

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA

IN HIGH COURT OF JUSTICE

CASE NO. DOMHCR2016/0016

BETWEEN:

THE STATE

AND

GARY JNO FINN

Appearances:

Ms. Carlita Benjamin led by the Director of Public Prosecutions for the State;
Mr. Wayne Nordé for the defendant

.....
2017: March 7th
: April 28th
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JUDGEMENT ON SENTENCING

[1] **Charles-Clarke, J:** The offender, Gary Jno Finn pleaded guilty for the offence of unlawful sexual intercourse with the virtual complainant a female thirteen years and seven months old who was not his spouse, contrary to Section 7(1) of the **Sexual Offences Act No. 1 of 1998, of the Laws of Dominica.**

The Facts

[2] The facts presented by the prosecution and which were accepted by the defence reveal that the prisoner was the boyfriend of the virtual complainant's sister. He also had twin daughters with his girlfriend and they lived about fifteen feet away from where the virtual complainant and her family resided. The prosecution's case was that sometime in January 2013 between 2 p.m

and 3 p.m the virtual complainant was at home when the offender came into her room to ask for rubbing alcohol. The prisoner was accustomed to coming to her room to watch television. He left the room and returned a few minutes later. He went onto the bed and began to touch her breast and kiss her. The offender put the virtual complainant to lie down and held her hands down. He then proceeded to have sexual intercourse with the complainant. The virtual complainant was pushing him and telling him to stop but he did not. He had sex with her for about fifteen minutes during which she starting bleeding from her vagina which was burning and blood was running down her legs. After he was finished the offender left and the virtual complainant went to bathe. At the time the offender's children who are the virtual complainant's nieces were outside playing while the virtual complainant's sister who is the children's mother had gone to the shop.

- [3] The offender had sexual intercourse with the virtual complainant again in February and March 2013. However he was not charged or indicted for these dates.

The Social Enquiry Report

- [4] After the allocutus was read to the prisoner a social enquiry report was ordered on his behalf. The report dated 28th March 2017 was based on interviews conducted with the prisoner, the prisoner's aunt, friends and members of his community. Interviews were also conducted with the virtual complainant, the virtual complainant's mother and members of the community where they lived.

- [5] The Report revealed that the prisoner was born out of a common law relationship between his parents both of whom migrated when he was of

tender age. His father left when he was four years old and his mother at age nine although she maintained contact with him. Thereafter he was raised by the grandmother and aunt and most of his needs were met by them. The social welfare officer noted that he was a first time offender and he expressed remorse for his actions during the interview and indicated his desire to apologise to the victim and her family.

[6] The defendant's aunt indicated that he was a very helpful individual and this behaviour was not in keeping with his character.

[7] The general view of the offender's friends and members of the community was that he is a community oriented, helpful, dependable, nice and hardworking individual. Persons in the community expressed surprise about his actions and considered the alleged behaviour to be external to his normal behaviours.

[8] In the interview with the social welfare officer the virtual complainant indicated that the incident had affected her in several ways. She felt a betrayal of trust by the offender who she regarded as a brother. As a result of the assault she was subjected to teasing from her peers and had to change her school. Her academic performance declined and she was no longer a sociable individual. She now spends most of her time at home and continues to be embarrassed whenever she thinks of the incident.

[9] The virtual complainant's mother expressed anger and hurt over the incident involving her daughter and the sense of betrayal as the offender was someone whom she treated as a son and trusted him with her family. She lamented the effect of the incident on the virtual complainant indicating that at one time the

virtual complainant was contemplating suicide and had to seek therapeutic intervention.

The Sentencing Hearing

[10] At the sentence hearing defence counsel Mr Wayne Norde made a plea in mitigation on behalf of the offender. Mr. Nordé urged the court to apply the guidelines in the case of **Winston Joseph et al v The Queen**¹ laid down by Sir Denis Byron and to weigh the mitigating and aggravating factors.

[11] Referring to the principles in **Winston Joseph et al** he highlighted the mitigating factors which the court should take into consideration namely:

- a. The offender's guilty plea;
- b. The offender's remorse and desire to apologise to the virtual complainant;
- c. The offender's good character and the positive remarks made about him by members of the community who described him as nice, helpful and hardworking;
- d. He has no previous convictions;
- e. There was no evidence of actual violence over and above what is required to commit the offence;
- f. There was no evidence the victim became pregnant;
- g. The virtual complainant being 13 years old was not considered to be very young.
- h. The offender is the father of four children ages five, four, two and four months old, all of whom reside in Dominica and he is their sole provider.

[12] Mr. Nordé referred the court to the case of **The State v Andrew Valmond**². Where the prisoner was sentenced to eight years after trial and submitted that

¹ Criminal Appeal Nos 4,7 and 8 ECSC(1)

² Claim No. DOMHCR 2010/0009

the sentence should be higher where the aggravating factors outweighed the mitigating factors.

[13] Ms. Carlita Benjamin on behalf of the State submitted that the aggravating factors outweighed the mitigating factors. She highlighted the aggravating factors as follows:

- a. The breach of trust – the virtual complainant regarded the offender as a brother and her mother trusted him as a son. The offender has two young children with the virtual complainant's sister.
- b. The virtual complainant suffered both physically and psychologically.
- c. The offence was repeated more than once;
- d. The fact that the virtual complainant was thirteen years which is considered very young.

She also relied on the case of **The State v Andrew Valmond**.

The Law

[14] Section 3 of the **Sexual Offences Act No. 1 of 1998** of the Revised Laws of Dominica makes it an offence for a person to have sexual intercourse with another person who is not his spouse; and who is under the age of fourteen years. The offence carries a maximum penalty of 25 years.

[15] In the case of **Winston Joseph et al v The Queen** the court in considering the range of sentences for cases of rape, unlawful carnal knowledge and incest in St. Lucia laid down guidelines for sentencing and indicated what factors the sentencing judge should take into consideration when dealing with offences of this nature. According to Byron C.J the sentencing guidelines were established *'with the intention of promoting greater consistency in the approach to sentencing practices and provide uniformity on the principles which inform the discretion in sentencing'*.

[16] The court went on to list the aggravating and mitigating factors which should inform the sentencing judge when deciding what would be the appropriate sentence in a particular case. At paragraphs 17 -19 of the judgement Byron C.J stated:

“the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors, the more common which I attempt to list below. It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark on 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 towards a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.”

Aggravating Factors

- i. If the girl has suffered physically or psychologically from the sexual assault
- ii. If it has been accompanied by abhorrent perversions e.g. buggery or fellatio
- iii. Violence is used over and above the force necessary to commit the offence
- iv. The offence has been frequently repeated
- v. The defendant has previous convictions for serious offences of a violent or sexual kind
- vi. The victim has become pregnant as a result of the crime
- vii. The victim is either very young or very old

Mitigating Factors

- i. A plea of guilty should be met by an appropriate discount, depending on the usual considerations, that is to say how promptly he confessed and the degree of contrition and other relevant factors.

- ii. Where incest was consensual, in the case of a girl at least 16 years of age if it seems that there was a genuine affection on the part of the defendant rather than the intention to use the girl simply as an outlet for sexual inclinations.
- iii. Where the girl of at least 16 years of age made deliberate attempts at seduction.
- iv. Where the defendant is a first offender and/or is a youth.

[17] In setting these guidelines the court accepted and adapted sentencing policies expressed in **Att. Gen.'s Reference**³ with appropriate modifications to the statutory scheme on Saint Lucia which was aimed at combating the growing prevalence of these crimes, while preserving the human rights of persons committing these offences as established by the Constitution.

[18] The sentencing judge is also required to apply the classical principles of sentencing laid down in **R v Sargeant** and restated by Byron CJ in **Desmond Baptiste et al** ⁴namely:- **Retribution** - in recognition that punishment is intended to reflect society's abhorrence of the offence and the offender;- **Deterrence**- to deter potential offenders and the offender himself from recidivism; **Prevention** - aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and **Rehabilitation** – aimed at assisting the offender to reform his ways so as to become a member of society.

[19] The cases which deal with sentencing have also considered other factors which will assist in determining the appropriate sentence such as; the prevalence of that particular offence in society; the character and antecedents of the offender and the peculiar circumstances of each case. In **DPP v**

³ (No. 1 of 1989) 90 Cr. App R. 141

⁴ SVG Crim App No. 8 of 2008

Shaunlee Fahie⁵ – George-Creque J.A adopting the principles enunciated by Byron C.J stated that *“the sentence scale will slide up or down depending on the peculiar circumstances of each case.”*

[20] In the instant case I find the aggravating factors are as follows:

- i) There was a breach of trust by the offender towards the virtual complainant. The virtual complainant trusted the prisoner as a brother. In addition he was the father of her sister's children.

In **The Queen v Andre Penn⁶**; and **The Queen v Derek Knight⁷** Hariprashad-Charles J. and Ellis J respectively, considered a breach of trust to be a major aggravating factor and listed a number of cases in which this was a determining factor for imposing a custodial sentence⁸.

- ii) The offence was repeated more than once.

- iii) The psychological effects of the act upon the virtual complainant. Although there was no psychological assessment conducted upon the virtual complainant the social welfare officer's report was very helpful in informing the court of the effects of the incident on the virtual complainant. The social welfare officer noted the impact of the sexual abuse and the short and long term physical, psychological and social consequences it has on its victims. She noted that some of the effects includes *‘shame, distrust of others, psychological distress, and difficulties at school. (This) can be worsened if the victim does not receive the required therapeutic*

⁵ BVI HCRAP 2008/003

⁶ BVIHCR2009/0031

⁷ BVIHCR2014/0003

⁸ R v Clive Mcvane Crim. Case no. 2010/0215 (SLU) – Victim was defendant's step daughter

R v Ronald Rogers BVIHCR2004/0024 – Victim was defendant's god daughter

Andre Renn v R – Victim was neice of defendant's wife

R v Loff James Lenon – Victim was daughter of defendant's girlfriend 1999 1 CR 1 Cr App. R. (S)

intervention in dealing with the aftermath of the assault or if the victim is familiar with the abuser’.

She concluded that the virtual complainant has been affected and continues to be affected by the offender’s act.

THE SENTENCE

[21] In arriving at the appropriate sentence the court must not only embark on a balancing exercise, weighing the aggravating factors against the mitigating factors but must also bear in mind the classical principles of sentencing, having regard to the particular circumstances of the case. There is also an obligation by the sentencing judge to apply a range of sentence which is proportionate to the seriousness of the offence and comparable to other sentences imposed for similar offences. However, the court is not prevented from departing from a notional sentence given in a particular case depending on the circumstances of the case at bar.

[22] It has been accepted that sentencing guidelines while they provide assistance to the court, cannot be slavishly and adhered to. In **Roger Naitram et al v R**,⁹ Baptiste JA stated:

“Sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the guidelines into account, the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate. It follows therefore that a sentencing judge can depart from guidelines if adherence would result in an unjust sentence. The existence of a particular powerful personal mitigation or very strong aggravating factors may be a good reason to depart from the guidelines. Clearly the suggested starting points contained in sentencing guidelines are not immutable or rigid. Where the particular circumstances of a case may

⁹ HCRAP 2006/005

dictate deviating from the guidelines it would be instructive for the sentencing judge to furnish reason for so departing.”

[23] In **The Queen v Elwin Lansiquot**¹⁰ Cumberbatch J. departed from the benchmark in **Winston Joseph et al** and used a benchmark of 18 years. In that case the defendant had pleaded guilty to rape, unlawful sexual connection and gross indecency. And the learned trial judge gave discounts of three years for the guilty plea, and three years for the delay in bringing the matter to trial.

[24] Thus in reviewing the above principles and the various sentences imposed in other cases of a similar nature I believe there is a need to depart from the range of sentences indicated in **Winston Joseph et al** for the following reasons:

- i. While the legal principles propounded in the guidelines are still relevant the range of sentences prescribed were issued some 16 years ago. Since then there has been extensive reform of sexual offences legislation in Saint Lucia and other jurisdictions which have seen an increase in the penalties stipulated (except for rape) and the establishment of new forms of offences; therefore the range of sentence stated may well be considered outdated.
- ii. There were no aggravating features identified in case of **Winston Joseph et al** where the starting point was eight years, a case of unlawful sexual intercourse. Indeed some of the aggravating factors which the court in **Winston Joseph et al** said should be taken into consideration by the sentencing judge are present in the instant case. These include the breach of trust, the age of the victim, the psychological effect on the victim, and the fact that the offence was repeated more than once.

¹⁰ SLUHCRCR 2010/0012

- iii. There is a rise in the prevalence of sexual offences in this jurisdiction. The most common type of cases listed for hearing in the criminal division are sexual assault cases. Therefore a clear message of deterrence must be sent out to would be offenders.

[25] I am of the view that the aggravating factors in this case far outweigh the mitigating factors. I also believe that the main aims of sentencing in this case are prevention, deterrence and rehabilitation. Therefore a custodial sentence is warranted in this case.

[26] Applying the principles of sentencing expounded in **Desmond Baptiste et al** and using the methodology in **Aguilliera & Ors v The State**¹¹. I believe that the appropriate starting point for this offence is twelve years. The court will then make the necessary deductions or additions for the aggravating and mitigating factors. The prisoner having pleaded guilty to this offence he is entitled to a discount of one third which reduces the sentence to 9 years imprisonment. No further discount will be given in mitigation. Given the aggravating factors in this case namely: the seriousness of the offence; the prevalence of that type of offence in Dominica; the breach of trust; the fact that the act was repeated and the psychological effect on the virtual complainant an additional year will be added. Accordingly the prisoner is sentenced to ten years in prison for the offence of having sexual intercourse with a minor a female aged thirteen years old.

[27] The aim of sentencing is not merely to punish but also to assist in the rehabilitation of the offender. Accordingly it is also my order that the offender shall receive counselling and sex therapy to assist him in the rehabilitation process. This will allow him to address any dysfunctional sexual tendencies he has. It is my hope that at the end of his term of incarceration the prisoner

¹¹ Crim. App. Nos. 5,6,7,8 of 2015 CA, TNT.

would have been sufficiently reformed to enable him to assume his role as a father and make a meaningful contribution to society.

Victoria Charles-Clarke
High Court Judge

By The Court

Registrar