

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

COMMONWEALTH OF DOMINICA

A.D. 2023

DOMHCR2022/0022

BETWEEN:

THE STATE

V

A.R.

Before:

The Honourable Thomas W.R. Astaphan, K.C., J (Ag.)

Appearances:

Ms. Sherma Dalrymple, Director of Public Prosecutions, assisted by Ms. Marie Louis Pierre-Louis, State Attorneys for The Commonwealth of Dominica

Mr. Edward Peter Alleyne, Director of the Legal Aid Clinic, for the Accused

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2023: June 12

: July 24
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JUDGMENT ON SENTENCING

[1] **THOMAS W.R. ASTAPHAN, K.C.; J (AG.):** Given the nature of this case, the names of the parties, both adults, shall not be used so as to preserve the privacy of the Virtual Complainant.

- [2] The facts in this case are not in dispute.
- [3] In summary, they are that the Virtual Complainant G.T. ("V.C.") was at her home on 24th February 2020, conversing with a friend when A.R. entered her front yard.
- [4] He had a microphone in his hand and was singing loudly.
- [5] He was asked by the V.C. and her friend to desist from his loud conduct. He ignored them.
- [6] Shortly thereafter the V.C. stated that she was going to take a bath.
- [7] She entered her home and shortly after reappeared and walked past her friend and A.R. and entered her outdoor bathroom.
- [8] The bathroom is located about 7 feet to the eastern side of the front entrance of her house.
- [9] The bathroom has three sides, with the entrance being without door or curtain, thereby rendering it not private. This fact, however, does not present an invitation to anyone to exploit it, and to thereby deprive the V.C. of her expected privacy in the comfort of her home.
- [10] While the V.C. was in her shower she heard A.R.'s voice in her immediate vicinity. She looked up and saw him standing at the entrance of her bathroom looking at her and speaking.
- [11] She immediately asked told him to leave.
- [12] He did not leave.

- [13] Instead, he lunged at her and pinched the nipple of her left breast.
- [14] She angrily ordered him to leave.
- [15] He did not leave, and he again lunged at her and pinched the nipple of her left breast.
- [16] The V.C. told A.R. that she was going to make a report to the Police. He then turned away from her and left the scene.
- [17] One year and seven months later, on Tuesday 28th September 2021, a report of the incident now only having been made, A.R. was arrested on suspicion of indecent assault.
- [18] He was charged with that offence on the next day.
- [19] On Thursday 30th September 2021 A.R. was brought before a Magistrate and was remanded to prison where he stayed until he obtained bail on 11th January 2022.
- [20] A.R. has no previous convictions.
- [21] A.R. was indicted on an Indictment with one Count that he indecently assaulted the V.C. by pinching the nipple of her breast contrary to **section 13(1)(c) of the Sexual Offences Act Chapter 10:36 of the Laws of the Commonwealth of Dominica** which reads:

“Any person who indecently assaults another is guilty of an offence and liable on conviction to imprisonment –

...

(c) for five years, if committed on a person who is sixteen years of age or more.”

[22] The V.C. is 57 years old.

[23] The law which guides this sentencing exercise, in respect of the principles underlying the objectives of sentencing, is to be found in the celebrated case of **Desmond Baptiste et. Al v R**¹ out of the Eastern Caribbean Court of Appeal. The Eastern Caribbean Court Compendium Sentencing **Guidelines for Sexual Offences, Re-Issue: 8th November 2021** is the vehicle which takes us on the journey of sentencing in the context of the **Baptiste** objectives.

[24] **Baptiste** establishes the objectives as:

- (i) **Retribution** – in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;
- (ii) **Deterrence** – to deter potential offenders from offending, and the offender himself from recidivism;
- (iii) **Prevention** – aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and
- (iv) **Rehabilitation** – aimed at assisting the offender to reform his ways so as to become a contributing member of society.

The Guidelines

[25] Step 1 of the Guidelines is to establish the starting point (of the sentence) for the offence, which requires an assessment of the seriousness of the offence, and its consequences on the victim, by reference to the harm caused, considering the culpability of the offender. This is a four-stage process.

¹ Crim App No. 8 of 2008 (SVG)

[26] Stage 1 is to consider the consequence in relation to the harm caused by the offence and there are three categories.

[27] **Consequence Category 1** – Exceptional, which admits of extreme psychological and/or physical harm supported by evidence, extreme degradation/humiliation, use of extreme force, victim under 10 years of age, victim 65 years and over.

(i) On the deposition of the V.C. the only consequence she establishes is that she felt ashamed, she didn't "feel good". Clearly, therefore, this is not a Category 1 case.

[28] **Consequence Category 2** – High, which admits of serious psychological and/or physical harm supported by evidence, significant degradation/humiliation, use of significant force, victim under 16 years of age, STI a consequence of the offence.

(i) Again, on the deposition of the V.C. none of these apply and therefore this is not a Category 2 case.

[29] **Consequence Category 3** – Significant, admits of when none of the factors of categories 1 or 2 are present.

(i) Axiomatically, this is the Consequence Category applicable to this offence, "**Significant**", according to the Guidelines. Both the State and the Convict agree on this categorization.

[30] The second stage requires a consideration of the seriousness of the offence by assessing the culpability of the offender.

[31] There are two levels of seriousness: Level A – High and Level B – Medium. None of the factors to be considered in High are present and the major factor for

Medium is not present. However, like Category 3 above, Medium has a “sprat net” catch-all phrase, “Other cases where the characteristics for Level A are not present.” This therefore would be a **Level B – Medium** case.

[32] Therefore, according to the Guidelines’ Third Stage – the Level B Seriousness and the Category 3 Consequence establishes the Starting Point (“S.P”) of the applicable punishment as “**Likely non-custodial**”. Again, both the State and the Defence Counsel are in agreement on this S.P.

[33] The next stage requires the determination of the existence of aggravating and mitigating factors of the offence. Again, both the State and Defence Counsel submit that there are no aggravating or mitigating factors of the offence. Having reviewed the depositions and the factors to be considered at this stage, I am in agreement with both Learned Counsel.

[34] The next stage is the consideration of aggravating and mitigating factors of the offender.

Aggravating Factors of the Offender

[35] The Guidelines suggest for consideration previous convictions for sexual offences, relevant convictions for other offences, whether the offence was committed whilst on bail, and knowledge of infection with STI. None of these are applicable and therefore there are no aggravating factors of the offender. The State and Defence Counsel both submit this conclusion as well.

Mitigating Factors of the Offender

- [36] The Convict has no prior conviction².
- [37] The Social Inquiry Report³ sets out the views on A.R. by his employer, friends and randomly selected members of the community, all of whom spoke exceptionally highly of A.R., and expressed only positive comments on him. This submission is repeated by Counsel for A.R. in his submissions, and this Court accepts that this is a mitigating factor of the offender.
- [38] The next step in the journey to sentence is the consideration of a reduction in sentence of 1/3 for a guilty plea. A.R. did indeed plead guilty at the first available opportunity. There is no reduction in sentence available because there will be no custodial sentence pronounced.
- [39] Step 4 (adjustment of sentence on the basis of the totality principle) is inapplicable as the offence is singular; and Step 5 (credit for time on remand on which A.R. spent 9 months, and this will be considered in the final punishment as a special mitigating factor) is also inapplicable given that there will be no custodial sentence.
- [40] Step 6 requires the consideration of, inter alia, a compensation order.
- [41] **Section 73(1) and (2) of the Criminal Law and Procedure Act** states:
- “(1) Any person who is convicted of an indictable offence may be adjudged by the court to make compensation to any person injured by his offence; and any sum adjudged may be recovered

² State Submissions paragraph 23

³ At paragraphs 6.2.1 to 6.4.3

by such process, including imprisonment in default of payment for twelve months as the court may direct.

(2) *The payment of such compensation shall be a bar to any further action for the same injury.”*

Compensation

[42] The leading case of the assessment of damages in the region is the case of **Cornillac v St. Louis**⁴. This case sets out for the Court’s consideration in assessing damages for injury the following:

- “(i) The nature and extent of the injuries sustained;
- (ii) The nature and gravity of the resulting physical disability;
- (iii) Pain and suffering endured;
- (iv) Loss of amenities; and
- (v) The impact of the injuries on pecuniary prospects.

[43] The court has also considered the cases of **The State v Kenneth Francis**⁵ and **The Queen v Kevin Sprauve**⁶ in coming to its decision on compensation.

[44] The V.C. according to her own evidence on deposition has suffered no physical injuries on account of the assault.

[45] By her own evidence she stated that she waited a full 11 months before reporting the matter to the Police⁷ and only made the report because she expected A.R. to

⁴ (1965) 7 WIR 491

⁵ Criminal Case No. 30 of 2015 (Dominica)

⁶ Criminal Case No. 4 of 2014 (Virgin Islands)

⁷ Page 5, lines 17 to 21 of the Deposition

apologize to her, and he did not. She even stated that she “...sent a message for him via E.V. but he never came to apologize.”

[46] To the Court this confirms that she did not suffer any physical or other injuries as a consequence of the assault. She stated that “*I feel shame, and embarrassed*”⁸.

[47] Thus, it is that the damages awarded must be premised on the physical touching of her nipple (twice) and the shame and embarrassment she claims to have felt – while waiting 11 months, from 24th February 2020 to 21st January 2021 and after he failed to apologize – to making her report.

[48] On this basis, I find that nominal damages are only applicable.

The Sentence and Compensation

[49] **Section 51(1) of the Criminal Law and Procedure Act** provides that:

“Upon a conviction of any person for an offence whether indictable or summary, under any written law, notwithstanding the absence of any provision in such written law to that effect, the Court shall have a discretion in lieu of or in addition to any imprisonment prescribed, to impose such fine as it thinks fit.”

[50] This section provides the statutory basis for the Guidelines “non-custodial” starting point, and in the exercise of the discretion so granted, the Court shall impose a fine on A.R.

⁸ Ibid

[51] Taking into consideration the Law and the facts of this case as set out in the depositions, particularly that of the V.C.:

IT IS HEREBY ORDERED THAT –

- [i] A.R. shall within 14 days of the date of delivery of this Judgment, pay a fine of E.C.\$50.00 (fifty dollars), failing which he shall serve 7 days in prison;
- [ii] A.R. shall pay to the Virtual Complainant as Nominal Damages the sum of E.C.\$50.00 (fifty dollars) within 14 days of the date of delivery of this Judgment, failing which he shall serve 7 days in prison.
- [iii] In light of all the circumstances of this case **IT IS FURTHER ORDERED THAT** no conviction shall be recorded against A.R.

[52] This is the Judgment on Sentencing of this Court.

Thomas W.R. Astaphan, K.C.; J (Ag)
High Court Judge

By the Court

Registrar