

**IN THE SUPREME COURT OF GRENADA  
AND IN THE WEST INDIES ASSOCIATED STATES  
HIGH COURT OF JUSTICE  
(CRIMINAL)**

**GRENADA**

**CASE NO. GDAHCR2024/1004**

**BETWEEN:**

**THE KING**

**And**

**S W**

**Appearances:**

Mr. Jordan Marshall, Crown Counsel of Counsel for the Crown  
Mr. Jerry Edwin of Counsel for the Defendant

-----  
2024: December 11; 20.  
-----

**SENTENCING JUDGMENT**

- [1] **INNOCENT, J.:** By indictment dated 17<sup>th</sup> September 2024 and filed on 19<sup>th</sup> September 2024, the defendant was charged with 2 counts of attempted sexual intercourse with a female person 14 years of age; 1 count of attempted intercourse with a female person aged 14 years; 3 counts of sexual assault; 3 counts of indecent assault and 1 count of sexual assault. The prosecution filed a new indictment on 10<sup>th</sup> October 2024 and the first indictment was subsequently withdrawn.
- [2] Upon his arraignment on 18<sup>th</sup> October 2024, he entered the following pleas to the counts in the indictment:
- Guilty to Count 1 charging sexual intercourse with a female aged 14 years;
  - Not Guilty to Counts 2 and 3 charging sexual assault and indecent assault respectively;

- Guilty to Count 4 charging attempt to have sexual intercourse with a female aged 14 years;
- Not Guilty to Counts 5 and 6 charging sexual assault and indecent assault respectively;
- Guilty to Count 7 charging attempted sexual intercourse with a female aged 14 years; and
- Not Guilty to Counts 8 and 9 charging sexual assault and indecent assault.

[3] The defendant's pleas were accepted by the prosecution. The defendant now stands before the court to be sentenced for three (3) offences of attempted sexual intercourse with a female aged 14 years but under the age of 16 years contrary to Section 43(1) 1 and Section 181(1) of the Criminal Code as amended by section 19 of the Criminal Code (Amendment) Act No. 29 of 2012.

[4] Section 43(1) of the Criminal Code contains provisions related to attempts to commit crimes and provides:

“A person who attempts to commit a crime by any means shall not be acquitted on the grounds that, by reason of the imperfection or other condition of the means, or by reason of the circumstances under which they are used, or by reason of any circumstances affecting the person against whom, or the thing in respect of which the crime is intended to be committed, or by reason of the absence of such person or thing, the crime could not be committed according to his or her intent.”

[5] Section 43(3) of the Criminal Code makes provision for the manner in which a person convicted of an attempt to commit a crime is to be punished. The section reads:

“Whoever is guilty of an attempt other than an attempt in the first degree shall, except as in this Code otherwise expressly provided, be liable to any kind of punishment to which he would have been liable if the crime had been completed; but the Court shall mitigate the punishment according to the circumstances of the case.”

[6] Section 181(1) of the Criminal Code as amended by the Criminal Code (Amendment) Act provides:

“A person who has sexual intercourse with another person who is thirteen years of age or more but has not attained the age of sixteen years, whether

with or without his consent, commits an offence and is liable on conviction on indictment to a term of imprisonment not exceeding fifteen years.”

- [7] The agreed facts are as follows. The defendant and the victim met on a social media platform on or about the month of March 2023. At the material time the victim was 14 years old, and the defendant was 22. In the exchanges that ensued between them, the defendant asked the victim to be his “woman” to which the victim responded “OK”.
- [8] Sometime in the month of March 2023, the defendant messaged the victim over a social media platform and told her that he was coming to pick her up from school. The victim agreed. They met at Lagoon Road in the Parish of Saint George. The victim sat in the front seat of the motorcar driven by the defendant, and they proceeded to Woolwich in the Parish of Saint George. The defendant parked the motorcar and asked the victim to go to the back seat. The defendant exited the motorcar and entered the back seat of the vehicle. The defendant blocked the front windshield and the rear windows of the motor car with a visor. He asked the victim to remove her tights and underwear. The victim complied. At which point the defendant asked the victim to have sexual intercourse with him. The victim declined. To which the defendant responded: “well we done here already, let’s just do it while we here nah”. The victim agreed.
- [9] The defendant retrieved his penis and placed it on the victim’s vagina. He attempted to enter the victim’s vagina with his penis. His attempts proved futile. After several attempts at coitus, the victim asked him to stop because it was painful. The defendant complied with the victim’s request.
- [10] On another day, sometime in March of the same year, the victim and the defendant met up again after he had contacted her via a social media platform. They met at the previous location. They again drove to Woolwich Road to the exact location they had been on the previous occasion. After they had parked, the victim sat in the back seat with her tights off. Again, the defendant covered the motorcar’s windows.

The victim told him that she did not want to have sexual intercourse. They both got dressed and left.

- [11] On 12<sup>th</sup> September 2023, the defendant picked up the victim. Again, they went to Woolwich Road. However, since there were people around he drove to Mont Tout in the Parish of Saint George where he parked the vehicle. The defendant asked the victim to remove her tights and lay down on the back seat. He then asked the victim to straddle him. She obliged. The defendant retrieved his penis and attempted to insert it into the victim's vagina. He made several unsuccessful attempts at penetration. The victim asked him to stop as it was painful. However, the defendant made another series of unsuccessful attempts at coitus. They eventually got dressed and left the location.
- [12] Upon the discovery of the illicit affair, the victim was taken to be examined by a medical practitioner. The gynecological examination revealed that the victim's hymen was partially ruptured centrally with irregular borders. A speculum could not have been inserted.
- [13] The defendant was subsequently arrested by the police. He was cautioned and interviewed. In an interview under caution, he essentially admitted to attempting to have sexual intercourse with the victim.
- [14] It must be borne in mind at all times that sentencing is an individualized process, in which the sentencing judge has considerable discretion in fashioning a fit sentence. The rationale behind this approach stems from the principle of proportionality - the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime". As a by-product of such an individualized approach, there will be inevitable variation in the sentences imposed for particular crimes.

- [15] Therefore, at the heart of the principle of proportionality is that the punishment must be commensurate with the seriousness of the offence as exemplified by the degree of harm done, and the offender's degree of culpability in the commission of the offence, also having regard to the aggravating and mitigating factors inherent in the commission of the offence and the offender; the latter at times requiring an assessment of the subjective factors that may have influenced the offender in the commission of the offence.
- [16] In assessing the harm caused by the commission of the offences, the court has noted that none of the factors mentioned in Category 1 and Category 2 are present. Therefore, the court will assess the consequences by reference to the harm caused at Category 3 of the Guidelines.
- [17] In assessing seriousness by reference to the defendant's culpability in the commission of the offence, the court was concerned about the disparity in age between the offender and the victim. The court thinks it necessary to assess this disparity in age by placing it within its proper social context. Both the defendant and the victim may properly be regarded as "young people". To some extent the defendant may be regarded as a "young adult". It is not uncommon for persons around the same age as the defendant and the victim to come into social contact with each other. Admittedly, they can both be taken to have been at various stages of their sexual evolution. Furthermore, it is not uncommon for girls of equal age to the victim to begin exploring their sexual curiosity. In addition, a lot turns on the defendant's level of maturity.
- [18] The court does not think that the age disparity between the victim and the defendant is of much significance in the present case to bring it within the ambit of the level of seriousness contemplated by Level A of the Guidelines. Additionally, none of the factors or factors similar to that canvassed by Level A are present in this case. Therefore, in the court's view, the defendant's culpability falls within Level B of the Guidelines. Applying the Grid in the Guidelines, the starting point sentence would be 20% of the statutory minimum sentence adjusted within a range of 5% to 35% to

take account of the aggravating and mitigating factors relevant to the offence and the offender, with the likely imposition of a non-custodial sentence.

[19] In the court's view, there are no aggravating factors in the commission of the offence. As far as the mitigating factors are concerned, the court took into account that the victim and the defendant became involved in a consensual relationship with some disparity in age. The defendant's conduct can hardly be considered as predatory in these circumstances. The court is also mindful of the fact that on each occasion that the defendant attempted to have sexual intercourse with the victim he complied with her requests to stop. Another aspect of mitigation is what is contemplated by section 43(1) of the Criminal Code itself. Section 43(3) empowers the court to mitigate the punishment according to the circumstances of the case.

[20] Section 179 which was repealed by section 19 of the Criminal Code (Amendment) Act provided under the chapeau 'Defilement of female between thirteen and sixteen years of age':

"Whoever unlawfully and carnally knows any female, being of or above thirteen years and under sixteen years of age, whether with or without her consent, shall be liable to imprisonment for five years:

Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the Court or jury that the accused person had reasonable cause to believe that the female was of or above sixteen years of age:

Provided also, that no prosecution shall be commenced for an offence under this section more than three months after the commission of the offence."

[21] As stated previously, section 19 of the Criminal Code (Amendment) Act expressly repealed section 179 of the Criminal Code and substituted section 181. Therefore, the repeal of section 179 removed the proviso that no prosecution shall be commenced for an offence under this section more than three months after the commission of the offence. The court is fortified in its view by the provisions of section 183 of the Criminal Code which was also inserted by virtue of section 19 of

the Criminal Code (Amendment) Act, under the chapeau “Saving as to liability for rape in case of defilement & etc.” where it states:

“Nothing in sections 179, 180, 181 and 182 shall exempt a person from any liability to punishment for rape or for an attempt to commit rape.”

- [22] Section 181 (2) of the Criminal Code inserted by section 19 of the Criminal Code (Amendment) Act has extended the defences open to a defendant who is charged with an offence under section 181(1). Section 181(2) provides:

“It is a defence to a charge under this section if the person charged proves that he—

- (a) was not more than nineteen years of age at the time of the commission of the offence and has not been previously charged with the same or similar offence;”

- [23] The defendant in the present case was just approximately 3 years shy of availing himself of the defence provided by section 181(2). The court took this fact into account when considering the question of the disparity in age between the victim and the offender. The defendant has not been previously charged with the same or similar offence is a mitigating factor that operates substantially in the defendant’s favour. In fact, the defendant has no previous convictions for any offence.

- [24] It would seem that the increase in the punishment for the commission of the predicate offence is emblematic of the legislature’s intention to reflect the seriousness of the offence and society’s condemnation and abhorrence for such offences. However, it seems also that the legislature in its infinite wisdom also recognized that in certain circumstances, there may be a defence or that some level of mitigation is required as in the case of young persons.

- [25] Although the defence of reasonable belief as to age lies within the province of the jury, in the present case, the court cannot restrain itself from commenting on the fact that the victim in this case, the court having had sight of her, appears to be quite a precocious young lady. Therefore, it is not inconceivable that the defendant, although not mistaken as to her age, may have been lured on by this feature to engage in the conduct which he did.

- [26] The court has critically assessed the question of youthfulness in its consideration of what would be the appropriate sentence in all the circumstances of the present case. The court is inclined to find that the defendant's offending was the result of youthful exuberance. Clearly, the question of youthfulness affects the level of an offender's culpability.
- [27] Practice Direction 8D No. 4 of 2019 (the 'Practice Direction') highlights the considerations the court must have regard to when sentencing persons below the age of 18 and how these must be applied in determining sentence. It sets out the approach which the court must consider and apply when sentencing children and young offenders.
- [28] When sentencing children or young persons as at the date of the offence a court must have regard to: the principal aim to prevent offending by children and young persons; the aim of rehabilitation; and the welfare of the child or young person. The Practice Direction sets out in detail the objectives for adopting the approach which it sets out.
- [29] However, the defendant being over the age of 18 years means that the Practice Direction is inapplicable to him. Although it has not been shown demonstrably how the defendant's young adulthood would have affected or diminished his culpability in the commission of the offence, it is not inconceivable that it may have played a role as a subjective factor that may have influenced his conduct.
- [30] It is not disputed that the defendant could properly be regarded as a young adult at the time of the commission of the offence. Therefore, instead of applying the Practice Direction, the court will assess the defendant's "young adulthood" as a factor to be considered in the determination of whether the imposition of either a reduced sentence or a non-custodial sentence is appropriate in the circumstances.
- [31] The general principle is that where the offender is a young person who is in all relevant respects a first offender and appears generally motivated towards reform,

there may be a benefit both to the offender and society of a significantly reduced sentence.

[32] Therefore, youth, the level of maturity and the prospect of rehabilitation of an offender, may be considered as factors militating against the imposition of a custodial sentence or the length of the sentence which the court may be minded to impose. However, it is important to recognize that what is appropriate in any given case depends substantially on the circumstances of the case.

[33] Whether this is so in a particular case, requires a realistic assessment which gives proper and adequate weight to the fact that the commission of a sexual act on a victim resulting in rape, even when committed by an immature offender, remains serious and egregious offending. However, the circumstances of the present case, in the court's view, cannot properly be said to be so egregious as to warrant incarceration.

[34] The court remains mindful of the fact that once the age of majority has been attained, that is eighteen years, with the attendant conferral of important adult rights and privileges, youth by itself cannot lead inevitably to a reduction in sentence. Adult offenders must be taken, when deliberate action is engaged in, to have courted the consequences of their behaviour choices. By doing so, adult offenders cannot seek to be partially immunized in the sentencing process, by praying in aid "young adulthood" as a mitigating factor. If the age of majority is to be considered as meaningful, representing as it does both notionally and practically the portal into the world of adult decision-making and overall responsibility, then any offender of and above that age, will have a severely steep uphill climb in persuading a sentencing court, that without more, comparative youth is a mitigating factor that should steer the court away from a custodial sentence or a significantly reduced sentence.

[35] There is no evidence of the defendant having any prior criminal behaviour or record. The court has before it on the one hand, the defendant's good character, and on the other, the absence of any aggravating factors relative to the seriousness of the offence. In the court's view, the combination of these factors do not make the

offence so abhorrent that the defendant's good character and young adulthood ought to pale into insignificance, so that it fails to hold sufficient merit to justify a departure from the Guidelines and therefore require the imposition of a noncustodial sentence.

- [36] There are no aggravating factors in the commission of the subject offences requiring any uplift from any notional sentence which the court may be minded to impose. In the court's view, the aggravating factors relative to the offence and the offender are far outweighed by the mitigating factors relative to the offence and the offender.
- [37] The defendant, in any event, would have been entitled to a discount for his early guilty plea, to the maximum amount permissible by sentencing practice. Additionally, the question of deducting time spent on remand does not arise in the present case as the defendant spent no time on remand.
- [38] The feature of this particular case which looms large in the court's consideration is whether the imposition of a custodial sentence is appropriate to fit the justice of the case. In other words, whether a custodial sentence is proportionate to the offending conduct or commensurate with the seriousness of the offence.
- [39] In the court's view, the imposition of a suspended sentence does not meet the justice of the case. The court is reminded of the fact that a suspended sentence is in fact a custodial sentence which the offender is required to serve out in public.
- [40] A suspended sentence is intended to be punitive in nature. Therefore, suspended sentences should generally include punitive conditions that are restrictive of the offender's liberty. The Practice Direction<sup>1</sup> provides that a suspended sentence remains a prison sentence and should not be passed unless a term of imprisonment is warranted. It should not be considered another form of non-custodial penalty like probation or community service.

---

<sup>1</sup> Practice Direction 8C No. 3 of 2019 (the 'Practice Direction') made pursuant to the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019

- [41] The Practice Direction provides that the court may consider the following non-exhaustive list of factors in exercising its discretion whether to impose a suspended sentence: (1) whether an appropriate punishment can only be achieved by an immediate custodial sentence; (2) whether the offender presents a risk or danger to the public or to the victim; (3) whether the offender has a history of poor compliance with court orders; (4) whether there is a realistic prospect of rehabilitation; (5) If sentencing a person under 21, whether there is a realistic prospect that incarceration will so affect an offender as to turn that person more towards criminality and less toward rehabilitation; (6) whether there is strong personal mitigation; and (7) what will be the impact of an immediate custodial sentence on dependent relatives, employees, and the community?
- [42] The court, having considered all of the abovementioned matters relative to this defendant and his offending, does not believe that a suspended sentence is appropriate in all the circumstances of the case. The point is that a suspended sentence is still a custodial sentence, and it may have the effect of stigmatizing the defendant and likely derail him in his future prospects.
- [43] The punishment which the court has meted out in this case is not intended to be an open invitation to would-be offenders. The sentence imposed herein is based on an assessment of the peculiar facts and circumstances of the present case and is in no way intended to signal to would-be offenders that offences of this nature are not likely to be met with the most condign consequences.
- [44] In the premises, and for the reasons stated in the court's sentencing remarks, the court is minded to make a probation order relative to this defendant and the court will so order. Accordingly, the sentence of the court is that:
1. The defendant shall be placed under the supervision of a probation officer for a period of two (2) years and shall submit during the period of probation to the supervision of a probation officer for the Parish in which the defendant shall reside during the probation period.

2. The probation officer shall provide the Court with a written report concerning the defendant's conduct every six (6) months commencing from the date of this order.
3. If the defendant shall fail to comply with the terms and conditions of the probation order he shall be liable to be sentenced for the original offences.
4. If at any time during the probation period the defendant fails to comply with the terms and conditions thereof, the defendant shall be summoned to appear before the High Court, or a warrant may be issued for his arrest to secure his attendance before the High Court.
5. If it shall be proved to the satisfaction of the High Court that the defendant has failed to comply with the terms and conditions of the probation order the Court may, without prejudice to the continuation of the probation order, impose a fine on him or commit him to custody or release him on bail until he shall be brought before the Court.
6. If when the defendant is brought or appears before the Court, it is proved to the satisfaction of the Court that the defendant has failed to comply with the terms and conditions of the probation order the Court shall deal with him as if he had just been convicted before the Court of the subject offences.
7. Should the defendant commit any similar offence, that is an offence of a sexual nature, during the probation period, he shall be dealt with in accordance with the provisions of section 8 of the Probation Act.
8. The defendant shall enter into a recognizance with one (1) suitable surety to be of good behaviour during the probation period.

Shawn Innocent  
**High Court Judge**

**By the Court**

**Registrar**