

EASTERN CARIBBEAN SUPREME COURT

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CRIMINAL)
A.D. 2015**

CLAIM NO. SKBHCR2011/0037A

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

AND

**[1] JAMAL PHILLIP
[2] CHARLES BOWRY**

Appearances:

Mr. Tessaun Vasquez and Ms. Greatess Gordon for the Director of Public Prosecutions

Dr. Henry Browne Q.C, Mr. Hesketh Benjamin and Mrs. Marissa Hobson-Newman for the Accused

2015: May 12th, 21st

JUDGMENT ON SENTENCE

[1] **CARTER J.:** Jamal Phillip and Charles Bowry are before the court for sentencing on one count of rape committed between the 18th and 19th February 2011.

[2] The facts of the case were accepted by the jury who delivered a unanimous verdict. The jury accepted that between the 18th and 19th February 2011, the virtual complainant, was walking along the road in Shadwell at around 12 o'clock, when an army truck pulled up next to her. Accused #1, Jamal Phillip, jumped out of the truck and invited her to go inside. The virtual complainant hesitated

whereupon she was pushed into the truck by accused #1. Inside the truck was accused #2, Charles Bowry, the driver of the truck. She was seated between the men, both of whom were dressed in their army uniform. The accused men took the virtual complainant to the compound of the old Fort Thomas Hotel in Basseterre. Inside the premises she was asked by accused #1 if she would “give him some?” The virtual complainant did not respond, at which point she was pushed by Jamal Phillip towards a pool bar. He then pulled down her pants and her panty, and raped her. The virtual complainant was raped by both prisoners who took turns having sex with her, for a time which the virtual complainant estimated in evidence to be around two (2) hours. At the time of the offence the virtual complainant was sixteen (16) years old.

[3] In this jurisdiction, the offence of rape carries the maximum penalty of life imprisonment. This penalty underscores the gravity of the offence as it places rape in the category of such other serious offences such as murder, manslaughter, robbery and grievous bodily harm, which nearly always warrant a custodial sentence.

[4] Indeed in the case of **R v Franklyn Huggins**,¹ Hariprashad-Charles J. at paragraph 17 of her judgment stated that: *“Short of homicide, it [rape] 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.”*

[5] In **Winston Joseph v R**² at paragraph 17 of the judgment, Sir Dennis Byron CJ stated that the actual sentence imposed, will depend upon the existence and evaluation of aggravating and mitigating factors. The court must not only identify

¹BVIHCR 2009/001; Judgment delivered July 2010

²Criminal Appeal No. 4 of 2000 (SLU)

the presence of aggravating and mitigating factors, but must embark upon an evaluative process. The aggravating and mitigating factors must be weighed. If the aggravating factors are outweighed by the mitigating factors, the tendency must be towards a lower sentence. Where the mitigating factors are outweighed by the aggravating factors, the sentence must tend to go higher.

[6] Having considered these authorities and the submissions of Counsel, the court finds that the aggravating factors in this case are as follows:

(1)The rape was committed by two offenders acting together: the evidence presented by the prosecution and accepted by the jury was that the prisoners at Fort Thomas Hotel took the victim to the pool area of the hotel and that they both had sex with her against her will.

(2)This was a repeated rape by both men in the course of one attack: the virtual complainant described that the prisoners took turns raping her for some considerable time.

(3)The prisoners as members of the St. Kitts Nevis Defense Force (SKNDF) owed a fiduciary duty to the community. There is clearly a breach of their duty to the community which they were pledged to protect and serve. The facts of the case were that the prisoners were on duty, on patrol, on the evening that this crime was committed dressed in army fatigues and driving an army issued vehicle.

(4)The use of a weapon to intimidate the victim: The evidence of the virtual complainant which has been accepted by the jury is that she did not do anything while the prisoner Jamal Phillip was having sex with her because he had removed his gun and placed it on the bar in the area where the act took place and that she was frightened; frightened because of the gun.

(5)The age of the victim at the time of the offence and the disparity in ages between the victim and the prisoners. The victim was sixteen (16) years old at the

date of the offence and the prisoners, Charles Bowry, thirty-nine (39) years old and Jamal Phillip thirty-five (35) years old.

Mitigating factor:

(1) The accused men were men of good character and had never been charged for a criminal offence prior to the commission of this offence.

- [7] The aggravating factors outweigh the mitigating factors in this case.
- [8] Halsbury's Laws vol.11 (2), paragraph 1188 on the aims of sentencing states that:
"The aims of sentencing are now considered to be retribution, deterrence and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion of the offence and to punish the offender for his wrong conduct. Deterrent sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation. However, the protection of society is often the overriding consideration. In addition, reparation is becoming an important objective in sentencing".
- [9] This approach has been widely accepted in the Eastern Caribbean Supreme Court and emphasized in similar cases such as **DPP v Lake and Jederon**³. The court is satisfied that it must consider too, the aim of the rehabilitation in sentencing of the offenders. Consequently, upon the jury's verdict at the conclusion of the trial, Social Inquiry Reports were ordered on the two (2) prisoners.
- [10] The report in respect of Charles Bowry, painted a picture of a man who, to his peers, was always very respectful, quiet and easy going. They also described him as being helpful and humble. The persons interviewed on his behalf by the social worker related their shock and bafflement at finding out that he was involved with

³ SKBHCR2012/0027

this crime. Charles Bowry is now forty-seven (47) years of age. He joined the St. Kitts Nevis Defence Force (SKNDF) in 1997 and has served for some twenty-eight (28) years. In describing his helpfulness and generosity, the probation officer opined that these were “*honourable attributes that seem scarce in the days we are living in*” concluding that “*Mr. Bowry was doing good for himself and had much more to look forward to in life if he had continued on the straight and narrow.*”

[11] With respect to Jamal Phillip, the Social Inquiry Report tells of Mr. Phillip having a very close-knit extended family. The report spoke to his being the primary carer for his ailing mother. His neighbours and peers described him as being someone who took pride in himself, an easy, quiet, young man who possessed a lot of ambition. He joined the St. Kitts Nevis Defence Force (SKNDF) in 1999 and rose to the rank of Lance Corporal. He expressed some remorse for the crime committed stating that: “*I must say I am sorry for what the victim may be going through. This is the last thing I thought would occur in my life.*”

[12] In the instant case, the court has heard the pleas of family and friends for mercy. The court has heard too the plea of Defence Counsel that the court should consider an alternative sentence; alternative to the immediate custodial sentence that is usually warranted for crimes such as this. However, as was expressed in **Desmond Baptiste v R**⁴, while good character is to be commended, it is not an overriding consideration or one that ought to be given much weight in sentence for a serious a crime such as rape.

[13] In any event, this is not a case without aggravating features or where such aggravating features are outweighed in any measure by the previously unblemished characters of the accused. This is a case in which the court cannot view rehabilitation as paramount. The court is also satisfied that there is no history of offending by either of these prisoners for the court to conclude that they would reoffend and for this reason deterrence, in the sense of deterring the actual

⁴Criminal Appeal No. 8 of 2003(SVG)

offender is also not paramount. The main aims to which the court must look in this case is toward retribution, the protection of the society and deterring potential offenders.

[14] In the case of **R v Millberry and Others**⁵, Lord Lane CJ outlined five factors which warranted the imposition of a custodial sentence for the offence of rape. He observed: *“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. Secondly, to emphasize public disapproval. Thirdly, to serve as a warning to others. Fourthly, 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 those in cases of rape vary widely from case to case.”*

[15] In **Millberry and Others**⁶, the court concluded that the starting point for sentence after a contested trial for rape should be eight (8) years, if any of the following aggravating factors are present:

- (1) *The rape is committed by two or more offenders acting together;*
- (2) *The offender is in a position of responsibility towards the victim (e.g., in the relationship of medical practitioner and patient or teacher and pupil), or the offender is a person in whom the victim has placed his or her trust (e.g., a clergyman, an emergency services patrolman, a taxi driver, or a police officer);*
- (3) *The offender abducts the victim and holds him or her captive;*
- (4) *Rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability;*
- (5) *Racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (e.g., homophobic rape);*

⁵[2003] 2 Cr. App R (S) 31

⁶*Ibid.*, p. 5

(6) Repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped);

(7) Rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

[16] In **Winston Joseph et al v R**⁷, Byron CJ provided starting points in respect to various sexual offences. In respect of the offence of rape, the court considered that an appropriate starting point would be eight (8) years where there are no aggravating factors. The presence of aggravating factors would attract a starting point of ten (10) years.

[17] The court has determined that there are at least five (5) aggravating factors in this case.

[18] The court has considered other recent cases in this jurisdiction. In Nevis, Alistair **Isaac**⁸ was sentenced to a term of thirty (30) years for rape and robbery where a knife was used to intimidate the victim during the rape. The offender had a string of previous convictions for offences of burglary, robbery and other offences of violence.

[19] In the case of **DPP v Lake and Jederon**,⁹ Lake was sentenced to a term of imprisonment of twenty (21) years for rape committed during the course of a robbery after trial. The aggravating factors included the use of a weapon to intimidate the victim as well as the brutal nature of the rape.

[20] The court has also noted other cases from this jurisdiction including that of **David Morton**,¹⁰ where the Court of Appeal found a sentence of fifteen (15) years to be appropriate. **Morton** had threatened the virtual complainant by pressing a pointed

⁷Ibid., p. 2

⁸NEVHCR2013/0005

⁹Ibid., p.4

¹⁰SKBHCR2010/0006

stick to her neck, punched her in the mouth, choked her and threatened her life. In the case of **Clayton Laws**,¹¹ the prisoner was sentenced to fifteen (15) years imprisonment for rape of a sixteen (16) year old girl whom he had known and who had come to his house. The prisoner had one previous conviction for kidnapping.

[21] In **Gregory Burton v R**,¹² the offence of rape was committed against a sixteen (16) year old girl by a school teacher. The Court of Appeal accepted that at the date of commission of the offence, the appellant was thirty (30) years of age and of unblemished character. Having agreed that there were aggravating factors in that case: violence was used over and above the force necessary to commit the offence; the victim was sixteen (16) years of age and was from all accounts a virgin and that the appellant was in a position of trust as school teacher, a trust which he breached and betrayed in a most appalling manner, the court upheld the sentence of fifteen (15) years imprisonment.

[22] The court has taken into consideration the principles of sentencing as cited herein, the comparable judicial authorities, the mitigating factor, the Social Inquiry Reports and the gravity of the offence. The court has also taken into careful consideration Learned Queen's Counsel's plea in mitigation.

[23] As detailed in the Social Inquiry Report prepared by Ms. Khisma Huggins, Probation Officer, on behalf of Charles Bowry:

"This offence is one that takes away from ones needs as described in Maslow's Hierarchy of Needs. The victim's sense of safety has been violated and her confidence degraded. Such an act plays on one's emotional being and can have a negative impact on their lives for a long time. This may affect the way she relates to future relationships, the way she relates to family and so many other possibilities. It is hard enough for many young persons to find positivity to cling to and grow up to be a successful individual without such acts committed against them."

[24] This Court like the jury, noted the distressed condition of the young woman who

¹¹SKBHCR2012/0047

¹²Criminal Appeal No. 1 of 2002

told what had happened to her on the night of 19th February 2011, at the hands of these two (2) prisoners. This was some four (4) years after the incident and the obvious impact of the violation on the virtual complainant was clearly as fresh for her as it was immediately after the incident. The virtual complainant's evidence was that she was frightened, confused, uncomfortable, and that she felt nasty during the course of the rape.

[25] The court must set a sentence that reflects its abhorrence with the crime that was committed by these prisoners; one which will deter any other person who seeks to violate the young women in this society. The blatant disregard for the dignity of this young woman must not be tolerated or visited upon any other person in this society.

[26] The very characteristics which were offered as commending the prisoners to the court are the very matters that the court looks upon as the most aggravating of factors. These prisoners were both entrusted with the security of this society. Instead the society must be protected from its very defenders.

[27] Parliament had decreed that the maximum sentence for the offence of rape is life imprisonment. The court must set a number of years. The court takes as its starting point that of ten (10) years. Having regard to all the matters outlined above, this court considers a term of sixteen (16) years imprisonment with hard labour to be the appropriate sentence. The time that the prisoners have served since the date of conviction will be deducted from this sentence.

Marlene I. Carter
Resident Judge