

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2020/0006

REGINA

V

JG

APPEARANCES

Mrs Shannon Jones-Gittens for the Crown.

Mr Lawrence Daniels for the defendant.

2020: JULY 28

RULING

On whether it is a legal defence to aggravated unlawful sexual intercourse

if a male was deceived by the female she was 16

- 1 **Morley J:** JG¹ now 25 is accused when 23 of unlawful sexual intercourse with a girl under 14, contrary to **s5 Sexual Offences Act No.9 of 1995** (SOA), said to occur on 27.11.18 with KC² then aged 13.

¹ In this ruling, the defendant shall not be identified as unless convicted he is entitled to anonymity.

² The complainant shall not be identified as she is entitled to anonymity.

- 2 The allegation is the sex was in fact consensual; there is no suggestion in this case of rape. In law being below 16 KC cannot consent, but as a fact she did, as she describes in her statement, which is why the offence is not rape but unlawful sexual intercourse (usi), here in the aggravated form as she was below 14.
- 3 Offences of usi (where a girl is 14 or 15) attracting up to ten years, and more often if aggravated (where a girl is under 14) with a maximum life sentence, understandably attract considerable public interest, as to progress and particularly sentencing. To help homogenise sentence approach across the nine island nations of the Eastern Caribbean Supreme Court (ECSC), in September 2019 sentencing guidelines were published, available for all on the ECSC website.
- 4 Alive to the public interest, sometimes news mistakenly reports consensual sex with a person below the age of consent as 'rape'. Justification may be offered because the event is said to be "statutory" rape', but such an expression is not an offence known to law on Antigua, it is a generic journalistic term, which may then inadvertently raise emotive confusion between the two offences, causing some to think usi and rape are the same, leading to understandable scandal and public outrage, yet mischaracterising the offending. It is important in these difficult cases that reporting remains balanced, as to the interests of the complainant, and defendant, showing the detail of court reasoning. While usi is serious offending, it is incorrect to headline it as rape³.
- 5 The foregoing should help to introduce this case, realising the allegation may well attract public interest.
- 6 Although JG admitted sexual intercourse to police on 28.11.18, nevertheless on 30.06.20, he pleaded not guilty.
- 7 Defence counsel Lawrence Daniels has argued it is a defence in law if KC deceived JG to believe she was 16, which he makes plain to police. Submissions were called, and filed by Counsel Daniels on 20.07.20, with response by Crown Counsel Shannon Jones-Gittens received on 24.07.20. Counsel Daniels over 2 pages merely asserted deception ought to be a defence,

³ As happened for example recently on 23.07.20, where the Antigua Observer in error carried a headline concerning the case on 22.07.20 of **R v Theodore Horsford 2020** ANUHCR 2020/0024 when sentenced for aggravated usi, '*Briggins man gets probation for raping 13-year old*'.

unsupported by any authority; Counsel Gittens over 9 pages argued the contrary in depth, referring to the local law, and extensive learning from the UK⁴. Her submissions are here preferred.

8 The offence at **s5 SOA** reads:

Where a male person has sexual intercourse with a female person who is under the age of fourteen years, he is guilty of an offence, whether or not the female person consented to the intercourse or whether or not at the time of the intercourse he believed her to be fourteen years of age or more, and is liable on conviction to imprisonment for life.

9 On Antigua, if a girl is under 14, the plain language of the section is it is an *'offence....whether or not ...he believed her to be fourteen years of age or more'*. It follows his belief in her age is expressly irrelevant, so that by implication it is irrelevant if she lied to cause this belief. Men must learn, if she is under 14, strict liability arises.

10 Starkly, under **s5 SOA** there is no defence of deception; more simply, on Antigua there can be no defence of an honest and reasonable but mistaken belief a girl under 14 is 16 or older.

11 And if there was, a floodgate may open, where the defence to every allegation of aggravated use will be 'she told me she was 16', with invitation for the Crown to prove otherwise. This to my mind would cut across the intention of the section, wrongly turning many trials into a desperate contest in which young girls are routinely maligned as liars about their age in order to escape the consequences of the charge.

12 Deception is however capable of being mitigation which might reduce the sentence.

13 Given the stringent terms of the section, denying a need for any mens rea as to age, allowing no defensive excuses, in my judgment by implication the test should be a defendant must show on balance that he had been deceived, rather than the Crown show beyond reasonable doubt he had not. This is because the section is designed to protect young girls from predatory male attention, no matter what they might say to encourage it, putting the onus on men to find out

⁴ See **R v Brown 2013** UKSC 43; **B (a minor) v DPP 2000** 1AER 833; and **R v G 2008** UKHL 37.

about age, meaning it is a man's burden in mitigation to show what he honestly and reasonably thought and why.

- 14 Put shortly, and for emphasis, **s5 SOA** requires that men ought to know the real age of girls with whom they have sex, particularly to protect girls under 14, no matter a girl may lie. Such an onerous provision implies it should be for the defendant to establish the mitigation of honest and reasonable belief in age rather than the Crown to disprove it.
- 15 Again, otherwise a floodgate may open, where the mitigation to every allegation of aggravated *usi* will be 'she told me she was 16 and the Crown cannot prove otherwise', which to my mind would cut across the intention of the section, meaning instead the burden should be on the defendant.
- 16 It follows in the event there is a trial and Counsel Daniels raises to the jury a defence of deception, the court will correct him, and direct the jury there is no such legal defence. More, in light of this ruling, it will likely be misconduct for Counsel Daniels to suggest to the jury there is or ought to be such a defence in what may amount to an attempt to invite the jury to disregard directions of law from the court.
- 17 Instead, JG can put the Crown to proof, as is his right, that the Crown in bringing the case must prove it, and so require every element to be proved beyond reasonable doubt, requiring KC to attend, to give evidence, for her age to be proved, and for it to be proved they had sexual intercourse when she was 13. But Counsel Daniels will not be able to suggest to the jury sex had not occurred, as he has framed the case on instructions it had. In putting the Crown to proof, if convicted JG will have no credit for an early plea.
- 18 Alternatively, JG might plead guilty to the offence, attracting maximum credit, and seek to raise deception in mitigation, where the burden will be on him on balance to show he was deceived. The sentence following would be bound by the ECSC sentencing guidelines for aggravated *usi*, and should not be confused with sentencing for rape.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

28 July 2020