

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CRIMINAL CASE NO. SLUCRD2012/1287

BETWEEN:

THE QUEEN

Claimant

and

BARRY NELSON

Defendant

Appearances:

Ms. Tamara Foster for the Claimant
Mr. Ferguson John for the Defendant

2016: October 14.

JUDGMENT ON SENTENCING

- [1] **CUMBERBATCH, J.:** The defendant an unemployed 27 year old man was convicted after a jury trial for the offences of unlawful sexual connection and indecent assault contrary to sections 124(1)(c) (1) and 130(1)(a) of the Criminal Code. Both offences were committed between the months of May and June 2012.

THE FACTS

- [2] The virtual complainant was at the time of the commission of these offences an 8 year old schoolgirl born on the 1st February 2004. The defendant aged 23 at the time of the commission of the offences was a frequent visitor to her home and was her mother's friend. He regularly played

with her and her siblings and gained the trust of her mother who allowed him to be with the virtual complainant unsupervised and collect her from school at times.

- [3] During the month of May 2012 the defendant was at the virtual complainant's home playing a tickling game with her. He then slid her shirt off her shoulder and sucked one of her breasts. He also pushed his finger in her vagina. On another occasion he inserted his finger in the virtual complainant's vagina and sucked her vagina. He also had the virtual complainant suck his penis whilst she was a visitor at his home.

THE PRE-SENTENCE REPORT

- [4] After the allocutus the court ordered a pre-sentence report be prepared. This document revealed that the defendant was raised in a single parent family. He is described by community residents as quiet jovial and respectful. He is not known to be a nuisance to the community. His education was limited to the Primary School level and is described as being academically challenged. He was unemployed prior to his arrest and at one time worked in the construction industry.
- [5] One resident however expressed her concern at the relationship with the defendant and the virtual complainant. She was usually seen sitting between his legs and was seen being carried by him on his back or on his bicycle. I shall refer to the contents of the pre-sentence report later in this judgment.

SUBMISSIONS

- [6] In his written submissions defence counsel Mr. John submitted that his client abused the position of trust he held with the virtual complainant and her mother. He further contended that the defendant expressed remorse for his actions and eventually took full responsibility therefor.
- [7] Mr. John went on to submit that the defendant's rehabilitation should be the overriding consideration. He also addressed the court on the question of delay and the time his client spent on remand whilst awaiting his trial.

- [8] Counsel contends that whilst the aggravating factors might well on their own invite a custodial sentence he stressed the significance of the mitigating factors. He submits that apart from one conviction for an unrelated offence the defendant has not been in trouble with the law.
- [9] Crown counsel addressed the court on the principles of sentencing. She urged the court to take into account the prevalence of the offence in the region hence the court should by the sentence it imposes send a strong message to the society to respect and protect young females from adult males.
- [10] Mrs. Calderon contends that the defendant should be rehabilitated to address his predilection for deviant sexual practices with minor girls. She went on to state that the aggravating factors outweigh the mitigating ones and a sentence commensurate with the gravity of the offence should be imposed.

THE LAW

- [11] I will consider and apply the classical principles of sentencing to the facts and circumstances of the case at bar.

RETRIBUTION

- [12] The defendant committed heinous sexual offences against an 8 year old girl. In so doing he abused her trust and that of her mother. Moreover he took advantage of her immaturity and innocence. Indeed as disclosed in the victim impact statement of the pre-sentence report the virtual complainant blamed herself for what happened to her. She was also perplexed at her mother's disbelief of her complaints when she reported what the defendant did to her.
- [13] The defendant's sexual abuse of the victim was not an isolated incident but consisted of repeated acts over a period of time. This court is inundated with cases of a similar manner within this jurisdiction and is well aware of its prevalence.
- [14] The court must impose a deserved sentence commensurate with the gravity of this offence which is quite prevalent in this jurisdiction.

DETERRENCE

- [15] This principle is applicable generally to the public at large and specifically to the def. Defence counsel has urged the court to take into account the remorse expressed and by so doing exercise leniency with his client. Whilst the court is impressed by his exhortations to reform himself the bald facts disclose that he had developed a close relationship with the virtual complainant and continuously sexually abused her.
- [16] The court is also aware as stated aforesaid of the prevalence of offences of a similar nature where victims of the age of the virtual complainant have been targeted for sexual abuse by adult males of this jurisdiction. The court must of necessity impose a suitable sentence to deter this defendant and others from sexually abusing the little girls of this nation.

PREVENTION

- [17] This defendant though a first offender for this kind of offence he is no stranger to the court. The previous offence for which he was convicted was committed some 11 years ago and may well be considered spent. I will say no more about that.
- [18] I find however his predilection for sexual acts with persons of the age of the victim reeks of pedophilia. Indeed the probation officer opines at page 9 of the report thus;
- "Based on the results of the investigation the pattern of interaction of the defendant with the virtual complainant is of significant concern to the writer because it appears to be indicative of someone who is predisposed to recommit an offence of this nature unless successful rehabilitation has been achieved."*
- [19] Thus in the circumstances the defendant's sentence must include an aggressive program of rehabilitation to cause him to eschew the urge to indulge in sexual activities with little girls.

REHABILITATION

- [20] The defendant has accepted responsibility for what he has done and states in the Pre-Sentence Report he hopes he can get out of prison and start a new life. He went on to state he hopes the virtual complainant can forgive him for what he did and hopes he can regain the trust from persons in the community. Though his expressions of remorse were not as stated in the Pre-Sentence

Report readily forthcoming the court accepts this as a positive indication of his amenability to rehabilitation.

[21] The court holds the view that the defendant's rehabilitation is of primary importance as unless he is weaned off of his predilection for intimacy with little girls he will reoffend in similar nature upon his reintegration to the society. He also needs to learn an employable skill.

[22] The aggravating and mitigating factors of the case at bar are as follows;

AGGRAVATING FACTORS

1. The offence was repeated on different occasions,
2. The psychological effect of these offences on the virtual complainant as is evidenced in the victim impact statement of the Pre-Sentence Report,
3. The defendant's breach of trust,
4. The wide disparity of ages between the defendant and the virtual complainant,
5. The tender age of the VC who by virtue thereof is regarded as a vulnerable person.

MITIGATING FACTORS

1. The defendant has taken responsibility for his actions and expressed remorse,
2. The delay in trying this matter.

[23] I have considered and balanced the aggravating and mitigating factors in light of the facts and circumstances of this case and find that the aggravating factors outweigh the mitigating ones.

SENTENCE

[24] This defendant is convicted for offences contrary to sections 124(1)(c) (i) and 130 (1) (a) of the Criminal Code. The maximum sentences for these offences are 14 years imprisonment and 15 years imprisonment respectively. This is indicative of the seriousness with which Parliament views acts of this nature.

[25] The evidence disclosed that the defendant took advantage of the trust placed in him by the virtual complainant and her mother to abuse the virtual complainant. He was also bold enough to do so in her home whilst her mother was at home and even persuaded her to meet him at his home where further acts of sexual abuse occurred. Had it not been for the observations of her school teachers

the acts of abuse against the virtual complainant might have continued unabated with more disastrous consequences.

- [26] Defence counsel has urged the court to impose a light sentence taking into account the defendant's remorse and personal characteristics. In this regard I find the dictum of **Henry LJ in R v Loff James Lennon (1998) EWCA CRIM 1216** to be instructive. Though Henry L J was adjudicating in an offence of indecent assault I find the principles applied therein to be relevant and applicable to the case at bar;

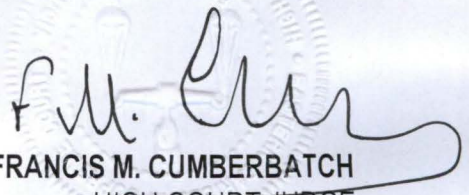
"It is not the purpose of the judgment to seek to lay down guidelines for sentencing in cases of indecent assault. It is never easy to sentence in such cases. The circumstances of each case will vary greatly....What the judge must do, as I see it, is to tailor the sentence to the particular facts of the case before the court. In most cases, the personal circumstances of the offender would normally take second place behind the plain duty of the court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may have been the case in former years when the position of the victim may not have been so clearly focused in the public eye".(underscoring mine)."

- [27] I find the dictum of Henry LJ aforesaid to be helpful in determining an appropriate sentence in the case at bar. The prevalence of the offence in this jurisdiction and the defendant's acts of pedophilia are compelling reasons for the imposition of a severe sentence to protect the victims of sexual abuse and give effect to the intentions of Parliament.

- [28] The court is obliged however to consider the delay in bringing this case to trial. This defendant though granted bail has been unable to reach same. As a result he has been in custody from the time he was charged by the police in October 2012. This trial was relatively short and was uncomplicated by complex issues of law and evidence. Moreover the delay cannot be attributed to the defence. I find however that notwithstanding the delay and consequential breach of the defendant's constitutional rights society demands that an offence of this gravity must be met with a custodial sentence. Further the aggravating factors outweigh the mitigating ones.

- [29] I find taking into consideration all the circumstances of this case that a reasonable starting point would be 7 years imprisonment for each offence. I will however deduct 1 year for the delay.

[30] Accordingly the defendant is sentenced to 6 years imprisonment on each offence. Sentence shall run concurrently. He shall be credited for all time spent on remand whilst awaiting his trial. He shall receive the necessary counseling for his pedophilia.



FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE

