

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

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD2010/0215

BETWEEN:

REGINA

Claimant

AND

CLIVE MCVANE

Defendant

Appearances:

Ms. Diana M. Thomas Counsel for the Defendant

Mr. Giovanni James Crown Counsel for the Crown.

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2011: November 30
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- [1] **CUMBERBATCH, J.:** On the 13th May 2011 the defendant was indicted by the Director of Public Prosecutions on one count of unlawful sexual intercourse with a female aged nine (9) years old and a second count of unlawful sexual intercourse with a female aged fourteen (14) years old not being his spouse. On the 30th June 2011 at his arraignment the defendant pleaded guilty to the second count and not guilty to the first count. The crown offered no evidence in respect of the first count to which the defendant had pleaded not guilty.

[2] **THE FACTS**

The defendant lived and cohabited with one Magdalene Mitchell and her minor children in a common law union at Fond St. Jacques, Soufriere. The Virtual Complainant was one of those children. She was born on the 6th day of March 1996. The defendant had known her since she was seven (7) years old. In or around the month of January 2010 Magdalene Mitchell began caring for an elderly person in Soufriere which necessitated her absence from the home at nights. The Virtual Complainant and her two (2) minor sisters were left in the care of the defendant when their mother went off to work.

[3] Between the months of January to April 2010 the defendant had sex with the Virtual Complainant on numerous occasions. At nights he would come to her room which she shared with her two siblings and have sex with her when they fell asleep. On one occasion the older of her siblings witnessed the defendant having sex with her sister. On the 28th June 2010, an older sister of the Virtual Complainant caused her to take a pregnancy test which revealed that she was pregnant. At the St. Jude's Hospital she was medically examined and the results of her examination showed that the Virtual Complainant was pregnant in the second trimester. On that day the defendant left the home of the Virtual Complainant and her mother and resided elsewhere.

[4] This matter was reported to the police and after investigations the defendant was charged and a warrant was issued for his arrest. On the 29th July 2010 the defendant was found hiding in the roof of the premises where he resided and was taken into custody.

[5] **THE HEARING**

At the sentencing hearing the defendant was represented pro bono by Counsel Ms. Diana Thomas for which the court expresses its gratitude. The court also had the benefit of a comprehensive pre-sentence report prepared by Mr. Dolor of the probation department.

Counsel for the defendant in her written submissions stated that the issue for determination was the sentence to be imposed having regard to the offence and sentencing guidelines. Counsel considered the following to be the aggravating and mitigating factors herein;

- [6] The Defendant pleaded guilty at the first opportunity after the indictment was preferred. He did so on 30th June 2011.
- I. The Defendant has expressed remorse, shame and contrition for his actions.
 - II. There is no evidence of whether the sexual intercourse was consensual. However, it is respectfully submitted that the Court ought to take into account the absence of any statement by the Virtual Complainant of the Defendant forcing himself on her or of her refusing his advances.
 - III. While the Defendant's statement that the Virtual Complainant made advances towards him differs from the prosecution's case, the Court is asked to take into account the circumstances in which the Defendant found himself.
 - IV. It is the Defendant's contention that having regard to the fact that the Virtual Complainant now has a baby and the admitted economic impact on the family by reason of this new mouth to feed, the Court should take this into account in fixing the sentence. The Defendant ought to be punished for this unlawful act but said punishment should not be at the expense of the welfare of the child who he brought into this world. He should be sent out to work and meet his responsibility.
 - V. Apart from the minor offence of possession of cannabis the Defendant appears to be of general good character and does not pose any risk to society. He is of an industrious nature and his social and family ties are strong.

VI. It is the Defendant's contention that in all the circumstance, there is one aggravating factor, that of the pregnancy, and so the mitigating factors far outweigh the aggravating factors and his punishment should be at the lower end of the scale.

[7] Counsel went on to submit that the expressions of contrition by the defendant are indicative of his willingness to make amends for his actions, hence lengthy incarceration will not have a deterrent effect on him because of the circumstances in which he found himself.

[8] Crown counsel Mr. James submitted that the court should take into consideration the age difference between the defendant and the Virtual Complainant. He contended that the defendant was viewed by the Virtual Complainant as her stepfather and that he betrayed the position of trust in which he was placed. He also reminded the court that the acts of sexual intercourse took place in the presence of other minor siblings and that the defendant has not accepted full responsibility for his actions as he claims that the Virtual Complainant came on to him.

[9] The probation officer in his pre-sentence report states that the defendant remarked that because the Virtual Complainant's mother was always absent from home at nights the Virtual Complainant began making sexual advances towards him and eventually he gave in. He states that he feels very bad, ashamed and sorry about the situation and craves the court's leniency.

[10] The victim impact statement of the pre-sentence report states that the Virtual Complainant feels ashamed and walks in public with her head down as members of the community accuse her of taking her mother's man. Her mother states that when she got the job in Soufriere she indicated to the defendant that she would send the children to sleep at the residence of an older daughter. The defendant objected to this arrangement and accused her of not trusting him. She stated that the situation has placed the family in a state of

emotional and financial distress as the Virtual Complainant now has a nine (9) month old baby son for the defendant and she is now the sole breadwinner of the family.

[11] **THE LAW**

A useful starting point would be to examine the classical principles of sentencing. The classical principles of sentencing namely retribution, deterrence, prevention and rehabilitation were laid down by Lawson LJ in the celebrated case of **R v James Henry Sargeant** 1974 60 Cr. App. R. 74. in that decision Lawson LJ stated that '***any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing***'

In **Desmond Baptiste v Regina** CJ Sir Dennis Byron embraced and applied these principles. I will now apply these principles to the case at bar.

[12] **RETRIBUTION**

This offence is most heinous in all respects. The defendant by objecting to the decision of Magdalene Mitchell to have the Virtual Complainant and minor siblings sleep elsewhere indicates that he had clearly evinced the intention to have the Virtual Complainant within his reach for his sexual gratification. What makes it more egregious is that the defendant knew the Virtual Complainant from the time she was seven (7) years old and rather than treating her like a daughter and child of the family he made her the outlet for his sexual predilections.

[13] **DETERRENCE**

I have noted with interest the submissions of defence counsel in this regard in her written submissions. Counsel contends incarceration of her client for a lengthy period of time will not have a deterrent effect on him because of the circumstances in which he found himself. Her contentions however are premised on the defendant's assertion as stated by the probation officer in the pre-sentence report aforesaid, that it was the Virtual Complainant

who made sexual advances to him. However in light of the unchallenged disclosure in the said report by the victim's mother of the defendant's insistence that the Virtual Complainant and her siblings remain with him at night, I find it difficult to accept the contentions of the defendant in this regard. In any event however deterrence is not necessarily for the deterrence of the defendant but also for the wider community. Crown counsel in his submissions has reminded the court of the prevalence of this offence. Thus the court must in the circumstances impose a suitable penalty to signify its abhorrence of this type of conduct.

[14] **PREVENTION**

I have already found that the defendant by his insistence on having the Virtual Complainant and her siblings sleep with him rather than at the home of an older sister evinced an interest in having her available for his sexual gratification. That this was so even though he had known the Virtual Complainant from since she was seven (7) years old is alarming. His recklessness as to the possibility of the Virtual Complainant becoming pregnant is inexplicable. I find that his conduct demonstrated an uninhibited preference for sexual intercourse with minors.

[15] **REHABILITATION**

Both defence counsel and the probation officer in the pre-sentence report bemoan the absence of easy access to counseling service for sexual offenders. I am satisfied after taking into consideration all the circumstances of this case that the defendant must undergo some form of rehabilitation before he is re-integrated to the society and I am prepared to make the appropriate orders therefor. To release him into the society in his present state of denial for his actions is not a desirable option.

[16] **SENTENCE**

In **Winston Joseph v R** Chief Justice Sir Dennis Byron set out matters which the court should consider as aggravating and mitigating factors. These are;

[17] **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 a crime.
- VII. The victim is either very young or very old.

[18] **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 sixteen (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 sixteen years of age made deliberate attempts at seduction.
- IV. Where the defendant is a first offender and/or is a youth.

[19] The defendant has undoubtedly committed a most heinous offence with devastating consequences for the victim and other family members. I find that the virtual complainant by being the unfortunate victim of the defendant's sexual predilections has been pitchforked from adolescence to parenthood without having had an opportunity to experience the natural progression from childhood to adulthood.

[20] I have considered the submissions of counsel for the defendant aforesaid as to what constitutes the aggravating and mitigating factors herein. I find that I do not accept that the acts of sexual intercourse between her client and the Virtual Complainant were consensual. In any event such a contention was not within the approved mitigating circumstances as set out by Byron CJ who was at pains to point out those deliberate attempts at seduction or consensual sexual intercourse may be considered as mitigating factors **where the girl is at least sixteen (16) years old.**

I have considered all of the circumstances of this case and the dictum of **Sir Dennis Byron CJ in Winston Joseph v R** and find the following to be the aggravating and mitigating factors.

[21] **MITIGATING FACTORS**

1. The defendant's guilty plea at the first available opportunity. This obviated the need for a lengthy trial and spared the Virtual Complainant the anguish of having to relive and relate the unpleasant details of the heinous actions of the defendant.
2. The remorse expressed by the defendant.

[22] **AGGRVATING FACTORS**

1. The repeated acts of sexual intercourse with the Virtual Complainant who regarded him as her stepfather and who knew him since she was seven (7) years old,

2. The impregnating of the Virtual Complainant with the resultant birth of the baby boy,
3. The defendant's insistence that the minor children of his common law wife remain with him at night rather than with their older sister,
4. The defendant has not taken full responsibility for his actions.
5. The defendant was some thirty (30) years older than the Virtual Complainant.

[23] I have applied the principles enunciated by Sir Dennis Byron in Winston Joseph v R aforesaid and find that having weighed up the aggravating and mitigating factors and having considered all the circumstances of this case that the aggravating factors significantly outweigh the mitigating factors.

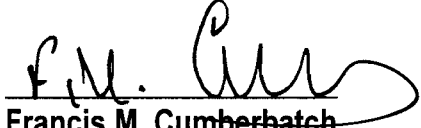
[24] Crown counsel has invited the court to apply the provisions of section 1097 (2) (b) of the Criminal Code in determining an appropriate sentence. I have in considering crown counsel's submission borne in mind the contentions of Ms. Thomas that there was no evidence of violence or other physical force on the part of the defendant nor were there any complaints of abhorrent perversions committed by the defendant upon the virtual complainant.

[25] I find that this was a planned and premeditated offence. What makes it more egregious was the refusal or neglect of the defendant to take the necessary preventive measures to avoid the pregnancy of the victim in light of his numerous acts of unlawful sex with her. His unrestrained and unbridled series of sexual acts with the victim being some thirty (30) years his junior and who he had known from infancy are as such that I am reminded of the dictum of the court in Regina v James Henry Sergeant:

Lawton LJ stated that:

'...society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass'

[26] I am however persuaded by the submissions of counsel for the defendant that this is not a fitting case for the application of the provisions of section 1097 (2) (b) of the Criminal Code. I must also take into account in the defendant's favour the fact of his early guilty plea. Though the defendant is no stranger to incarceration his previous conviction is for an unrelated offence and no evidence has been disclosed which suggests that the defendant was under the influence of illegal narcotic drugs when he committed this offence. Thus in the circumstances I find that a sentence of seven (7) years imprisonment to be appropriate. I will order that the defendant be at the expense of the state provided with the necessary counselling for sexual offenders of his type for as long as is considered necessary by his counsellor. The defendant will receive full credit for all time served in custody whilst on remand.


Francis M. Cumberbatch
HIGH COURT JUDGE