

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COMMONWEALTH OF DOMINICA

IN HIGH COURT OF JUSTICE

[CRIMINAL]

CASE NO. DOMHCR2016/0012

BETWEEN:

THE STATE

V

STEVE JOHN

Appearances:

Mr. Keith Scotland and Ms. Carlita Benjamin, State Attorneys for the State
Mr. Peter Alleyne for the Defendant

.....
2016: October

2016: December 2nd
.....

JUDGMENT ON SENTENCING

[1] **Charles-Clarke, J:** The prisoner Steve John was indicted by the Learned Director of Public Prosecutions on three counts of sexual assault namely: Incest with the virtual complainant whom he knew to be his sister, contrary to section 6(1) (b) of the **Sexual Offences Act** No. 1 of 1998; Unlawful sexual connection with the virtual complainant a girl to wit ten years of age contrary to Section 4 (2) (a) (i) and indecent assault contrary to section 13(1) (a) of the **Sexual Offences Act** No. 1 of 1998.

[2] The prisoner pleaded guilty to the second count of unlawful sexual connection on 27th October 2016. Mr Scotland for the prosecution indicated that the Director of Public Prosecutions accepts the plea. He then withdrew the first count of incest and the third count of indecent assault against the prisoner. An amendment was made to the second count whereupon the indictment was re-read

to the defendant who pleaded guilty to unlawful sexual connection. The Court then ordered a social inquiry report and the matter was adjourned to 24th November 2016 for a sentence hearing. On 24th November 2016 upon receipt of the social enquiry report (the report) the court made an order for the filing of submissions and for a sentence hearing to be held on 30th November 2016. The sentence hearing was held on 2nd December 2016.

THE FACTS

- [3] The prisoner and the virtual complainant are brother and sister. They share the same biological mother. The virtual complainant was ten (10) years old and the prisoner was 31 at the time of the incident. At the time of the incident they both lived at the home of their sister who was the virtual complainant's older sister and her 7 year old cousin. The virtual complainant referred to the prisoner as *'Uncle Steve'*.
- [4] Sometime during the year 2014, the virtual complainant was at home with her 7 year old cousin and the prisoner while her older sister went out. During the night she woke up and went to the living room where the prisoner was sleeping on a mattress. She states she left the room because it was dark and she was scared. She went to the prisoner's bed and lay down by him. He asked her why she was on his bed. He then touched her vagina. She stated that she took off her pants and panty and she went on him. He told her to come out on him and then he touched the back of her vagina. She told him to stop and she left and went to her bedroom.
- [5] On another day she was filling a tub for her to play with her younger cousin. She told her cousin she was going to lie down. The prisoner was in the kitchen so she went to lie down on the mattress in the living room. The prisoner came and lay down on her and put his finger inside her vagina and he began to move it. She told him to stop and her younger cousin came and asked the prisoner what he was doing and the prisoner said nothing. She went outside to play with her cousin and the prisoner came and told her he was sorry and he would not do it again.

[6] On another night her sister again left her with the prisoner and her cousin. She told the prisoner and her cousin good night and went on her bed. When she woke up she saw the prisoner on her bed. She told him to come out on her bed and he told her he is her brother he would not do her anything. She went back to sleep with her back facing the prisoner. He put his hand inside of her pants and he put his finger in her vagina. He started to move his finger and the virtual complainant told him to stop doing that and he left and went on his bed.

[7] A Social Enquiry Report was received on 18th November 2016 and was based on interviews conducted with the prisoner, the virtual complainant, their mother, the virtual complainant's paternal grandmother and members of the community who were familiar with the prisoner. The report highlighted the following: Family History, Steve's Sentiments, Victim's sentiments, Sentiment of Annette Davis (mother of Victim and Accused) and sentiments from community.

[8] In conclusion she stated:

'Child sexual abuse is a negative phenomenon that seriously affects the normal psychological and social functioning of a child. It brings about common after-effects to include post-traumatic stress, behavioural changes, coping challenges and possible sexual dysfunction later in life. Among the other effects of child sexual abuse is incest, there is the possibility that the after-effects may cause more disruption to the child given that it establishes a breach on the family circle; bearing in mind that the family is one of the key primary support system for the child.

Bearing in mind the interview with the victim, it appears that her emotional and social functioning is still being affected by Steve's action. As a result of the incident, she was teased by her school peers and experienced various self-conscious emotions to include embarrassment and shame. She also revealed that she is still fearful of Steve. The victim's grandmother also revealed that since the incident she has observed visible changes in her behaviours; she is disobedient and often pulls her hair for no reason.

In discussion with Steve he admitted that although he and the victim did not share a close sibling bond, he was someone she trusted and was comfortable being in his presence. Importantly, the victim acknowledges that she is not to be blamed for Steve's ill action and that she desires for him to receive a custodial sentence.

Although he pled guilty to the offence, Steve did not directly express remorse for his action and neither did he fully accept responsibility for his involvement in the incident. Throughout the interview Steve maintained that the victim is the one who initiated the action between

them. This statement by Steve is ludicrous given that as already stated, the victim was ten years of age.'

THE SENTENCE HEARING

[9] In his plea in mitigation Mr Peter Alleyne accepted the social enquiry report. In mitigation he informed the court of the following:

- i) The prisoner who is now 33 years old is a construction worker who although from a stable home is indigent.
- ii) The prisoner does not have an aggressive disposition and has no previous convictions relating to violence or similar offences.
- iii) The prisoner expressed his bad feelings and unhappiness about what has happened and indicated he would like to apologise to the victim.
- iv) The prisoner pleaded guilty after counsel had the opportunity to review the depositions. With regards to his guilty plea Mr Alleyne indicated that the prisoner was not represented at the preliminary inquiry in the Magistrate's Court and would have wanted to plead guilty earlier to prevent his sister going through this ordeal and hopes he can make it up to her in the future..
- v) No greater force than what was necessary to commit the offence was used, in this case there was no violence or physical force used by the prisoner.

[10] Mr Alleyne noted the aggravating factors as follows:

- i) There was a breach of trust by the prisoner towards the virtual complainant.
- ii) Both the prisoner and his mother have blamed the victim. However Mr. Alleyne explained this as a coping mechanism, and further stated that the prisoner had indicated his embarrassment and regrets that he stands charged for an incident which should not have happened. The prisoner attributes this to loss of self-

control and respect and feels that he should not have allowed things to progress to that stage.

[11] Mr Alleyne stated that the prisoner is fully aware that his sister is emotionally scarred and all his family have been negatively impacted by this incident. He submitted that the court should consider the mitigating and aggravating factors, to look at the particular circumstances of this case and not place it at the worse end but to exercise leniency.

[12] In their submission on sentencing the prosecution highlighted the aggravating factors in this case as follows;

- i) The fact that the virtual complainant and the prisoner were siblings, a fact well known to the accused;
- ii) The disparity in ages – the virtual complainant was 10 years and the prisoner was 31, a difference of 21 years at the time of the incident;
- iii) The offence took place on more than one occasion;
- iv) The prisoner betrayed the trust of the virtual complainant and his other family members when he was entrusted with the care of the virtual complainant by her elder sister.
- v) Despite pleading guilty the prisoner continues to blame the virtual complainant for the repeated unlawful acts done to her;
- vi) The prisoner has not shown any remorse for his actions;
- vii) The virtual complainant suffered emotionally and mentally and faces embarrassment on a daily basis at school where she is teased by her peers as a result of the abuse.

THE LAW

[13] Section 4 (2) (a) of the **Sexual Offences Act** No.1 of 1998 provides:

'A person is guilty of unlawful sexual connection with another person if that person has sexual connection with that other person –

- a) without the consent of the other person;
- b) without believing that the other person consents to that sexual connection
- c) with the consent of the other person if the consent is –
 - i) obtained from a person under the age of sixteen;....
 - v) obtained by the use of the accused's position of authority over that other person

(2) In subsection (1) "*sexual connection*" means –

- a) the introduction, to any extent, into the vagina or the anus of any person or
 - i) any part of the body of any other person; or
 - ii) any object held or manipulated by any other person, otherwise than for bona fide medical purposes;
- b) connection between the mouth or tongue of any person and any part of the genitalia of any other person;

A person who is guilty of unlawful sexual connection is liable on conviction –

- a) imprisonment for fourteen years; etc'

[14] In the case of ***Winston Joseph et al v The Queen***¹ the Eastern Caribbean Supreme Court in considering the range of sentences for cases of rape, and 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 in the principles which inform the discretion in sentencing***'.

[15] The court went on to set out a range of sentences which could be applied for cases of rape unlawful carnal knowledge and incest in Saint Lucia and listed the aggravating and mitigating

¹ Criminal Appeal Nos. 4,7, and 8

factors which should inform the sentencing judge when deciding what would be the appropriate sentence in a particular case.

[16] At paras 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.

[17] 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*

[18] 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.*

[19] In setting these guidelines the court accepted and adapted sentencing policies expressed in **Att. Gen.'s Reference (No. 1 of 1989) 90 Cr. App R. 141** with appropriate modifications to the statutory scheme in Saint Lucia aimed at combating the growing prevalence of these crimes Saint Lucia, while preserving the human rights of persons committing these offences as established by the Constitution.

[20] While these principles are still applicable today the range of sentences indicated may well be in need of reform as Saint Lucia and other jurisdictions in the Eastern Caribbean have reformed and updated their sexual offences legislation to deal with the growing incidence and the emergence of new forms of sexual offences.

[21] 16. 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**²as:

- 1) **Retribution** - in recognition that punishment is intended to reflect society's abhorrence of the offence and the offender;
- 2) **Deterrence**- to deter potential offenders and the offender himself from recidivism.
- 3) **Prevention** - aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and
- 4) **Rehabilitation** – aimed at assisting the offender to reform his ways so as to become a member of society.

[22] 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, the mitigating and aggravating factors. In determining an appropriate sentence the court will consider the peculiar circumstances of each

² SVG Criminal App No. 8 of 2008

case. In **DPP v Shaunlee Fahie**³ – George-Creque J.A stated that “*the sentence scale will slide up or down depending on the peculiar circumstances of each case.*”

THE SENTENCE

[23] In the instant case I find the aggravating factors far outweigh the mitigating factors. The mitigating factors are the early guilty plea and the fact that the accused has no previous conviction for an offence of this type or for an offence of violence. Also he is described by members of the community as a person who is not disruptive.

[24] In the instant case the court finds that there are several aggravating factors which must be taken into consideration in passing sentence. These are as follows:

- a) the tender age of the virtual complainant; - she was at an age where she was vulnerable and impressionable;
- b) the prisoner is the virtual complainant's brother and therefore there was a breach of trust;
- c) the disparity in ages; the prisoner was 31 years and the virtual complainant was 10 years;
- d) the prisoner perpetrated these acts upon the virtual complainant on several occasions;
- e) the fact that the prisoner blames the virtual complainant for his unlawful conduct;
- f) the virtual complainant has suffered and continues to suffer psychologically from the sexual assault;

[25] The court recognises the effect of sexual assault upon its victims especially minors. Indeed this was recognized by the legislature in framing legislation which sought to protect children who are rightly considered vulnerable and impressionable and unable to make responsible decisions at that age. In **R. v G**⁴ at para 44 Baroness Hale of Richmond had this to say in relation to unlawful sexual intercourse with children which in my view is applicable to all cases of sexual assault against children;

³ HCRAP2008/0003 at pg. 5

⁴ 2009] AC 92

“.. the offences of unlawful sexual intercourse (with children) were often colloquially known as ‘statutory rape’. This is because the law regards the attitude of the victim of this behaviour as irrelevant to the commission of the offence (although it may, of course be relevant to the appropriate sentence). Even if a child is fully capable of understanding and agreeing to such sexual activity, which may often be doubted, especially with a child under 13, the law says that makes no difference.”

[26] She further stated at para 45;

“...it is important to stress that the object is not only to protect children from predatory adult paedophiles but also to protect them from premature sexual activity of all kinds”

[27] The conduct of the prisoner towards the virtual complainant is reprehensible to say the least and is made even more egregious by the fact that he blames the virtual complainant who was 21 years his junior at the time. It is even more disturbing that the prisoner is the brother of the virtual complainant and someone whom she looked up to for protection when she was afraid in the night. Moreover the prisoner was placed in a position of trust when the virtual complainant's elder sister left her in his care. The prisoner did not engage in this conduct once but several times. How then can he justify his repeated abusive actions by blaming the virtual complainant? This is clearly an indication that the prisoner has not fully accepted responsibility for his actions or he simply does not understand the full import of his wrongdoing. This attitude is not only deplorable but it is dangerous. It begs the question whether the prisoner is truly remorseful or is just full of self -pity. This therefore indicates that the prisoner requires some time away from society to come to terms with his wrong doing, engage in self -reflection and rehabilitation to ensure that he does not re-offend.

[28] The effect of the prisoner's criminal acts against the virtual complainant cannot be trivialized. The social welfare report indicates the psychological effect upon the virtual complainant who has now become ostracised from her mother who also blames her for the prisoner's wrong doing. The virtual complainant has become the subject of ridicule amongst her peers at school as a result of this case. Apart from being fearful of the prisoner she feels bad and embarrassed and on a daily basis she is reminded of what happened to her. Although there has not been a psychological assessment of the virtual complainant it is fair to conclude, based on the social welfare report that

her psychological and social functioning will be seriously affected and she has already begun to exhibit some of these negative anti-social behaviours.

[29] In passing sentence the court will take into consideration the mitigating and aggravating factors and apply the principles of retribution, deterrence, prevention and rehabilitation. Given the prevalence of that type of offence in Dominica a strong message of deterrence and prevention must be sent out to the prisoner and potential offenders. It is also necessary that the principles of retribution and rehabilitation be realised by the sentence imposed. The punishment must be proportionate to the seriousness of the offence and the type of punishment meted out for offences of that nature.

[30] It should be noted that the sentencing guidelines established in *Winston Joseph et al* did not address the offence of unlawful sexual connection and therefore the range of sentences recommended may not apply to this type of offence. However the court is still required to embark on a balancing exercise. Taking into consideration the fact that the offences dealt with in **Winston Joseph et al** are more serious in terms of the sexual act and the penalty imposed it may be argued that it is logical to start at a lower range than *Winston Joseph*. However I hasten to add that in **Winston Joseph** the court felt that there were no aggravating factors and I daresay the range of sentencing in **Winston Joseph** may have outlived its purpose as the prevalence of sexual offences has not diminished but continues to grow. It should also be noted that the effects of the offence of unlawful sexual connection is no less traumatic on the victim than rape and other more penetrative acts of sexual assault.

[31] Accordingly in light of the type of offence and the penalty stipulated a custodial sentence is appropriate in this case. In the case of **R v Elwin Lansiquot**⁵ a case from St. Lucia in which there were aggravating factors a benchmark of ten years was set for unlawful sexual connection where the prisoner pleaded guilty. In the instant case this offence carries a maximum penalty of fourteen years imprisonment. The prisoner having entered a guilty plea at a reasonably early opportunity will be given a one third discount; the only mitigating factor going for the prisoner is that he has no

⁵ SLUHCR2010/0012

previous conviction of that nature. As indicated before the aggravating factors far outweigh the mitigating factors. There is a need for the victim and society to be protected from the prisoner. A strong message must be sent to the prisoner and would be offenders that this type of crime will not be tolerated or treated lightly by the justice system. Given the aggravating factors in this case the prisoner is sentenced to 7 years imprisonment. It is my hope that he will engage in some form of reflection and rehabilitation so that he may be able to re-integrate into society upon his release.

.....
Victoria Charles-Clarke
High Court Judge