

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2020/0024

REGINA

V

THEODORE HORSFORD

APPEARANCES

Ms Rilys Adams for the Crown.

Mr Damien Benjamin for the defendant.

2020: JULY 22

SENTENCE

**Concerning the lowest category of aggravated unlawful sexual intercourse
and consideration of probation**

- 1 **Morley J:** Theodore Horsford now aged 21 (dob 16.03.99) falls to be sentenced on an early plea on 11.06.20 for a single count on 09.01.19 when 19 of 'aggravated' unlawful sexual intercourse, meaning with a girl under 14, DF¹, then 13, for which the maximum is life imprisonment, contrary to s5 *Sexual Offences Act*. The case was opened and mitigated on 20.07.20, and adjourned for written sentence.

¹ DF will not be identified as she is entitled to anonymity.

- 2 Sentences for unlawful sexual intercourse (usi) are sensitive and of great public interest. There have been guidelines in place since September 2019. Within the ECSC the legal age of consent is 16, so that sexual intercourse is usually an offence if below that age under s6 *Sexual Offences Act* carrying a maximum of 10 years, while on Antigua the more serious or 'aggravated' form arises if under 14.
- 3 On the one hand young people often understandably take an interest in sex from an early age, through school, peer groups, and sometimes various media; on the other hand, it has long been widely thought by legislators very young girls need to be protected from possibly predatory male behaviour, as perhaps lacking the maturity to cope with sexual relations and yet bearing the consequence through pregnancy, so that society has decreed in law there is an 'age of consent' (applicable to males as well). Sex requires responsibility. For this reason for aggravated usi it is no defence for a young man, under 21, merely to 'believe' a girl of age; a young man must learn how old a young woman is with whom he has sex, as if under 16, and particularly so if under 14, sex can be expected to attract jail time.
- 4 The law puts on notice young men under 21 to find out age; it is not acceptable to guess.
- 5 As for older men, 21 or over, probably raising disparity of age, they are on re-doubled notice.
- 6 In this case, on 09.01.19, DF was in company with friends and after being driven about, she ended up, then 13, during the evening at Horsford's home in Briggins, then 19, on whom she said she had a crush, he asked her for sex and she agreed, using a condom, it lasting for 30mins. She stayed out all night, at the home of Dave Allen, and being spotted next morning while being sought she was asked what she had done, and told of sex with Horsford, being then taken to the police station. When asked on 25.01.19, he admitted the intercourse, being intoxicated, recalling she had earlier on 09.01.19 been in school uniform, saying he knew her from high school days, as indeed she had said she knew him from when at Foundation Mix Primary School (attendees aged 4-12), and later when in Jennings Secondary School: in my judgement he well knew she was at least below 16.

- 7 The present case raises uncomfortable features. Tragically DF is troubled, having been a ward of state, in a girl's home, her mother has become disconnected from her, her legal guardian is her father, who believes she lies about her age, it seems she has left home, and though now 14, still a child, she will not tell the authorities where she is living, which may be with another female, though the situation is unclear. Senior Probation Officer Alvin Jarvis prepared an assessment of the impact of her sexual contact with Horsford, dated 15.07.20, and giving evidence in court on 20.07.20 he described his interaction with her as one of the most difficult he has had. He writes DF *'does not appear to have experienced any adverse psychological or deep emotional impact'*, while her father *'expressed remorse for the defendant...[his daughter] is not concerned over the matter...he is firmly of the view by her actions and behaviour she is complicit...'* In evidence PO Jarvis suggested DF is *'deceptive'*, she had promised to write a letter for the court to express *'her remorse for Horsford's position'*, she was aware it was illegal for her to have sex, and he repeated orally his written view her sexual experience has not caused her trauma. When asked what should happen to Horsford, he opined, unusually, in this case it would be just to pass a probation order for three years.
- 8 This court is most concerned about DF, and would ask social services to redouble their efforts to reach out to her, to support her, and to make her environment safer. It is deeply troubling she has left her father's home, still a child, and there seems no facility to place her into formal social care.
- 9 Mitigating, Horsford was the subject of a pre-sentence report dated 15.07.20 by Nakitia Williams. He lives in Briggins with his godfather Everette Barker, with a daughter Kalia born since events, aged 1, and the child's mother. He has no previous convictions and is employed as a waiter at Starfish resort in Jolly Harbour, and as a landscaper. On 20.07.20, his father was in court showing support. Of DF's precise age he never inquired.

Constructing the sentence

- 10 I assess the starting point within the guidelines to be in the lowest category, being 3B, meaning 5% of a notational life sentence of 30 years, being 18 months: there is no evidence of trauma,

while none of level A applies, hence consequence category 3 and seriousness level B. I am of the view, knowing her as well as he did, he closed his mind to her being at least under 16, which is aggravating, so I increase the sentence by 6 months to 24 months. His good character, in combination with his being a teenager, reduces the sentence a further 6 months to 18 months. His early plea of guilty attracts a discount of one-third, making the sentence 12 months. If serving such sentence, time on remand would count.

- 11 Under the late great Redhead J, and after, since 19.12.16, suspending imprisonment had been believed *intra vires*, on analysis by Crown counsel and the defence Bar as an inherent court power. However, following a recent decision by the Court of Appeal on 26.05.20, in **R v Shane Williams 2020 ANUHCRA2018/0011**, as reported on 03.07.20, suspension has been found to lack statutory basis on Antigua & Barbuda, and so is not permissible, (though is widely permissible elsewhere in the ECSC, begging whether relevant legislation perhaps ought here to be enacted).
- 12 The question arises here, dealing with a short a prison sentence like 12 months, whether to make a probation order instead, as suggested by PO Jarvis, noting the range of sentencing for aggravated *usi* if a category 3B offence includes the possibility of a non-custodial outcome.
- 13 Such an order would be governed by the **Probation of Offenders Act 1921 cap 345**, (POA) which being so old may be due reconsideration by parliament.
- 14 In old language s2(2) reads:

(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

- 15 This section appears to create a power to pass, not formally a 'suspended sentence', but instead a 'conditional discharge', namely it grants the ability, where appropriate, with or without sureties, to discharge an offender on condition by solemn recognisance he or she is of good behaviour, or does probation, for a period up to three years, at the end of which period the offender should attend for sentence, which might then be nominal or nothing.
- 16 When passing a conditional discharge, under **s2(3) POA** there is in addition the power to order the award of damages, compensation, and costs.
- 17 If the discharge is on condition the offender satisfies a probation order, then under **s3 POA** the supervisor and the conditions of probation are to be specified, and can include requirements '*with respect to residence, abstention from intoxicating liquor, and any other matters,*' as to prevent re-offending, which shall be given in writing to the offender. To monitor the probation order, under **s5 POA** the offender must report as required to the supervisor, who should report as required to the court. The terms of the probation order can be varied or discharged on application under **s6 POA**. If the probation order is breached, or the offender fails to observe good behavior, under **s7 POA** he or she can be arrested and sentenced afresh, which can include for committing further offences.
- 18 In effect then, a 'conditional discharge' under the **POA** can have much the same effect as what had earlier been passed in error as a 'suspended sentence', as both can lead to later imprisonment if breaching the conditions within the time specified, in particular by committing further offences.
- 19 The question now arises in what circumstances a probation order might be made. There is assistance under **Practice Direction 8C of 2019**, which deals with when a suspended sentence (where permissible) might be passed. At para 4, it says:

- 4 The court may consider the following non-exhaustive list of factors in exercising its discretion....:
- a. Can appropriate punishment only be achieved by immediate custody?

- b. Does the offender present a risk or danger to the public or to the victim?
- c. Has there been a history of poor compliance with court orders?
- d. Is there a realistic prospect of rehabilitation?
- e. If sentencing a person under 21, is there a realistic prospect that incarceration will so affect an offender as to turn that person more towards criminality and less toward rehabilitation?
- f. Is there strong personal mitigation?
- g. What will be the impact of an immediate custodial sentence on dependent relatives, employees, and the community?

20 Adapting and adopting the test set out, in my judgment Horsford being under 21 (e), without previous convictions does not present a risk or danger to the public or DF (b), there is no history of poor compliance with court orders (c), there is in his presentation to the court, supported by PO Jarvis, strong personal mitigation in the arrival of his daughter with whom he lives (f) with a realistic prospect of rehabilitation (d), immediate custody will impact his new family which has arisen since the instant offence (g), such that appropriate punishment can be achieved by something other than immediate custody (a).

21 Further, under **Practice Direction 8C at para 3**, suspension is discouraged for longer than two years, (and ought rarely to arise if a prison term is calculated as longer than two years). Adapting such consideration, this court will hesitate to order a longer probation order.

22 On 20.07.20 for a like offence, in category 3B, following an invited *Goodyear* indication, a sentence of 12 months imprisonment was passed on *Ladaniel Nedd*², aged 20 at the time, without previous convictions, on an early plea, but his case is distinguishable as his defence counsel Warren Cassell oddly did not want input from the probation service, so that the strong mitigation afforded to Horsford by PO Jarvis was not sought by Nedd.

23 In these circumstances, under the **POA** I will pass a probation order, with costs to the prosecution of \$1000ec payable within 3 months to 22.10.20 or there shall be 3 months jail in default (for

² Case ANUHCR 2020/0052.

which time on remand will not count). The probation order shall have the following terms, and shall be given in writing, as attached further below:

- a. Horsford shall enter into a recognizance without a surety to complete a probation order.
- b. PO Jarvis will be his supervisor, variable on application.
- c. The term shall be 2 years, to 22.07.22.
- d. There shall be a brief court report every six months, in writing from the supervisor, the first being due on 22.01.21, on which date Horsford is to attend court for review.
- e. Horsford shall reside with his daughter and godfather in Briggins, which is an address he is not to move from without written permission from the supervisor, who at all times shall know Horsford's address and phonecell number.
- f. Though he may be permitted some alcohol, he shall refrain from being so intoxicated as to be drunk.
- g. He shall attend such courses as directed by PO Jarvis, including if possible teaching on the responsibilities of sexual relations.
- h. There shall be liberty by PO Jarvis to vary or discharge the order.
- i. If it is breached, Horsford shall be resentenced, which will likely mean a custodial term.
- j. Breach shall include committing further offences.
- k. If it is not breached, he shall be discharged on or before 22.07.22 without further sentence.

24 *Theodore Horsford, please stand up.* For the offence when 19 of unlawful sexual intercourse with DF on 09.01.19, then 13, to which you pleaded early, for the reasons I have explained, and in particular having heard from PO Jarvis, you will be conditionally discharged on your solemn recognisance to perform a probation order for two years, up to 22.07.22, which if completed satisfactorily with no further offending will mean you will on return to court that day or earlier be sentenced to no further penalty, but if not will be resentenced to a likely custodial term, today assessed as 12 months. The terms of the order will be served on you in writing as a court order. In addition, you will pay \$1000ec in costs, within 3 months, or serve 3 months in prison in default, for which any time already on remand will not count, and the money will remain owing. Thank you, you may step down.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

22 July 2020

IN THE EASTERN CARIBBEAN SUPREME COURT

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ON ANTIGUA & BARBUDA

CASE ANUHCR 2020/0024

REGINA

V

THEODORE HORSFORD

PROBATION ORDER

BEFORE THE HON. MR. JUSTICE IAIN MORLEY QC

DATED 22 JULY 2020

ENTERED 22 JULY 2020

APPEARANCES

Ms Rilys Adams for the Crown.

Mr Damien Benjamin for the defendant.

UPON SENTENCING the defendant Horsford on 22.07.20 who pleaded guilty on 11.06.20 to unlawful sexual intercourse when 19 on 09.01.19 with a girl under 14 contrary to s5 *Sexual Offences Act*;

AND UPON HEARING IN EVIDENCE on 20.07.20 from senior Probation Officer Alvin Jarvis;

IT IS ORDERED THAT:

- 1 The defendant Horsford shall be conditionally discharged on his solemn recognizance to perform a probation order with the following terms, to be served in writing on him:
 - a. Horsford shall enter into a recognizance without a surety to complete a probation order.
 - b. PO Alvin Jarvis will be his supervisor, variable on application.
 - c. The term shall be 2 years, to 22.07.22.
 - d. There shall be a brief court report every six months, in writing from the supervisor, the first being due on 22.01.21, on which date Horsford is to attend court for review.
 - e. Horsford shall reside with his daughter and godfather in Briggins, which is an address he is not to move from without written permission from the supervisor, who at all times shall know his Horsford's address and cell number.
 - f. Though he may be permitted some alcohol, he shall refrain from being so intoxicated as to be drunk.
 - g. He shall attend such education courses as directed by PO Jarvis, including if possible teaching on the responsibilities of sexual relations.
 - h. There shall be liberty by PO Jarvis to vary or discharge the order.
 - i. If it is breached, Horsford shall be resentenced, which will likely mean a custodial term.
 - j. Breach shall include committing further offences.
 - k. If it is not breached, he shall be discharged on or before 22.07.22 without further sentence.
- 2 Further, Horsford shall pay as contribution to the costs of the prosecution \$1000ec payable within 3 months to 22.10.20 or there shall be 3 months jail in default (for which time on remand will not count).

BY ORDER OF THE COURT

REGISTRAR

Settled,

Iain Morley

Morley J

22 July 2020