SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP 2007/001

BETWEEN:

DWIGHT DOOKIE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh Rawlins — Chief Justice
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mde.Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Mondesir and Mr. Lorne Theophilus for the Appellant
The Director of Public Prosecutions (Mrs. Victoria Charles-Clarke) for the Crown

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2007: October 29; November 26;
2008: January 7; November 19.

Criminal law – rape – sentencing guidelines – aggravating and mitigating factors – pre-sentence report

The appellant was convicted of rape of a girl of 17 years, to whom at the time of the offence the appellant had been a good friend and confidant. The appellant, who was of previous good character, was sentenced to 15 years' imprisonment. The sentencing decision was taken immediately upon the return of the jury's guilty verdict, the judge having determined that a pre-sentence report was unnecessary. The appellant appealed against conviction and sentence. The conviction was upheld on appeal and the decision on sentencing reserved pending receipt of a pre-sentence report and the submissions of counsel.

Held: allowing the appeal against sentence and substituting a sentence of 7 years imprisonment:

(1) The court, in determining the sentence to impose on a conviction after a trial for an offence such as rape, should have regard to the sentencing guidelines in R v Winston Joseph and Others. These guidelines indicate the starting sentence for

such offences and suggest increases or decreases in sentence according to the degree by which the commission of the offence was aggravated or mitigated by certain factors. Except where there is good reason to do otherwise a judge will always do well to approach sentencing from that starting point.

(2) An appellate court should not lightly interfere with the sentence imposed by a trial judge when the appropriate guidelines have been followed. In the instant case, it is clear that the sentencing guidelines were not followed so that a reconsideration of the sentencing decision was justified.

(3) The guidelines indicate that the starting sentence on a conviction for rape after a trial should be 8 years' imprisonment. In the present case, the absence of aggravating factors and the presence of a mitigating factor (the appellant was a first time offender) meant there was no justification for imposing a sentence heavier than the starting sentence of 8 years. In fact, the mitigating factor of the appellant's previous good character justified a sentence lower than the starting sentence.

R v Winston Joseph and Others Saint Lucia Criminal Appeals Nos. 4, 8 & 7 of 2000, decision re-issued 21 October, 2001 followed.

(4) Whether or not required as a matter of law, there are good reasons for a judge to require and await the preparation of a probation report. Deferring sentence may be particularly appropriate where the judge is thinking, as he approaches the sentencing phase, of imposing a sentence that is heavier than the starting sentence.

JUDGMENT

[1] BARROW, J.A.: Shortly after hearing the appeal in this matter against conviction and sentence, this court dismissed the appeal against conviction but reserved its decision on the appeal against the sentence of 15 years' imprisonment for rape. The report of the probation officer and the submissions of counsel having been received we now determine the issue of sentence.

[2] The facts surrounding the rape are all too familiar to the courts (but this makes the crime no less harrowing to an individual victim). The virtual complainant was 17 years of age at the time. She had known the appellant for about 5 years. The appellant was then 22 years of age. They were good friends and he was her confidant. They used to meet nearly every Saturday. On the day of the rape, 8th

April 2003, he telephoned her and she left home and met him. After she had accompanied him to the barber and they had lunch, the appellant stopped the bus in which they were travelling and explained that he did so because he wanted to show her where he lived. He took her to his home. She knew he had a house mate who was expected to be home shortly. She met a sleeping child in the house. Therefore, she remained trusting. He persuaded her to enter his bedroom. He forced himself upon her and raped her. After the rape he asked and she confirmed that she was previously a virgin. He told her he would not have done that to her if he had known. Later that evening, he telephoned her at home and told her he was sorry and repeated that he would not have done that if he had known.

[3] After the jury returned its verdict of guilty the judge proceeded straight away to hear counsel in mitigation and then to sentence the appellant. The judge responded to the Director's inquiry whether he would like a pre-sentencing report by stating it was not necessary. In pronouncing sentence the judge mentioned a number of factors. He stated that rape was prevalent in Saint Lucia, the appellant had planned what he did, it was a vicious attack on a young girl, and the appellant had turned a deaf ear to the girl's cries for the appellant to stop and her pleas for help. The judge said he always set his face like stone against the offence of rape and anyone who came before his court and was convicted of rape would feel the full force of the law and will be dealt with "very severely", "of course, within the perimeters of the law." The judge referred to the appellant's dismissive statement to the family when they confronted the appellant and said he did not see any remorse in the appellant. The judge considered the traumatic effect of rape. He considered the maximum sentence for the offence was life imprisonment. He considered this was the appellant's first conviction. The judge said he would impose a lenient custodial sentence of 15 years.

[4] It was because the individual conceptions of judges of what is a lenient or a severe sentence in sexual offences varied widely that Byron CJ found it necessary to

provide sentencing guidelines for such cases in R v Winston Joseph and others.[1] In the three cases that were the subject of that decision a sentence of 8 years had been imposed for the offence of carnal knowledge of a girl 12 years of age, a sentence of 15 years had been imposed for incest by a father with his 14 year old daughter, and a sentence of 30 years imposed for rape. The expressed purpose of the court in the Joseph case was to give guidance on sentencing in sexual offences with the intention of promoting consistency in the approach to sentencing. The court appreciated:

> "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".[2]

The court was also conscious that:

> "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."[3]

[5] In the Winston Joseph decision Redhead J.A. and Archibald J.A. [Ag.] agreed with Byron C.J. that the starting sentence on a conviction for rape after a trial should be 8 years' imprisonment. The Chief Justice suggested the following range of sentences according to the features of the particular rape:

> "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.
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> 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.
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> 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.
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> iv. Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder and where

[1] Saint Lucia Criminal Appeals Nos. 4, 8 & 7 of 2000, decision re-issued 21 October 2001
[2] At paragraph [10]
[3] At paragraph [11]

> 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."
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> "[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."

[6] In the instant case there was an absence of any of the more common aggravating factors identified in the Winston Joseph case. The aggravating factors that were identified in that case, and that are not present in the instant case, included physical or psychological suffering from a sexual assault, abhorrent perversions such as buggery or fellatio, violence beyond that inherent in the commission of the offence, repetition of the offence, previous convictions of the defendant for serious offences of a violent or sexual nature, that the victim has become pregnant as a result of the crime and that the victim is very young or very old. Although the victim in this case was only 17 years of age, she is treated in law as capable of consenting to sexual intercourse and for that reason her age should not be regarded as an aggravating factor, although it should not be disregarded as part of the overall consideration of the case.

[7] The sole mitigating factor present in the instant case was that the appellant was a first-time offender. Other mitigating factors identified in the Winston Joseph case on a conviction for rape, but which are not present in this case, include where the offender is a youth and where he enters an early guilty plea. The appellant was not a youth but, as with the age of the victim, some regard may be paid to the fact that he was not a more mature person.

[8] Had the judge addressed his mind to the Winston Joseph sentencing guidelines he would have begun with a starting sentence in mind of 8 years' imprisonment for a rape with no unusual features. He would have considered and concluded that there was none of the more common aggravating factors in the case. Therefore, the judge would have recognized there was no legal basis for imposing on the appellant a sentence greater than 8 years' imprisonment. Unfortunately, the judge made no reference to any aspect of the Winston Joseph sentencing guidelines. I have not the slightest doubt this judge was aware of that case and those guidelines. But the judge gave no indication that he bore them in mind when he was passing sentence in this case. Not only did the judge give no indication he had the starting sentence in mind; on the contrary, it is clear that the judge's departure point was the maximum penalty for this offence. The judge twice adverted to the maximum (erroneously, as being 15 years imprisonment, in the first reference). The maximum is relevant for fixing the starting sentence in a case where there are no aggravating or mitigating factors. As this court has stated, the maximum is not the starting point in determining the sentence to impose .[4] This is because the maximum sentence may only be imposed in a case of the worst instance of the commission of the offence. This was the premise of the Winston Joseph case which identified the starting sentence for sexual offences where there were no aggravating factors and suggested increases in sentences according to the degree by which the commission of the offence was aggravated by certain factors.

[9] The sentencing process in the instant case might have benefitted from an adjournment of sentencing for a later date, to allow a pre-sentence report to be prepared. It is now the law in Saint Lucia that a judge must obtain a pre-sentence report, unless, on an offence triable only on indictment, he considers one unnecessary.[5] Even in other jurisdictions where there is no legislation to that effect there are good reasons for the judge to require and await such a report.

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[4] Kenneth Samuel v R St Vincent and the Grenadines Criminal Appeal No 7 of 2005, at paragraph 20 (judgment delivered 28 November 2005)

[5] Section 1098, Criminal Code of Saint Lucia 2004

The inquiries that a probation officer makes enable him or her to provide a report that reveals to the court the distinct character of an offender, whether good, bad or indifferent. In this case the report that was provided to this court showed a decent and well regarded young man who presents no danger to society and seems a suitable candidate for rehabilitation. As a matter of fairness a convicted person is entitled to have this sort of information placed before a judge to inform the judge's overall consideration of what sentence is appropriate. There is a degree of difference between simply treating a convicted person as having no previous conviction and positively treating him as a person of good character before he committed the offence.

[10] Another good reason for deferring sentencing is that the time it takes for the report to be obtained also gives the judge time to distance himself or herself from the emotions of the case. It is natural and appropriate that judges should be sensitive to the impact of a crime upon a victim and a judge will often be exposed to a lot of raw emotions in a rape case. But it is always the duty of a judge to be balanced in his conduct of a case and no less so with a rape case. When the judge returns to the case after receiving the report he or she is likely to be more dispassionate and more able to see not only the need to do justice to the victim but also to the convicted person.

[11] Deferring sentencing may be particularly appropriate where the judge is thinking, as he approaches the sentencing phase, of imposing a sentence that is heavier than the starting sentence.

[12] It is not a good departure point for arriving at an appropriate sentence for a judge to begin with his attitude or disposition to the particular crime. A metaphorical setting of the judicial face in stone against a person convicted of rape conveys the image of judicial eyes and ears of stone. No doubt an unseeing and unhearing disposition was not what the judge brought to this particular sentencing exercise and it is not what he meant to convey. It would, therefore, have been better if he

had started by adopting the established Winston Joseph starting point. Judges will always do well to adopt the conventional approach to sentencing except where there is a good reason to do otherwise. Integral to adopting that approach is that it permits and requires a judge to give his or her reasons for imposing a particular sentence and a reasoned decision, because it is more transparent and intelligible, will more readily be seen to be fair.

[13] The prevalence of sexual offences in Saint Lucia requires the court to be mindful of the important public dimension of criminal sentencing, which includes protecting the public by punishing the offender, or reforming him, or deterring him and others, or preventing him from committing further crime, or all of these things. The court needs to be mindful, as well, of the importance of maintaining public confidence in the sentencing system. However, those considerations must be balanced by the core consideration that the sentence imposed should be no longer than is necessary to meet the penal purpose that the court intended.[6] Sentencing, it must be acknowledged, is essentially subjective even when appropriate guidelines are followed. An appellate court should, in such a situation, not lightly interfere with the sentence imposed by a trial judge.

[14] In the instant case, however, the notes of the proceedings reveal the considerations that informed the judge's sentencing and it is clear the sentencing guidelines were not followed. Had they been followed, the judge would have appreciated that the absence of aggravating factors and the presence of a mitigating factor meant there was no justification for imposing a sentence heavier than the starting sentence of 8 years. Indeed, the mitigating factor of the appellant's previous good character justified a sentence lower than the starting sentence.

[6] See Archbold 2003 5-147

[15] I would therefore allow the appeal against sentence. I would substitute a sentence of 7 years imprisonment.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]