

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA



DOM HCR2012/029

BETWEEN

THE STATE

AND

RONALD LESTRADE

[2013: 25th March]

Appearances:

Mr. Gene Pestaina Director of Public Prosecution with Mr. Clement Joseph and Arthlyn Nesty State Counsel for the State.

Mr. Darius Jones *Amicus Curiae* for the defendant.

SENTENCING REMARKS

(Criminal Law- Sentencing- Sexual Offence-Attempted Rape- Burglary – Sentence

Aggravating and Mitigating factors- Considerations in Sentencing)

[1] STEPHENSON J: On the 14th January 2013 the defendant Ronald Lestrade was indicted by the Learned Director of Public Prosecution for the following offences:

Count 1: Attempted Rape contrary to Section 3(1) (a) of the Sexual Offences Act 1998.¹

Count 2: Burglary contrary to the provision of Section 11(1) (b) of the Theft Act².

¹ Act No. 1 of 1998 of the Laws of Dominica

- [2] At his arraignment the defendant pleaded guilty and is now before the court for sentencing.
- [3] As the sentencing judge I am obliged to bear in mind the four cardinal principles of sentencing viz. *"...retribution, deterrence, prevention and rehabilitation."* I am also required to consider first the aggravating and mitigating circumstances and then I must determine what sentence fits the crime.

The Facts:

- [4] The facts as agreed by Counsel in this case are simply this. At about 4:00 a.m on Saturday 2nd April 2011 JA was awakened by the presence of someone standing in her bedroom. Thinking it was her daughter she called out to the person who did not answer. She recognized the person to be the defendant who is her first cousin and who lived in the immediate vicinity. When the defendant was asked what he was doing there he told the virtual complainant that he wanted sex. He then attempted to attack her and a physical struggle ensued. The virtual complainant offered the defendant money to leave her alone and he refused the offer. He pulled his pants down and attempted to have sex with the virtual complainant. She managed to call out to her daughter who responded, and together they managed to fight off the defendant and flee the house to her mother's house a short distance away.
- [5] A report was made to the Portsmouth Police Station and an investigation was started immediately and the defendant was subsequently arrested. The virtual complainant's hand bag was found to be missing after she returned to her home. This bag was found in possession of the defendant who admitted to the investigating officer that he did enter the virtual complainant's dwelling and to taking the handbag and attempting to rape her.

Plea in mitigation

- [6] Learned Counsel Mr. Darius Jones appeared Amicus Curiae for the defendant. He made a brief plea in mitigation on behalf of the defendant.

Pre-Sentence Report

- [7] A pre-sentence report and psychiatric report was filed as ordered by the Court. In preparing the report the welfare officer Mrs. Delia Giddings-Stedman held interviews with the virtual complainant, the defendant, relatives and community members. The report shed some light on the defendant's family, educational and social background. The defendant's attitude towards the offence, the virtual complainant's views and the impact the incident has on her and those of the persons in the immediate environment at Portsmouth.

² Chapter 10:33 of the Dominica Revised Laws

- [8] The virtual complainant who is the first cousin of the defendant indicated that since the defendant has returned to Dominica she has made the effort to assist him and to "stand in the gap" so to speak left by his parents a result of which the defendant called her "Tanty" in what could be said is in recognition of her actions. The virtual complainant says that the incident has changed her life in that she now suffers from "anxiety attacks" and she now has difficulty in sleeping. She also now has to take prescribed medication for her condition and she becomes paranoid when she is home alone. She constantly checks her home to ensure that it is locked up and she becomes fixated on the windows to ensure that no one is there. (It is to be noted that the defendant gained entry to the home through the window).
- [9] It should be noted that based on the contents of the pre-sentence report it is considered that the defendant should be afforded the opportunity to be rehabilitated and to secure himself some training to acquire a skill which should make it better for him to secure employment upon his return to society. It is also noted that the defendant should take the opportunity to avail himself of some treatment to assist him in kicking his habit of using drugs and psychotropic substances.

Count: 1 - RAPE

- [10] Section 3(1) (a) of the Sexual Offences Act provides

"Any person who has sexual intercourse with another –

(a) Without the consent of the other person

... is guilty of the offence of rape and liable on conviction to imprisonment for twenty five years."

- [11] Rape is nonconsensual sexual intercourse with another person. In law attempted rape does not require "... ***any different intention on the part of the defendant from that for the full offence of rape. ...***"³ and the offence is committed where the defendant having the necessary intent, that is to have sexual intercourse with a woman without her consent or reckless as to the absence of her consent and he does some act which is more than preparatory to have sexual intercourse.
- [12] In the notable case of **Winston Joseph et al –v- R**⁴ Sir Dennis Byron (CJ) laid down the guidelines for sentencing in sexual offences. Chief Justice Byron had this to say

"The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors, the more common of 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 upon an evaluative

³ Per Lord Justice Russell in **R-v- Khan et al** [1990] 2 ALL E R 783 (CA)

⁴ Criminal Appeal No 4 of 2000, Criminal Appeal No 8 of 2000 and Criminal Appeal No 7 of 2000 (Consolidated) St Vincent & The Grenadines

process. It must weigh the mitigating and aggravating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.

[18] 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.**

[19] 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."**

[13] In the case at bar, Learned State Counsel Mr. Joseph identified five aggravating factors viz.

- (a) Breach of trust as the defendant is the first cousin of the defendant.
- (b) The defendant entered the home in the early hours with the occupants therein.
- (c) The offences are becoming prevalent within the state.
- (d) The defendant is known to the police.

[14] The Mitigating factors were identified as:

- (a) The defendant cooperated with the police from the initial arrest
- (b) The prisoner pleaded guilty at the earliest opportunity.
- (c) The virtual complainant suffered no physical harm.

[15] Learned Counsel Mr. Joseph submitted local and regional authorities to assist the Court in determining the proper starting point and sentencing ranges for offences in the case at bar. The authorities cited are: **James –v- The State**⁵, **The State –v- Frederick George**⁶, **Agard –v- The Queen**⁷, **Malcolm Mayers –v- The Queen**⁸. It is to be noted that the defendants in these matters did not plead guilty as charged; they were all convicted after trial.

Court's consideration

[16] I have determined the seriousness of this offence having regard to the following factors:

- (a) The fact that the offence was committed inside the home of the virtual complainant; that the defendant broke into the said house.
- (b) That the defendant told the virtual complainant that he wanted sex and took steps to do just that and had it not been for the presence of the virtual complainant's daughter who came to her mother's aid, coupled with her spirit to fight enabling them to fight him off he may well have completed his mission on the night in question.
- (c) The fact that the victim was the defendant's first cousin who extended the hand of friendship and made attempts to assist him and show him familial love and acceptance when he came to Dominica from St Martin.
- (d) The fact that the defendant has previous convictions.
- (e) The fact that the defendant admitted to be a user of prohibited substances such as crack, cocaine and marijuana in addition to consuming alcohol.
- (f) That the defendant has expressed no remorse.

⁵ Criminal Appeal NO. 2 OF 2003 (Dominica) – The Court of Appeal varied a sentence on Conviction for rape from 12 to 7 years.

⁶ DOMHCR2011/0045 the Defendant was sentenced to 31/2 years to serve 3 months with the remainder suspended.

⁷ BB 1991 CA 11 (Barbados) A 4 year sentence was affirmed and upheld on conviction of rape was upheld by the Court of Appeal.

⁸ No 22 of 2001 Barbados (unreported) An 8 year sentence was affirmed and upheld by the Court of Appeal.

- [16] Having considered the circumstances of the offence and the established starting point along with the guidelines that have been laid down which requires that the punishment of the offence must be commensurate with the seriousness of the offence. Having considered the aggravated and mitigating circumstances and also taking into consideration that the defendant has pleaded guilty at arraignment which has permitted him access to the 30% discount, Ronald Lestrade on the offence of the attempted rape you are hereby sentenced to Five years in prison.

BURGLARY:

- [17] Section 11(1) (b) of the Theft Act⁹ provides that

"A person is guilty of burglary if ...

(b) Having entered any building or part of a building as a trespasser, he steals or attempts to steal anything in the building or part of it or inflicts or attempts to inflict on person therein grievous bodily harm.

...

(4) a person guilty of burglary is liable on conviction on indictment to imprisonment for twelve years."

- [18] Burglary is a serious offence which more often than not, draws a prison sentence, which is necessary for a variety of reasons; to punish the offender and to mark the gravity of the offence. Secondly, to stress the aversion with which members of the public have for those who break and enter the houses of others. There is also the need for the sentence to serve as a deterrent to others.
- [19] In determining the fitting sentence I must have regard to any guidance to be garnered from other judgments and additionally to the particular circumstances of the offence committed, its effect upon the victim and the record of the offender.
- [20] I have taken the sentences handed down in the following cases into consideration:

- I. The Court of Appeal in the **Desmond Baptiste Et al -v- The Queen Cases**¹⁰ upheld Baptiste's 8 year sentence for burglary having pleaded guilty at the first opportunity, and

⁹ *supra*

¹⁰ Numbers 8,10,16,22, 23/2003 St Vincent and the Grenadines

where the items stolen were recovered and where he had an extensive record of previous convictions for like offences was confirmed.

- II. In the Bahamas the Court of Appeal upheld a sentence of 3 years on the guilty verdict for the offence of burglary¹¹.
- III. In **R v William Penn**¹² – the Defendant was convicted on 3 counts of burglary in relation to villas at Virgin Gorda. He was sentenced to 8 years imprisonment on each count which sentences to run concurrently.
- IV. In **Denzil Sam v The Queen**¹³ the appellant was convicted of burglary. The Court of Appeal affirmed the sentence of 5 years in prison.
- V. In the **Queen v Keenan Kendell Bethelmy**¹⁴ the defendant who was a young man of 24 years and who had pleaded guilty to two offences of burglary was sentenced to 10 years and 3 years to run concurrently
- VI. In the **Queen –v- Gairy Flemming**¹⁵ the defendant was sentenced to three years and six years respectively on burglary charges to which he pleaded guilty. The defendant in this matter had a number of previous convictions of like offences.

[21] In the absence of definitive guidelines within our jurisdiction as it regards Burglary, I have taken into account the guidelines that are applicable in England, I have also taken into account the aforementioned decisions and I am of the view that the appropriate sentence must be five years' imprisonment for the offence of Burglary.

[22] In order to avoid any misunderstanding the sentences handed down herein have already taken into account the 30% discount earned by the defendant for his early guilty plea and the sentence of 5 years on each count is to run concurrently from the date of his remand.



M E Birnie Stephenson

Resident Judge

¹¹ Barnett –v- R BS 1980 CA 22 (Court of Appeal)

¹² BVI Criminal Case No. 1 of 2006 –judgment delivered on 21 March 2006 –per Hariprashad-Charles J.

¹³ St. Vincent and the Grenadines Criminal Appeal No. 3 of 2006,

¹⁴ Criminal Case No. 11 of 2007 (British Virgin Islands)

¹⁵ **CRIMINAL CASE NO. 0015/2010 (Anguilla)**