EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 5 OF 2013

BETWEEN:

THE QUEEN

and

SYLON FORBES

Appearances:

Mr. Valston Graham Senior Crown Counsel and Ms. Shantal Flax Crown Counsel for the Crown
Mr. Stephen Daniels for the Accused

2014: 4th April
9th April

JUDGMENT ON SENTENCING

Criminal law- Sentencing - Sexual intercourse with a girl under 16- possession of child pornography – matters to be considered

[1] BYER J.:- On the 14th March 2014 Mr. Forbes was found guilty by a unanimous jury of the following offences:

(1) Sexual intercourse with a girl over the age of 13 but under the age of 16 contrary to Section 119 of the Criminal Code of the British Virgin Islands 1997.

(2) Possession of child pornography contrary to Section 284A(2) (c) of the Criminal Code of the British Virgin Islands 1997 as amended.

[2] The sentencing hearing was adjourned and heard on the 4th April 2014 and judgment was reserved in the said sentence. This is now the decision on that sentence which I intend to impose on this Defendant.

The Background facts

[3] On a day between 8th March and 11th March 2013, the Virtual Complainant was walking home from a soft ball match. She was offered a ride by Mr. Forbes accompanied by a male companion. The Virtual complainant was taken to her home where she changed and left her home again to attend at her mother's place of business on the island of Anegada.

[4] On her way to her mother, she was again met by Mr. Forbes and the same male companion who offered her ride once again which ride she then refused. It was not until the said Mr. Forbes threatened to publish photographs in his possession showing her in a nude state that the Virtual Complainant entered the car. Mr. Forbes and the said male companion then drove the Virtual Complainant to a desolate and isolated spot just outside the The Settlement in Anegada.

[5] It is here, that the jury believed the evidence led, that sexual intercourse occurred with the Virtual complainant who was 15 years old at the time. After the sexual encounter Mr. Forbes took pictures of the Virtual complainant. Mr. Forbes was subsequently arrested upon the complaint being made by the Virtual Complainant and was charged initially with rape (for which the Defendant was subsequently acquitted) and possession of child pornography. At the time of his arrest, the Defendant was found to be in possession on his computer of several nude photographs depicting the Virtual Complainant.

The Plea In Mitigation

[6] Counsel for the Defendant Mr. Daniels made an impassioned plea on the part of his client the Defendant. The Defendant was said to be a single man 31 years old with a 4 years old son who resides on the island of Tortola. At the time of the incident the Defendant was a self employed Disc Jockey or in local parlance a DJ on the island of Anegada.

[7] Counsel for the Defendant sought to impress upon the Court that despite the seriousness of the offences for which the Defendant stood convicted that the mere fact that the jury did not find him guilty of rape but rather of unlawful sexual intercourse with a girl under 16 demonstrated that the jury believed that there was some complicity on the part of the Virtual Complainant in the commission of these offences. Counsel further sought to argue that the only aggravating factors that were present in this matter were the age difference between the Defendant and the Virtual Complainant and the fact that there was a prevalence of offences of this nature within the territory. He argued that the aggravating factors relied upon by the prosecution did not take into account that the assessment of the Virtual Complainant's intellectual ability was one that was assessed by an expert and that the Defendant could not have known of the same he not having the skill set of the expert. Counsel also submitted that the fact that the incident took place in a lonely location could not be an aggravating factor since the jury found him not guilty of rape and as such the remoteness of the location was of no moment especially since as he persisted to submit to the Court that there was some complicity on the part of the Virtual Complainant.

[8] Counsel argued that there were therefore more mitigating circumstances than aggravating circumstances and sought to identify them as being that the Defendant was unknown to this Court ,there was only one image which identified the Virtual Complainant, that there was no evidence that the Defendant shared the photographs with a third party or that he had used the images for his pecuniary benefit or gain, he assisted the police in their investigations he having voluntarily given them the electronic equipment and that there was evidently complicity on the part of the Virtual Complainant.

[9] Counsel further submitted to this Court with regard to the sentence to be imposed for the offence of possession of child pornography that there should be a benchmark established by this Court to create a starting point at which the sentence in matters of this nature would start, to be increased or decreased according to the relevant aggravating or mitigating circumstances. Counsel suggested to this Court that the benchmark in this matter should start at 10 years.

The Crown's submissions

[10] The Crown has argued that there are several more aggravating than mitigating factors in this matter. They have submitted as aggravating that the victim was vulnerable, that the Defendant targeted this victim particularly for her vulnerability, that the offence took place in an isolated area, that there was a degradation of the victim in that there were photographs taken, the age of the victim vis a vis the Defendant and the prevalence of offences of this nature in this jurisdiction. In relation to the aggravating factors for the possession of child pornography the Crown sought to also rely on the fact that the Defendant had the images on more than one device.

[11] In mitigation the only factor they seek to proffer is that the Defendant has no previous convictions and in relation specifically to the conviction for possession of child pornography that there were only a few images that were in the possession of the Defendant and only one of those showed the identity of the Virtual Complainant.

[12] The Crown submitted before this Court that these offences required that the sentences should run consecutively and not concurrently to ensure that the sentence reflected the overall criminality of the two offences. Counsel for the Crown made a passionate argument that although it could be said that the two offences arose out of the same transaction that the discretion of the Court lay in looking at the offences separately. The taking of the photographs which the Defendant was found guilty of possessing did not form any part of the mens rea for the unlawful sexual intercourse and as such should be looked as not forming part of the same set of circumstances. The taking of the photographs they argued taken after the unlawful sexual intercourse pushed it past the threshold of concurrent sentences and the Court should therefore consider the imposition of consecutive as opposed to concurrent sentences.

The Court's Considerations and findings

Unlawful Sexual intercourse with a girl under 16 years

[13] By Section 119 (1) of the Criminal Code "*a man who has unlawful sexual intercourse with a girl above the age of thirteen years and under the age of sixteen years commits an offence and is liable on conviction to imprisonment to a term not exceeding seven years."*

[14] Thus the starting point as established by the legislature is that this offence attracts a period of incarceration of seven years.

[15] In looking at this offence this Court is mindful that the creation of this offence was as a means to protect children who cannot protect themselves and who the law recognizes are not in any position to make adult decisions regarding their sexuality.

[16] Thus laws of this nature are not just to protect children from preying adults but also to "...***protect them from premature sexual activity of all kinds"***[1]

[17] This Court must therefore bear in mind that it must not only conduct an evaluative process of weighing the mitigating and aggravating factors in this particular case but I must also consider that in doing so that the sentence that is meted out adequately reflects the purpose for which it is meant, that is, punishment of the offender, deterrence of other potential offenders, protection of society and if at all possible rehabilitation of this offender.

[18] In considering what is to be taken into account in sentencing on matters of this nature, our Court of Appeal on 17th September and 31st October 2001 in the consolidated criminal cases of Winston Joseph v The Queen[2], Benedict Charles v The Queen[3] and Glenroy Sean Victor v The Queen[4] established guidelines for sentencing in sexual offences cases. These guidelines were re-

[1] R v G [2009] 1 AC 92 cited with approval by Stephenson Brooks J in The State v Andrew Valmond DOMHCR 9/2010 paragraph 10

[2] Criminal Appeal No. 4 of 2000 (Saint Lucia) unreported

[3] Criminal Appeal No. 8 of 2000 (Saint Lucia) unreported

[4] Criminal Appeal No. 7 of 2000 (Saint Lucia) unreported

affirmed in January 2004 in yet another Saint Lucian case of Gregory Burton v The Queen[5]. At page 7 of the judgment in Winston Joseph et al, Sir Dennis Byron, C.J. laid down the benchmark for sentencing in different cases of unlawful carnal knowledge. He suggested that where the girl is aged from 13 to 16 years, a sentence between 3 years to 7 years seems appropriate for a first offence.

[19] However, the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors. At paragraph 17, thereof Byron CJ stated:

> "*The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors ... It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. 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."*

[20] However as identified by Baptiste JA in the case of Roger Naitram and others v The Queen[6] any guidelines that are given to the Court in aid of sentencing are simply that, guidelines. As he stated at paragraph 17:

> "*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 ... clearly the suggested starting points contained in sentencing guidelines are not immutable or rigid."*

[21] In undertaking the evaluative process, this Court is also assisted by the indications that were made by Sir Dennis in the case of Winston Joseph [7] who identified some common aggravating factors namely:

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.

[5] Criminal Appeal No. 1 of 2002 (Saint Lucia) (unreported)
[6] Antigua Crim App 5/2006.6/2006 and 8/2006
[7] Op Cit

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.

[22] He also mentioned the mitigating factors as:

(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.

[23] I must say with certainty that this Court had not found any of the aggravating factors that were identified by Byron CJ as stated above nor the mitigating factors, save that the Defendant is a first offender. However this case itself, from the evidence presented before the Court raised its own aggravating and mitigating circumstances.

[24] In this case the Court finds that the aggravating factors were as follows: i) that the Virtual Complainant was a vulnerable member of the society as a result of her underdeveloped social and intellectual capabilities which would not have been lost on the Defendant despite his Counsel's argument to the contrary, she being a girl of 15 still in the primary division of her school. ii) The age difference between the Defendant a man of 31 years who took advantage of a girl of 15 years, literally half his age; iii) that the act by the Defendant was premeditated in that he took her to a remote and desolate area and committed these acts. It was apparent that it was not an act of impulse or taking advantage of an opportunity. The Defendant gave the instructions to the driver where to go, how long to stay and where to go after, it was an act of planning on the part of the

Defendant that cannot be taken lightly by this Court; iv) and that this Defendant felt it necessary to memorialize the act by taking pictures of the Virtual Complainant in her nakedness.

[25] The sole mitigating factor as seen by this Court with regard to this offence is that the Defendant has an unblemished record before the Court he having no previous convictions.

[26] Having thus assessed the relevant factors, it is apparent that the aggravating factors far outweigh the mitigating factors with regard to this offence.

[27] Like Stephenson – Brooks J in the case of R v Webster Edmond [8] this Court is of the mind that:

> *"...this is a very serious offence that merits a custodial sentence of a length sufficient to punish the offender, deter others and to emphasize the need to protect young girls from sexual exploitation and corruption."*

[28] This Court is well aware that despite the advent of sentences for offences of this type of a custodial nature, the prevalence of offences of this ilk are still increasing at an alarming rate within this Territory. This Court cannot and will not lose sight of that and will continue to forge ahead as the main bastion of protection for the children of this Territory.

[29] In light of all the circumstances of this case and with all the aggravating factors that exist here, this Court imposes on this Defendant a sentence of 5 years for the offence of sexual intercourse with a girl over the age of 13 and under the age of 16.

Possession of Child Pornography

[30] By Section 284A (2) (c) "*A person who intentionally has child pornography in his possession commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."*

[31] It is very apparent from the term of imprisonment that this offence has been viewed by the Legislators of this Territory as being one that is not to be condoned or allowed to take root in a small society such as ours.

[32] It is recognized by both Counsels who have appeared in this matter and the Court itself that this conviction is the first that has occurred under the Legislation since its implementation in 2007. Further when an assessment is made of regional decisions this offence does not seem to have

[8] DOMHCR 13/2012 paragraph 62

attracted the attention of the Prosecutors or the Courts across the region, however with the rise of what seems to a tide of sexually deviant behaviour among members of our society both locally and regionally, targeting our young people and our young women in particular, I envision that soon enough it will no longer be novel.

[33] This Court in seeking to get some assistance on sentencing in matters of this nature, has therefore had to gain support from the wider commonwealth, and although the decisions given in those cases are not binding on this Court, it would be readily agreed that they are of persuasive authority.

[34] In considering those authorities, what was evident to this Court is that the Courts in approaching the sentence of an offender with regard to the charge of possession of child pornography seek to emphasize deterrence as the aim of sentencing.

[35] In the seminal Canadian case on child pornography of R v Sharpe [9] the Court stated therein that "*the prohibition and criminalization of child pornography arises out of the society's interest to protect children.*"

[36] With the protection of children in mind, this Court must be cognizant that the behaviour of persons who are so convicted must be approached with disapproval in no uncertain terms.

[37] As the Court of New South Wales by Simpson J in the case of R v Booth [10] said "…*Possession of child pornography is a callous and predatory crime.*"

[38] Bearing this in mind, this Court is of the view that this offence must carry a term of imprisonment to encapsulate the "*primary principles [of]…denunciation and general deterrence"* [11]

[39] In looking at the sentence that the Legislature sought to impose, that general principle of deterrence is quite evident, but this Court has to also recognize that the sentence set by the Legislature was also meant to capture a wide range of behaviour within the offence as this sentence is also referable to publication and production as well as to possession of child pornography.

[40] This Court is of the view that it can be argued that the more egregious and injurious behaviour relating to child pornography are the production and publication of the images which are captured by the definition in the Criminal Code. The Court is of the opinion that these offences should therefore attract a higher tariff in sentences that are meted out. Therefore when considering the

[9] 2001 SCC 2
[10] [2009] NSWCCA 89
[11] Missions v R [2005] NSCA 82

offence of possession of child pornography without any aggravating factors of publication or production, this Court is of the view that as unsavoury as this offence is, that a sentence for this offence should be on the lower end of the scale.

[41] In that regard, Counsel for the Defendant invited the Court to set a benchmark in this matter to demarcate this tariff, there not being one in existence. This Court does admit that is it reluctant to set a definitive term but I think that it is only proper given the variances of the nature of the behaviour that is in fact captured by the sentence, that I do create a starting point here. I am however not prepared to set it as a definitive benchmark but will say that in instances where there is only the charge of possession without the additional offences as mentioned in the said Section 284(2) I am prepared to start any sentencing considerations at the half way mark of 7 years.

[42] Having thus said this I will now assess the mitigating and aggravating factors in this case at hand.

[43] This Court finds that the aggravating factors in this case were i) the Defendant was found with the material on his computer and the evidence was that the Defendant took pictures on his phone of the Virtual Complainant. There was therefore a sharing of data as between devices and can only be indicative of a less than innocent act on the part of the Defendant; ii) that the Defendant took the pictures and kept them in his custody for a period in excess of a month; and iii) that he felt it necessary to take the pictures in the first place.

[44] This Court however has also had notice of the mitigating factors. However before I itemize them, I want to make it clear that the prior good character of the Defendant in this case will not provide a free pass to the Defendant as an automatic aid. In fact it appears when there is some analysis made of the cases where sentences have been imposed, that prior good character did little to mitigate the ultimate sentence handed down.

[45] In the case of Mouscas v R [12] the court held that as the offence of possessing child pornography is frequently committed by persons of prior good character and since general deterrence is necessarily important, it is legitimate for a court to give less weight to good character as a mitigating factor.

[46] Bearing this in mind, I am however prepared to take the good character of this Defendant into account and use that as one of the mitigating factors. The others are i) the co operation that the Defendant gave the police at the start of the investigation; ii) that there was only one photograph of the Virtual Complainant that depicted her identity clearly; iii) there was no evidence of any sharing of the photograph with any third party; and iv) there was no evidence that the Defendant obtained any personal gain.

[12] [2008] NSWCCA 181

[47] There is therefore evidently an outweighing of the aggravating factors by the mitigating factors. This Court is therefore guided by the well established practice that the sentence imposed should be reflective of the balancing exercise that weighs in favour of the Defendant. I however must state categorically that this Court will ensure that our young people do not become victims of persons who see nothing wrong with taking advantage of them. Whether it is by predators or persons considered as friends, pornography involving our children will not and cannot be tolerated.

[48] I therefore sentence this Defendant to a term of 3 years for the offence of possession of child pornography.

Conclusion

[49] It has been impressed upon this Court by the Crown that in sentencing this Court should consider that the sentences should run consecutively in that as they argue ***"the overall criminality will not be sufficiently reflected by a concurrent sentence."***

[50] The general principle as understood by this Court is that where there are different offences arising out of the same incident that the Court should consider that the sentences imposed should run concurrently as opposed to consecutively. It would appear that this being the general rule that the Court must be satisfied that there is a good reason to depart from that.

[51] In considering whether the Court should be minded to depart from the general principle, this Court must be guided by the principle of totality of the sentence. This consideration is that the sentencer must look at the aggregate sentence given to ensure that it is reflective of being "***just and appropriate."*** [13]

[52] What must be addressed by the sentencer is whether "***the sentence for one offence can comprehend and reflect criminality of the other... otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences. If not then the sentence will fail to reflect the total criminality of the two offences."*** [14]

[53] This Court is not, within the context of this present case, satisfied that the criminality of the offences would not be met by the imposition of a concurrent sentence.

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[13] D.A Thomas , Principles of Sentencing 56 – 57 cited with approval by Ellis J in BVICRIM 40/2011 R v Yan Edwards and anr

[14] Cahyadi v R [2007] 168 A Crim R 41 cited in the case of Yan Edwards and anr Op cit

[54] This does not of course mean that this Court is not of the opinion that these matters for which this Defendant stands convicted are not of a serious nature, however the Court is satisfied that the sentence imposed concurrently will in fact reflect the requisite criminality of these offences. There is nothing to commend to the court that there is sufficient or any, separation of these offences to warrant the Court's consideration that the sentences should run consecutively.

[55] So for the avoidance of doubt the Defendant stands sentenced to 3 years for the possession of child pornography to run concurrently with the sentence of 5 years for unlawful sexual intercourse with a child under 16. On the principle contained in the case of Callachand & Anr v State of Mauritius (Mauritius)[15] the sentence is to take effect from the date upon which the Defendant was in custody, to take into account the period that he has been on remand pending the hearing of this matter.

[56] Upon the completion of the sentence by the Defendant, restitution is ordered of the laptop computer and the smart phone confiscated during the investigation of this matter upon being certified by a Technician that the said pieces of equipment are completely purged of all images and materials related to this matter.

Nicola Byer
High Court Judge

[15] [2008]UKPC 49 cited with approval in the case of Yourrick Furlonge v The Queen ANUHCRAP 2009/006