

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CRIMINAL CASE NO. 24 OF 2015

BETWEEN:

THE STATE

V

KALID NANTHAN

Appearances:

Ms Sherma Dalrymple, for the State

Defendant in person.

2015: October 23

JUDGMENT ON SENTENCING

[1] **THOMAS, J (Ag):** Before the court for sentencing is Kalid Nanthan, esquire as he was found guilty of unlawful sexual intercourse with a girl who at the time of the offence was eleven years and six months of age. The statutory provision contravened is section 7 (1) of the **Sexual Offences Act, 1998**.

[2] At the end of the trial the court ordered a Social Inquiry to be prepared by a Probation Officer, Welfare Department. The author of such a report is Ms. Delia Giddings Steadman. Her conclusion reads thus:

“Kalid Nanthan was found guilty for the Offence of Unlawful Sexual Intercourse. It should be noted that offence was committed on a minor who was eleven years at the time. This is an age where the victim is very trusting and may not realize that the abuse is not their fault. The victims may feel embarrassed, shameful and powerless. These feelings were expressed by the victim. What’s more, it was highlighted during the investigation, that Kalid was aware of the victim’s age during the time he sexually assaulted her and that the victim is Kalid’s maternal relative; her father is Kalid’s uncle.

In the circumstances, Kalid took advantage of the victim's vulnerability and trustworthiness. One therefore cannot trivialize the wrongfulness of Kalid's actions.

One should note to, that the effect of sexual abuse by a family member is considered to be even more painful, on the basis that the victim is familiar with the abuser which maybe compound by feeling of betrayal and the victims extended family flooded with shame, blame and guilt.

In addition, Kalid expressed remorse for his action, and expressed that he feels ashamed and in own words stated "I should have known better, wrong is wrong" and claimed that he is willing to pay the price for his action. Kalid is also asking the Honorable Court for leniency. It was also noted that the Kalid is a first time offender.

Sentiments expressed by those interviewed reveal that Kalid's action is unforgiveable and that may be a threat to the wider society. Kalid was also described as one who has a pedophiliac personality; on the basis that in the past there were allegations of him sexually assaulting minors. However, the matters were never pursued because it is alleged that the victims were immediate family members. Furthermore, due consideration could be given to the views expressed of this report particularly as it relates to sentencing, when handing down sentence in this matter. It is felt that Kalid should be given a custodial sentence. Bearing in mind the offence for which he is charged and the age of the victim."

Relevant considerations

- [3] The court must now give due consideration to certain variables as part of the sentencing process. These are; the nature of the offence, the manner of execution, the ages of the defendant and the victim, the maximum penalty under the law for the offence, the aggravating factors, the mitigating factors, the plea in mitigation and the Social Inquiry Report.

Nature of the Offence

- [4] The offence is unlawful sexual intercourse which is so characterized by Parliament because in law a child cannot consent to a number of things, including sex. Thus, the logic is that sex with a minor is simply unlawful.

Manner of execution

- [5] The unlawful sex took place at the defendant's home where he lives with his girlfriend and children. In order to get the victim, his cousin, to come to his house, the defendant sought the permission of the victim's father by saying he needed her to go to the shop as he and the shopkeeper were not on good terms. Another reason for help was to mix juice. In all instances these were guises to get the victim in his house to throw

her on the bed and have sex with her. This is underscored by the victim's evidence that money to go to the shop or ingredients for the juice were never a reality.

Ages of the defendant and victim

- [6] The defendant at the time of the offence was between 23 to 24 years. He is now 27 years old. The victim was 11 years 6 months at the material time.

Maximum penalty under the law

- [7] The Parliament of the Commonwealth of Dominica has passed a statute, the **Sexual Offences Act 1998**, which prescribed the maximum penalty for unlawful sexual intercourse under the said Act to be 25 years imprisonment.

Principles of sentencing

- [8] In the celebrated cases of R v Sergeant¹ Lord Justice Lawton identified the principles of sentencing to be retribution, deterrence, rehabilitation and protection. These principles will be placed in context at a later stage.

Aggravating Factors

- [9] The court identifies the following as aggravating factors: the age of the victim, the victim's evidence that the defendant has sex with her more than 5 times, the victim's evidence is that on one occasion which the defendant was having sex with her he said repeatedly "xxxx it coming," the breach of trust his uncle, the victim's father placed in him, and lives with his girlfriend and their offspring's.

Mitigating factors

- [10] The mitigating factor rests on the fact that the defendant has no previous convictions.

¹ [1974]60 CR APP R. 74

Judicial dicta concerning unlawful sexual intercourse and rape

[11] Shorn of legal technicalities, unlawful sexual is rape of a child. And judges over time have recorded their sentiments concerning this crime.

[12] In the case of **The Queen v Franklyn Thuggins**², Madam Justice Hariprashad Charles had this to say:

“Short of homicide it [rape] and I should add unlawful sexual intercourse with a girl under the age of thirteen, is the ultimate violation of self. It is a violent crime because it normally involves force, or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. Along with other forms of sexual assault, it belongs to that class of indignities against the person that cannot ever be fully righted and that diminishes all humanity.”

[13] In case of **R v Puru** one of the judges³ added the following:

“Rape always involves a disgraceful exercise of physical power over the victim and degradation of her human personality.

But there are some cases having particularly aggravating features. There are cases involving very young girls or elderly woman.

There are deplorable examples of gang activity. There are instances of the victim being snatched of the street or invaded in the privacy of her own home. And there are cases involving serious physical violence or acts of sexual perversions and other forms of degradation so clear distinctions must inevitably be drawn to take care of bad and finally worst kinds of cases,”

Social Inquiry Report

[14] The Social Inquiry Report is commendable in that the issues were placed both in the context of the victim, her family and the wider society. Again, the social consequences are highlighted.

The sentencing precedents

[15] In the British Virgin Islands case of **The Queen v Bevern Smith**⁴. The defendant was sentenced to 12 years imprisonment on two counts of unlawful sexual intercourse with a girl under 13 years of age. Also from the same jurisdiction, **The Queen v Shem Jackson**⁵, the defendant was found guilty on 3 counts of unlawful guilty under 13 years of age and was sentenced to 5 years imprisonment on each count to run concurrently.

² BVIHCR 2009/0001 Written judgment delivered on 13th July 2010

³[1985] LRC (Crim) 817 per Woodhouse P.

⁴ Criminal Case No. 13 of 2000

⁵ Criminal Case of 2004

And in *The Queen v Andre Penn*⁶ the defendant was sentenced to 8 years imprisonment on two counts of unlawful sexual intercourse which were to run concurrently. The child involved in that case was aged between 9 and 12 years.

[16] In the cases of Dominica the sentenced range from 5 years⁷, 25⁸ years have been imposed between 2010 to date.

[17] In one case two sentences of 25 years were imposed to run concurrently. That case the defendant had the following antecedents: he was sentenced to death by hanging for the murder of a man and his wife after he had raped the wife. The sentence of death was commuted to 10 years imprisonment by Mercy Commuted. Upon release the defendant raped a minor; his niece, and was sentenced to 10 years imprisonment and upon release he sentenced to a further 3 years imprisonment for escaping lawful custody. This was followed by 9 months for battery. Finally, the school child whom he raped was nine years old and she testified that he had sex with her many times in her vagina and 4 times in her anus.

Sentencing matrix

[18] By definition the actions of Kalid Nanthan are abhorrent. But the court must go further since according to the ruling in the **Winston Joseph case**; at this stage the court must inter alia examine the aggravating and mitigating factors that surround the defendant.

[19] In terms of mitigating factor this resets on the defendant's clean record. But as noted before, the aggravating factors are formidable. They are as follows: "the age of the victim being 11 years and 6 months at the relevant times; the victim is the defendant's cousin who lived next door with her father, the defendant according to the victim had sex with her more than five times, the victim's further evidence is that on one occasion when he was having sex with her he was saying repeatedly "xxxx it coming," the defendant had to resort to lies and deception in order to persuade the victim's father to send his daughter to mix juice and to run errands at the shop because he did not get along with the shopkeeper; the ingredients for the juice and the money to run the errands were never forthcoming and at the material time the defendant lived with his girlfriend.

⁶ Criminal Case No. 31 of 2009. Convictions subsequently overturned by the Court of Appeal on 11th January 2012

⁷ *The State v Edmund Sully*, BVI

⁸ *The State v Fagan Jno. Hope* Case No. 37/2014 the defendant served 10 years for murder, 10 years for unlawful sexual intercourse, 3 years for escaping lawful custody, plus 9 months for battery Finally, he raped a nine year old school child who testified that he had sex with her many times in her vagina and 4 times in her anus for which he was sentenced to 25 years imprisonment.

[20] It must be noted that the aggravating factors include two identified in The **Winson Joseph case**. These are the very young age of the victim and the repeated acts of sexual intercourse.

[21] Given the foregoing, there is absolutely no contest between mitigating factors and aggravating factors and the evidence as a whole presents a person who is selfish, greedy, cruel, a liar of the highest order, who shows no regard of respect for family, a person without a modicum of common sense or decency, a person who in his wisdom determined that he could commit a crime repeatedly, with impunity. The defendant has now left a school child and her family to deal with the atrocity of sex between two family members, one of whom is 11 years old. In the wider context, Dominica again suffers and youths are given heavy psychological burdens which cannot help the future development of Dominica.

[22] And the child's addiction to sex at such a young age cannot be ruled out. This well illustrated by a recent Dominica case, in which part of the evidence is that the nine year old victim got out of her bed at 6:00 am to go to meet the defendant who lived next door.

The sentence

[23] The rule established in the **Desmond Baptiste**⁹ case is that where the girl is not too far from her 13th birthday and there case no aggravating factors the minimum sentence must start at 8 years imprisonment and going upwards. Here the victim was 11 and there are many aggravating factors. Added to that, the sentencing principles of retribution, deterrence, and protection become paramount for the sake of society. In all circumstances and the prior sentence in this court, the defendant is sentenced to 15 years imprisonment.

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Errol L. Thomas
High Court Judge

⁹ Supra