

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

Claim No. DOMHCR2011/029

BETWEEN:-

THE STATE

-and-

JACHELENA "SPLIFEE" LEWIS

Before:

Her Ladyship Justice Stephenson-Brooks

Appearances:

Mr Gene Pestaina DPP with Mr Clement Joseph and Miss Arthlyn Nesty for the State

Miss Bernadette Lambert with Mr Wayne Norde for the Defendant

21 November 2011

5 December 2011

JUDGMENT ON SENTENCING

1. Stephenson – Brooks J: Miss Jachelene "Spliffee" Lewis was indicted by the Learned Director of Public Prosecutions on the offence of attempted Murder. She has pleaded guilty and is before the court for sentencing.

FACTS

2. The facts on which both side agree briefly is that on the 18th day of May 2006, the defendant gave birth to a baby girl "AL" in a pit toilet owned by her neighbour. The defendant knowingly abandoned the new born baby in the said pit toilet. The baby was found the following day by the neighbour who after he heard the infant crying searched and with the aid of a flashlight found the new born babe.
3. The defendant was examined by a doctor and was found to have just given birth, according to the Doctor judging from the firmness of the uterus as well as the fundal height "SFH", the defendant was pregnant and had an expulsion of the product of conception.
4. The infant was rescued by the Roseau Fire and Ambulance Service and taken to the Princess Margaret Hospital. Baby AL made a recovery and has since been adopted.
5. I wish to point out that the defendant knew the baby was left in the toilet and left her there to her fate, that Baby AL did not die was indeed fortuitous.
6. Are there any mitigating circumstances here? Is there any evidence of the defendant showing any remorse for her actions? What could have prompted Miss Lewis to do such a dastardly thing on the day in question?

The Law:

Section 17 of the Offences against the Person Act¹ states

"Any person who by any means other than those specified in sections 13,14,15 and 16 attempts to commit murder is liable to imprisonment for ten years"

The Pre Sentence Report:

- 7 A Court Ordered Pre sentence report was filed on the 2nd December 2011. According to the report Miss Lewis is 25 years old, and comes from a family filled with incidents of "instability, abuse, illegal activities and struggle during her developmental phase. She was the last of nine children and prior to her mother leaving Dominica to take up residence in St Marteen they all lived together. Her mother left Dominica when she was just eight years old and Miss Lewis was separated from

¹ Chapter 10:31 Revised Laws of the Commonwealth of Dominica (1990)

her siblings at this stage and for the next three years she lived with her oldest sister until she joined her mother and older sister in Antigua. According to the report, whilst Miss Lewis lived with her mother she was subjected to sexual and emotional abuse at the hands of her mother's intimate partners.

- 8 Miss Lewis became a mother at age 16, her first son was fathered by a relationship that she became involved in and maintained from age 13 in Antigua until she left Antigua pregnant at age 16 years, and shortly thereafter she entered into a common law relationship here in Dominica still at the age of 16 years. This relationship lasted four years and she bore her three more children two of whom are alive, one being fostered by a family member, one dying at age five months and the youngest one being the victim in this matter. This relationship we are told was an extremely abusive one and Miss Lewis was a victim of domestic violence and abuse from her intimate partner and she carries visible scars on her body from this abuse.
- 9 Miss Lewis we are told is skilled at deep sea and river diving and she has utilized this skill to provide for her welfare. She has also been involved in a dance group. Miss Lewis has also been involved in the production and sale of crafts to tourist at the Roseau Bay Front and was involved in that activity up until she was remanded to the Stock Farm State Prison.
- 10 The Social Worker interviewed members of Jachlena's family and her former neighbours and according to these sources Jachlena is a nice person who has had a hard life and has been subjected to physical cruelty. That she has in the past company with the "wrong crowd" which could have led to her misguided actions. It is to be noted that even though Jachlena has been exposed to drugs and alcohol she has abstained from same and is not known to use or abuse either.
- 11 The overall assessment of Miss Lewis is that she has had a troubled and traumatic past. Her circumstances, was one of instability within her family setting and that she was subjected to sexual abuse as a child and young teenager, incomplete education and early motherhood. The welfare officer notes that Jachlena was very penitent and hopes to one day ask for forgiveness from her daughter.

Submissions:

By defence Counsel:

- 12 Miss Bernadette Lambert for the defendant in her plea of mitigation on behalf of the defendant² urged the court to temper justice with mercy in sentencing the defendant. Miss Lambert asked the court to take into consideration that Miss Lewis was the tender age of 20 years at the time of the commission of the offence and at that time she was already the mother of three children and that some five years have since elapsed and that she has had this offence hanging over her head for the last five and half years, which made it difficult for her to make any definite plans for the future due to the uncertainty and as to what would happen to her. Counsel also made mention of the stigma attached by the society to this type of offence. Counsel urged the court to consider this as a type of prison sentence in itself.
- 13 Counsel also asked the court to consider that Miss Lewis prior to this incident was someone of good character and was not known to the police neither did she have any previous convictions. That she was currently 25 years of age and the mother of two other children aged 9 and 6 who need her presence in their life. Counsel asked the court to also take into account that Miss Lewis has prior to her remand supported herself and her children by making craft products which she sold to locals as well as tourists on the Roseau Bay front whenever ships were in port. Counsel also pointed out that since she has been on remand Miss Lewis has continued to practice her craft and also took up making cards and other craft products for fellow inmates as well as prison officers to mark birthdays and other special occasions.
- 14 Counsel also informed the Court that the defendant has expressed her deep regret for her actions and that she is appealing to this court for a second chance to be the best mother she can be to her children and to become a productive member of the society.
- 15 Counsel also asked the court to take into consideration that the defendant not only pleaded guilty at the first possible opportunity and as such she did not use up the court's limited resources by pursuing trial but that the record shows that she fully co-operated fully with the police by agreeing to an interview soon after the incident.
- 16 Counsel urged the court to consider that her client was therefore entitled to be given some credit for her guilty plea in keeping with the guidelines and practice in the jurisdiction and made reference to Desmond Baptist –v- The Queen³ and the often quoted dicta of Sir Dennis Byron and to consider imposing a suspended sentence on the defendant for all the mitigating circumstances.

² See Paragraphs 8 to 15 in her written submissions filed on the 2nd December pursuant to order of Court.

³ No 8 of 2003 (St Vincent and the Grenadines)

17 Learned Counsel Miss Bernadette Lambert conceded that the grave aggravating factor in the case at bar is that the defendant is the mother of the victim, in circumstances when she should have been protecting her child and that this case could be said to be an abuse of trust. Counsel urged the court to look closely at the circumstances of the case and inquire as to the defendant's state of mind immediately before, during and after the commission of the offence.

18 Learned Counsel referred to the following regional cases:

- a. Alric Lynch et anor -v- The Queen⁴ where the defendant's were sentenced to 7 and 10 years for the offence of attempted murder. In that case the accused shot at the home of the victims whilst the victims were at home at night. The lights were on in the house and it was found that they would have been able to see the victims at the time of the shooting and they were found guilty by the jury.
- b. Carlton Bedminster et al -v- The Queen⁵, the defendants in this matter were sentenced to 5 and 7 years respectively on the charge of attempted murder. It was noted that these convictions were quashed on a point of law as it regards to identification evidence, Counsel however made use of it as a reference point for sentences for the charge of manslaughter.

By the state:

19 Learned Counsel Miss Arthlyn Nesty on behalf of the State identified the aggravating and mitigating factors in the case and also submitted cases to assist the court in coming to its decision.

The aggravating circumstances identified by the state are as follows:

- a. The breach of degree of trust and care in the relation to mother and child;
- b. The victim may have been left with a psychological effect because of the tragic effect of the offence;
- c. The accused concealed the birth of the child
- d. The intention to abandon the child
- e. An intention to commit more serious harm than actually resulted from the offence

20 The mitigating factors identified by the state were:

⁴ Criminal Appeal No's 4 & 5 of 1996 (Montserrat)

⁵ Criminal Appeal No's 2 & 3 of 2008 (Antigua & Barbuda)

- a. that the accused has been on remand since the 4th day of January 2011 when her bail was revoked
- b. the accused pleaded guilty and did not waste the court's time and expense
- c. the accused is a first time offender.

21 Learned Counsel Miss Arthlyn Nesty made reference to a few cases on sentencing in her submissions. Counsel made reference to:

- (i) The Queen -v- Gary Fleming⁶ in support of the proposition that the guilty plea by the defendant normally attracts a one third reduction on sentence.
- (ii) R -v- Manjit Singh Sandhu⁷ in support of her submission of what the starting point for attempted murder where the parties were closely related that a starting point for attempted murder which reflected the fact that the appellant's severely injured the victim made a full recovery and the victims genuine desire to reestablish her relationship with the appellant. The Court in that matter considered 12 years to an appropriate starting point and after applying the one third discount for the guilty plea was sentenced to eight years in prison.
- (iii) R-v-Andrew Lester Taylor⁸ where the defendant in that matter was found guilty of attempted murder. Briefly in that matter the defendant set fire to a car occupied by a man who he thought was a drug dealer. Davis J said

"In order to achieve proportionality in sentencing for attempted murder a judge ordinary should have regard to the notional minimum term (if not as an exact figure that at least as a range) reflecting that which a defendant might have been expected to receive had he been facing a charge of murder, and having regard to all aggravating and mitigating features. Then ordinarily a notional discount of around one half may be appropriate to be considered in assessing the time that the defendant should actually serve with a view to fixing the determinate term."

⁶ Anguilla Criminal Case #15/2010

⁷ (2009) 2 Criminal Appeal Report 10

⁸ [2007] EWCA Crim 2755, [2008] 2 Cr App Report (S) 9

“However in the judgment of this Court, even adopting that approach, as ordinarily will be appropriate, that should not result in an unduly rigidly mechanistic approach. ... the judge should still sit back and ask whether the resulting sentence does indeed properly reflect the gravity of the attempted murder in question, having regard to all the circumstances both relating to the offence (including the question of whether any weapons had been used, the extent of the injuries which had been suffered and so on) and also relating to the offender and to any personal mitigation.”

(iv) R-v-Benjamin⁹ in support of her submission that there are five objects which comprise the aims of punishment which are:

- “[i] Retribution
- [ii] Deterrence of potential offenders
- [iii] Prevention and
- [iv] Rehabilitation

Also in support of her submission that the Court in the case at bar ought to consider particularly the provisions of the Convention of the rights of the Child and the breach of trust by the mother (the defendant herein) and also retribution and deterrence when considering what sentence to impose on Miss Lewis.

22 Counsel pointed out to the court that according to the presentence report presented Miss Lewis in the case at bar has made no attempt to establish contact with her daughter in the face of the statement by the welfare officer that this could have been possible with intervention from the welfare department. It is my view that baby AL is now adopted and lives with her adoptive family and really this may not be necessarily the best thing for the child.

Court’s Analysis and Conclusion

⁹ (1964) 7 WIR 459 (Court of Appeal of Trinidad & Tobago)

- 23 This offence is a serious one. One that involves a breach of trust, a mother's role in the life of her new born daughter is to take care of her, make her comfortable, to protect her and to give her the best life that she the mother could possibly give her. Instead in this matter, the defendant gave birth to her daughter who was obviously very healthy or she would not have survived the ordeal presented to her in the first few hours of her life and left her in an outside toilet in the dark. Fortunately for baby "AL" the neighbour went out to the toilet heard her cries looked for her with the aid of a torch light and was able to rescue her. We are told she has made a full recovery and lives a normal happy life that all little girls deserve.
- 24 In determining the sentence to be imposed I am required to take into consideration the aggravating and mitigating factors, the individual circumstances of the case, factors which evidence culpability and factors that may evidence or indicate more than usual degree or level of harm. I will also take into account the character of the defendant, the contents of the Presentence report, the submissions made by Learned counsel on both sides of this case.
- 25 The presence of the aggravating features will attract a more severe sentence and on the other hand the presence of the mitigating factors will attract a less severe sentence. In offences such as attempted murder the court has to consider whether there are factors which indicate a higher level of culpability on the part of the offender. The court would consider factors such as whether the offence was committed whilst on bail for other offences, where there is failure on the part of the defendant to respond to previous sentences whether the offence was racially or religiously aggravated. The only feature that is present in the case at bar is that there was an abuse of the position of trust in that the victim in this case was the new born infant daughter of the defendant.
- 26 Learned Counsel Miss Nesty quite correctly in my view made reference to Article 6 of The Convention of the rights of the Child 1989 which Dominica ratified on 13 March 1991. which provides that:

"Children have the right to be protected from being hurt and mistreated physically or mentally ..."

The Court is in light of this provision also obliged to take into consideration Dominica's responsibilities towards its children and the need to send the message out that they must be protected from being hurt.

- 27 The Court is also to take into consideration whether or not there are factors indicating a more than usually serious degree of harm. In the case at bar the victim was particularly vulnerable and the location of the offence is also a cause of concern in that the accused knew that she was pregnant and that she must have known that she was about to give birth to her baby and that she went to the outside toilet which is not in the house or in a place where people would not necessarily frequent.
- 28 The law has vested a wide discretion on the court on sentencing to ensure that the sentence is appropriate, that justice is done between the defendant/perpetrator and the victim. The court must ensure that the punishment imposed reflects the justice of the case having regard to the facts of the case.
- 29 When sentencing a defendant the court engages itself in a two-stage process which requires consideration of both aggravating and mitigating factors. The Court must seek to determine what sentence the seriousness of the offence itself merits.
- 30 Further, can that sentence be reduced in light of the mitigation relating to the offender? In determining the appropriateness of sentence, the court must apply what is now considered to be the four classic principles of sentencing namely *retribution, deterrence, prevention and rehabilitation* as identified in R-v-Sergeant¹⁰ and which have been recognized and adopted and applied by the Courts in our jurisdiction and by Byron J in the leading Eastern Caribbean case in this regard of Desmond Baptiste –v- R¹¹
- 31 There are also sentencing guidelines from our Court of Appeal which provide the court with useful assistance, however the courts are encouraged not to be slavishly follow them as each case invariably turns on its own peculiar facts. The reported cases and guidelines serve to assist the court and to provide benchmarks for sentencing for specific offences. However it is for each court to determine what is appropriate in the case before it. The Key to arriving at the appropriate sentence is proportionality.

¹⁰ 60 Cr App R 74 per Lawton J

¹¹ Criminal Appeal No. 8 of 2003 (St Vincent & The Grenadines)

- 32 A message must be sent out to young mother's out there in the community that abandoning your new born infant to his or her own fate and possibly death or to suffer serious harm is not the way to go. In Dominica there is a functioning and efficient Welfare Department that serves to protect children at risk and which is available to counsel and assist mothers in need. The actions of Miss Lewis in this matter were just not acceptable.
- 33 I also consider particularly the objective of rehabilitation which must be considered. The Social Inquiry report presented to this court spoke to the Defendant being involved in craft making prior to her incarceration and to the fact that she continued her venture and activities since she has been remanded at the Stock Farm State Prison, mention was also made to the fact that the defendant is skilled at deep sea and river diving, evidencing the fact that the defendant is equipped with skills that would allow her to maintain herself in an honest manner. However there is the obvious need for the defendant to be equipped with the social skills to deal with her social life, how to make decisions in difficult times, on the importance of staying away from bad company and persons who could influence you negatively to your detriment, effective parenting skills and skills to assist her to overcome the negative impact of her offence and to be properly reintegrated in to society. I am of the view that Miss Lewis is a good candidate for rehabilitation and with the correct counselling she can yet be a good citizen.
- 34 I take into consideration and wish to note that the defendant has no previous convictions and that in spite of being surrounded by lawlessness and having a life which has been filled with "incidents of instability, abuse, illegal activities and struggles during her developmental life" ¹²the defendant has managed to abstain from using illegal drugs, smoking cigarettes and consuming alcoholic beverages. She is to be commended for this.
- 35 I also take into consideration that at the time of the commission of this offence the defendant was involved in a very abusive relationship, she was a young woman who from all appearances motherhood was thrust upon her as two of her previous children were taken from her as being children in need of care and protection which to my mind speaks to her inability to function as a mother also the fact that she lost a child previously and probably never dealt with that loss. From the facts presented in the Social Inquiry report Miss Lewis was in a state of denial as it regards this

¹² Extracted from the Social Welfare Report prepared by Delia Giddings Stedman, Probation Officer and filed in this matter.

pregnancy at one stage. Her circumstances spoke to a person who clearly was not acting in a cogent and reasonable manner and whose actions even though despicable were not made in circumstances that would have lent itself to rational thinking and responsible actions.

36 This court notes and agrees with the statement made by Mrs Giddings Steadman in her report that “Jachlena’s present situation is as a result of a despicable act of violence which placed the innocent life at risk. ... That Jachlena needs to be made aware of the severity of her actions and made to bear the consequences of her actions. ...”¹³.

37 The Court also takes into account that the defendant has expressed her remorse through the social inquiry report and through her counsel and in sentencing Miss Lewis I am also taking into account her circumstances at the time of the commission of the crime.

38 It is not disputed that Jachlena has been on remand since January 2011, and the court will take into consideration the time she has spent on remand.

The sentence:

39 Having regard to all the fact and circumstances in this case and evaluating the aggravating and mitigating factors I am of the view that a custodial sentence would be appropriate. Considering that the starting point should be 7 years in the case of attempted murder such as the present case, also applying the discount earned by the guilty plea and taking all the matters and factors into consideration and the court has also taken into consideration the fact that Miss Lewis has been on remand for approximately 11 months awaiting her trial. I sentence you Jachlena Lewis to five years in prison to be served as follows:

- a. You are to serve three years less the 11 months already spent on remand
- b. And thereafter the remaining two years is to be suspended for two years

40 I also order that Miss Lewis is to receive counselling on cognitive thinking and life style as well as parenting skills.

41 I acknowledge the assistance of Miss Aurthlyn Nesty State Counsel on behalf of the Director of Public Prosecutions and Miss Bernadette Lambert on behalf of the Defendant.

M E Birnie Stephenson – Brooks
High Court Judge

¹³ ibid