

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

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

CRIMINAL CASE No. 30 of 2020

BETWEEN:

THE QUEEN

and

DWIGHT SMITH

Appearances: Ms. Patrice Hickson, Counsel for the Crown
Mr. Nelson Samuels, Counsel for the Defendant

2022: September 29th

JUDGMENT

- [1] **FLOYD J:** The Defendant was charged with two counts of Unlawful Sexual Intercourse with a Girl Under the Age of Sixteen, contrary to **s. 119 (1) of the Criminal Code 1997**. The incidents were said to have occurred between 1st August, 2014 and 31st August, 2014 and also between 1st November, 2014 and 30th November, 2014. A Goodyear Indication was sought and given on 12th November, 2021. However, for a variety of reasons, the matter continued in the pre-trial system for several months. Eventually, guilty pleas were entered and convictions were registered on 11th July, 2022. A Social Inquiry Report was sought and sentencing was adjourned. An extension for the production of that report was sought and granted. The Social Inquiry Report was eventually received under covering letter dated 21st September, 2022. The matter now proceeds to sentencing.

THE FACTS

- [2] The Defendant and the complainant met through social media in 2014 and began an intimate relationship in August of that year. The Defendant was born on 3rd July, 1995 and the complainant, on 23rd November, 1998. He was 18 years old and the complainant was 15 years old when the events first occurred in August, 2014.
- [3] The Department of Social Services became involved with the complainant in an unrelated matter that resulted in a referral to police in 2015. The complainant was interviewed, as was the Defendant. The complainant disclosed having sexual intercourse with the Defendant on two occasions. However, the Defendant candidly admitted to police under caution that he had sexual intercourse with the complainant on five or six occasions. The Defendant further admitted that he knew the complainant to be a minor at the time with an age of “around” 15 years. However, no force was used by the Defendant upon the complainant.
- [4] In order to obtain precise information regarding the nature of the relationship, the ODPP obtained a Victim Impact Statement from the complainant on 10th March, 2022. In that report, the complainant confirmed that she was friends with the Defendant and had a sexual relationship with him. She indicated that all sexual contact that occurred between them took place with her consent, although of course she was not of an age to legally give that consent.
- [5] To her credit, the complainant also stated that she had put all of this behind her and is making better choices. She does not hate the Defendant. Those words indicate a very intelligent, well-adjusted person and the court is pleased to take note of that.

SENTENCING BACKGROUND

- [6] Learned Counsel for the Crown relies upon the written submissions filed in relation to the Goodyear Indication. Learned Counsel for the Defence filed no written submissions but relies upon the Victim Impact Statement, the Social Inquiry Report and the Goodyear Indication itself.

THE LAW

- [7] Sentencing in criminal cases involves many considerations. In fashioning a sentence appropriate to the facts of the case and the characteristics of the offender, the court must consider the principles set out in cases such as **R v Sargent**¹, referred to with approval by our appellate court in the seminal case of **Desmond Baptiste et al v The Queen**². In determining the appropriate penalty, sentencing seeks to promote respect for the law and an orderly society. The sanctions imposed by a court when fashioning the proper penalty are based upon the classic principles of sentencing. In **R v Sargent**, those principles include:
- (a) Retribution.
 - (b) Deterrence.
 - (c) Prevention.
 - (d) Rehabilitation.
- [8] The court in the **Desmond Baptiste** case confirmed at **para. 20** that “perhaps the most difficult and controversial area for the sentencer is fitting the punishment to the crime committed.” The court went on to state that the age of the offender and the presence or lack of any criminal record were amongst factors to be considered.
- [9] Although denunciation and deterrence may be required for the imposition of a fit sentence, particularly for offences such as this, there is also a need to promote a sense of responsibility in the offender and to acknowledge the harm done. To do that, one must return to a weighing of characteristics of the offender with the facts surrounding the offence. The sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender. The court must consider the conduct and the moral blameworthiness of an offender and determine if the public interest is best served by either rehabilitating the offender, removing the offender from the community or a combination thereof. The age of the offender can be a significant consideration, particularly for youthful, first-time offenders.

¹ 60 Cr. App. R. 74

² Cr. App. No. 8 of 2003

- [10] The court notes the guidance in the **Desmond Baptiste** case at **para 30**, wherein it was confirmed that “on the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young offenders...The Court should take care to consider the prospects of rehabilitation.” This court also notes the guidance found in the **Eastern Caribbean Supreme Court Sentencing Guidelines for Unlawful Sexual Intercourse**, where it is noted that in cases of consensual relationships between young people, non-custodial sentences or diversion may be appropriate.
- [11] The Court in **R v Parranto**³, confirmed that sentencing is one of the most delicate stages of the criminal justice process. Sentencing requires judges to consider and balance a multiplicity of factors. While the sentencing process is governed by clearly defined objectives, it remains a discretionary exercise for sentencing courts in balancing all relevant factors to meet the basic objectives of sentencing. The goal in every case is a fair, fit and principled sanction. Sentencing is a highly individualized exercise, approached on a case-by-case basis for this offence, committed by this offender, harming this victim, in this community. 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.
- [12] The court bears all of this in mind when approaching sentencing in this case.
- [13] The offence of Unlawful Sexual Intercourse with a Girl Under the Age of Sixteen carries a maximum penalty of imprisonment for a term not exceeding seven years. This offence is broadly enumerated in the **Compendium of Sentencing Guidelines for the Eastern Caribbean Supreme Court**. Assistance is provided therein for crafting sentences generally and in particular as it relates to Sexual Offences.

³ 2021 SCC 46 at paras 9, 10 & 113

THE POSITION OF THE PARTIES

- [14] Learned Crown Counsel referred the Court to several authorities including cases involving sexual offences with a young Complainant and cases wherein the offender and the Complainant were relatively close in age. What is clear is that there is a great range of sentence for this type of offence from significant custodial periods to suspended sentences. What is also clear is that sentences are fact driven.
- [15] One of the authorities provided by counsel for the Crown, **The Queen v Kevey Barthelmy**⁴, involved charges of unlawful sexual intercourse with a young person. In that case, the court considered the inordinate delay in dealing with the case. It was a simple, uncomplicated case bereft of lengthy evidence and complicated legal issues. The court went so far as to rule that there was a breach of the defendant's right to a trial within a reasonable time. As a result, the sentence was 50 hours of community service.
- [16] As already noted, counsel for the Defendant relied upon the documents filed and the Goodyear Indication given. Both counsel also made brief oral submissions.
- [17] The Social Inquiry Report described a defendant who is now 27 years old and who cooperated with the production of the report. Although he engaged with the report's author, he had difficulty at times organizing his thoughts and understanding all of the questions. This is consistent with information provided by family members and school records of a potential learning disability and lack of mental acuity. He experienced difficulty at school but eventually completed his studies at the Virgin Islands School of Technical Studies. To his credit, he also obtained a certificate in House Wiring from the H. Lavity Stoutt Community College. He was separated from his parents at a young age, although they were eventually reunited. He experienced corporal punishment in the home. Not surprisingly, he experienced issues of abandonment, with limited social and emotional support. Contact with the Royal Virgin Islands Police Force by the report's author confirmed that the Defendant has one entry for theft in 2015 for which he was bound over to keep the peace for two years. Although the information before the court at the time of the Goodyear Indication was that there was no criminal

⁴ SLUHCR 2011/0078

record, this one entry has no impact on that, given the nature of the offence and the sentence imposed.

- [18] The Defendant is described as a quiet person who keeps to himself. He is a regular user of marijuana but continues with a “non-offending lifestyle”, as described in the report. In referring to the offences, the defendant admitted that what he did was wrong. It would not happen again. He would try to be civilized, obedient and do the right thing. He also indicated that the entire charge and court process has had an impact on him. He now avoids intimate relationships but hopes to eventually have a healthy, positive relationship in the future, and making better decisions. Family members describe the Defendant as being anxious and negatively affected when court appearances approach. Although he has had regular employment since leaving school, it has been on more of a casual basis.

FORMULATION OF SENTENCE

- [19] In crafting this sentence, the Court has relied upon the general provisions of the **Eastern Caribbean Supreme Court Sentencing Guidelines for Sexual Offences**. In establishing a starting point for sentence, the court has considered several issues. In assessing the harm caused by this offence, there are no factors present that would place this offence in anything other than Category 3, Significant Consequence.
- [20] In terms of the culpability of the offender and the level of seriousness, the court notes that there was no abuse of any trust or of the relationship between the parties, and there was no significant disparity in age between the Defendant and the Complainant. Consequently, the court would assign this to Level B, Lesser Seriousness.
- [21] By combining the first and second stages, the court finds the starting point for sentence to be what is described as “likely non-custodial”.

- [22] When examining the factors relating to the offence, no aggravating features were found to be present. In mitigation, it is noted that the offence involved no threat or use of violence and the parties were involved in a consensual relationship with little disparity in age. These mitigating factors would serve to strengthen the likelihood of a non-custodial sentence.
- [23] In considering the factors as they relate to the offender, the court finds no aggravating factors. By way of mitigating factors, it is noted that the Defendant has no relevant criminal record. He was, at the time of the offence, a young adult lacking in maturity. The Defendant cooperated with police and provided a statement. In fact, he admitted to more incidents of physical contact than the complainant mentioned. He appears to be genuinely remorseful and contrite, as is indicated in the Social Inquiry Report. Although a youthful offender must be held accountable, meaningful consequences must include rehabilitation as paramount. The Defendant is a strong candidate for rehabilitation. This continues to militate towards a non-custodial disposition.
- [24] The Defendant was not incarcerated on this charge following his arrest. However, he has been on a \$70,000.00 recognizance of bail with conditions for some time. The Court is not aware of any breaches of those conditions. The court gives the Defendant full credit for his guilty plea. He has accepted responsibility for his actions. In consideration of all of this, the sentence must therefore be non-custodial.
- [25] The preamble to the Sentencing Guidelines recognizes that non-custodial sentences are possible for this type of offence. A non-custodial disposition, as confirmed in the calculation process outlined above, was the sentence provided in the Goodyear Indication. The Court notes the general undesirability of incarcerating young, first time offenders. This offence occurred eight years ago. There has been a significant delay in dealing with this matter. Much time has passed and the Defendant has not only maintained his bail conditions, he has remained free of any further legal difficulties. The court is satisfied that the mitigating factors far outweigh any aggravating factors. Everything points to a non-custodial disposition. This Defendant poses no threat to the community and no useful purpose would be served by incarcerating him.

[26] Taking all of this into account, the court shall impose the following sentence: As to count one, the Defendant is hereby sentenced to 12 months' probation. Under the terms of the order, the Defendant shall: A) keep the peace and be of good behaviour. B) He shall report to and be under the supervision of a probation officer. C) He shall attend for and accept such counselling as directed by the probation office, with particular emphasis on interpersonal relationships and domestic issues. As to count two, the same sentence will apply. 12 months' probation with the same conditions. The sentences are to be served concurrently, as they arise out of the same ongoing relationship between the parties, with the same facts, are close in relative time and involve the same complainant. A written report shall be provided to this court within 90 days of the date of sentence and thereafter at 6 months from the date of sentence.

Richard G. Floyd
High Court Judge

By the Court

Registrar