

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2018/0004

REGINA

V

JOHN ALLEN

APPEARANCES

Mr Henry Gordon and Ms Korah Galloway for the Crown.

Mr Jean Kelsick for the defendant.

2019: MARCH 11

SENTENCE

For rape and buggery of a frail lady aged 86

- 1 Morley J: On Montserrat, John Allen, **also known as 'Big Man'**, dob 04.02.52, (Allen), falls to be sentenced following conviction by the jury on 14.11.18 on four counts, for rape, buggery, indecent assault (all unanimously by a jury of eight), and burglary with intent to rape (by a majority of 7:1), of MS¹, aged 86.

¹ The parties will be referred to as above, in brackets or letters, rather than as complainant or defendant and other terms of legalese or formality, to help ease of reading, and in addition as the complainant in a sexual offence case is entitled to anonymity, with no disrespect intended to any person.

- 2 He had chosen to be unrepresented at trial. He is represented at sentence at the behest of the defendant pro bono by Counsel Jean Kelsick, President of the Montserrat Bar Association, to whom the court is indebted.
- 3 Allen was convicted on the following facts as found proved by the jury:
 - a. On 05.01.18, MS was 86, living in Salem, awaiting her breakfast from her brother seated at his bar, and at about 07.30 Allen, who is related to her, was seen by her neighbors Livingston Robinson and Sanjae Prince to be crouched by her, stroking her leg with one hand and with his other hand between her legs. He was told to leave her alone. This was the indecent assault, count 3.
 - b. Next day, on 06.01.18, Robinson found him in her home, chased him out, made a police report, and he was arrested back in her home emerging from her bedroom. This was the burglary with intent to rape, count 4. **MS was found by police at her brother's bar where she reported Allen, who she knows as a relative, had raped her the day before.**
 - c. MS presented on 08.01.18 between 15.41 and 16.41 during her videoed police ABE interview (so-called as designed to achieve best evidence), as a feeble, frail, obviously vulnerable person, of a generation reluctant to use words describing sexual anatomy, and who through questions from two female police officers, clearly well-trained in the sensitivities of sexual offence cases, told a story of how Allen had come to her home in daylight on an indistinct recent date, between 01.12.17 and 06.01.18, while she was on her bed, forced his penis into her vagina and anus, wanted her to suck his penis which she refused, she believed he ejaculated and it appeared he had used a condom. There was not significant force. These allegations were the rape and buggery, counts 1 and 2.
 - d. At first following arrest on 06.01.18, to officers in the evening of 08.01.18 and in a statement under caution on 09.01.18, Allen said he was merely visiting family with no indecent intent or sexual contact, but later between 10.22 and 11.08 on 09.01.18 in a videoed interview admitted sexual intercourse but said it was with consent.

- 4 During the trial it was often unclear what precisely was **Allen's defence**. **Discussing the case in preliminary hearings and in the jury's absence** as the trial began, he denied there was any sexual contact, and yet also said there was consent to sexual activity. He was animated to exclude his videoed interview where he admitted intercourse, wanted MS called so she could be cross-examined personally by him (which is impermissible) as to what happened and on consent, and wanted the doctor and forensic scientists to say their findings must mean there was no rape. On 13.11.18, at the close of the prosecution case he said his defence was there had been consensual sex (consistent with his video interview) and on returning from the toilet minutes later **announced he wanted to 'go back', as he put it, to his original position (as in his statement under caution)** there had been no sexual contact. It seemed to the court that Allen lied in its face as it suited him, (though the jury had no sight of his vacillations). Moreover, on a *voire dire* to support exclusion of his video interview, he claimed he had been tortured in his cell by five officers applying pliers to his testicles, and yet in evidence before the jury did not put this, and in making a closing speech simply asserted a police sergeant, who had not been a witness in the case, had mischievously advised him to lie he had had sex with MS to improve his position.
- 5 The case has been a good example of the difficulties an unrepresented defendant can create.
- 6 Moreover, the dishonesty of the defendant was plain for the court to see, though its full extent was not in front of the jury. This dishonesty continued into the pre-sentence report by Probation Officer **Stanford Kelly dated 04.03.19, where he reports on the defendant's** evident untruthfulness and lack of remorse in paragraphs 2.2 and 2.3 when interacting with him. I will keep in mind this thorough dishonesty when assessing the gravity of the offending.
- 7 It is with sadness the court notes that MS died at the beginning of March 2019. It may be important for the defendant to know her passing will not increase his sentence. However, equally it is important to note she was too frail to be the subject of a victim impact assessment as there was concern discussing the case would re-traumatise her. Instead, her brother Daniel Sweeney has spoken for her in a police statement dated 02.02.19, where he says *inter alia*:

'...I stayed with MS at the hospital to provide her with the emotional support she needed. She sat there and she cried on and off which showed how much the incident really **affected her...**Since 06.01.18, upon her discharge from the hospital MS was temporarily placed in the Margetson memorial home where her brother was. She stayed there for a short time but could not return home for fear of reliving the trauma that took place in her own home. After that she was placed in the Golden Years home for the elderly in **Brades....because she became poorly and needed a lot more help and supervision.** Prior to the incident, I had no intention of putting her in a home.... Initially MS did not fit in well at the home, she cried continuously and once I visited she would be devastated after I left and she would not interact with the other residents and staff. She was before this a friendly person...**she does not have the same personality as she had before...**she does not walk around anymore which was a big part of her life. Physically MS got much weaker, she rapidly declined, which was not happening when she was living in Salem. Now she cannot walk on her own. MS does not speak **about what happened...it seems the pain of the event would start the process for her all over again.'**

8 The defendant has relevant previous convictions. Now 67, he has 35 listed convictions.

a. Probation Officer Kelly notes at para 3.1:

'...**there is a distinct pattern of offending that demonstrates his lack of** boundaries and self-discipline. Mr Allen has a long list of previous convictions for both sexual and physical assaults dating back over thirty years. I think it is important to note there are at least nine convictions where he has been found in a residential **home without good reason....The** most recent matter of indecent assault in 2016 was an incident involving a minor for which he received a two year prison sentence. By my calculations he would have been released from that sentence a short time before he committed these current matters.'

b. In a helpful sentencing note dated 04.02.19, the Crown notes the following as particularly relevant previous convictions:

i. 07.03.88 Burglary with intent to rape, seven years; the victim was 67.

- ii. 20.11.88 Burglary with intent to rape, three years consecutive the above; the victim was 60.
- iii. 17.07.06 Indecent assault, nine months.
- iv. 20.07.16 Indecent assault, two years; the victim was 16, (from which sentence he was released on 17.07.17, so that the offences on MS were within six months of release).

9 Weighing matters, I begin my approach to this sentence as concerning very serious offending, namely serious sexual offences, on a person in her own home who was obviously highly vulnerable and feeble, being then 86, now deceased, having been debilitated by the offending, by a person, aged then 65, who has a history of sexual offending and being on property with intent to commit sexual offences, having served one previous sentence of ten years for sexual offending, who is a high risk of re-offending (per para 10.1 of Officer Kelly's report), shows no remorse, is dishonest, about whom members of the public have expressed concerns has learned nothing from his previous offending (per para 11.1), and who can properly be characterised as a recidivist sexual predator who is dangerous to the public, presenting a significant risk of committing further serious sexual offences.

10 However, set against this overview has been the mitigation ably offered by Counsel Kelsick, who has urged there should be some light at the end of the tunnel. Concerning a possible life sentence, he points out that the working of the parole board on Montserrat is not wholly clear, so that it largely makes recommendations to the Governor and does not function as a parole board might in the UK. This would mean a life sentence might have the effect of meaning life without an effective mechanism to consider release after what in the UK would be a 'minimum term', so that it may be a mistake to imagine that what a life sentence may mean in the UK means the same here, as here it may inadvertently be an altogether harsher sentence. Moreover, he asks that no sentence is consecutive, as the danger exists the overall sentence will become unfair as too long, recalling the gravitas is rape and buggery, not the later offences alongside and which resulted in little actual harm.

11 In addition, Mr Joseph W Bass, currently in Boston MA addressed the court through whatsapp, **aged 78, and who has known the defendant through his life. He describes the defendant's mother** as being of good name, working hard, on a subsistence income from labour and farming, known **for rummaging in bins. He adds he is concerned for the defendant's mental health, as he has** observed him to talk to himself and burst into spontaneous laughter, though is intelligent, reads a lot, and often made perceptive contributions to prayer groups. In tandem, Counsel Kelsick urges the court to consider that in addition to his incarceration the defendant should be the subject of psychiatric evaluation, to ascertain if there may be a mental disorder requiring treatment, (while certainly the court has discussed if he may suffer a narcissistic personality disorder).

Constructing the sentence

12 The maximum sentences under the *Montserrat Penal Code* Cap 4.02 for the offences are life for rape (s117) and buggery (s137), 14 years for burglary with intent to rape (s224), and five years for indecent assault (s122, as amended).

13 The court will approach the sentence on the basis the rape in association with the buggery are together the most serious offences.

14 To find the starting point, I have chosen to be guided by the UK Sentencing Guidelines for offences of rape, where the maximum is the same, and am of the view the case falls there into category 1B².

a. In assessing the harm, I find there has been:

- i. Severe psychological harm;
- ii. Uninvited entry into **victim's home**; and
- iii. The victim is particularly vulnerable due to personal circumstances (namely she is 86).

These three features in combination, and the extreme nature of the assault being on a person who is so vulnerable elevate the case to category 1.

² See Blackstones 2016 supplement, SG59-61.

- b. In assessing the culpability, I find there has been:
 - i. Some degree of planning, in that the defendant went to the home of MS intending to have a sexual encounter, and
 - ii. Some abuse of trust as he is her relative.

These two features do not elevate the case into level A, as the planning or abuse of trust must **be more than 'some' and instead be 'significant'**, but they do aggravate the starting point.

15 The starting point for level 1B is 12 years with a range of 10-15 years. Owing to there being some degree of planning and abuse of trust, I place the offence at the higher end, with a starting point therefore of 14 years.

16 Reflecting further on the starting point of 14 years, there are the following aggravating features pertaining to the offence:

- a. Ejaculation;
- b. Commission of the offence while under the influence of alcohol.

In combination, these increase the sentence by a year to 15 years.

17 In addition, and as a separate analysis, under different draft sentencing guidelines for rape due shortly to be in force from the Chief Justice within the Eastern Caribbean Supreme Court (ECSC), I would assess the case would fall here using different criteria at Category 2A, with a starting point of 50% of 30 years, which is 15 years, so that the starting points under either guideline, whether from the ECSC or UK, emerge as the same.

18 It may be of note that Counsel Kelsick did not demur from the assessment of 15 years as the starting point.

19 There are no mitigating features identifiable for the offence. I do not consider the **defendant's** admission to police he had intercourse with MS to be mitigation given his vacillations over this admission during the trial.

20 Turning to features pertaining to the offender, there is a further aggravating feature in that he has significant previous convictions, as listed above. I have given careful thought to whether these should take the case outside the guideline, possibly to merit the passing of a life sentence, particularly as I find that the defendant is dangerous, as above.

a. After much contemplation, assisted by Counsel Kelsick (to whom I would hope the defendant will be very grateful indeed), I have decided not to pass a life sentence, which may mean he would never be released. Instead I will reflect his previous convictions and dangerousness in a determinate sentence, adjusted upwards from 15 years.

b. Specifically, in light of his convictions for similar behavior, I increase the sentence by six years, to 21 years; then, in light of his dangerousness, consistent with dicta in para 20(e) in the case of *R v Desmond Baptiste 2004*³, which contemplates an extended sentence for a someone who poses a significant risk of further serious offending and therefore being a person from whom the public needs protection, I increase the sentence by two years, being roughly 10%, to 23 years.

21 The one mitigating feature which might be offered pertaining to the offender is his age, namely now 67, whereby it may be said he will not survive a sentence of 23 years. However, he has a long history in the courts, and at his age ought to know better than to continue offending. Nevertheless, again assisted by Counsel Kelsick, to give some light at the end of the tunnel, I will make a discreet allowance for the fact he is notionally a 'pensioner', and adjust the sentence downwards by one year, to 22 years, which will have the effect of likely meaning he will serve just under 15 years in jail, which may just be the glint of light Counsel Kelsick sought. This is because of the 22 years contemplated, as the prison rules currently are, he will serve two-thirds of the sentence before being eligible for remission if cooperative with the prison authority, meaning he can expect to serve at least 14 years and eight months. Time spent on remand already will count.

22 Because this was a trial, there is no credit available for a plea of guilty.

³ See <https://www.eccourts.org/desmond-baptiste-v-the-queen/>.

- 23 Turning to the other offences, **because of Counsel Kelsick's remarks**, I have decided, balancing compassion for MS with fairness to the defendant, I will pass concurrent sentences, judging these offences are all part of the same, not separate, criminality concerning a same complainant, and keeping an eye on the **Counsel Kelsick's** glint of light at the end of the tunnel.
- a. For the buggery, 22 years;
 - b. For the indecent assault, 2 years;
 - c. For the burglary with intent to rape, 10 years.
- 24 There being no consecutive sentence, the question of adjusting the sentence for totality does not arise.
- 25 In light of the sentence to be passed, there will be no ancillary orders (and none are sought by the Crown), though I would add that there should be a sex offenders register established on Montserrat, and if today there was one, I would order the defendant remain on it for life.
- 26 *John Allen, please stand up.* You have been much assisted today in your sentence by Counsel Kelsick. For the reasons I have explained, the sentence I pass for the rape of MS is 22 years in prison, for the buggery of MS is 22 years in prison, for the indecent assault is 2 years in prison, and for the burglary with intent to rape is 10 years in prison, all sentences to run concurrently. Time spent on remand will count. I will in addition recommend that you are assessed by a psychiatrist once a year so that you may benefit from counselling and medication if appropriate while you serve. You may go with the gaoler.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

11 March 2019