IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2011/0183

REGINA

V

WR

APPEARANCES

Mr Adlai Smith for the Crown.

Mr Sherfield Bowen for the defendant.

2018: JUNE 8

SENTENCE

For unlawful sexual intercourse with a girl under 16, who believed him her father

1 Morley J: WR, now aged 62, falls to be sentenced for a single count of having sexual intercourse on 29.05.10 with a girl under 16, namely AA[1], then aged 15. AA is said to be his daughter, and there is abundant evidence that he treated her as his daughter while she grew up calling him her father.

2 The maximum sentence for the offence, under s6 (1) of the Sexual Offences Act no.9 of 1995, is 10 years.

[1] All parties are anonymized, including the defendant, as the complainant is entitled to lifelong anonymity, while the defendant is said to be her father, so that identifying him or other family members may identify her.

3 There was an earlier trial on an allegation of rape, before Redhead J, at which on 16.01.15 WR was convicted of raping AA, for which the maximum sentence is life imprisonment, and for which he was sentenced to 25 years. The conviction was quashed by the Court of Appeal, so that he faced retrial before me. He was in custody from 20.10.14 to 07.11.17.

4 On 01.05.18, the prosecution accepted a plea to unlawful sexual intercourse and the rape allegation was ordered to lie on the file, not to be proceeded with, if ever, without leave from the Court of Appeal. The plea was at the first practicable opportunity, as it would not have been accepted earlier, and it will therefore attract a degree of credit.

5 On the day of the plea, the defence challenged whether it could be proved WR was AA's biological father. This had not been raised during any earlier hearing. There followed a 'Newton' hearing before me to determine two features in the case to assist in assessing the sentence:

a. Can the prosecution prove WR is AA's biological father?
b. To what extent was there ever a father-daughter relationship?

6 On 02.05.18, I heard evidence from MA, who is AA's mother, from Michael Murrell, who is a DNA scientist, and my attention was drawn to parts of WR's Q&A interview of 31.05.10.

a. MA said WR in 1994 was in a separate relationship with another, his wife named SR, and still is. MA fell pregnant by him. She could not put his name on AA's birth certificate as his consent was required, and he did not want to acknowledge paternity to SR. From when AA was aged two months, WR would stop by MA's home, in his car, and would bring supplies for the baby. He would stay about a half hour. His contact continued weekly throughout AA's life, usually on a Saturday. In particular, from the age of 13, he would from time to time take her out, from the morning to midday. She referred to him specifically as her father. He showed her affection, often giving her a hug when he saw her, and gave her Christmas presents a number of times when about 10. AA has an older sister H, by one year, whose father is named T, but on her birth certificate there is the name F, which MA admits is not true.

b. During the course of the investigation, Scientist Murrell obtained full DNA profiles from WR and AA. Having these, he was able to assess her paternity. He filed a report on 02.05.18. He opined the only other person who could be her father would be WR's identical twin, if there is one, which there is not. He put his findings in the negative, in that he excluded all others, save an identical twin. He agreed under intelligent cross-examination that there are other calculations which can be done to prove paternity in the positive. His positon was to say it was vanishingly improbable WR was not the father, whereas a formal paternity test would show it was vanishingly probable he was. The order of probabilities either way can be expressed in quadrillions. Counsel Bowen made the point that excluding others, irrespective of the odds, is not the same as positive attribution, suggesting that on the evidence produced to the court reasonable doubt was raised. Moreover, on enquiry from the court, counsel said WR would not offer to undergo a paternity test, and instead squarely relied on the prosecution having failed to prove paternity.

c. In police interview, while WR did not answer many questions, he was on page 8 asked, 'do you love your daughter?', to which he replied 'very much', suggesting he was then accepting AA is indeed his daughter.

7 In assessing this evidence, the burden is on the prosecution to make me sure.

a. Concerning the nature of the relationship between AA and WR, I am sure he long treated her as his daughter, and that he knew she considered him through her whole life to be her father. This point was specifically conceded by Counsel Bowen, who said in his closing submissions, *'the defendant concedes and is aware that AA considered him to be her father in 2010'*. I observe that, from what I have heard from MA, their relationship was an appropriate and paternal one, unchallenged by the defence. Moreover, Counsel Bowen has said the defendant accepts WR was in a *'position of trust'* with AA, so that the sexual event, which was not gainsaid to be his inflicting sexual intercourse on her as a person believing him her father, was in gross breach of trust.

b. Concerning paternity, after careful reflection, I do not consider it necessary for the purposes of this sentencing exercise to declare this. On the one hand, it may be said there is

overwhelming evidence he is the biological father; on the other, paternity does not matter in assessing culpability and harm, if he treated her as his daughter throughout her whole life, and he knew she believed herself to be such: the harm inflicted, and his culpability in breach of trust, cannot be higher, whether or not he is the biological father.

8 I have said from the outset that I consider this case to be in a wholly different category of offending from the more frequent case of a girl aged 14 or 15 being in an inappropriate and illegal though consensual relationship, with someone she, still a child, thinks is a 'boyfriend' a few years older. Instead we have here a disgraceful behaviour where a purported 'father' aged 54 inflicts sexual intercourse on an underage girl who believes she is his daughter, to no doubt enormous psychological harm.

9 To this end, in the pre-sentence report of 21.06.18, from Denfield Philip, concerning victim impact, he records how *'the incident has seriously impacted her life to the point she could not focus in school….she was taunted by many…no one seems to care for the pains and hurts she is carrying…she is so embarrassed that she believed that her life has no value…no one seeks to help her, only to destroy her'.* She no longer loves WR, but hates him, and cannot easily form relations with any male as the memory of what he did rises up to close her off.

10 The facts of what happened are as follows. In March or April 2010, at WR's home, while collecting school money, AA had a sleep on a bed in her netball uniform. He father came in, closed the door, forced his tongue into her mouth, grabbed both her breasts, suggesting sex, which she refused. On Saturday 29.05.10, WR took AA to his farm in Bendalls, they picked mangoes, he cut cane, and they later met in a shed. He grabbed her hands and began to talk to her indecently. She was encouraged to lie on a beach chair. He pulled off her pants and undressed. He lifted her legs in the air, pulled aside her panty, and thrust his erect penis into her vagina, eventually ejaculating in her. She felt frightened and humiliated. She was told to clean herself by a car, and 20 mins later, back in the shed, he did the same again to her on the beach chair, once again ejaculating in her. AA complained to her mother that night. In interview, WR did not deny the sexual intercourse, instead not answering. He has no previous convictions.

11 For the sentencing exercise, I have been assisted by a tome of authorities filed by Counsel Bowen, offered as a 'sentencing memorandum', running to an inch thick, for which I am indebted, listing many of the leading judgments on sexual offence sentences. It is a most useful reference work, which I shall keep in my library. There is no case directly on point. While sentences in previous cases can be of some help, many cases turn on their own facts, and particularly so in this case which is unusually disgusting.

12 In assessing the starting point, I put out of mind his earlier conviction for rape and sentence of 25 years.

13 However, on the facts, I do approach the case as one of inflicted intercourse, where WR was not considering the wishes of AA, being instead determined to penetrate her, whether she wanted this or not. While consent is not an element of the offence, as a factual feature I find that in fear of the person she believed to be her father, she submitted to him, his being more powerful so that resistance was futile. In this context, her consent was not freely given, which is a significantly aggravating feature of the offence, as is the fact he did the act twice, without protection, ejaculating inside her. I will sentence on the basis she did not want him to do what he did. I say this so that AA and her family will know that the plea to unlawful sexual intercourse, accepted by the prosecution, which might be said to be over-generous, does not mean that WR can say AA was a willing participant.

14 The maximum is 10 years. I cannot think of a more serious form of this offence, except perhaps if AA had been made pregnant, or received an sti, or was a year younger, at 14 (as the offence under s6 supra concerns girls aged 14 or 15). In my judgement, making a small adjustment for age and other aggravating possibilities, the starting point is almost the maximum, at 9.5 years.

15 There are no further aggravating features.

16 Though now 62, he is a farmer, who is strong in reasonable health for his age, so I do not find he is elderly and weak, so as to mitigate the sentence. Good character is a mitigating feature, though of limited value, in light of the gross breach of trust, meaning it was his very model character that contributed to AA trusting him so. Nevertheless, having reached 62 without

conviction can be treated as mitigating the sentence by 6 months, reducing it to 9 years. There are no other features of help in the pre-sentence report of 21.06.18.

17 I turn to the effect of his plea. It was at the first practicable opportunity and in theory could possibly attract a discount of one-third. However, in my judgement, there are two features which reduce the size of the credit.

a. It could be said that the opportunity, generously granted by the prosecution, ably negotiated by defence counsel Bowen, to plead out to the unlawful sexual intercourse is already the discount, on these facts, as the sentence maximum has been reduced from life to 10 years.
b. Moreover, up until the offer to plead to unlawful sexual intercourse, noted by the court to be first at large on 30.04.18, WR had always denied sexual contact, and had maintained it through an earlier trial, so that it cannot be said to be a plea that was always on offer. What has happened is that AA is fed up, the case now being very old, she is 23 and wants to get on with her life, and does not want to go through the trial process all over again, being re-traumatised by it. Her anguish is understandable.

18 Reflecting on the plea, in my discretion, for the above reasons, I will not grant the full one-third discount, but will reduce its size by two-thirds to one-ninth, meaning to one year, (though some might say there should be no discount at all on these facts). This further reduction of one year will mean an overall sentence of 8 years.

19 Time already spent in jail on these proceedings, being 20.10.14 to 07.11.17, will count toward the sentence. WR may be eligible for remission after serving two-thirds, meaning his actual time in custody will likely be 5 years 4 months, which is longer than the 3 years and 2 weeks I am told he has already served. For this reason, this sentence means he must go back into custody.

20 *WR, please stand up*. For the offence on 29.05.10, of unlawful sexual intercourse with a girl under 16, namely AA, then 15, whom you had all her life treated as your daughter and who you know believed you to be her father, and therefore an offence in disgustingly gross breach of trust, and who was not a freely willing participant, for the reasons I have explained, the sentence will be 8 years imprisonment. Time spent in custody in these proceedings, (which I am told is

20.10.14 – 07.11.17), to be calculated formally by the prison, will count, and you may be eligible for remission after serving two-thirds. You may go down.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

22 June 2018