

IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
CRIMINAL

No: DOMHCR2013/0003

THE STATE
-V-
TP

APPEARANCES: Miss Arthlyn Nesty for The State
Mr. Darius Jones for The Defendant

2013: 16th October
2014: 14th March

SENTENCING REMARKS

[1] STEPHENSON J:

*"Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected whether they like it or not. There are still some people for whom the loss of virginity is an important step, not to be lightly undertaken, or for whom its premature loss may eventually prove more harmful than they understand at the time. More importantly, anyone who has practiced in the family courts is only too well aware of the long term and serious harm, both physical and psychological, which premature sexual activity can do."*¹

[2] Non-consensual sex is a traumatic and humiliating experience and the particular circumstances in which the rape takes place may affect the sentence imposed. Unlawful sexual intercourse with a minor is also referred to as statutory rape in that a minor cannot consent to participating in the act.

[3] On the 16th day of September 2013, the defendant, TP was indicted with the following offences:

Count 1: Unlawful Sexual Intercourse: Contrary to Section 7 of the Sexual Offences Act, No. 1 of 1998 of the Laws of Dominica

¹ R v Hess; R v Nguyen [1990] 2 SCR 906

Count 2: Indecent Assault: Contrary to section 13(1) (a) of the Sexual Offences Act, No. 1 of 1998 of the Laws of Dominica

- [4] The defendant was arraigned on the 14th day of October 2013 and pleaded guilty. A pre-sentence report was ordered and filed on the 18th November 2013. Subsequent to the submission of the pre-sentence report, a psychiatric examination was ordered and a report from two doctors were submitted on the 14th February 2014. Submissions on sentencing by the State was filed on the 20th February 2014, and by defence counsel on the 14th March 2014.
- [5] The defendant is now before the court for sentencing.

Facts:

- [6] The facts as agreed by Learned Counsel for both parties can be stated as thus. On three occasions between the 1st day of March 2011, and the 30th day of April 2011, the accused who is the uncle of the virtual complainant called the virtual complainant who at that time was 10 years old to his home and had three sexual encounters with her. On each occasion the accused gave the virtual complainant a gift. First it was a soda, on the second occasion yogurts and on the third occasion lollipops.
- [7] Initially the virtual complainant was silent about these encounters and eventually told her older sister about it. The sister immediately made a report to the police and following an investigation the accused was charged with unlawful sexual intercourse with a minor and indecent assault and the defendant pleaded guilty at the first possible opportunity to the offence of unlawful sexual intercourse.

Mitigation

- [8] Learned Counsel for the defendant, Mr. Darius Jones, in his plea in mitigation urged the court to temper justice with mercy and urged the court to take into consideration the contents of the social enquiry report and the following mitigating factors:
- 1) The early guilty plea
 - 2) The remorse and regret demonstrated by the accused
 - 3) The accused had no previous convictions
 - 4) The accused state of health and age

- 5) The lack of evidence of permanent damage to the virtual complainant
- 6) There was no evidence of violence in the luring of the virtual complainant²

The Pre-sentence report and Medical and Psychiatric Report:

- [9] I have taken into consideration the contents of the pre-sentence report which was prepared and submitted by Mr. Oliver Wallace, the Assistant Chief Welfare Officer (Ag) and the psychiatric and medical reports submitted by Mr. Griffin Benjamin MD, MPH, MBA, DM and Dr. L. R. Fevrier- Drigo MD.

Considerations by the Court

- [10] The law has vested a wide discretion in the High Court on sentencing to ensure that the punishment imposed reflects the justice of the case having regard to the particular facts of each case. At all times the punishment should fit the crime.

- [11] This, however, is not an arbitrary exercise. As the sentencing Judge I am required to take into consideration the principles and objects of sentencing which are punishment, deterrence, rehabilitation and the protection of the society as applied by Chief Justice Hugh Wooding in 1964 in Trinidad & Tobago in the case of **Benjamin –v- R**³ and later expounded by Lawton LJ in **R v Sergeant**⁴ and judicially acknowledged and applied in the Eastern Caribbean in the **Desmond Baptiste case**⁵.

- [12] Sentencing guidelines in sexual matters such as the case at bar have been laid down in the case of **Winston Joseph et al –v- The Queen** . These guidelines have been established with the intention of promoting greater consistency in the approach to sentencing in these types of matters within the jurisdiction. I must bear in mind when taking the guidelines into account that I ought not to slavishly follow the guidelines lest I arrive at a sentence which can be seen as unjust.

- [13] It is important that I examine the facts of the case carefully in order to assess the seriousness of

² Taken from the written submissions of Mr. D. Jones Learned Counsel for the Defendant filed on the 14th March 2014

³ (1964) 7 West Indian Reports 459

⁴ (1974)60 Cr App R 74

⁵ Criminal Appeal No 8 of 2003 (St Vincent & The Grenadines)

the offence and the level of culpability of the accused. Consideration is given to the extent of harm to the Virtual Complainant. Based on the facts presented to the Court, the activity was nonconsensual and coercive.

[14] What was the nature of the sexual acts complained of? Penetrative acts which are more serious than non-penetrative acts. I am guided by the words of Chief Justice Sir Dennis Byron who said:

"...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."...

[15] Chief Justice Byron also identified the aggravating factors that can exist as:

- i. If the girl has suffered physically or psychologically from the sexual assault.*
- ii. If it has been accompanied by abhorrent perversions e.g. buggery or fellatio.*
- iii. Violence is used over and above the force necessary to commit the offence.*
- iv. The offence has been frequently repeated.*
- v. The defendant has previous convictions for serious offences of a violent or sexual kind.*
- vi. The victim has become pregnant as a result of the crime.*
- vii. The victim is either very young or very old. "*

[16] The possible mitigating factors were identified as follows:

- i. A plea of guilty should be met by an appropriate discount, depending on the usual considerations, that is to say how promptly he confessed and the degree of contrition and other relevant factors.*
- ii. Where incest was consensual, in the case of a girl at least 16 years of age if it seems that there was a genuine affection on the part of the defendant rather than the intention to use the girl simply as an outlet for sexual inclinations.*
- iii. Where the girl of at least 16 years of age made deliberate attempts at seduction.*
- iv. Where the defendant is a first offender and/or is a youth. "*

[17] My task is now to weigh the aggravating factors of this case against the mitigating factors in determining the appropriate sentence.

[18] The mitigating factors:

- i. The accused pleaded guilty at the trial of the matter.
- ii. The accused has been on remand since the 16th October 2013.
- iii. The accused has no previous convictions.
- iv. That accused has expressed remorse and regret for the offence committed .
- v. The accused has cooperated with the police.
- vi. The accused state of health and age he being 63 years old and that he is a diabetic and suffers also from hypertension.
- vii. No evidence of violence against the virtual complainant.

[19] There are a number of aggravating factors that exist in this case.

- i. The virtual complainant in this matter was initially ten (10) years old at the of the commission of the offence.
- ii. The accused was the uncle of the virtual complainant and he was sixty years old at the time of the offence. I, therefore, have to take into consideration the considerable age gap between the Virtual Complainant and the Accused and the breach of trust and abuse of the relationship of trust.
- iii. The manner of execution of the crime in that the accused lured the virtual complainant into his house on the three occasions with promises of treats.
- iv. That the virtual complainant contracted a sexually transmitted infection.
- v. The traumatic and psychological effect the events have had on the virtual complainant including embarrassment, distress and humiliation.
- vi. The level of discomfort and disappointment suffered by the family.

[20] Section 7 of the Sexual Offences Act says:

*“Any person who has sexual intercourse with another person who –
(a) Is not the spouse of the first mentioned person; and
(b) Is under the age of fourteen years whether or not the other person consented whether or not the first mentioned person believes that the other person is fourteen years of age or more,
Is guilty of an offence and liable on conviction to imprisonment for twenty five years.”*

[21] This to my mind is one of the worst crimes that can be perpetrated against a young girl who is a pre-teen in this country. Mr. Prince you lured the virtual complainant into your home with the offer of a treat and on the first occasion you “fingered” her and on the second and third occasions you actually had sexual intercourse with her . You took her innocence. You introduced her to what is meant to be an adult activity which is to be executed or carried out in a loving atmosphere and with her consent.

[22] Offences of this kind usually attract a custodial sentence. Learned counsel for the prosecution referred to the case of **Roberts and Roberts**⁶ in support of her case for a custodial sentence to be handed down in the case. Counsel urged the court to consider the dicta of Lord Lane:

“Rape is always a serious crime. Other than in wholly exceptional circumstances it calls for an immediate custodial sentence ... a custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence, secondly to emphasise public disapproval, thirdly to serve as a warning to others, fourthly, to punish the offender and last but by no means least to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case”

[23] In **The State –v- Andrew Valmond**,⁷ I expressed concern about the amount of incidences of sexual abuse of children by family members and today I repeat those concerns and of the fact that I am conscious that the courts must do everything possible to discourage sexual activity of persons of a very young age.

[24] I once again stress the importance of protecting our children from premature sexual activity and repeat the dicta of Baroness Hale of Richmond in the House of Lords Case of **R v G**⁸:

“it is important to stress that the object is not only to protect ... children from predatory adult pedophiles but also to protect them from premature sexual activity of all kinds”

⁶ (1982) Cr App R (S) 8

⁷ Op cit

⁸ [2009] 1 AC 92 at para 45

[25] I am also conscious of Dominica's obligation under the **Convention of the Rights of the Child, 1989** which was ratified by Dominica on the 13 March 1991. Article 34 of the **Convention** provides:

"State parties undertake to protect the child from all forms of sexual exploitation and abuse"

[26] **The Sexual Offences Act**⁹ provides the necessary legislative protection for the children of Dominica and for the punishment of adults who abuse children. It is for the courts to appropriately recognise the gravity of the offence by imposing an appropriate sentence.

[27] In the Territory of the Virgin Islands, Justice Indra Harriprasad-Charles in the case of **The Queen – v- Andre Penn**, in considering the starting point for the offence of unlawful sexual intercourse against a girl under the age of 13 where the maximum sentence was 14 years, considered 7 years a suitable starting point. Where there are aggravating and extenuating factors the sentence imposed will be increased. Mr. Penn was sentenced to 8 years on the count of unlawful sexual intercourse with a girl under thirteen years. In that case the Learned Trial Judge found that the aggravating factors far outweighed the mitigating factors.

[28] Having identified the aggravating and mitigating factors in this case, I must evaluate these factors. I must weigh the aggravating factors against the mitigating factors and in the case at bar the aggravating factors outweigh the mitigating factors, thereby tending to a higher sentence.

[29] A review of the sentences imposed by trial judges within the region in matters such as this have generally been in the region of 12 – 15 years.

[30] In the case at bar the accused has been charged and has pleaded guilty to the offence of

unlawful sexual intercourse. In the case of **R-v-Mcvane** the defendant pleaded guilty to the offence of unlawful sexual intercourse with a female aged 14 years old who was not his spouse. The defendant was no stranger to incarceration having had convictions previously for unrelated offences. In that matter the virtual complainant bore a child as a result of the unlawful sexual activity and that defendant was sentenced to 7 years.

⁹ Op cit

[31] In **The State –v- Andrew Valmond**¹⁰ the defendant was charged with unlawful sexual intercourse with a girl who was not his spouse and who was under the age of 14 years old. In that matter the defendant was the virtual complainant's stepfather and he was sentenced by this court to 8 years in prison.

[32] In the case of **The Queen –v- Kerril Gilbert**¹¹ the defendant pleaded guilty to unlawful sexual intercourse with a girl of or under the age of 13 years. He was sentenced to 3 ½ years imprisonment.

[33] In the case of **the Queen –v- Shem Jackson**¹² the defendant was sentenced to 3 1/2 years imprisonment for unlawful sexual intercourse with a girl 11 years of age.

[34] In Dominica the following sentences were handed down in the following cases where the offence charged was unlawful sexual intercourse with a girl under the age of 14 years:

- (i) **The State –v- Richard Stout**¹³ Cottle J sentenced the defendant to 4 years in prison;
- (ii) **The State –v- Carlton Gregoire**¹⁴ Baptiste J sentenced the defendant to 9 years in prison;
- (iii) **The State –v- Jeffery Parillon**¹⁵ Baptiste J sentenced the defendant to 6 years in prison;
- (iv) **The State –v- McPherson Cockrane**¹⁶ Baptiste J sentenced the Accused to 4 years in prison;
- (v) **The State –v- Raymond Austrie**¹⁷ Henry J sentenced the Defendant to 10 years in prison;
- (vi) **The State –v- Alvin Shipley**¹⁸ Henry J sentenced the Defendant to 10 years in prison.

[35] The defendant has pleaded guilty to the offence of statutory rape that is of having sexual intercourse with a young lady who was under the age of 14 years. The facts disclosed that the victim called him uncle and was in fact his niece, he was in a position of trust living within the same vicinity as the victim. His decision to have sexual relations with her was a breach of that relationship, a breach of trust and that is an aggravating circumstance in this case.

¹⁰ DOMHCR2010/0009

¹¹ Criminal Case number 8 of 2009 BVI

¹² Criminal Case (2004) BVI

¹³ DOMHCR2009/0037 (UNREPORTED)

¹⁴ DOMHCR2009/0030 (UNREPORTED)

¹⁵ DOMHCR2007/0027 (UNREPORTED)

¹⁶ DOMHCR2006/004 (UNREPORTED)

¹⁷ DOMHCR2005/0021 (UNREPORTED)

¹⁸ DOMHCR2003/58 (UNREPORTED)

[36] In determining the appropriate sentence I have taken into account the stated circumstances of this case, the aggravating and mitigating factors and note the defendant's previous clean record and the fact that he has pleaded guilty and that he has been on remand since the plea. I have also taken into account Counsel's oral plea in mitigation and his request that I temper mercy with justice and the fact that the Defendant has been remorseful.

[37] Based on all the factors in this case I find that only a custodial sentence would be just and fair. The approved benchmark for matters such as these has been declared by Sir Dennis Byron to be 8 years going upwards, "*where the girl is not far from her 13th birthday and there are no aggravating factors*".

[38] The Notional Sentence in this matter would be therefore be 9 years. Having pleaded guilty the defendant has availed himself of the 1/3 discount and is therefore sentenced to 6 years in prison commencing on the date of his remand that is the 16th October 2013.

[39] I wish to thank Miss Nesty, State Counsel and Mr. Darius Jones for their written submissions which assisted the court in its consideration.

[40] The judgment can be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

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M E Birnie Stephenson
High Court Judge