



[2019] JMSC Crim 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CLAIM NO. 2018CR00373

BETWEEN

REGINA

CROWN

AND

KENNETH BLAKE

DEFENDANT

Ms Cherly Lee Bolton Crown Counsel from the Office of the Director of Public Prosecutions for Crown

Mr. Russel Stewart for Defendant

Sentence: Plea - Guilty – Sexual Touching and Sexual intercourse with a person under 16 years.

Heard: 29th July 2019 and 18th October 2019

Shelly-Williams J

Facts

- [1] At the time the offences were committed the complainant was twelve years old whilst the defendant was over fifty years old. The defendant was the boyfriend of the complainant's mother and the pastor of the church the complainant attended.
- [2] On a date in September 2015, the Complainant went to the home of the defendant to visit her sisters. The sisters of the complainant were residing with the defendant at the relevant time. The defendant asked the two sisters of the complainant to

purchase groceries in Kingston which is some distance from the defendant's home. The defendant asked that the complainant to remain at his house and not accompany her sisters. The complainant started to watch television in the defendant's room after which the defendant entered the room and told the complainant that he wanted to suck her breast. He then proceeded to suck her breast, touched her vagina and then had sexual intercourse with her. He later promised the complainant that he was going to purchase a telephone for her.

- [3] In March 2017, the complainant again visited the home of the defendant. Whilst there the defendant sent her two sisters to a shopping centre to purchase drinks and water. The defendant then called the complainant into his room where he had sexual intercourse with her.
- [4] The complainant later realised that she was pregnant. On the 16th of July 2017 the complainant told a family friend that she was pregnant and that it was the defendant who was responsible. The complainant was taken to the Centre for the Investigation of Sexual Offences and Child Abuse (CISOCA) where she made a report and a statement was recorded. She was also medically examined. On the birth of the child a Deoxyribonucleic Acid (DNA) test was conducted by the Crown and the defendant could not be excluded as the father of the child.
- [5] On the 15th of October 2017 the defendant was arrested and charged for the aforementioned offences. He was cautioned and he made no statement. The defendant requested that another DNA test be conducted to determine the paternity of the child. That test also could not exclude the defendant as the father of the child.
- [6] On the 29th of July 2019 the defendant pleaded guilty to the aforementioned offences. In approaching sentencing in this matter, I was guided by case law, statute and by the sentencing guidelines.

The Case Law

[7] The case of **Blake (Samuel) v R** [2015] JMCA Crim 9, gives some guidance in relation to the sentencing of this defendant. In that case the defendant pleaded guilty to unlawful sexual intercourse with a girl under 16. This offence attracts a maximum sentence of life imprisonment. The facts in that case were that the defendant was a shop keeper in the community that the complainant resided in. The complainant was fifteen years old at the time. The sexual intercourse resulted in a child being produced. At the time of sentencing, the defendant did not have a criminal record. The Court of Appeal affirmed the sentence of four (4) years imprisonment that had been handed down by the trial court, however expressed some strong views in relation to the sentence.

[8] Per McDonald – Bishop JA stated :-

“[23]... the fact that Parliament had seen it fit to move the penalty from seven years in the case of older girls to a term of life imprisonment is indicative of its intention that a lengthy term of imprisonment is warrant for these offences. The statute by so doing has also removed the distinction that was formerly made pertaining to sentences relative to girls under 12 and those over 12. This, again, shows the seriousness with which Parliament intends that these offences committed against older girls should be treated.....

[24] We have also noted that the learned trial judge might not have indicated in his reasoning, in forensic terms, the objectives of sentencing by specific reference to the usual principles of sentencing. His reasoning, however, does demonstrate that he had, in substance, taken matters into account that would go towards satisfying those considerations on an objective evaluation of the circumstances of the case. He highlighted the aggravating factors, and identified the seriousness of the offence as “the first and most significant aggravating factor”. He also emphasized the age of the applicant, noting that he could have been the complainant’s father or grandfather. He then, rightly

noted, having made that observation that "... the larger the age range, the applicable principles indicate, the greater the requirements for a custodial sentence".

[25] He also looked at the fact that the applicant did not readily admit to having had sexual intercourse with the complainant but that he did so only after the paternity test revealed that he is likely to be the father of the child. Furthermore, he noted that the applicant sought to put blame on the complainant for the commission of the offence that she tempted him and made sexual advances at him. He also noted the fact that based on the poor economic circumstances of the complainant, the applicant was of the view that the matter could have been settled out of court. He stated further:

"...this is not a civil matter for settlement out of court. This is about the law protecting young girls from being interfered with by older men and having their life prospects marred by such exploitation. I have to also consider the negative impact of the offence on the victim. She now has a child to take care of when she should be seeking to further her education. I also have to take into account that the offence is very prevalent and the sentence of the court has to reflect the need to address that. So those are the aggravating factors."

[27] All the factors identified by Miss Kiffin, as going to the attributes of the applicant in mitigation of sentence, were before the learned trial judge and he duly considered them. As he indicated and had later demonstrated:

"Now, I wait [sic], for the purposes of sentencing, to accept your version of event where there is a conflict between your account and the account of the complainant. I also take into account everything that has been urged on behalf by your lawyer, and that is contained in the Antecedent Report and the Social Enquiry Report."

In sum, the learned trial judge considered the plea in mitigation through which learned counsel, then, managed to put all facts favourable to the applicant before the court. Counsel had even prayed in aid the Bible in asking the court to treat with the issue of the temptation of the applicant by the complainant. The

social enquiry and antecedent reports also contained some glowing testimonials of his attributes.

[29] Furthermore, when the girls are impregnated by these men, this must not be taken as a mitigating factor as counsel is urging on us because to do so could well send the wrong signal that a man who gets the girl pregnant is likely to be treated more favourably by the court than one who has not done so. While the welfare of the child is always an important consideration, it cannot be an overriding factor in the context of the criminal law where the child is a direct product of the criminal act being penalized. The learned trial judge cannot, at all, be faulted for viewing it as an aggravating factor in the circumstances of this case and, particularly, so in the light of the substantial age difference between the applicant and the complainant and the adverse impact it has on the complainant's life. She was, at the time, attending school and the applicant knew that"

[9] Per McDonald – Bishop JA further stated :-

[32] We believe in all the circumstances that the learned trial judge was rather lenient, bearing in mind that the maximum is life imprisonment. The applicant was not in a position of trust, properly so called, to which the minimum sentence of 15 years prescribed by the statute would apply but he was in a position of superiority given his age, stage of maturity and economic position vis-à-vis the complainant. A sentence of imprisonment of meaningful duration was, therefore, warranted.

Sentencing Guidelines

[10] The court has promulgated sentencing guidelines that were launched in January 2018. These sentencing guidelines seek to promote, among other things, some consistency in the sentences that were handed down by Judges. In the sentencing guidelines as it relates to sexual touching and sexual intercourse with a person under 16 years the following terms are established:-

Sexual Intercourse with a person under 16 years:-

- (1) The statutory maximum is life.*
- (2) The usual starting point for sexual intercourse with a person under 16 years is fifteen years (15) years*
- (3) The range of sentences for sexual intercourse with a person under 16 years is between fifteen (15) to twenty (20) years.*

Sexual Touching of a child:-

- (1) The statutory maximum is 10 years.*
- (2) The usual starting point for sexual touching is between two (2) years to ten (10) years.*
- (3) The normal range of sentences for sexual touching is five (5) years.*

The Criminal Justice (Administration) (Amendment) Act 2015

- [11]** The Criminal Justice (Administration) (Amendment) Act 2015 gives some guidance to the court as to the discount that may be awarded in the event that an accused person pleads guilty to an offence. Section 42 (D) and 42(H) are especially helpful.

Section 42(D) and 42 (H) states that:

- (1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.*
- (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner-*

- a) *Where the defendant indicates to the Court on the first relevant date that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty per cent,*
 - b) *Where the defendant indicates to the Court after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty five per cent;*
 - c) *Where the defendant pleads guilty to the offence, after the trial has commenced but before the verdict is given, the sentence may be reduced by up to fifteen per cent.*
- (3) *Subject to section 42E, and notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –*
- a) *reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and*
 - b) *specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.*
- (4) *In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant.*

42(H) Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-

- a) *Whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;*
- b) *the circumstances of the offence, including its impact on the victims;*
- c) *any factors that are relevant to the defendant.;*

- d) *the circumstances surrounding the plea;*
- e) *where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;*
- f) *whether the defendant has any previous convictions;*

The Sentence

[12] The aggravating circumstances of this case among other things are:

1. The complainant was twelve years old at the time the offences were committed.
2. The defendant was the pastor of the church she attended and as such was in a position of superiority with regards to her.
3. The defendant was the boyfriend of the mother of the complainant.
4. The complainant now has a child as a result of the incidents.
5. The defendant did not enter a guilty plea at the first opportunity. There had been full disclosure to the defendant that included a DNA test that determine that he could not be excluded as the father. The defendant conducted his own DNA test with the same result. The guilty plea was entered after two further court dates subsequent to the results of the DNA test he requested.
6. The sexual offences were committed over an extended period of time.

Mitigating circumstances:-

1. The Defendant has a good social enquiry report especially in regard to his community report.
2. The Defendant has no previous conviction recorded against him.

Sexual intercourse with a person under 16 years.

[13] I have taken into consideration the plea in mitigation as well as the aggravating and mitigating circumstances. I note that the Defendant is an adult, in a position of superiority and the offences were committed on more than one occasion. The maximum sentence for this offence is life imprisonment but I will not be considering such a sentence at this time. I will be adopting the suggested starting point as outlined in the sentencing guidelines of 15 years. I will deduct:

1. a year for a good social enquiry report.
2. one year for the fact that he has no previous conviction.
3. The period of time that the defendant has been in custody which is ten months. I will, however round up this period to one year.

[14] Although I note that the defendant had pleaded guilty, in these circumstances I will not award a discount for this plea. I will not award a discount as:-

- a. The defendant did not plea at the first convenient time.
- b. The evidence against him was overwhelming. Based on the strength of the evidence, a conviction was inevitable.

In sentencing, a discount for a guilty plea is a discretion, which I will not exercise in his favour.

[15] On each count for the offence of sexual intercourse with a person under sixteen years the Defendant is sentenced to twelve years.

[16] With regards to the Sexual touching I will also rely on the sentencing guidelines and will utilise the usual starting point of eight (8) years. The eight years will be reduced by:-

1. One year for a good social enquiry report.
2. One year for the fact that he has no previous conviction.
3. The time spent in custody which is ten months which I round up to one year.

[17] The defendant is sentenced to five (5) years imprisonment for the sexual touching.

[18] The sentences are to run currently.