

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(CRIMINAL JURISDICTION)
CRIMINAL CASE NO 11 of 2006

THE QUEEN
and
AKEEM SEBASTAIN

Appearances: Ms. Tamia Richards, Crown Counsel for the Prosecution
Mr. Hayden St. Clair-Douglas and Mr. Kevon Swan for the Defendant

2006: June 26th and July 14th

Judgment on Sentencing

(Criminal law – sentencing – conviction - Unlawful sexual intercourse with girl of 13 – Criminal Code 1997 S. 118)

[1] **Joseph-Olivetti, J:** The Defendant was charged on a joint indictment containing four counts of having unlawful sexual intercourse with a girl of 13 years contrary to section 118 of the Criminal Code 1997. The indictment was severed (count 2 related solely to another accused) and the Defendant was tried separately. After a trial lasting 3 days the jury found him guilty of two counts, namely counts 1 and 3 and not guilty on count 4. A sentencing hearing was held on 26th June 2006 but in view of the Defendant's youth the Court requested a social inquiry report and sentencing was deferred until 14th July, to accommodate that request. In the interim the Defendant was remanded in custody. On the 14th July the Defendant was sentenced to one year imprisonment on both counts, sentences to run concurrently. I now give my full reasons.

Facts

[2] The Crown's case, on Count 1, which the jury accepted was to the following effect. On the evening of 22nd April 2005, the victim, a young girl of approximately 13 years and 6

- months, went to a basketball game at the Sports Complex, Road Town, Tortola with her older cousin. Shortly after she arrived there the victim left her companion and went with the Defendant to the neighbouring A.O. Shirley Sports Grounds. They both walked to an old ticket booth on the premises and had sexual intercourse at his request.
- [3] The evidence on count 2 is that the victim went to the Sponge Bob Show at the Sports Complex on the evening of 7th May 2005. She was accompanied by her older cousin and younger sister. At some point in time she wandered out on the grounds and met the Defendant. She walked with him to the bleachers where they had sexual intercourse at his request.
- [4] The girl said that she had a “boyfriend and girlfriend relationship” with the Defendant and that she had told him at first at some time prior to the incidents that she was fifteen then had immediately told him that it was not true and that she was thirteen.
- [5] Sometime in July, 2005 the victim told one of her brothers about these incidents and he reported it to her mother who had the young girl examined by Dr. Brewley on 20th July. Dr. Brewley confirmed that the girl could have been sexually active as her hymen was not intact. Immediately, the mother took the girl and they went in search of the Defendant. They found him in the vicinity of the Sunday Morning Well in Road Town and the mother told him of the girl’s allegations among other things.
- [6] The Defendant at first denied any involvement but when pressed admitted to the mother to having sex with the girl on two occasions. He denied the third offence. He gave the mother \$100.00 upon her request for money to take the girl to the doctor and told her that she could return for more if she wanted. He also told her that he did not want his wife to know of the offences. Eventually, the mother reported the matter to the Police and the Defendant was arrested and charged.
- [7] On his arrest he admitted to having sex with the girl on one occasion but the arresting officer, Officer Ambrose, did not make a record of that statement in his pocket book or anywhere else at the time.

[8] The Defendant gave evidence himself and called two witnesses. Essentially he denied that he had had sex with the girl and denied making any admissions either to her mother or to the Police. He relied on the defence of alibi for the two evenings in question but the jury rejected that defence.

The Plea in Mitigation

[9] Learned Counsel for the Defendant asked for the Court's leniency on behalf of his client. He said that the Defendant was 22 years old and lived with his mother, grandmother and younger brother. Prior to his arrest he had worked in the construction industry. Counsel asked the court to consider in particular that the sexual intercourse was without violence or perversions of any kind and that the girl was a willing partner. He said that his client only had one prior conviction which although not for a similar offence was a serious one. His client had expressed remorse and was trying to re-habilitate himself. In that regard he had the full support of his mother who was present in court and also that of his maternal aunt.

The Crown's Submissions

[10] The Crown submitted the following cases as guidelines:-

1. The Queen v. Jason Glasgow (2000)
2. The Queen v. Benson Thomas (2004)
3. The Queen v. Clinton Hamm (2004)
4. The Queen v. Shem Jackson (2004)
5. The Queen v. Kerril Gilbert (2006)

Social Inquiry Report

[11] The Social Development Department submitted the report dated 11th July, on the 14th. The report was admitted by consent as the maker did not attend Court. We understand

that the report could not have been prepared earlier as the Senior Probation Officer had commitments abroad.

- [12] The report was very helpful in that it provided us with a very useful insight into the Defendant's health, social and family background albeit the Probation Officer for no apparent reason did not make any recommendations to the Court.
- [13] The significant factors gleaned from the report are that the Defendant was diagnosed as suffering from Attention Deficit Hyperactivity Disorder Syndrome when he was at school and had behavioral problems but that after he was expelled from school he appears to have been bent on improving himself with some success and this is borne out by the comments from the Principal of the High School which was attached to the Report. This is also supported by his employment record and indeed one of his employers described him as an "industrious, well-mannered and affectionate young man."
- [14] Of interest also is the fact that the Defendant got married on 31st May, 2005 after he committed the offences and did not reside with his spouse but instead lived with his aged grandmother, mother and brother prior to his incarceration. Having regard to this factor and to the significant age difference between him and his spouse and to the spouse's own family, it strikes this court that this was a marriage of convenience only.

Victim Impact Assessment

- [15] The court, being mindful that it ought not to speculate on the effect of the crime on the victim (See Lord Woolf C.J. **Practice Direction [2001]** 4 All E.R. 640) requested a victim impact statement which was provided by the victim with the assistance of the Crown. I thank both the victim and Counsel for their efforts. It is apparent from the statement that the victim has suffered little or no ill-effects except embarrassment when faced with questions from her peers who happened to learn of the trial. She also professes sympathy for the plight of the Defendant.

The Court's Considerations

[16] This offence is a serious one as it carries a maximum penalty of 14 years imprisonment. The Court is also mindful that generally offences of a sexual nature especially involving under-age girls are of increasing concern to the public because they appear to be becoming more prevalent. However, the law has invested a wide discretion in the court on sentencing to ensure that the punishment imposed reflects the justice of the case having regard to the particular facts of each case. The aims of sentencing are well known, the primary goals being punishment, deterrence, rehabilitation and the protection of the society.

[17] In considering my sentence I am also required to engage in an evaluative process by weighing the mitigating and the aggravating factors. This is the approach endorsed by the Court of Appeal in **Winston Joseph v R**.¹ which set down general principles on sentencing for sexual offences.

[18] In that case **Byron, C.J.** said (para. 17) that the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors and that the tendency would be towards a higher sentence if the aggravating factors are outweighed by the mitigating factors and vice versa. He also listed the more **common** aggravating and mitigating factors. The aggravating factors are:

- (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;

¹Criminal Appeal No. 4 of 2000 (St. Lucia) **Winston Joseph v R**,
Criminal Appeal No. 8 of 2000 (St. Lucia) **Benedict Charles v R**,
Criminal Appeal No. 7 of 2000 (St. Lucia) **Glenroy Sean Victor v R**.

- (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] Let me say at once that I see no aggravating circumstances having regard to those referred to in **Joseph** except the fact that we are considering two counts. I note specifically that the victim and the Defendant were friends, that she might have misled him about her age although 15 would still have attracted punishment as 16 is the age at which a girl can legally consent to sexual intercourse, she was not forced, there was no "abhorrent perversions", and that this was not her first sexual encounter.

[20] There are however, his previous convictions to be considered. I will not take account of the traffic offences which are minor ones. However, he was convicted in March 2005 in the High Court for unlawful possession of a firearm and fined and placed on a bond to keep the peace for three years and imprisonment for six months in breach. Although it was a serious offence a custodial sentence was not imposed obviously having regard to his youth and good character. Now had this offence not taken place during the currency of the bond I might have been minded to impose a non-custodial sentence having regard to the mitigating factors identified below.

[21] As mitigating factors I take account of the following: - the Defendant did not coerce or induce the victim in any way and used no violence on her neither did he seduce her with money or gifts or use any undue influence and she appears to have suffered no lasting harm. I also consider the Defendant's level of maturity – he was aged twenty-one at the time of the offences and his health problems. And, what cannot be overlooked is that he is a young man who, despite the odds, has been actively trying to improve himself.

[22] I have considered the authorities cited by the Crown. They are all first instant decisions and although useful as an aid to uniformity in sentencing have no binding effect. See **Archbold**² where it is stated that the customary view is that the vast majority of decisions

²Archbold Criminal Pleading Evidence and Practice 1998 para. 7-136.

on sentencing are no more than examples with no binding effect but useful as an aid to uniformity of sentence. I am satisfied that none of the cases cited are on all fours with the case at bar.

The Sentence

[23] In all the circumstances, a custodial sentence is called for having regard to the gravity with which such offences are regarded by Parliament but I am guided by the principles followed in the English courts and no doubt equally applicable here that a custodial sentence should be proportionate to the harm caused, culpability of the offender and the effect upon the victim and that the prison sentence should be as short as possible to achieve the purpose for which it is imposed. See Blackstone 2004 E 1.11 and E 1.12. Accordingly, taking all the foregoing into consideration the Defendant is sentenced to twelve months imprisonment on each count to run concurrently, time spent in custody awaiting sentence to be taken into account.

[24] The Defendant is in breach of his bond. It was agreed that the matter should be dealt with at the same time. The Defendant was therefore sentenced to six months imprisonment as provided for by Hariprashad-Charles, J on the 1st day of March 2005 in Case No. 16 of 2003. This sentence is to run concurrently with the other sentences imposed.

Rita Joseph-Olivetti
High Court Judge