

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COMMONWEALTH OF DOMINICA

IN HIGH COURT OF JUSTICE

[CRIMINAL]

CASE NO. DOMHCR2015/0015

BETWEEN:

THE STATE

V

KENNETH HADEED

Appearances:

Ms. Sherma Dalrymple assisted by Ms Ann Riviere for the State;

Mr. Teyani Behanzin for the defendant

.....
2017: July

2018: September
.....

JUDGEMENT ON SENTENCING

[1] **Charles-Clarke, J:** The offender, Kenneth Hadeed was indicted for the offences of unlawful sexual intercourse with the virtual complainant a female under the age of thirteen years to wit: nine years and nine months old who was not his spouse, contrary to Section 7(1) of the **Sexual Offences Act No. 1 of 1998**; gross indecency contrary to section 13(1) and indecent assault contrary to section 3 (1) (C). He was found guilty by a unanimous jury on 5th July 2017.

THE FACTS

- [2] The facts upon which the offender was convicted revealed that on 18th December 2010 the virtual complainant who was nine years and nine months, along with her three (3) year old sister and their mother went to the offender's home to spend the weekend. At the time the offender was involved in a relationship with the aunt of the virtual complainant's mother who was away in Antigua. Upon arrival at the offender's home the virtual complainant's mother left the virtual complainant and her sister with him and went to Roseau.
- [3] The offender took the virtual complainant and her sister into his bedroom to watch television. While lying on his bed watching television the virtual complainant's three year old sister fell asleep. The offender took the sleeping child to another room and returned to his bedroom where the virtual complainant was still watching television. The offender locked the door to his bedroom and put on a pornographic video, showing images which the virtual complainant described as a man and woman having sex. He turned the virtual complainant onto her back, pulled down his pants and sucked her vagina. He then proceeded to force his penis into the virtual complainant's vagina. The virtual complainant stated that she was in pain and started screaming. She told the offender to stop because she was too young but he told her to shut up. Afterwards the virtual complainant put on her party and went to the room where her sister was sleeping. The offender later came into the room and asked her whether she wanted something to eat. He took her to a shop down the road and bought her chicken, bakes and juice. On 20th December 2010 she told her mother about the incident.
- [4] The offender who was unrepresented at the trial maintained his innocence throughout. After the allocutus the Court ordered a social inquiry report and a psychiatric report for the offender.
- [5] A first report was presented by social welfare officer Anestin Baron on July 19, 2017. On 21st July 2017 Mr Tehani Behanzin appeared on behalf of the offender

and requested additional information regarding him. The court ordered a supplementary social enquiry report and a psychiatric report. The supplementary social enquiry report was received on 29th August 2017. Both prosecution and defence were ordered to file sentencing submissions on or before 24th September 2017 or within fourteen days of receiving the reports. The matter was adjourned to 28th September 2017 for a sentence hearing. However due to the intervening event of hurricane Maria on 18th September 2017 the sentencing hearing was not held until July 18th 2018.

THE SOCIAL ENQUIRY REPORT

- [6] The social inquiry report was based on interviews conducted with the offender, his maternal sister, friends and members of his community. The social welfare officer indicated that efforts to reach other persons mentioned by the offender were unsuccessful. Interviews were also conducted with the virtual complainant and her mother.
- [6] The Report revealed that from birth until his adult years the offender went into foster care. He described his upbringing as being rough, stating that he was never accepted into his foster home. He never shared a close relationship with his biological mother although his biological father was somewhat involved in his upbringing. Similarly, although he had biological siblings he did not share a close relationship with any of his family. He viewed his childhood as an unhappy one claiming that he received no love growing up in a foster home. He is unmarried and is the father of four children, three of whom have reached adulthood. He described himself to the social worker as an easy going and very helpful individual who prefers to help others rather than receive help. He based this on his quest for love. He claimed that he does not have an aggressive disposition and is not quick to resort to anger nor is he known for engaging in conflictive situations in the community.

- [7] One of the offender's friends described him as a helpful and caring individual. She thought that his weakness is that he is unable to say no to others and is always willing to help everyone. He was described as a community oriented person and well known for his carpentry skills. It was her view and that of other members of the community that the offender should be held responsible for his actions.
- [8] The social welfare officer's interview with the virtual complainant revealed the effect of the sexual abuse upon her. The virtual complainant indicated that she had suffered in several ways and the incident made her feel terrible and scared. She continually thinks about the incident and this has resulted in low grades at school. While she does not internalize the blame which she attributes to the offender she however feels less trusting of others.
- [9] The virtual complainant's mother indicated that she became acquainted with the offender because of the intimate relationship he shared with her aunt. As a result of this she established a level of trust with him and this was the reason she left her two children alone with him. She expressed anger and hurt over the incident which she said seriously affected her daughter. She stated that her daughter's grades continue to drop and she has detected a change in her attitude in that she is now more stubborn. To a certain extent she blames herself for trusting the offender with her children. She further lamented that the offender has never reached out to her family or apologised for his actions. It should be noted here that after the allocutus the offender turned around and said he was sorry for the victim and her family.
- [10] The social welfare officer noted the impact of the sexual abuse and the short and long term physical, psychological and social consequences it has on its victims and some of the effects which includes *'shame, distrust of others, psychological distress, and difficulties at school. She opined that this can be worsened if the victim does not receive the required therapeutic intervention in dealing with the aftermath of the assault or if the victim is familiar with the abuser'*.

[11] She concluded that the virtual complainant has been affected and continues to be affected by the offender's act and opined that '*The events surrounding the incident may forever be etched in the victim's mind thus leading to disruptions in how the child interprets the environment and the world. The interpretations not only focus on the abuse, but affects how the child construes the behaviours of others, hence the inability to trust others. In the case of Kenneth Hadeed the victim has indicated that she blames the offender for her predicament and has issues trusting others*'.

THE PSYCHIATRIC REPORT

[12] A psychiatric report dated August 24, 2017 was prepared by Dr Nadia Wallace. She noted that the offender had '*a clinical history of Severe Substance Use Disorder characterized by persistent and heavy alcohol use over twenty years with loss of control. He lacked any insight into his psychiatric problem as he ignored the likely impact of drug use on his disturbed personal family and social life*'. She did not find any features of psychotic or cognitive impairment, and concluded that the offender was mentally fit to be sentenced at this time.

THE SENTENCING HEARING

[13] In his submissions counsel for the defendant Mr Behanzin raised the issue that the indictment presented by the Director of Public Prosecutions was duplicitous in that the three counts of unlawful sexual intercourse contrary to section 7(1) of the **Sexual offences Act**; indecent assault contrary to section 13(1) and gross indecency contrary to section 14(1) of the **Sexual Offences Act**, No.1 of 1998 should have been laid in the alternative as they are mutually exclusive charges. Reference was made to section 12(1) of the said Act which allows for an alternative verdict where the jury is not satisfied that the offence charged is made out.

[14] I will not address this issue except to say that while this could have been dealt with as a preliminary issue, however the jury having returned a verdict on all three counts this issue of duplicity can now only be dealt with at another forum. Be that as it may I do not think that Section 12(1) supports defence counsel's submissions. Moreover it is well established law, and Mr Behanzin adverted to this in his submissions, that in passing sentence the court should take into consideration the fact that all three offences were committed at the same time in determining what is the appropriate sentence.

[15] Mr. Behanzin in his submissions relied on the guidelines for sentencing in sexual offences laid down by Sir Denis Byron CJ in the case of **Winston Joseph et al v The Queen**¹ and asked the court to weigh the mitigating and aggravating factors in the instant case. He also alluded to the principles of sentencing laid down in **R v Sergeant**² namely retribution, deterrence, prevention, and rehabilitation.

[16] He noted the following aggravating factors:

- a. The incident took place in the offender's home;
- b. The virtual complainant and her younger sister were left in the offender's care;
- c. The virtual complainant was nine years old at the time of the offence;
- d. The relationship of trust with the victim.
- e. The offender told the victim to shut up when she protested;
- f. The offender had been drinking voluntarily;
- g. The prevalence of the offence.

[17] He highlighted the mitigating factors namely:

- a. The fact that the offender had no previous convictions;
- b. The offender was forty-eight years old at the time of the incident and is now fifty-five years old;

¹ Criminal Appeal Nos 4,7 and 8 ECSC(1)

² [1974] 60 Crim App R 74

- c. The incident occurred almost seven years before the trial;
- d. The offender is the father of four children, one of whom is a minor;
- e. The offender is well liked and a community spirited/oriented person.

[18] In further mitigation Mr Behanzin submitted that the offender was a not a violent or anti-social person. He also contended that contrary to the social inquiry report the offender is close to his daughters and two of his sisters who often come to visit him in Dominica. (However this was not substantiated by enquiries made by the social welfare officer). Mr Benanzin indicated that the offender was not academically inclined but he completed the Dominica Grammar school and the Technical College where he pursued agricultural sciences and woodwork. He informed the court of the offender's love for artistry and creativity working with all kinds of natural forest products. As a result the offender established himself as someone skilled in carpentry who owned a workshop fixing furniture, upholstery, woodwork and cabinetry, and at the time of his conviction he had several incomplete jobs and also employed several young persons.

[19] Mr Behanzin referred the Court to the sentences imposed in several cases of unlawful sexual intercourse from this jurisdiction and the wider region involving young girls of various ages. The sentences ranged from 14 years³, - to 12 years⁴.

[20] Ms Sherma Darlrymple in her written submissions on behalf of the State also alluded to the sentencing guidelines in **Desmond Baptiste et al** and submitted that in the instant case the aggravating factors outweighed the mitigating factors. Indicating that the only mitigating factor was that the offender had no previous conviction she highlighted the aggravating factors as follows:

- a. The virtual complainant was nine years old and very young at the time of the incident and the offender stole her joy of being a child;

³ The State v Uranus Carbon DOMHCR

⁴ Gordon Cunningham v The State TNT Crim App No. 18 of 2005; Surughalal v The State TNT Cr. App No. 26 of 2000

- b. The virtual complainant is still affected by the incident and her school grades have declined;
- c. The breach of trust;
- d. The refusal by the offender to accept responsibility for his wrongful actions but instead he attempts to transfer the blame to the victim. He has never reached out to the victim's family and does not desire to talk to them.
- e. The virtual complainant suffered both physically and psychologically.

[21] She also referred the court to the case of **The State v Joseph Senhouse**⁵ in which the virtual complainant was eight years old. In that case the social welfare officer noted that the offender maintained his innocence and showed no remorse. Noting the prevalence of this offence in the State of Dominica based on the statistics and the growing tendency for these offences to be committed against victims of tender age, Thomas J imposed a penalty of 25 years for unlawful sexual intercourse, 25 years for the offence of buggery and 10 years for indecent assault. The first two terms to run concurrently with each other. It should be noted that in **Senhouse** the offence was repeated several times and there was evidence of grooming which is not the case here.

THE LAW

[22] Section 7(1) of the **Sexual Offences Act No. 1 of 1998** of the Revised Laws of Dominica makes it an offence for a person to have sexual intercourse with another person who is not his spouse; and who is under the age of fourteen years whether or not the other person consented and whether or not the first mentioned person believes she is fourteen years of age or more. The offence carries a maximum penalty of 25 years.

⁵ DOMHCR No.27 of 2015

- [23] Section 13(1) of the Act provides that ‘any person who indecently assaults another is guilty of an offence and liable on conviction to imprisonment for ten years if committed on a person under the age of fourteen. Section 13(3) defines “*indecent assault*’ as an assault or battery accompanied by words or circumstances indicating an indecent intention.
- [24] Section 14(1) of the said Act provides that any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for five years.
- [25] In passing sentence I am enjoined by the classical principles of sentencing established in **R v Sargeant** and restated by Byron CJ in **Desmond Baptiste et al** ⁶namely:- retribution, deterrence, prevention and rehabilitation.
- [26] I will also consider the guidelines for sentencing laid down by Byron CJ which highlighted the need to consider the aggravating and mitigating factors, the character and antecedents of the offender, the prevalence of that particular offence in society and the peculiar circumstances of each case.
- [27] In the seminal case of **Winston Joseph et al v The Queen** the court in considering the range of sentences for cases of rape, unlawful carnal knowledge and incest in St. Lucia laid down guidelines for sentencing and indicated what factors the sentencing judge should take into consideration when dealing with offences of this nature.
- [28] 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*’. At paragraphs 17 -19 of the judgement Byron C.J further noted the need for an evaluative process by weighing the aggravating and mitigating factors and stated:

⁶ SVG Crim App No. 8 of 2008

'If the aggravating factors are outweighed by the mitigating factors then the tendency must be towards a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.'

[29] The court went to provide a non-exhaustive list of the aggravating factors and mitigating factors which should inform the sentencing judge when deciding what would be the appropriate sentence in a particular case. I make mention of those relevant to the instant case, namely physical or psychological suffering from a sexual assault, abhorrent perversions such as buggery or fellatio; the victim is either very young or very old. The only mitigating factor listed relevant to the instant case was the fact that the defendant is a first offender.

[30] Accordingly 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 peculiar circumstances of the case. There is also an obligation on the sentencing judge to apply a range of sentence which is proportionate to the seriousness of the offence and comparable to other sentences imposed for similar offences. However, the court is not prevented from departing from a notional sentence given in a particular case depending on the circumstances of the case at bar.

[31] In **Roger Naitram et al v R**,⁷ Baptiste JA stated:

'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. It follows therefore that a sentencing judge can depart from guidelines if adherence would result in an unjust sentence. The existence of a particular 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

⁷ HCRAP 2006/005

dictate deviating from the guidelines it would be instructive for the sentencing judge to furnish reason for so departing.”

[32] Thus in reviewing the above principles and the various sentences imposed in other cases of a similar nature I believe there is a need to depart from the benchmark indicated in **Winston Joseph et al** for the following reasons:

- i. While the legal principles propounded in the guidelines are still relevant the range of sentences prescribed were issued some 17 years ago. Since then there has been extensive reform of sexual offences legislation in Dominica and other OECS jurisdictions which have seen an increase in the penalties stipulated (except for rape) and the establishment of new forms of sexual offences; therefore the range of sentence stated is outdated. I note that there is currently a review of sentencing guidelines being undertaken by the Eastern Caribbean Supreme Court with a view to adopting a new approach and methodology to sentencing.
- ii. The nature of this case and the numerous aggravating factors none of which were present in **Winston Joseph et al**, a case of unlawful carnal knowledge where the starting point was eight years. Indeed some of the aggravating factors which the court in **Winston Joseph et al** said should be taken into consideration by the sentencing judge are present in the instant case. These include the breach of trust, the tender age of the victim, the accompanying act of perversion – namely the playing of the pornographic video and the act of fellatio and the psychological effect on the victim.
- iii. There is a rise in the prevalence of sexual offences in this jurisdiction. The most common type of cases listed for hearing in the criminal division is sexual assault cases. Therefore a clear message of deterrence must be sent out to would be offenders.

- iv. The lack of remorse shown by the offender and the blame and shame of the victim by the offender.

[33] The modern approach to sentencing was highlighted in the case of **Aguillera et al v The State**⁸ where the Court of Appeal of Trinidad and Tobago outlined the methodology to be applied in passing sentence. Reference was made to the numerous cases which dealt with the issue. Reliance was placed on the definition of 'a starting point' as defined by the Court of Appeal of New Zealand in the case of **R v Taukai Ridley and Roberts**⁹ as:

'The sentence appropriate when aggravating and mitigating circumstances relating to the offending are taken into account, but excluding the aggravating and mitigating factors personal to the offender. Put another way the starting point "is the sentence considered appropriate for the particular offence for an adult offender after a defended trial". (**R v Mako NZLR 170**)

[34] In **Aguillera** the court emphasized the need to distinguish between aggravating and mitigating factors relative to the offence and the offender and adopted the following methodology.

- i. 'calculate the starting point by taking account of the aggravating and mitigating factors of the offence. These are the objective circumstances which relate to the gravity of the offence itself which assist in gauging its seriousness;
- ii. the aggravating and mitigating factors relative to the offender – these are the subjective circumstances of the offender which in turn inform the degree of culpability of the particular offender;
- iii. a discount for a guilty plea;
- iv. credit for the period of time spent in pre-trial custody'.

Aggravating Factors

⁸ TNT Crim App. Nos. 5,6,7,8 of 2005' p. 13

⁹ [2005] NZLR 372

- [35] I will first consider the aggravating factors relative to the offence. These are:-
- i. The psychological suffering from the sexual assault. Although there was no psychological assessment conducted upon the virtual complainant the social welfare officer's report was very helpful in informing the court of the effects of the incident on the virtual complainant. In her interview with the social welfare officer the virtual complainant also revealed emotions of feeling terrible and afraid and distrustful of others. Her academic performance was negatively affected resulting in a decline in her grades;
 - ii. The act was accompanied by abhorrent perversions, in this case the use of pornographic material and also the act of gross indecency performed upon the virtual complainant by the offender;
 - iii. The breach of trust by the offender towards the virtual complainant. The virtual complainant's mother trusted the offender with her children ages nine and three years and left them in his care.

In *The Queen v Andre Penn* ¹⁰ (per Hariprashad J) and ***The Queen v Derek Knight*** ¹¹ (per Ellis J) a breach of trust was considered to be a major aggravating factor and a determining factor for imposing a custodial sentence;
 - iv. the victim is very young and there was a great disparity in age with the offender who was 48 years old.
 - v. the prevalence of this type of offence in this society.

[36] The aggravating factors relative to the offender include:-

- vi. The voluntary use or consumption of alcohol by the offender on that day. The offender himself admitted that he consumed a great deal of

¹⁰ BVIHCR2009/0031

¹¹ BVIHCR2014/0003

alcohol on that day as a result of his frustration and anger towards the virtual complainant's mother for taking advantage of his generosity and leaving the children in his care for an extended period whilst she went about her own business. Although he did not admit to committing the offence I believe the effect of consuming alcohol may have caused him to exercise poor judgement and to mete out his frustrations by sexually assaulting the virtual complainant.

- vii. The offender's lack of remorse or refusal to accept responsibility while it may be consistent with his claim of innocence is an aggravating factor. Further he blames the victim and accuses her of framing him. He told the social welfare officer that the virtual complainant of throwing herself at him on three occasions. The offender revealed that the victim was deceptive and capable of framing him for something he did not do. He maintained that he never had any ill intentions towards her and that she acted towards him in a sexually inappropriate way on several occasions and on the last occasion he literally pushed her away. He claimed that because he did not tolerate her behaviour towards him, she fabricated the events which led to these current charges being preferred against him.

[37] I find it difficult to accept the behaviour described by the offender given the virtual complainant's age and the fact that she was with her three year old sister at the time of the incident. Further the offender has admitted to drinking alcohol on that day which may have distorted his judgement. In addition his admission of his habit for watching pornographic movies is something the victim would not have known unless it was done in her presence. These are all matters that the jury would have taken into consideration in arriving at their verdict.

The Mitigating Factors

[38] There are no mitigating factors relative to the offence. However as it relates to the offender the fact that he has no previous convictions and is considered a first offender is a mitigating factor. Also the offender seemed to be a person of good character in that he was described as a kind and helpful person in the community. He was self-employed and used his skill to serve the community and train other young men in carpentry.

THE SENTENCE

[39] I am of the view that given the nature and seriousness of this offence, the fact that the aggravating factors relevant to the offence and the offender outweigh the mitigating factors, a custodial sentence is warranted.

[40] Kenneth Haddeed please stand up. Applying the principles of sentencing expounded in **Desmond Baptiste et al** and using the methodology in **Aguilliera et al v The State**, I will first take into account the fact that the offence of sexual intercourse with a person below the age of thirteen years carries a maximum penalty of twenty five years imprisonment. Given the nature of this offence and considering the aggravating factors of the offence and for the reasons already stated I will begin at a starting point of twelve years. I believe that the appropriate starting point for an offence of this nature is twelve years. I will then make the necessary deductions or additions for the aggravating and mitigating factors relative to the offence. As stated above I find that there are several aggravating factors relative to the offence namely:- the breach of trust; the young age of the victim and the disparity in age of the offender; the psychological effect on the virtual complainant; the use of pornographic material. I find that the aggravating factors serve to increase the sentence by four years. This brings the sentence to sixteen years. I do not find any mitigating factors relative to the offence.

[41] I will then consider the aggravating factors relative to the offender. These have been identified as the consumption of alcohol, lack of remorse and the blaming of

the victim. The mitigating factors are the fact that you are a first offender, and a person of good character. However I find that the aggravating factors and the mitigating factors balance out each other and there will be no addition or reduction in the sentence. The sentence for sexual intercourse with a person below the age of fourteen is sixteen years.

[42] With regards to the offence of gross indecency, the maximum penalty is five years. Given the nature of the offence I will begin with a starting point of two (2) years. In considering the seriousness of the offence and taking into account the same aggravating factors outlined for the offence of sexual intercourse with a person below the age of fourteen and the absence of mitigating factors relating to this offence I will increase the sentence by two (2) years. Similarly as in the first count the aggravating and mitigating factors relating to the offender will balance out each other so there will be no adjustment to the sentence. The sentence for gross indecency is four years.

[43] With regards to the offence of indecent assault I do not think it is necessary to impose a separate sentence as I believe this offence is subsumed within the other two offences.

THE DELAY IN TRIAL

[44] Although neither counsel have raised the issue of delay in trial and sentence, it should be noted that the offender has spent almost seven years awaiting trial and another year awaiting sentence. The delays were not caused by the offender. This offence was committed in December 2010 but the offender was only indicted in January 2016. No reason has been given by the prosecution except that the witnesses in this matter were all out of State. I am aware since assuming this office of no less than eight adjournments in this matter occasioned by the State due to the absence of their witnesses. The offender has regularly attended court. In these circumstances the offender should not be blamed for the delay. Accordingly a reduction of the sentence by one year is granted on each offence for

the delay in the trial. I hereby sentence you Kenneth Hadeed to fifteen (15) years for the offence of sexual intercourse with a minor; and three (3) years for gross indecency. The two terms shall run concurrently with the necessary deductions made for time spent on remand including the time spent awaiting sentence. With regards to the offence of indecent assault you are cautioned reprimanded and discharged.

[45] Finally I wish to state that the aim of sentencing is not merely to punish but also to assist in the rehabilitation of the offender. In order for you to be rehabilitated you must first accept responsibility for his actions and come to terms with his wrongdoing. Both the social welfare report and the psychiatric report indicate your lack of remorse or regret over the incident. The psychiatric report notes that you have not accepted responsibility for the offence and consistently expressed negative views about the victim. In addition the psychiatrist Dr Nadia Wallace noted the effect of alcohol consumption upon you. You stated *'I need a drink before I start my day. I get angry when people talk to me about my drinking'*. Based on the psychiatrist's assessment it is my view that you require psychotherapy and other psychiatric intervention to treat your problem of alcohol abuse and your dysfunctional sexual tendencies and behaviours. Accordingly it is also my order that you shall receive counselling and psychotherapy to assist you in the rehabilitation process and to treat your alcohol addiction. You should also utilise your skills in carpentry and joinery while at Stockfarm Prison to instruct and train fellow inmates in that trade. It is my hope that at the end of your term of incarceration you would have been sufficiently reformed to enable you to assume your role as a father and make a meaningful contribution to society.

**Victoria Charles-Clarke
High Court Judge**

By the Court

Registrar