THE EASTERN CARIBBEAN SUPREME COURT

IN THE COMMONWEALTH OF DOMINICA

IN HIGH COURT OF JUSTICE

[CRIMINAL]

CASE NO. DOMHCR2016/0012

BETWEEN:

THE STATE

V

HAROLD TYSON

Appearances:

Ms. Dalrymple and Ms.Carlita Benjamin, Attorneys for the State;
Mr Wayne Nordé for the defendant

……..
2017: January 11th
2017: March 17th
……

JUDGEMENT ON SENTENCING

[1] Charles-Clarke, J: The prisoner, Harold Tyson was convicted by a unanimous jury for the offence of buggery contrary to Section16 (1) of the Sexual Offences Act No.1 of 1998, of the Laws of Dominica

[2] This is my judgement on sentencing.

THE FACTS

[3] The prisoner was 40 years old and the virtual complainant was 18 years old at the time of the incident. On Friday 5th September 2015 the virtual complainant went to the home of Jarlyn Africa

who was the operator of a shop at Woodford Hill to assist her in her business. There he met the prisoner who worked for Jarlyn Africa in her shop. That night Jarlyn Africa went to bed because she was not feeling well and left the prisoner and the virtual complainant in the shop. After they attended to some customers they remained in the shop cleaning, seasoning chicken and talking until the wee hours of the morning. Sometime after 3:00 am the virtual complainant went to sleep on a mattress in the living room. He was dressed in a blue La Coste t-shirt, and a khaki short pants tied with a scarf. Whilst sleeping, about one hour later he felt someone pushing their penis into his bottom. He turned around and saw the prisoner lying behind him with his pants below his knees. The virtual complainant's pants and his boxers were also below his knees. He held the prisoner by the neck and began hitting him with his fist. They began to struggle and while wrestling they came to the back door and the prisoner pushed the virtual complainant out of the door. When he tried to get back inside the prisoner kicked the virtual complainant in the face and ran away. The virtual complainant immediately called his father on the phone and told him what had happened. He also told Jarlyn Africa what had happened.

[4] Later that morning the virtual complainant was taken to the Portsmouth Hospital and was examined by Dr Jacob- Desbonnes who noticed there were multiple cuts and tears in the virtual complainant's anus. The doctor found there was fresh bleeding which was about three to four hours old and was caused by the injuries she saw. She concluded that the injuries were most likely caused by blunt force trauma that would necessitate forceful penetration or application. She opined that the act of introduction of a blunt object into the anus would cause tears and cuts into the structure of the anus.

The Social Welfare Report

[5] After the allocutus was read the court ordered a social welfare report on behalf of the prisoner. The report dated 26th January 2017 was based on interviews conducted with the prisoner, the virtual complainant, the virtual complainant's mother, grand aunt and members of the community where he lived.

[6] The Report revealed that the prisoner was born out of a marital union which produced three children. He lived with his parents until he went to live with his maternal grand aunt, a decision he

said he took because of physical and emotional abuse by his father which he could no longer endure. He indicated that he was exposed to domestic violence between his parents whenever his father would come home inebriated. Both of his parents had other children with whom he shared a good relationship. His aunt described him as someone who was not aggressive, defiant or delinquent.

[7] Members of the community who were interviewed spoke positively about the prisoner. They described him as a skilled and helpful individual but who due to pride did not seek help in dealing with his weakness and this hindered his ability to become a more industrious individual in society.

[8] The probation report revealed that the prisoner was a first offender. The prisoner maintained his innocence and did not express remorse for his actions. According to the prisoner he is baffled by this charge as he is known within the community as an individual who represents the youth and also speaks out against abuse of children and young persons. He feels the victim has taken away his rights as an advocate against abuse of young persons and children.

[9] The virtual complainant indicated that as a result of the incident he has become less trusting of others, has few friends and is mindful of his choice of friends. He expressed his anger about the incident and desires that the prisoner receives a custodial sentence. The virtual complainant's mother indicated that the incident has greatly affected his interaction with others. The incident has led him to smoking and distancing himself from others and as a result she has become over protective towards him.

THE SENTENCE HEARING

[10] At the sentence hearing defence counsel made a plea in mitigation on behalf of the offender. He relied on his written submission which highlighted the following mitigating factors:

i. The prisoner has no previous convictions;
ii. The virtual complainant was over the age of majority;
iii. The prisoner suffered physical and emotional abuse as a child;
iv. No violence or excessive force was used as sometimes occur in sexual offences.

[11] Reference was made to the cases of Dwight Wilson v R [1] where it was stated that the starting point in cases of buggery was five years. In that case a sentence of five years and four months imprisonment was given after the appropriate discount was made on a guilty plea. In the case of Nelson Callwood[2] a sentence of 6 years imprisonment was given for a guilty plea on one count of buggery. At the lowest end in the Queen v Andre Penn[3] the defendant was sentenced to 2 ½ years imprisonment on conviction after trial for three counts of buggery. The defence made a distinction between these cases and the case at bar indicating that in these cases the aggravating factors outweighed the mitigating factors. He pointed out some of the aggravating factors which were not present in the instant case namely:- repeated abusive conduct; breach of trust; the tender age of the virtual complainant; the grooming of the virtual complainant by the offender; the acts of perversion by the accused with the virtual complainant.

[12] In their written submissions on sentence, the prosecution highlighted the aggravating factors as follows:

i. The prisoner had shown no remorse;
ii. The act was penetrative;
iii. The act was premediated as the prisoner waited while the virtual complainant was asleep;
iv. The psychological and emotional effects on the victim;
v. The age gap between the prisoner and the virtual complainant.

The Law

[13] In passing sentence the court will take into consideration the maximum penalty for the offence of buggery which is ten years under Section 16 (1) of the Sexual Offences Act No. 1 of 1998 of the Revised Laws of Dominica.

[14] The court will also consider the legal principles laid down in the case of *Winston Joseph et al v The Queen*[4] where the Eastern Caribbean Supreme Court laid down sentencing guidelines in

[1] Case no. 21 of 2015
[2] Criminal case No. 17 of 2009
[3] BVI HCR 2009/ 0031
[4] Criminal Appeal Nos. 4,7, and 8

cases of rape, unlawful carnal knowledge and incest in St. Lucia. The court indicated what factors the sentencing judge should take into consideration when dealing with sexual offences. According to Byron C.J the sentencing guidelines were established *'with the intention of promoting greater consistency in the approach to sentencing practices and provide uniformity on the principles which inform the discretion in sentencing'.*

[15] At paragraphs 17 -19 of the judgement Byron C.J indicated the need for the court to identify the presence of the mitigating and aggravating factors and to embark on an evaluative process in deciding the appropriate sentence. He went on to list the aggravating factor and mitigating factors common to these types of cases, namely:

[18] *Aggravating Factors*

i. *If the girl (boy) 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.*

[19] Mitigating Factors

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.*

[19] The sentencing judge is also required to apply the classical principles of sentencing laid down in R v Sargeant and restated by Byron CJ in Desmond Baptiste et al [5]namely: retribution; deterrence, prevention, and rehabilitation.

[20] The cases which deal with sentencing have also considered other factors which will assist in determining the appropriate sentence such as; the prevalence of that particular offence in society and the character and antecedents of the offender. Also in determining an appropriate sentence the court will consider the peculiar circumstances of each case. In *DPP v Shaunlee Fahie*[6]– George-Creque J.A adopting the principles enunciated by Byron C.J stated that "*the sentence scale will slide up or down depending on the peculiar circumstances of each case.*"

[21] Having considered the law and upon review of the facts of this case I agree that some of the aggravating factors present in the cases highlighted by both defence and the prosecution are not present in this case. For example the offence was committed only on one occasion; there was no breach of trust; there was no additional violence inflicted upon the victim to commit the offence; the accused has no previous convictions for an offence of that nature or any other offence. Nevertheless I find the aggravating factors in this case are as follows:

i) the nature and seriousness of the offence;

ii) the premeditation;

iii) the denial and absence of remorse by the accused, who however apologised to the virtual complainant and his family at the sentence hearing;

iv) the emotional and psychological effect on the victim;

v) the difference in age between the virtual complainant and the accused.

[22] I have accepted the mitigating factors highlighted by the defence, and will add to that the good character of the accused and his work in the community especially with young people which I believe is relevant in this case.

[5] SVG Crim App No. 8 of 2008
[6] BVI HCRAP 2008/003

THE SENTENCE

[23] The offence of buggery can be considered by some as particularly depraved and abhorrent. While some societies have decriminalised the act between consenting adults however this is not the case in the Commonwealth of Dominica where it is still a serious crime which is abhorred by society and carries a penalty of ten years imprisonment. While there are no specific guidelines for sentence of this offence in the UK Guidelines for Sexual Offences 2014, however in the United Kingdom non-consensual buggery is considered analogous to the offence of rape and is prosecuted as anal rape. In R v Roberts[7] pages 134-135 Lord Lane CJ 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; 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 sentence will depend on the circumstances*."

[24] The same principle applies here and given the psychological and emotional effect of this offence its effect can be as devastating on its victim as the offence of rape. This is borne out by the social welfare officer's interview of the virtual complainant who stated that the incident has made him less trusting of others and more cautious, resulting in him having fewer friends. Since the incident he has had trouble sleeping and at one point did not leave home for a month due to humiliation by the publicity from this matter. He stated that he becomes very angry whenever he thinks of the accused conduct towards him. He suffers from headaches and started smoking and distancing himself from others. Although there is no psychological report in this case the general conclusion of the social welfare officer at page 5 of her report is noteworthy. She stated:

> *'Being sexually assaulted is one of the many painful and potentially damaging experiences that a human being may suffer, whether as a child or adult. Sexual assault has both long term and short term effects on the victim more particularly, on the emotional and social aspect of their functioning. Among the many effects of sexual abuse are trust issue, social differences, drug addiction and inability to engage in fulfilling*

[7] (Hugh) 1982 1 WLR

interpersonal relationships. She concluded that the incident has adversely affected the victim's emotional and psychological state of mind'.

[25] In arriving at the appropriate sentence the court must not only embark on a balancing exercise, weighing the aggravating factors against the mitigating factors but must also bear in mind the classical principles of sentencing, having regard to the particular circumstances of the case. There is also an obligation by the sentencing judge to use a range of sentence which is proportionate to the seriousness of the offence and comparable to other sentences imposed for similar offences.

[26] Using the principles stated in ***Desmond Baptiste et al*** (*supra*) and the methodology in ***Aguillera v The State TNT***[8] and looking at the aggravating and mitigating factors relevant to the offence, and the range of sentences imposed for cases of that type of case, I believe that the appropriate starting point in this case after a full trial is six years. This is not the worst case of buggery and therefore there will be no addition for aggravating factors. I will take into account the physical and emotional childhood abuse suffered by the offender and his good deeds in the community as mitigating factors which warrant a discount of one year. Accordingly the accused is sentenced to five years imprisonment for the offence of buggery.

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Victoria Charles-Clarke
High Court Judge

[8] Crim App. Nos 5,6,7,8 of 2015