

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
(CRIMINAL)

CASE NO. 08 OF 2006

BETWEEN:

THE QUEEN

and

TIFERN HENLEY

**Appearances:**

Ms. Tamia Richards, Senior Crown Counsel and Ms. Tiffany R. Scatliffe, Crown Counsel  
for the Crown

Ms. Anthea Smith for the Defendant

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2007: July 9

2007: July 16, September 11  
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**JUDGMENT ON SENTENCING**

**(Criminal law – Evidence and Procedure – Offences against the Person – Sexual  
Offences - Rape - Sentence - Matters to be considered)**

[1] **HARIPRASHAD-CHARLES J:** On 9 July, 2007, the defendant, Tifern Henley was convicted by a majority jury for the rape of a young woman, contrary to section 117 of the Criminal Code, 1997 (Act No. 1 of 1997) of the Laws of the Virgin Islands.

**The facts**

[2] The facts which the Jury accepted can be encapsulated thus. On 7 December 2006, after attending the opening ceremony of the new Administrative Complex in Virgin Gorda, the victim (whom I shall refer to as "V") went to the home of her good friend, Naheem Stevens ("Naheem") who is also the brother of her then boyfriend, Lee Stevens. While at his house, V drank 2 glasses of Little Dix rum on an empty stomach.

She took one "on the rocks" and the other, mixed with some lime juice. Unexpectedly, Mr. Henley telephoned the residence looking for Naheem's father. After conversing with Naheem and V, Mr. Henley came to Naheem's residence. After a short conversation, both Naheem and V went in Mr. Henley's vehicle with the intention of taking V home. However, Mr. Henley told them that he would like to go to his apartment to change his working clothes since he was wearing them all day. As a result, he drove to his two-bedroom apartment which he shared with another individual. His room-mate was not present at that time. Mr. Henley took a bath and changed his clothes while Naheem and V remained in his bedroom watching a movie. Shortly thereafter, V began to feel hungry. She and Mr. Henley left to go to Rock Café to purchase some food. Naheem was left in the apartment uninformed of their whereabouts. Before going to Rock Café, V went to her home to get some money and changed her clothes. At Rock Café, she ordered the food and then she drove Mr. Henley's vehicle to the world-renowned Baths of Virgin Gorda. In passing, I observe that V was not the holder of a driving licence. At the Baths, they spoke about various issues including her mother which made her cry. He hugged and comforted her. They stayed there for about 10 – 15 minutes and then she drove back to Rock Café and eventually to Mr. Henley's apartment. Naheem was still there. She began feeling nauseous and dizzy. She spoke with Naheem and then went to the bathroom to vomit. When she came back to Mr. Henley's bedroom, she saw no-one there. She went to the bedroom to lie down because she was not feeling well. She was falling asleep when Mr. Henley came back. He began to undress and she asked him for Naheem. He replied that Naheem went home because he wanted them to be alone.

- [3] She told him that she wanted to go home. He did not heed to her request but took off her clothes and began to engage in oral sexual activities with her. She tried to push him off and asked him to give her back her clothes. She again requested him to take her home but he refused. She told him that she was too tired but he kept trying to have sex with her. Eventually, he let go of her and she put on her clothes. She headed out of the apartment with her food whereupon he stood in front of the door and obstructed her from leaving. She again pleaded with him to go home and then collapsed on top of

a trash bag. Mr. Henley said that he was not letting her go home half-drunk to her mother but she insisted that she wanted to go home. At that moment, he said that he would make her some tea. He also tried to kiss her. She moved her head and then pushed him away. She told him that she wanted to vomit and went to the bathroom. Mr. Henley followed her. He sat down on the toilet seat and put her in his lap. She was feeling weak, dizzy and nauseated. He was talking to her but she could not comprehend. He then took her, put her on his bed and went into the kitchen. She fell asleep. She did not know how long she slept. During that time, Mr. Henley went and spoke to his room-mate who had returned to the apartment and was in his room. The conversation was short.

[4] V woke up to find Mr. Henley over her. Her pants and underwear were gone. He had his shirt off. He was trying to insert his penis into her vagina. She kept resisting. He told her to relax and she told him that she wanted her clothes back as she wanted to go home. He eventually managed to force his penis into her vagina after putting pressure on her. He was in her vagina for 5 minutes. She did not know whether he ejaculated.

[5] After the sexual ordeal, he drove her home. At her home, she took a bath. Her mother was home but she did not say anything to her. Instead, she set off to Mr. Henley's home because she said she was in a rage and wanted to do something to him. This was around midnight. At Mr. Henley's home, she first encountered Melissa Hodge, the girlfriend of Mr. Henley. Melissa is also her cousin. She asked for Mr. Henley and after a brief conversation with Melissa and him, she left. She went to Naheem's home and told him that "Tifern raped her." She was crying. At about 9.00 a.m. the following morning, she went to the Virgin Gorda Police Station and made a report of rape against Mr. Henley to WPC Demming. During the interview, she was upset and crying. Later that day, WPC Demming took V to the Peebles Hospital in Tortola where she was medically examined by Dr. Lard who has since left the Territory. Samples of blood, saliva and vaginal swabs were taken from V. WPC Demming did not observe any visible marks on V.

- [6] On the said morning of 8 December 2006, Detective Constable John Antoine became aware of the report made by V against Mr. Henley. As a result, he commenced investigations into the matter. Later that day, he interviewed Mr. Henley at the police station. Mr. Henley gave a statement under caution to the police. In his statement, he admitted that he had sexual intercourse with V but said that she consented <sup>1</sup>.
- [7] The police continued their investigations into the matter and subsequently arrested and charged Mr. Henley for the offence of rape.
- [8] Mr. Henley gave evidence and called his girlfriend, Melissa Hodge as his witness. Essentially, he admitted having sexual intercourse with V but insisted that it was consensual. He intimated that he and V had a secret sexual relationship – not known to the public –because Melissa is V’s cousin. He admitted having two relationships at the same time.
- [9] Ms. Hodge gave evidence which largely supported Mr. Henley’s testimony that V and Mr. Henley were having an undercover sexual relationship. Of course, she was not present at the time of the alleged rape.
- [10] After nearly four hours of deliberation, the Jury returned a 7:2 majority verdict of guilty of rape.

### **Plea in mitigation**

- [11] Learned Counsel, Ms. Anthea Smith made a passionate plea in mitigation on behalf of her client. She submitted that Mr. Henley, aged 25, is the youngest contractor in the British Virgin Islands and that his enterprising career should not suffer. She stated that Mr. Henley is an extremely ambitious young man which could be borne out of the fact that he was thrown out of school because of low grades. He then went to the Ministry of Education and persuaded them that he could excel. As a result, he was given a

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<sup>1</sup> Report was tendered into evidence and marked Exhibit “JA1”.

chance and he ultimately successfully graduated from the BVI High School (now Elmore Stoutt High School). He then went on to pursue higher studies. He now holds a Certificate in Accountancy from Ashford College in Atlanta, USA.

[12] Ms. Smith implored the Court to temper justice with mercy stating that although Mr. Henley has a criminal record with 2 prior convictions, they are minor and not of a similar nature. She also stated that he supports his 2 infant daughters, ages 2 and 1.

### Submissions by the Crown

[13] Ms. Tiffany Scatliffe appearing as Counsel for the Crown identified the aggravating as well as the mitigating factors that are to be taken into account when considering an appropriate sentence for the crime of rape. She referred to the consolidated Court of Appeal judgment of **Winston Joseph v The Queen**<sup>2</sup>, **Benedict Charles v The Queen**<sup>3</sup> and **Glenroy Sean Victor v The Queen**<sup>4</sup> which set down established guidelines for sentencing in sexual offences cases. 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.
- 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.

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<sup>2</sup> Criminal Appeal No. 4 of 2000 (Saint Lucia) unreported

<sup>3</sup> Criminal Appeal No. 8 of 2000 (Saint Lucia) unreported

<sup>4</sup> Criminal Appeal No. 7 of 2000 (Saint Lucia) unreported

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

[14] The mitigating factors are identified as follows:

- 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 a youth.

[15] In addition, Ms. Scatliffe helpfully provided a compendium of local as well as regional authorities as guidelines.

#### **Local Authorities:**

- **R v Curtis Bruce**<sup>5</sup> - the Defendant was sentenced to 14 years for the rape of an eleven (11) year old girl with mental disability. Mr. Bruce was sentenced after he indicated that he wished to change his plea in light of DNA evidence. This is distinguishable from the present case for sentencing as it involves an underage girl with a mental handicap and a Defendant who had previously served a term of imprisonment for manslaughter.
- **R v Winston Harrigan**<sup>6</sup> - the Defendant pleaded guilty to the offences of rape and burglary and was sentenced to 5 years imprisonment. He broke into the house of the complainant and raped her at knife point.

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<sup>5</sup> BVI Criminal Case No. 17 of 2006 [unreported] – Judgment on sentencing delivered on 29 May and 4 June 2007 respectively.

<sup>6</sup> BVI Criminal Case No. 5 of 1996 [unreported]

- **R. v Claudius Frett**<sup>7</sup> - the Defendant was convicted by a unanimous jury of raping his daughter who at the time, was a student of the BVI High School. He was sentenced to 12 years for rape.
- **R v Robert Thomas**<sup>8</sup> - the Defendant was sentenced to 10 years imprisonment for rape where the rape was not repeated. He had previous convictions but only one of which involved violence. The victim was intimidated during the ordeal by the presence of a cutlass.
- **R v Malcolm Spencer**<sup>9</sup> - the Defendant pleaded guilty to the rape of a 15 year old girl of low intellect. He was sentenced to 7 years imprisonment. He had an unblemished criminal record.

### Regional Authorities

[16] In the Dominican case of **James (Stephen Trevor Kurt) v The State**<sup>10</sup>, the Defendant was convicted of rape and was sentenced to 12 years. On appeal, his sentence was reduced to 7 years in light of the lack of aggravating factors.

[17] In **Julien (Dion) v The State**<sup>11</sup>, the Defendant was sentenced to 10 years imprisonment for rape where the rape was not repeated and there were no aggravating factors. He had no previous convictions.

### Antecedents

[18] Mr. Henley is a 25 year old British Virgin islander, who has two prior convictions at the Magistrate's Court level. On 8 August 2003 before His Worship, Magistrate Cecil Dawson, he was fined US\$100.00 or 1 month imprisonment for the offence of threatening language. On the same date, he was reprimanded and discharged for the offence of criminal trespass.

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<sup>7</sup> BVI Criminal Case No. 7 of 2000 [unreported]

<sup>8</sup> BVI Criminal Case No. 17 of 2001 [unreported]

<sup>9</sup> BVI Criminal Case No. 3 of 2007 [unreported]

<sup>10</sup> Criminal Appeal No. 2 of 2003 [unreported] [Commonwealth of Dominica].

<sup>11</sup> [1996] 50 WIR 481.

## The Victim

[19] A victim impact assessment was not obtained. As such, the Court ought not to speculate on the effect of the crime on the victim. It is however evident that V was not a virgin and has had many sexual encounters prior to the date of the commission of the rape.

## Court's considerations

[20] Rape is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and the latter's privilege of choosing those with whom intimate relations are to be established. In **The Queen v Curtis Bruce**, I asserted:

"Short of homicide, it [rape] is the 'ultimate violation of self'. It is a violent crime because it normally involves force, or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. Along with other forms of sexual assault, it belongs to that class of indignities against the person that cannot ever be fully righted and that diminishes all humanity...."

[21] Section 117 of the Criminal Code, 1997 of the Laws of the Virgin Islands ("the Criminal Code") makes rape one of the most serious sexual offences. This is mirrored by the maximum penalty of life imprisonment which it carries. 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.

[22] The Court also bears in mind the classical principles of sentencing which could be summed up in four words "retribution, deterrence, prevention and rehabilitation." In **R. v. Sargeant**<sup>12</sup>, Lawton L.J. said:

"Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing."

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<sup>12</sup> 60 Cr. App. R. 74.

[23] In considering the appropriate sentence to be imposed, I am also required to engage in the evaluative process by weighing the mitigating and aggravating factors as expounded by Sir Dennis Byron CJ in **Winston Joseph et al.** At paragraph 17, Byron CJ (as he then was) stated as follows:

“The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors...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.”

[24] Byron CJ went on to list the more common aggravating and mitigating factors. Based on the factors identified above<sup>13</sup>, I can see no aggravating factors in the present case. There is however one mitigating factor: Mr. Henley being a first offender and is a youth.<sup>14</sup>

[25] In **Winston Joseph et al**, Byron, C.J. suggested (at page 8 of the judgment) that for rape committed on an **adult** [emphasis added] without aggravating or mitigating features, the starting point should be 8 years in a contested case and 3 years on a plea of guilty<sup>15</sup>.

### The sentence

[26] Having regard to all the facts and circumstances in this case, there is no doubt in my mind that a custodial sentence is necessary for a variety of reasons. “First of all, to mark the gravity of the offence. Second, to emphasize public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last but not least, to protect women.”<sup>16</sup>

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<sup>13</sup> See paragraph 12 of judgment.

<sup>14</sup> The Court has not taken into consideration the two unrelated prior convictions of the Defendant.

<sup>15</sup> See paragraph 16 of the judgment.

<sup>16</sup> See Lord Lane in **R v Roberts** [1982] 1 All E.R. 609 at page 610.

[27] Considering that the starting point should be 8 years in a contested rape case, such as the present, and taking all matters into consideration, I hereby sentence you, Tifern Henley to 7 years imprisonment.

**Indra Hariprashad-Charles**  
High Court Judge