

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR 2012/0019

BETWEEN:

THE QUEEN

Applicant

-AND-

KENO ALLEN

Defendant

Appearances: Mrs. Tiffany Scatliffe Esprit, Principal Crown Counsel for the Crown
Mr. Richard Rowe, Counsel for the Defendant

2018: April 30th
May 1st
June, 12th, 16th
July 19th
November 1st, 12th

JUDGMENT ON SENTENCING

Background

- [1] Smith J: The defendant in this matter Mr. Keno Allen (hereinafter referred to as the “**defendant**”) was retried after the Court of Appeal remitted his case for retrial and after the trial before Byer J was aborted. This decision on sentence was as a **result of the defendant’s third trial which concluded on 19th July, 2018.**
- [2] On 14th May, 2012, the defendant was arrested and charged with committing three (3) counts of criminal acts against Miss Ann Nicole Parry (hereinafter referred to as “**the complainant**”).

[3] The offences against the complainant occurred on 11th May, 2012, on Main Street, Road Town, Tortola, and British Virgin Islands. The defendant was tried before this Court and the jury returned unanimous verdicts of guilty on all three (3) counts namely:

Count One – Attempting to choke, contrary to Section 166 of the Criminal Code, 1997 of the Laws of the Virgin Islands

Count Two – Robbery, contrary to Section 210 of the Criminal Code, 1997 of the Laws of the Virgin Islands

Count Three – Indecent Assault, contrary to Section 124 (1) (c) of the Criminal Code, 1997 as amended of the Laws of the Virgin Islands

[4] As already stated above, this is the third trial of the charges on this indictment. Learned Crown Counsel Mrs. Scatliffe Esprit prepared a very useful bundle of authorities and sentencing guidelines in which she captured the relevant facts of the case. A plea in mitigation by Mr. Richard Rowe on behalf of the defendant was also considered.

[5] On 19th July, 2018 the jury quite rightly returned guilty verdicts on all counts on the Indictment. A sentencing hearing was held and the matter was adjourned to 12th November for the sentence to handed down.

Brief Facts

[6] The complainant testified via video link from Kent, United Kingdom as well as Mr. Philip Kite and his wife Mrs. Krista Kite.¹ The other witnesses give viva voce evidence in Tortola, BVI.

[7] The Crown called a total of seven (7) witnesses. The complainant testified that on 11th May, 2012 she left work at the Necker Bell catamaran by Necker Island and caught a ferry to Virgin Gorda and then made her way to Trellis Bay, Beef Island. The complainant then met a friend and had a drink before catching a taxi to Road Town where she was scheduled to meet another friend at The Dove Restaurant for dinner. The taxi dropped her off in the vicinity of Village Cay Marina in Road Town. She testified that she did not recall the exact location of The Dove Restaurant, however

¹ Section 27 (3) of the 2006 Evidence Act allows the Court to hear evidence of witnesses through live video link that permits the virtual presence of witnesses before the Court and the parties to hear, examine and cross-examine the witnesses

she eventually found it and was walking towards the restaurant when she encountered the defendant.

[8] The defendant approached the complainant and enquired if she was going into The Dove Restaurant and she answered in the affirmative. The defendant then began to execute his cunning plan for the complainant. He told her that he was a police officer working undercover and that he had reasons to believe that the barman at the restaurant was selling marijuana. He wanted her to purchase some marijuana from him (the barman) and report back to him (the defendant). She refused to do what he asked and he said that he would have to take her to his supervisor. She testified that even though he did not show her any identification she believed that he was a police officer and that he was wearing an ear piece and she went with him.

[9] The defendant then attacked the complainant and dragged her into the alleyway beside Harneys Law offices. She indicated in her testimony that she screamed and the defendant pushed her to the floor on the stairs, held her with one hand around her throat and began to strangle her and used his free hand to touch her vagina through her dress.

[10] She testified that she fainted and blacked out and when she came to, she observed the defendant rummaging through her purse. She stated that she then saw a man coming from the side entrance of Harneys' and the defendant made good his escape with her Hugo Boss purse, \$200.00US and several bank cards.

[11] **The man who came to the complainant's assistance was Mr. Phillip Kite** who worked at Harneys Law offices. He testified that he was walking towards where his wife was waiting for him at the base of Russell Hill Road when he observed a woman on the ground and a man over her. He shouted, the man ran off and he (Mr. Kite) gave chase for a short distance. He stated that the **woman's dress was up and that she had on underwear. The wife of Mr. Kite**, Mrs. Kirsten Kite testified that at the same moment she observed a man run through the parking area, jump on the embankment and run up Russell Hill later slowing to a walk.

[12] While the defendant made good his escape up the hill he was passed by Mr. Glenford "**Chappy**" Maduro. Mr. Maduro indicated that he recognized the defendant and that he had known him for

several years from he was a member of the Purple Dragon Karate club and from playing **basketball and that he knew him as “Jumanji”**. He said that when they passed each other the **defendant ‘growled’ at him which he ignored and continued on his way**. Mrs. Kite indicated that after seeing the man run up the hill she became concerned for her husband. She then heard him calling her and found him with a visibly upset complainant.

[13] The complainant attended at the Road Town Police Station and made a formal report to Detective Sergeant Dervent Murray and thereafter attended at the Peebles Hospital where she was examined by Dr. Christopher Roberts and he documented his findings.

[14] The defendant was subsequently arrested and charged.

[15] At the trial, the defendant gave sworn testimony and indicated that at the time of the incident he was at home watching a movie and that he had worked that day at The Solid Waste Department. Significantly, he was unable to explain how Mr. Maduro had confirmed seeing him (the defendant) on Russell Hill that evening.

[16] At the sentencing hearing Defence Counsel indicated that his client had been in custody for a protracted length of time due to his inability to take up his bail. He also noted that his client had been gainfully employed at the Solid Waste Department prior to his incarceration.

Victim’s Impact Statement and Psychologist’s Report

[17] The complainant indicated in her impact statement that the events of May, 2012 have had a lasting effect on her life. As a result of the attack she resigned from her job here in the BVI a job that she loved and returned to the UK where she was prescribed anti-depressant medication and underwent counseling.

[18] She said that after the attack she had difficulty sleeping, suffered from flashbacks became depressed and started to drink in order to make the pain go away.

[19] In addition to her Impact Statement a report was obtained from Clinical Psychologist Dr. Amy-Kate Hurrell who examined the complainant shortly after the incident in 2012. The complainant was

diagnosed with Post-Traumatic Stress Disorder (PTSD) and alcoholism and had undergone four (4) months in-patient treatment for these ailments.

- [20] The trials and retrials of this matter have also added to the stress of the complainant as she has had to relive the events of 2012 resulting in her difficulty in moving forward with her life. In addition, the complainant has developed trust issues relating to men and continues to suffer emotionally and physically from the attack.

Sentence on Retrial

- [21] This issue was dealt with by Ramdhani J in the R vs. Andre Penn² case. In that case the Learned Director of Public Prosecutions who had not dealt with this issue in his sentencing guidelines was invited to address the Court on that particular point. Ramdhani J in turn stated that the conviction having been quashed, the second Court was at large to treat with all the issues including sentencing afresh without regard to the sentence imposed on the first trial. He pointed this Court to Section 37 of the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap 80 to make the point that even the Court of Appeal had a power to increase sentence.

- [22] He went on further to state:- *“As a general starting point, on a sentencing following convictions on a retrial, a Court is entitled and required as a matter of law to fix an appropriate sentence having regard to all the applicable legal principles, the facts of the particular case and the personal mitigating features of the defendant. A Court in considering what is an appropriate sentence following a retrial is not engaged in a process of ‘resentencing’ but one of ‘sentencing’ in which it is exercising a fresh and independent jurisdiction.”*

- [23] Therefore, in matters of retrials the Court may treat the sentencing as a first sentence.

The Defendant's record

- [24] The defendant has a long history of offending dating back to 1998 and ranging from threatening language to burglary.

² Criminal case No. 31 of 2009

The Offences on the Indictment

Attempt to Choke

- [25] The Criminal Code of the Virgin Islands states: - ***“Any person who by any means whatsoever attempts to choke suffocate or strangle any other person or who by any means calculated to choke suffocate or strangle attempts to render any other person insensible, unconscious or incapable of resistance with intent in any such case there by to enable himself or any other person in committing any criminal offence, commits an offence and is liable on conviction to imprisonment for life”.***
- [26] The defendant engaged in an act of violence by attempting to choke the complainant during which by her own testimony she blacked out. I would place this act in the region of medium seriousness **exacerbated by the injuries occasioned to the complainant’s neck** and the lasting emotional effects on her. An authority was supplied by the Crown which emanated from the United Kingdom where the defendant in that case had pleaded guilty to attempting to choke and was sentenced to life imprisonment with a minimum sentence of 12 years imprisonment³.

Indecent Assault

- [27] The maximum sentence that may be imposed on an offender for the offence of Indecent Assault is ten (10) years. The relevant provision is section 124 of the Criminal Code 1997 as amended by Act No. 8 of 2006 of the Laws of the Virgin Islands. This section states that: ***“Any person who makes an Indecent Assault on another person commits an offence and is liable (b) on conviction on indictment, if on a person of or under the age of thirteen years, to imprisonment for a term not exceeding ten years”.*** In the case at bar, the indecent assault occurred when the defendant **placed his hand on the complainant’s vagina over her clothes.**
- [28] On a scale of one to ten the Court would place this assault at a four as it was in my view not of the most serious on the spectrum of assaults. However, the acts of the defendant left the complainant extremely traumatized and injured as highlighted in her Victim Impact Statement and corroborated by Dr. Christopher Roberts and this will be factored into the sentence.

³ R vs. Hann (1996) 1 Cr. App. R. (s) 267

Robbery

- [29] The Criminal Code of the Virgin Islands states:
- (1) A person is guilty of robbery if he steals and immediately before or at the time of doing so and in order to do so force on any person or seeks to put any person in fear of being then and there subjected to force.
 - (2) A person who commits robbery is guilty of an offence and is liable on conviction to imprisonment for life.
- [30] The Court has perused the local authorities supplied by the Crown and has noted that the range for robbery after a trial is within a range of 8 to 10 years.
- [31] The starting point in relation to the construction of this sentence is to consider the seriousness and consequences of the offence and the circumstances of the offender. This case involved a high level of emotional distress, disruption, and harm to the victim. Its seriousness is illustrated by the offender engaging in a misleading plan on a vulnerable victim.
- [32] The Court has consulted the draft Eastern Caribbean Supreme Court sentencing guidelines for robbery and having regard to the foregoing matters the Court has fixed this robbery in the mid-range on the seriousness scale.
- [33] There was some degree of planning involved in the execution of this offence and the defendant clearly thought out his plan to trick the complainant.
- [34] The Court is also of the view that the defendant targeted the complainant because of her obvious vulnerability (searching for the restaurant, female, appearing to be a tourist).
- [35] Accordingly, I have determined that a custodial sentence is presumptively appropriate with a starting point of ten (10) years.
- [36] This starting point sentence is susceptible to upward or downward adjustment depending on the existence of aggravating or mitigating factors personal to the offender unless there is a cancelling out; in which case there will be no adjustment at all.

[37] These subjective circumstances of the offender inform the degree of culpability of the particular offender. My findings in relation to the aggravating and mitigating factors are as follows:-

Aggravating Factors of the Offence:

- Offence was committed in a public place and at night
- The offence was premeditated as illustrated by the story the defendant told to the complainant about being a police officer and the tale of the barman selling marijuana inside of The Dove Restaurant
- Complainant sustained injuries
- Property stolen was never recovered
- The extensive psychological and emotional harm inflicted on the complainant as a result of the offence

[38] Aggravating Factors relating to the Defendant:

- Extensive list of previous convictions including offences for violence
- Lack of remorse

Mitigating Factors relating to the Defendant and Offence:

[39] The Court could not identify any mitigating factors which could be related to the defendant in this case, nor to the offence.

Principles of Sentencing

[40] The principles of sentencing were set out by Chief Justice Wooding in the case of R vs. Sargeant⁴ and further elaborated on by Chief Justice Sir Dennis Byron (as he then was) in the oft quoted case of Desmond Baptiste vs. The Queen.⁵ The Court selects a starting point that is commensurate with the seriousness of the offence. This exercise is necessary for establishing **the defendant's degree of criminal culpability**. In this regard, the Court will have regard to the aggravating and mitigating circumstances of the case. The Court will also have regard to the principles of sentencing as set out below:

⁴ (1975) 60 Cr. App R. 74

⁵ Consolidated Criminal Appeal No. 8 of 2003

- Reduce crime/Prevention – by preventing the offender from committing more criminal acts and deterring others off from committing similar offences. In the defendant’s case, he has been away from society since 2012 when he was first taken into custody.
- Reform and rehabilitate offenders – **changing an offender’s behaviour to prevent future** criminal acts for example by requiring an offender to undergo treatment for drug addiction or alcohol abuse. The defendant in this case has shown no remorse and so, it is the view of the Court that he will benefit from intensive counseling in order for him to acknowledge and change his anti-social behavior. It is also significant to note that the majority of the victims of his offending have been women and so the Court is also of the view that intensive anti misogynic training or counseling be undertaken by the defendant.
- Protection of the public – from the offender and from the risk of more criminal activity being committed by him. This could be achieved by incarceration, restricting their activities or supervision by probation. The Court is of the firm view that society must be protected from the defendant and his deviant behaviour.

Conclusion

- [41] Finally having said all of the above, the Court is constrained to comment that this case falls into the category of being planned and as being one of premeditation where the defendant lay in wait for his vulnerable prey.
- [42] He has previous convictions for offences of violence and this Court considers him to be a great danger to women.
- [43] The sentence will reflect the fact that the public must be protected from this defendant.
- [44] With a starting point of ten (10) years I have made no adjustments downward as there are no mitigating factors relating to the offence or to the defendant.

- [45] I am treating this defendant as if he were being tried and sentenced for the very first time. I have been guided by Ramdhani J when he stated in case of Andre Penn that the Court may treat the case at bar as *“sentencing afresh without regard to the sentence imposed on the first trial.”*
- [46] As already mentioned the starting point for the robbery is ten (10) years and the Court has adjusted it upwards to reflect the aggravating factors and lack of mitigating factors to bring the sentence to twelve (12) years.
- [47] The defendant is sentenced to twelve (12) years in prison on the robbery charge, three (3) years on the indecent assault and three (3) years on the attempt to choke charge.
- [48] The defendant has been in custody since 2012, which is a total of six (6) years. Therefore this time in custody will be subtracted from the twelve (12) years to bring the sentence to six (6) years.
- [49] All sentences are to run concurrently.

Ann-Marie Smith
High Court Judge

By the Court

Registrar