

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

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

BVIHCR 2020/0028

BETWEEN:

THE QUEEN

and

DENVILLE CLARKE

Appearances: Ms. Patrice Hickson, Counsel for the Crown
Ms. Reynella Rawlins, Counsel for the Defendant

**2021: October 15th
December 9th**

JUDGMENT

[1] **FLOYD J:** The Defendant was originally charged with Attempting to Choke and Assault Occasioning Actual Bodily Harm. A Goodyear Indication was requested and it was given on 26th March, 2021. The case was adjourned to 16th April, 2021, at which time the Defendant was arraigned and not guilty pleas were entered. On 14th May, 2021, a trial was scheduled to commence on 19th October, 2021. However, at the request of Counsel for the Defendant, the matter was brought forward to 15th October, 2021. The Defendant was arraigned on Count One and entered a not guilty plea to Attempting to Choke, contrary to **s. 166 of the Criminal Code 1997**. The Crown offered no evidence in relation to that count and the Defendant was accordingly found not guilty. The Defendant was arraigned on Count Two and entered a guilty plea to Assault Occasioning Actual Bodily Harm, contrary to **s. 184 of the Criminal Code 1997**. A conviction was therefore registered in relation to the second count. The case was adjourned and the matter now proceeds to sentencing.

THE FACTS

- [2] The Defendant and the Complainant, Jermaine Colaire, were in an intimate relationship for approximately nine months. The relationship ended roughly three months prior to August, 2019.
- [3] Sometime after 11:00 pm on 26th August, 2019, the Complainant was at home in her apartment. After she had retired for the evening, the Complainant heard a knock at her bedroom door. Upon turning on the lights, she saw that it was the Defendant. He had not been invited to her residence. The Complainant asked the Defendant to leave, and escorted him down the stairs and outside. The Defendant asked why his belongings had been removed. The Complainant replied that someone had moved the items and if he did not leave, she would call the police.
- [4] While outside, the Defendant pushed the door closed and stood in front of it. The Defendant stated that he had \$690.00 and he wanted sex for it. The Defendant produced his wallet, however, the Complainant advised him that she would not have sex with him. As she proceeded towards the door, the Defendant grabbed the Complainant by the neck. The Defendant called out to a friend, McKoy Blake. The Defendant placed his hand over the Complainant's mouth and told her to shut up.
- [5] The Defendant took the Complainant to the rear of the building, whereupon she fell to the ground with the Defendant squeezing her throat. The Complainant had difficulty breathing and tried to fight the Defendant off. However, the Defendant had the Complainant in a neck hold. The Complainant's friend, McKoy Blake, heard the disturbance and came to her assistance. Mr. Blake pulled the Defendant off the Complainant, tearing the Defendant's shirt in the process. The Defendant ran off and the Complainant called police.
- [6] Responding police officers came upon the Defendant while on route to the Complainant's residence. When told of the report, the Defendant advised police that he had his hand around her neck "like so". The Defendant was taken into custody. He subsequently gave a recorded statement to police under caution. He admitted to being at the residence of the Complainant. He knocked on her bedroom door, they got into an argument, he placed his hands around her neck and they fell. McKoy Blake then intervened.

- [7] A Royal Virgin Islands Police Force Medical Examination Form dated 26th August, 2019 was completed by Dr. S. Richards, regarding Jermaine Colaie. Under the heading, Nature of Injuries, the report noted: “The patient has a history of being physically assaulted, sustaining blunt trauma to chest, superficial bruises to legs, wound to left side of face, blunt trauma to neck”.

SENTENCING BACKGROUND

- [8] When pleas were entered on 15th October, 2021, Counsel for the Crown indicated that she would rely upon the written submissions filed in relation to the Goodyear Indication. Counsel for the Defence, indicated that she would file written submissions by way of Plea in Mitigation. Such material was indeed filed on 9th November, 2021. It was confirmed that no Social Inquiry Report would be sought in this case. A Victim Impact Statement was obtained from Jermaine Colaie and filed by the Office of the Director of Public Prosecutions on 2nd December, 2021.

THE LAW

- [9] 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 leading case of **Desmond Baptiste et al v The Queen**². As Lawton L.J. stated in the **Sargent** case, the court endeavours to answer the question: “What ought the proper penalty to be”? 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, the court must reflect society’s abhorrence of particular types of crime through punishment of such unlawful conduct.
 - (b) Deterrence, specific to the offender and generally to likely offenders or persons who may be minded to commit similar offences.
 - (c) Prevention, to protect the public from offenders who persist in committing crimes by separating them from society.

¹ 60 Cr. App. R. 74

² Cr. App. No. 8 of 2003

(d) Rehabilitation, to engage offenders in activities designed to assist them in their reintegration into society.

- [10] The court in the **Baptiste et al** 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 factors to consider. The offender should also receive credit for time spent on remand.
- [11] The imposition of a fit sentence requires many considerations. Although denunciation may be required, 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.
- [12] In a recent decision, the Court in **R v Parranto**³, confirmed that sentencing is one of the most delicate stages of the criminal justice process. More of an art than a science, 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.
- [13] I bear all of this in mind when approaching sentencing in this case.

³ 2021 SCC 46 at paras 9, 10 & 113

- [14] The offence of Assault Occasioning Actual Bodily Harm carries a maximum penalty of imprisonment for a term not exceeding five 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 offences of violence.
- [15] Learned Crown Counsel referred the Court to several cases, although most came from the Territory's Magistrate Court. While some indicated the presence of a female victim, it was difficult to determine whether they related to crimes involving domestic violence. The case of **The Queen v Emerson Delplesche**⁴ resulted in the imposition of a sentence of seven months on one count and time served on a second count, both were for Assault Occasioning Actual Bodily Harm. However, it is noted that there were other serious charges and the Defendant had spent a substantial amount of time on remand, for which he received credit.
- [16] Learned Defence Counsel also referred the Court to several cases, including two local cases from the Magistrate Court. In particular, was **R v Glenn Lennard**⁵. That was a case of assault involving domestic violence. It resulted in a 6 months' custodial sentence, a compensation order and an order to attend for anger management counselling.

THE POSITION OF THE PARTIES

- [17] In addition to the authorities provided, Counsel for the Crown provided a Victim Impact Statement from the Complainant. In that document, the Complainant describes the physical and emotional harm that she suffered as a result of the commission of this offence. The injuries that she received caused her to be off work for over two weeks. She had difficulty eating and swallowing. She experienced ongoing pain for some time afterwards. When the incident occurred, she feared for her life and continues to experience fear, headaches, depression, anxiety and difficulty sleeping. The offence has affected both the Complainant and her daughter. Crown Counsel submitted that the Court should consider as aggravating features, the prevalence of domestic violence in this Territory,

⁴ SVGHCR 2016/002 & SVGHCR 2016/0016

⁵ BVIHCR 2010/0011

the incident occurred in the Complainant's home, and the Complainant suffered injuries as a result. In mitigation, Crown Counsel points out that there is no criminal record for the Defendant.

[18] As noted, Counsel for the Crown asked the Court to consider the prevalence of this type of offence as being an aggravating factor. In that regard, the Court refers to **Practice Direction 8A No. 1 of 2019** which holds that judicial notice can be taken of local circumstances, if appropriate. If it affects the sentence, then reasons must be given. The Court can receive evidence from local police, prosecutors, probation officers or other appropriate persons. In the case of intimate partner violence, there can be no doubt, unfortunately, of its prevalence in this Territory and beyond. News stories are common in local media and projects designed to deal with domestic violence, such as the Partnership for Peace Program operated by the Office of Gender Affairs, and the assistance provided by the Family Support Network to families in distress as a result of domestic violence, are well known to the Court. Therefore, the Court is in a position to take judicial notice of the prevalence of this type of offence.

[19] In addition to the cases submitted, Defence Counsel provided background for the Defendant. He was born in St. Vincent on 4th October, 1975 and has been resident in the Territory of the Virgin Islands for over three years. He is employed as a handy man. He has four children. As noted, he has no criminal record. Defence Counsel submits this was an isolated incident, describing the Defendant as a person of otherwise good character who is remorseful.

[20] Counsel for the defence described the injuries to the Complainant as being mild to lesser and not significantly serious. She urges the Court to consider a fine or a suspended sentence. If, however, a custodial sentence is warranted, then something less than seven months should be considered. Counsel for the Defendant submits that he is a candidate for a course in anger management.

FORMULATION OF SENTENCE

[21] This is a very serious crime. Male intimate partner violence against women has been described as "one of the most universal and widespread forms of violence against women"⁶. The existence and

⁶ J Du Mont, D Parnis & T Forte, "Judicial Sentencing in Canadian Intimate Partner Sexual Assault Cases" (2006) 25:1 Med & L 139 at 139

seriousness of domestic violence is a profound problem in society. The term domestic violence encompasses any form of intimate partner violence involving a spouse or domestic partner. The parties may or may not be cohabiting. The behaviour exhibited may take the form of physical, sexual, emotional or psychological abuse. It reflects an imbalance of power and control between the parties.

- [22] While rehabilitation has a role in sentencing, the paramount considerations in imposing a sentence in a case involving domestic violence must include deterrence and denunciation. The sentence is not only an instrument of deterrence generally of other persons who may consider acting in such an unacceptable fashion but also a means of deterring the offender specifically, breaking the cycle of violence and confirming society's abhorrence of such behaviour. This was clearly stated in the case of **R v Brown et al**⁷:

When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live... In the case of assaults by a man against his wife or other female partner in life, two of the applicable principles are that the sentence should be shaped in the hope of furthering the rehabilitation of that man and in the hope of deterring him from repeating his conduct in the future. However, the more important principles are that the sentence should be such as to deter other men from similarly conducting themselves toward women who are their wives or partners (what is called the principle of "general deterrence"), and that the sentence should express the community's wish to repudiate such conduct in a society that values the dignity of the individual (the "denunciation principle").

- [23] In crafting this sentence, the Court has relied upon the general provisions of the **Eastern Caribbean Supreme Court Sentencing Guidelines for Offences of Violence**. In establishing a starting point for sentence, the court has considered several issues. In assessing the harm caused by this offence, there can be no doubt that the Complainant suffered both physical and emotional injuries. They were not trifling in nature. Fortunately, the physical injuries have resolved for the most part but the emotional distress continues. The overall impact upon the Complainant was great but appears to be lessening. I therefore place this matter in Category 3, Lesser Consequence.

⁷ (1992) 73 C.C.C. (3d) 242 (Alta. C.A.)

- [24] In terms of the culpability of the offender and the level of seriousness, I note that, although the Defendant attended at the home of the Complainant, there is no evidence of forced entry. Fortunately, no weapon was used and the Defendant acted alone. Consequently, I would assign this to Level B, Lesser Seriousness.
- [25] By combining the first and second stages, I find the starting point for sentence to be 20% or one (1) year or twelve (12) months.
- [26] When examining the factors relating to the offence, it is noted that the incident was a crime of domestic violence, abusing a relationship of trust and taking advantage of an imbalance of power. The Defendant attended the home of the Complainant at night, under cover of darkness. He forced her to the rear of the building, away from the public area and he covered her mouth to prevent her from calling for help. The Complainant was fortunate to receive the timely assistance of a nearby friend, who intervened on her behalf. These aggravating features would increase the sentence by a further six (6) months to 1.5 years or eighteen (18) months.
- [27] In considering the factors as they relate to the offender, it is noted that the Defendant has no criminal record. He is a person of good character. Although, as the Court pointed out in the **Baptiste et al** case, the more serious the offence, the less relevant will be the fact that the offender was committing a crime for the first time. The Defendant is now 46 years of age. He is a man of middle years. He cooperated with police and provided a statement. The Defendant is a candidate for rehabilitation. I would therefore reduce the sentence by three (3) months to fifteen (15) months.
- [28] The Defendant was not incarcerated on this charge following his arrest. He has been on a \$50,000.00 recognizance of bail for some time. Following the surrender of his travel documents, he has been reporting twice weekly to police. The Court is not aware of any breaches of those conditions. Despite the delay in it being entered, I give the Defendant full credit for his guilty plea. He has accepted responsibility for his actions and the sentence is therefore reduced by a further one third or five (5) months to ten (10) months.

[29] Ten (10) months, as indicated in the calculation process outlined above, was the sentence noted in the Goodyear Indication. However, I have reviewed the decision of the Learned, now retired, Justice Olivetti, in the **Lennard** case submitted by Counsel for the Defendant. I am therefore persuaded to reduce the sentence somewhat, in order to fully reflect the rehabilitation component. But make no mistake, a crime such as this involving domestic violence, injuries and a residual affect upon the Complainant, requires a custodial sentence of some length to reflect the importance of deterrence and denunciation.

[30] Taking all of this into account, I impose a sentence of nine (9) months' incarceration for the charge of Assault Occasioning Actual Bodily Harm. The sentence is to commence today. Once the sentence is served, the Defendant shall attend for and accept counselling for anger management and domestic violence in a structured and formal course, such as the Partnership for Peace Program. The Defendant or Program Coordinator shall provide a Progress Report to the High Court within six (6) months of the Defendant's release from prison and a Final Report upon completion of the program.

Richard G. Floyd
High Court Judge

By the Court

Registrar