

SAINT LUCIA

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

CASE NO. SLUCRD2014/2118

BETWEEN:

THE QUEEN

Complainant

-v-

MACARIUS AURELIEN

Defendant

Appearances:

Ms. Isa Cyril for the Crown
Mr. Leslie Mondesir for the Defendant
The Defendant present

2017: May 17.

DECISION ON SENTENCING

- [1] **Taylor –Alexander J:** The Defendant Macarius Aurelien was indicted by the Learned Director of Public Prosecutions on two counts of (1) Sexual Intercourse with a Minor, and (2) Indecent Assault contrary to Section 126 (1) and section 130 (a) respectively, of the Criminal Code of Saint Lucia. At arraignment on the 24th day of January 2017, the Defendant pleaded not guilty to Unlawful Sexual Intercourse with a Minor and guilty to Indecent Assault, contrary to Section 130 (1) (a). The Prosecution declined to offer evidence on the charge of Unlawful Sexual Intercourse. The jury empanelled for the trial of the Defendant were instructed to return a formal verdict of guilty to the count of Indecent Assault. The Defendant is now to be sentenced.

Facts Supporting the Conviction

- [2] The Defendant was in a relationship with the Virtual Complainant's mother from the time the Virtual Complainant was four (4) years old. On a date unknown in 2007, the Virtual Complainant and the Defendant were home alone. The Defendant was viewing pornographic material on the television and the Virtual Complainant asked for the remote control to change the channel, but the Defendant refused to give it to her. She proceeded to her bedroom and the Defendant followed her and started touching her on her back. She turned and he began touching her on her breasts and other parts of her body. He squeezed her arm and she ran outside. The Defendant came outside where she was and offered her a dollar. She told him that she didn't want his money. On the following day the Virtual Complainant and the Defendant were again home alone. The Virtual Complainant was in her mother's bedroom and the Defendant came and grabbed her hand. He threw her on her mother's bed. He positioned himself on top of her and held both her hands down on the bed and said in patois, "your father is not feeding you, your mother is not giving me what I want, so I'm taking what I want from you". These are the facts supporting conviction.

The Pre-Sentence Report

- [3] The report discloses that the Defendant left school prematurely at the age of twelve (12) to obtain employment, to assist his parents with his younger siblings. He is therefore poorly educated. He is a farmer by profession and has been engaged in farming from the time he left school at the age of twelve (12). He also engages in construction work whenever the opportunity avails itself.
- [4] Members of the Defendant's family describe him as quiet and reserved. He is reported to be helpful and would go out of his way to assist the family in any way that he is able to. Members of the community generally share the same sentiments, except that they said he is usually seen on the block smoking his weed.
- [5] The Defendant accepts that he was regarded as the Virtual Complainant's father and is therefore very sorry for his actions. He acknowledges that his actions have caused much pain to the victim and her family and if he could have turned back time, he would never repeat his actions. In apparent contradiction to his expressed contrition, the Defendant says that it was based on advice from his attorney, that he pleaded guilty to the charge of Indecent Assault.

Victims Impact

- [6] The victim in this matter is now nineteen (19) year old. At the time of the incident she was ten (10) years old. She lives with her mother and younger siblings and is currently employed with Sandals Halcyon as a Waitress. She continues to recall the incident very vividly. She says that she has been trying to move on with her life and therefore does not like to talk about the incident. She disclosed that during the period of time, leading to the incident, her mother worked at a factory in Gros Islet and was the sole breadwinner in the home. The Defendant was unemployed and therefore spent more time with her and her siblings, than her mother did. She explained that her mother would not return home daily, as her salary was not sufficient to enable her to commute from Dennery, to Gros Islet, and back every day.
- [7] The Virtual Complainant states that she was at home alone, with the Defendant, when he attacked her from behind. She discloses that the Defendant threatened to kill her if she disclosed what had transpired. She says she was frightened and made several attempts to inform her mother about what was happening to her, but she was too afraid to do so. She revealed, that reporting the Defendant, has made her life very difficult, as most persons in her community, dislike her for having the Defendant arrested. The incident she says has caused a strain on the relationship between her and her mother. She continues to blame her mother for not paying attention to her children; and putting her sister and her in jeopardy.
- [8] The Virtual Complainant says that living at home is a constant reminder of what happened to her, although her mother has reorganized the house to make it more comfortable for her. She continues to be very emotional about the incident and during the interview with the Probation Officer, she cried often.

Plea in Mitigation

- [9] Mr. Leslie Mondesir advanced the plea in mitigation for the Defendant. He reminded the Court that these allegations arose in 2007 and a report was only made to the police 7 years later in 2014. The Defendant has been incarcerated on remand at the Bordelais Correctional Facility from the 26th of June 2014, a period now of almost three (3) years. He identified the aggravating factors as the age of the Virtual Complainant at the time of the offence and breach of trust. He identified the mitigating factors as follows:

- a) The Defendant has pleaded guilty;
- b) The Defendant has no previous convictions;
- c) The Defendant is a person of previous good character and exemplary conduct;
- d) The present age of the Defendant. He is 62 years old.
- e) The genuine remorse expressed by the Defendant;
- f) The Defendant was gainfully employed;
- g) Delay in the Virtual Complainant bringing forward the complaint;
- h) The Defendant has been in custody for 2 years 4 months;
- i) The allegation arose in 2007;
- j) A report was made years after the alleged incident took place;
- k) The Defendant only has one incident before the Court;
- l) Contact was slight;
- m) No violence used on the Virtual Complainant.

[10] I commend counsel on his valiant efforts to distillate these, and in some cases duplicitous mitigating factors.

[11] The Defendant challenged the submission of the Crown, that there is a prevalence of these types of offences. He states that this is unsubstantial be referenced statistics. He relies on **Q v Raymond Harrison** (2014) out of British Virgin Island which case placed reliance on statistics in order to justify the prevalence of the offence. He stated that it is not sufficient to merely recite the prevalence of the offence without support.

[12] The Defence submits that the starting point sentence should be 4 years. He referenced the case out of St. Lucia of **Q v Marc St. Rose** SLUCRD2009/0429 and the dicta of Cumberbatch J. The Defendant submits that on a consideration of the aggravating and mitigating factors and the applicable law, the mitigating factors outweigh the aggravating factors. The Defendant has been incarcerated for the last 2 years and 4 months and has already served his time for the offence charged. In light of all the circumstances of this case, the Defendant requests that the Court consider time served by the Defendant.

The Crown's Submissions

[13] Expectedly, the Crown challenged the Defendant's submissions on the identified mitigating factors. The Crown reminds the Court that the Defendant was at the time of the incident approximately 55 years old, with knowledge that his step-daughter was only 10 years old. There is a clear age difference, which Counsel Ms. Cyril submits, makes the Defendant actions all the more egregious. She submits there is no identified limitation in the Criminal Code as to when such claims may be brought, for obvious reasons, and as such, there should be no consideration given to delay in bringing a charge as a mitigating factor. Ms. Cyril instead asks the Court to note that there was planning in the Defendant's advances on his step-daughter. His remorse should be treated with circumspection, as he admitted that he pleaded guilty on the advice of his lawyer.

[14] The Crown submits the following for weighing by this Court as the aggravating and mitigating factors:

Aggravating

- i. The seriousness and prevalence of the offence.
- ii. The age of the Virtual Complainant who was ten (10) years of age at the time and still under the legal/prescribed age of consent.
- iii. The Defendant knew the Virtual Complainant was a minor.
- iv. He abused the position of trust, he was her step-father.
- v. The use of threats to silence the Virtual Complainant.
- vi. Age difference between the Defendant and the Virtual Complainant. 45 years.
- vii. Violation of the victim's sexual anatomy.
- viii. The sexual approach was well planned.
- ix. Exploitation of a vulnerable victim.
- x. Defendant was prepared to put the Virtual Complainant through a trial to relive the ordeal.

Mitigating

- i. No previous convictions

[15] I accept the aggravating and mitigating factors as espoused by the Crown but have added as an additional aggravating factor the embarrassment and humiliation of the victim, as she continues to be blamed and judged by her community for the Defendant's incarceration.

[16] The Crown submits that of the aims of sentencing, General Deterrence, Retribution and Rehabilitation, are to be prioritised, and the Court should consider incarceration as a method of deterrence with rehabilitation to assist the Defendant in curbing any proclivity he may have to sexual activity with under aged girls. Finally, the Crown submits that a suitable sentence should be imposed on the Defendant which reflects society's repugnance and abhorrence to these types of offences. I am in accord with these submissions.

Sentencing

[17] In settling on a starting point sentence, I had regard firstly to the statutory provisions contained in the Criminal Code of St. Lucia, that is, the maximum penalty which Parliament has legislated for this offence. This is contained in Section 130 (1) (a) which provides:—

“(1) Any person who indecently assaults another commits an offence and is liable on conviction—

(a) on indictment to imprisonment for 15 years, if committed on a person under the age of 12 or on summary conviction to imprisonment for 5 years;”

[18] Section 130 (1) is augmented by Section 1097 of the Criminal Code which acknowledges the ability of the Court to... *“sentence an offender to a term not exceeding the statutory maximum provided that the sentence is commensurate with the seriousness of the offence or the combination of offences and where the offence is of a violent or sexual nature, as is in the opinion of the court is necessary to protect the public from serious harm from the offender”.*

[19] I have also taken guidance from the dicta in the case of **Loff James Lennon** [1999] 1Cr. App. R (s) 117 CA. referenced in the case of **Q v Camilus Paris** BHIHCR2010/0014, where Henry LJ said thus:—

“It is never easy to sentence in such cases. (Indecent assault) The Circumstances will vary greatly...What the judge must do as I see it, is to tailor the sentence to the particular facts of the case before the court. In most cases the personal circumstances of the offender would normally take second place, behind the plain duty of the court to protect the victims

of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may have been the case in former years when the position of the victim may not have been so focused in the public eye”

- [20] I have considered to the aggravating and mitigating factors relevant to the offence namely the Defendant's acceptance that he stood in the position of a father to the victim and that he knowingly violated that trust and the comfort of her home environment. His actions were premeditated, as he used the opportunity when the Virtual Complainant's mother was away at work to perpetrate his unlawful conduct. Additionally, the evidence reveals that the Defendant attempted to set the scene for this 10 year old victim by playing pornographic material on television.
- [21] I fix the starting point sentence at 4 years.
- [22] The overwhelming aggravating features relevant to the offender, in particular the great disparity in the victim and the Defendant's age; the Defendant's less than sincere remorse, his use of violence and money to silence his victim, the continuing psychological impact on the victim as gleaned from the Pre-Sentence Report; the embarrassment and the humiliation suffered by the victim in the community in which she resides and the blame she is being made to feel for the Defendant's incarceration, the Court is minded to increase the starting point sentence to 5 years.
- [23] Application of mitigating features: The Defendant pleaded guilty, however, this was not at the first available instance. A trial had already commenced and a jury had been empanelled. The case had been in the system for over two years and had been awaiting trial for over one year. Lord Taylor, CJ stressed in **R v Paul Edward Buffery** (1993) 14 Cr. App. R. (S) that *“it would be quite wrong...to suggest that there was an absolute rule as to what the discount should be. Each case must be assessed by the trial Judge on its own facts and there will be considerable variance between one case and another.”* I make no discount for the Defendant's very late guilty plea, but I discount the Defendant's sentence by one year for his previous good character.
- [24] As regards rehabilitation, the Bordelais Correctional Facility does not have any reform programs for persons convicted of sexual offences; such structured programs are available on the “outside” and

are usually managed by probation services. In any event, I am hesitant to conclude that the Defendant has a proclivity to a particular type of conduct, this being his first such offence before this Court. In the circumstances the Defendant is sentenced to 4 years imprisonment. He is to be credited with time spent on remand.

V. Georgis Taylor-Alexander
High Court Judge

BY THE COURT

REGISTRAR