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

SAINT LUCIA
CASE NO. SLUCHRD2008/0081

BETWEEN

THE QUEEN

vs.

GARVIN ST. AIMEE

Appearances:
Mr. Huggins Nichols for the Defendant
Mr. Leon France Crown Counsel for the Crown

2015: March 27, April 22, May 4, July 17

Criminal Law - Sentencing – Unlawful Sexual Intercourse with a Girl Over the age of 12 and Under the Age of 16 - Application of Principles – Serious Offence – Prevalence – Custodial Sentence Appropriate - Maximum Statutory Penalty – General Ranges of Sentence – Aggravation - Strong Mitigation – Young Offender - Positive Good Character – Benchmark of 8 years - Guilty Plea – Custodial Sentence of 6 years Appropriate in All Circumstances - Delay of nearly 8 years in Proceedings Amounting to Breach of Constitutional Right to trial within Reasonable Time – Delay Influencing Sentence by Reduction of 3 years – Positive Good Character – Defendant Effectively Role Model in Community - Absence of Re-Offending Risk Factors Resulting in Suspension of Sentence for Period of Two Years.

DECISION

[1] **RAMDHANI J. (Ag.)** The offence of unlawful sexual intercourse was allegedly committed against a 12 year-old girl (LJ) on Tuesday the 18th of December 2007 at Industry in the Quarter of Choiseul. The report of this incident led to the arrest and charge of the defendant and after the Preliminary Inquiry into the charge, to the preferment of an

indictment on the 27th August 2010. In November 2010, he was arraigned on this indictment and pleaded not guilty.

[2] The matter came on for trial on a number of occasions but on all occasions for one reason or another it was adjourned. Eventually, on the 27th March 2015, the defendant through his Counsel requested that he be re-arraigned, upon which he pleaded guilty to the offence.

[3] The offence took place at about 5 p.m. on the December 2007. The 12 year-old LJ was walking along the main road passing the home of the defendant. He and another man were standing outside and the other man called out LJ. She responded by going up the defendant and this other man. He other man walked away and left her alone with the defendant who then took her by the hand and pulled her into his house.

[4] He asked her if she wanted to have sex. She told him 'no' and that she was not ready for sex. He nonetheless pulled her into his bedroom, took off his clothes then he took off her clothes. He began touching her and then had sex with her.

[5] After he was done, he told her that if she told anyone about it, she and her 'whole family' would get into trouble. She got dressed and he followed her part of the way home. When she was taking a bath she discovered blood on her panties.

[6] On Monday the 11th February 2008, her mother questioned her and she disclosed what had happened between the defendant and herself. The following day her mother took her to the Vieux Fort Police Station and made a report to officers of the Vulnerable Persons Team. She was later taken to the hospital and examined by Dr. Claire Louisy in the presence of her mother. The doctor noted that her hymen was not present and opined that LJ was sexually active.

[7] It would seem that the defendant heard that the police wished to interview him as on the 14th February 2008, accompanies by his attorney Mr. Nichols, he attended the Vieux Fort

Police Station and after he was informed of the allegation and cautioned he elected to make a statement. He told the police:

"That day when the incident happened L came by my home. She stood on the road. She called me and made a sign that she would come and check me later. At that time two of my friends, Ryan St. Marie and one Kurt were at my home. After five minutes later, L return and came to my home. She entered the house and my two friends went outside. We sat on the settee about 20 minutes or so. We then entered my bedroom. She then took off her clothes and we had sex."

Victim Impact Statement

[8] The victim in this matter is one now 19 years old. She is now a resident of Delcer, Choiseul and currently unemployed. At the time of offence, she was a 12 year-old schoolgirl in form One. At the time the victim and family did have to endure some embarrassment as a result of the incident. The mother of the victim has forgiven the defendant she states that the defendant never denied the incident and has apologized to her.

[9] The victim today states that she has no further interest in the matter as she does not want to relive the incident. She states that she has moved on and plans to further her studies. She states that she has no ill feelings towards the defendant.

The Defendant – Pre Sentence Report

[10] The defendant Garvin St. Aimee is presented to his court as a 27 year old man who is a carpenter by profession. There are positive reports of him from his family members and from school, though the latter was more reports of his sporting activities at school rather than academics. Since leaving school he has pursued a Tour Guide Certification Course with the National Skills Development Centre.

[11] He grew up with a grandmother who cared for him during his childhood. Today he cares and provides the basis needs of his maternal grandmother who now worries about him and the consequences that may flow from this matter.

[12] The defendant in a four-year old relationship and he and his common law partner have a one-year old daughter from this union. His partner described him as kind, loving and caring. She says that he is very supportive and takes his responsibilities seriously and she has no regrets being in a relationship with him. She notes that he especially loves his daughter who is very attached to him. (The probation officer personally attests to the close bond that was evident when that officer made a visit to the defendant's home.)

[13] The defendant is not regarded as a troublemaker in his community. In fact he is regarded as quiet, friendly and respectful and very involved in community activities. He is the Treasurer of the Ladeline Sports Committee, engaging actively in fund raising activities. He is also an enthusiastic cricketer and plays for a number of clubs in his community including the Industry Cricket Team, Delcer Youth Cricket Team, Farmers Association, Still Cricket Team and Drivers Cricket Team. Members of the community describe him as talented, enthusiastic, disciplined and vocal. He appears to have become a man of positive good character.

[14] Since leaving school, the defendant has worked as a pool boy and then became a tour guide in addition to working in the construction industry. For the last year even though he continues working as a freelance Tour Guide he has been employed in the building of cottages with Sorin Moldovan in Delcer, Choiseul. His present employer informs that he is a pleasant and hard working young man, one who goes the extra mile in performing his tasks. In fact, the employer states that he had decided to employ the defendant after meeting him years ago when the Defendant was a Tour Guide and being impressed with his personality.

The Court's Consideration on Sentence

[15] Section 127(1) of the Criminal Code, Cap 3.01 of the Revised Laws of St. Lucia prescribes a maximum penalty of 15 years for the commission of this offence. The court has a wide discretion to impose a sentence having regard to this maximum.

[16] The Code itself provides some statutory guidance to the court in arriving at the appropriate sentence in any given matter. First the court is reminded that no custodial sentence is to be imposed unless the offence is so serious that it warrants such a sentence, or the offence is of a sexual or violent nature and only a custodial sentence would adequately protect the public from harm from the offender.

[17] The court must also give due regard to all sentencing guideline and must consider that rehabilitation is one of the aims of sentencing. Other aims of sentencing are well established and the common law and experience of the courts have shown that the court must have those classic principles of sentencing in mind.

[18] In any given case each of these principles will have varying degree of influence on the eventual determination of the appropriate sentence. This would be so, as for example in some cases, a court may consider that having regard to the particular offender, the class of offence, or the manner of its commission, substantial elements of deterrence and punishment should be the primary consideration whilst the others given less weight.[1]

[19] I am also guided that in getting to an appropriate sentence, I am to consider both the personal mitigating factors of the defendant and the aggravating features associated with the offence. This is to be an evaluative exercise which, taken together with a measured and balanced application of the relevant principles, will guide a court to fashion an appropriate sentence fitting the crime and the offender. It is well established that the weighing of these factors may result in a greater or lesser sentence in any given case. The approach is not to be a mechanistic one, but the court must consider all the circumstances in the round and impose a sentence that is suitable in the any given case.

[1] See for example R. v Foxley (Gordon) (1995) 16 Cr. App. R.(S.) 879

Range of Sentence – The Yardstick Cases

[20] In **Winston Joseph v R**, the Court of Appeal on a charge of unlawful carnal knowledge with a girl over 13 and under 16 years of age, an offence which carried a maximum of 15 years, suggested that a sentence between 3 years and 7 years seems appropriate for the first offence. The court of Appeal made the point clearly that the younger the girl, the more serious the crime.

[21] In **R v Clive Mcvane** Criminal Case No. 215 of 2010, the defendant pleaded guilty to unlawful sexual intercourse with his step daughter, a girl aged 14 year and impregnated her. She gave birth to a baby boy. There was considerable breach of trust in this case and there was an age disparity of 30 years between the defendant and the virtual complainant. It was an aggravating feature that the defendant had had sex with the virtual complainant on numerous occasions.[2] The court found that he had demonstrated an uninhibited preference for sexual intercourse with minors. He was sentence to 7 years imprisonment.

[22] The case of **R v Kevin Barthelmy** Criminal Case No. 78 of 2011 provides a useful contrast. The defendant a 20 year-old young man had a relationship with a girl under the age of 16 and about February 2006, impregnated her. She had the baby. Apart from the prevalence of the offence, the court found that it brought a premature end of the virtual complainant's schooling, and that she had also suffered some psychological trauma. On the mitigating side, Even though he pleaded guilty to the offence in 2011, he had at first indicted that she had told him that she was 16 years old and he had believed her. His plea eschewing his opportunity to rely on the statutory defence was regarded as an attempt to spare her of a trial. He had positive good character and was taking care of the child above the required standard and had expressed strong remorse. The court also considered his young age when the offence was committed and the delay and found that this was a good case to depart from the guidelines set out in Winston Joseph and imposed a probation order on the defendant.

[2] Strangely he was not charged or found guilty of any of these other offences.

[23] **R v Dwain Lamas Williams** Criminal Case No. 1300 of 2009 has a curious factual background to the offence. In this case the defendant had been involved with the 14 year old virtual for some time before the incident and had actually been living with her at her grandmother's house. She had terminated the relationship because of his abuse and one day in June 2009, she left home in the afternoon to go to a nearby bakery. On her way the defendant accosted her and threatened her with a homemade gun and told her that he had a warrant for her arrest. He took her to a shack and has sexual intercourse with her twice releasing her until 2 a.m. the next day. The court found that the defendant though possessing some trade skill was a man prone to violence and obscene outbursts. He was a user of marijuana and was seen as one who could be influenced to negative conduct. He pleaded to one count of unlawful sexual intercourse. The court considered that a benchmark of 10 years was suitable in this case and reduced it to 6 years for his guilty plea.

[24] In **R v Andrew Valcent** Criminal Case No. 1184 of 2011, the defendant was caught red handed having sexual intercourse with his housekeeper's[3] 14 years old daughter. The daughter was accustomed to coming to the defendant's home to assist her mother with the chores. It was discovered that the defendant had had sex with her on three previous occasions. He pleaded guilty to four counts of unlawful sexual intercourse with a girl above the age of 12 years and below the age of 16 years. There were several aggravating features in the case. First the court found that there was a breach of trust as the girl looked on him as a father, and he abused her coming into his home to clean to have sex with her. She was also psychologically affected by the incident. It was also an aggravation that the offences were frequently repeated. He also groomed the child to commit these offences and there was an age disparity of 23 years between the defendant and the virtual complainant. On the mitigating side he was a man without previous convictions. He expressed considerable remorse and the court considered that he was prepared to face the consequences of his actions. The court considered that a benchmark of 10 years was appropriate and deducted 3 years for the guilty plea and 1 year for the previous clean record. He was sentenced to 6 years imprisonment.

[3] Before the incident, he had once been intimate with the mother.

[25] In most cases, offences of a sexual nature will attract a custodial sentence. Society, through its Parliamentary voice, in imposing a serious maximum sentence for this offence, has expressed its abhorrence for the corruption of minor girls, its recognition of the negative consequences of these acts, and its censure of these offenders. These offences almost inevitably have life long personal consequences for these girls and their families and in turn wider social and economic consequences for society as a whole. Young girls are in need of protection both from themselves and from boys and men who will prey on them.

[26] There is the much-quoted passage from **R v Roberts and related appeal** - [1982] 1 All ER 609 as to why a custodial sentence is appropriate for serious sexual offences. Though Lord Lane CJ was speaking in the context of rape, it is judicially fitting especially in the context of the consequences of sexual intercourse with minors in our Caribbean societies that our courts have considered it relevant for these statutory sexual offences. He stated:

> *"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. Second, to emphasise public disapproval. Third, to serve as a warning to others. Fourth, 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 these in cases of rape vary widely from case to case."*

[27] In the context of existing guidelines, the court has to examine the instant offence and the offender bearing in mind the three broad dimensions relevant to assessing the gravity of any sexual offence. First, the court has to consider the degree of harm to the victim. Second, the court has to consider the level of culpability of the offender and third, the level of the risk that the offender poses to society.[4] This is the underlying rational for examining the aggravating and mitigating features of the offence as well as the personal mitigating features of the offender. It is also the rationale for having regard to the Victim Impact Statement that should always be requested in these kinds of case.

[4] R v Millberry - [2002] All ER (D) 99 (Dec) speaking to the views of the UK Sentencing Advisory Panel Guidelines for Rape.

[28] This court is mindful of the caution issued by **Millberry v R** and our Court of Appeal in **Roger Naitram v R** about following guidelines and applying a mechanistic approach lest the produce inappropriate and unjust sentences. As the Lord Chief Justice said in **Milberry**:

> *" 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."*

[29] Baptiste J.A. of the Court of Appeal in **Winston Joseph** approved the caution and in turn added:

> *"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.*

[30] I now turn to consider the aggravating and mitigating features in this case.

[31] There are several aggravating features of this case. First it is the fact that pulled the virtual complainant in the home as she stopped to talk to him. This was a young girl of 12 years of age and she was clearly vulnerable; he took advantage of that. When she was inside the house, and he asked for sex, she initially refused, but he persisted.

[32] It is also of some aggravation in this matter that the defendant albeit still a young man of 19 years of age was already an adult from whom one should have expected some degree of maturity.

[33] It has been presented to me as aggravation factors in this case that the offence is serious and it is prevalent. I do not regard that these are aggravating factors. They are surely

matters that the court considers in the first in deciding that a custodial sentence is appropriate and whether it should be a higher starting point. I cannot double count them for the purposes of increasing the sentence.

The Mitigating Factors

[34] It is mitigating feature in this case that the defendant is a first time offender and was a young man of 19 years at the date of the offence.

[35] It is also a mitigating factor that the defendant cooperated with the police from the date of his arrest. In fact he voluntarily went to the police station when he heard they were looking for him. He admitted that he had had sex with the virtual complainant, though he stated that it was consensual and that he had believed that she was over 16 years.

[36] It is to his benefit that he has eschewed his statutory defence saving her the trauma of having to give evidence and the relive the incident so many years after the fact.

[37] Having regards to both the aggravating and mitigating factors in this case a benchmark of 8 years is appropriate. I now turn to consider what discount of the overall sentence should be given for the guilty plea.

The Guilty Plea

[38] The defendant has pleaded guilty to this offence. It has not been at the first reasonable opportunity. The court has had regard to the nature of this offence and the fact that the defendant may have well decided to pray in aid his statutory defence. In all the circumstances the sentence will be discounted by 2 years.

Delay – Breach of the Reasonable Time Requirement

[39] The cases have established that the right to be tried within a reasonable time is separate guarantee contained within the right to fair trial.[5] A breach of this right or even delay falling short of a breach may have consequences for the sentence. This point has not been raised by this defendant or Mr. Nichols, but I am guided by the Privy Council that it is matter I am entitled to consider. In **Rummun v State of Mauritius** [2013] 1 WLR 598, Lord Kerr of Tonaghmore JSC on behalf of the Board stated:

> *"…it is the duty of the sentencing court, whether or not the matter has been raised on behalf of a defendant or appellant, to examine the possibility of a breach of that person's constitutional rights in order to decide whether any such breach should have an effect on the disposal of the case."*

[40] It is simply a question as to whether he has been tried within a reasonable time.[6] There are three matters that the court must consider is seeking to determine the reasonableness of the period that has elapsed.[7] One such matter would be the 'complexity of the case' as the more complex a matter is, is the more time needs to be spent preparing for it trial. Another important matter in this regard would be the conduct of the defendant. A relevant question would be whether the delay could be attributable to the defendant or whether he may have made spurious and unmeritorious applications in the course of the proceedings?[8] It is also an important matter to consider the conduct of the administrative and judicial authorities. In to the latter consideration, the point was made in **Dyer v Watson** [2004] 1 AC 379 para. 55:

> *"The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It*

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[5] Darmalingum v The State 2000 1 WLR 2303; MILLS v HM ADVOCATE - 2003 SC(PC) 1

[6] Darmalingum v The State 2000 1 WLR 2303

[7] Dyer v Watson [2004] 1 AC 379; Rummun v State of Mauritius - [2013] 1 WLR 598

[8] In Rummun, the Board examining this issue stated at para. 16: "… On the latter aspect the Board has recently said in the *Celine* case [2012] 1 WLR 3707 that this may affect the choice of appropriate sentence. At para. 8 of that case the Board said this:
"The Board] observes, however, that a defendant who seeks to challenge the propriety of a sentence passed on the ground that there has been delay in the prosecution of offences must expect to have his attitude to the postponement of proceedings closely examined. Even if success in opposing applications for adjournment is unlikely, one would expect to see evidence of representations on a defendant's behalf protesting about delay before accepting that he was truly anxious for the case to be completed." and, at para. 23: "All the indications are that the defendant was content to postpone the day of judgment and while this cannot excuse the failure to adhere to the reasonable time guarantee (see Boolell's case [2012] 1 WLR 3718, para 32 and Elaheebocus v The State [2009] MR 323, para 20), it is relevant to the selection of the proper sentence." The Board did go on to note that in Rummun "…the appellant does not appear to have pressed to have his case tried expeditiously. This must therefore be taken into account in deciding whether any reduction in his sentence is appropriate. The Board observes, however, that while he may have been passively acquiescent in the continued postponement of the case there is no evidence that he was actively complicit in the maneuverings of others in delaying the trial of the case."

> *is plain that contracting states cannot blame unacceptable* **delays** *on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the* **reasonable time** *requirement is honoured."*

[41] Whilst there is no need to show prejudice, the authorities show that there are perhaps two prejudices likely to be caused by the substantial delay. First, there is the anxiety of having a charge over his head for such a long time and the uncertainty as to its outcome. Second, there is the possibility that his life may have changed in the period of delay. It may give rise to additional problems by way of hardship for his family if he were to suddenly have to be returned to prison.[9] In **Mills v HM Advocate** the court pointed to the Strasbourg Jurisprudence which described the rational in the following way:

> *"Three themes can be identified. First, 'in criminal matters, especially, it is designed to avoid that a person charged could remain too long in a state of uncertainty about his fate': Stoegmueller v Austria (1969) 1 EHRR 155, 191, para 5. Secondly it is recognised that lapse of time may result in the loss of exculpatory evidence or in a deterioration in the quality of evidence generally. Thirdly, it has been said that 'the safety of a verdict reached a considerable time after the offence often become s the subject of controversy, and undermine s public confidence in the criminal justice system': S. Stavros, The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights, (1993), p 77. Even if not exhaustive these underlying themes have a bearing on a proper disposal when there has been a breach of the* **'reasonable time'** *guarantee."*

[42] When it has been determined that the reasonable time guarantee has been breached the question becomes one of remedy.

[43] It has been accepted that the court must have all the factors before it to decide on this remedy. The remedy may include a discontinuance of the proceedings, the quashing of a conviction, or a reduction in the sentence. It may also include monetary compensation or simply a declaration.[10] In an appropriate case the finding that the right is breached may be all that is necessary to vindicate the right.[11]

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[9] Mills v HM Advocate 2003 SC(PC) 1
[10] Mills v HM Advocate 2003 SC(PC) 1
[11] Eckle v Germany (Just Satisfaction) (1983) 13 EHRR 556, 560, para 24 cited with approval in Mills v HM Advocate 2003 SC(PC) 1

'In some instances it may not be a factor of great weight and there may even be some cases in which, because of the strength of countervailing factors such as the gravity of the offence, it will be accorded no weight at all." [12]

[44] In this case the delay has been a considerable one. The Crown has accepted that the delay is primarily attributable to the administrative arm of the State; for years there has been only one court and many cases are in the queue awaiting trial. This has been one such case. It has eight years since the offence was committed. This charge was hanging over this man's head for all this time. It must have been the cause for considerable anxiety all this time. As a matter of discretion, this court must take a practical approach. This is a serious offence. There will be a custodial sentence, but the delay will have an effect on the sentence in this case.

The Appropriate Sentence

[45] This is a serious offence and it is prevalent in our society. It has long lasting consequences. It affects the victims and their families. It also affects the wider community and the entire social and economic fabric of out society. These offences will generally carry a custodial sentence. One is appropriate in this case. Having regards to the aggravating and mitigating factors in this case the benchmark sentence is a sentence of 8 years imprisonment. I have considered the defendant should be entitled to a discount of 2 years for his guilty plea. I have further considered that he should be entitled to a reduction of 3 years for the delay in these proceedings.

[46] This defendant has been clearly turned out to be a positive young man with positive good character within his community. He is actively engaged in community sporting activities and appears to be well liked by all who knows him. He appears to be a role model today. He has no other convictions and has also been on the right side of the law since this offence.

[12] Rummun v State of Mauritius [2013] 1 WLR 598 para. 13

[47] This offence requires a custodial sentence. Having regard, however, to all of the positive good things related to this offender **and the delay** I have considered that a suspended sentence would be appropriate and a just sentence in this case.

[48] He is accordingly sentenced to three years imprisonment from today's date. This sentence will be suspended for a period of three years. Should he commit any other offence within this period he shall be brought back to this court for a determination of whether he should be required to serve this full three years of imprisonment or a portion of it.

Darshan Ramdhani
High Court Judge (Ag.)