

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CRIMINAL CASE No. BVIHCR 2020/0033

BETWEEN:

THE QUEEN

and

T.S.

Appearances: Mr. Kristian R.G. Johnson, Crown Counsel, Counsel for the Crown
Ms. Carmilita Jamieson, Counsel for the Defendant

2021: January 29th
February 3rd
February 24th

JUDGMENT

[1] **FLOYD J:** The Defendant T.S. was indicted on 21st September 2020, charged with Procuring Poison or a Noxious Thing to be Used with Intent to Procure a Miscarriage, contrary to **s. 140 of the Criminal Code of the Virgin Islands**. On 3rd February 2021, the Defendant entered a guilty plea to the charge. Prior to plea, a Goodyear Indication based upon an agreed statement of facts was sought by the parties and was provided by this court on 29th January, 2021. This judgment reflects that indication and these are the reasons therefore.

[2] At the time of plea, this court made an order directing that any information that could identify the complainant should not be published in any document or broadcast or transmitted in any way in respect of these proceedings. That order was made because the complainant was a young person under the age of 18 years at the time of the offence, combined with the facts of the case and the underlying sexual nature of those facts. Given that the relationship between the Defendant and the

complainant was one of mother and daughter, the order was extended to include the name of the Defendant, since to identify her, would lead to the identification of the complainant. The circumstances of the case were found to be sufficiently compelling to warrant such an order.

THE FACTS

- [3] The complainant was born on 3rd May, 2003 and is the daughter of the Defendant. They resided together, along with other family members. The complainant became involved in an intimate relationship with an older male which resulted in her becoming pregnant in January, 2018. On 19th February, 2018, the complainant and her male partner attended a medical clinic in order to confirm the pregnancy. However, because of her age, she was refused treatment without a parent being present. She therefore contacted her mother and informed her. This was the first notice the Defendant had of her daughter's pregnancy.
- [4] The Defendant and her daughter reattended at the medical centre and the pregnancy was confirmed. The complainant was age 14 at the time. The father of the unborn child was age 18. Following discussions with the medical staff, a decision was made by the Defendant and her daughter to terminate the pregnancy. Instructions were therefore provided to them to attend a medical facility in the United States Virgin Islands (USVI), as the procedure could not be performed in this Territory.
- [5] On 20th February 2018, the Defendant and her daughter travelled to St. Thomas, USVI, with the intention of terminating the pregnancy. Unfortunately, they were unable to find the correct medical clinic. They did, however, attend at a pharmacy where, after the Defendant consulted with the pharmacist, they obtained a number of pills in order to follow through with the pregnancy termination. The Defendant purchased the pills and upon their return home, she supplied them to her daughter. The complainant consumed all of the pills provided. She became ill. For the next several weeks, the complainant experienced intermittent bleeding, pain and nausea. On 24th April 2018, the complainant experienced an extreme episode that led to her transportation to hospital. She was medically assessed as having had an incomplete miscarriage and underwent surgery.

Following her recovery and discharge, she was referred to outpatient care and the Department of Social Services. Eventually, the police were notified in May, 2018.

- [6] The Defendant provided an inculpatory statement to police under caution, admitting to her role in these events, including the purchase and supply of the pills to the complainant. She believed her daughter was too young to become a parent. She believed the birth of a child would ruin her daughter's life and her future. She loves her daughter and wants the best for her. She recognized the serious nature of the events and accepted her role in them. She believed that her daughter did not want the baby.
- [7] The Defendant's daughter was also interviewed by police. She corroborated the events as described by her mother. She voluntarily participated in the plan to terminate the pregnancy and agreed to consume the pills. There was no suggestion of anyone forcing her to take part in this process. It was apparent that, fortunately, she had physically recovered from the incident.

THE LAW

- [8] 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.

- [9] The court in the **Desmond Baptiste** case confirmed **at paragraph 20** that “perhaps the most difficult and controversial area for the sentencer is fitting the punishment to the crime committed.” That is indeed the situation in this case. 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.
- [10] 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. But how best is that done? To answer 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. Has, for example, a guilty plea been entered? All of these considerations play a role in determining a fit sentence.
- [11] The offence of supplying or procuring any noxious substance intended to be used to procure a miscarriage carries a maximum penalty of imprisonment for a term not exceeding five (5) years.
- [12] Although this offence is not one enumerated in the Compendium of Sentencing Guidelines for the Eastern Caribbean Supreme Court, assistance is provided therein for crafting sentences generally.

THE POSITION OF THE PARTIES

- [13] Learned Counsel for the Crown provided helpful submissions on the general sentencing powers of the court, the aims of sentencing and listed what he thought to be several aggravating and mitigating factors in this case. He pointed out the serious nature of the event, exposing the complainant to injury both physical and mental. He pointed to the position of trust the Defendant held with the complainant and argued the actions of the Defendant were not in the complainant’s best interest. The latter contention raises the classic debate, both legally and ethically, surrounding teen pregnancy and what is best for the woman. Crown Counsel went on to refer to the young age

of the complainant and the planning that was involved in the transaction. Clearly, the Defendant intended her actions and planned them out.

[14] Crown Counsel referred the court to the case of **Kandy James v. The Queen, BVIHCRAP 2011/0008** where the accused was sentenced to three (3) years for the offence of procurement. However, that case can be distinguished from the case at bar. The **Kandy James** case included a second conviction for assault and more importantly, as Crown Counsel pointed out, involved the substance being administered to the complainant against her will. That is significantly different to this case.

[15] Learned Counsel for the Defendant described the Defendant as a hard-working single mother with four children that she supported and cared for very much, including the complainant. The family has maintained a positive and close-knit relationship. Several supportive letters from family members, former colleagues and friends, attesting to the good character of the Defendant, were provided. A letter from the Defendant apologizing for her actions and the harm caused was also submitted. The court notes the reference to counseling being sought for both the Defendant and the complainant as they move forward with their lives. No doubt that is a positive and helpful path to take. The court also takes note of the fact that the complainant is described as having completed high school and gone on to College. A notable achievement.

[16] Defence Counsel referred the court to the provisions of **ss. 3 and 4 of the Criminal Justice (Alternative Sentencing) Act**, as amended, where discharge provisions and general sentencing principles are referenced. Indeed, factors relevant to sentencing considerations are set out therein and reflect generally held sentencing concepts including:

- The circumstances of the offence
- Other offences if any
- Any course of conduct
- Personal circumstances of the victim
- Injury, loss or damage suffered

- Demonstrated contrition by the Defendant
- Guilty plea
- Cooperation by the Defendant with the investigation
- The need to protect the community
- General and specific deterrence
- Adequate punishment
- The character, antecedents, age, means, physical and mental condition of the Defendant
- Any other appropriate matter

[17] These sentencing concepts are universal and this court takes them all into consideration when crafting an appropriate sentence.

[18] In referring to the **Criminal Justice (Alternative Sentencing) Act**, Defence Counsel submitted the court should consider the discharge provisions and alternatives to a suspended sentence despite the court's Goodyear Indication in this case. She referred to **para 54** in the case of **R. v. Goodyear (Karl)**, [2005] EWCA Crim 888, [2005] 1 WLR 2532 wherein the court indicated that "any advance indication of sentence to be given by the judge should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought." However, this court directs itself to **para 61** of the **Goodyear** case where it is clearly stated that "once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case."

[19] The general maintenance of a Goodyear Indication was articulated by **Morley J.** in the High Court of Justice for Antigua & Barbuda in the case of **R. v. Steffan Sylvester**, ANUHCR 2020/0018 & 0058 at paras 8 & 9:

In the absence of any authority having been offered to the contrary, noting submissions from the Crown and defence, in my judgement it may be possible to bring down an indication, but Goodyear will not allow it pushed up. However, to bring it down, there would have to be exceptional new mitigation, or a fashion among defence counsel would arise

where every indication would result in a further mitigating hearing, which is to be discouraged. In this case, there has been no exceptional further mitigation. An uttered apology from the defendant is not enough, nor a description of how he helps his mother.

- [20] As in the **Sylvester** case, I am similarly not satisfied that there has been exceptional new mitigation presented such that I should deviate from the Goodyear Indication given in this case.
- [21] Learned Counsel for the defence took issue with some of the Crown's submissions on the mitigating and aggravating circumstances to be considered. She admitted the serious nature of the offence but balanced that with the remorse of the Defendant. Defence Counsel admits the trauma suffered by the complainant in the incident. She also submits that although the medication was administered to the complainant in this Territory, where the miscarriage actually occurred, the bulk of the planning for the event was in regard to a legal termination outside of this jurisdiction. Defence Counsel pointed out the early guilty plea and the concomitant saving of the complainant from having to testify against her own mother. Indeed, substantial credit must be given to the Defendant for that. Defence Counsel also referred to the Defendant's good character, her lack of previous record, her cooperation with police, and the lack of force exerted upon the complainant in the events.
- [22] In responding to the Crown's submission that the actions of the Defendant were not reasonably justified and therefore aggravating, Learned Counsel for the defence submits that the actions must be considered objectively, based upon the circumstances of the case, bearing in mind the nature of the legislation with which she was charged. To use the words of Defence Counsel, the law which "criminalizes the acts of the Defendant is archaic and is not applicable in many jurisdictions."
- [23] Similarly, Learned Defence Counsel challenges the Crown's position that the actions of the Defendant were not in the best interests of the complainant. More information would be necessary to make such a determination of what is best for a pregnant 14-year-old child. She reminds the court that although the Defendant is the mother of the complainant, it cannot be said that she exploited her position of authority and trust. Who is to say whether these actions, when carried out by a mother, are aggravating? Defence Counsel refers to the "eccentricity" of the offence and

submits that the circumstances of this mother's actions must be considered in light of social policy and moral issues, when one considers the best interests of a child.

[24] Defence Counsel also provided helpful submissions on general sentencing principles and considerations. She distinguished the **Kandy James** case from the case at bar based on the level of violence and the non-consensual element.

[25] The court was referred by Defence Counsel to legislation and case law from the United Kingdom, and in particular Northern Ireland, in the area of abortion. None of the cases were directly on point but they do serve to illustrate a wide variety of sentencing options in this unique area of jurisprudence. Indeed, the conundrum is illustrated in the case of **R. v. Sarah Louise Catt, [2013] EWCA Crim 1187 at para 19** where the court noted that “presented with a novel sentencing exercise the judge should stand back and assess the facts before approaching the task”. The court then went on to state at **para 23** “the court's task is to reach a view on culpability and harm.” It is that latter observation in particular that strikes true in this case. Assessing the culpability of the Defendant for the harm caused to the complainant is critical.

FORMULATION OF SENTENCE

[26] In crafting this sentence, the court has relied upon the general provisions of the Eastern Caribbean Supreme Court Sentencing Guidelines, as well as **Practice Direction 8C No. 3 of 2019**, regarding the imposition of a Suspended Sentence. This offence is not specifically recognized in those guidelines but they are helpful. In establishing a starting point for sentence, the court has considered several issues. Although the complainant was a child of 14 years at the time, there is no doubt that she was an active and willing participant in the transaction, unlike the complainant in the **Kandy James** case. She was indeed in the care of the Defendant and therefore an element of breach of trust exists. But there is no suggestion of force or undue influence being exerted upon her by the Defendant. This was a case of a misguided attempt on the part of the Defendant to “help” her daughter. But rather than continuing to seek out an appropriate medical facility, the Defendant foolishly chose to purchase over-the-counter drugs. That decision placed her daughter at risk and that cannot be countenanced. Although she loves her daughter and wanted what, in her

mind, was the best for her, her actions resulted in pain, discomfort and injury to her daughter. This continued over a protracted period of time, necessitating medical attention and surgical intervention. Fortunately, there was no lasting physical harm, although we may never know the extent of the mental harm suffered. Such is the nature of this type of event, an unwanted pregnancy, and all that flows from the steps taken to deal with that.

[27] Abortion is a highly emotional subject and one that excites deeply held opinions. Equitable access to safe abortion services is generally desirable. Where abortion is safe and legal, no one is forced to have one. Where abortion is illegal and unsafe, women are forced to carry unwanted pregnancies to term or suffer serious health consequences. Women seek, as in this case, to decide independently in all matters related to reproduction. Issues of pregnancy, a woman's right to self-determination, and the right to choose what to do with the pregnancy are critically important. Such decisions are worthy of respect but must also be balanced with the state of the prevailing law. Restrictions on access to abortion can lead to unsafe abortions being carried out with the potential for harm and injury to the woman, as happened here. Notwithstanding the issue of reproductive rights and considerations, the court is troubled by the harm and injury suffered by the complainant in this clumsy and ill-considered plan. Therefore, after careful consideration of all of these issues, I would place this offence in the category of lesser yet significant consequence.

[28] In considering the second stage, the seriousness of the offence and the offender's culpability, I make several observations. Obviously, the Defendant played an active and leading role in the transaction. There was planning and deliberation involved but it appears to be limited or rudimentary. There was an apparent rush to deal with the pregnancy which is evidenced by the inability to even find the right premises to have the procedure done. Such was the haste, that I find there was a general lack of awareness or understanding of the long-term ramifications of the behaviour and the impact it would have on the complainant. Consequently, I place this offence in the medium to lower seriousness level.

[29] It should be noted that the court was concerned with the age difference between the complainant and the male involved in the transaction that led to the pregnancy. The court was advised that he

was also charged and forced to accept responsibility for the role that he played. Such are the unfortunate circumstances here that impacted several people's lives.

[30] In considering all of these details, the court comes to the conclusion that the starting point for sentence should be 30% or 1.5 years or 18 months. It is significant that this Defendant is of good character. She comes before the court with no prior criminal record. She was born on 15th December, 1977. She was fully employed for many years, until her recent retirement. She has friends and a family. She has four children, including the complainant. She has led a productive life without any contact with the criminal justice system. She is to be commended for that and shall receive every credit. In recognition of that, I therefore reduce the sentence to 9 months.

[31] I also give the Defendant full credit for her guilty plea, thus removing the necessity of her daughter having to testify, and reduce the sentence by a further one third, taking the sentence to six (6) months. In considering the mitigating and aggravating factors further, I am reminded that the Defendant had no desire to harm the complainant. On the contrary, she sought to help her daughter to deal with what she believed was misfortune. She cooperated with the police investigation and provided an inculpatory statement as to her role. She was remorseful and contrite.

[32] In considering the principles of sentencing, I find the need for deterrence to be low. This sentence is unlikely to provide a sense of general deterrence to anyone considering such behaviour for the reasons referred to above and the general considerations involved in reproductive rights issues. Deterrence specific to this defendant is not a factor, given her anguish and response to the events, including the charge. The Defendant does not present a risk or danger to the public or to the complainant. I find very little role for punishment or denunciation in this sentence. Rather, I find a need to promote a sense of responsibility in the defendant for her actions and to acknowledge the harm done to her daughter. In doing so, I am confident that sense of responsibility has been achieved in the Defendant as she has gone through the criminal justice system.

[33] I therefore impose a sentence of 6 months imprisonment. That sentence is to be suspended for a period of 12 months. That was the sentence contemplated by the Goodyear Indication. I have

considered the provisions of **s. 29 of the Criminal Code of the Virgin Islands** as well as **Practice Direction 8C No 3 of 2019** and I am satisfied that this is a case in which a sentence of imprisonment would have been appropriate even without the power to suspend the sentence, given the harm suffered by the complainant. However, in passing this sentence, I find that the exercise of that power can be and is justified by the exceptional circumstances of this case as already outlined. The Defendant should be aware that by suspending the sentence, the 6 months custodial sentence shall not take effect unless she commits another offence punishable by imprisonment within 12 months of today. Should that occur, the Defendant may be brought back to this court and be called upon to serve the 6 months sentence. I have considered, as I am required to, whether the circumstances warrant, additionally, a fine or compensation order. I find they do not. I also find this not to be a case warranting a probation order.

Richard G. Floyd
High Court Judge

By the Court

Registrar