

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

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR 2018/0001

BETWEEN:

THE QUEEN

Applicant

-AND-

DAVID ANDREWS

Defendant

Appearances: Mrs. Tiffany Scatliffe-Esprit, Principal Crown Counsel for the Crown
Mr. Patrick Thompson, Counsel for the Defendant

2018: 19th June, 20th July

JUDGMENT ON SENTENCING

HEADNOTES: Criminal Law:-Indecent Assault, Gross Indecency, Child Victims,
Sentencing matters to be considered, Poor Health of the Defendant.

Agreed Facts

[1] **Smith J:** The defendant, Davis Andrews (hereinafter referred to as the “defendant”) resides at Fat Hog’s Bay Tortola and was born in the republic of Trinidad and Tobago and has Belonger status in this Territory. He is married and the father of three (3) daughters. Britney Mendez (hereinafter referred to as “The Complainant”) is the defendant’s niece being the daughter of his sister. On January 20th 2018 the defendant was charged with:

- (i) Indecent Assault contrary to **Section 124 (1) (b) contrary to the Criminal Code.**
- (ii) Indecency with a Child contrary to **Section 125 of the Criminal Code.**

- [2] On 19th June, 2018 the defendant entered a plea of guilty to the aforementioned charges and a subsequent sentencing hearing was held. I had promised to put my sentencing reasons in writing and this I now do.

Background

- [3] In May 2017 Abigail Moran Mendez the complainant's mother, moved into an apartment owned by the defendant. The complainant was still living with her father Curtis Mendez and her younger brother at the time. The complainant and her brother would visit their mother.
- [4] The defendant was very accommodating to the complainant and her brother and allowed them to watch TV and play video games in his apartment. This is the point when the abuse started.
- [5] The defendant began to tell the complainant secrets of a sexual and inappropriate nature. The inappropriate conversations escalated to the defendant rubbing his penis in front of her, telling her she could touch his penis any time, rubbing her shoulder. He then unfastened her bra and touched the complainant on her breast and used a vibrator on her body.
- [6] The defendant told the complainant she could touch his penis. The incidents resulted in the complainant's father noticing a change in the in the complainant's school work. It was then that the complainant divulged to her father the abuse being visited upon her by the defendant her uncle.
- [7] A report was made to the police on 14th November, 2017 and the defendant was arrested and charged for the said offences on the indictment in January, 2018.

Relevant Law

Indecent Assault

- [8] Section 124 (1) (b) of the Criminal Code is to the effect that any person who commits an offence will be liable on conviction on indictment, if on a person of or under the age of thirteen years, to imprisonment for a term not exceeding ten years.

Indecency with a Child

- [9] **Section 125 of the Criminal Code** provides that any person who commit an act of gross indecency with or towards a child under the age of fourteen (14) years or who incites a child under that age to such act with him or another, commits an offence and is liable on conviction to imprisonment for a term not exceeding three (3) years or to a fine not exceeding three thousand dollars.

The Defendant's Medical Condition

- [10] The defendant suffers from spondylitis which is a progressive arthritic condition. The defendant has suffered from this illness for over twenty-five (25) years and is unemployed and medically unable to work as a result of this condition.

- [11] Mr. Thompson has indicated that the prison at Her Majesty's Prison, Balsam Ghut is not properly equipped to adequately care for the defendant and his particular medical condition. The report from the prison dated 25th June and prepared by Mr. Royston Percival, the acting superintendent indicates the following:

"Although Mr. Andrews has some mobility challenges which is associated with his chronic medical condition we are satisfied that our dedicated medical team and our expert access through BVI Health Services Authority his condition will continue to be reasonably managed by adhering to best practice medical principles and methodologies".

- [12] The Court will deal with this issue later in this decision.

Victim's Impact Statement

- [13] In her impact statement, the complainant speaks of her confusion at seeing her uncle with his penis hanging from his pants, the naked girls on his computer and the conversations about a child named Kamoya whom she knew.

- [14] She said that after the incident she went home and cried herself to sleep as she was confused and hurt. She says that since the abuse, she has not been able to look her uncle in the face as she feels ashamed and she says she is distrusting of her other uncles and grown men in general.
- [15] This mistrust also causes her to hit the boys at her school if they get too close to her. She also mentioned in her statement about the breakdown in the relationship with the defendant's daughters, her cousins who no longer speak to her. The Court views the breakdown of this relationship as being unfortunate.

Remorse

- [16] The defendant has no previous convictions for any offences and is of previous good character. Character references from various upstanding members of British Virgin Island society including ministers of religion have been received, read and taken into account.
- [17] The defendant has written to the complainant and the remorse and contrition is also reflected by the character witnesses who have written on his behalf. He further also indicated contrition to the police officers from the outset during his police interview.
- [18] Counsel for the defendant has set out the aggravating and mitigating factors as follows:

Aggravating Factors:

- (i) The age disparity between the parties
- (ii) The breach of trust (the defendant is the uncle of the victim)

Mitigating Factors:

- (i) The defendant's lack of previous convictions
- (ii) The defendant's remorse and early admissions to the police
- (iii) The defendant's willingness to plead guilty at an early stage in the proceedings
- (iv) The defendant's medical condition which requires and may require continued long term treatment

[19] The Crown set out its aggravating and mitigating factors as follows:

Aggravating Factors

- (i) There was an abuse of trust
- (ii) There was a significant age difference of about 36 years between the defendant and the complainant. The complainant was approximately 12 years at the time of the incident and the defendant was approximately 48 years old;
- (iii) His offending entailed deliberately targeting a vulnerable young girl
- (iv) The sharing of sexual secrets by the defendant to the complainant is grooming. The defendant by discussing sexual content was preparing the complainant for sexual encounters
- (v) While all indecent assaults and acts of ardency with children are serious the fact that the incident involved the exposure and touching of the defendant's penis made the case at bar more serious

Mitigating Factors

- (i) The defendant admitted his guilt when he was first cautioned by the police
- (ii) defendant has shown remorse
- (iii) The defendant is a first time offender

Court's Findings

[20] The Court finds the aggravating and mitigating factors to be as follows:-

Aggravating Factors

- (i) The age difference between the defendant and the VC being some 36 years
- (ii) The breach of trust carried out by the defendant. He is her uncle and someone whom she trusted. In her victim impact statement the VC expressed hurt, embarrassment and shame
- (iii) His offending entailed deliberately targeting a vulnerable young girl
- (iv) The fact that the defendant exposed his penis and asked her to touch it makes this a particularly aggravating factor in the Court's view

The Mitigating Factors were found to be:

- (i) The defendant's early guilty plea. It was through no fault of the Defendants that the matter was not committed to the High Court for sentence earlier
- (ii) Remorse shown by the defendant in his police interview and the letter written to the VC
- (iii) The poor health of the defendant. The medical reports indicate that the defendant is in poor health is issues relating to his mobility and is on a course of folic acid and methotrexate

[21] At this stage, the Court must note that it does not agree with the Crown's assertion that this case is a case where the virtual complainant was 'groomed' in the sense of the word as used by Ramdhani J. in the case of **Andre Penn** and that case can be distinguished from the case at bar.

[22] In that case there was a high level of perversion and abuse which spanned a long period of time. Although the incidents in this case are abhorrent I am not satisfied that the conduct of the defendant reached the heights of grooming.

[23] The defendant has been given his full one third discounts for his early guilty pleas as well as the appropriate credit for the fact that he is a first time offender.

[24] The Court also finds that the aggravating factors outweigh the mitigating factors and the sentence will reflect this fact.

[25] The Crown in its usual helpful manner has furnished the Court with a wealth of authorities for perusal and consideration namely **Desmond Baptiste vs The Queen**¹, **R vs David Webb**², **R vs Jeremy Paul Pepper et al**³, **R vs Alaan Cain et al**⁴, **Roger Naitram et al vs The Queen**⁵, **R vs Millberry and others**⁶, **R vs Morgan**⁷, **R vs Lackenby**⁸ and **Winston Joseph vs The Queen**⁹ as well as statutory provisions.

¹ High Court Appeal No 8 of 2003

² (2003) EWCA, Crim. 3731

³ (2006) 1 Cr Appeal R. 20

⁴ (2007) 2 Cr Appeal R. 25

⁵ (005-006,2006-2008) COA

⁶ [2003] 2 Cr App R 31

⁷ [1977] Crim. LR 488 applied

⁸ (2002) EWCA Crim. 2891

⁹ Criminal Appeal No 4 of 200

- [26] I am also grateful to the defence for their submissions and authorities. I have also perused the Belizean case of **Melanie and Michael Coye vs The Queen**¹⁰ where both defendants raised the issue of ill health and the lack of amenities at the Kolbe Foundation (Central Prison) of Belize to adequately treat and manage acute conditions of diabetes and hypertension.
- [27] Justice of Appeal Morrison (as he then was) held in that case that the prison was adequately equipped to treat the defendants and their particular ailments and their application for bail pending appeal was denied.
- [28] In sentencing, the Court must consider the relevant principles of sentencing as they have been set out by Chief Justice Wooding in the case **R vs. Sargeant**¹¹ and expounded upon by Chief Justice Dennis Byron (as he then was) in **Desmond Baptiste v The Queen**¹².
- [29] The general public must be made to understand by the sentence imposed for offences such as these that criminal offending of this kind involving young children will not be tolerated and has real consequences.
- [30] The Court bears in mind that it not just the identification of these factors that is called for. As stated by Byron CJ in **Winston Joseph**: “It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing
- [31] A sentencing Court must embark upon an evaluative process. It must weigh the mitigating and aggravating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.
- [32] The aggravating factors clearly outweigh the mitigating factors in this case.

¹⁰ <http://belizejudiciary.org/wp-content/uploads/2012/12/Criminal-Appeal-No-19-of-2012-Michael-Coye-Melanie-Coye-v-The-Queen-Bail-application1.pdf>

¹¹ (1975) 69 Cr App R 74

¹² Consolidated Criminal Appeal No 8 of 2003

- [33] The Court agrees with the Crown that a custodial sentence is warranted in this matter and is satisfied and persuaded that the facilities and personnel at Her Majesty's Prison are in a position to deal with the particular ailments of this defendant.
- [34] It is recommended that that the defendant undergo counselling and sex offender treatment as part of the rehabilitation process while he is incarcerated. It has been noted that the prison has indicated that the defendant has "behaved very well, is respectful to all staff and inmates alike and regularly attends Bible Study Classes and spends most of his time in his cell". This bodes well for the defendant as he seems to be a good candidate for rehabilitation.
- [35] The defendant is sentenced to **18 months** for the indecent assault and **12 months** for the indecency with a child with both sentences to run concurrently from the time that the defendant was remanded into custody.

Ann-Marie Smith
High Court Judge

By the Court

Registrar