



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2018: No. 029

BETWEEN:

THE QUEEN

Plaintiff

-and-

MORRIS O'BRIEN

Defendant

Before: Hon. Justice Greaves

Appearances: Ms Kenlyn Swan, and Ms Maria Sofianos, Department
of Public Prosecutions, for the Crown
Mr Archibald Warner, Chancery Legal Limited, for the
Defendant

Date of Hearing: 20 April 2019

Date of Judgment: 3 May 2019

JUDGMENT

Sentencing Principles applicable to sentencing in a rape case under old repealed provisions of the Criminal Code Act 1907. Sentencing range in a contested case.

FACTS

1. The defendant was unanimously convicted after a trial by a jury on 7th February, 2019, on an indictment for rape, said to have been committed about 30 years ago, between the 1st September and 31st October 1988. At the time of the alleged offence, the complainant was a 15 year old Portuguese school girl and the defendant was a 23 year old young man engaged to be married to the complainant's 17 or 18 year old sister.
2. At the time of the offence, the old provisions of the Criminal Code Act 1907 were still in force, hence the charge for rape. Had the offence been prosecuted at the time, the likely charge might have been carnal knowledge, for which consent would not have been an issue, since the complainant was under age 16. However, that offence became statute barred after the passage of two years from the date of the event, hence the prosecution for rape, resulting in a defence of consent or reasonable belief. The penalty for rape at the time was 20 years imprisonment.
3. Since the repeal of the old provisions, the regime for sexual offences has been changed substantially under the new provisions.
4. The defendant has changed counsel since his conviction and was subject to a lengthily investigated presentencing report. His record was in the process of preparation for his appeal and is now complete. His new counsel needed time to study the record in order to properly prepare for mitigation at his sentencing. These together with other pressing court matters contributed to the delay in his sentencing.
5. It is not disputed that the two families had been very close for several years.
6. The complainant alleged that her Portuguese family were very strict. The girls were not allowed out alone with boys, nor could boys be allowed at their home when the parents or an adult were not there. These things were known to the defendant.

7. She said that on the night of the rape, she was upstairs in the bedroom she shared with her sister who was asleep. Her parents were not at home. She heard a knock at the door and went down stairs to investigate.
8. There, at the door, as she slightly opened it, she saw the defendant. He asked for her sister and she informed him she was upstairs asleep. She said the defendant then blocked the door, preventing her closing it, held onto her, and pushed her backwards into the living room. He got on top of her and raped her. She said she was unable to scream, as the sound would not emit her mouth as if someone had put a hand in her throat and ripped out her voice. She said she felt the pain of the intercourse and must have passed out. She was a virgin.
9. After the encounter, the defendant got up and left. She saw blood on the carpet and she got a cloth from the kitchen and scrubbed it up. She then went upstairs and washed up herself and went to bed. She told no one. She was afraid and ashamed.
10. She went to school and the defendant kept trying to speak to her. He came to the gate near the school, but she ignored him and demanded he leave her alone. Sometime after, she found out through a series of events at school, she was pregnant.
11. The defendant gave her a letter at some point, admitted in evidence, in which he inter alia confessed his love for her, acknowledged she was not speaking to him, and that she was carrying his child whilst he was getting married to her sister and still wanted to make love to her.
12. She had the baby but refused to tell her family who had impregnated her. So much was her pain because of the rape event; she rejected the baby at first. She endured much rejection and ridicule by her circle in the Portuguese community. It was a huge disgrace in that community for a young girl from a strict family like hers to

- have a child out of wedlock. Even her mother rejected her and called her terrible names.
13. Eventually she told her mother. There was confrontation between her mother, the defendant and the defendant's parents. The defendant denied the child and the rape. By then the defendant was married to her sister.
 14. She and her mother sought counsel from a lawyer. No prosecution was pursued at the time in order to save the sister's marriage but a lawyers letter was sent to the defendant prohibiting contact with her.
 15. The boy child was raised to call the defendant uncle. He constantly confronted her to tell him who was his father but she made excuses. When he became of age and confronted her again, she told him the truth. The man you call uncle is your daddy. She also told him he raped her. The boy rejected the rape account and clung to the defendant, his new found father. He even testified against her and told the jury he does not believe her.
 16. Now the news was confirmed to the defendant's wife and seem to have caused discomfort in the marriage, so the defendant wrote his wife another letter making certain financial commitments to her and asking her not to blame the complainant as he was the adult at the time. Like the complainant's mother, the wife kept that letter for a long time until it too was discovered fortuitously and it too was produced in evidence.
 17. The son went overseas with the defendant and has himself become married.
 18. One day without informing her, he and the defendant went for a DNA test. As they waited near the DNA office, the complainant happened to be passing. That's when the son informed her. She responded she didn't need that because she already knew the truth.

19. This, she said, made her feel as if she had been slapped again, this time by her own son who refused to believe her. It also upset her, that after all her pain, the defendant was now claiming her son. In her very emotional words and tears in testimony, she loudly proclaimed, he is not his son, he is my son. So this time she went to the police and made her report, even before the DNA results were known.
20. The defendant was interviewed and charged. The complainant testified in trial. The defendant did likewise and raised the defence of consent. He alleged that she consented to the sexual episode and or he reasonably believed that she was consenting. To support that belief, he alleged having sexual intercourse with her on three occasions. One in the house in the living room floor area on a night his best friend who is her older brother, her sister who was his fiancé were also there in close proximity; another at the sea when their families were nearby, and another in the bathroom upstairs when her family were nearby. He also called character witnesses of some sort, inclusive of his brother and another or others.
21. The jury rejected his defence and by their verdict unanimously accepted the complainant's version.

THE SUBMISSIONS

22. The prosecution, at first, submitted that the defendant should be sentenced to between 10 and 12 years imprisonment with a starting point of 8 years.
23. After hearing defence submissions and upon accepting that the old youthful convictions of the defendant should not be considered and that the defendant should otherwise be treated as a person with good character, the prosecution adjusted their submission by, as they said, 10% and submitted the minimum sentence should be 9 years.
24. They relied upon the cases of *R v Billam and others* [1986] 1 All ER 985, *Leroy Burgess v The Queen* Cr. App. No. 10 of 1986, *Denzil Simmons v The Queen*

Crim. App. No. 14 of 1987 and *The Queen v Michael Bell* Crim. App. No. 8 of 1989.

25. In *Billam*, certain guidelines were laid down in the UK for sentencing in rape cases. They included guidelines for various types of circumstances, the respective starting points, aggravating and mitigating circumstances and the general sentences appropriate.
26. In the interest of brevity and relevance, I will not extensively repeat those guidelines and will limit this judgment only to those I consider relevant to the instant case.
27. In *Burgess*, upon a plea of guilty midway in trial for the rape of three females, a sentence of ten years was upheld on appeal.
28. In *Bell*, upon a plea of guilty of rape of a 21 year old female, a sentence of nine years was upheld on appeal.
29. The defence submitted that the starting point should be 5 years and that the sentence should be no more than 7 years. They relied upon the cases of *Billan*, *Jermaine Simmons* Crim. App. No. 14 of 1994, in which an appeal against a sentence of 5 years after a guilty plea for rape of a 14 year female student was dismissed, Annex B of the UK Sentencing Guidelines for Historic Sexual Offences, and *R v Stephen Forbes and others* [2016] EWA Crim 1388, which largely referred to the sentencing guidelines earlier referred. It also, inter alia, lends directions to how a court should approach the issue of good character post the criminal conduct.
30. The defence submitted that the starting point in the instant case should be five years and the sentence should be no more than 7 years imprisonment.

REASONINGS

31. In *Billam* the relevant guideline applicable to this case provided that; *the appropriate sentence for rape committed by an adult without any aggravating or mitigating features is not less than five years imprisonment.....Where rape is committed....by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim,the appropriate sentence is not less than eight years imprisonment.*
32. In the instant case, the defendant forced himself into the complainant's house when he placed his leg between the door, and prevented her from closing it. By his act he then forced himself into the house, grabbed her by her arms and walked her backwards to the area in the house where he committed the rape against her.
33. In the circumstances, I consider the appropriate starting point to be 8 years.
34. In addition , I find two relevant aggravating factors in the instant case identifiable under the *Billam* guidelines, which provides; "*the crime of rape will be treated as aggravated by the following factors...(g) where the victim is either very old or very young, and (h) where the effect on the victim , whether physical or mental, is of special seriousness. Where any such aggravating features are present, a substantially higher sentence should be imposed than would otherwise be the case*".
35. The victim was only 15 years old at the time. She was a virgin school girl raised in a strict, conservative family circle. The defendant though a young man of 23 years was nevertheless much older than she was by some 8 years. He knew of her young age and her family circumstances. He was a person closely associated with the family for many years. He must have known how scandalous it would be for her if it was known of any sexual engagement between the two. Yet he took advantage of her. He betrayed her, her sister his fiancé and her entire family, all of whom he knew would expect him to exercise a mature and trusted level of responsibility

towards the young girl. Yet he betrayed that trust and took advantage of it to the detriment of the young lady. Furthermore, he impregnated her, even if not intentionally. That produced a son for the world and her conservative community to see much to her severe embarrassment and shame at her young age. Thus the effect upon her was not only mental but physical as well.

36. I accept both from the evidence she and her mother gave during the trial and from her victim impact statement which was read into the record at her request that she suffered tremendous harm and ridicule. She was shunned by her community, insulted and name called while forced by the circumstances to act in goodwill towards the defendant throughout. She turned to drugs and alcohol and even to his twin brother with whom she entered a relationship for some 8 years.

37. Furthermore, she was forced to hide the truth from her son, the product of the rape, only to be rejected by him as a liar when she finally told him the truth as he clung to his new found father, the defendant. As she said, it was as if she had been slapped in the face another time.

38. Through all this, the defendant, who at first denied he had sex with her or that the child was his and claimed it was likely that of some other boy or boys with whom she must have been sleeping, later changed his song and has by his words and conduct fostered the doubt against her, to the son and others, that she consented, even up to this moment. This trial and the verdict herein, has done nothing to remove or diminish in the eyes of her son, even if others, that she is truthful when she says the defendant raped her. Only the defendant can remove that doubt and confirm that truth, even if he explains it as the consequence of the inexperience and emotional exuberance of a misled youth, driven by a forbidden passion at the time, who mistakenly thought she was consenting and he being too ashamed and afraid of the consequences, to confess thereafter.

39. I have been urged by his new counsel, that I should not take her apparent psychological state or affect into consideration without the assistance of a professional psychological report.

40. With that, I cannot agree. I have had the advantage of observing this lady in trial. It was traumatic and obvious, the pain she endured from the date of that act to throughout the years.
41. I am convinced her evidence and demeanour displayed throughout the trial was not an act. To see her evidence in writing on paper is one thing. To witness it live is another. In my opinion no psychologist can substitute for that.
42. In the circumstances, I think these aggravating factors justify an increase from eight to 9 years.
43. On the other hand, I have taken into account that it has been many years since the criminal event and that beside, the defendant has since then otherwise lived a life of good character. I will also take into account, that despite the difference in ages and her underage, he too was a relatively young man at the time, perhaps overwhelmed by his youthful lust and arrogance.
44. In the circumstances I will revert from the 9 years to 8 years.

SENTENCE

45. The defendant is sentenced to 8 years imprisonment. All time spent in custody in respect of this matter shall be counted as part of the sentence.

Dated 3 May 2019

CARLISLE GREAVES
PUISNE JUDGE