

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

GRENADA

CASE NO. GDAHCR2021/0016

BETWEEN:

THE KING

And

KLIVON NECKLES

Appearances:

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

2024: February 16; 29.

Sentencing – Rape – Section 177 Criminal Code – Indecent Assault – Section 176 Criminal Code – Factual basis of sentence – Interpretation of jury’s verdict – Correct approach – Compendium Sentencing Guideline of the Eastern Caribbean Supreme Court (the ‘Guideline’) – Defendant entering plea of guilty to offence in respect of one count on the indictment charging indecent assault prior to being tried on two other counts of rape and indecent assault contained in the same indictment – Defendant acquitted after trial on remaining two counts of rape and indecent assault – All three counts on the indictment arising from the same transaction – Consent only issue at trial – Fact finding for the purpose of sentencing – Onus and standard of proof – Pretrial delay – Whether the circumstances of the case warranted a departure from the sentencing guidelines in the exercise of the court’s sentencing powers relative to sentencing – Court not invited to consider the question of vacating the defendant’s plea of guilty in light of the jury’s verdict – Whether the court can of its own volition and at present stage of the proceedings vacate the defendant’s plea and enter a plea of not guilty

[1] **Innocent, J.:** Mr. Klivon Neckles (hereafter referred to as “Mr. Neckles”) was initially indicted on 9th April 2021 for the offence of rape relative to events that occurred on 18th February 2017. Mr. Neckles had pleaded not guilty to all counts on the indictment on 7th May 2021.

- [2] The prosecution subsequently filed a new indictment dated and filed 31st January 2024 and withdrew the previous indictment. The new indictment contained three counts, namely: rape and two counts of indecent assault.
- [3] On 1st February 2024, Mr. Neckles who had previously pleaded not guilty on the single count of rape contained in the first indictment, was arraigned upon the subsequent indictment, and upon his being arraigned pleaded not guilty to the first two counts contained in the second indictment but guilty on the third count.
- [4] The trial commenced on 2nd February 2024 in respect of the first two counts in the indictment. On 13th February 2024, the jury returned verdicts of not guilty on the first two counts contained in the indictment. The ultimate question that the jury had to decide at the trial was whether the prosecution had established beyond a reasonable doubt that the complainant did not consent to the acts of a sexual nature committed by the defendant.
- [5] The matter came on for a sentencing hearing on 16th February 2024 and Counsel for Mr. Neckles in his oral submissions raised the point, albeit after some prompting by the court, that the jury's verdict in respect of the first two counts on the indictment meant that the prosecution had failed to prove the absence of consent and that it followed that the court should take this into account in considering the defendant's guilty plea to count three.
- [6] The dilemma which the court faces in sentencing Mr. Neckles arises within the context of the jury's finding of fact in relation to the question of consent upon Mr. Neckles' trial for the first two offences charged in the indictment, which ultimately lead to their verdict of acquittal.
- [7] Another issue which poses a challenge to the court is whether, at this stage of the proceedings, it is open to the court to vacate the defendant's guilty plea and substitute a plea of not guilty and thereafter discharge the defendant. This point was raised by the court of its own volition, having considered the question of the interpretation of the jury's verdict based on their finding of fact relative to the issue

of consent. It is unfortunate that the court did not have the benefit of either written or oral submissions of Counsel on this point which the court finds salient to the present proceedings.

- [8] The other question that arises on sentencing Mr. Neckles is the issue of whether the circumstances surrounding the jury's finding and the element of delay are factors that are capable of triggering the court's discretion to depart from the sentencing guidelines or whether ultimately they ought to be considered squarely within the context of the guidelines themselves in determining what sentence to impose.
- [9] Although all of these points were not canvassed by Counsel for the defendant in his written submissions, the court has deemed it appropriate that they be considered in the interest of fairness and justice in the administration of the criminal courts. Indeed, the court has a solemn obligation to guard against the likelihood of miscarriages of justice occurring in the criminal justice system.
- [10] At the sentencing hearing, Counsel for the defendant made oblique reference to the fact that the jury having found the defendant not guilty on the other counts of rape and indecent assault, it would be unfair in these circumstances to impose any sentence on the defendant. Counsel for the defendant appeared to have premised his argument on the fact that the jury having found that the prosecution had failed to establish the absence of consent to the necessary standard meant that the jury's findings conflicted with the defendant's guilty plea.
- [11] The first observation that the court makes is simply that there was no finding by the jury in respect of count three on the indictment to which the defendant entered a plea of guilty. There has been no application from the defendant to vacate his plea. It stands to reason therefore, that the court can comfortably operate on the assumption that his plea was voluntary. There has been no allusion to the fact that the voluntary nature of his plea is capable of challenge.
- [12] The court is also fortified in its view by the fact that the count to which the defendant entered the plea of guilty arose at a different point in time during the course of the

transaction that gave rise to the other counts in the indictment. In the court's view, the defendant's plea of guilty signifies an acceptance of the fact that at that particular point in time, the complainant had withdrawn her consent to the act of a sexual nature perpetrated by the defendant. Clearly, there can be no other interpretation that is consonant with the legal principles as they relate to the question of consent in the commission of sexual offences of this nature.

[13] On the foregoing basis, the court has determined that for all intents and purposes, this issue can be whittled down and faded to a vanishing point and ought not to factor into the court's considerations upon the sentencing hearing. Therefore, there is no basis to interfere with the defendant's guilty plea. Accordingly, his plea does not stand to be vacated.

[14] The context of the present case stands in contradistinction to a situation where, for example, the court is required to establish the factual basis for sentence based on an interpretation of the jury's verdict. The situation clearly does not arise in the present case. Where a situation as in the latter case arises the approach of the courts has always been that, after a trial, the approach to the determination of the factual basis upon which to pass sentence, is that if there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. However, when there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant.

[15] The foregoing pronouncements are made only to amplify the point that the situation adverted to, albeit obliquely, by Counsel for the defendant simply does not arise in the present case. What arises however, in the court's considered view, is whether the defendant can rely on that issue as a matter of mitigation. It cannot, in the court's view, be otherwise for the simple reason that there is no general issue that is joined

between prosecution and offender in these sentencing proceedings; there is no such joinder of issue. In the ordinary course of things it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. It is noteworthy that the court has confined itself to the expression “if necessary” because the calling of evidence would be required only if an asserted fact was controverted or if the judge was not prepared to act on the assertion.

- [16] Therefore, at the sentencing hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the basis of the plea. The onus is on the Crown to negative the presence of mitigating factors beyond a reasonable doubt. It is only trite that the sentencing court may not take facts into account in a way that is adverse to the interest of the convicted person unless those facts are established beyond a reasonable doubt. The convicted person carries the burden of proving on a balance of probabilities matters relative to mitigation submitted in his favour. This principle finds its applicability in relation to the question of intention and planning and the question of the absence consent in the commission of the offence.
- [17] In the present case, however, the defendant by pleading guilty to indecent assault has accepted the presence of all the constituent elements of the offence. By his own plea of guilty the defendant has accepted that: he intentionally applied force to the complainant; that is that he assaulted the complainant; that the complainant did not consent to the force that the defendant intentionally applied; that he knew that the complainant did not consent to the force that he intentionally applied; and that the force which he intentionally applied took place in circumstances of a sexual nature. Therefore, these are not matters that are in dispute at the sentencing hearing.
- [18] Having regard to all the circumstances of the present case, the court is lead to the ineluctable conclusion that the defendant cannot now rely on any assertions as it relates to the findings of fact made by the jury in relation to the foregoing issues

canvassed in respect of those counts that were tried by them. The defendant's plea, in the court's view, emanated from a conscious decision to enter the plea.

[19] By way of commentary the court hastens to add that the defendant's conduct in voluntarily entering such a plea was borne out of his trial strategy. Given the factual context of the counts contained in the indictment, it seemed somewhat baffling why the prosecution would have accepted the plea in the first instance. The circumstances of the commission of the offence contained in count three on the indictment were in the court's view, was based on a more egregious set of facts which permits the court to surmise that had the jury heard that evidence they may very well have come to an entirely different verdict. But that may very well be entirely a matter of speculation. The point which the court is attempting to make is simply that the defendant cannot now at this stage seek to rely on the jury's findings of fact in relation to the other counts on the indictment as a form of mitigation. The jury did not adjudicate on and gave no decision in relation to the count upon which the defendant entered his plea. To hold otherwise would run contrary to the avowed principles of our adversarial system of justice. Clearly, the defendant cannot approbate and reprobate. He is subject to the adage "that which I approve, I cannot now disapprove".

[20] In view of all of the above, the court will now set out the approach that it will adopt in sentencing the defendant.

[21] In arriving at the appropriate sentence to impose on the defendant in respect of the subject offence, the court first determined the starting point sentence having regard to the seriousness of the offence. The seriousness of the offence was determined in accordance with the defendant's culpability and the degree of harm caused by the commission of the offence flowing from the consequences attendant on the commission of the offence.

[22] The Court thereafter adjusted the sentence arrived at upwards or downwards within the prescribed range of sentences having taken into account the aggravating and mitigating factors attendant on the commission of the offence.

- [23] The figure arrived at was adjusted having regard to the aggravating and mitigating factors affecting the defendant.
- [24] Thereafter, the Court considered what discount from the sentence was appropriate to take into account the defendant's guilty plea.
- [25] Having arrived at the actual sentence to be imposed, the Court took into consideration whether any ancillary orders were necessary taking into account the circumstances of the offending and the personal circumstances of the defendant.
- [26] The penalty prescribed by statute for conviction on indictment for the subject offence is not less than 10 years' imprisonment. The court is cognizant of the fact that the starting point is not necessarily the maximum penalty that the statute prescribes.
- [27] Applying the grid in the Sentencing Guideline the court has determined that the commission of the subject offence falls within category 2 in relation to the degree of harm and level A with respect to culpability.
- [28] In making the determination that the degree of harm fell within category 2, the court took the following matters into account:
- (1) The victim suffered significant degradation and humiliation;
 - (2) The use of force in the execution of the offence.
- [29] In determining seriousness of the offence having regard to the defendant's degree of culpability at level A the court took into account the following matters:
- (1) The fact that there was contact made with the defendant's genitalia which was inserted into the victim's mouth;
 - (2) The defendant's seemingly seeking to obtain arousal and/or gratification by placing his genitals in the victim's mouth and subsequently down her throat causing her to gag and vomit;
 - (3) The duration of the offence. It appears that the defendant's insertion of his genitals into the victim's mouth although not sustained was not fleeting or tentative;

(4) The defendant had continued the act despite the victim's protestations and did not stop until the victim had vomited.

[30] Applying the grid referenced in the Sentencing Guideline, the commission of the subject offence would attract a sentence of approximately 4 years and 6 months.

[31] In adjusting the term of 4 years and 6 months to take account of the aggravating and mitigating factors relative to the defendant, the court has taken into account the fact that the defendant has no previous convictions for any similar offence. This is perhaps the only mitigating factor present in the case. The court has also considered the fact that no violence or intimidation was used in the commission of the offence. Also, there appeared to be no significant physical or psychological harm done to the victim, at least in terms of the evidence before the court.

[32] In making the adjustment for the aggravating factors relative to the defendant the court took the view that any aggravating factors found would ostensibly amount to double counting of the factors identified by the court in the consideration of the degree of harm and degree of culpability in determining the seriousness of the offence.

[33] However, in assessing the aggravating factors, the court took into consideration that the offence occurred at night and in an environment alien to the complainant and where the victim clearly did not feel safe.

[34] In addition, the offence occurred while the victim obviously withdrew her consent or did not consent to the defendant's conduct. The defendant continued despite the victim's protest and only stopped after she had vomited which suggests an element of recklessness on the part of the defendant as to the likelihood of the risk of his dastardly act not having been consented to, of which he must have been aware.

[35] In the circumstances, the court has adjusted the term of 4 years and 6 months upwards after taking into account the aggravating and mitigating factors relative to the commission of the offence and in relation to the defendant, within the range of

30% to 60% prescribed statutory penalty. In the court's view, an assessment of the aggravating and mitigating factors warrants an uplift from the 45% of the statutory penalty prescribed by the Guidelines. Therefore, the court has assessed the appropriate sentence for the offence as falling at 50% of the period of imprisonment prescribed by statute. Accordingly, the court will impose a sentence of 5 years imprisonment on the defendant.

[36] The court has assessed the aggravating and mitigating factors relative to the defendant. It cannot be said by any stretch of imagination that the defendant is of relatively good character. He is no stranger to the judicial system. Although the defendant has no previous convictions for any similar offence or sexual offence.

[37] The court has considered whether and to what extent the defendant is entitled to a discount from the overall sentence to take account of his guilty plea. Generally the court has a discretion to deduct a period equivalent to 1/3 of the actual sentence on account of the defendant's guilty plea where the plea was entered at the earliest available opportunity. Where the plea has not been entered at the earliest available opportunity, the court can in its discretion deduct a lesser period depending on the circumstances of the case. In the present case, given the timing of the second indictment it cannot be said that the defendant entered the plea at a late stage of the proceedings. Indeed, it was at the first available opportunity when the second indictment was presented. In fact, the defendant had waived his right to service of the new indictment. Therefore, the court will credit the defendant for his guilty plea with a discount of a period of 1/3 of the actual sentence being 1 year and 6 months' imprisonment.

[38] The court has also considered the question of whether the defendant is entitled to any discount from the overall sentence to take account of the delay arising in the present proceedings. Counsel for the defendant has presented the question of delay as a factor which the court ought to take into account in determining the quantum of any sentence which the court is minded to impose. It is indeed unfortunate that the court did not have the benefit of full and substantial submissions from counsel on

either side. The court is mindful of the fact that delay does not translate into an automatic reduction in sentence. The sentencing court is required to adopt a principled approach to the issue which mandates that an inquiry be conducted to determine the cause, facts and circumstances that have contributed to the delay.

[39] Although there appeared to be some concession made by the prosecution that delay is a factor which the court ought to take into account in determining the length of sentence, the substantial causes for the delay and how the defendant may have likely suffered prejudice, if any, as a result of such delay has not been articulated before the court. However, given the length of the delay in this matter as chronicled in the record of proceedings, it may be appropriate to examine the record with a view to determining whether the delay ought in light of the prevailing circumstances, warrant a reduction of sentence. However, before doing so it will be necessary to examine the approach that the court should adopt and the existing legal principles set out in the jurisprudence on this issue.

[40] It is well settled that a defendant has a constitutional right to a fair hearing within a reasonable time, before a fair and impartial tribunal established by law. In an appropriate case, the court ought to address the question of delay as it relates to sentencing in a criminal trial. Delay in a criminal case which constitutes a breach of a defendant's constitutional right to a fair hearing within a reasonable time will always be a factor to be considered in deciding upon the appropriate disposal.¹

[41] The factors relevant to the cause of the delay ought to be assessed in determining whether there has been any breach of a defendant's constitutional right. Where a breach of this constitutional right has been established, the sentencing court should consider whether there should be any effect on the sentence that would have been passed if there had been no delay.

[42] In the case of **Violet Hodge v The Commissioner of Police**² the Court of Appeal of the Eastern Caribbean Supreme Court dealt with the question of the relevance of

¹ Hassen Eid-En Rummun v The State of Mauritius [2013] UKPC 6 at para 13

² BVIMCRAP 2015/0005 delivered 27th February 2017

delay in criminal proceedings to sentencing. Baptiste JA, delivering the judgment of the court said:

"The principles regarding delay can be summarized as follows. In determining sentence, there is a need to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of *Mills v Her Majesty's Advocate*. "A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly" per Lady Hallett in *R v Kerrigan* at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in Attorney General's Reference No. 79 of 2009. He emphasised that applications for reductions in sentence would be unusual.

With the guidance provided by the cases, this Court has to consider whether the magistrate erred in failing to make a specific allowance for delay in imposing sentence. There was ample material to support the assessment that the magistrate should have considered the issue of delay as a mitigating factor conducing to a reduction in sentence. The question of whether delay is excessive is really fact sensitive. The magistrate gave no reason for not factoring in delay as a mitigating factor. It is therefore open to this Court to exercise its discretion by assessing the facts and making a judgment as to what is required. There is no automatic right to a reduction in sentence on the ground of delay. As has been seen, the court possesses a residual discretion in the matter, per Mr. Justice King in *R v Phillips et al*:

'Discretion by definition requires a court to exercise an assessment of the facts and to make a judgment as to what is required'

...

"There was undoubted delay for which the appellant was not responsible. There would be anxiety resulting from the prolongation of the proceedings. Delay related grounds may justify an adjustment to sentence; one of the grounds would be the anxiety resulting from prolongation of the proceedings per Lord Hope in *Mills v HM Advocate*. Reference has already been made to the appellant's state of health. In the circumstances, the court in the exercise of its discretion considers that a one year reduction for delay

would be fair. The sentence of six years is accordingly reduced to five years.”³

- [43] Given the substantial and inexplicable delay in this matter coming on before the court particularly in light of the late stage at which the new indictment was filed, the court has formed the view that the defendant is entitled to a discount on account of the delay. Accordingly, the court will discount a period of 1 year and 4 months from the notional sentence.
- [44] The defendant was bailed shortly after being arrested and therefore, the time which he spent remanded was approximately 4 days. He will be credited for such time.
- [45] In the premises, the sentence which the court is minded to pass is 2 years’ imprisonment. The court has given considerable thought to whether the defendant should serve any period of incarceration in fulfillment of this sentence or whether the court ought to order that the sentence be suspended. The defendant has no previous convictions for any similar offence. The court also took into account the circumstances in which the offence occurred and the contrition expressed by the defendant which is implicit in his early guilty plea. Additionally, the defendant’s last offending was in 2015 for a dissimilar offence. Therefore, the court will order that the sentence of 2 years’ imprisonment be suspended. The sentence of 2 years’ imprisonment herein shall not take effect unless, during the period of 1 year 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.
- [46] It would be remiss of the court if it did not state emphatically that the type of sentence imposed on the defendant in the present case is not intended to send the message that offences of a similar nature will be dealt with by the proverbial slap on the wrist. Neither is the punishment meted out to the defendant intended to convey the impression that it is a seemingly convenient method of palliating the wrong committed by the defendant towards the victim. The imposition of a suspended

³ Per Baptiste JA at paras [66], [67] and [69]

sentence ought to be properly regarded as punishment and not a convenient alternative to imprisonment. Misogyny of any form ought to be deprecated.

- [47] No evidence has been presented to the court whereby the court is mandated to consider the necessity for the making of any ancillary orders. There is no basis upon which the court can exercise its discretion in that regard. Therefore, the court makes no ancillary orders.

Shawn Innocent
High Court Judge

By the Court

Registrar