

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. ANUHCR2020/0074

BETWEEN:

THE QUEEN

and

ZAIR AUGUSTA

Appearances:

Mr. Curtis Cornelius, Counsel for the Crown
Mr. Cosbert Cumberbatch, Counsel for the Defendant

Before: The Honourable Mr Justice Colin Williams

2022: January 25th, 26th, 27th, 28th,
March 11th,
July 28th

JUDGMENT

[1] **WILLIAMS J.:** Mr. Zair Augusta was indicted by the learned Director of Public Prosecutions on the 17th day of June, 2020 for three offences contrary to the **Sexual Offences Act**, No. 9 of 1995 of the Laws of Antigua and Barbuda. The first two counts were for incest, contrary to section 8 (1) and the third count was for serious indecency contrary to section 15 (1) (a).

[2] The First and Second Counts were worded in identical terms. At the commencement of the trial, there was an objection by Counsel, Mr. Cosbert Cumberbatch on behalf of the Defendant, who submitted that the first and second counts were the same. In response the Crown applied for and was granted an amendment to the Second Count. That amendment distinguishes the First Count from the Second Count.

[3] The First Count reads:

“Zair August between the 1st day of April and the 4th day of August, 2018, at Cassada Gardens, in the Parish of Saint John in Antigua and Barbuda, had sexual intercourse with

Devonnay Martin a female of the age of six (6) years old, knowing that the said Devonnay Martin was his sister.”

[4] The Second Count differs from the First Count in that the words “on an occasion other than that in the First Count” were inserted after the words ‘in Antigua and Barbuda’.

[5] The Third Count alleges that the Defendant:

“(B)etween the 1st day of April and 4th day of August, 2018, at Cassada Gardens, in the Parish of Saint John in Antigua and Barbuda, committed and act of serious indecency with Devonnay Martin a female of the age of six (6) years old by putting his finger into her vagina.”

[6] This matter came on for trial before a single Judge, sitting alone without a separate jury on Tuesday 25th January, 2022. On Friday 11th March, 2022 the oral decision of ‘not guilty’ was delivered remotely via skype from Tortola, the British Virgin Islands. The written reasons are now being provided.

Case Management

[7] This matter came on for case management on 14th June, 2021. At that sitting, the trial was scheduled for the 22nd September, 2021.

[8] By the adjourned date, the 22nd September, 2021 jury trials had not yet resumed. The matter was therefore adjourned to the 30th September, 2021 for further case management.

[9] On the 30th September, 2021 Mr. Cumberbatch indicated that following consultations with his client, the defence intended to make an application for the matter to be tried by a Judge sitting alone. The matter was adjourned for one week.

[10] On the 7th October, 2021 a ‘Certificate of Consent to be Tried by a Judge Alone’ duly signed by Mr. Augusta was filed at the High Court. Trial was set for Monday 15th November, 2021. The estimated length of trial was said to be three-days.

[11] The trial date of 15th November, 2021 turned out to be a clash with another Judge-alone trial which involved counsel who travelled from overseas. This matter was then listed for the 7th December, 2021 for trial.

[12] When the matter was called up on the 7th December, 2021 the Crown indicated that it was not ready to proceed with the matter. None of the witnesses in the matter were present at the Court House. The Crown requested an adjournment. Counsel for the Defendant indicated that were it not “a matter

of this type” he would have made an application to have the matter dismissed. A new trial date was once again scheduled; this time for Tuesday 25th January, 2022.

Jurisdiction

- [13] The **Criminal Proceedings (Trial by Judge Alone) Act**, No. 8 of 2021 entered into force on the 7th June, 2021. That **Act** provides for trials before a single Judge sitting without a jury.
- [14] The Defendant, pursuant to section 5 (1) (a) of the **Criminal Proceedings (Trial by Judge Alone) Act**, having sought and received legal advice from an Attorney-at-Law in relation to that mode of trial, filed a Certificate of Confirmation with the Registrar of the High Court in the prescribed Form.

Burden and Standard of Proof

- [15] As in every criminal trial, it is the Prosecution that bears the burden of proof. That burden never shifts. The Prosecution is required to prove so that the forum of fact is sure of the guilt of the Defendant. If the Prosecution does not meet the required standard of proof, then the Defendant must be found not guilty.

The Law

- [16] Section 8 (1) of the **Sexual Offences Act** states:

“A person commits the offence of incest knowing that another person is by blood relationship, his or her parent, child, brother, sister, grandparent, grandchild, uncle, niece, aunt or nephew as the case may be, has sexual intercourse with that [other] person.”

- [17] The Crown is required to prove, so that the forum of fact is sure, that:

- 1) The Defendant and the virtual complainant are related by blood;
- 2) The virtual Complainant falls within one of the prohibited categories;
- 3) The Defendant knew that he is related to the virtual Complainant;
- 4) The Defendant had sexual intercourse with the virtual Complainant.

- [18] “Sexual intercourse” is the slightest penetration of the female vagina by the male’s penis. It is unnecessary to prove actual emission of seed; sexual intercourse is deemed complete upon proof of penetration only.

- [19] The issue of consent is immaterial and irrelevant to the offence of incest.
- [20] 'Serious indecency' is defined at section 15 (3) of the **Sexual Offences Act 1995** as follows:

“An act of ‘serious indecency’ is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.”

- [21] To prove the count of serious indecency as detailed in the indictment, the Crown has to prove that the Defendant manually penetrated the virtual Complainant's vagina for the purpose of arousal or sexual gratification.
- [22] The virtual Complainant's age, although included in the particulars of the offences, is not critical to establishing any of the offences, but rather is concerned with the post-conviction proceedings as to what sentence a convicted person would face.

Live Issue

- [23] With regard to the elements of incest, there was only one real live issue: whether the Crown proved that the defendant, Mr. Zair Augusta, had sexual intercourse with the virtual Complainant on a date unknown between the 1st April, 2018 and the 4th August, 2018 or at all.
- [24] In relation to the count of serious indecency, the live issue was whether the Crown could prove that the defendant, Mr. Zair Augusta, manually penetrated the virtual Complainant.
- [25] It is common ground between the Crown and the defence that the Defendant and the virtual Complainant, Miss Devonnay Martin, (referred to as Devonnay), are siblings. Mr. Augusta and the virtual Complainant have the same mother – Ms. Nadia Joseph. Mr. Augusta is Ms Joseph's first child; the Defendant does not dispute that he is Devonnay's oldest brother.

Video Link

- [26] Prosecuting Counsel, Mr. Cornelius, applied for the virtual Complainant to testify from a remote location. The application was grounded in the **Evidence (Special Measures) (Amendment) Act No. 9 of 2016**.
- [27] The virtual Complainant was nine years old at the time of the trial.

[28] The Interpretation section of the **Evidence (Special Measures) (Amendment) Act** states at section 2 (a), (f), (g) and (h) that:

“‘Vulnerable witness’ means a witness, whose ability to give evidence or the quality of whose evidence is likely to be affected by reason of age or maturity; the nature of the proceedings; the nature of the evidence that the witness is expected to give; the relationship of the witness to any party in the proceeding.”

[29] More specifically, that **Act** – No: 9 of 2016 - at section 7 provides:

“Where the witness is the complainant in the case and is less than 12 years of age, he or she shall be taken to be a vulnerable witness and shall give evidence in a manner described in subsection (5) (a), (b) or (c), as directed by the judge, and the judge may also apply other measures outlined in subsections (5) (d) to (i) in relation to that testimony.”

[30] The Crown’s application was granted to permit the virtual complainant to testify:-

“from an appropriate place outside the courtroom, in Antigua and Barbuda, by means of technology which allows for the witness to see or hear (or see and hear) a person in the courtroom and be seen or heard by the judge, the prosecutor, the legal representative acting in the proceedings and the defendant.”

No Oath

[31] Pursuant to the **Evidence (Special Provisions) Act**, No. 5 of 2009, the virtual Complainant’s testimony was received without her having to affirm or swear.

[32] Matters relating to the testimony from a person under fourteen years of age are addressed in section 17 of the **Act**, No. 5 of 2009:

“(1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if the proposed witness is able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue of the proposed witness to understand and respond to questions.

- (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting the proposed witness to give evidence, conduct an inquiry to determine whether he is able to understand and respond to questions.
- (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require the proposed witness to promise to tell the truth.
- (7) No proposed witness under fourteen years of age shall be asked any questions regarding his understanding of the nature of the promise to tell the truth for the purpose of determining whether his evidence is to be received by the court.
- (8) If the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath."

[33] The virtual Complainant's evidence fell to be considered on the same scale as all the other witnesses in the case, even though they testified under oath – either by being sworn or affirming.

VC's Evidence in Chief

[34] Devonny could not recall any dates. She however spoke of "the first part."

[35] The virtual Complainant said that she was at home on the bed with her little sister Andinashia (then aged about three years old). The Defendant came into the bedroom:

"He take me. Put me on top of the bed and take off my panty. When he take off my panty he open up my legs and then he put his penis inside of my vagina. I was feeling pain and telling him to stop. After he take out his penis, me get up. He put me on his lap and said if I talk he will chop me up. I told him I would tell Andy. He put his hand on my mouth."

[36] According to the virtual Complainant, the Defendant then left.

[37] Devonny explained that Andy was her mother's boyfriend.

[38] The virtual Complainant then went on to describe the second incident:

"Mommy went away and left the gallery door open and he [the defendant] came inside the house. He came inside the bedroom. Me and Andinashia was inside. We were playing a game. He came in, take down my panty and put his penis inside my vagina for a long while.

And then he took out his penis. He used his finger inside of my vagina and I was feeling pain. I was calling out for Andy. Andy sleep hard. Andy could not hear me. Andy was sleeping.”

“After he took out his finger, he wash his hand, take up a pink bag and leave.”

[39] The virtual complainant testified that she was six-years old when the incidents occurred.

Cross Examination of Virtual Complainant

[40] Cross examination of the virtual Complainant focused initially on Devonny's living arrangements and the relationship between the families of her mother and her father.

[41] When asked initially whether she knew her mother, Devonny queried: “Which one you are talking about?” She said that she had “two Mommy’s”. Devonny testified that at the time the report was made to the police, she “was living with my other Mommy. I was living in Clare Hall.” That mother, Mrs. Phyllis Martin is her father’s wife.

[42] The virtual Complainant gave conflicting stories as to how she came to be living with Mrs. Martin. At first she said that her birth mother, Ms. Joseph took her to live with Mrs. Martin. Then she changed and said that Mrs. Martin came for her and that: “Nadia pack my bag. Mommy Phyllis came for me and went by Mommy Phyllis house.” She denied that it was another person who took her to Mrs. Martin’s residence.

[43] In relation to how the virtual Complainant ended up living at Clare Hall, Mrs. Martin said that it was Devonny’s father who went to Ms. Joseph’s house for the virtual Complainant. Mr. Devinson Martin, the virtual Complainant’s father also testified that he was the one who went to Ms. Martin’s home two days before Panorama in August 2018 and took the virtual Complainant to live with him. Ms. Joseph also testified that it was Mr. Martin who came and took Devonny to live with him; it was to be a temporary arrangement for the school vacation.

[44] Both Mr. and Mrs. Martin testified that since the virtual Complainant came to live with them, Devonny has not been allowed to leave in the ensuing years. In Mr. Martin’s view, Ms. Joseph was “not a fit mother.”

[45] Devonny referred to her birth mother as one “who beat, beat.”

[46] Devonny agreed with the Defendant’s counsel that she had not seen her mother for three years. She said that she did not want to see her mother “because she always smoking and blowing smoke

in my face and saying I don't want to see you no more." Later, in further cross examination, Devonny said that her father, Mr. Martin smokes 'weed'.

- [47] The virtual Complainant denied that her father and her step mother kept her away from her natural mother. She said that they encouraged her to see birth mother. Devonny had not seen her mother in three years. She did not know if her father and mother had a matter in court.
- [48] According to the virtual Complainant, at the time of the incidents, her mother's boyfriend, Andy, was at home in the bedroom and Sekine, her brother was outside. When Mr. Cumberbatch returned to the issue seeking confirmation as to who all were at home at the time, no mention was made of Sekine being there.
- [49] Miss Martin agreed that when the report was made to the police, her birth mother was not there. However both her father and step mother were there.
- [50] The virtual Complainant said that it is correct to say that before the report was made to the police, her step mother asked her a number of questions. Devonny said she began to cry. She agreed that she was afraid.
- [51] It was put to Devonny that the Defendant did not do what she said he did. She asserted that what she said was true.
- [52] It was also put to Devonny that the Defendant never put her on his lap to sit as she testified. She agreed she said so and that it was true.
- [53] It was further put to her that it was her father, Mr. Devison Martin and his wife, Mrs. Phyllis Martin who planted the story in her head. The virtual Complainant said that they did not plant and put it in her head; all they said to her was to "remember what you said."

The Mothers

- [54] Mrs. Martin said that on the 9th August, 2018 around 4:00 pm, she got home from work and her daughter, Jermaine Joseph, told her something. Mrs Martin had a conversation with Devonny. Mrs. Martin then called the virtual Complainant's father. He came home. They then took Devonny to the Saint John's Police Station and made a report.
- [55] In cross examination, Mrs. Martin said that she questioned Devonny. She took Devonny to the Police Station because what she heard was serious. Later on Mrs. Martin acknowledged that Devonny "was a little nervous and afraid when I began to question her."

- [56] Mrs. Martin agreed that she did not make any attempt to call Devonny's mother. She said that she did not have any contact with Ms. Joseph and said that Ms. Joseph was very hard person to find.
- [57] Mrs. Martin was aware that there was a child maintenance matter in court involving her husband and Devonny's mother.
- [58] Ms Joseph testified that she is the mother of six children – four boys and two girls. Devonny Martin is her fourth child and was born on the 12th April, 2014. [According to the Birth Certificate, the year of birth is 2012]. The Defendant was her first child. He did not live with her but visited from time to time.
- [59] Ms Joseph acknowledged that there was a dispute between herself and Mr. Martin over arrears for maintenance; she said that she never stopped Mr. Martin from seeing his child. Miss Joseph said that since Devonny was taken by her father in August 2018, she has only seen her daughter three times, one of the occasions being at the Welfare Office and another occasion at Burger King on Market Street in Saint John's.

Caution Statement and Interview

- [60] The Crown tendered a caution statement the Defendant gave to the police on the 5th October, 2018 as well as a question and answer interview done later that very day.
- [61] During the interview recorded by Senior Sergeant 560 Kleus Lavia the Defendant said:
- “[T]he last time that I went down by my Mom, it was for my little sister[s] birthday, Nafatarie and that was the 6th of May, 2018. On that day I didn't see 'Dee Dee' in the house. She was down by her dad. I didn't return by my Mom until I think the Thursday after Carnival finish. I didn't see 'Dee Dee' after when I returned still.”
- [62] Nafatarie is Miss Joseph's first daughter but second child (after the Defendant). Mr. Augusta refers to his other sister, the virtual Complainant, as 'Dee Dee'.
- [63] Some of the exchanges during the interview are worth repeating:

Q: What kind of relationship do you have with Devonny?

A: She is my little sister. I don't play with her that much. The most is I watch TV with her and if she wants something to eat I give it to her.

Q: How often do you go by the house where she lives?

A: About every three weeks. Sometimes ah month go pass and I don't go down dey.

Q: What do you normally go there to do?

A: Go look for my Mom and wash and plait my hair.

Q: How often do you see Devonny?

A: I hardly see her because she go school. So when I come from school 1:30 pm and I go by my Mom, she doesn't reach home yet with me little brother.

Q: How many times you visited the house and your mother wasn't there?

A: Every time I go over there my Mom home. I called (sic) her before I go.

Q: How many times you and Devonny alone inside the room watching TV?

A: Not really much. Somebody always inside the room.

Q: Have there been any time when you and just the kids alone inside the bedroom watching TV?

A: Yes

Q: Have (sic) Devonny ever lied on you before?

A: Yes. She would say me drink out juice. If the bed rumple up, she would say ah me rumple up the bed. One time she spray out all my step father perfume and say ah me.

Medical Examination

[64] The final witness called by the Crown was Dr. Delrose Christian. He has been a registered medical practitioner in the State of Antigua and Barbuda since April 1990. Dr. Christian is the District Medical Officer for District No. 2.

[65] Dr. Christian performed a medical examination on the female child Devonny Martin on 9th August, 2018.

[66] On examination, there was irritation of the right side of the introitus of the vagina – the entrance to the vaginal orifice. There was an abnormal discharge; the discharge was not clear, or white or off white, but of a different colour – yellow-green. The hymen was not intact.

[67] The Doctor said that the hymen is a thin membrane that covers the entrance to the vagina. He said that it varies from one female to another; in some cases it may be absent. In the majority of cases, the hymen would be intact, or vestiges of it, where females are not sexually active.

- [68] Dr. Christian acknowledged under cross examination that the presence or absence of the hymen was not conclusive of a person being sexually active. He stated that he has seen abnormal discharge in a child without any allegation of sexual intercourse taking place. Abnormal discharge, the Doctor said, is not necessarily related to sexual activity.
- [69] According to Dr. Christian, from what he saw, it could be a case of sexual molestation or it could be trauma. It could be caused by a foreign object and caused by sexual experimentation.
- [70] The Doctor when asked about a six year old child having intercourse with an adult male, he said: "It will be traumatic for a child of six years old to accommodate a man of 20-plus years. It should cause bleeding. Most likely it would not pass unnoticed or unobserved by those closest to the child."
- [71] Dr. Christian informed the Court that the irritation that he saw was recent and occurred within the preceding 24 hours.

Defendant's Case

- [72] Following the close of the Crown's case, the election was put to the Defendant. Mr. Augusta elected to give sworn testimony.
- [73] The Defendant's evidence was in the main similar to the documentary evidence previously tendered by the Crown.
- [74] Mr. Augusta testified that he lived with his father. He would visit his mother on Wednesday's and on the weekend to assist her, wash or plait his hair. Sometimes his mother invites him to go along with her and the children to the beach or to the movies. He does not visit the house if his mother is not there; that is because he does not get along with Anderson – his stepfather.
- [75] He denied all of the essentials of the charges.
- [76] When the Defendant was cross examined by Crown Counsel, he again denied all the suggestions put to him about the offences he is charged with committing.
- [77] The defence called Mr. Devinson Martin as a witness. He confirmed that there are various issues between himself and Devonnay's mother. There was even a physical fight that lead to criminal charges being laid against him. The matter was eventually dropped.
- [78] Mr. Martin said that since he took Devonnay to his house in August 2018, she has not stopped living there. He stated that because of the alleged incident that occurred at Miss Joseph's house he decided "not to take Devonnay back. The mother asked back for her. I told her not under my watch."

He said that since August 2018, “Devonnay was allowed to see her mother twice, arranged by Ms. Jeffrey the Social Worker and Ms. Peters, the counsellor.”

Analysis

- [79] It is noted that the defendant, Mr. Augusta did not reside at the same premises as his sister, Devonnay Martin. Mr. Augusta however would visit his mother’s residence where the virtual Complainant lived from time to time.
- [80] The Crown’s case is that the offences occurred on an unknown date between the 1st of April, 2018 and the 4th of August, 2018. The virtual Complainant could not give any date or any notable occasion when either of the incidents occurred. Her testimony was that she was six years old. According to Devonnay’s Birth Certificate, her date of birth was the 10th of April, 2012. Her sixth birthday would have been on the 10th of April 2018.
- [81] The evidence as to when the Defendant was at the Cassada Gardens residence where the virtual Complainant lived at the relevant time, comes only from Mr. Augusta himself in his caution statement as well as the question and answer interview with the police. According to the Defendant, his last visit to the Cassada Gardens residence in 2018 prior to the Carnival in August, was on 6th May, 2018 for his sister’s birthday. Further, he visited the house once every three weeks or sometimes after more than a month. There was no direct evidence from any witness to refute what Mr. Augusta said.
- [82] According to the information in the statements tendered by the Crown and which Mr Augusta repeated in the witness stand, the Defendant only visits his mother’s residence when she is there. Mr. Augusta will call first; this is because he did not get along with his step father Anderson. The Defendant’s explanation for only making scheduled visits to the premises on Wednesday’s or weekends when he did so, seemed plausible.
- [83] Although the Crown called Ms Joseph as a witness, no effort was made to elicit from her any evidence with regard to the Defendant only visiting on specific days or calling first to ensure that she is there. Instead, reliance was placed solely on Devonnay’s testimony that their mother was not at the house when the incidents occurred.
- [84] It is noted and accepted that Devonnay is a child witness. The law permits her to give unsworn testimony and that evidence received as if it was given under oath. One however must not expect her to display the same degree of concentration and focus like an adult witness. Devonnay was cross examined in some detail by the Defendant’s counsel, even though much of the cross examination did not focus on the actual incident itself. It was noted that on a few occasions Devonnay may have erred; some of it may be attributed to her tender years. The most significant discrepancy had to do

with how she came to reside with her father with her narrative being at variance from three adult witnesses. It was therefore up to the forum of fact to give Devonnay's testimony whatever weight it deserved.

- [85] Mr. Cumberbatch on behalf of the Defendant placed much emphasis in canvassing from the witnesses a separate and distinct dispute between Devonnay's parents. The focus in that regard was to place before the Court for consideration not just a motive to influence Devonnay to misrepresent the facts, but more so, exclusive opportunity to get Devonnay to do the bidding of Mr. and Mrs. Martin.
- [86] The Defendant testified under oath. He was cross examined by Counsel Cornelius for the Crown. The Prosecutor was unable to ruffle the Defendant. Mr. Augusta testified in much the same terms as his out of court statement and interview given to the police. The Defendant remained calm and consistent.
- [87] It was noted earlier that the evidence is that Mr. Augusta last visited Cassada Gardens during the relevant time on the 6th May, 2018. (Although he said on that occasion the virtual Complainant was not at the house). The virtual Complainant was in the care, custody and control of her father, Mr. Martin from sometime prior to the Panorama Competition which formed part of Antigua and Barbuda's Carnival Celebrations that year. Judicial notice is taken that the Annual Festival is around early August. When the virtual Complainant was examined by the District Medical Officer on the 9th August, 2018 he opined that the irritation to the virtual Complainant's vagina was caused within the preceding 24 hours. This does not necessarily mean that Devonnay's allegation is false – as she could have been molested not just as she alleged, but also within 24-hours of the medical examination. But it certainly raises questions as to what occurred at Mr. Martin's home since there is no suggestion that the Defendant was at Mr. Martin's house on the 8th or 9th of August, 2018.
- [88] Mr. Cumberbatch's assertion that Mr. Augusta is being wrongly accused gains some credence. What specifically did Ms. Jermaine Joseph observe that triggered a report to Mrs. Martin? The forum of fact can only act on the available evidence. There cannot be any speculation about evidence that was not tendered and what it may or may not have said. A decision has to be based on the evidence placed before the tribunal.

Conclusion

- [89] Bearing in mind that it is the prosecution that bears the burden to prove, so that the forum of fact is sure that the Defendant is guilty of the offence as charged; and having considered the evidence as a whole; and not being persuaded that the evidence from the Crown with regard to the offences is reliable, or convincing or persuasive; and accepting that the Defendant's narrative is credible; it is determined that the Crown has failed to discharge its burden.

[90] In the circumstances: on the First Count of incest, the defendant Mr. Zair Augusta is found not guilty. On the Second Count of incest, the defendant Mr. Zair Augusta is found not guilty. On the Third Count of Serious Indecency, the defendant Mr. Zair Augusta is found not guilty.

Colin Williams
High Court Judge

By the Court

Registrar