

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2017/0014

REGINA

V

FRANKLYN PERKINS

APPEARANCES

Mr Kenroy Hyman and Ms Korah Galloway for the Crown.

Mr David Brandt for the defendant.

2018: MARCH 12

SENTENCE

Concerning indecent assault by a doctor

- 1 **Morley J:** Franklyn Perkins, a medical doctor, born 06.11.50, now aged 67, falls to be sentenced for indecent assault on 23.02.17 on LD¹, a patient in his surgery, then aged 19, following conviction by the jury on 01.12.17.
- 2 LD is from Guyana, and came to Montserrat when 14. She was working for a local insurance company. She had not visited a doctor on her own before, and had not been to one at all on Montserrat. She had to undergo a routine medical examination as part of her application for a

¹ LD is not named in this written judgment, to be published, as to do so would breach her right to anonymity as a complainant in a sexual offence.

work permit. She made an appointment to see Dr Perkins for 11.30 on 23.02.17. Dr Perkins asked about her general health and gave her advice about a dietary condition she reported. As part of the discussion, he playfully knocked her hand twice. He examined her on the surgery bed, routinely checking her heart, lungs and blood pressure. He took a blood sample. He made various notes. He gave her a prescription concerning her diet. She put on her shoes, and went to leave, though she had to get past him to the door. What follows, as edited, is what she said in her video recorded interview on 24.02.17:

'I get up now from the chair and about to leave when he say I not giving him a hug and I smiled and give him a hug. I know a hug don't last long so I finish and I notice he not loosing, then he start rubbing me from my back up and coming down, so I put my hand to the side, and I had the paper in my left hand then he there a rub. Then he hold my hands and then he turn around and pull me to the chair and I just there frighten. Then he stand up and hug me and say that I have nice smooth skin and so. When he said that I did not say nothing...he said it twice, and I say thanks the second time. Then he there rubbing and...I feel kinda nervous. I was sweating...I stand there and he there hugging, then he go upon the chair and sit down on the rocking chair, and the chair got wheels, and he pulling me over the chair and I hold on, pushing away the chair, and the chair sliding...towards the wall and it couldn't go anymore, it stuck to the wall. He there pulling me and rubbing up and he put his hand under my dress and there rubbing me up but I had on tights at that time under my dress and he rubbing up my bottom, by back, and he say that he could give me money to buy the stuff that I need, I can come and visit him regular, if I need any more blood tests I must come to him, then he get up and he asked me if I have to go now, and I said I have to go back to work, and he get up, and say I will let you go now, and he get up and he start hugging me, and I didn't hug him this time, I let go my hand to the side. He held on to my two hands here and put it around his waist, and when I put it there, and he loose me hand, and I loose him, then my hand go from his waist and it go back to my side. He started kissing me my neck and rubbing he tongue, and so he start saying uhhmmmm, uhhmmmm, uhhmmmm, and then he start breathing fast fast fast...he didn't stop yet but he say I going soon, but he not stopping, he kissing om my neck and feeling up my bottom...he put his nose by my breast and I could feel he was sniffing, at one time I look his head was here resting...looking up, and I was praying somebody come to the door, and then when he sniffing I close my eyes...he rubbing up, feeling, and touching up my breast and belly, and he say that I need to exercise because my belly getting big, I never say nothing, he just there, rubbing, rubbing, rubbing, and I just there doing nothing, I just feel frighten. Then the door somebody knocked twice, then he

stop...I just there, like I stupid, and I just stand up saying nothing, but I was closing my eye and I could feel his spitty mouth on my neck, and I nervous, I was frightened, I didn't say nothing...he kept pulling me close...I could feel his penis on my foot [*meaning thigh*]...I felt scared, I wasn't thinking, I...just stand there, I was nervous, I wanted to cry, but it wasn't coming...he squeeze especially my bottom and my back, he just rubbing and so, and feeling and squeezed but not too hard...I felt shame...he touch me on my bottom, he rub up my back and neck and my breast and my belly and my leg...and coming up under my skirt to my bottom...he keep saying you going soon, when you gonna come visit me, when you gonna spend time with me...he come to my ear, he was kissing and say uhhmmmmm, and he keep kissing and he breathing, and I could feel the hotness on my neck.'

- 3 On leaving the surgery, she was immediately tearful with her boyfriend in the surgery carpark and with support from staff at her work a complaint was lodged that day, so that the videoed police interview was the day after, when events were very fresh in her recollection.
- 4 LD was a compelling witness, for anyone who saw her in court, withstanding long cross-examination, and in the end the jury was quite sure she was telling the truth.
- 5 Dr Perkins denied any impropriety, insisting there was simply a routine medical examination, that LD has exaggerated his touching her, which was necessary for a medical examination, but in the end the jury was sure he was not telling the truth.
- 6 As part of mitigation on 09.03.18, I heard from acting Governor Sir Howard Fergus, Senior Nurse Brenda Daley, Clerical Officer Shirley Livan, Dr Perkins' wife Cynthia, and retired Teacher Ginelda Howson, who read a letter from retired Reverend Ronald Wade. It is right to note that Dr Perkins has served the community of Montserrat in an exemplary way for many years. He is Montserratian, met his wife Cynthia while both were students at UWI, and he opened a practice on the island in 1980. He stayed throughout the volcano crisis when many left. He has a high sense of patriotism to the nation state. He has been an anesthetist on island for over 20 years, and Nurse Daley says he has never lost a patient, nor ever behaved inappropriately toward female medical staff, while though a private man, can be jovial, bringing life to the operating room. There is no doubt he is a good doctor. Shirley Livan said he had been her trusted family doctor for many years and her daughters, now 33, 30, and 20, have

never reported inappropriate behavior. Ginelda Howson and Rev Wade also speak to his trusted standing within the community. Sir Howard, with great authority, being a former speaker of parliament and professor at UWI, made three points: that Dr Perkins brings reasonableness to local debate; he is versatile as a doctor, doing house calls when others may not; and in addition to being a doctor, he is a much-needed and able anesthetist in a small country which cannot afford two.

- 7 In addition, I received a letter dated 05.03.18 addressed 'to whom it may concern' which was clearly intended for the court, signed by five doctors, Lewis, Gibbs, Kassim, Adgusin, and Greeway-Duberry, with two others listed, Fergus and Buffonge. It said the doctors were *'surprised and disappointed at the outcome of the trial'* and *'we believe that a custodial sentence or one which prohibits his practice for a lengthy period will not only cause severe hardship for him and his family who are upstanding people in the society, but will also impact negatively on his patients'*.
- 8 Weighing against the doctors expressing 'surprise' at the verdict, is that none say they know anything of the allegation, and Sir Howard and Nurse Daley said they knew no details. It has come to my attention that there has been public discussion on radio about the allegation, though without knowing what LD was saying had happened, which has it seems led to people in this small community having a ready and wholly incorrect opinion prior to the trial as to the unreliability of the complainant. I have heard a podcast, where Drs Buffonge and Kassim speak out. Within the month of the complaint being made, doctors even scheduled a day of industrial action to protest the arrest of Dr Perkins, arguing there needed to be protection against *'unsubstantiated claims'*, arising from the *'mere fact of being medically examined'*. The DPP responded robustly, observing that what was being said on the radio undermined due process and might wrongly bias jurors, (though in the end did not, as there was an impartial conviction). What was said on the radio was quite wrong, and I wholly endorse the reply of the DPP.
- 9 In her victim impact statement, dated 17.01.18, LD says:

'...days following the assault I felt real bad as I travelled on the bus, people who don't even know me spoke out loudly, attacking me and my mother and in fact the entire Guyanese

fraternity. They made comments like 'is money I am looking'...people even whatsapp me sending threatening messages to me, even as far as the UK...I even had to get a second phone to prevent people from getting in touch with me to remind me of the assault all over again. I had to deactivate all my social media accounts as persons even took my pictures and send it all over social media to destroy my reputation and character, even professionals accused me of lying. They went on radio and defended him. He was treated as if he was the victim. This had a strong negative impact on my life. The assault compelled me to see and have follow up visit with a psychologist, I was an emotional wreck and had to be given time off work...I was frustrated and could not sleep...I cried every day and wondered why me....My mother and brother were harassed and were embarrassed at times to go out. My mother stayed at home at times to avoid the assault of words from people.'

10 It is profoundly disturbing to the court that this complainant, her family, and the Guyanese community, have been victimized for making a complaint about Dr Perkins. There appears in this to be an undercurrent of racism, sexism, and snobbery, hinting that a less-educated young female Guyanese is not to be believed over the word of a highly-educated senior male Montserratian doctor. Such an undercurrent is corrosive to the trust of non-native Montserratians and can have the effect of making some feel like second class persons, whose opinions and experiences are to be kept unreported. Insofar as I am able, I direct the Commissioner of Police to make police inquiry into whether any persons have committed any offences in harassing the complainant or her family, or possibly in publicizing before trial any opinions that the complaint is not to be believed, and to report to the Director of Public Prosecutions.

11 Moreover, in the same victim impact statement, LD goes on to say this:

'Since the assault, many persons have come up to me crying because of other such offences hushed up while these victims cried in silence for years. I am happy I was able to endure the pain and tears to share how I felt and what I have been through for the past 12 months...Since he was found guilty of assaulting me, several young persons my age came to me... and told me that they themselves were victims where he ...sexually assaulted them during their doctor's visit with him, but because of his status in society and fear of persons not believing them, they did not report it.'

12 I make it plain that I will not sentence Dr Perkins for anything other than for what happened with LD, and take no account of her report she has been approached by other complainants. However, again, as far as I am able, I direct the Commissioner of Police to make police inquiry into whether there are indeed other complainants, and to report to the Director of Public Prosecutions.

13 Turning to how to approach the sentence, I make a number of observations:

- a. In the pre-sentence report filed on 06.03.18, prepared thoroughly by Senior Probation Officer Beverly Reid, there is no non-custodial sentence offered, such as probation or community service, even if appropriate, because Dr Perkins continues to deny any of what LD said, and in consequence is assessed *'as being at a medium risk of re-offending and a medium risk of harm to female patients'*.
- b. Moreover, Ms Reid observes at paragraph 7: *'If the victim is to be believed Dr Perkins took advantage of his position, possibly never expecting any patient to actually file a complaint with police'*.
- c. On 29.01.18, Dr Perkins underwent a medical test, with the result that Dr Lewis by email on 09.03.18 reports that he is 'very likely' to be suffering a serious condition, probably life-threatening, which if confirmed on biopsy will require 'curative surgical treatment' (which may not work).

14 In addition, my attention has been directed to the **Medical Act cap 14.02** (as revised on 01.01.02) where at s11 and s12 it says:

11. (1) If any person registered under this Act is convicted of felony or misdemeanour before the High Court, or after due inquiry by a Committee consisting of not less than two registered medical practitioners whom the Governor is hereby authorised to appoint to conduct such inquiry, is adjudged by the Committee to have been guilty of disgraceful conduct in a professional capacity the Governor in Council may on the recommendation of the said Committee direct the Registrar to erase the name of such person from the Medical Register.

12. (1) For the purposes of any inquiry under subsection (1) of section 11 the Governor may, at the request of the Committee, appoint a judicial assessor and (where necessary) retain counsel, to assist the Committee, and upon any such inquiry the complainant (if any) and the person against whom disgraceful conduct is alleged shall be entitled to be heard and may be represented by counsel. (2) The Governor in Council may make rules prescribing the procedure to be followed with respect to the institution and prosecution of inquiries under section 11.

- 15 I read these sections to mean that in light of his conviction the Governor may commission an inquiry committee, consisting of not less than two medical practitioners, and possibly a judge and counsel, to have a hearing into whether Dr Perkins is to be struck off for disgraceful conduct. While I express no opinion on what should happen to the practice certificate of Dr Perkins, I do express the opinion that the Governor ought to convene such an inquiry committee, whose medical practitioners should be from off-island and not know Dr Perkins.

Constructing the sentence

- 16 I turn now to constructing the sentence.
- 17 On Montserrat, the maximum sentence for indecent assault contrary to **s 122(1) Penal Code** (as amended) on a person over twelve is five years.
- 18 In England & Wales, the equivalent offence of 'sexual assault' contrary to **s3 Sexual Offences Act 2003** carries a maximum of 10 years. I have chosen to be assisted by the UK sentencing guidelines for sexual assault², and assess that there the case would be in 'category 2A', which discloses a starting point of 2 years with a range of 1-4 years.
- 19 Defending Counsel Brandt has conceded the offence crosses the custody threshold.
- 20 The offending consists of prolonged touching, beginning with perhaps an explorative knocking of the hand, a request for a hug, and then, when LD did not push him off, holding on to her, rubbing of the breasts, with his head on breasts, and under her skirt rubbing of her bottom, feeling her up, squeezing, with LD being aware of his penis against her thigh.

² See https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf, at page 17.

- 21 I do not add to the sentence because he denied the touching, and continues to do so.
- 22 As to the *actus reus*, thinking on the 'harm' done to LD, the starting point for such acts, being a prolonged unwanted attention, squeezing and rubbing, in my judgment is 18 months in prison. This was not momentary activity. However, I will want to consider the *mens rea* carefully in a moment.
- 23 Turning to the aggravating features pertaining to the offence, the assault occurred in breach of trust, being while a patient was with a doctor, having presented herself at her most vulnerable for physical examination, to a person in authority, and consenting to being touched only insofar as medically necessary. This consent to being touched was hugely abused. As such, the considerable breach of trust in this case in my judgment has the effect of increasing the sentence by 18 months, doubling it to three years.
- 24 This size of sentence is therefore consistent with category 2A of the UK sentencing guidelines, which as mentioned above allow there for a range of 1-4 years, though adjusted here for the circumstances of this case, lower maximum, and for local sentencing expectations.
- 25 Turning to the mitigating features, on the evidence before me, supported by formidable character references, including from Sir Howard Fergus, an acting Governor, it is clear Dr Perkins has behaved in a manner which has been out of character, being not just of good character but of shining exemplary character, serving his community faithfully for well over 30 years. This reduces the sentence by 12 months, from three years to two years.
- 26 I now wish to look further into what happened on 23.02.17, going beyond the doctor's actions and turn my mind to the *mens rea*, peering as best I can into his mind, having just reflected on how this behavior appears so very much out of character. I ignore that Dr Perkins says nothing happened and rely on LD. In my judgment, having watched this case, Dr Perkins in breach of trust tried his luck and made a pass at his patient. I have wondered if he may on that day have been ill, perhaps suffering depression, though none say so. I am fortified in this concern by the medical test on 29.01.18, which shows that he is likely quite unwell, has been for well over a

year, and so probably was at the time he saw LD. In some unhinged fantasy of mind, I sense he wondered whether being a powerful older male he might be attractive to LD, and being unfamiliar with visiting a doctor, and in the presence of a figure of authority, understandably she behaved in a compliant manner. When he asked for a hug, trying it on, she gave him one, and when he did not let go, she did not push him off, instead placing her hands by her side. Over-excited, and developing an erection she felt, he completely misread her not pushing him off and so pursued her with aggressive tactility. Bewildered as to how to behave, though she tried to pull away, when he drew her into a hug again, she closed her eyes, her hands by her side, which he thought was a signal she might like what he was doing, as he placed his head on her breasts and hand up under her skirt, but in fact at 19, never having encountered such a situation before, she just did not know what to do.

- 27 In closing argument, Counsel Brandt made a powerful speech to the jury that, ignoring Dr Perkins' denials, what may have happened was, in the absence of opposition he thought she liked his attention, and thought therefore she was consenting, meaning he should be acquitted. The jury have rejected this, and I find that the verdict reflects that whatever delusion Dr Perkins may have had, his behavior as a doctor was appalling, and he forced himself on her far beyond any consent he might wrongly have thought she offered.
- 28 LD is not to be criticized for not pushing him off. It is completely understandable and she has the court's fullest sympathy. She was in a terrible predicament and very young. In fairness to Dr Perkins however the sentence should reflect that on the evidence he at first thought his wholly inappropriate advance was not being rejected, and that in what appears a mad recklessness on the part of a man in his closing years, being 66 on the day, he then just went way, way too far, and violated her. In this context, in my judgement, sensing there was a bizarre element in his elderly head of mixed-messages, the sentence can be reduced by a further six months, to 18 months.
- 29 There is no credit for a plea available, so the sentence will not be further reduced. As the evidence is this is a one-off, I do not consider Dr Perkins to be dangerous, so the sentence will not for public protection be increased.

- 30 The question now arises whether to impose immediate custody, or whether to suspend the sentence of 18 months. It must be understood that a suspended sentence of imprisonment is still a sentence of imprisonment. Suspension is not a leniency; it is instead a discretionary staying of the hand of punishment. I must look now to whether there are grounds for suspending.
- 31 The test in England & Wales for passing a suspended sentence is governed by **s189 Criminal Justice Act 2003**. In short, I must assess: does the offender present a danger to the public, can appropriate punishment only be achieved by immediate custody, and has there been a history of poor compliance with court orders; while factors which indicate that it may be appropriate to suspend a custodial sentence are whether there is a realistic prospect of rehabilitation and strong personal mitigation.
- 32 On the one hand, here we have a doctor in breach of trust conducting a prolonged sexual rubbing over the body of his frightened young patient; on the other, we have an old man who has served his community for many years with distinction, and for whom no less than Sir Howard Fergus speaks up. If jailed immediately, he cannot continue to treat patients, nor be a much needed anesthetist (if allowed by the Governor to continue practicing). Moreover, immediate imprisonment may compel an inquiry to strike him off, so steering the outcome, when that inquiry should be independent of this court. In addition, I surmise he is of some means, and therefore could pay some compensation, while at the same time he faces an uncertain future owing to a recent medical examination and to not knowing whether he may no longer be able to practice medicine. In particular, the very fact of this conviction for a man in his circumstance is already an enormous blow.
- 33 While custody is justified, applying the test he is not dangerous, has strong mitigation, rehabilitation is realistic, and there has been no history of failing to comply with court orders.
- 34 Weighing these features, I am of the view punishment can be achieved other than by immediate custody, so the prison sentence should be suspended, for 18 months, which is a period I assess as appropriate, because this matter as a one-off is out of character and has been hanging over him for a year already. However, he should pay compensation to LD, as he

is of means. She has not sought any money, but I observe from her victim impact statement she has clearly been traumatized by what happened, and though no sum can ever fully redress such a sense of being violated, some monies are appropriate. I assess that compensation should be to the value of \$10000ec, payable within 3 months, or Dr Perkins is separately to serve six months in default.

- 35 *Franklyn Perkins, please stand up.* For the offence of indecent assault on LD on 23.02.17, for the reasons I have explained, the sentence shall be 18 months imprisonment suspended for 18 months, with an order that you pay to LD compensation of \$10000ec within three months, or serve six months in default, separate from the suspended sentence.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

12 March 2018