

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

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

CRIMINAL CASE No. 0012 of 2016

BETWEEN:

THE QUEEN

and

NELSON CALLWOOD

Appearances: Mr. Kael E. London, Counsel for the Crown
Ms. Ruthilia Maximea, Counsel for the Defendant

2021: July 6th

JUDGMENT

- [1] **FLOYD J:** The Defendant was charged with possession of child pornography, contrary to **s. 14 (1) c** of the **Computer Misuse and Cybercrime Act 2014** and publication (distribution) of child pornography, contrary to **s. 14 (1) b** of the same Act. The incidents were to have taken place between 1st November, 2013 and 31st August, 2015. He entered not guilty pleas and a trial was conducted in April 2021. He was convicted by a jury on 26th April, 2021. A Social Inquiry Report was ordered and that has been received. Due to the age of the Complainant and the nature of these offences, an order was made banning the publication of the identity of the Complainant. The Defendant now appears for sentencing on these matters.

THE FACTS

- [2] The Complainant was born on 8th October, 2001. In November 2013 she participated in a group chat on line through a social media platform known as Oovoo. She generally knew all those involved in the chat. However, a new participant entered the group chat using the name Tribal (that was an alias

for the Defendant). He began asking for nude pictures. Many of the participants left the chat at that point, however, the Complainant and some other females remained online. The chat eventually ended but the Defendant began communicating with the Complainant through private messages. At one point, the Defendant mentioned his two children, whom the Complainant knew, as they attended the same school as her, albeit in lower grades. The Defendant therefore became aware of the Complainant's age but continued to demand nude photographs. The Defendant threatened to harm the Complainant's family if she did not comply. The Complainant was frightened and so, eventually, she sent several photographs to the Defendant. They included pictures of herself in her underwear and pictures of her vaginal and breast areas without clothing. The communication eventually ended.

- [3] In August 2015, during electronic communication between the Defendant and the mother of his children, he was told about an upcoming field trip where the children would be accompanied by the Complainant. The Defendant became upset with that arrangement and sent several photographs of the Complainant to his ex-spouse. These were some of the same pictures the Complainant had previously sent to him. The sharing of these photographs constitutes the basis of the publication conviction. Once she received the pictures, the Defendant's ex-spouse became so alarmed that she reported the incident to her local Social Services office. The matter was eventually referred to police. An investigation began and a total of five images were recovered from the woman's cell phone. When arrested, the Defendant denied knowing the Complainant and denied requesting nude pictures. The Defendant was arrested in September, 2015 and charged in December, 2015.

SENTENCING BACKGROUND

- [4] A Social Inquiry Report was prepared by Probation Officer Wheatley and Chief Social Development Officer Frett. In the Report, the Defendant provided a statement that did not accord with the evidence heard at trial. He maintained that he received a picture of a young person in underwear from an unknown number. When he realized it was someone who would supervise his children, he notified his ex-spouse.
- [5] The Report confirms the Defendant comes from a large family and has three children of his own. They range in age from 5 to 16 years.

- [6] The Defendant was born on 2nd February, 1971 in the Territory of the Virgin Islands. He had a troubled childhood characterized by neglect and abuse. He was separated from his siblings and lived with other families, eventually entering foster care. The abuse that he suffered was mental, physical and sexual in nature. At one point, he was sent to a Boys Training School in Antigua and upon his return to this Territory, he lived rough, having no fixed address.
- [7] The Defendant eventually found stability as a farm labourer and fisherman. Sources describe him as taking pride in his work. Much of that work was of an informal nature as a general labourer. Although he attended school, it does not appear that he completed any formal high school program.
- [8] The Defendant has a lengthy criminal history. Prison records confirm that he has had sixteen different periods of incarceration, beginning in 1988. The record of conviction appears to begin in 1984 and is extensive, with thirty-three entries. Of concern are the three entries for sexual offences including attempted rape, indecent assault and buggery. The last entry on the Defendant's record was in 2015. His current early release date is September, 2021 and his statutory release date is set for September, 2024.
- [9] The Report indicates a related concern regarding the nature of the Defendant's past intimate relationships. The Defendant has children with two different women. However, in each case, his role began as more of a caregiver as both women were underage and significantly younger than he was. Both associations developed romantically and produced children. The Defendant's interest in young females is therefore noted both historically and in this case.
- [10] On the positive side, prison records confirm the Defendant is a hard worker in the areas of stone masonry, wood working, construction and maintenance. He has worked on the prison farm and taken part in community projects. Although he has been disciplined for bad behaviour and other infractions while at HM Prison, his overall behavioural assessment scores have been positive. The Defendant has generally displayed good behaviour and rule compliance.
- [11] The Defendant has maintained contact with his children and indicated a desire to attempt to provide for them as best he can.

- [12] During the production of the Social Inquiry Report, the Defendant indicated a concern for his own mental health and what are described as high stress levels. He recently sought the assistance of a prison psychologist. No evidence was found to suggest any mental health evaluations have ever been performed. It is indicated that such an evaluation would assist in determining the appropriate treatment to allow the Defendant to address and overcome the traumas he has suffered in his life. The Report recommends psycho-sexual and psychiatric evaluations in order to tailor appropriate treatment and counselling and to aid in rehabilitation.

THE LAW

- [13] 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, 60 Cr. App. R. 74**, referred to with approval by our appellate court in the seminal case of **Desmond Baptiste v The Queen, Saint Vincent and the Grenadines Criminal Appeal No. 8 of 2003**. In the words of Lawton L.J. in the case of **R. v Sargent**, 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 sentencing 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.
- (d) Rehabilitation, to engage offenders in activities designed to assist them in their reintegration into society.

- [14] 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 factors to consider.

- [15] Sentencing considerations go further. 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. All of these considerations play a role in determining a fit sentence.
- [16] The offences of possession and distribution of child pornography are extremely serious. Our children are our most precious resources. They are to be treasured and nurtured. Courts in many jurisdictions have recognized the exploitation and ongoing abuse suffered by child victims when these images are recirculated.
- [17] Crown Counsel submitted two local cases for the court's consideration. **The Queen v Syon Forbes Case No. 5 of 2013 ECSC BVI** and **The Queen v Raymond Harrison Case No. 2 of 2013 ECSC BVI**. Both cases emphasized the principle of deterrence in sentencing for these offences. Although sentencing always involves a balancing of aggravating and mitigating factors and a consideration of all the recognized principles of sentencing, crimes of this nature require a message to be sent to the community that such behaviour will not be tolerated. The impact of such behaviour on victims and their extended families is extreme and must be deterred. It is not only the specific offender who must be deterred. All those who would consider following such a course must be deterred generally.
- [18] The **Forbes** case referred to a decision of the Supreme Court of Canada, **R v Sharpe**, [2001] 1 SCR 45. The court in **Sharpe** reminded us of the reason for child pornography laws, indicating at **para 34** that such laws were passed in order to prevent harm to children by banning the production, distribution and possession of child pornography and to send out a message that children were to be protected from the harmful effects of child sexual abuse exploitation. Further, at **para 158**, the court described the degrading, dehumanizing and objectifying depictions of children as being inherently harmful to children and to society.

[19] Following on from the **Sharpe** case, the Ontario Court of Appeal in **R v E.O., 169 OAC 110 at para 7** reiterated what courts throughout this region and elsewhere have determined, and that is that possession of child pornography is a crime of enormous gravity, both for the affected victims and for society as a whole. For that reason, courts have repeatedly recognized that the most important sentencing principles in cases involving child pornography are general deterrence and denunciation. Further, the offence of possession of child pornography requires the imposition of sentences which denounce the morally reprehensible nature of the crime, deters others from the commission of the offence, and reflects the gravity of the offence.

[20] Byer J, in the **Forbes** case at **para 40** rightly indicated that aggravating features of child pornography offences included the production and publication of the images. That being so, the learned Justice went on to indicate that without such aggravating features, the starting point for sentencing would be the halfway mark or 7 years. The maximum penalty being 14 years.

THE POSITION OF THE PARTIES

[21] Crown Counsel submitted that the Court should consider a starting point for sentencing at the 30% level, taking into account the harm caused by the offence as being in the High Category and the culpability of the offender as being in the Medium Category. He went on to cite what he described as several aggravating factors including the serious nature of the offence, the previous sexual offence convictions for the Defendant, the use of threats in committing the offence, the age of the Complainant, the significant age disparity between the Defendant and the Complainant and the fact that the Defendant kept the photos in his possession for a long period of time

[22] Defence Counsel pointed out the successful work record the Defendant had, despite his difficult background. She also emphasized the success the Defendant had while incarcerated by working and taking part in prison programs. Defence Counsel reminded the Court that there was no physical violence involved in these offences and the Defendant had not sold or profited from the images. Despite the extensive criminal record for the Defendant, Defence Counsel submitted that he was a candidate for rehabilitation, especially as he was now engaged in a counselling program at HM Prison.

[23] Defence Counsel candidly recognized the serious nature of the offences and the fact that deterrence was a significant consideration for the Court. She adopted the case law submitted by Crown Counsel, including the **Forbes** case, although she drew the attention of the Court to the sentence imposed in that case, which was 3 years for the Child Pornography count. However, the Court notes that the Defendant in the **Forbes** case had an additional sexual offence charge for which he was convicted and sentenced. He also had no previous criminal record. Defence Counsel submitted the starting point for sentencing should be somewhat less than the 30% suggested by Crown Counsel.

FORMULATION OF SENTENCE

[24] In crafting this sentence, the court has relied upon the general provisions of the Eastern Caribbean Supreme Court Sentencing Guidelines for Sexual Offences. These offences are not specifically recognized in those guidelines but they are helpful. In establishing a starting point for sentence, the court has considered several issues. As already noted above, crimes of this nature have an enormous impact upon child victims, their families and the greater community. The Complainant in this case was frightened by the threats made to her family by the Defendant. That is what caused her to comply with his demand. Although no physical harm was caused, mental anguish was created in the mind of the Complainant. No use of force occurred but it was threatened. The Complainant was a vulnerable child between the ages of 12 and 13 years at the time of the offences. To her credit, it appears that the Complainant was able to carry on with her life after this very difficult incident. As a result of this analysis, I would place the consequences of this offence in the Medium-High Category.

[25] When considering the second stage, the seriousness of the offence, the Court takes note that there was some degree of planning involved. The Defendant entered a Group Chat on the internet, seeking out persons in the Chat Room and soliciting nude pictures. It was not a chance encounter. That initial interaction was followed by private messages sent to the Complainant demanding nude pictures. The disparity in age between the Defendant and the Complainant is also noted. He was 30 years older than her when the incident began. The disturbing threats of violence directed by the Defendant towards the Complainant, designed to get her to comply with his requests, is troubling. Finally, the court notes that the images received by the Defendant from the Complainant were stored by him

electronically for almost two years before being shared with his ex-spouse. I therefore assess the seriousness of the offence to be at the High Level.

- [26] By combining the first and second stages, I find the starting point for sentence to be 45% or approaching 7 years. This accords generally with the position taken in the **Forbes** case. Although I am concerned with the fact that there are convictions for both possession and publication of the images, I take into account the nature of the publication. It was not for gain nor was it a form of sharing with like-minded individuals interested in such distasteful material. It was a rather foolish sharing of images of the person looking after his children with his ex-spouse. As such, the aggravating features of the image sharing are muted. The starting point will therefore be set at 7 years.
- [27] Turning to a consideration of aggravating factors relating to the offence itself, I can find none that have not already been considered earlier in this analysis. I can find no mitigating factors relating to the offence.
- [28] As for the Defendant, the court is concerned with his extensive criminal record, especially the three entries for sexual offences for which he is currently serving a sentence. Although those offences do not include child pornography, their sexual nature combined with the volume of convictions are aggravating features which will result in a sentence increased by 18 months.
- [29] In mitigation, however, the court also considers the difficult background the Defendant comes from. Perhaps more importantly, the Defendant has managed to generate positive reports detailing progress and overall good behaviour while incarcerated at HM Prison. The sentence will therefore be reduced by 6 months.

- [30] The Defendant is 50 years of age. He has spent a good part of his life in prison. Although coming from a difficult and troubled background, he has generated positive work habits and has some construction skills. It is to be hoped that he will be able build upon the success he has had while in custody. The Social Inquiry Report recommends counselling and treatment to assist him with the problems that he obviously has. If the prison services can arrange for that, it would be helpful indeed. I will therefore make such a recommendation.
- [31] It appears that the Defendant was sentenced to the term of incarceration that he is presently serving almost immediately after his arrest on these charges. That being so, he has no credit for time already served available to be applied to this sentence. I am therefore unable to apportion any credit for that.
- [32] Make no mistake, these are serious offences. In considering the principles of sentencing, I find the need for denunciation and deterrence, both specific and general, to be uppermost in this case. Such objectives are generally achieved through imprisonment. As confirmed by the court in **R v Oliver, [2002] EWCA Crim 2766**, in cases of child pornography, the two primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it. Where an offender is actively involved in or encourages the creation of such images, a custodial disposition is warranted. Having a record for previous sexual offences can increase the sentence. This Defendant has a record of convictions for sexual offences. He sought out the Complainant. He threatened her family and actively encouraged her to provide multiple intimate images of herself. The harm that caused was significant. The impact of offences like this is enormous. It must be deterred. A message must be sent to those who would seek to behave in such a terrible manner that it will not be tolerated and will be met with imprisonment.

[33] Taking all of this into consideration, I therefore impose a sentence of 8 years on count one, possession of child pornography and a sentence of 8 years on count two, publishing child pornography. Since the counts are interrelated, arising as they do from a series of events and transactions, the sentences are to be served concurrently on each count. The total sentence is therefore 8 years. The sentence is, however, to be served consecutively to any other sentence the Defendant is currently serving. To assist in the Defendant's rehabilitation, it is recommended that, while incarcerated, the Defendant be assessed for psycho-sexual and general psychiatric issues, and that he receive the appropriate treatment.

**Richard G. Floyd
High Court Judge**

By the Court

Registrar