

BRITISH VIRGIN ISLANDS

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

CASE NO. 24 OF 2009

BETWEEN:

THE QUEEN

and

DONALD ROGERS

Appearances:

Ms. Tiffany Scatliffe, Senior Crown Counsel and Ms. Leslie Ann Faulkner Crown Counsel for the Crown.

Mr. Herbert McKenzie and Mrs. Ingrid Moses-Scatliffe of Orion Law Firm for the Defendant.

2010: June 15, 18, 25

2010: June 25

JUDGMENT ON SENTENCING

(Criminal Law - Offences against the Person - Sexual Offences - Indecent Assault on god-daughter- Sentence - Matters to be considered – Aggravating factors- breach of trust –age differential-defendant offered alcohol beverage to child- Mitigating Factors- former crown witness – no previous convictions- diabetic)

Introduction

- [1] **HARIPRASHAD-CHARLES J:** On 28 May 2010, Donald Rogers, an Acting Inspector of Police of the Royal Virgin Islands Police Force, was convicted by a unanimous jury of indecently assaulting his god-daughter, who was 15 years old at the date of the commission of the offence.

The facts

- [2] The facts of the case can be summarised shortly as follows. On 15 February 2009, at about 4:00 p.m. the virtual complainant, for anonymity, I will call her, “the VC”) and her sister came to

Tortola from St. Thomas to spend the weekend and also, to collect her school transcript from the Elmore Stoutt High School. She was to stay with her father, at Cane Garden Bay. Sometime after the VC arrived, she telephoned Mr. Rogers and suggested that she could overnight with him at his home as she had not seen him for a while. It was not unusual for the VC to visit Mr. Rogers whenever she came to Tortola but she had never spent the night at his home. The VC's father allowed his daughter to go with Mr. Rogers whom he considered to be respectable and trustworthy. He was also the godfather of the VC who regarded him as her second father.

- [3] On 15 February 2009, at approximately 10.00 p.m., Mr. Rogers came to collect the VC. When he arrived, the VC ran outside to meet him, greeted him and placed a plastic bag which contained her overnight clothing into his car. The VC was dressed in long pajama yellow pants with monkeys on it and a shirt-type top with straps. The VC's father came and he exchanged pleasantries with Mr. Rogers who then left with the VC to his house at Josiah's Bay.
- [4] During the drive to Josiah's Bay, which is in the direction away from Road Town, Mr. Rogers and the VC conversed about many things including her school and her upcoming 16th birthday. At some point, they began to speak about Smirnoff Ice, an alcoholic beverage. By this time, Mr. Rogers was driving in the vicinity of Fish Bay whereupon he turned around his car and headed to Bobby's Supermarket in Road Town to purchase some drinks.
- [5] He got to Bobby's Supermarket at about 12.05 a.m. The supermarket was already closed but Sergeant Roger Williams who was doing part-time security work at the supermarket, opened the door and let Mr. Rogers in. The VC testified that it was Smirnoff Ice, and Mr. Rogers said that he bought Bacardi Ice, as he had never drink Smirnoff. From the supermarket, they proceeded to his home at Josiah's Bay.
- [6] The VC said that she saw Mr. Rogers poured two glasses of Smirnoff Ice into wine glasses. He gave her one and drank the other. After she drank the Smirnoff Ice, she became sleepy and her eyes began to shut down. She then proceeded to sleep in the guest bedroom with the smaller bed. Mr. Rogers told her that she should sleep in the master bedroom with the bigger bed as the guest room was dirty and he wanted her to feel comfortable. The VC left the guest

bedroom and went to the master bedroom to sleep. She was still dressed in her pyjamas pants and top when she fell asleep.

[7] About fifteen minutes later, she was awakened to find Mr. Rogers massaging her back and buttocks. Her pyjamas pants were missing. She did not remove them. She asked him what he was doing and to stop. She was continuously pushing him away and asking him to stop. Mr. Rogers stopped massaging the VC. She moved to the edge of the bed and soon fell asleep. She was awakened a second time, to find Mr. Rogers very close to her and hugging her. She wriggled away and pushed him away from her. At one point, his penis touched her on her buttocks. Mr. Rogers continued to hug the VC and said to her that he just wanted to cuddle. He then held her hands together, pulled across her top and bra and tried to suck on her breast. She continuously wriggled away in an attempt to avoid Mr. Rogers. He told her that he will not hurt her. Mr. Rogers then tried to pull down her underwear. She struggled with him and managed to get it pulled down half-way. He then attempted to suck her vagina. He told her that it would make her feel good. After a while, Mr. Rogers stopped. The VC cried until she fell asleep.

[8] She woke up around 7:00 a.m. Mr. Rogers made breakfast for her. She hardly ate any as she just wanted to leave. She then took a bath. Mr. Rogers told the VC that whatever happened between them stays between them. He also gave her \$40.00. It was usual for him to give her money whenever she visited him.

[9] Mr. Rogers then dropped the VC to the Elmore Stouff High School to collect her transcript and await her sister and brother. She called her brother using Mr. Rogers' mobile. The VC did not tell her brother and sister what had happened to her as she was not sure what her brother would do and she was still in shock. She returned to St. Thomas that afternoon. She did not mention the incident to anyone. It was only after she could not sleep well that about some days later, she told her mother of the incident.

[10] Consequently, a report was made to the police. Mr. Rogers was arrested on 25th February 2009.

Plea in mitigation

- [11] Learned Counsel, Mr. McKenzie made a fervent plea on behalf of Mr. Rogers. His overarching submissions were that the objectives of sentencing could be achieved without incarceration and that the circumstances of the offence were not so serious as to warrant a custodial sentence. Firstly, learned Counsel submitted that only two aggravating factors were present, not five, as alleged by the Crown. He identified them as (1) breach of trust; and (2) the age differential. He submitted that the issue of breach of trust is premised on two limbs (1) being the godfather of the VC and (2) by reason of a police-officer but it should only count as one aggravating factor.
- [12] Learned Counsel also submitted that there was no means to ascertain the basis of the jury's verdict and as such, there is no basis for the Crown's assertion that Mr. Rogers had in fact given the VC alcohol and therefore, it should not be considered as an aggravating factor. He also submitted that the prevalence of these offences should not be regarded as an aggravating factor.
- [13] Mr. McKenzie asserted that not only does Mr. Rogers have a clean police record but his unique circumstances, namely, his status as a former crown witness and his medical status as a diabetic should be important considerations weighing against a non-custodial sentence .
- [14] As a former crown witness and it is not disputed by the Crown, Mr. Rogers gave evidence in trials which resulted in prisoners being incarcerated in the very same institution to which he would be committed if given a custodial sentence. The concern is that Mr. Rogers would be required to "watch his back" if incarcerated. As a diabetic, he requires a specialized diet that would not readily be available in the prison.

Victim impact assessment

- [15] A Victim Impact Statement was prepared by Dr. Sylvia Buntin-Simmons, MSW, MPA, PhD and submitted by the Crown. The VC suffered no physical injuries. However, her emotional life has been significantly changed by the incident. She has reported feeling helpless, scared and angry as a result of the event. She feels it was her fault for asking to spend the night by him because he was her godfather. She has had nightmares and difficulty sleeping and has

experienced loss of appetite. The VC does not trust easily anymore and is afraid to go places alone. She finds herself becoming depressed and angry and wanting to “crawl inside her skin” at the thought, which has stayed in her mind, of Mr. Roger’s hands trying to caress her. She feels that he invaded her person, and he left her feeling dirty and cheated of her innocence. She reports that her grades dropped significantly while dealing with the case and this is a concern because she needs good grades to go to college.

- [16] Further, the VC has been affected by the negative things said about her in the media. She feels hurt that her family has had to put through this ordeal. In her statement, on Mr. Rogers, she stated:

“I never thought you would have been that kind of person. I saw you as a father figure who was there to protect me not [to] violate me. I felt like a daughter, but you left me violated and feeling dirty. You have changed my outlook on life and relationships. I am not able to trust anyone and I am not sure if I will ever be able to do so. I trust that you realize the damage you have done and I hope one day can admit it to yourself.”

- [17] Learned Defence counsel argued that such a statement is so prejudicial that it requires the VC to come to court and give it under sworn testimony. In passing, I say that the VC has already faced the accused. She is a minor and there is no need to be put her through that grueling experience again.

Submissions by the Crown

- [18] Learned Senior Crown Counsel, Ms. Tiffany Scatliffe, succinctly submitted that the offence, being of a sexual nature, is very serious and readily calls for a custodial sentence. The Crown identified the following aggravating factors:

1. Breach of trust as Mr. Rogers is the godfather of the victim.
2. Breach of duty and trust as he has an obligation to uphold and enforce the law.
3. Mr. Rogers tried to conceal the offence by telling the VC not to tell anyone about the incident.
4. Mr. Rogers offered alcohol to the VC who was underage.

- [19] The Crown next submitted that the Court should take into consideration the prevalence of sexual offences in the Territory and pass sentences to deter prospective offenders.

The starting point

- [20] The maximum penalty that can be imposed for the offence of indecent assault is seven (7) years¹.

- [21] Circumstances vary widely and the penalty imposed must take into account a number of considerations. In **R v Loff James Lemon**², the appellant was convicted of indecent assault and was sentenced to 2 years imprisonment. He was involved in a relationship with the mother of the nine-year old girl. He masturbated in the presence of the girl, and then pulled off her trousers and knickers. After referring to a plethora of decided cases, dealing with the appropriate sentence in cases of this kind, Henry LJ said:

“It is not the purpose of the judgment to seek to lay down guidelines for sentencing in cases of indecent assault. It was never easy to sentence in such cases. The circumstances of each case would vary greatly.

What the judge must do, as we 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 will have to 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 are to 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.”

Local Authorities

- [22] There are several local authorities cited by the Crown and Defence where there has been a breach of trust. In **R. v Kevin Dorset**³, the victim was under 13 years and the defendant was her neighbor and a preacher, of good character. A sentence of 18 months was imposed. In **R. v. Terry Hodge**⁴, a fine of \$1400 or six-months was imposed where the victim was under 13

¹ See section 124(1)(b) of the Criminal Code, 1997 as amended by section 20 of Act No. 8 of 2006 of the Laws of the Virgin Islands.

² [1999] 1 Cr App R (S) 9.

³ BVI Criminal Case No. 26 of 2005 [unreported], Judgment on Sentencing 18 October 2005.

⁴ BVI Criminal Case No. 11 of 2004 [unreported].

years. However, no written judgment is available to explain the reasons why this non-custodial sentence was imposed. A sentence of 5 years was imposed in **R. v Lloyd Arthur**⁵ where the victim was under 13 years and the defendant a pastor. It is to be observed that the case involved a breach of trust although the victim there was younger than the present victim. In **R. v. S. Williams Hamn** where an indecent assault was carried out in K'Mark supermarket. A sentence of 2 years imposed [no breach of trust involved]. In **R v Cecil Abednego**⁶ where the victim was a young girl. A sentence of 2 years was imposed. In **R. v. Keshawn Huggins**⁷, the victim was 11 years old and the defendant her 23 year old brother. A sentence of 3 years suspended was given. The case involved breach of trust and a very young victim. In **R v. Akeem Sebastian**,⁸ the defendant was convicted on 2 counts of unlawful sexual intercourse with a minor of 13 years age. Defence counsel noted that that case involved actual sexual intercourse and the maximum sentence at the time was 14 years. A sentence of 12 months was imposed. This case is not relevant.

Regional authorities

- [23] In **R v Winston Joseph et al**⁹ (unlawful sex) the defendant attacked the victim who was only 8 years old in a pit latrine. Defence sought to argue that there was vaginal penetration in that case and a sentence of 8 years reduced to only 2½ years. However, I reminded counsel that on 31 October 2001, the Court of Appeal re-issued an explanatory cover note recognising that there were accidental slips relating to the statement of the relevant statutory penalties and certain matters of expression.
- [24] Paragraph 2 of that Explanatory Cover Note states “*The maximum penalty for unlawful carnal knowledge of a female above thirteen years and under sixteen years was taken to be five years under the old statute, but it had been increased to fifteen years under the Criminal Code [Amendment] Act, Act No. 14 of 1997; and the maximum penalty for incest was taken to be seven years, but had been increased to fifteen years under the said amendment to the*

⁵ BVI Criminal Case No. 7 of 2004 [unreported].

⁶ BVI Criminal Case No. 15 of 2004 [unreported].

⁷ BVI Criminal Case No. 13 of 2008 [unreported]

⁸ BVI Criminal Case No. 11 of 2006 [unreported]

⁹ Criminal Case No. 4 of 2000 (St. Lucia) [unreported] CA Judgment 17 September 2001.

Criminal Code...It is necessary to make clear that we recognise that the court is functus officio with regard to the sentencing orders that were made and there is no interference with them..."

- [25] In **Goodridge v The Queen**,¹⁰ the victim was 6 years. The defendant was a stranger. A sentence of 2 years imposed.
- [26] A sentence of 4 years was reduced to 18 months on appeal in **Joseph Shane Merchant v The Queen**¹¹ where the appellant was indicted for rape but convicted on the lesser offence of indecent assault. Violence was used on the 13 year old victim who suffered physical injury - bleeding from the vagina.

English authorities

- [27] A sentence of 2 years was imposed in **R v Loff James Lemon**¹² where the victim was 9 years and the defendant was her mother's boyfriend. This was another case involving breach of trust.
- [28] In **R v AG Ref No. 1 of 2001**¹³ a probation order in a case involving breach of trust was replaced by a custodial sentence of 3 years. The victim was 10 years old. The appellant had previous convictions for an identical offence committed on his daughter when she was 6 years old.
- [29] A sentence of 2 years was imposed in **R v H**¹⁴ where the victim was a child and the defendant's step-daughter, so there was again a breach of trust. The defendant was caught on video striking the victim on the back of her head with his naked penis.
- [30] From the wealth of authorities submitted by the Crown and the Defence, it seems to me that on a plea of guilty, where there has been a breach of trust, sentences between nine to eighteen months' imprisonment have been approved by our courts. Thus, it may be said that the maximum sentence, speaking broadly, in a contested trial would be in the region of 12 months to 3 years.

¹⁰ Criminal Case No. 13 of 1997 (St. Vincent and the Grenadines) [unreported].

¹¹ Criminal Appeal No. 2 of 1995 (Antigua & Barbuda)[unreported]

¹² [1999] 1 Cr. App R (S) 19.

¹³ [2001] 2 Cr App R (S) 105.

¹⁴ [2009] EWCA Criminal 414.

Court's Considerations

[31] Indecent assault is largely a non-penetrative sexual offence but no less despicable on that account. In the words of Lord Griffiths: “...*although the offence of indecent assault may vary greatly in its gravity from an unauthorized teenage sexual groping at one end of the scale to a near rape at the other, it is in any circumstances a nasty, unpleasant offence* ...”¹⁵

[32] Although indecent assault is less serious than rape, the latter carrying a maximum penalty of life imprisonment, that does not make it any less traumatic to the victim. Thus, in determining an appropriate sentence for this type of sexual offence, the court will have reference to the various types of harm that can result from the offence, a number of which are outlined in the **Sentencing Guidelines for Sexual Offences by the Sentencing Advisory Panel 2003**, which was referred to by the Crown. These include:

- Violation of the victim's sexual anatomy
- Exploitation of a vulnerable victim
- Embarrassment, distress or humiliation of the victim
- Infringement of standards of socially acceptable behaviour
- The physical/psychological harm caused by non-consensual offences
- The relationship between the victim and the offender
- Abuse of a position of trust

[33] I take into consideration the guidance from the Court of Appeal on sentencing in sexual crimes in **Winston Joseph et al v R**¹⁶. At paragraph 17, Byron CJ has this to say:

“The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors....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 R v Court [1988] 2 All ER 223 at C.

¹⁶ Criminal Case No. 4 of 2000, Criminal Case No. 8 of 2000 and Criminal Case No. 7 of 2000 (St. Lucia) [unreported]; CA Judgment 17 September 2001; Re-issued with explanatory cover note on 31 October 2001.

- [34] In the instant case, Mr. Rogers' good character and unblemished professional record have been underscored by learned Counsel for the defence. Mr. Rogers' good character was also accentuated by Jasmine Brewley, a respectable businesswoman in this community who spoke in glowing terms about Mr. Rogers. She called upon this court to impose a non-custodial sentence on Mr. Rogers.
- [35] Although I agree, albeit diffidently that a non-custodial sentence is not without precedent¹⁷, it is factually true that offences of a sexual nature especially where young girls are victims, almost always attract a custodial sentence.
- [36] In my opinion, there are at least four aggravating factors in this case. Of particular concern is Mr. Rogers' position as the godfather of this child and as a top-ranking law enforcement officer; both of which import a very high degree of trust from the VC and the community at large. Accordingly, a breach of this nature is a betrayal of his fiduciary duty to his goddaughter and to the community that he has pledged to serve and protect.
- [37] In weighing the gravity of the offence, regard must be had to "*the degree of harm to the victim,...the level of culpability of the offender.. and the level of risk posed by the offender to society*"¹⁸
- [38] The VC has suffered no physical injury but has been subjected to the types of harm identified in para. [32] above. Mr. Rogers exposed and attempted to suck the VC's breasts and vagina, he held or "cuddled" her against her will and he brought his penis into contact with her bottom. He has emphatically denied the commission of the offence and therefore, he has not taken any responsibility for the injury done to the child. No doubt, this has caused her greater pain.
- [39] I am of the firm view that a custodial sentence is warranted in order to punish Mr. Rogers and to record society's abhorrence of the act as well as to serve as a deterrent both to Mr. Rogers

¹⁷ See BVI Criminal Case No. 11 of 2004 - **R v Terry Hodge** [unreported]. The victim was under 13 years of age and the defendant was a school-teacher. A fine of \$1,400 or 6 months imprisonment was imposed. There is no written judgment to explain why such sentence was imposed. See also BVI Criminal Case No. 13 of 2008 – **R v Keshawn Huggins** [unreported]. The victim was 11 years old and the defendant was her brother. The case involved breach of trust and a very young victim. A suspended sentence of 3 years was imposed. No written reasons were given for the imposition of such sentence.

¹⁸ **R v Millberry et al** [2003] 2 Cr App R (S) 31.

and those who might be minded to imitate him. Offences of a sexual nature are becoming too prevalent in this Territory and it is time that the court sends out the signal that even the mere act of touching women particularly young girls will be met with stiff custodial sentences.

[40] No doubt, in imposing the appropriate sentence, I have to consider the mitigating factors namely Mr. Rogers' good character, the lack of "physical" violence and his low level of risk to the society.

The Sentence

[41] Having regard to all the facts and circumstances in this case, and taking all matters into consideration, I hereby sentence you **DONALD ROGERS** to 18 months imprisonment to commence from the date of conviction, 28 May 2010.

Indra Hariprashad-Charles
High Court Judge