

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE (Criminal)

CASE NO. 11/2004

BETWEEN

THE QUEEN

Claimant

VS

JOHNNY ANTHONY
AKA "SAMMY"

FOR

(1) *Unnatural Carnal Knowledge*
(2) *Indecency*

Defendant

Appearances:

Mr. Leslie Mondesir for the Crown
Mr. Byran Stephen for Accused

2004: June 30
July 7

JUDGMENT ON SENTENCING

[1] **EDWARDS J:** The accused Johnny Anthony was 18 years old on the 12th February 2004.

- [2] On the 8th June 2004, he pleaded guilty to the 2 Counts on the Indictment, charging him with Unnatural Carnal Knowledge and Indecency.
- [3] I heard the facts and Mitigation submissions from his Counsel Mr. Stephen on the 30th June 2004.
- [4] I also have before me the Social Inquiry Report for the accused and a Psychiatric Report from Dr. S. Srikumarun who also testified on the accused's behalf.

THE FACTS

- [5] On Thursday 20th November 2003 after 3:00 p.m., 9 years old Roneal Popo accompanied the accused who is his cousin to the garden at Plateau Babonneau to untie goats and place them in cages.
- [6] In the course of accomplishing their mission, the accused lured Roneal inside a shed, pulled down his pants, inserted his penis into Roneal's anus, and buggered him.
- [7] After completing this act, the accused told Roneal not to tell anyone about what had just happened.
- [8] Upon returning home, Roneal later had difficulty easing his bowels. He told his mother and sister what accused had done to him.
- [9] Roneal's parents promptly made a report to the Police and took Roneal to the Victoria Hospital.
- [10] Dr. Cherida Seymour examined Roneal's body and particularly his anus at about 10:57 p.m. that night. She found no abrasions or lacerations on his body. She found that the surrounding tissue of his perianal region was mildly excoriated and erythematic. She found no visible discharge, tears or lacerations. The area was not tender to palpation.
- [11] The doctor's impression according to the allegations was that there was physical assault with evidence of sexual manipulation.
- [12] Roneal received medication and was sent home.
- [13] On the 22nd November 2003, Roneal was treated at the Hospital, for complaints of vomiting, insomnia and anorexia for 2 days. Dr. Gilford diagnosed Roneal to be suffering from post traumatic alleged assault symptoms. Roneal received further treatment and was discharged. The doctor advised Roneal's father to ensure a follow-up with a Social Worker.

THE LAW

- [14] Article 242 of the Criminal Code provides an indeterminate sentence of life imprisonment for Buggery.
- [15] Article 112A states that a conviction on indictment for indecency with a child under 14 years old attracts a penalty of imprisonment for 2 years.
- [16] Article 1284 states that “***Unless otherwise expressly provided, a Court may sentence any offender to any less punishment . . . than that prescribed***”.
- [17] Our Court of Appeal established guidelines for Sentencing in Rape and Unlawful Carnal Knowledge Cases in its decisions in **Winston Joseph –vs- The Queen** Criminal Appeal No. 4 of 2000 and **Benedict Charles –vs- The Queen**, Criminal Appeal No. 7 of 2000 delivered 31st October 2001.
- [18] No decision from our jurisdiction, or from our Court of Appeal, establishing guidelines on Sentencing in Buggery Cases were brought to my attention.
- [19] I shall therefore have to consider the extent to which I can apply the guidelines established in the **Winston Joseph and Benedict Charles** cases to the present case.
- [20] I will also consider the decided English Cases relating to Sentencing in Buggery Cases and the guidelines established by them. I must however, bear in mind the legal and social context within which some of the pronouncements in these cases have been made, having regard to the differences between our law and the English Law. The English Law permits homosexual acts between consenting males in some circumstances. The Law of St. Lucia criminalizes all of such conduct.
- [21] In Winston Joseph and Benedict Charles cases the Court of Appeal pronounced the following guide lines to establish uniformity in the principles which a Judge should apply in determining what sentence to impose in Unlawful Carnal Knowledge Cases.
- [22] The severity of the punishment depends on the age of the Virtual Complainant and the aggravating and Mitigating factors present.
- [23] The aggravating factors may include the violence used, apart from any force used to commit the offence, the age of the virtual complainant, whether pregnancy has resulted from the crime, any perverted acts of anal or oral sex used by the accused, whether the offence has caused physical or psychological injury to the Virtual Complainant, whether the offence was frequently repeated, and any previous convictions for similar offences.
- [24] Other aggravating features may be the fact that the accused was an authority figure in authority over the Virtual Complainant i.e. step father family friend, relative or teacher. The age of the accused where he is 28 years and upward and any abuse of trust are also aggravating features.

- [25] The mitigating factors may include the accused's guilty plea evidencing contrition, the age of the accused where he is under 22 years and is a first offender, any evidence that the Virtual Complainant was a willing participant and or seduced the accused.
- [26] The fact that buggery is an unnatural offence may be in itself revulsive given the norms of our society. This was recognized by Lawton L.J. in R -vs- Willis [1974] 60 Cr App. R. 146.
- [27] Lawton L.J acknowledged that ***"one of the difficulties which Judges have in sentencing offenders of this type is their own reactions of revulsion to what the accused has been proved to have done. Right- thinking members of the public have the same reactions and expect the Judges in their sentences to reflect public abhorrence of homosexual acts"***.
- [28] Lawton L. J. also recognized that ***"there is a widely held opinion that homosexual offences involving boys lead to the corruption of the boys and cause them severe emotional damage"***.
- [29] The Social Inquiry Report and the submissions of Counsel Mr. Stephen reveal that the accused was exposed to homosexual acts from he was 7 years old for several years by his uncle who buggered him, and who is now living in Barbados. He did not inform his parents or any other family member about what his uncle was doing to him because the uncle told him not to. Mr. Stephen submitted that the accused consequently grew up, believing that such behaviour was normal.
- [30] Reflecting on similar cases of homosexual abuse, and the homosexual experiences of the accused at a young age, Lawton J. acknowledged that experienced Judges also hold the view that a boy's exposure to homosexual abuse may pre-dispose him to homosexuality, ***"because when considering homosexual offences. . [they] are frequently told in pleas of mitigation that the accused was made a homosexual as a result of being involved when a boy in homosexual acts by a man"***.
- [31] In R -vs- Willis (supra) a 24 years old man committed buggery with an 8 years old boy. At his trial he pleaded guilty and admitted 7 other similar offences for indecent assault on boys of a similar age. He had 2 previous convictions for indecent assault on girls aged about 10 years. He was sentenced to 5 years imprisonment for buggery and 3 years for indecent assault with sentences to run concurrently :([1975] 1 A L L E.R. 620).
- [32] On appeal it was held that:
- (i) **Buggery committed with boys under the age of 16 years was a serious offence and the younger the boy the more serious the offence.**
 - (ii) **In the absence of very strong mitigating factors the proper sentence was one which would result in immediate loss of liberty.**
 - (iii) **The aggravating factors to be taken into account include:-**

- a) *Physical injury to the Virtual Complainant or use of violence in order to get the Virtual Complainant to submit to the accused's driving force of lust.*
- b) *Any likely emotional and psychological damage and the possibility, depending on the make up and tender age of the Virtual Complainant that the act of the accused may predispose him towards homosexuality.*
- c) *Moral corruption by way of enticements, in the form of money, gifts and other material comforts.*
- d) *Abuse of authority and trust. Accused persons in authority over boys should get severe sentences for abusing their positions in order to gratify their deviant sexual urges. This aggravating factor should attract a sentence aimed at deterring all other persons in such authority, letting them know that such abuses of trust will not be tolerated by the Courts and the society.*
- e) *For accused persons suffering from a mental illness, the offence of buggery should result in immediate custody.*
- (iv) The Mitigating Features include :
 - a) Personality disorders varying from mental immaturity in an adult to the effeminate and flaunting exhibitionist, and resentful anti social types.
 - (i) *The mentally immature adult who is in the transitional stage of psycho-sexual development can be helped by a sentence designed to help him grow up mentally.*
 - (ii) *However for the effeminate, exhibitionist and anti-social types, sentences may focus on management rather than treatment. Where they cannot be managed, they should be incarcerated for indefinite periods since they are potentially a danger to boys when at large in the society.*
 - b) Latent homosexual disposition in an accused which becomes uncontrolled, precipitated by emotional stress or expected powerful temptations, resulting in buggery offences and indecent assault. In such cases Lawton L.J. opined that a measure of leniency may be necessary.

[33] Lawton L.J. recommended that a similar approach for sentencing in cases of indecent assault on boys should be taken by the Court. However, the Judge should remember that in these cases it is not the label of indecent assault which is important, but the nature of the act. While the cases involving putting a hand on or under clothing in the region of the testicles on buttocks are not serious, assaults involving revolting acts of fellatio is as bad as buggery or even more so. Sentences should therefore reflect the seriousness of the act constituting the act of indecency.

- [34] A more recent decision which sets out the factors to be taken into account in sentencing accused persons for Buggery committed on children is **R -vs- Jones (Attorney General's Reference No. 17/1990** [1991] 92 Cr App R. 288.
- [35] The factors are:
- (i) the overall gravity of the offence,
 - (ii) the necessity for punishment of the offender,
 - (iii) the necessity to protect the public from the activities of someone who is prepared to commit such an offence,
 - (iv) the effect that a severe sentence might have on other people minded to act in such a manner.

THE CHARACTER AND RECORD OF THE ACCUSED

- [36] At the time of the offence the accused was 17 years and 9 months old and not 16 years as Mr. Stephen told this Court.
- [37] The accused has 4 brothers including his twin brother. They live with their unmarried parents in a modest 2 bedroom wooden house surrounded by an extensive kitchen garden. His parents are reputed reformed alcoholics.
- [38] He is regarded as well behaved, normal, helpful, caring, pleasant, quiet, reserved, and respectful by his parents, relatives, neighbors and community members of Plateau Babonneau.
- [39] He attends the Evangelical Church regularly. He attended the Rock Hall Senior Primary School as he was unsuccessful in the common entrance examination. His teachers said he had average ability, was an introvert, and successful sportsman representing his school.
- [40] Accused was said to have no friends apart from family members. He told the Probation Officer that he had 2 relationships at school but they ended when he left school. The nature of these relationships were not disclosed in the report.
- [41] His twin brother described accused as the best brother anyone could have. His twin brother and himself built 2 miniature model homes which have been regular news items and a source of local attraction.
- [42] He is employed at the Display Creations Union, and his co-workers regard him as hardworking, an introvert and a loner. They spoke highly of him and said they had no problems working with him.
- [43] All of the persons who were interviewed were shocked to hear of the incident as they all described him as well-behaved and never been in trouble.

- [44] The accused was polite, calm and cooperative when interviewed by the Probation Officer. He said he was ashamed of what he had done to his cousin, was tearful, and said he wanted to apologise to his cousin's family and his family for what he had done.
- [45] His family members were unaware that he was sexually abused by his uncle who community members said was a homosexual. Accused said that while he was playing with Roneal he had flash backs of his childhood. He felt that what he had done to his cousin was alright until his cousin reported the incident. He confessed to always feeling confused with a need to sort out his feelings.
- [46] The Psychiatrist diagnosed the accused with Paraphalia (Pedophilia), a rare illness associated with abnormal sexual fantasies, urges and acts. In this condition, Dr. Srikumarum said this sexual deviance causes him to be very much attracted to boys and he is distressed about this because he told the doctor he had a girlfriend.
- [47] The Psychiatrist explained that his current condition could also be a manifestation of his experience of being sexually abused when he was 7 years old.
- [48] Dr. Srikumarum also diagnosed that he may be suffering from an illness called obsessive compulsive disorder simply because he repeatedly utters the name of "JESUS" at least 4 to 5 times daily.
- [49] I am not persuaded by Dr. Srikumarum that uttering the name of JESUS several times daily could be a physical manifestation of the illness obsessive compulsive disorder, particularly where there is information that accused is of Evangelical faith, attends church frequently, is confused about his personal condition, and wants to sort himself out. Calling on "JESUS" repeatedly could be one of the methods that he is utilizing to sort himself out.
- [50] In my opinion what the social inquiry report shows along with Dr. Srikumarum's testimony and report is that this accused is in desperate need of proper and adequate assistance to help him sort himself out.
- [51] Dr. Srikumarum stated that Paraphilia is a rare illness and there is no body of research on this. Case studies show he said, that anti depressant medication can decrease his sexual impulses. Consequently he has been treating him with such mediation since the 21st June 2004. The Psychiatrist has also recommended psychotherapy once weekly for about 20 sessions to help him overcome his sexual conflicts.
- [52] Despite the psychiatrist's testimony and report, I have to bear in mind the pronouncements of Lawton L.T. in R -vs- Willis (supra). When dealing with the mitigating factor of Mental imbalance he said:-

"The Wolfenden Report rejected the theory that homosexuality is a disease. . .Some psychiatrists try to persuade judges that it is and that its

manifestations should be regarded as symptoms of the disease, rather than a breaches of the Criminal Law. Parliament. . . has decided that. . .buggery. . . should be [a] criminal offence. . . There is no justification for Judges taking any other view. The Wolfenden Report recognized however, that in some cases homosexual offences do occur as symptoms in the course of recognized mental or physical illness and cited as an example senile dementia. . . When such cases are identified by satisfactory medical evidence, Judges will want to pass sentences which do not result in immediate committal to prison”.

AGGRAVATING AND MITIGATING FACTORS

- [53] It is quite evident that Roneal was detrimentally affected by the bugging incident. It had a traumatic effect on him which caused him to be sick for a few days following the incident. Though the extent of the harm done to Roneal may be difficult to evaluate, with proper counseling, and a loving and understanding family environment, he can recover and himself reflect no symptoms of sexual deviance.
- [54] The fact that the accused told Roneal not to tell anybody what he had done to him, shows in my opinion, that accused knew that what he was doing was wrong.
- [55] I do not accept that because accused was abused by his uncle and socialized in accepting such behaviour, he did not know that it was wrong until this incident was reported to the Police.
- [56] However, this matter has caused the Court a great deal of anxious consideration. Despite the public revulsion for homosexual conduct and offences, in my opinion the accused is entitled to credit for his guilty plea, good record, good character, his youthfulness, the circumstances leading up to the commission of the buggery offence, and the contrition and remorse he has shown since the offence.
- [57] The accused has been punished severely by the publicity which has attended his arrest and conviction, and he has been in custody since the 8th June 2004.
- [58] Counsel Mr. Stephen has urged me to find that the mitigating features put forward for the accused far outweigh the one aggravating feature, since there was no violence or physical injury inflicted on Roneal. Counsel's submission finds favour with this Court.
- [59] I regard the accused as possessing a latent homosexual disposition which got out of control at the time of the incident. He yielded to the temptation and sexual impulses on that occasion. He is in the category of those offenders who Lawton L.J. opined should be treated with some measure of leniency:(**R -vs- Willis**

Supra). I have also applied the principles in **R –vs- Jones** mentioned at paragraphs 34 and 35 of this Judgment.

[60] This accused is obviously not a dangerous offender who needs preventative confinement. I also do not believe that the penal objective in this case should emphasize deterrence. In my opinion the focus should be on an individualized mode of sentence, which promotes the rehabilitation of the young accused while exposing him to appropriate counseling and treatment.

[61] The vehicle for rehabilitation will be the Probation Ordinance 1960.

[62] Section 3 of the Probation Ordinance 1960 provides:-

“Where a Court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the Court may instead of Sentencing him make a Probation Order.

Provided that, before making a Probation Order, the Court shall explain to the offender in ordinary language the effect of the Order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence”.

[63] I am required by the Ordinance to obtain his consent prior to placing him on probation.

[64] Where he so consents, I have contemplated placing him on probation for 3 years with conditions regarding psychiatric treatment and any other medical treatment that the doctor recommends to assist in the waning of his deviant sexual urges.

[65] The indecent assault is merely a necessary incident to and an aspect of the offence of buggery. In my opinion for the purposes of punishment it is not an alternative offence, so dual punishment is inappropriate.

Dated this 7th day of July, 2004

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OLA MAE EDWARDS
High Court Judge