

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CASE NO: DOMHCR2019/007

BETWEEN:

THE STATE

and

CARSON BURTON

Appearances:

Ms. Sherma Dalrymple, Director of Public Prosecutions, Counsel for the State
Ms. Dawn Yearwood-Stewart, Counsel for the Defendant

**2023: February 13th
: March 31st**

JUDGMENT ON SENTENCE

- [1] **FLOYD J.:** The defendant, Carson Burton, was originally charged with unlawful sexual intercourse and indecent assault. On 13th February 2023, the defendant was arraigned, and entered a not guilty plea to count one, unlawful sexual intercourse, but guilty to count two, indecent assault. Following the pleas, State counsel withdrew count one. A Social Inquiry Report was sought by counsel for the defendant, and counsel for the State. The defendant was remanded into custody following his plea. However, a bail hearing took place that same day, and the defendant was released on conditions, with a surety. The case was adjourned to 31st March 2023 for sentence. An agreed Statement of Facts was filed on 3rd March 2023. The Social Inquiry Report was filed on 20th March 2023. Written submissions

were filed by State counsel on 29th March 2023, and by defence counsel on 31st March 2023. State counsel relied upon her written submissions, while defence counsel made oral submissions in support of what was filed. The matter now proceeds to sentencing.

The Facts

- [2] The child complainant knew the defendant, as he was involved in a relationship with her aunt, and resided close by, at her grandmother's house. At the time of the incident, the complainant was age 12 years, and the defendant was age 31 years.
- [3] On 27th October 2018, the complainant was at home with her 6-year-old sister. At approximately 8:00 pm, the defendant passed by and saw the complainant standing in the doorway. He struck up a conversation, and she let him into her residence. They sat on the edge of a bed, and he offered her some food. The complainant declined, and the defendant attempted to kiss her on the lips. The complainant pulled away and said no. The defendant attempted to touch the complainant's "*private parts*," and asked her if he could touch her there, but the complainant said no. The defendant got angry, and asked to use the bathroom, to wash his hands. After doing that, he returned, and sat on the bed. He again tried to kiss the complainant but she said no, and asked him to leave. The defendant walked to the door, but turned to come back, whereupon the complainant said "*Carson, stop joking*." The defendant then left the residence.
- [4] The parents of the complainant came home very late. The next day, the complainant told them what had happened. The police were notified and attended. A statement was obtained from the complainant. The defendant was arrested, and on 31st October 2018, he gave a statement under caution to police. He admitted trying to kiss the complainant and trying to touch her "*private parts*."
- [5] A Social Inquiry Report was prepared by Welfare Officer, Anestin Baron, and Chief Welfare Officer, Delia Giddings-Stedman. The defendant was born on 28th February

1987. He is now age 36 years. He has three siblings, and described a happy childhood. He left school in the fifth form, but attended a skills training program in welding. Unfortunately, the defendant has never been employed on a full-time basis, engaging in fishing, and farming for sustenance.

- [6] Although unmarried, the defendant has three young children. He describes himself as quiet and respectable. He spends a lot of time on his own, and enjoys fishing and gardening. He has no criminal record.
- [7] The defendant acknowledged his wrongdoing, and feels badly about what he did. He would like to apologize to the complainant. This incident has resulted in the breakdown of his relationship with his common-law partner, the complainant's aunt.
- [8] The parents of the defendant, and a close friend, all described him as a quiet, calm, good, and respectful person. The defendant was not known to be aggressive. They were surprised by this incident. They continue to be supportive of him. Although generally described as being quiet and not a troublemaker, community members offered mixed opinions of the defendant.
- [9] The complainant is now 16 years old. She was age 12 at the time of the incident. She had difficulty discussing the incident with the author of the Social Inquiry Report, as it brought back painful memories and emotions. After the incident, the complainant blamed herself, and felt insecure. She sought counselling and therapeutic intervention. However, it has done little to help. She prefers to simply forget what happened to her. The impact upon her has been significant. She had to change schools to avoid questions from other students. She felt overwhelmed, was unable to focus on her studies, and had to repeat a form at school. She has difficulty sleeping, and experiences nightmares. Finding it hard to cope socially, the complainant stopped participating in extracurricular activities such as netball, and stopped attending church. She questions why God allowed this to happen to her. She has been traumatized, saying the incident will be forever etched in her memory.

- [10] The mother of the complainant confirmed that, at the time of the incident, the defendant was involved in a common-law relationship with her sister, and lived nearby. The complainant has been deeply affected by the incident. She is very quiet, easily angered, and does not like to be touched or spoken to. The complainant's father confirmed that she experiences nightmares, which interrupt her sleep pattern. She is frequently tearful and afraid. She is aggressive, temperamental, and lacks trust in others.

The Position of the Parties

- [11] Learned counsel for the State referred to the agreed Statement of Facts and the Social Inquiry Report. Authorities were submitted in support of her position. The complainant was age 12 years and suffered serious psychological harm as a result of this incident. This places the case into the Consequence Category 2 – High. In dealing with the seriousness component of the sentencing guidelines, State counsel describes the situation as an abuse of trust, since the defendant was known to the complainant and was in a relationship with her aunt. However, the court notes that the defendant did not reside with the complainant, and did not stand in the position of loco parentis. Mere knowledge of the defendant and being acquainted with him, does not rise to the level of a position of trust.
- [12] While counsel for the State correctly refers to a significant disparity in age of 19 years between the parties, she goes on to refer to an alleged threat made by the defendant to the complainant, as described by the complainant in the Social Inquiry Report. However, no threat is referred to in the agreed Statement of Facts, tendered and signed by both counsel, as the basis upon which the plea was entered and this court is to pass sentence. Short of an agreement between counsel to amend the Statement of Facts, the court cannot rely upon such a fact. To do so, after the plea of guilty has been entered, would be unfair to the defendant. The significant disparity in age is sufficient, nonetheless, to place the matter into the Seriousness Level A – High category.

- [13] State counsel submits that the presence of another child “*during the assault,*” should be considered as an aggravating factor. However, the court again refers to the agreed Statement of Facts. The only reference to another child is that the complainant “*was at home with her 6-year-old sister when the accused came into the said home and spoke to her.*” There are no further details as to the whereabouts of the complainant’s sister as the incident unfolded. No information is given as to the size of the home or the number of rooms. The specific location of the complainant’s sister is not identified. The court interprets the reference in the guidelines to the “*offence in the presence of others, especially children,*” to mean that the child must be physically present, and therefore in a position to potentially see and hear the offence taking place. In this case, the agreed facts do not specify the location of the complainant’s sister, other than being in the same home when the defendant entered. Without greater clarity, that is not sufficient for the court to accept such an aggravating factor. To do otherwise, would be unfair to the defendant.
- [14] By way of mitigating factors, State counsel correctly refers to the good character of the defendant, and his lack of any criminal record of conviction.
- [15] Taking into account the guilty plea of the defendant, and the time served on remand, which is calculated at 15 days, counsel for the State recommends a sentence of 3 years, 3 months, 1 week and 13 days, as being the appropriate sentence.
- [16] Learned defence counsel referred to the Social Inquiry Report, the agreed Statement of Facts, and authorities, to support her position. She correctly submits that the agreed Statement of Facts indicates only attempted contact, not actual contact. Defence counsel also submits that the agreed facts indicate no threats of violence directed by the defendant towards the complainant. Further, counsel for the defendant submits that the level of psychological harm described by the complainant cannot possibly be attributed to the facts related to the charge of indecent assault, and cautions the court not to sentence the defendant based upon

harm that can only be attributed to the offence which was withdrawn. However, the court bears in mind that there is no “ideal” victim of sexual abuse. There can be no stereotypical approach taken to how a victim of sexual abuse should behave or react to the offence. Every victim of sexual abuse is an individual, and must be treated as such. The way one person may react to such trauma differs from how another may respond. It would be unreasonable to expect victims who are sexually assaulted to actually cope and respond in the same manner. The court must not allow any myths, biases, assumptions, or expectations to interfere with the way it receives evidence or, in this case, information by way of report, from victims.

[17] Defence counsel accepts that the complainant was under 16 years at the time, and that there was a significant age disparity in this case. This brings the matter to Consequence Category 2 – High and Seriousness Level A – High, under the sentencing guidelines. The starting point is therefore 45% or 53 months. Counsel for the defendant submits there are no aggravating factors, and by way of mitigating factors, points to the good character of the defendant, his genuine remorse, and attempts on his part to address his behaviour. The defendant indicated that he wanted to apologize to the complainant but was prevented from doing so by the terms of his bail. This moves the starting point to 30%.

[18] Defence counsel submits that the defendant should receive a one third sentence reduction for his guilty plea, particularly as it saved valuable court time and spared the complainant the trauma of testifying at trial. This reduces the sentence to 12 months. Counsel for the defendant accepts that time spent on remand by the defendant equates to 2 weeks or 15 days, for which he should receive credit. The appropriate sentence is therefore 11 months and 15 days.

The Law

- [19] Under **s. 13 (1) (a)** of the **Sexual Offences Act**¹, any person who indecently assaults another, is guilty of an offence, and liable upon conviction, to imprisonment for ten years, if committed on a person under the age of fourteen.
- [20] Sentencing in criminal cases involves many considerations in order to achieve the appropriate penalty. The sentencing goals of retribution, deterrence (both general and specific), prevention and rehabilitation, are confirmed in the well-known cases of **R. v Sargent**² and **Desmond Baptiste et al v The Queen**³. The more recent case of **Renaldo Anderson Alleyne v The Queen**⁴ describes sentencing principles as including punishment, deterrence, and rehabilitation. Sentencing seeks to promote respect for the law and an orderly society. A sentencing court must consider the facts of the case, and the nature and gravity of the offence, balanced with the circumstances of the offender, including his age and background, whether he has a criminal record, the role he played in the offence, the design and execution of the offence, and the possibility of reform and reintegration into society.
- [21] The case of **R. v Parranto**⁵ reminds us that sentencing requires judges to consider and balance a range of factors. While the process is governed by clearly defined objectives, it remains a discretionary exercise for courts in balancing all the relevant components, in order to achieve the purposes of sentencing. The goal in every case is a fair, fit, and principled sanction. Sentencing is approached on an individual, case-by-case basis. The court must determine which objectives of sentencing merit greater weight, and evaluate the importance of mitigating or aggravating factors to best reflect the circumstances of each case.
- [22] All of this has been considered by the court in formulating an appropriate sentence in this case.

¹ CHAP 10:36

² 60 Cr. Ap. R. 74

³ Cr. Ap. No. 8 of 2003

⁴ [2019] CCJ 06 AJ, 93 WIR 155

⁵ [2021] SCC 46

Analysis

- [23] Having received and carefully reviewed the written and oral submissions of counsel for both parties, as well as the agreed Statement of Facts, and the Social Inquiry Report, what follows is the sentencing decision in this case. This was a crime of sexual violence, perpetrated by an adult male on a female child, in her own home. A place where children should feel safe and secure. The conduct of the defendant resulted in untold grief and misery for the complainant, and her family. The complainant's life has been enormously affected. She has been psychologically scarred. This is attested to in the complainant's interview for the Social Inquiry Report, and the statements of her parents.
- [24] In describing the sentence that should be imposed upon offenders who sexually abuse young children, the court in the case of **R. v D. (D.)**⁶ stated that the defendant was prepared to prey upon an innocent child, to satisfy his sexual cravings. His conduct was reprehensible and it must be condemned in the strongest of terms. The harm occasioned by the defendant and others like him, is cause for grave concern. Children are robbed of their youth and innocence, families are often torn apart or rendered dysfunctional, lives are irretrievably damaged and sometimes permanently destroyed. Because of this, the message to such offenders must be clear, prey upon innocent children and you will pay a heavy price. The court in the **D. (D.)** case affirmed that when offenders sexually abuse innocent children, they must expect to receive a lengthy period of incarceration. Deterrence must be the upper most consideration in sentences for such crimes. Not only must the offender be deterred, but a message must be sent to others who would consider such heinous behaviour, that it will not be tolerated.
- [25] In crafting this sentence, the Court has relied upon the general provisions of the **Eastern Caribbean Supreme Court Sentencing Guidelines for Sexual Offences, Re-Issue 8th November 2021**, using the category heading of Indecency.

⁶ 2002 58 O.R. (3d) 788 (C.A.)

An indecency case requires an assessment of the seriousness of the offence and its consequences, by reference to the harm caused. Assessing seriousness will include reference to the culpability of the offender. To establish the starting point for the offence within the relevant range, there are four stages. The first stage considers consequence by assessing the harm caused by the offence. In this case, the complainant was under the age of 16 years, and the Social Inquiry Report confirms that serious psychological harm was caused to her. The court therefore finds the appropriate classification to be Consequence Category 2 – High.

[26] The second stage will consider seriousness by assessing the culpability of the offender. Levels of seriousness may be demonstrated in several ways. But in this case, the agreed Statement of Facts confirms only attempted contact with the genitals, and attempts at kissing the complainant. Further, as noted above, the court does not accept that a position of trust existed, and therefore was not abused. The court also noted above that the agreed Statement of Facts does not indicate any threats being made by the defendant. Nor does it indicate any forced or uninvited entry to the complainant's home. The court does, however, accept that 19 years is a significant disparity of age. This leads to a finding that the appropriate category is Seriousness Level A – High.

[27] Having determined the levels of consequence and seriousness, the starting point is found by consulting the sentencing guidelines grid. This leads to a starting point of 45%, or a range of 30% - 60%. In this case, the court has determined the appropriate starting point to be 45% or 54 months.

[28] Having established a starting point of 54 months, the court must consider aggravating and mitigating factors of the offence, and adjust the number upwards or downwards as necessary. As already noted, the court is not satisfied that the agreed Statement of Facts indicates that the offence occurred in the presence of the complainant's sister. Therefore, no aggravating factors are found for the offence, and the court can find no mitigating factors. The sentence therefore remains at 54 months.

- [29] The court must next consider aggravating and mitigating factors pertaining to the offender, and adjust the figure accordingly. In this case, the court can find no aggravating factors. In mitigation, the court notes the defendant's good character. He has no previous criminal record. Further, the Social Inquiry Report confirms that the defendant displayed genuine remorse. The sentence is therefore reduced by 9 months, to 45 months.
- [30] Credit must be given to the defendant for his guilty plea. Although it was not entered at the earliest opportunity, it saved the complainant from undergoing the rigors of a trial, and testifying. It is clear from the Social Inquiry Report, that such a task would have been very difficult for the complainant to endure. Therefore, a reduction of one third shall be given. This reduces the sentence by 15 months to 30 months. The defendant must also receive credit for time spent on remand. The court has been advised that the defendant spent a total of 15 days, or half a month, in custody before being released on bail. The defendant will receive credit for that. This reduces the sentence to 29 and a half months, or 29 months and 2 weeks.
- [31] For all of these reasons, the defendant, Carson Burton, is hereby sentenced to a period of 30 months for the crime of indecent assault. Taking into account the time he has served on remand, and giving him full credit for that, the sentence imposed is reduced to 29 months and 2 weeks, as of today's date.

Richard G. Floyd
High Court Judge

BY THE COURT

REGISTRAR