

BRITISH VIRGIN ISLANDS

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

BVIHCR2011/0005

BETWEEN:

THE QUEEN

-v-

RICHARD FINNEGAN

Appearances:

Ms. Jude Indra Hanley, Crown Counsel, DPP Chambers for the Crown:
Mr. Stephen Daniels of V.E. Malone & Co. for the Defendant

2011: February 27, March 03

2011: March 04, April 14

JUDGMENT ON SENTENCING

(Criminal Law – Defendant pleaded guilty to bigamy – Impeccable previous record – Case appears to be one of personal folly rather than deception – Prison Overcrowding Sentencing guidelines)

Introduction

- (1) **HARIPRASHAD-CHARLES J:** On 27 February 2011, the defendant, Richard Finnegan pleaded guilty to bigamy¹ and not guilty to giving false information to a person employed in the public service.² The Crown offered no evidence on the latter charge which was subsequently dismissed.

¹ Contrary to section 142(1) of the Criminal Code, 1997 (Act No. 1 of 1997) of the Laws of the Virgin Islands.

² Contrary to section 110(a) of the Criminal Code, 1997 (Act No. 1 of 1997) of the Laws of the Virgin Islands.

- (2) A sentencing hearing was held on 3 March 2011. The following day, Mr. Finnegan was sentenced to a fine of \$20,000 to be paid by 4:30 p.m. on the same day or in default of payment, 4 months imprisonment. The court further ordered that the purported marriage solemnized on 27 February 2010 be declared null and void and of no legal effect. The Registrar was also directed to cancel Marriage Certificate No. 056123 which she issued on 14 April 2010.
- (3) This is the first bigamy case in the British Virgin Islands ("the Territory"). As such, I feel duty-bound to reduce my oral reasons to writing. I do so now.

The brief facts

- (4) Mr. Finnegan is a Canadian national who currently resides at Cane Garden Bay, Tortola in the Territory. The virtual complainant is Zoe Tydeman of Nanaimo, British Columbia, Canada. On 2 August 2003, Mr. Finnegan and Ms. Tydeman were married in Victoria, British Columbia. The marriage was registered at the Vital Statistics Agency of British Columbia.
- (5) On 25 February 2010, Mr. Finnegan and one Carla Lacario visited the Attorney General's Chambers in the Territory and applied for a marriage licence from Ms. Violata Clyne, a staff at those Chambers. Mr. Finnegan and Ms. Lacario completed the marriage licence application form with one Shironda Pemberton present as a witness.
- (6) Before filling out the application form, Mr. Finnegan was orally asked whether he was married before. He replied that he was not. He also filled out the application form indicating that he was never married and signed it. Ms. Lacario and Ms. Pemberton also signed. Ms. Clyne checked their passports to ensure that the information stated on the application form corresponded with the passports. Thereafter, Ms. Clyne signed the application form.
- (7) The same day, a marriage licence was issued by the Deputy Governor to Reverend Paul Ricketts. Two days later, Reverend Ricketts solemnized the marriage between

Mr. Finnegan and Ms. Lacario at Nanny Cay, Tortola. A marriage certificate was duly issued thereafter.

- (8) On 13 April 2010, a report was made to the police indicating that Mr. Finnegan was still married to Ms. Tydeman and that the marriage had not been dissolved nor declared to be void nor a decree of nullity made by a court of competent jurisdiction.
- (9) On 29 April 2010, Detective Constable Antoine met Mr. Finnegan at his place of employment. He was informed of a report made against him by Ms. Tydeman. As a result, Mr. Finnegan was escorted to the Road Town Police Station where he was questioned. He was cautioned and he replied "I am married to Zoe but now married to Carla." A cautioned audio interview was conducted. Mr. Finnegan admitted that he was legally married to Ms. Tydeman who is still alive; that their marriage had not been dissolved nor declared to be void nor was any decree of nullity made by a court of competent jurisdiction. He also admitted that he made an application to obtain a marriage licence on 25 February 2010 and that he married Ms. Locario two days after he obtained the marriage licence.
- (10) Mr. Finnegan was formally arrested and charged with the offence of bigamy and giving false information to a public officer.

Plea in mitigation

- (11) Learned Counsel, Mr. Daniels who appeared for Mr. Finnegan pleaded for leniency on behalf of his client. He submitted that the circumstances of the case do not require the imposition of a custodial sentence. Counsel alluded that Mr. Finnegan had no previous convictions, he had pleaded guilty at the first available opportunity and he was, by no means, a danger to the public. Counsel relied heavily on the case of **R v Trigger Alan Mike Seed and Philip Stark**.³ The Lord Chief Justice stated (at paragraph 6):

"Unless imprisonment is necessary for the protection of the public the court should always give consideration to the question of whether the aims of rehabilitation and thus the reduction of crime cannot better be achieved by a

³ [2007] EWCA 254; [2007] 2 Cr. App. R. (s) 69.

fine or community sentence rather than by imprisonment, and whether punishment cannot adequately be achieved by such a sentence.... Enforcement of fines is now rigorous and effective and, where the offender had the means, a heavy fine can often be an adequate and appropriate punishment.”

Submissions by the Crown

- (12) Learned Crown Counsel, Ms. Hanley identified the mitigating and aggravating factors in this case. She also cited four authorities from the United Kingdom (“UK”) where the UK courts have imposed custodial sentences for bigamy. Learned Crown Counsel urged upon me to do likewise and impose, however slight, a custodial sentence, to mark the gravity of the offence.

Mitigating Factors

- (13) The Crown correctly identified three mitigating factors namely:
- (1) Mr. Finnegan is of previous impeccable character;
 - (2) He pleaded guilty at the first available opportunity; and
 - (3) Bigamy is not a prevalent offence.

Aggravating Factors

- (14) The Crown also correctly recognized the following two aggravating factors:
- (1) This is the first reported case of bigamy in the Territory, an offence which is clearly repugnant to the morals of society; and
 - (2) Mr. Finnegan lied to or deceived the Attorney General’s Chambers to obtain a marriage licence; when he *knew* full well that the divorce proceedings between himself and Ms. Tydeman were not complete.

UK Authorities

- (15) The leading case on bigamy is **R v Crowhurst**.⁴ In that case, the marriage was not consummated and lasted only one week. The woman’s evidence was that she would

⁴ [1979] Crim. L.R. 399.

not have married the offender had she known that he was still married. Waller L.J. noted:

"It appears to this Court the sentence for bigamy must vary very much with the particular circumstances of the case. In many cases of bigamy, it is possible to deal with the case by some sentence which does not involve deprivation of liberty. In other cases, there may be a clear deception which has resulted in some injury to the woman concerned; in which an immediate custodial sentence must be passed, and the length of that sentence must depend greatly on the seriousness of the injury that has been done."

- (16) The Court of Appeal reduced an 18 month sentence to 4 months.
- (17) In **R v Arthur William Ballard**,⁵ the Court of Appeal reduced a sentence of 5 months to 3 months. The Court reiterated that **a custodial sentence should be given where the innocent party has been deceived and suffered some injury** [emphasis added]. The Court found that the defendant had caused distress to the victim, being his second wife. The offence was not discovered until after the second wife had been separated from the defendant and this was considered to have lessened the distress.
- (18) In **R v Bajlu Islam Khan, Karen Mary Kennedy**,⁶ Mrs. Kennedy was legitimately married in 1990. In July 2002 and again in November 2002, she married two separate individuals, both of whom were Bangladeshi nationals. The marriages were shams with the object of defeating immigration laws. She was sentenced to 12 months imprisonment for one count and 15 months imprisonment for the second count; to run consecutively. The court took into account the circumstances that Mrs. Kennedy had initiated matters by going to the police and making admissions, she made early guilty pleas and she was willing to give evidence to the Crown. However, the Court of Appeal was of the opinion that there was "nothing impeachable in the sentence imposed on Mrs. Kennedy." The Court stated that "deterrence is a legitimate aim of judicial disposition" and "the sentencing remarks properly underlined the evil behind these indicted offences, that is, flouting of immigration provisions."

⁵ [2007] 2 Cr. App. R. (S) 94, C.A.

⁶ [2004] EWCA Crim. 3316, CA.

- (19) Finally, in **R v Edward Cairns**,⁷ the defendant married a Zimbabwean national in August 1994 in Liverpool. A few weeks later, he married a Nigerian national in London. Both marriages were contracted for payment, so as to allow the women to evade immigration control. The defendant pleaded guilty and was sentenced to 15 months imprisonment. The Court of Appeal reduced the sentence to 9 months noting: *"...in seeking to avoid immigration controls and marrying for money for such a purpose, must require a deterrent sentence and a custodial sentence is inevitable and wholly correct in principle."*

Court's considerations

- (20) Bigamy is the crime of marrying while one has a wife or husband still living, from whom no valid divorce has been effected. In colloquial terms, it is having one wife too many.
- (21) Section 142 (1) of the Criminal Code of the Territory makes bigamy an offence. It carries a maximum penalty of 7 years imprisonment. 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 cardinal principles of sentencing which could be summed up as "retribution, deterrence, prevention and rehabilitation."
- (23) There is a dearth of reported local or regional cases on sentencing for the offence of bigamy. The UK cases referred to by the Crown serve to accentuate the principles that the level of injury caused to victims by the defendant's deception and the deliberate avoidance of immigration controls are serious aggravating factors in the determination and imposition of a custodial sentence.⁸
- (24) The present case has nothing to do with the avoidance of immigration controls. In addition, the Crown adduced no evidence to show that the second wife suffered any injury. So, neither of these factors is important here. In passing, I should say that the

⁷ [1997] 1 Cr. App. R (S) 118, CA.

⁸ "Bigamy" in Crown Prosecution Services Sentencing Manual

second wife was present at court throughout these proceedings. She was called upon to speak but she declined. But, from my observation, she stood unwaveringly by Mr. Finnegan's side. When I imposed the fine, she indicated to me that she was able to pay it forthwith.

- (25) Mr. Finnegan's bigamy was reported by his first wife, who had already initiated divorce proceedings. In her statement to the police, she documented a 6-year marriage replete with myriad incidents of deception and mendacity. Mr. Finnegan made numerous promises to return to Canada to be with Ms. Tydeman but, on every occasion, he found an excuse for not doing so. Eventually, Ms. Tydeman got drained of his excuses and deceptions.
- (26) On 28 August 2009, she instituted a Writ of Summons for divorce in the Supreme Court of British Columbia. In her particulars, she alleged that the parties ceased to cohabit on or about April 2008. Thereafter, it became difficult to serve Mr. Finnegan. On 24 February 2010, a Judicial Case Conference was held.
- (27) Three days later, Mr. Finnegan contracted the second marriage to Ms. Locario. Understandably, Ms. Tydeman would have been indignant upon learning of this new marriage. However, the principles in **Ballard**, her prior initiation of dissolution proceedings must be a factor in lessening the distress which Mr. Finnegan caused her. She was not living with him at the time and she had already instituted divorce proceedings with the view of bringing their union to an end.
- (28) A highly relevant factor in this case is Mr. Finnegan's willful deception of the Government. He was a party to a marriage which had not yet been dissolved, yet on the application form, he indicated that he had "never been married". This was a blatant lie made with the intention to induce a public officer to process his application for a marriage licence.
- (29) In **Seed and Stark** (supra), the appellant, Stark was an American citizen living in the UK. He met his wife Marjorie in the United States in the 1980's and returned with her

to the UK where they married in 1990. At the time he was 35 and she was 51 and a divorcee. Their relationship deteriorated and the appellant obtained employment away from his home in Essex. He often returned to his wife in Essex at the weekends. In the summer of 2002, the appellant commenced a relationship with Marina, a Russian national. He made several trips to Russia and eventually, Marina moved to the UK. In 2002, the appellant initiated proceedings for divorce against Marjorie and obtained a decree nisi prior to his marriage to Marina. However, he had abandoned those proceedings before obtaining a decree absolute following a diagnosis that Marjorie was suffering from breast cancer.

- (30) In April 2003, he went through a purported marriage ceremony in the UK. Thereafter, he and Marina lived together as if they were husband and wife. Marjorie became aware of the appellant's new relationship. He continued to return to stay with her every other weekend in Essex. Marina was aware of Marjorie but understood that the couple was divorced. That latter fact is one that the appellant himself admitted. It is the only (albeit significant) element of deception in the case.
- (31) Neither woman made a complaint. In summer 2004, someone reported the matter to the police and the appellant was arrested. He made admissions and pleaded guilty. He was committed to Crown Court for sentencing but panicked and fled to take up a job in the United States. Both women went with him. He cohabited with his second wife and established a residence for his first wife nearby. He continued to support both of them financially. Upon a return to England to attend the funeral of his son, who had died in tragic circumstances, the appellant was arrested at the funeral for the charge of bigamy and failing to surrender to bail. Neither woman agreed to testify. The first wife telephoned defence solicitors expressing deep concern for the outcome. The second wife wrote the appellant in prison expressing her love and her eagerness to see him again.
- (32) The Court of Appeal took the view that the circumstances of the case did not demand a custodial sentence; an alternative should have been considered. Nonetheless, the Court went on to say that the choice of an alternative was not, however,

straightforward as the appellant had moved to the United States and was only in the country to attend his son's funeral. But, had the charge of bigamy been the only one which the judge had to deal with, a substantial fine would have been a suitable way of disposal of the case.

(33) For the charge of bigamy, the Court of Appeal reduced his sentence from 6 months to 3 months to be served concurrently with the 3 months custodial sentence properly imposed for the serious offence of breach of bail.

(34) The Court of Appeal went on to consider some matters that should be considered when judges determine whether to impose a custodial sentence. The Lord Chief Justice, referring to section 152(2) of the Requirements of the Criminal Justice Act 2003 [UK] noted [at paragraph 3]:

"It requires the court, when looking at the particulars of the offence, to decide whether the "custodial threshold" has been passed. If it has not, then no custodial sentence can be imposed. If it has, it does not follow that a custodial sentence must be imposed. The effect of a guilty plea or of personal mitigation may make it appropriate for the sentencer to impose a non-custodial sentence."

(35) In addition, his Lordship explicated some guidelines with respect to prison overcrowding. At paragraph 1, he stated:

"Once again judges who have to sentence offenders are confronted with the fact that the prisons are full. When they impose sentences of imprisonment –and very often the nature of the offence will mean that there is no alternative to this course – the prison regime that the offender will experience will be likely to be more punitive because of the consequence of overcrowding and the opportunities for rehabilitative intervention in prison will be restricted."

(36) His Lordship reminded us that in terms of prison overcrowding, it is particularly important that we pay close attention to the requirements of both these provisions. In particular, when considering the length of a custodial sentence, the court should properly bear in mind that the prison regime is likely to be more punitive as a result of prison overcrowding.

(37) These dicta are highly relevant here. A few days before this sentencing hearing, I was presented with a paper called "Her Majesty's Prison – Alternatives to Prison Discussion Paper" written by Mr. Richard Holder, the Superintendent of Prison. In that paper he provided information of what the prison population was ten years ago and that "today the prison population stands at 120 and still rising." He stated that:

"This state of affairs is unsafe and poses a real threat to the safety and security of staff and the general public⁹...This overall state of affairs need us to focus our efforts on provision of new accommodation over the next three years or reduce the number of prisoners being sent to prison; unfortunately that decision is outside of the control of the prison authorities¹⁰."

(38) The Court is not oblivious to the concerns of the Superintendent.

(39) All matters considered, I take into account the facts and circumstances of this case. In particular, I note the following: (i) while there was a significant deception of a Government official, the deception was not intended to avoid immigration controls; (ii) the deception could not have caused significant distress or injury to Ms. Tydeman as she had already commenced divorce proceedings; (iii) Mr. Finnegan is not a threat to public safety; (iv) there is no need for rehabilitation, (v) the prison suffers from some degree of overcrowding and (vi) the case appears to be one of personal folly rather than deception, As such, I am of the considered opinion that a custodial sentence is uncalled-for.

The sentence

(40) I hereby sentence the defendant, **RICHARD FINNEGAN** to a fine of \$20,000 to be paid by 4:30 p.m. on 4 March 2011, in default of payment, 4 months imprisonment.

(41) I also order that the purported marriage ceremony solemnized on 27 February 2010 at Nanny Cay, Tortola in the Territory between **RICHARD FINNEGAN** and **CARLA**

⁹ Page 2 of the Paper by Richard Holder, Superintendent of Prison.

¹⁰ Ibid, page 6.

INGRID LOCARIO be declared null and void and that the Registrar-General is directed to cancel Marriage Certificate No. 056123 given under her hand and seal on 14 April 2010.

Indra Hariprashad-Charles

High Court Judge