

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)
SAINT LUCIA**



CLAIM NOS. SLUCRD 2018/0304, 0322

R

v

FORNS ARLETTE

Appearances:

Mr. Bertrand Xavier for the Defendant
Mrs. Tanya Alexis Francis for the Crown

2022: March 31, May 27, June 15

1. **THOMPSON JR. P:** On March 31st, 2022, a jury returned unanimous verdicts of guilty against Mr. Arlette for two counts of unlawful carnal knowledge.
2. The maximum penalty on conviction for unlawful carnal knowledge is life imprisonment¹.
3. Mr. Arlette was convicted after a trial and it is important to briefly summarize the case for the prosecution at Mr. Arlette's trial.

Factual Summary

4. At trial, the victim testified that in 2000 to 2001, Mr. Arlette was her primary school teacher. She was aged 10-11 at the time while Mr. Arlette was aged 30. The victim testified that her family was poor and that Mr. Arlette would come to her home on Saturdays. He would speak with her mother, her father being absent at work. He would then take her to the town of Vieux Fort and buy her food (often KFC) or snacks and then take her to his home where he would have sexual intercourse with her.
5. According to the victim, the acts of sexual intercourse took place every Saturday at Mr. Arlette's house. It was her evidence that he would send her to sleep in his

¹ Life imprisonment on the Guideline is represented by a 30 year sentence

daughter's bedroom and then enter the bedroom take off her clothes and have sex with her.

6. In or about 2018 the victim spoke with a police officer about what had happened to her and these criminal proceedings which culminated in Mr. Arlette's arrest, trial and conviction were initiated.
7. Mr. Arlette's case at trial was that while he was the teacher of the victim and would take her to his house he never had sexual intercourse with her. It was his case that the victim and her family were poor and that he was a Good Samaritan who helped a student in need by buying groceries for her and her family. The jurors by their verdict accepted the case for the prosecution.

The Law

8. Everyone agrees that the ECSC Sentencing Guideline for Sexual Offences² ("the Guideline") and in particular the guideline that addresses the offence of aggravated unlawful sexual intercourse should guide the construction of the sentence to be imposed on Mr. Arlette.
9. The Crown contended that Mr. Arlette's offending falls into Consequence – Category 2 on the relevant Guideline. In support of that submission, they contended that the victim had sustained serious psychological harm. Mr. Xavier for Mr. Arlette contended that Category 3 was more appropriate since there was no evidence that the victim had sustained serious psychological harm in the absence of any psychological report from the victim.
10. The Guideline clearly provides that evidence of psychological harm can come from the victim. In this Court's view that scuppers Mr. Xavier's argument that this court required some additional report from a medical professional. In any event, the victim impact statement provides powerful evidence of the impact of Mr. Arlette's offending and is set out below:

"During the time that Forns was having sex with me my self-esteem was very low. I felt worthless and embarrassed about what people would think if they found out I was having sex with Forns. I couldn't even concentrate during classes because I was thinking about what Forns was doing to me a lot. These thoughts would go through my mind daily and many times during the day. This affected my grades in school and I was doing very poorly. I was failing every class and every exam. No matter how hard I tried in school I just couldn't get my mind to focus. This continued to affect me throughout all my years at school. I did not write my CXC exams because I did not see any point in going through with it since I wasn't learning anything at school. After I left school I became depressed because of what I had gone through for all those years with Forns and I didn't have a good education. I felt like my life was over before it started and I would

² In force and updated as of November 8th, 2021

never amount to anything. Eventually I was able to get my life together but the memories of what Forns did to me never left. I would still relive those events from time to time and become depressed all over again."

11. There can be no dispute that Mr. Arlette's offending had a lasting and profound psychological impact on the victim. As a result, this Court is satisfied that a Consequence - Category 2 finding is warranted. This Court derives further support for this finding from the fact that the Exceptional – Category 1 group is reserved for victims under the age of 10. The victim in this matter was aged 11 so that in this Court's view, Mr. Arlette's offending is at the upper end of the Category 2 scale of offending.

12. The Crown contended that Mr. Arlette's offending fell into Seriousness-Level A – High on the relevant Guideline for the following reasons. It was their submission that the

- (i) abuse of trust
- (ii) significant degree of planning including grooming and enticement and
- (iii) significant age disparity [the 20 year difference in age]

warranted this finding. Mr. Xavier was compelled to accept the Crown's submissions in this regard in view of the verdict of the jurors.

13. An application of the table on the Guideline provides for a starting point of 12 years imprisonment with a sentencing range of 7-15 years imprisonment³. See footnote 3 below.

14. This Court finds that Mr. Arlette's offending was aggravated by the fact that the victim was particularly vulnerable due to her personal circumstances. Those circumstances include but are not limited to any physical or mental disability and permit this Court to find that her personal circumstances as more fully described in her evidence at trial and her victim impact statement meant that she was particularly vulnerable.

15. This Court was not prepared to find that Mr. Arlette's offending was mitigated by the fact that there was no violence. The Guideline provides that 'no violence' is a mitigating factor but in this Court's view it would be inappropriate to give Mr. Arlette

³ The starting point for a Category 2/Level A Seriousness offence is 40 % of the maximum sentence of life (30 years imprisonment) which is equal to 12 years imprisonment. The relevant range for a Category 2 offence/Level A Seriousness offence is 25 % to 55% and amounts to a range of 7 ½ to 16 ½ years imprisonment.

In comparison, the starting point for a Category 1/Level A Seriousness offence is 65 % of the maximum sentence of life imprisonment and is equal to 19 ½ years imprisonment with a range of 50 % to 80 % which amounts to a sentencing range of 15-24 years imprisonment. As a matter of law, the Court is always required to keep an eye on the hypothetical 'worst of the worst' offender. This Defendant's actions, though reprehensible, do not fall into that category.

credit for the fact that Mr. Arlette's sexual encounters with the victim were 'nonviolent' for the following reasons.

- (i) The ECSC Guideline is largely derived from the UK Guideline for Sexual Offences. The UK Guideline provides that violence or threats of violence beyond that which is inherent in the offence is factored into assessing the harm caused by the defendant. The UK approach thus calculates the level of violence, whether real or threatened into its assessment of the harm caused. The level of violence in the UK is thus used to calculate whether the offence is a category 1, 2 or 3 type offence.
- (ii) Conversely, the ECSC Guideline appears to suggest that a lack of violence on the part of the Defendant in perpetrating his criminality should redound to his credit as a mitigating factor. Therefore violence in the ECSC Guideline is only taken into account as a mitigating factor after the offence has already been categorized.
- (iii) The ECSC Guideline thus appears to suggest that a Defendant's offending is less serious because he did not violently have sexual intercourse with his victim. In this Court's view, the UK approach is preferable since it properly weighs up the violence used or not used by the Defendant as an initial step. To go further and give credit for the lack of violence as a mitigating factor appears to reward a Defendant for having not committed a more violent form of what is already an invasive and violent act. In this Court's view, that could not have been what was intended by the framers of the ECSC Guideline and in any event this Court's discretion is not fettered by the Guideline.

16. This is not to say that a lack of violence can never mitigate a Defendant's offending but that in the particular circumstances of this case it would be inappropriate to find that Mr. Arlette's offending was mitigated because the offence was less violent than it could have been.

17. There were no aggravating factors of the offender as he had no previous convictions for any offences.

18. Mr. Xavier sought to argue that his client was of good character and suffered from either physical ill health and/or a vulnerable personality trait. Mr. Xavier was unable to particularize the nature of his client's personality trait and his client's ill health related to the fact that he was hospitalized on April 19 and 20, 2022 after he had been remanded at the Bordelais Correctional Facility. The reasons for his need for medical attention appear to relate to violence that is sadly prevalent at correctional facilities. These matters do not meet the threshold for factors that could mitigate, that is to say, reduce the scope of Mr. Arlette's offending.

19. Mr. Arlette's previous good character has to be considered against the reasoning of Sir Denis Byron CJ at paragraphs 29-30 in the case of Desmond Baptiste.

"As to the fact that the offender was committing crime for the first time, it seems to us that the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. It must be stressed though that the more serious the offence, the less relevant will be this circumstance. In *Turner v The Queen*, a case of armed robbery, Lord Lane, CJ stated that 'the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the Court is dealing with cases of this gravity'. Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of an insubstantial nature.

On the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances."

20. In this Court's view, Mr. Arlette is to receive credit for the fact that he has no previous convictions but the extent and amount of that credit is a matter for this Court in the exercise of its undoubted discretion as circumscribed by the reasoning of Byron CJ as set out above.
21. Mr. Xavier's argument that the delay in reporting the offence somehow inured to his client's benefit does not require extensive treatment. As a matter of law, there is no statute of limitations for offences of this nature. Secondly, while delay can be a mitigating factor (**see the reasoning of the Court of Appeal in the case of Violet Hodge v The Commissioner of Police**) this Court has to consider the reasons for the delay in deciding whether the delay mitigates the Defendant's offending. Put another way, the fact of delay in reporting an offence does not automatically mean that the Defendant's offending is less serious.
22. In this case, the delay appears to have been largely occasioned by the inability of the victim to speak with anyone about what had befallen her. It would be perverse for this Court to award credit to Mr. Arlette for the delay in the matter coming to light. To do so would reward Mr. Arlette for the significant harm that he had caused the

victim and effectively penalize the victims of all state dated sexual offences for their delay in coming forward with their accounts.

23. The Crown's case at trial was framed in the following terms. Count 1 averred that Mr. Arlette had unlawful carnal knowledge of the victim on a date unknown between September and December 2000. Count 2 averred that Mr. Arlette had unlawful carnal knowledge of the victim in the year 2001. The evidence of the victim at Mr. Arlette's trial was that Mr. Arlette repeatedly had sexual intercourse with her at his home in both 2000 and 2001.
24. As a matter of law, the totality principle was engaged since this Court was required to grapple with the issue of whether a concurrent or consecutive sentence was required. Everyone was agreed that a consecutive sentence though permissible was inappropriate since to do so would lead to a sentence greater than the likely sentence that could reasonably be imposed on Mr. Arlette. Consecutive 12 or 14 year terms of imprisonment would lead to a global 24 or 28 year sentence which would be unjustifiable when the Guideline is applied.
25. Counsel for the Crown and the defence agreed and this Court finds that an uplift in the overall sentence to take into account the totality of Mr. Arlette's offending was appropriate. A global concurrent sentence which took into account the totality of Mr. Arlette's offending was thus the appropriate approach. Moreover, while Mr. Arlette could not be sentenced for offences that he had not been convicted of, the Crown argued that count 2, covering the entire 2001 period was analogous to a specimen or sample count. The evidence on count 2 was that Mr. Arlette had repeatedly had sexual intercourse with the victim throughout 2001.
26. At the Defendant's sentencing hearing on May 27th, 2022 this Court was of the view that count 2 was analogous to a specimen or sample count. A specimen or sample count arises where it is alleged that the Defendant has committed a large number of offences of similar character, the indictment is then limited to a number of smaller counts that are representative of the larger number of offences which the Defendant is alleged to have committed. See **Blackstone's D.20.50** onwards
27. Upon further consideration of the law this Court is compelled to find that it would be dangerous to treat count 2 as a specimen count/sample count. In order to treat count 2 as a specimen count Mr. Arlette would had to have accepted that he had in fact committed those other offences. Without his clear acceptance of that position he could only be sentenced for what he had been indicted for, that is to say, two separate acts of unlawful carnal knowledge. Mr. Arlette could not lawfully be punished for offences which he had not been indicted for or declined to admit to. **See Archbold's (2001) at paragraph 5-14 and Blackstone's 20.50 as cited above.**
28. It was open to the Crown to seek to amend the indictment at Mr. Arlette's trial to reflect the victim's evidence that Mr Arlette had had sexual intercourse with her on

every Saturday in 2001. This would have increased the length of the indictment but would have captured the Defendant's alleged criminality. Without that amendment the Defendant could only be sentenced for what the indictment reflected, that is to say, that he had only had sex with the victim on 2 occasions.

29. At sentencing Mr. Arlette called his aunt as a character witness. Mr. Arlette's aunt indicated that she had known him for all his life and that his mother died when he was 10 years old. It was her evidence that Mr. Arlette was a helpful and God fearing man of whom not a bad word would be said in his community. In answer to a question from the Court she indicated that while she had been made aware of what her nephew had been convicted of she was of the view that he was innocent. This Court will accord such weight as it thinks fit to Mr. Arlette's aunt's evidence.
30. The allocutus was put to Mr. Arlette and he tearfully sought mercy from this Court. He indicated that he had had a difficult upbringing and had been the victim of sexual abuse from men in his youth. Mr. Arlette reminded this Court that he had lost the emoluments due to him after a 34 year teaching career and threw himself at the mercy of the Court.
31. This Court has taken into account the time spent on remand by Mr. Arlette, that is to say the period from his conviction and initial remand on March 31st, 2022 to date. This Court has also taken into account all of the submissions made by Mr. Arlette and his counsel and expresses its gratitude to all counsel for their assistance in this matter.
32. On May 27th, 2022 this Court pronounced a sentence of 18 years imprisonment on Mr. Arlette. That sentence was expressed to run concurrently with the 18 year sentence on count 2. For the reasons set out at paragraphs 29-30, those sentences were pronounced on an unlawful factual basis. What then should a court do?
33. Section 1106 of the Criminal Code of St Lucia provides that a Court may alter or modify its sentence but cannot increase the original sentence imposed. This is consistent with good practice as this power allows a sentencer to modify a sentence that was based on a misapprehension of the law or of a material fact without the need to engage an already overburdened Court of Appeal.
34. This Court draws support from the reasoning of Justice Olivetti J in the BVI case of R v Dellon Williams in May 2010 in which the learned judge reduced the initial 5 year sentence of imprisonment imposed on Mr. Williams to one of 3 years imprisonment. It is worth noting that the BVI's criminal legislation did not contain a provision analogous to Section 1106 of the St Lucian Code but Justice Olivetti found that she was empowered to alter her sentence downwards. This Court thinks it just and fitting to alter the sentence imposed on Mr. Arlette to ensure that he is properly sentenced. In any event, the perfected sentencing order has not been made so that the slip rule (familiar to civil practitioners) is another mechanism which would permit a court to correct any factual or legal errors in its order.

35. In this Court's view, 15 year concurrent sentences of imprisonment expressed to run from March 31st, 2022 are appropriate. Such a sentence is consistent with the sentences imposed on other offenders convicted of unlawful carnal knowledge both in St Lucia and in the wider ECSC jurisdiction and is at the upper end of the range of sentences when the Guideline is applied.
36. In passing sentence on Mr. Arlette, this Court has applied the objectives of sentencing laid down in the case of Desmond Baptiste. These are retribution, deterrence, prevention and rehabilitation.
37. For the avoidance of doubt, this Court has not rigidly or mechanistically applied the Guideline and for this reason Mr. Arlette is sentenced to the following:
- (i) For the offence of unlawful carnal knowledge (count 1), Mr. Arlette is sentenced to serve a term of 15 years imprisonment from March 31st, 2022
 - (ii) For the offence of unlawful carnal knowledge (count 2), Mr. Arlette is sentenced to serve a term of 15 years imprisonment from March 31st, 2022
 - (iii) Mr. Arlette is ordered to enroll, participate and complete any and all such sex offenders programs as are available to him during his incarceration at the Bordelais Correctional Facility.
 - (iv) The victim is ordered to undergo a period of counseling and/or medical intervention for such period as the relevant medical and mental health professionals think fit.
38. For the reasons previously discussed the sentences on count 1 and 2 are expressed to run concurrently with each other.

JUSTICE PATRICK THOMPSON JR.

HIGH COURT JUDGE

BY THE COURT



DP. REGISTRAR