

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

SAINT LUCIA

CRIMINAL CASE NO. SLUHCR 2011/0078

BETWEEN:

THE QUEEN

Claimant

AND

KEVEY BARTHELMY

Defendant

Appearances:

Mr. Jeannot Walters, Counsel for the defendant
Mr. Stephen Brette, Crown Counsel for the Crown

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2013: February 27
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JUDGMENT ON SENTENCING

[1]. CUMBERBATCH, J. : In or around the month of February 2006, the defendant and one Keyshanker John (the virtual complainant) became involved in a relationship and were regarded in common parlance to be boyfriend and girlfriend. The defendant and virtual complainant commenced having protected sex. However on 23rd April, 2006, they had unprotected sex which resulted in the virtual complainant becoming pregnant. On the 17th January 2007, the virtual complainant gave birth to a baby girl at the Victoria Hospital.

- [2]. On 20th February, 2007, a complaint was proffered against the defendant for the offence of unlawful sexual intercourse contrary to section 127(1) of the Criminal Code 2004. On 20th April, 2009, after a preliminary inquiry, the defendant was committed to stand trial for the offences charged.
- [3]. On the 11th April, 2012, the defendant was indicted by the Director of Public Prosecution on three counts of unlawful sexual intercourse with a young person contrary to section 127(1) of the Criminal Code 2004 and at his arraignment on the 14th September, 2012, he pleaded guilty as indicted. After he was allocuted, the court ordered a pre-sentence report be produced and set a date for a sentencing hearing.

[4]. **THE HEARING**

The pre-sentence report disclosed that members of the community in which the defendant resides, and family members, spoke of the him in glowing terms. He's known to be an avid footballer, and a hard worker who is always meaningfully employed. His current employer describes the defendant as a serious employee with whom the company has no issues.

- [5]. Crown counsel considered the following to be the aggravating and mitigating factors herein:

MITIGATING FACTORS

1. An early plea of guilty – obviating a need for trial;
2. The defendant has no previous conviction;
3. The defendant is reportedly taking proper care of the offspring of the offence above the required standard;
4. The delay in bringing the defendant to trial;

5. Had the matter gone to trial the defendant would have had the statutory defense available to him;
6. The glowing picture of the defendant's character presented in the pre-sentence report.

AGGRAVATING FACTORS

1. The commission of the offence resulted in the virtual complainant's pregnancy;
 2. The prevalence of the offence in St. Lucia and the Caribbean;
 3. The premature end to the virtual complainant's secondary education;
 4. The emotional (psychological) trauma that the virtual complainant suffered.
- [6]. Mr. Brette also referred the court to the dictum of Sir Dennis Byron CJ in the decision of *Winston Joseph et al v Regina Criminal Appeal No. 4 of 2000* and the sentencing guidelines set out therein.
- [7]. The court finds the following to be the aggravating and mitigating factors herein:

AGGRAVATING FACTORS

1. The seriousness of the offence;
2. The virtual complainant has become pregnant;
3. The prevalence of this offence in St. Lucia.

MITIGATING FACTORS

1. The sexual intercourse was consensual. There was genuine affection on the part of the defendant for the virtual complainant who he regarded as his girlfriend;
2. The early guilty plea by the defendant;
3. The strong sense of remorse expressed by the defendant who has been taking care of his daughter;

4. The defendant is a young first offender;
5. The inordinate delay in bringing this case to a stage of finality;
6. The defendant, by entering a guilty plea, has eschewed the opportunity to rely on the statutory defence which may have resulted in his complete acquittal.

I have evaluated the aggravating and mitigating factors in light of the circumstances of this case and find that the mitigating factors outweigh the aggravating ones.

[8]. **SENTENCE**

In *Winston Joseph v Regina Byron* CJ set out guidelines to be applied and followed in cases of sexual offences. For a girl the age of the virtual complainant herein Sir Dennis considered a sentence of between 3 to 7 years imprisonment to be appropriate.

- [9]. This case is one of consensual sex between the virtual complainant and the defendant. The defendant in the pre-sentence report states that he was told by the virtual complainant that she was sixteen (16) years old and that he believed her. This assertion by the defendant is unchallenged. Section 127(2) of the Criminal Code provides thus:

127 (2) It is a defense to a charge under this section if the person charged proves that:

a. The other person consented; and

b. The person charged

(i) was not more than twenty-one (21) years of age at the time of the commission of the offence and has not been previously charged with the same or similar offence; and

- (ii) ***had reasonable cause to believe and did believe that the other person was sixteen (16) years of age or more.***

[10]. At the Preliminary Inquiry, the virtual complainant testified saying thus:

"I was still at school and we had a relationship going on. So therefore we weren't into very sexual activities, but we loved each other and it came that one day we had sex more than once and I got pregnant with his child..."

[11]. Thus the court can accept from the evidence on oath of the virtual complainant at the Preliminary Inquiry that sex was consensual and that the parties were in love. The defendant at that time was twenty (20) years old hence he could have subjected the virtual complainant to the rigors of a full trial to obtain a full acquittal.

[12]. In *Desmond Baptiste v Regina* Criminal Appeal No. 8 of 2003 Byron CJ opined thus:

"On the issue of age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders the court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances."

- [13]. In *Roger Naitran et al v Regina Baptiste JA* cited the following dictum of the Lord Chief Justice in *Millberry v Regina* (2002) EWCA Crim. 2891 at paragraph 34:

“Before concluding our general guidance with regard to sentencing on rape and turning to the cases of the individual appellants, we would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers adopt a mechanistic approach to the guidelines. It is essential that, having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances... Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.”

- [14]. Baptiste JA having cited the aforesaid passage went on to opine thus:

I fully adopt the above quotation from the Lord Chief Justice. Sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the guidelines into account, the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate. It follows therefore that a sentencing judge can depart from the guidelines if adherence would result in an unjust sentence. The existence of a particularly powerful personal mitigation or

very strong aggravating factors may be a good reason to depart from the guidelines. Clearly the suggested starting points contained in sentencing guidelines are not immutable or rigid. Where the particular circumstances of a case may dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing.

[15]. The court must, in considering an appropriate sentence, bear in mind the child of the parties herein. It has been submitted by counsel who appeared pro bono for the defendant that no useful purpose would be served by subjecting the defendant to a period of incarceration as the child would suffer from the absence of his financial and emotional support. The defendant is a first offender and poses no threat to the community.

[16]. Whilst the court is ever mindful of the seriousness and prevalence of this offence the court must of necessity act in the best interest of the child herein. Crown counsel has submitted in this regard the following matters for the court's consideration:

- a. The mitigating factors outweigh the aggravating ones;***
- b. The statutory defence that would have been available at trial;***
- c. The delay in bringing the defendant to trial;***
- d. The rationale in Winston Joseph above;***
- e. The consideration of the maintenance of the offspring of the offence;***
- f. The complimentary and positive contents of the pre-sentence report.***

[17]. I have also considered the delay in bringing this matter to a stage of finality. No reason has been proffered by crown counsel for the inordinate delay in this matter. Crown counsel in his written

submissions was sufficiently candid with the court to concede that there was delay herein which was prejudicial to the defendant's defence.

I find that this matter was simple and uncomplicated one bereft of lengthy evidence and substantial legal issues. However, the chronology of events herein before set out is inconsistent with the simplicity of this matter. In the circumstances I find that there has been a breach of the defendant's constitutional right to a fair hearing within a reasonable time. Though the hearing was not unfair, the delay constitutes a breach of the defendant's rights for which there must be an appropriate remedy which in this case should be a reduction in sentence.

[18]. I have considered the principles of law set out aforesaid and the special circumstances of this case as it relates to the interest of the child and the strong mitigating factors. I find that the circumstances of this case reach the threshold for a departure from the guidelines set out by Byron CJ in Winston Joseph.

[19]. Accordingly, the court makes the following orders:

1. The defendant shall perform fifty (50) hours of community service at a location and time to be determined by the Director of Parole and Probation. Defendant shall report to the department of Probation and Parole on the 11th day of March, 2013 to commence community service.
2. The defendant shall attend the Family Court on the 9th day of April, 2013 for the determination of matters of maintenance and custody of the child of the parties.


FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE