

IN THE EASTERN CARIBBEAN SUPREME COURT

SAINT CHRISTOPHER & NEVIS

SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CASE SKBHCR 2022/0024

REX

V

KH

APPEARANCES

Mr Tessaun Vasquez for the Crown.

Mr Vaughan Henderson for the defendant.

2023: OCTOBER 9

SENTENCE

For twice unlawful carnal knowledge of partner's sister's daughter aged 13

1 **Morley J:** KH, aged 39, falls to be sentenced for having unlawful sexual intercourse twice in 2020 when aged 36 with DS then aged 13, who is the daughter of S, who is the sister of KH's then partner K, when the two sisters lived with their children in the same home, KH living there too¹.

2 The history of proceedings is:

¹ The complainant will not be identified as she is entitled to anonymity, so that because the defendant was in a familial relationship, neither he nor other family members will be identified either in this judgment, as to do so will likely identify the complainant.

- a. Because DS is under 16, she cannot consent in law to sexual intercourse even if she might in fact have agreed, (though any such agreement from a child aged 13 carries no mitigating weight).
- b. Initially, the allegation was two counts of 'rape'², being on indictment counts 1 and 2, alleging intercourse which was in fact non-consensual.
- c. KH made his first appearance in the High Court on 13.01.23.
- d. On 07.02.23, after discussion between counsel and some confusion in the courtroom, two counts of 'unlawful carnal knowledge'³ were added to the indictment, being counts 3 and 4, at which point KH pleaded guilty to count 4.
- e. The Crown was minded for a time to pursue the rape counts on counts 1 and 2, but on 05.05.23 settled for a second plea, now to count 3, counts 1 and 2 to lie on the file, a '*basis of fact*' was agreed between counsel, while the court decided the pleas to counts 3 and 4 would attract the maximum credit as each was offered at the most practicable opportunity.
- f. A social inquiry report was prepared for 30.06.23 but there was not enough court time to pass sentence, and next day the instant judge went to sit on Montserrat, returning after summer recess to sit on St Kitts from 20.09.23.
- g. The facts were opened on 28.09.23, then mitigation was on 04.10.23, with adjournment to today 09.10.23 for sentence remarks to be in writing.

3 The facts are, per the agreed basis of fact:

- a. On a day in February 2020, around 6pm, KH led DS by the hand into a shed, where he removed her top and bottom, and proceeded to have sexual intercourse with her for 5-10mins. On completion he told her to get dressed and not to tell anyone, which she did not. She had been a virgin.
- b. On 21.07.20, there was a water outage, and DS getting water from a pipe she was approached by KH, who held her hand, leading her into the shed, where he had sexual intercourse with her, ejaculating, they were discovered by KH's partner K, who became angry and slapped DS. DS complained to her mother S, police were alerted, and KH's semen was found in DS's vagina. On arrest, KH said nought about either event.

² Contrary to **Common Law**.

³ Contrary to **s3 Criminal law Amendment Act** cap 4.05.

- 4 A victim impact statement dated 17.05.23 from DS, now 16, was offered to the court. It recites her version of events offered in her police statement of 22.07.20, which alleges rape with violence, on both occasions, where she says in particular on 21.07.20 she was choked unconscious, and she is most aggrieved her aunt K slapped her. She goes on to say:

He took away my innocence and my self-worth. He was like a father figure to me...I do not socialise with my peers like I used to. I am terrified of people and what they can do. I have anxiety and depression issues. I am afraid to go to crowded places by myself. Sometimes I do wish I was dead. I do not feel safe living. Some [of my family] do not talk to me because of this incident. I did not do anything wrong. I had difficulties concentrating on my schoolwork, as a result my grades dropped from all passes to four failures...I started to drink alcohol and using marijuana. I am still using drinks such as Beehive, Smirnoff, Black Label, Hypnotic, Malibu, and Hennessy...vodka. I smoke marijuana when I am feeling depressed. It is my way of escaping reality...I have gone to counselling at my school...talking about what had happened to me makes me feel as though I was reliving the incident all over again. I felt humiliated...I am usually up all kinds of hours crying and it makes it difficult to fall asleep. Nobody ever asks me how I am doing, I learnt to deal with this on my own by smoking, drinking, or listening to music...My grades before the incident used to be on average 80% but dropped significantly to an average 40%....

- 5 In the social inquiry report of probation officer Nekisha O'Loughlin:

- a. She records an explanation from KH for the event on 21.07.20:

I heard a noise in my shed, I went to look to see what was the noise, as a pigeon lives in the shed too. When I went to see what the noise was, it was actually under the shed. When I turn around to come out of the shed DS was standing in front of me. Then we ended up kissing, then that lead to the next, and the door started to pull, then I realise K pulling the door. She basically caught us in the shed...I went in the house to take a shower. ...DS mother called me...she said DS told her I raped her. I said if that is what she said...then I told her I have nothing to say, as I going to the station then. After I went out and wait for the car...I have nothing against DS, she is young and I can't have nothing against her at all. I feel like I disappoint her family and hope they all forgive me some day...I pleaded guilty because I think that was the right and fair thing to do...

- b. And she goes on to write a supportive report of KH in these terms:

Based on our research...KH appears an honest community activist and man. We have had praised references from a number of people who he has known mostly all his life. His former teacher, neighbour, family and friends all spoke about him in the highest regards stating their experience with him has been fairly good. He has managed to touch many lives by his selfless personality. It is a rare occasion in this profession to receive all glowing recommendations, but I can honestly say of all the people we have contacted, not one person had a negative word regarding KH, but most have expressed how shocked they were upon hearing about the incident...

- 6 Further, character references were offered to the court:

- a. In writing from John Douglas, his step grandfather, saying:

KH is like one of my own sons....It is breaking my heart...KH was a very helpful and kind person...he used to pay my bills...he was always helping in the community, cleaning up abandoned houses and yards that were overgrown.

- b. In person, from his sister X, saying since his arrest she '*sees a lot more positive in him, taking greater responsibility*', and who presented a written statement, supporting her older brother, saying:

KH is a very kind-hearted person, he is always there to lend a helping hand. KH often helps the elders such as cleaning their yard and abandoned lots. He is a coconut vendor and farmer. He was good at fixing bicycles...KH has repeatedly expressed to me how sorry he is about the incident.

- 7 Counsel Vasquez for the Crown and Counsel Henderson for the defence have argued into what category the offending should fit, the Crown arguing category 1A owing to the impact on DS, with the defence arguing for the lesser category 2A. It is agreed an aggravating feature is there was ejaculation, and mitigating features are KH pleaded, is of good character, and has expressed remorse, supported by a helpful sentencing note from Counsel Henderson.

- 8 There are however two features of the case which must be made clear:

- a. In his remarks to the probation officer, KH does not offer much detail of what happened in the shed on 21.07.20, but from their disposition it may appear he is blaming DS as the initiator of sexual contact, and there should be sympathy for him he finds himself prosecuted, adding he has nothing against her and pleaded only because it is the right thing to do, as if taking manly responsibility for DS's waywardness. This will not do. DS was a child aged 13, while KH was 36, knowing her age as he lived with her. Moreover, there was dna finding of his semen in her, leaving him little option but to accept he is guilty he had had sexual intercourse with her. This court rejects any suggestion she threw herself at him and finds the self-pitying explanation to the probation officer repugnant.
- b. Further, the Crown has a difficult task in choosing how to proceed in cases such as these, dealing with a child complainant, for whom the ordeal of giving evidence may be

expected to re-traumatise her, so a plea to the lesser offence may to counsel seem to balance the interests of justice against damaging DS more. Bearing this balance in mind:

- i. It needs to be remembered the maximum sentence on St Kitts for rape and also for unlawful carnal knowledge is life imprisonment;
- ii. It needs further to be noted the latter is generally less serious than the former (though still very serious);
- iii. More, the court should not pass a rape sentence hidden within a sentence for unlawful sexual intercourse, but avoiding the trial, the maxima being the same, but instead there must be reflected in the sentence the agreed basis of plea, which here in particular did not involve suggestion formally from the Crown there was violence;
- iv. It may be a measure of compromise between the Crown and Defence has arisen, which indeed daily occurs in courts as cases settle, which is properly in the discretion of the Crown, balancing the desire for a trial, against the damage a trial may cause a child, along with what then may otherwise meet the justice of matters;
- v. And finally, it is important to comprehend, as a matter of sentencing sensitivity, in these circumstances the sentence which will follow must reflect the agreed basis of plea, accepted in the discretion of the Crown, and therefore not wholly what DS has written in her original and victim-impact statements.

9 There are sentencing guidelines in the ECSC published in November 2021 for unlawful sexual intercourse, on St Kitts expressed as 'unlawful carnal knowledge'. The offence is in the aggravated form as DS was under 14.

10 From how each offence was opened, they stand alike.

11 Considering step 1 in the six steps of sentencing procedure, being assessment of each offence, I find each falls within category 2A - being level A owing to disparity of age and abuse of a position of trust in a familial relationship; and category 2, owing to 'serious' psychological impact, falling short of 'extreme', while such 'serious' impact is consistent with any sexual contact arising between someone aged 13 and a senior member of her household in seeming parental authority. There follows a starting point of 40% the maximum, where a life sentence is treated as notionally 30 years, meaning at 40 % therefore 12 years. It is an

aggravating feature in the first incident she had been a virgin, and in the second there was evidence of ejaculation, adding 2 years to each, making an adjusted starting point of 14 years.

- 12 Considering step 2, being assessment of the offender, he was of good character, with highly positive review in the community, justifying a reduction of 2 years, back to 12 years. Further, the court accepts a significant measure of remorse, though self-pitying, and reduces the sentence 18 months in each to 10.5 years.
- 13 Considering step 3, which is credit for plea, each attracting the maximum one-third, the sentence for each reduces to 7 years.
- 14 Considering totality in step 4, in my judgment the sentences should not be consecutive as they arise from a series of similar events, with the same complainant, not on bail, with no earlier complaint, and with no violence suggested by the Crown, but there should be an upward adjustment to reflect there were two offences, by 3 years, meaning count 4 shall be expressed as 10 years, with count 3 as 7 years concurrently.
- 15 Considering time on remand as step 5, it shall count as the time from when he was arrested to being bailed, plus then going into custody on his plea on 07.02.23, to be calculated definitively by the prison, while KH can expect remission of one-third of his sentence if of good behaviour, meaning I expect he will serve two-thirds of 10 years, further adjusted for time already served on remand.
- 16 There are no ancillary orders to make under step 6.
- 17 Finally, I wish to say, so that DS hears it and I direct she is told, what happened to DS is not her fault. She did nothing wrong. A grown man who knew she was a child of 13 took advantage of her and has now been sentenced to 10 years in jail for what he did.
- 18 *KH, please stand up.* For the reasons explained, for the offence of unlawful carnal knowledge of DS aged 13, disgracefully while you were 36 living in her household with her aunt, on count 4 being on 21.07.20 the sentence will be 10 years imprisonment, and on count 3 being in February 2020 will be 7 years imprisonment concurrently. The total will be 10 years. Time on remand shall count, to be settled by the prison. You shall be eligible for remission for one third of your sentence if of good behaviour. You may go with the gaoler.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

9 October 2023