

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

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD 2009/0429 - 0431

BETWEEN:

THE QUEEN

Claimant

AND

MARC ST ROSE

Defendant

Appearances:

Mr. Alfred Alcide Counsel for the Defendant

Ms. Tina Mensah Crown Counsel for the Crown

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2012: April 17
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JUDGMENT ON SENTENCING

[1]. **CUMBERBATCH, J. :** On the 7th January 2010 the defendant was indicted by the Director of Public Prosecutions on one count of attempted rape, one count of unlawful sexual connection and one count of indecent assault. The offences were allegedly committed on the 3rd February 2009 at Bagatelle in the city of Castries. On the 8th December, 2011 a jury acquitted the defendant of the count of attempted rape and convicted him for the offences of unlawful sexual connection and indecent assault.

[2] **THE FACTS**

The Virtual Complainant, a 24 year old young lady was a friend of the granddaughter of the defendant and at her invitation the Virtual Complainant resided at premises owned by the defendant. On the night in question both the defendant and the Virtual Complainant travelled in the same mini bus to the home in Bagatelle. The evidence disclosed that though the defendant owned that property he was not ordinarily resident there. Sometime during that night the defendant entered the room occupied by the Virtual Complainant and engaged her in a conversation about the house. He returned to the room later in the night, told the Virtual Complainant she was a nice person and offered to go to Castries to get her something to eat. She declined the offer.

[3] After she had fallen to sleep she was awoken when she felt someone on top of her. She struggled with the person who placed his mouth on her breast and then kissed and licked her vagina. She was able to kick the person off of her and saw the defendant standing next to the bed with his pants down and penis exposed. She then locked herself in the toilet for around 2 – 3 hours and called her boyfriend to alert him of the incident. On leaving the toilet at around 5.00 am she packed her belongings and removed from the premises.

[4] **THE HEARING**

The court ordered a pre-sentence report which was accepted unchallenged by counsel on both sides. I shall return to the significance of this feature of the report later in my judgment. The defendant was portrayed as a positive figure in his community and not known to indulge in shady activities. Persons interviewed spoke of his consumption of large amounts of alcohol which was confirmed by the defendant. He also spoke of his great love for women and that he had constantly pursued other women which resulted in the breakdown of most of his common law unions. As

regards this incident the defendant insisted that this was done at the instance of the Virtual Complainant who initiated sexual activity between them.

- [5] The report under the heading Victim Impact Assessment speaks to the effect that this experience has had on the Virtual Complainant more particularly the difficulty the Virtual Complainant faced in resuming sexual relations with the gentleman who at the time of this incident was her partner and is now her lawful husband. She stated that she gets the shivers when she remembers the incident.
- [6] Counsel for the defendant in his submissions has urged the court to find that a non-custodial sentence would in the circumstances be appropriate. He referred the court to the positive sentiments of his client as stated in the pre-sentence report and opined that he was a person of good character. He goes on to contend that in the report the defendant seem to suggest that he committed the offences for which he was convicted but rather surprisingly asserts in his written submissions that **'the commission of those offences were not completely one sided** (emphasis added).
- [7] Mr. Alcide contends that there are very little aggravating factors in this matter save for the seriousness of the offences for which the defendant was convicted and the likely effect it would have on the Virtual Complainant. He finds the following to be the Mitigating Factors;
- (i) The age of the Defendant and the circumstances thereof;
 - (ii) The Defendant's previous good character;
 - (iii) The Defendant has no previous conviction, considering his and the fact that this is the Defendant's first encounter with the Court, the Criminal Court at that;
 - (iv) The lack of premeditated thoughts on the morning prior to the incident;

- (v) The defendant's co-operation with the police during the investigation of the matter and the Probation Officer in preparing this Report.

[8] Counsel submits that the mitigating factors by far outweigh the aggravating ones and has urged the court that in the circumstances to impose either a non-custodial sentence or a custodial sentence at the lower end of the scale.

[9] Crown counsel Ms. Mensah in her written submissions submitted the following as the aggravating and mitigating factors;

[10] In the case at the bar, the crown submits the following:

AGGRAVATING FACTORS

The victim has suffered psychologically from the incident page 7 of the pre-sentence report that the victim had difficulty resuming sexual relations with her partner for many months subsequent to the incident. She also reported suffering with shivers when she remembers the incident.

- (a) The age of the complainant vis-à-vis the age of the defendant. The defendant was 62 at the time of the incident whilst the complainant was 24;
- (b) The defendant did not enter a guilty plea and put the victim through the trauma of reliving the incident;
- (c) Breach of trust as the defendant is the grandfather of the virtual complainant's friend;
- (d) The Virtual Complainant's 5 year old son was asleep on the bed at the time of the incident.

MITIGATING FACTORS

- (a) The defendant has no previous convictions;
- (b) No Violence was use on the Virtual Complainant.

[12] Ms. Mensah went to address the court on the law on sentencing in cases of sexual assault and submitted for the courts attention the dictum of Sir Dennis Byron C.J. in Winston Joseph v Regina Criminal Appeal No. 7 of 2000 the locus classicus on sentencing on sexual offences.

[13] Crown counsel noted with concern what she considered to be the lack of genuine remorse expressed by the defendant for his actions and his insistence in the report that the Virtual Complainant consented to his advances. She provided the court with authorities on which she relied to persuade the court that a custodial sentence is appropriate in the circumstances.

[14] **THE LAW**

The Court of Appeal in Winston Joseph et al v Regina per Sir Dennis Byron C.J. set out the guidelines to be applied when the court comes to sentence an offender for a sexual offence. I find that these principles and guidelines are worth repeating here: - Sir Dennis opined thus;

“The actual sentence impose 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 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.”

[15] **AGGRAVATING FACTORS**

- i. If the girl has suffered physically or psychologically from the sexual assault;

- ii. If it has been accompanied by perversions abhorrent to the girl, 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.

[16] **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 it was consensual, 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 made deliberate attempts at seduction;
- iv Where the defendant is a first offender and/or is a youth.

[17] In applying these guidelines to the case at bar I find the dictum of Henry L.J. in *R v Loff James Lennon* (1999) 1 Cr App. Rep. (s) 117 to be most helpful and instructive:

“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”.

[18] The Sentencing Guidelines for Sexual Offences as issued by the Sentencing Advisory Panel 2003 lists the following factors to be considered;

- (a) Violation of the victim's sexual anatomy
- (b) Exploitation of a vulnerable victim
- (c) Embarrassment, distress or humiliation of the victim
- (d) Infringement of standards of socially accepted behavior
- (e) The physical/psychological harm caused by non-consensual offences
- (f) The relationship between the victim and offender
- (g) Abuse of a position of trust.

[19] In applying these principles and guidelines to the case at bar I find the following to be the aggravating and mitigating factors:

AGGRAVATING FACTORS

- (a) The psychological damage done to the victim as a result of this incident as stated in the pre-sentence report aforesaid;

- (b) The breach of trust committed by the defendant who the Virtual Complainant said in her testimony that she trusted the defendant as the grandfather of her friend;
- (c) The seriousness of the offences committed by the defendant;
- (d) The lack of remorse by the defendant who now for the first time claims that the sexual acts were consensual;
- (e) The defendant's disregard for the presence of the Virtual Complainant's minor child when he sexually assaulted the Virtual Complainant;
- (f) That the defendant planned and premeditated the commission of the offences.

MITIGATING FACTORS

1. The hitherto clean criminal record of the defendant;
2. That no violence was used on the Virtual Complainant over and above that which was necessary for the commission of the offences for which the defendant was convicted.

[20] FINDINGS

I have conducted a balancing exercise of the aggravating and mitigating factors of this case. In doing so I have taken into consideration all the circumstances of this case including but not limited to the submissions of counsel on both sides, the pre-sentence report and the law as stated aforesaid. Having done so I find that the defendant's age is not a mitigating factor as he is at that stage of maturity when it is expected he would rigidly eschew though or temptation to indulge in activities as heinous as those for which he has been convicted. I also find from the evidence before the jury that the defendant sought to ingratiate himself with the Virtual Complainant by seeking to win her confidence by discussing matters pertaining to the house with her. He later complimented her by telling her she's a nice person and insisting that he would go to Castries at such a late hour

that night to get her something to eat. Finally he entered her bed in which she was asleep with her minor son. These I consider to be acts preliminary to his sexual assault on the Virtual Complainant, and indicative of his intention to have a sexual encounter with her that night. Thus in the circumstances I find that the aggravating factors significantly outweigh the mitigating ones.

[21] The defendant when interviewed by the probation officer said thus:

“Mr. St. Rose stated once he got into the room he lay on the bed in a horizontal position just below the feet of the Virtual Complainant who was asleep on that same bed at the time. He further said that whilst in that position he touched the Virtual Complainant’s leg to get her attention and she wriggled slightly. He continued and touched her again, after which she awoke and attended to him and they held a small whispering conversation. He said he told her that he would like some sexual favours from her and that he would compensate her the following day and that she agreed. He said that she allowed him to take off her underwear and fondle her vagina and did not complain, then ask him whether he had performed oral sex on a woman before, for which his response was no. He claimed that the Virtual Complainant then held the back of his head and immersed his head unto her breasts and made him suck them. He said the sexual activity ceased and he went to sleep, knowing that he did not have any penetrative sex with the individual”.

[22] I find this to be a cause for concern, more so as counsel for the defendant has sought to rely thereon in his written submissions on mitigating. It was never suggested at the trial nor was it the defendant’s defence that the alleged acts of sexual assault did take place and that the Virtual Complainant consented thereto. The thrust of the case for the defendant was that these events

never took place. Moreover the defendant chose his right to remain silent at the trial. On one consideration of the defendant's assertions aforesaid it may be said that the defendant is engaged in an absurd attempt to guild the lily. However when I consider the defendant's stated predilection of having a great love for women as a result of which he constantly pursued other women it seems that the defendant has distanced himself from reality and remains firmly entrenched in the land of fantasy.

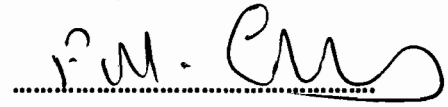
[23] **SENTENCE**

Defence Counsel has drawn the court's attention to section 124(3) of the criminal code which provides for a non-custodial penalty in circumstances where the court has regard to the circumstances of the offence or offender including the nature of the conduct constituting the offence.

[24] I have found that these heinous offences were premeditated and committed by an unrepentant 62 year old defendant who clearly needs some form of counseling and/or psychological assistance before he is reintegrated into the society. I also find his excessive consumption of alcohol to be of concern as this may be a trigger to recidivism. I find that this section is not applicable to the circumstances of this case and this offender. I am also aware of the prevalence of sexual offences in this jurisdiction.

[25] The offences of unlawful sexual connection and indecent assault carry maximum penalties of 14 years and 7 years imprisonment respectively. I find that in all the circumstances a benchmark of 9 years and 4 years respectively is appropriate for these offences.

[26] I will deduct five (5) years from the benchmark figure for the offence of unlawful sexual connection and two (2) years for indecent assault. I will also deduct one (1) year from each offence for the absence of excessive force and for the defendant's clean criminal record. In the circumstances the defendant is sentenced to a period of imprisonment of three (3) years on the offence of unlawful sexual connection and one (1) year on the offence of indecent assault. The defendant shall be credited with all time spent on remand. Both sentences will run concurrently.


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FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE