

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(CRIMINAL JURISDICTION)

CRIMINAL CASE NO. 13 of 2007

THE QUEEN
and
KELVIN TURNBULL

Appearances: Ms. Grace McKenzie and Ms. Tiffany Scatliffe for the Prosecution
Mr. Hayden St. Clair Douglas for the Defendant

2007: October 23rd,
November 9th, 14th, 28th

Judgment on Sentencing

(Criminal Law – Sentencing – Conviction – Rape – Criminal Code 1997 – s. 117)

[1] **Joseph-Olivetti J:** - I am called upon to pass sentence on the Prisoner, Kelvin Turnbull who was convicted on 23rd October 2007 of two counts of rape contrary to s. 117 of the Criminal Code 1997 (“the Code”). The sentencing hearing was adjourned to 9th November at the behest of his counsel, same was held and judgment was delivered on 14th November. These are my full reasons.

The Salient Facts as Accepted by the Jury by their Verdicts

[2] In brief, in 2006, the victim, a young girl of the age of 13 years travelled to school on the Prisoner’s bus along with other children. This was pursuant to a contract made with the Government of the British Virgin Islands and the child’s mother as we do not have a public school bus system here. The Government and the mother shared the costs equally. On a day unknown in 2006 the Prisoner at about 7a.m. picked up the girl who was by herself at her usual place of waiting and took her to Beef Island. After a quick stop at the airport restaurant to drop off something for his wife he drove to an isolated area in the vicinity of a dilapidated dock on the island where he raped her after locking the doors and despite the girl’s struggles and protestations. When he was finished he warned the girl not to tell

- anyone and his young victim complied saying nothing to her friends, her teachers or even her mother. The mother was a strict disciplinarian and she feared chastisement from her.
- [3] On another occasion in January of 2007 just after 7 a.m. the Prisoner picked up the young girl at her usual spot near her home and took her to an isolated area at Greenland where he again raped her.
- [4] One night, sometime in late January, 2007, the mother had reason to question her daughter and the victim told her what had happened. The mother telephoned the Prisoner and informed him of her daughter's allegations which the Prisoner rather nervously denied. However, that very night he repaired to the mother's house despite the late hour (it was after 10 p.m.) and the mother told him again of the allegations in the presence of the girl who insisted that they were true. The next day the Prisoner attempted to telephone the mother.
- [5] Subsequently, the mother reported the matter to the Police. A medical practitioner examined the girl and found that she was not **virgo intacto**, a sign that the girl had had sexual congress. However, he found no signs of physical injury which he explained was not uncommon having regard to the time that had elapsed between the alleged incidents and the examination. (The jury by their verdict accepted the girl's evidence that the first rape was her first sexual encounter). The Police investigated the matter and later arrested and charged the prisoner with three counts of rape. He denied the allegations. He was found guilty of two counts of rape.

Mitigation

- [6] On behalf of the Prisoner, learned counsel, Mr. Douglas, submitted three references and a letter from the Prisoner's wife. The references were from Mr. Henderson Tittle, the territorial youth director of the New Testament Church of God International Worship Center, Mr. Elroy Fahie, director of Elroy's Cruise Line and Tour Agency Ltd and Pastor Daniel of the BVI Seventh Day Adventist Church of which the Prisoner is a member.
- [7] These various testimonials indicate that prior to his convictions the Prisoner was regarded as a very respectable and industrious member of the community. He always conducted himself in a professional manner, was courteous friendly and knowledgeable in his line of work as a taxi-driver and Mr. Fahie said that he had never received a negative report about

him from any of the cruise ship passengers who were among his clients. He was considered to be a dedicated family man and a regular churchgoer. In particular, he contributed to the church by participating in class discussions, providing meals to visitors especially on special occasions and the church congregation was deeply saddened by this state of affairs. All sought mercy on his behalf.

[8] The Prisoner's wife in her letter explained that she has been married to the Prisoner for nigh on six years and that he is a responsible, industrious, affectionate and loving father and husband. He is the sole provider of a family of six and that she is a housewife whose sole responsibility is taking care of the family. She expressed her concern that she would be unable to meet the financial needs of the household without her husband's assistance. In addition, she explained that they have a young son who suffers from asthma and sometimes requires immediate medical attention and that she is unable to drive and has to rely on the kindness of neighbours. She told of the resulting distress and inconvenience that they have suffered and will continue to suffer without her husband's help. She too prayed for leniency.

[9] Mr. Douglas, learned counsel for the Prisoner candidly submitted that there were no mitigating circumstances to put before the court on the Prisoner's behalf save the situation of his family and the fact that the Prisoner can be considered as having no relevant prior convictions having regard to the one traffic offence on record.

[10] Mr. Douglas also submitted with respect to the allegations of victimization in the victim impact statement submitted by the Crown at the court's request that the Prisoner should not be held responsible for the actions of other persons including that of the girl's school mates who are allegedly vilifying her as they are not matters within the Prisoner's control.

[11] Finally, Mr. Douglas urged, specifically at the Prisoner's request that the court should consider a fine or some other penalty other than a custodial sentence as that would enable the Prisoner to continue to meet the financial obligations of his family.

Crown's Submissions

[12] Ms. Scatliffe learned Crown Counsel, provided a wealth of authorities on sentencing. These included several authorities from the BVI, the OECS and England. The local cases

were: *R. v. Tifern Henley*¹, *R. v. Curtis Bruce*², *R. v. Malcolm Spencer*³, *R. v. Robert Thomas*⁴, *R. v. Claudius Frett*⁵ and *R. v. Winston Harrigan*.⁶ The regional cases were *Winston Joseph v. R.*, *Benedict Charles v. R.*, *Glenroy Sean Victor v. R.*, *R. v. Ivan Henry Milton (St. Lucia)*, *Gregory Burton v. The Queen (Criminal Appeal)* and *Julien (Dion) v. The State*⁷ and the English cases were *R. v. Billan et al*⁸, *R. v. William Christopher Millberry and Others*.⁹

[13] Ms. Scatliffe submitted that the only mitigating factor was the Defendant's prior good character.

[14] Counsel enumerated the aggravating factors as: (i) The victim's age – 13 years old at the time of the rape, thus a child pursuant to the Children and Young Persons Act, 2005 (No. 8 of 2005)¹⁰, (ii) there was a breach of trust as Mr. Turnbull had a relationship of trust to safely take the victim to school, and she was under his temporary care, (iii) the offence was repeated, it was not a "one off" event, (iv) the victim suffered emotionally from the rape, as evidenced by Dr. Simmonds' report and (v) rape "is a crime which involves emotional and psychological trauma that obliterates the personality of the victim, degrades the victim, and involves an intimate proximity between the offender and the victim".

Court's Consideration

[15] The maximum sentence this Court can impose for rape is life imprisonment - section 117(1) of the Code (as amended). This in itself is an indication of the gravity of the offence as this penalty is only mandated for cases where death results and for treason.

[16] The authorities relied on by the Crown establish that offences of rape invariably merit a custodial sentence even for a first offender with a prior good character. The sentencing

¹ BVI High Court Criminal Case No.3 of 2007

² BVI High Court Criminal Case No. 17 of 2006

³ BVI High Court Criminal Case No. 3 of 2007

⁴ BVI High Court Criminal Case No. 17 of 2002

⁵ BVI High Court Criminal Case No. 7 of 2001

⁶ BVI High Court Criminal Case No. 6 of 1996

⁷ [1996] 50 WIR 481

⁸ [1986] Cr. App. R. (S.) 48

⁹ [2003] 2 Cr. App. R. (S) 31

¹⁰ This Act defines a "child" as a person under the age of sixteen years.

guidelines in **Winston Joseph v. R.**, having been promulgated by the Court of Appeal are directly applicable but they must be read with the necessary modifications having regard to the statutory regimes existing in each state. Further as it has been noted in **R. v. William Christopher Millberry and Others**, "The Court would emphasise that guidelines could produce sentences which were inappropriately high or inappropriately low if the sentencer merely adopted a mechanistic approach to the guidelines. It was essential that having taken the guidelines into account, sentencers should stand back and look at the circumstances as a whole and impose a sentence which was appropriate having regard to all the circumstances. Double accounting, which could be the result if guidelines were applied indiscriminately, should be avoided. Guideline judgments were intended to assist the judge to arrive at the current sentence. They did not purport to identify the correct sentence. Doing so was the task of the trial judge."

- [17] The Court has a wide discretion on sentencing and a wide range of options and the Court, in determining sentence, must have regard to particular circumstances of the case. For our purposes the main factors are:- (a) the entire course of conduct as the offences consist of a series of criminal acts of the same or a similar character, (b) the injury, loss or damage resulting from the offence; (c) the deterrent effect any sentence may have on the Prisoner or other persons; (d) the need to ensure that the Prisoner is adequately punished for the offence; (e) the character, antecedents, age, means and physical or mental condition of the Prisoner.
- [18] I have considered all the circumstances of the case and the submissions made by the Crown and counsel for the Prisoner. Most significantly, this was the repeated rape of a child of whom the Prisoner can be said to have had temporary care for a particular purpose and he abused that trust. The world regards persons who have sexual congress with children as among the worst categories of offenders and have a word for such persons - paedophiles. This is a word which I have seldom heard voiced in our part of the world and it is time we face facts and apply the accurate name to such offenders then perhaps the gravity of the acts can be readily recognized by all including persons who are tempted to emulate the Prisoner.
- [19] I have also taken into account the victim impact statement, the statement from the child's mother and the doctor – they all speak to the psychological impact of the offences on the

- child. In particular, I remark that the girl is a diabetic and that that condition as well as her temper and general outlook on life has deteriorated since the incidents. Doubtless, this child will carry her emotional scars for a long time, perhaps a lifetime if she is not lucky.
- [20] I have also considered the resulting acts of her peers. As far as I am concerned the Prisoner must be held liable for those as well, as this could easily have been foreseen as arising indirectly from his actions in inflicting harm on the child in the first place. In this regard I take judicial notice of the statement made in the press recently by the Office of the Director of Public Prosecutions about the impact adverse publicity can have on victims of rape and the importance of shielding the identities of young victims and the role of the press in assisting with this. Victims of sexual offences should be encouraged to come forward and to break the cult of silence which such crimes thrive on. A caring and enlightened society ought to do all in its power to ensure that such victims are not ostracized and victimized and have equal access to justice. The Office of the Director of Public Prosecutions ought to be commended for taking this bold and necessary initiative.
- [21] The only real mitigating factor is the Prisoner's prior good record as I agree with Mr. Douglas that the only conviction which he has, being one for a traffic offence relating to tinted windows, can properly be disregarded for these purposes. I note his age (34) and that he has no medical problems. His personal circumstances including those of his family are not exceptional. Accordingly, I will make no allowance for that. In short the aggravating circumstances identified by the Crown far outweigh the mitigating circumstances.
- [22] Accordingly, I am of the view that a custodial sentence is warranted. Therefore, I hereby sentence; you Mr. Turnbull, to ten years imprisonment on each count of rape. The sentences are to run concurrently and time spent on remand awaiting sentence is to be taken into account in computing the sentence.

Rita Joseph Olivetti
High Court Judge
British Virgin Islands