

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

**SAINT LUCIA
CASE NO. SLUHRD2010/0010**

BETWEEN

THE QUEEN

vs.

EZRA ISIDORE

Appearances:

The Defendant in Person

Ms. Tamara Foster-Calderon Counsel for the Crown

2015: 23 April, 4 May, July 15, 17

Criminal Law - Sentencing – Unlawful Sexual Intercourse with a Girl Over the age of 12 and Under the Age of 16 - Application of Principles – Serious Offence –Custodial Sentence Appropriate – Prevalence – Higher Starting Point - General Ranges of Sentence – Maximum Statutory Penalty – Starting Point of 7 years – Aggravation – Virtual Complainant Autistic - Mitigation - First Time Offender - Benchmark 7½ years – Reduction for Guilty Plea - Delay of nearly 8 years in Proceedings Amounting to Breach of Constitutional Reasonable Time Guarantee – Delay Influencing Sentence by Reduction of 2 years – Custodial Sentence of 3 years Appropriate Sentence.

DECISION

[1] **RAMDHANI J. (Ag.)** By an indictment filed on the 5th March 2015, the defendant Ezra Isidore, was indicted for the offence of rape and the alternative count of unlawful sexual intercourse with a minor arising from an incident which allegedly occurred between the 10th and the 28th February 2007. On the 23rd April 2015, he was arraigned on this indictment and he pleaded not guilty to the offence of rape but guilty the second count of unlawful

sexual intercourse with a girl above the age of 13 and below the age of 16 years. The Crown then withdrew the first count of rape.

The Basis of the Plea

- [2] The offence was committed between the 10th and the 28th February 2007 at Bar Denis in the Quarter of Chausee. The virtual complainant was a 13 years old schoolgirl living in the area. On a day during the relevant period, she was on her way to buy groceries for her mother when she passed the defendant's home. She heard someone calling her and she realized it was the defendant. She stopped and went to him. He was standing by the door of his home. He asked her name, her age and about the school she attended. She told him her name and told him that she was 13 years old. She also told him the name of her school and that she was in Form one.
- [3] It was the Crown's case that he then told her to come, and she told him 'no'. He then grabbed her hand and pulled her into his living room. He then asked her for sexual intercourse and she replied and told him 'no'. He then pulled her into his bedroom and took her to a double bunk bed and pushed down on the lower bunk. He took her clothes notwithstanding her struggles to resist him. He then took off his clothes and has sex with her holding her hands and barring her mouth to prevent her from screaming.
- [4] She then heard her mother's voice calling her name. The defendant stopped and told her to go home. As she got up she saw blood coming from her vagina. She put on her clothes and ran home. She met her mother standing outside. She had the groceries and gave it to her mother. She went inside the bathroom and saw her panties were bloodstained. She said that she did not tell her mother as she was afraid the latter would beat her.
- [5] She did tell one Wendy, a friend of hers. She showed Wendy the house and Wendy told her the name of the man who lived there. In May 2007, her mother confronted her about a report she had heard about the defendant. It was only then that the virtual complainant told

her mother what had happened. A report was made to the police station and the virtual complainant was medically examined. The defendant was then arrested and charged.

[6] There was his version on the facts that he was home playing video games with several friends when the virtual complainant came over to his house. She had indicated that she was going to return. His friends left and she returned and came into his house and then followed him into the bedroom. She unzipped his pants, held his penis. They then had sex. After the virtual complainant left when she heard her mother calling for her.

[7] The Crown's stance in this matter of accepting the plea on the lesser count is instructive. To the express enquiry from the court the Crown advised that they were not challenging the defendant's version. This court will proceed on that basis.

Victim Impact Statement

[8] The court was not provided with any information relating to the impact of this offence on the victim as the court was informed that despite all efforts, the Crown was unable to locate her.

The Defendant – Pre Sentence Report

[9] The defendant, Ezra Isadore, is presented to this court as a 29 years old Rastafarian single man who is a mason by profession.

[10] He is stated to be a primary school drop out and today is considered semi literate. From his early days he worked with his uncle in a mechanic shop but eventually left to join the construction industry where he worked prior to his remand as a mason.

[11] Community members have seen this defendant change from a quiet and reserved man to an aggressive and retaliatory man after he began socializing in the 'ghetto'. He started using marijuana and began gambling and would often engage on physical altercations.

[12] He has been on remand since the 10th August 2012. He has gotten into a physical altercation with another inmate at the facility, but is nonetheless regarded as a good inmate.

[13] He has expressed some remorse for this offence. Today he states that he should have known better and should not have gotten himself involved with the virtual complainant.

Maximum Sentence and Relevant Principles

[14] Section 127(1) of the Criminal Code, Cap 3.01 of the Revised Laws of St. Lucia prescribes a maximum penalty of 15 years for the commission of this offence. The court has a wide discretion to impose a sentence having regard to this maximum.

[15] The Code itself provides some statutory guidance to the court in arriving at the appropriate sentence in any given matter. First the court is reminded that no custodial sentence is to be imposed unless the offence is so serious that it warrants such a sentence, or the offence is of a sexual or violent nature and only a custodial sentence would adequately protect the public from harm from the offender.

[16] The court must also give due regard to all sentencing guideline and must consider that rehabilitation is one of the aims of sentencing. Other aims of sentencing are well established and the common law and experience of the courts have shown that the court must have those classic principles of sentencing in mind. A court must in applying these principles ask whether the instant offence is one that requires denunciation.

[17] In any given case each of these principles will have varying degree of influence on the eventual determination of the appropriate sentence. This would be so, as for example in some cases, a court may consider that having regard to the particular offender, the class

of offence, or the manner of its commission, substantial elements of deterrence and punishment should be the primary consideration whilst the others given less weight.¹

- [18] I am also guided that in getting to an appropriate sentence, I am to consider both the personal mitigating factors of the defendant and the aggravating features associated with the offence. This is to be an evaluative exercise which, taken together with a measured and balanced application of the relevant principles, will guide a court to fashion an appropriate sentence fitting the crime and the offender. It is well established that the weighing of these factors may result in a greater or lesser sentence in any given case. The approach is not to be a mechanistic one, but the court must consider all the circumstances in the round and impose a sentence that is suitable in the any given case.

Guidelines and Yardstick Cases – Reflection of the Seriousness of the Offence

- [19] In most cases, offences of a sexual nature will attract a custodial sentence. Society, through its Parliamentary voice, in imposing a serious maximum sentence for this offence, has expressed its abhorrence for the corruption of minor girls, its recognition of the negative consequences of these acts, and its censure of these offenders. These offences almost inevitably have life long personal consequences for these girls and their families and in turn wider social and economic consequences for society as a whole. Young girls are in need of protection both from themselves and from boys and men who will prey on them.
- [20] There is the much-quoted passage from **R v Roberts and related appeal** - [1982] 1 All ER 609 as to why a custodial sentence is appropriate for serious sexual offences. Though Lord Lane CJ was speaking in the context of rape, it is judicially fitting especially in the context of the consequences of sexual intercourse with minors in our Caribbean societies that our courts have considered it relevant for these statutory sexual offences. He stated:

“Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. ... A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to

¹ See for example *R. v Foxley (Gordon)* (1995) 16 Cr. App. R.(S.) 879

emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances-. That is a trite observation, but these in cases of rape vary widely from case to case."

[21] In the context of existing guidelines, the court has to examine the instant offence and the offender bearing in mind the three broad dimensions relevant to assessing the gravity of any sexual offence. First, the court has to consider the degree of harm to the victim. Second, the court has to consider the level of culpability of the offender and third, the level of the risk that the offender poses to society.² This is the underlying rationale for examining the aggravating and mitigating features of the offence as well as the personal mitigating features of the offender. It is also the rationale for having regard to the Victim Impact Statement that should always be requested in these kinds of case.

[22] I now turn to the cases.

[23] In **Winston Joseph v R**, the Court of Appeal on a charge of unlawful carnal knowledge with a girl over 13 and under 16 years of age, an offence which carried a maximum of 15 years, suggested that a sentence between 3 years and 7 years seems appropriate for the first offence. The court of Appeal made the point clearly that the younger the girl, the more serious the crime.

[24] In **R v Clive Mcvane** Criminal Case No. 215 of 2010, the defendant pleaded guilty to unlawful sexual intercourse with his step daughter, a girl aged 14 year and impregnated her. She gave birth to a baby boy. There was considerable breach of trust in this case and there was an age disparity of 30 years between the defendant and the virtual complainant. It was an aggravating feature that the defendant had had sex with the virtual complainant on numerous occasions.³ The court found that he had demonstrated an uninhibited preference for sexual intercourse with minors. He was sentenced to 7 years imprisonment.

² R v Millberry - [2002] All ER (D) 99 (Dec) speaking to the views of the UK Sentencing Advisory Panel Guidelines for Rape.

³ Strangely he was not charged or found guilty of any of these other offences.

[25] The case of **R v Kevin Barthelmy** Criminal Case No. 78 of 201, provides a useful contrast. The defendant, a 20 years old man, had a relationship with a girl under the age of 16, and about February 2006, impregnated her. She had the baby. Apart from the prevalence of the offence, the court found that it brought a premature end of the virtual complainant's schooling, and that she had also suffered some psychological trauma. On the mitigating side, Even though he pleaded guilty to the offence in 2011, he had at first indicted that she had told him that she was 16 years old and he had believed her. His plea eschewing his opportunity to rely on the statutory defence was regarded as an attempt to spare her of a trial. He had positive good character and was taking care of the child above the required standard and had expressed strong remorse. The court also considered his young age when the offence was committed and the delay and found that this was a good case to depart from the guidelines set out in Winston Joseph and imposed a probation order on the defendant.

[26] **R v Dwain Lamas Williams** Criminal Case No. 1300 of 2009 has a curious factual background to the offence. In this case the defendant had been involved with the 14 years old virtual complainant for some time before the incident and had actually been living with her at her grandmother's house. She had terminated the relationship because of his abuse and one day in June 2009, she left home in the afternoon to go to a nearby bakery. On her way the defendant accosted her and threatened her with a homemade gun and told her that he had a warrant for her arrest. He took her to a shack and has sexual intercourse with her twice releasing her until 2 a.m. the next day. The court found that the defendant though possessing some trade skill was a man prone to violence and obscene outbursts. He was a user of marijuana and was seen as one who could be influenced to negative conduct. He pleaded to one count of unlawful sexual intercourse. The court considered that a benchmark of 10 years was suitable in this case and reduced it to 6 years for his guilty plea.

[27] In **R v Andrew Valcent** Criminal Case No. 1184 of 2011, the defendant was caught red handed having sexual intercourse with his housekeeper's⁴ 14 years old daughter. The

⁴ Before the incident, he had once been intimate with the mother.

daughter was accustomed to coming to the defendant's home to assist her mother with the chores. It was discovered that the defendant had had sex with her on three previous occasions. He pleaded guilty to four counts of unlawful sexual intercourse with a girl above the age of 12 years and below the age of 16 years. There were several aggravating features in the case. First the court found that there was a breach of trust as the girl looked on him as a father, and he abused her coming into his home to clean to have sex with her. She was also psychologically affected by the incident. It was also an aggravation that the offences were frequently repeated. He also groomed the child to commit these offences and there was an age disparity of 23 years between the defendant and the virtual complainant. On the mitigating side he was a man without previous convictions. He expressed considerable remorse and the court considered that he was prepared to face the consequences of his actions. The court considered that a benchmark of 10 years was appropriate and deducted 3 years for the guilty plea and 1 year for the previous clean record. He was sentenced to 6 years imprisonment.

[28] The cases have usefully identified a number of aggravating and mitigating features that have been identified for offences of a sexual nature.⁵

[29] This court is mindful of the caution issued by **Millberry v R** [2002] EWCA Crim. 2091 and our Court of Appeal in **Roger Naitram v R** [2010] ECSCJ No. 330 about following guidelines and applying a mechanistic approach lest they produce inappropriate and unjust sentences. As the Lord Chief Justice said in **Milberry**:

" It is essential that, having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances... Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge."

[30] Baptiste J.A. of the Court of Appeal in **Winston Joseph** approved the caution and in turn added:

⁵ See **Winston Joseph v R and Other Appeals** Criminal Appeals Nos. 4, 8 and 7 of 2000

“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 the guidelines if adherence would result in an unjust sentence. The existence of a particularly 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 dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing.”

[31] I now turn to consider the aggravating and mitigating features of the instant offence.

The Aggravating Factors

[32] The guidelines has listed the five aggravating factors in this case, namely, (1) the seriousness of the offence; (2) the prevalence of the offence; (3) the physical and psychological effect on the virtual complainant; (4) the virtual complainant is autistic; and the defendant's abuse of marijuana.

[33] It seems that I must lay to rest what appears to be a popular misconception on the part of the Crown in this jurisdiction. The fact that the offence is to be regarded as a serious offence is not an aggravating feature that may serve to increase the notional starting point sentence. The seriousness of the offence is the reason why parliament has fixed a 15-year maximum term of imprisonment. This is the significant reason why punishment for these offences will be presumptively custodial.

[34] The prevalence of an offence does not operate like the usual aggravating factors in a case to drive the starting point sentence upwards. What it does is that it increases the starting point sentence as a method of addressing the prevalence.

[35] In this case, I do accept that the fact that this virtual complainant is autistic can be regarded as aggravating this offence.

- [36] I have no evidence before me that this virtual complainant however, has suffered physical or psychological harm. Am I to assume this? The virtual complainant today cannot be found. This offence is one in which the victim by law will be someone under the age of 13 years. This victim was 12 year old at the time. It is assumed, and rightfully so, in the offence that young girls will be affected by this offence. That, however, is what makes it a serious offence. In the absence of any real evidence of actual harm over and what may be inherent in the offence, I cannot use the guidelines' view to increase any sentence.

The Mitigating Features

- [37] For all intents and purpose, the defendant is to be regarded as a first time offender. I note that he has one previous conviction recorded in 2006 when he was found guilty of being in possession of the dangerous weapon. He was fined \$200 with an alternative of four weeks imprisonment. By law I am not to give any regard to this offence for the purpose of this exercise.
- [38] I also note that he has had some positive views from community members and that had it not been for the obvious peer pressure it is quite possible that even his slight aggressive tendencies might have remained dormant.
- [39] I have been asked to treat his use of marijuana as an aggravating feature. However, there is no evidence that he was ever affected by the use in the commission of this offence. There is no evidence as to how much marijuana he used on a daily basis or if in fact he even used marijuana on a daily basis. It is all well and good to throw that to the court and say that that is an aggravating feature. This, however, is an important matter and the Crown would do well to present the court with more information by way of evidence on this issues. If at all, I note that he has stopped using the substance and that inures to this benefit.

The Guilty Plea

[40] I have fixed the benchmark sentence in this matter as a sentence of 7½ years imprisonment. This man has pleaded guilty at the earliest possible opportunity and has saved the resources of the court. He has also assisted the prosecution tremendously as he could have waited on them to prove their case. The fact that the virtual complainant cannot be located, at least at this time, may have operated to cause some difficulties in this matter.

[41] In all the circumstances I will give him his full discount on this matter. For his early guilty plea I will deduct 2 ½ years from the sentence.

[42] There is one other matter I must consider. That is the issue of delay on these proceedings.

Delay – Breach of the Reasonable Time Requirement

[43] The defendant himself has not raised the point of delay and what effect it may have on the final sentence, but as I noted in another matter, I obligated to consider it as part of this exercise.⁶

[44] Section 8(1) of the St. Lucia Constitution states:

“If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

[45] There has hardly been any doubt that the fair trial provision requires that a person charged with a criminal offence be tried within a reasonable time. Even under the common law, it was regarded that a man ought to be tried within a reasonable time.

[46] The cases have shown that whether this as a separate guarantee or merely an element of the of the fair trial provision once it has been shown that that there has been an

⁶ *Rummun v State of Mauritius* [2013] 1 WLR 598 where Lord Kerr of Tonaghmore JSC on behalf of the Board stated: “...it is the duty of the sentencing court, whether or not the matter has been raised on behalf of a defendant or appellant, to examine the possibility of a breach of that person’s constitutional rights in order to decide whether any such breach should have an effect on the disposal of the case

unreasonable delay in commencing or completing the proceedings that guarantee or element would be breached. In assessing whether the period may be considered unreasonable it is useful to have regard to the period of the alleged delay and all of the circumstances of the case. As was stated in **R v Lord Advocate and Another** [2003] 2 LRC 51:

*“The threshold which has to be crossed in order that a delay may be categorised as unreasonable is a high one. The period by itself must give rise to real concern. The complexity of the case, the conduct of the accused and the manner in which the case has been handled by the administrative and judicial authorities must then be assessed. An unreasonable time is one which is excessive, inordinate and unacceptable.”*⁷

[47] The Crown has accepted in this matter that the delay has been substantial and that it rests primarily on the shoulders of the administrative and judicial authorities. This man could not have been tried earlier simply because the State had not allocated sufficient resources to try criminal cases in St. Lucia. For years there has been a single criminal court in this jurisdiction.⁸ It has been eight years since this offence was committed. This was no complex matter and there were only a handful of witnesses. It also involved a minor child and it was a sexual offence one going to the heart of moral issues in this society. Yet this matter was not given the priority it deserved. This is a sexual offence relating to a child. The child has become an adult and there is a real inference to be drawn that the adult victim has gotten fed up with the justice in this case.

[48] It is an irony that the defendant more than anyone else is the one who saw fit to bring this to an end. He too must have gotten fed up. His attitude is of course relevant to the selection to the eventual sentence, but it is more likely in this case he simply passively acquiesced in the various adjournments.⁹ This has really been a breach of his entitlement

⁷ See also *Frank Gibson v the Attorney General* [2010] CCH. 3 an appeal from the Court of Appeal of Barbados to the Caribbean Court of Justice

⁸ A second criminal court, this court was only installed in September 2014. the point was made in *Dyer v Watson* [2004] 1 AC 379 para. 55: “The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured.”

⁹ See *Rummun v State of Mauritius* [2013] UKPC 6; *Boolell v The State* [2012] 1 WLR 3718, para 32 and *Elaheebocus v The State* [2009] MR 323, para 20.

to be tried within a reasonable time. This is the type of case when the delay has gotten very close to giving rise to an inference that this defendant has actually suffered some prejudice.¹⁰ He is eight years older; that's how long he has been waiting to have this resolved.

[49] When it has been determined that the reasonable time guarantee has been breached the question becomes one of remedy.

[50] The remedy may include a discontinuance of the proceedings, the quashing of a conviction, or a reduction in the sentence. It may also include monetary compensation or simply a declaration.¹¹

[51] This is a serious offence. There is no question that the defendant is guilty of the offence. He has pleaded guilty to it and he awaits his sentence. The public interest justifies the imposition of a custodial sentence.¹² I am of the view that to acknowledge and vindicate the constitutional guarantee that has been breached whilst ensuring that justice is served for society and the victim, it would be appropriate in this case to give him some meaningful reduction of the sentence which had been fixed in this matter after all considerations including his guilty plea.

[52] I am of the view that an appropriate sentence in this matter is one of three years imprisonment.

[53] All time spent on remand will be taken into account in calculating his term. He is to benefit from all programmes that may assist in his rehabilitation at Bordelais and reduce the risk of him re-offending on his release.

¹⁰ In *Mills v HM Advocate* 2003 SC(PC) 1; *Stoegmueller v Austria* (1969) 1 EHRR 155, 191

¹¹ *Frank Gibson v the Attorney General* [2010] CCH. 3: Attorney General's Reference (No. 2 of 2001); *Mills v HM Advocate* 2003 SC(PC) 1

¹² *Celine v State of Mauritius* [2012] UKPC 32 at paragraph 23

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Darshan Ramdhani
High Court Judge (Ag.)