

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

GRENADA

CASE NO. GDAHCR2019/0037

BETWEEN:

THE KING

And

ELVIN DE ROCHE

Appearances:

Ms. Crisan Greenidge, Senior Crown Counsel for the Crown
Mr. George W. Prime of Counsel on for the Defendant

2024: November 29.

JUDGMENT ON SENTENCING

- [1] **INNOCENT, J.:** The defendant was indicted for the offence of rape contrary to section 177 (1) and (2) of the Criminal Code as amended by section 19 of the Criminal Code (Amendment) Act relative to events that occurred on 25th March 2019. He was convicted of the offence of rape after a trial by jury. He is now before the court for sentencing.
- [2] The jury's verdict was based on the following factual matrix. The victim resided with her older sister and the defendant. The defendant and the complainant's older sister were involved in a common law relationship. On 25th March 2019, the complainant's older sister left for work. At that time the defendant was getting ready to leave the house as well but remained there after the complainant's older sister had left. The complainant was well acquainted with the defendant.

- [3] At the material time the complainant was in the bedroom which she occupied to the exclusion of the defendant and her older sister. It was a one bedroom apartment which they all occupied. The defendant and the complainant's sister would use the bathroom located next to the bedroom at convenient times. This was the living arrangement which they had.
- [4] While the complainant was lying on the bed, the defendant sat at the foot of the bed and started a conversation with the complainant. The conversation concerned the defendant's sexual relationship with the complainant's older sister. During this conversation the defendant expressed his feelings of sincere affection towards the complainant.
- [5] The defendant started to touch the complainant. He caressed her from her leg up to her buttocks. The defendant rolled up the complainant's tank top and sucked on her breast. After he had finished sucking on her breast he removed her pants and undergarments all in one fell swoop. While he was doing this he repeatedly told the complainant to remain calm. The defendant then started performing cunnilingus on the complainant. He then climbed on top the complainant with each of his legs straddling her. He got up, unzipped his pants. He then climbed on top the complainant once again. The complainant put her hands up and tried to push him away. She was unable to put up any resistance since the defendant was heavy and stronger than she was.
- [6] The defendant then inserted his penis into her vagina and she attempted to push him off again. The complainant tried to push the defendant off because she claimed that he was hurting her and that he had forced himself on her. The defendant had sexual intercourse with the complainant for approximately three to four minutes until he ejaculated on her leg.
- [7] In the course of giving her testimony at the trial the complainant said:
"I was feeling disgusted. I was feeling angry. I always thought that if something like that happened to me I would be able to defend myself. I felt hopeless."

[8] The complainant testified that after the defendant had ejaculated he said the following words to her:

“You made my day, I hope I made yours.”

These words spoken by the defendant are open to many connotations. It could have been that he was merely expressing his satisfaction or gratification after the sexual encounter or he may have said it in such a way that the complainant may have felt humiliated or disgraced in some way. It could also mean that the defendant was expressing his hopeful expectation that the encounter was mutually enjoyable.

[9] Whatever the context, it is the impression on the minds of the jurors that counts. Clearly, having found the defendant guilty of the offence, it must have been the jury’s inclination that the words were intended to be demeaning in some way and reflective of the defendant’s intent to have sexual intercourse with the complainant without her consent.

[10] The defendant admitted to having sexual intercourse with the complainant but denied that it was without her consent. Hence, there was no dispute that penetration had occurred. The complainant testified that she did not give the defendant permission to put his penis into her vagina. In fine, the complainant’s case was that the defendant had sexual intercourse with her without her consent. Therefore, the only element of the offence that was in dispute at the trial was whether the act of sexual intercourse was consensual.

[11] The complainant telephoned her older sister and told her what had happened. The complainant was accompanied to the police station by her older sister and a report was made to the police. The defendant was arrested, interviewed and subsequently charged by the police. He was bailed shortly thereafter and therefore spent no time on remand.

[12] The complainant was subsequently examined by a medical practitioner. The report of her examination was not presented as evidence at the trial.

- [13] A basic principle of sentencing is that the punishment must be commensurate with the seriousness of the offence. The seriousness of the offence is based on an assessment of the offender's degree of criminal culpability in the commission of the offence and the consequences or harm done by the commission of the offence.
- [14] In sentencing offenders, the court must pay heed to the permissible aims of punishment, retribution, deterrence, rehabilitation and the need for the protection of the public from harm from the offender.
- [15] In the present case, the permissible aim of retribution or punishment is the only permissible aim of primordial importance. The other permissible aims have no significance to the present sentencing exercise. There is no need for the rehabilitation of this offender. This is his first offence. There is no evidence that there is any substantial risk of this defendant reoffending. Therefore, there is no requirement for the need to protect the public from harm from this defendant. It follows therefore, that there is no requirement for specific deterrence. However, general deterrence may be a factor which the court should consider in sentencing this defendant.
- [16] In assessing the harm done the court must consider not only the harm done to the victim but must also consider the need to register society's condemnation for the commission of this particular kind of offence. The court must consider the effect that the offence has on other parties who may be closely connected to the commission of the offence or to the victim. Quite often these kinds of offences have a tendency to erode familial relationships and erode the trust and confidence shared between family members. It may also have a deleterious effect on the victim to the extent that it may prevent them from fostering wholesome relationships with other male partners. Therefore, the commission of sexual offences of this nature have the effect of creating a myriad of behavioural issues both relative to the victim and those closely connected to the victim which could inevitably have a tendency to spill over into the societal context.

- [17] The facts of the present case do not reveal that the defendant engaged in any perversion or that he resorted to violence in the execution of the offence. There was no evidence of degradation or humiliation of the complainant by the defendant.
- [18] The complainant in this case was 20 years old at the time while the defendant was years 39 years old at the time of the commission of the offence. Hence, there was a relatively significant disparity in age between the defendant and the complainant.
- [19] In the premises, the court thinks that the consequences of the commission of the offence by reference to the harm done falls within Category 3 of the Guidelines.¹
- [20] The court has assessed the defendant's culpability in the commission of the offence at Level B as per the Guidelines.
- [21] The punishment prescribed for the commission of the offence of rape is imprisonment for a term not exceeding 30 years.²
- [22] In the premises, applying the grid in the Guidelines, the starting point sentence would be 25% of the maximum sentence of 30 years' imprisonment which equates 7 ½ years' imprisonment.
- [23] The aggravating factors present in the commission of the offence are minimal. The manner in which the defendant committed the offence suggests that there was an element of premeditation and planning on his part. It cannot be said that this was merely a crime of opportunity, a wanton act fueled by the existing circumstances of the complainant's availability.
- [24] This aspect of the case is well highlighted in the testimony of the complainant and that of her sister. The complainant' sister testified that:
- “I left Elvin and Ashley there. Elvin and I were getting ready together but I was in a rush so I left him there. Ashley was in her room. Elvin was almost dressed already.”

¹ Compendium Sentencing Guideline of the Eastern Caribbean Supreme Court – Re-issue 8th November 2021

² Section 19(2) Criminal Code (Amendment) Act

[25] The testimony of the complainant's sister when contrasted with the testimony of the complainant paints a picture of deception on the part of the defendant. It tells a story of a man who had decided to have sexual intercourse with the complainant on that morning. In the course of her testimony the complainant said:

"When this took place I was in my bedroom – it was about 7:45 am to 8 am. My sister was at work. She had left home approximately 7:15 am to 7:20 a.m for work. I was there in my bedroom and wanted to use the bathroom. I got up and went towards the bathroom area. I realized the door was closed and Elvin was saying that he was in the bathroom. ... I heard water running so assumed he was bathing ... A few minutes after he came out of the bathroom and into the bedroom to fetch his clothes...I saw Elvin with his boxer shorts on. He was wearing his boxers and I recalled he asked me what time I was going to work before he left the bedroom.... I have never seen him before in that bedroom in his boxers before he went to put on his clothes while I was still there in the bedroom. He sat at the foot of the bed and put on his socks – he had never done that before. He went outside to put his clothes on. When he returned he was fully clothed."

[26] Given that the defendant had told the complainant that he had been enamoured by her for some time also suggest that the defendant was unable to curb his passions and enthusiasm to have sex with the complainant. The defendant's actions, as chronicled by the complainant are also suggestive of a well-conceived plan by the defendant to have sexual intercourse with the complainant on that day.

[27] At the trial, the complainant testified that:

"He went on to say that he really liked me and that he wanted for him and I to spend some time together and that he been liking me for a long time."

[28] In addition, the defendant continued having sexual intercourse with the complainant until he ejaculated notwithstanding the complainant's attempts to suppress his lascivious desires. Clearly, the defendant's intent was to achieve sexual gratification even without the complainant's consent.

[29] The offence occurred within the domestic context. It is without a doubt that the defendant in this case abused his position of trust. Moreover, the complainant would have indicated the circumstances in which she came to live with her older sister. It is clear therefore, that she was obtaining boarding and lodging at the sufferance or pleasure of his sister. It is not inconceivable that this may very well have had an

overbearing effect on her seemingly putting up very little resistance to the defendant's sexual advances made towards her.

[30] Notwithstanding the complainant's sister's attestation of the sincere familial affection that she shared with the complainant, it still stands to reason that the complainant was a lodger at premises primarily occupied by the defendant and the complainant's sister. It is therefore arguable that for all intents and purposes this placed her in a vulnerable position as she was only a lodger at her sister's home. This fact, in the court's view, meant that the defendant stood in a position of authority relative to the complainant. To that extent it may be argued that the balance of power laid in his favour and that he capitalised on this reality to engage in sexual intercourse with the complainant.

[31] The complainant testified at the trial about the way she was feeling when she was engaged in conversation with the defendant prior to his sexual advances. She said:

"When he was talking I just felt uncomfortable about what he was saying to me because he is my sister's boyfriend and he knew that my sister is like my mom."

[32] Later on in her testimony she made the following statement regarding what happened after the defendant began to touch her, she said:

"He started to touch me. At that point I had moved further away from him. I had already moved closer to the wall because I started to feel scared. I was feeling scared because the words that he was saying to me was not normal – not what a normal man would say to someone especially his sister-in-law."

[33] It appears from the evidence led at the trial, that no violence or force was used beyond that which was inherent in the commission of the offence. Counsel for the defendant has posited that there was evidence, when taken in the light most favourable to the defendant that some initial consensual sexual activity occurred. The court disagrees with this submission.

[34] The allusion to there being any initial consensual sexual activity is debunked by the complainant's testimony where she said:

“He started to caress from my leg up to my behind ... my bottom. Then I was actually lying down on my left side. My back was facing him... At that point I turned over on my back. I did that because he was touching my bum. When I turned over on my back then he started to touch my breast. I asked him what you doing? I said stop. He did not stop ... he didn't. He started rolling up my tank top and he started sucking on my breast. At that point my body went into panic mode and I was shaking...”

- [35] The court fails to see any element of consent arising from the complainant's inaction to forestall the unwanted sexual advances. Her testimony recited above is a clear indication of her unwillingness to participate. The court thinks that the complainant's testimony explains the reasons for her inaction in attempting to make any strident physical attempt to forestall the defendant's unwanted sexual advances or foreplay.
- [36] Adjusting the sentence of 7 ½ years' imprisonment within the range, the court is of the view that the aggravating and mitigating factors in the case are evenly balanced. Therefore, the court will credit the defendant with a discount of 2 ½ years from the starting point sentence.
- [37] In the court's considered view, there are no aggravating factors relative to this defendant. The defendant has no previous convictions and is generally a man of good character.
- [38] Having placed the factual matrix into its proper context, it would seem that the defendant may have been overcome by the pressures inherent in his relationship with the complainant's older sister. The nature of the conversation that he had with the complainant prior to the offending conduct is emblematic of the nuances of his common law relationship with the complainant's sister.
- [39] This was highlighted in the complainant's testimony at the trial where she said:
- “... he sat on the bed again and started speaking to me. He asked me do you know that your sister and I don't have sex? I replied no I do not know that ... he said they had not been having sex for three months now... I asked why because it seemed that he wanted someone to speak to. He went on to explain to me that my sister had an issue that's why they could not have sex. He said that she had a bleeding problem. I told him ok – I did not tell him anything.”

- [40] Taken within this context, it appears that the defendant may have been driven to his unlawful actions out of a want for sympathy and a yearning for sexual intimacy. The court in saying this is also mindful of the fact that there was a degree of familiarity between the complainant and the defendant. This was made clear in the evidence given at the trial by the complainant's sister; particularly as it related to their engaging in the consumption of recreational pharmaceuticals together.
- [41] Although the circumstances highlighted above do not serve to palliate the defendant's wrongdoing, the court thinks that it is deserving of being considered as a mitigating factor operating in the defendant's favour. It is not uncommon for offences of this nature to occur within the domestic environment. It may very well be only natural that people residing in the same household and in frequent close proximity to each other may develop feelings of sexual attraction towards each other. This may have been the situation in the present case given the awkward and ad hoc living arrangement which the parties shared. The court's observations on this point is in no way intended to provide an excuse for the defendant's unbridled passion.
- [42] In the circumstances, the court is of the opinion that the aggravating factors relative to the defendant are far outweighed by the mitigating factors relative to him. In the premises, the court thinks that the defendant is entitled to a further discount of 2 years' imprisonment to take account of the mitigating factors subjective to him.
- [43] Therefore, the court has arrived at the conclusion that a sentence of 3 years' imprisonment is commensurate with the gravity or seriousness of the offence and the subjective factors that might have influenced the defendant in the commission of the offence.
- [44] Typically, offences of this nature attract a custodial sentence. However, the facts of this case do not disclose one of the worst cases of rape. There was no evidence of a prolonged detention or a sustained attack on the complainant. This was an isolated incident.

- [45] Although the defendant's good character was not specifically raised at the trial, it is particularly relevant to the present sentencing exercise. The fact that the defendant's good character shines and in view of the absence of any evidence of likely recidivism or his being a danger to the public leads the court to question whether an immediate custodial sentence would serve any meaningful purpose in this case. The court is of the view that it would not. The only meaningful aim of punishment to be achieved by way of an immediate custodial sentence is that of retribution.
- [46] In the premises, the court is minded to impose a suspended sentence. The real question in the present case is whether the imposition of an alternative means of sentencing such as a suspended sentence would serve the penological purpose of sentencing and meet the requirements of the general principles of sentencing in the same way as a custodial sentence.
- [47] The court's jurisdiction to impose a suspended sentence is founded in statute and not in the Guidelines. Therefore, it appears that if the sentencing court makes the determination that a particular case is an appropriate one to impose a suspended sentence then it must go on to consider whether such a sentence is appropriate in any given case based on certain criteria.
- [48] The court has adverted its attention to the provisions of Practice Direction 8C No. 3 of 2019 (the 'Practice Direction') made pursuant to the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 which sets out guidance on when a suspended sentence should be imposed. The Practice Direction highlights the factors to which the court must have regard to when imposing a suspended sentence. The Practice Direction provides crucial guidance to the court particularly since the statutory provisions dealing with suspended sentences in this jurisdiction do not provide any basis upon which the court should exercise its discretion to impose a suspended sentence.

- [49] Section 78 of the Criminal Code was amended by section 78BB of the Criminal Code (Amendment) Act by inserting the new section which provides that where a court passes on any person, a sentence of imprisonment for a term of not more than three years for an offence, it may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than three years from the date of the order, such person commits in Grenada another offence punishable with imprisonment and thereafter a court having power to do so orders that the original sentence shall take effect with or without variations of its terms. The section also defines a suspended sentence thus: “suspended sentence” as respects any offender, means a sentence which is ordered pursuant to this section not to take effect unless the offender commits another offence.” Therefore, a suspended sentence may properly be viewed as a sentence of imprisonment.
- [50] The difficulty with section 78BB is that it does not provide any guidance to the sentencing court as to when a suspended sentence is appropriate in any given set of circumstances. In the court’s view, the provisions of the Practice Direction supplements section 78BB of the Code.
- [51] 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 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. It appears that a literal interpretation of this provision in the Practice Direction, presupposes that a sentencing judge must first fix a term of imprisonment that is warranted in the circumstances of the case.
- [52] 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?

- [53] No offences are excluded from the suspended sentencing regime. There appears to be no presumptions in favour of or against a suspended sentence for specific offences. In the court's view, while the gravity of such offences is clearly relevant to determining whether a suspended sentence is appropriate in the circumstances, it would be both unwise and unnecessary to establish judicially created presumptions that suspended sentences are inappropriate for specific offences.
- [54] Offence-specific presumptions introduce unwarranted rigidity in the determination of whether a suspended sentence is a just and appropriate sanction. Such presumptions do not accord with the principle of proportionality and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of suspended sentences.
- [55] 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 individualised approach, there will be inevitable variation in sentences imposed for particular crimes.

- [56] It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this jurisdiction, as the “just and appropriate” mix of accepted sentencing goals will depend on the needs and current conditions of and in, the particular community where the crime occurred.
- [57] Therefore, the suggestion that the proportionality principle presumptively excludes certain offences from the suspended sentencing regime, espouses an approach that focuses inordinately on the gravity of the offence, and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors. The particular circumstances of the offender and the offence must be considered in each case.
- [58] In the circumstances, and for the reasons which the court has stated in its sentencing remarks, the sentence which the court holds to suit the justice of the case and which is proportionate to the seriousness or gravity of the offence is as follows:
1. The defendant is sentenced to 2 years’ imprisonment which shall be suspended for a period of 2 years. The sentence of 2 years’ imprisonment herein shall not take effect unless, during the period of 2 years from the date sentence is pronounced, the defendant commits another offence punishable with imprisonment and thereafter a court having power to do so orders that the original sentence shall take effect with or without variation of its terms.

2. The defendant is also ordered to pay compensation to the complainant in the sum of \$10,000.00 to be paid in six (6) months in default 6 months' imprisonment.
3. The defendant, the complainant's sister and the complainant are ordered to attend and participate in both individual and group counselling sessions to be conducted by a counselor assigned by the Ministry of Social Development.

Shawn Innocent
High Court Judge

By the Court

Registrar