years imprisonment. In the case of Benedict Charles the appellant was convicted of incest against his 14 year old daughter and sentenced to 15 years imprisonment. In the case of Glenroy Victor he was convicted of rape against an adult and sentenced to 30 years imprisonment. The appellants Joseph and Charles had contested their cases and the appellant Victor had pleaded guilty. We decided, with the consent of the appellants, to hear the arguments and adjudicate on the three appeals against sentence together. The appeals against convictions are fairly easily disposed of and we will first give our reasons for dismissing them, address the issue of the statutory punishments for the crimes involved and guidelines aimed at developing consistency in the sentencing practices for these offences. In dealing with this objective, however, it should be noted that up to now there is considerable divergence in the punishments available in the statutes from member state to member state.

Appeal Against the Conviction of Winston Joseph:

[2] The jury had returned a verdict of guilty for unlawful carnal knowledge against a female under the age of 13, being aged 12, on 16th February 1994. He was sentenced to 8 years imprisonment by Hariprashad-Charles, J. The evidence of the complainant was that on 16th February 1994 about 6:45 p.m. she went to use a pit latrine at home when the appellant a well-known neighbour came into the latrine and had sexual intercourse with her. Her elder sister gave evidence that she saw the incident and struck the appellant with a kettle, flogged the complainant and took her to the police station where a complaint was made. The appeal against conviction was limited to challenges to the committal process which counsel contended constituted a material irregularity which made the conviction unsafe.

[3] The chronology of events in this long drawn out matter is that after the complainant had reported the matter to the police on 16th February 1994, the appellant was arrested on 10th August 1994 and on 23rd November 1994 a Preliminary Enquiry was convened. On 18th April 1995, the charges were dismissed and the appellant was discharged. It appears that the decision of the Magistrate was based purely on the omission of the Prosecution to lead evidence of the age of the complainant. On 9th May 1995, the Director of Public Prosecutions issued a notice to the Magistrate with directions for a Preliminary Enquiry to be held to allow a birth certificate to be tendered in evidence. On 27th March 1996 the birth certificate was tendered in evidence and on 28th March the appellant was committed to trial for this offence. It was not until 4th April 1999 that an indictment was issued. The appellant had been out of custody since he was discharged in 1995. On 4th November 1999 a summons was issued for his appearance before the Assizes on 15th November. On that day he appeared pleaded not guilty and his matter was adjourned. He remained on bail until the hearing. At neither the hearing nor the appeal was any substantive argument raised on the issue of the delay in bringing this matter on for trial but we are concerned about it.

[4] The legal submissions raised were to the effect that the Director of Public Prosecutions had exceeded his powers in the directions he gave the Magistrate because they were limited to ordering a new Preliminary Enquiry under the provisions of Section 780 of the Criminal Code of St. Lucia, and what had transpired was not a new Preliminary Inquiry. However, the authority of the Director to pursue the course that was in fact taken is clearly set out in section 785. I therefore overrule the submission and dismiss the appeal against conviction. I need do no more than set out the provisions of section 785 (1) and (2):

> "(1) In any case where the magistrate discharges an accused person, the Director of Public Prosecutions may require the magistrate to send to him the depositions taken in the case or a copy thereof, and any other documents or things connected with the case, which he may think fit.
>
> (2) If, after the receipt of such documents and things, the Director of Public Prosecutions is of opinion that the accused person should have been committed for trial, the Director of Public Prosecutions may, if he thinks fit, refer back such documents and things to the magistrate, with directions to deal with the case accordingly, and with such other directions as he may think proper."

Appeal Against the Conviction of Benedict Charles

[5] The jury had returned a verdict of guilty of incest on 3rd November 2000 and Charles, J imposed a sentence of 15 years. The appellant appealed against the conviction on the grounds that there was no corroboration, the appropriate legal warnings were not given, and that the verdict was not supported by the evidence.

[6] The evidence disclosed that the appellant was the father of the complainant and her three brothers. Her mother left them when she was four years old and they lived and grew up with their father. The complainant was born on 17th July 1984. About 1997 she went to live with her aunt as her father worked as a security guard at night. She visited her father often. Her evidence was that in July 1998 she asked him for money to buy shoes. Although he agreed to give the money he did not keep his promises and she asked several times. On 21st August 1998 she went to her father's home and entered his bedroom where he was lying on his bed. He held her and had sexual intercourse with her. He did not give her the

money for the shoes. In her testimony she alleged that on previous occasions he used to finger her. He denied the allegation. In January 1999 she told her mother about the incident. A report was made to the police and criminal proceedings were initiated. The appellant denied that he had sexual intercourse with the complainant and suggested that the complaint was maliciously made because of dissatisfaction over the money for the shoes.

[7] The only evidence that the appellant had sexual intercourse with the complainant was given by the complainant. There was no corroboration of her testimony. The learned trial judge explained to the jury that there was no corroboration, and that it was dangerous to convict on the uncorroborated evidence of the complainant. Full explanations were given of the reasons for the warning, and the reasons included both the reasons of the ease with which a female could make false allegations of sexual intercourse and the difficulty of rebuttal, and the added circumstance of the youth of the complainant. After warning the jury that it was dangerous to convict, the judge said that if they were convinced that the complainant was telling the truth it was open to them to return a verdict of guilty. We did not find any fault with the directions which were expressed in a manner very favourable to the appellant.

[8] The prosecution called five witnesses. The appellant made an unsworn statement from the dock in which he denied having sexual intercourse with the complainant. The complainant gave clear and detailed evidence which supported the conviction. On the facts there was a direct conflict of testimony between the complainant and the appellant, and the jury believed the complainant. We did not think that the verdict was unsafe.

Appeal Against the Conviction of Glenroy Sean Victor

[9] The appellant pleaded guilty to rape and was sentenced to 30 years imprisonment by Charles J. The complainant and the appellant were employed as domestic help at the same place. She was a caretaker of the children of the family and he was a handyman. On the 1st June 2000 he forcibly had sexual intercourse with her in a bedroom of the

house. She immediately made a report to the police. He made a voluntary statement confessing to the rape but explained that for some time he had been making approaches to her and he believed that she had made up her mind to have a sexual relationship with him.

[10] The sentences for these offences showed such a broad divergence that we thought that we should give some guidance on sentencing in these sexual offences with the intention of promoting greater consistency in the approach to sentencing. We appreciate that circumstances will differ and our aim is not necessarily to require uniformity in the sentences but in the principles which inform the exercise of discretion in sentencing.

[11] We have accepted and adapted sentencing policies with appropriate modifications expressed in ***Att.-Gen.'s Reference (No.1 of 1989), 90 Cr.App.R. 141*** to the statutory scheme in St. Lucia as is set out in the Criminal Code which prescribes maximum sentences for carnal knowledge by age group in sections 215 and 216, incest by males in section 223, and rape in section 238. The court has to adopt a sentencing policy which is aimed at combating the growing prevalence of these crimes in our country, St. Lucia while at the same time not denying persons committing these crimes the application of the basic human rights prescribed by our Constitution.

[12] I should comment at once that the statutory scheme shows that for carnal knowledge of a girl under the age of thirteen and rape the maximum punishment is life imprisonment and flogging. However, for carnal knowledge of a girl between the ages of 13 and 16 years the maximum punishment is 15 years, and for incest the maximum punishment is 15 years.

Carnal Knowledge – under thirteen

[13] "Section 215. Whoever unlawfully and carnally knows any female under thirteen years of age, whether with or without her consent, is liable indictably to imprisonment for life, and to flogging."

In this category a wide range is likely. Starting at a minimum where the girl is not far from her 13th birthday and there are no aggravating factors at 8 years and going upwards. It

scarely needs to be said the younger the girl when the sexual approach commences the more serious the crime. The existence of a maximum sentence of life imprisonment for this offence would allow a rapid escalation of the term of imprisonment as the age of the complainant decreases.

Carnal Knowledge – thirteen to sixteen

[14] "Section 216. (1) Whoever unlawfully knows any female, being of and above thirteen years and under sixteen years of age, is liable indictably to imprisonment for fifteen years."

While this remains the state of the law, the courts will have to impose sentences in a manner which will enable some differentiation between crimes where there is mitigation and those where there is aggravation.

Incest

[15] "Section 223. (1) Any male who has carnal knowledge of a female who is, to his knowledge, his granddaughter, daughter, sister, or mother, is liable indictably to imprisonment for fifteen years."

With the maximum sentence for this offence set at 15 years the court must still make some differentiation in the severity of the punishment based on the age of the complainant and other factors.

i. **Where the girl is over 16 years:** Generally a range from 5 years down to 3 years for first offence depending on degree of force used, and the desirability of keeping family disruption to a minimum.

ii. **Where the girl is aged from 13 to 16 years:** Here a sentence between 3 years to 7 years seems appropriate for first offence.

iii. **Where the girl is under the age of 13 years:** It is inconceivable that a statute which imposes a sentence of life imprisonment and flogging for unlawful carnal knowledge of a girl under the age of 13 years would intend that there be a maximum penalty of 15 years for incest with a girl under the age of 13 years. It

would therefore seem that incest offences in that category would be charged and punished under provisions of the carnal knowledge sections. It scarely needs to be said the younger the girl when the sexual approach commences the more serious the crime.

Rape

[16] "Section 238. Whoever commits rape is liable indictably to imprisonment for life and to flogging."

i. For rape committed on an adult without aggravating or mitigating features a figure of 8 years should be taken as the starting point in a contested case with a minimum of 3 years on a plea of guilty.

ii. Where the rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living or by a person who abducts the victim and holds her captive the starting point should be 10 years.

iii. At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years to life or more may be appropriate.

iv. Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder and where he is likely if at large to remain a danger to women for an indefinite time a sentence of 20 years to life will not be inappropriate.

[17] The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors, the more common of which I attempt to list below. It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark upon an evaluative process. It must weigh the mitigating and aggravating factors. If the aggravating factors are

outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.

[18] **Aggravating factors**

i. If the girl has suffered physically or psychologically from the sexual assault

ii. If it has been accompanied by abhorrent perversions e.g. buggery or fellatio

iii. Violence is used over and above the force necessary to commit the offence

iv. The offence has been frequently repeated

v. The defendant has previous convictions for serious offences of a violent or sexual kind

vi. The victim has become pregnant as a result of the crime.

vii. The victim is either very young or very old.

[19] **Mitigating factors**

i. A plea of guilty should be met by an appropriate discount, depending on the usual considerations, that is to say how promptly he confessed and the degree of contrition and other relevant factors.

ii. Where incest was consensual, in the case of a girl at least 16 years of age if it seems that there was a genuine affection on the part of the defendant rather than the intention to use the girl simply as an outlet for sexual inclinations.

iii. Where the girl of at least 16 years of age made deliberate attempts at seduction.

iv. Where the defendant is a first offender and/or is a youth.

[20] **With regard to Winston Joseph.** Mr. Joseph is currently 41 years of age with no previous convictions. He is employed and seems respected in his community. Apart from his maturity, on the one hand, and his clean record and good character on the other, there were no aggravating or mitigating factors, directly connected with the offence. On the other hand we must bear in mind that the complainant was under the age of thirteen years and the maximum punishment for this offence is life imprisonment, as a reminder that the crime is a serious one. The predominant circumstance which we think should influence the punishment in this case is the fact that he came up for punishment more that 6 years after he had committed the offence due to the malfunction of the system of justice. It worked in a slow and peculiar manner which it is hard to justify. The appellant has had this hanging over his head all this time. The delay has been a substantial interference with his rights and must have affected his life. There is no indication that he has committed any other offences in the 6 year period while he was on bail. Thus the issue of rehabilitation seems to have been covered. We are satisfied that in the circumstances of this case, the fact of the conviction has vindicated the complainant, and served the society's purpose of condemning the crime. We do not think that there is any particular benefit to the complainant or to society for the appellant to commence serving a normal term so long after the commission of this crime. Had this case taken the normal course of trial within a reasonable time, the appellant could have served his sentence by the time this case came on for trial. In the circumstances of this case we feel the justice of the case requires that a substantial discount be given for the delay in bringing this matter on for sentence. I would therefore order that the sentence be varied to a term of two and a half years.

[21] **With regard to Benedict Charles:** The penalty imposed was the maximum sentence of fifteen years prescribed by the statute. This is a case where there were neither aggravating nor mitigating factors in the manner in which the offence was committed. The appellant has had no previous convictions and is of good character. The victim was between the ages of 13 and 16. We would impose a reduced sentence of 5 years imprisonment.

[22] **With regard to Glenroy Victor:** This too was a case where we found no aggravating factors. The appellant mitigated the offence by a guilty plea after confessing to the police

at the commencement of the investigation. In addition he told the police that the victim had given him the impression that she would have had consensual sexual intercourse with him. This was a rape against an adult without violence in excess of that necessary to commit the rape and there were mitigating factors. We are satisfied that the sentence imposed was excessive and should be reduced to 5 years imprisonment.

The Order of the Court is:

Winston Joseph v The Queen

[23] Appeal against conviction dismissed. Sentence varied by reduction from 8 years to 2 ½ years.

Benedict Charles v The Queen

[24] Appeal against conviction dismissed. Sentence varied by reduction from 15 years to 5 years.

Glenroy Sean Victor v The Queen

[25] Appeal against sentence allowed. Sentence varied by reduction from 30 years to 5 years.

Dennis Byron
Chief Justice

I concur

Albert Redhead
Justice of Appeal

I concur

Joseph Archibald
Justice of Appeal [Ag.]