

BRITISH VIRGIN ISLANDS

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

BVIHCR 2009/0020

BETWEEN:

THE QUEEN

and

DEREK CORT

Appearances:

Ms. Tiffany Scatliffe, Senior Crown Counsel and with her Mr. Valston Graham, Crown Counsel for the Crown

Mr. Stephen Daniels for the Defendant

2010: May 31

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JUDGMENT ON SENTENCING

(Criminal Law - Evidence and Procedure - Offences against the Person - Sexual Offences - Rape - Sentence - Matters to be considered)

Introduction

- [1] **HARIPRASHAD-CHARLES J:** On 13 May 2010, the defendant, Derek Cort was convicted by a unanimous jury for the rape of a woman contrary to section 117 of the Criminal Code, (Act No. 1 of 1997) of the Laws of the Virgin Islands (“the Criminal Code”).

The facts

- [2] The facts of the case which the Jury accepted are as follows: Mr. Cort and the victim were in an intimate relationship for eleven months. The victim terminated the relationship sometime in June 2008 because Mr. Cort was somewhat of an “Indian-giver”, i.e. everything he gave her he would take back. Mr. Cort did not take the break-up well and he would still call the victim

asking her to make-up with him. The victim refused. Indeed, it appeared that the victim had already commenced another relationship.

- [3] On 6 August 2008 around 8.00 p.m. the victim returned to her apartment from the beach. She entered her home and locked the door. The door which was a white tinning or aluminum door with Miami louvres, the winder of the louvres was not working at the time and so, one would have to use one's hand to manually open and close the louvres.
- [4] The victim went into her bathroom and took off her clothing which was wet. Her cell phone rang and she answered it. It was her friend, John Alex Charles. Whilst she was speaking to him, she saw a shadow darted across the bathroom. She realized that it was Mr. Cort. He had a knife. She struggled with him and at the same time, crying. She received a laceration to the palm of her right hand. Thereafter, Mr. Cort punched her in her right eye and dragged her to the bedroom. He asked her for sex and she refused. He had the knife held against her abdomen. Mr. Cort then took some of the green grease from the dressing table, put it on his penis and put his penis in her vagina. He did not use a condom. He had sexual intercourse with the victim for ten minutes. The victim was crying and kicking during the ordeal.
- [5] Subsequently, the victim attempted to escape but she was unsuccessful. Mr. Cort then put some more of the green grease on his penis and this time, he put his penis in her anus. He had anal sex with the victim for five minutes. After that, the victim asked Mr. Cort to leave her apartment. He refused. Mr. Cort told her that neither of them was going to sleep.
- [6] At about 5.00 a.m. Mr. Cort left the victim's apartment but before he left, he had sexual intercourse with her again for about five minutes. When leaving the apartment he told the victim to keep this between them and that if she told anyone he would kill her.
- [7] On her way to work on the morning of 7 August 2008, the victim saw Pastor Ricketts. Pastor Ricketts greeted her as was customary. The victim did not answer. Pastor Ricketts offered her a ride to work which she accepted. She asked her what was wrong. The victim told Pastor Ricketts that she could not say anything as her life depended on it. She eventually told Pastor

Ricketts what happened on the night of 6 August 2008. The victim made a report to the police on the 8 August 2008. Mr. Cort was subsequently arrested and charged with rape.

Plea in mitigation

- [8] Learned Counsel for Mr. Cort, Mr. Daniels beseeched the Court not to impose a custodial sentence for the following reasons: (1) Mr. Cort has no previous convictions; (2) he is a man of good character as confirmed by Pastor Gregory Smith of the Emmanuel Baptist Church and his former employer, Christina Yates of Yates Associates Construction Co. Ltd and (3) he supports his minor daughter, aged 7.
- [9] A Social Inquiry Report was also submitted to the Court. According to the report, Mr. Cort is 47 years of age. He was born in Guyana and is the sixth of ten children. His parents and two siblings are now deceased. With the exception of a sister in Virgin Gorda and a brother in New York, all of his siblings live and work in Guyana. He has fathered 4 children by 4 women. Three of the children presently reside in Guyana and one attends college in the USA. According to Mr. Cort, he maintained amicable relationships with the mothers of all his children. Mr. Cort claims that he is the sole financial provider for his minor child and her mother, although his relationship with the mother stopped in 2008 when she found out about the charge of rape.
- [10] The Social Worker interviewed Mr. Cort's sister in Virgin Gorda, his current landlord, a past co-worker, his present supervisor, and the pastors of two churches which he had sometimes attended. According to these sources, Mr. Cort was a playful well-adjusted child from a happy home with a good upbringing. He maintains good relationships with his siblings. On the job he "never gave problems", was a "perfect worker" and "always willing to work". He was "very quiet" as a tenant. He was described as having "a cool and calm demeanour", "trying to live a Christian life" or "making a conscious effort to be a Christian" and being "very devoted to the church". He is not known to have any history of alcohol or substance abuse, and Mr. Cort himself denies drinking any alcohol or using any drugs besides cigarettes at one period in the past. According to one pastor, the allegation of rape seemed to be "out of character".
- [11] The overall assessment of Mr. Cort is that he is a "quiet man" and a "nice person" who is always willing to teach others on the job site and who has earned the respect and confidence

of his supervisors. Mr. Cort was calm and co-operative during the interview. He professed to feel “real bad” for this incident but did not clarify specifically what he was remorseful about. The only negative report came from the victim.

Victim impact assessment

- [12] The victim was interviewed by a professional counselor, Dr. Sylvia Buntin-Simmons, MSW, MPA, PhD. According to the Report, the rape resulted in numerous physical, psychological, and economic impacts to the victim’s life. The physical injuries which she received during the incident have since healed but they caused great pain at the time inflicted. The violation, humiliation, and accompanying threats against her life left her with a lot of fear and emotional distress.
- [13] Psychologically, the victim reports that before the rape she had little difficulty sleeping, eating or trusting people. However, since her ordeal, she reports of being “constantly afraid” that someone will break into her apartment and rape her again. She is unable to relax in her home, has little appetite and is unable to trust people like she did before because she feels that someone might hurt her. For several weeks after the incident she entertained suicidal thoughts because of the shame and embarrassment, especially in respect of the sodomy which she regards as disgusting.
- [14] Since the incident, the victim has limited her socialization with other people because she is afraid that others may be harmed by Mr. Cort. The victim stated that Mr. Cort has made a series of threats against her life during the rape and she believes he is capable of hurting her if he is not imprisoned. She claims that during their relationship he was controlling and verbally abusive. She was not allowed to speak to men or her life would be a “living hell”. She related one incident where Mr. Cort stalked and assaulted a male acquaintance at his home and threatened to kill him if he ventured near the victim.
- [15] Dr. Simmons has recommended counseling for the victim.

Submissions by the Crown

[16] Learned Senior Crown Counsel, Ms. Scatliffe provided a plethora of judicial authorities on sentencing. These included several authorities from the British Virgin Islands, the OECS and England. The local authorities relied upon are **R. v Kelvin Turnbull**¹, **R. v Ricky Callwood**², **R. v Tiffern Henley**³, **R. v Robert Thomas**⁴, **R. v Claudius Frett**⁵ and **R. v Winston Harrigan**.⁶ The regional cases referred to by the Crown are **Winston Joseph v R.**, **Benedict Charles v R.**, and **Glenroy Sean Victor v R.**⁷ **Dwight Dookie v R**⁸ and **Gregory Burton v R.**⁹ Finally, the English cases cited are **R. v Billan et al**¹⁰, **R. Christopher Millberry**¹¹ and **R. v Puru**.¹²

[17] In identifying the aggravating and mitigating factors, Ms. Scatliffe alluded to the guidelines established by the Court of Appeal in **Winston Joseph v R.**, **Benedict Charles v R.** and **Glenroy Sean Victor v R** [supra]. In these consolidated cases, the aggravating factors were identified as:

- 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.

¹ Criminal Case No. 13 of 2007 [unreported] Judgment of sentencing delivered on 28 November 2007.

² Criminal Case No. 13 of 2009 [unreported]. Mr. Callwood was sentenced to 5 years for raping a young woman in his home. He was found guilty by a jury. No weapon was used in the commission of the offence and no perversions were committed.

³ Criminal Case No. 08 of 2006 [unreported]. Mr. Henley was convicted by a jury for the rape of a young woman and was sentenced to 7 years. No weapon was used during the commission of the offence. Mr. Henley was a first offender and a youth.

⁴ Criminal Case No. 17 of 2002. Mr. Thomas was sentenced to 10 years for raping a woman he had a prior relationship with. Mr. Thomas had several previous convictions.

⁵ Criminal Case No. 7 of 2001 [unreported]. Mr. Frett was convicted of raping his daughter who at the time was a high school student. He was sentenced to 12 years for rape and 8 years for incest.

⁶ Criminal Case No. 5 of 1996 (pre Criminal Code)- Mr. Harrigan pled guilty to the offences of common law rape and burglary and was sentenced to 5 years. He broke into the victim's home and raped her at knifepoint. He was awarded a lower sentence because of his guilty plea.

⁷ Criminal Appeal No. 4 of 2000, Criminal Appeal No. 8 of 2000 and Criminal Appeal No. 7 of 2000 (consolidated).

⁸ Criminal Appeal No. 1 of 2007 (Saint Lucia). The appellant was convicted of rape and sentenced to 15 years imprisonment. The sentence was affirmed on appeal.

⁹ Criminal Appeal No. 1 of 2002 (Saint Lucia). The appellant was convicted of rape of a school girl and sentenced to 15 years imprisonment. The Court of Appeal held that the sentence of 15 years was by no means excessive in the circumstances.

¹⁰ [1986] Cr. App. R. (S) 48.

¹¹ [2003] 2 Cr. App. R. (S) 31.

¹² (1985) LRC [Crim.] 817.

- 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.

[18] The mitigating factors are identified as follows:

- 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 a youth.

[19] In the instant case, Ms. Scatliffe submitted that the only mitigating factor is that Mr. Cort has no previous convictions. She identified the following aggravating factors:

- 1. The offence was accompanied by perversions abhorrent to the victim; in this case, buggery (anal sex) was done on the victim.
- 2. The victim suffered physically and psychologically from the sexual assault.
- 3. Violence was used over and above the force necessary to commit the offence. Mr. Cort physically assaulted the victim and used a weapon namely a jackknife during the commission of the offence.
- 4. He entered the home of the victim and ambushed her.

Court's considerations

[20] Rape is recognized as one of the most heinous and serious sexual offences. In **R. v Curtis Bruce**, I remarked 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 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 ...¹³

- [21] The crime nearly always results in a custodial sentence. In **R. v Christopher Millberry** [supra], Lord Lane, referring to the general guidelines as to sentencing for rape in **Roberts and Roberts**¹⁴ had this to say:

“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 emphasise 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.”

- [22] The maximum penalty for rape is life imprisonment.¹⁵ This in itself indicates the gravity of the offence. Having said that, the Court does have a wide discretion on sentencing. In determining the appropriate sentence, regard must be had to the particular circumstances of the case. In **R. v Puru** [supra], the court opined:

“In exercising their sentencing responsibilities, judges must balance various critical considerations. While society’s condemnation of rape is a paramount consideration, sentences should also seek to protect women, to deter future offences and to punish the offender justly with regard to his case and by reference to other cases.”

- [23] The Court also bears in mind the classical principles of sentencing which could be summed up in four words “retribution, deterrence, prevention and rehabilitation.” In **R. v. Sargeant**¹⁶, Lawton L.J. said:

“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.”

¹³ Criminal Case No. 17 of 2006. Judgment on sentencing delivered on 4 June 2007[unreported].

¹⁴ (1982) 4 Cr. App. R. (S) 8. See page 3 of Millberry’s judgment

¹⁵ See section 117 of the Criminal Code which reads: “a man who rapes a woman commits an offence and is liable on conviction to imprisonment for life”.

¹⁶ 60 Cr. App. R. 74.

[24] In considering the appropriate sentence to be imposed, I am also required to engage in the evaluative process by weighing the mitigating and aggravating factors as expounded by Sir Dennis Byron CJ in **Winston Joseph et al.** At paragraph 17, Byron CJ (as he then was) stated as follows:

“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.”

[25] Byron CJ went on to list the more common aggravating and mitigating factors. Based on the factors identified above¹⁷, in the present case, there are at least four aggravating factors.¹⁸ There is one mitigating factor: Mr. Cort has no previous convictions.

[26] In **Winston Joseph et al**, Byron, C.J. suggested (at page 8 of the judgment) that for rape committed on an **adult** [emphasis added] without aggravating or mitigating features, the starting point should be 8 years in a contested case and 3 years on a plea of guilty.¹⁹

The sentence

[27] Having regard to all the facts and circumstances in this case, there is no doubt in my mind that a custodial sentence is necessary. Considering that the starting point should be 8 years in a contested rape case, such as the present, and taking all matters into consideration, I hereby sentence you, **DEREK CORT** to 10 years imprisonment to commence from the date of conviction, that is, from 13 May 2010.

Indra Hariprashad-Charles
High Court Judge

¹⁷ See paragraph 12 of the judgment.

¹⁸ See paragraph 19 of this judgment [supra].

¹⁹ See paragraph 16 of the judgment.