BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 20 of 2011

BETWEEN:

THE QUEEN

v

BERNARD CHARLES

Appearances: Sarah Benjamin Senior Crown Counsel for the Director of Public Prosecutions
Herbert McKenzie of Orion Law for the Prisoner

2012: March 22
May 14

JUDGMENT ON SENTENCING

(Criminal law – Sentencing – Indecent Assault – girl under the age of 13 – Criminal Code 1997 s 124(1) as amended by s 4 of Act 7/2002 – Prisoner changed plea to guilty after trial had commenced – principles to be considered – custodial sentence imposed)

[1] **Joseph-Olivetti J:-** The Prisoner, Mr. Bernard Charles was charged with 3 counts of indecent assault with a girl under the age of thirteen. On his arraignment he pleaded not guilty. However, after his trial had commenced and evidence led he changed his plea to guilty on count 3 on the second day of his trial immediately after the examination in chief of the victim. The Crown chose to accept his plea and offer no evidence on the other two counts. Unusually, his bail was continued pending sentencing.

Facts

[2] The agreed facts can be summarised in this way. The girl, we shall call her "A" for her own protection, was aged 9 when she first met the Prisoner. He was her mother's boyfriend. He quickly assumed the role of father to the child. As a result the mother, having implicit trust in him, often allowed the child to stay overnight at his house so that he could take her on boating day trips with him. He was a sea captain. On the date in question the Prisoner drove to the child's house, he

stayed outside and sent a message to her with a neighbour to the effect that he was outside waiting for her. The child came out bearing birthday gifts for him – a popsicle stick boat and a hand drawn picture. He told her he had some of his birthday cake at home for her and her mother consented to her going with him.

[3] At his house the Prisoner wrapped up a slice of cake and some candy cane for the child. He then called her into his bedroom. The child went. In the bedroom the Prisoner asked her to remove her tights and panties and she did so. He then took his penis out and began to rub it on the child's vagina. He ceased after 3-5 minutes and went into the bathroom. On his return he asked the child whether she wanted some trail mix. She declined and he took her home. He also sent beers and apple juice to her mother. A was then twelve years old. I might add that the assault was only discovered after A drew a picture which her mother thought most inappropriate and this sparked off the inquiries which led to these charges against the Prisoner.

The Court's Considerations

[4] I have taken into account the Crown's submissions and the plea in mitigation made on behalf of the Prisoner including the testimony, both oral and written, about the Prisoner's prior good character and the Prisoner's verbal apology from the dock.

[5] By virtue of section 124(1) (b) of the Criminal Code 1997 as amended by section 4 of Act 7/2002, the maximum penalty for this offence is 10 years imprisonment.

[6] The cases referred to by the Crown include local, regional and English authorities. The relevant guidelines are contained in the Court of Appeal decision of **Winston Joseph et al v The Queen (2000)** emanating from St. Lucia. This case indicates the most common aggravating and mitigating factors which normally fall to be considered in such cases and reiterates that the court must consider the particular circumstances of each case and conduct a balancing exercise to determine a just sentence.

[7] The aggravating factors here present are as follows. A was 12 years old, hardly to be considered a sexual figure by any normal, reasonable person. The Prisoner was considerably older than A and further he committed a breach of trust as he was the mother's boyfriend and acted as a father to A.

[8] In addition, having regard to the victim impact statement I have no doubt that A has suffered psychological damage although no physical harm. Fortunately, she is receiving counselling and the indication is that in time she will be able to come to terms with and deal with her trauma. (I note to our society's disadvantage that her mother reports that the system has failed the child in that the Police in the particular area where they resided was insensitive and so too were the child's teachers. We will not speak of the co-workers attitude to the mother only to say that she reports that they were inclined to blame the mother rather than the Prisoner who was also a co-worker. One co-worker, the Prisoner's aunt gave evidence denying these allegations. These allegations, if true, reflect an uncharitable, blinkered and ignorant view. I accept the mother's statement that she felt so beleaguered that she had to change A's school in order to protect A.)

[9] Further, the Crown pointed out that such offences are becoming more prevalent in the Territory and although no statistics were provided, doubtless because of the costs and attendant difficulties in doing so, the court can certainly have regard to the Assize lists for the past five or more years which speak for themselves and to the fact that the Crown cited 9 such convictions from 2000 to the present.

[10] The only extenuating factors are the Prisoner's good character prior to the offence, his guilty plea, albeit somewhat late and the fact that he expressed remorse at his sentencing hearing.

[11] Learned counsel for the Prisoner, Mr. McKenzie, explained that the Prisoner is a sea captain by profession and enjoyed a good reputation among his co-workers. It would therefore appear that there was no untoward incident in his life which would have influenced or could in some way explain his abhorrent conduct. He is a mature man, aged 51, unmarried without children.

[12] Further, the court has a discretion to grant a reduction in sentence on a guilty plea. The reasons for this are well documented and acknowledged. See **R v Desmond Baptiste, Crim. App 8/2003.** The full reduction that the court can grant is one-third off the sentence that it would have imposed had it not been for the plea of guilty, i.e. the notional sentence. However, the court must have regard to all the circumstances in determining the extent of the reduction and in some cases have actually refused to give reduced sentences; see **R v Hastings [1995] 1 CR App R (S) 167**.

[13] Here the plea was made on day two of the trial and during the course of A's evidence. The Prisoner's plea came before A was subjected to cross-examination and so he saved her from the further trauma of cross-examination which is no small matter in such cases. Therefore, I am mindful to give him a reduction but not the full reduction because of the stage of the trial at the time of his change of plea. He certainly did not plead guilty at the earliest opportunity.

[14] I further bear in mind that the court must impose a sentence which is just and proportionate having regard to all the circumstances of the particular case before it including the circumstances of the prisoner and of the victim. To this end the court has a range of options available to it as provided for in the Criminal Code 2005 s. 22 and in the Criminal Justice (Alternative Sentencing) Act. I also am cognisant of the general principle that if the court considers an immediate term of imprisonment fitting then the shortest term which could achieve the results intended – in the main punishment, rehabilitation and deterrence – should be imposed. See Lord Lane CJ at p.1195 A in **R v Bibi [1980] WLR 1193.**

[15] Having considered all the relevant factors and circumstances of the crime including the impact on the victim and the personal circumstances of the Prisoner I am of the view that this is a very serious offence although at the lower range of gravity and merits a custodial sentence of a length sufficient to punish the offender, to deter others and to emphasize the need to protect young girls from sexual exploitation and corruption. This is particularly appropriate because of the aggravating circumstances in particular the age of the victim and the breach of trust involved. It is here salutary to refer to the words of Hariprashad-Charles, J in **R. V. Vernon Paddy, BVIHCR2010/0020** which brings home the gravity of such offences:-

> "Violence against women is an appalling human rights violation. In the broadest sense, it is the violation of a woman's personhood, mental or physical integrity or freedom of movement through individual acts and societal oppression. It is woven into the fabric of society to such an extent that many women who are victimized feel that they are at fault. Many of those who perpetuate violence feel justified by strong societal messages that violence against women, be it sexual harassment, rape, child abuse are acceptable."

[16] Because of his guilty plea I will grant the Prisoner a reduction but for reasons already explained not the full one-third. I therefore sentence the Prisoner to 12 months imprisonment. Time spent on

remand to be taken into consideration in computing the sentence. In addition he is to pay the sum of $5,000.00 by way of compensation to defray some of the travelling expenses attendant on A's change of school. He must do so within 6 months of completing his sentence, in default 6 months imprisonment.

[17] I also order that the Prisoner, during his incarceration, attend counselling sessions to help him to understand the nature of his actions, to recognize the harm he inflicted on his innocent victim and to help him to ensure that he does not repeat such harmful conduct in the future. He has agreed to this.

[18] And finally, I commend A and her mother for having the moral courage to persevere in the face of much difficulty and all those who assisted them including the Police and prosecuting authorities.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands