IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2012/ 0118

BETWEEN:

THE QUEEN

Claimant

AND

COLEMAN BAPTISTE

Defendant

Appearances:
Mr. Derek Sylvester for the Defendant
Mr. Howard Pinnock, Crown Counsel for the Claimant

2013: March 11; 27

JUDGMENT

[1] **PERSAD, J.;** The defendant Coleman Baptiste was indicted on a charge of rape. The particulars of the offence being that: Coleman Baptiste of La Tante in the parish of St. David on Sunday, 22nd January 2012 did commit rape by unlawfully or carnally knowing M.C. a female persons without her consent contrary to section 177 of the Criminal Code Cap. 72A Vol. 4 of the 2010 Continuous Revised Edition of the Laws of Grenada.

[2] The defendant entered a plea of guilty to the charge and the relevant facts were read after which the court was assisted by written and oral submissions by both

parties in relation to the matters to be taken into account in determining an appropriate sentence.

Outline of the Prosecution's Case

[3] The case for the prosecution may be summarized as follows: In January of 2012 the complainant went to see the defendant about buying a laptop. The defendant met the complainant at a shop where she was told that the laptop was at his home and was encouraged to go to his home inspector laptop. Before reaching the house to defendant indicated that he had to go to the beach because he had to meet someone. He asked the complainant to accompany him.

[4] The complainant was led to a villa on the beach, where the defendant pulled a knife from his back pocket and threatened to cut the throat of the complainant. Thereafter the complainant was raped several times until she was able to get the knife at which point she stabbed the defendant and after a valiant struggle she ran away from the villa, naked until she got to a main road where she was able to get help. According to the complainant she received scars on her face and on her fingers as well as bites on the hand.

Principles of Sentencing

[5] As a general rule, a court when faced with the task of sentencing an individual has to keep in mind the four cardinal principles of sentencing namely retribution, deterrence prevention and rehabilitation.

[6] These principles and their application to the sentencing process has long been recognized as being important considerations. In **Benjamin v R** 1964 7 WIR 459 Wooding CJ made the following observations at page 460:-

> "In an article in the "Modern Law Review" for September 1964, the threefold purpose of the punishment in Blake's case was expanded

> objectively so as to show that there are really five principal objects of sentencing: (1) the retributive or denunciatory, which is the same as the punitive; (2) the deterrent *vis-a-vis* potential offenders; (3) the deterrent *vis-a-vis* the particular offender then being sentenced; (4) the preventive, which aims at preventing the particular offender from again offending by incarcerating him for a long period; and (5) the rehabilitative, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society.
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> We accept these five principal objects as comprising the aims of punishment and we recognise that in some cases one object will be predominant whereas in others regard must be had more particularly to two or more of them.
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> In this case, for instance, the conduct of which the prisoner was found guilty should, in the words of HILBERY J, "not only be held by ordinary men and women in utter abhorrence but also should receive when brought to justice the severest … punishment".
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> We have omitted the word "possible" since it would seem to us that "the severest possible punishment" can entertain no limits save such as the legislature may have imposed for the particular offences. We prefer "the severest punishment" because we consider that the punishment should at all times fit the crime. In so saying, we mean that all five objects of sentencing policy should, if possible, be kept in view although they will not all be necessarily applied. Each case must depend upon its own facts.

[7] In cases of rape or other aggravated sexual assaults, the Courts have repeatedly found it necessary to send a very clear message to members of the public that such offences will in the normal course of things usually attract custodial sentences. The reason for this is self evident, it is perhaps appropriate to refer and adopt several passages from a 2011 judgment of Madam Justice Hariprashard Charles in **Queen v Camillus Paris** BVIHCR2010/0014 where at paragraphs 35 - 37 the court observed as follows:-

> I recalled with some degree of nostalgia my own observations in Franklyn Huggins when I stated 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 the 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. [emphasis added]

36. In **R v Christopher Millberry** [supra], Lord Lane, referring to the general guidelines as to sentencing for rape in Roberts and Roberts 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 (or in this case, young girls). 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."

37. In **R v Puru**, Woodhouse P. made a litany of remarks in relation to rape. However, these observations may apply generally to other sexual offences. He said at page 821 [g]:

"The Court certainly must and actually does keep in mind the public anxiety and the natural public resentment that such conduct occasions. That very fact, however, inevitably poses very difficult sentencing problems when the matter is not by reference to individual cases but in a wider way. Rape always involves a disgraceful exercise of physical power over the victim and degradation of her human personality.

But there are some cases which have particularly aggravating features. There are cases involving very young girls or elderly women. There are deplorable examples of gang activity. There are instances of the victim being snatched off the street or invaded in the privacy of her own home. And there are cases involving serious physical violence or acts of sexual perversion and other forms of degradation.

So clear distinctions must inevitably be drawn to take care of bad and finally the worst kinds of case. There is the added fact that if this margin is not kept in mind in relation to lesser offences then there could be the grave risk of the more serious attacks, even to the point of murder, by offenders who though that there was nothing to be gained by a residual restraint which might lead to detection. The extent to which all this can properly be translated into length of sentence must inevitably vary from case to case. The important consideration is to ensure that there is an appropriate degree of flexibility left to the Judge so that the punishment can actually be made to fit the crime. "

[8] The Court of Appeal provided very useful guidelines in sentencing sexual offences in the case of **Winston Joseph et al v The Queen**[1]. This case decided in 2000 establishes the following propositions:

1. The court must consider the particular circumstances of each case and conduct a balancing exercise to determine a just sentence.
2. The sentence that is eventually imposed should depend upon the existence and evaluation of aggravating and mitigating factors.
3. Where the aggravating factors tend to outweigh the mitigating factors the tendency would be towards a higher sentence and

[1] St Lucia Criminal Appeal 4 of 2000

where the mitigating factors outweigh the aggravating factors then the sentence would be on the lower end of the scale.

4. In defining aggravating factors the court would have regard to the following type of considerations:-

    a. If the girl has suffered physically or psychologically from sexual assault;
    b. If it has been accompanied by perversions abhorrent to the girl, e.g buggery or fellatio;
    c. Violence is used over and above the force necessary to commit the offence;
    d. The offence has been frequently repeated;
    e. The defendant has previous convictions for serious offences of a violent or sexual kind;
    f. The victim has become pregnant as a result of a crime;
    g. The victim is either very young or very old.

5. As regards "mitigating factors" the court would have regard to the following:-

    a. 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.
    b. Where it was consensual, 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.
    c. Where the girl made deliberate attempts at seduction.
    d. Where the defendant is a first offender and/or is a youth.

Application of the principles to the instant case.

[9] Under section 177 of the Criminal Code whosoever commits rape shall be liable to imprisonment for fifteen years. As mentioned above the court needs to identify the aggravating as well as the mitigating factors that exist on the facts of this case.

[10] Having considered the evidence on depositions as well as the mitigation made on behalf of the convicted person, the court has identified a number of aggravating factors including (i) the physical and psychological harm to the victim (ii) the use of violence over and above the force necessary to commit the offence (iii) the use of a weapon and (iv) the defendant's previous convictions for serious offences of a violent or sexual kind.

[11] In terms of mitigating factors the court has identified one such factor which is the defendant's decision to plead guilty.

Aggravating Factors

(i) Physical & Psychological Harm

On the facts of this case as accepted by the convicted man there was the use of threats, the physical rape of the victim and a struggle which involve violence as the victim attempted to get away from the convicted man during the course of the incident. The examining doctor found abrasions to the fingers, she was unable to make a fist and mild swelling was found. There were abrasions to the lower limbs, the doctor also described the abrasions to the labia may have been caused by trauma or extreme force.

As part of the material provided to the court in support of the sentencing hearing the prosecution relied on a victim impact statement. It is clear from the statement that the victim suffered immense psychological scarring. She describes the lost of her identity, according to her she is now a shadow of her former life her self esteem, respect and dignity was stripped from her in the most terrifying of situations. According to her trust in people is all but destroyed and that she uses medication to help her sleep, relax and stay relatively sane.

(ii) Use of Weapon/ Violence

There was a is no dispute that in the course of this incident the convicted person used a knife as a weapon to put the victim in fear of her life, according to the victim impact statement the complainant indicated "that worst of all she was held at knife point and that she thought she was going to die.

(iii) Antecedents – Previous Convictions

One of the special features of this case is the fact that the convicted person aged 42 years came before the court with thirteen previous convictions. In the course of the mitigation attorney for the convicted man encouraged the court treaty majority of the convictions as spent. It was generally accepted by defence Counsel that under Grenada law there is no express provision dealing with spent convictions.

Notwithstanding the lack of express provision establishing spent convictions, the court was told that there is a prevailing practice adopted by the courts whereby convictions on indictment over 7 to 10 years are usually disregarded and in relation to summary convictions older than five years the courts will usually not have regard to such convictions.

This practice was confirmed by other senior members of the criminal bar when the court had the opportunity to raise the question of this practice. Confirmation also came from Crown counsel who indicated to the court that such practice was known and recognized by the courts when dealing with a defendant's antecedents.

[12] The court has its doubts whether in the absence of express statutory provisions mandating convictions be classified spent after a particular period of time, whether the court should without more give no consideration to convictions beyond the accepted practice. It would seem to me that the better approach would be to attach a level of weight to a particular conviction that would vary in accordance with factors such as relevance to the offense for which the plea is being considered as well as the relative date of the conviction to the offense being considered.

[13] On the facts of this case of the 13 convictions, nine of the convictions are not relevant in that they relate to offences ranging from stealing housebreaking and trespass. Of the remaining convictions the convicted man has three convictions for possession of an offensive weapon and wounding and one for unlawful carnal knowledge in 2003 was sentenced to five years in prison by the High Court.

[14] The court will give no weight to the nine convictions which are not relevant. However, in relation to the other convictions which involve use of violence on a previous sexual offense the court will have regard to this history as it appears wrong for the court to turn a blind eye to these clear indicators that this convicted person as on previous occasions showed a predisposition towards violence and the commission of sexual offenses.

[15] In determining what weight the court will give to these convictions, regard will be had to the fact that the accused had been punished for these offenses previously.

However, in the overall sentence, such convictions will be highly relevant to the question of deterrence and the punitive elements of sentencing. It also is relevant in relation to the rehabilitative aspect that the court must consider in defining an appropriate sentence. In the round the court will give these relevant convictions some weight in determining an appropriate sentence but does not propose to aggravate the sentence significantly on this basis.

Mitigating Factors

[16] Plea of Guilty

In this case the Defendant indicated early in the Assizes his intention to adopt a plea of guilty. According to a recent decision of the High Court of Dominica Stephenson J in **The State v Wyke Charles and Baron** DOMHCR2011/043:-

> The Courts of the Eastern Caribbean which includes Dominica have accepted the practice of how to address the guilty plea. Where the offender pleads guilty the court shall take into account the plea and the stage of the proceedings at which the offender indicated an intention of doing so. In the case at bar, the defendants have pleaded guilty upon being arraigned at the last assizes, I am of the view that the defendants are entitled to receive a discount, in the case of Desmond Baptiste, Chief Justice Byron as he then was said:
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> > "In England a plea of Guilty normally attracts a significant, approximately a one third, reduction of the sentence, there are sound public policy reasons for this. The criminal justice system benefits from genuine guilty pleas, such pleas spare the judge, the jury and witnesses the stress and rigours of a full trial. The state saves both time and money.

> It could be manifestly unfair to accord the identical sentence to codefendants charged with the same offence where one has pleaded guilty at an early stage and the other has put the state through the ordeal of a long and demanding trial. The defendant who has pleaded guilty is entitled to a considerable discount. While suggesting a discount of the order of one third however, Lord Taylor, CJ stressed in Buffrey that "it would be quite wrong to suggest that there was an absolute rule as to what the discount should be. Each case must be assessed by the trial judge on its own facts and there will be considerable variance between one case and another. "

[17] In our view our courts should adopt; a similar approach. Clearly, the earlier the defendant pleads guilty, the greater the likelihood that he will receive the full discount permissible. Conversely, a plea of guilty late in the proceedings may not yield much of a discount. The discount should be applied not to the maximum sentence possible under the statute but rather to a notional sentence the sentencer might have given save for the guilty plea.

[18] In the case of **The Queen v Bernard Charles** BVI Case No. 20 of 2011, Madam Justice Olivetti at paragraph 18 noted as follows:-

> The court has a discretion to grant a reduction in sentence on a guilty plea. The reasons for this are well documented and acknowledged. See **R v Desmond Baptiste**, Crim. App 8/2003. The full reduction that the court can grant is one-third off the sentence that it would have imposed had it not been for the plea of guilty, i.e. the notional sentence. However, the court must have regard to all the circumstances in determining the extent of the reduction and in some cases have actually refused to give reduced sentences; see **R v Hastings** [1995] 1CR App R(8) 167.

[19] Having regard to the principles outlined above it is clear that the convicted man is entitled to a discount and there are no compelling reasons why he should not be entitled to a full 1/3 discount.

Comparable Sentences

[19] From the authorities it is clear that there exists some degree of divergence among the various islands, primarily because of the different sentencing regimes that operate among the islands. It is of course necessary to take into account how other judges have exercised discretion in the past cases particularly within this jurisdiction. It is therefore useful to have regard to sentences handed down by the High Court over the past few years.

[20] Counsel on both sides assisted the court with tables of sentences imposed in previous sexual offences cases. The obvious limitation of these tables were that they do not condescend to details of each particular case in terms of the relative aggravating and mitigating factors. They are useful however to assisting the court to get a sense of the range of sentences imposed in rape cases. It is clear that over the past few years the courts have been disposed to sentence persons convicted of rape to terms of imprisonment of between 7-10 years.

[21] The Court was also mindful that the sentencing process requires judges not to apply guidelines mechanistically. This principle has long been recognized by the local courts, in the Court of Appeal their lordships noted in **Roger Naitram et al** (at paras 17 and 18) as follows:

> "Sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the guidelines into account, the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating

and mitigating factors that may be present and impose the sentence which is appropriate.

[23] It follows therefore that a sentencing judge can depart from guidelines if adherence would result in an unjust sentence. The existence of a particularly powerful personal mitigation or very strong aggravating factors may be a good reason to depart from the guidelines.

[24] Clearly the suggested starting points contained in sentencing guidelines are not immutable or rigid. Where the particular circumstances of a case may dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing."

Time spent on remand

[25] The convicted man in this case has been in custody albeit on remand since being charged with this offence in January 2012. In total he has spent some fifteen months in custody before entering his plea, how should the court deal with this time spent?

[26] Recent decisions from the Judicial Committee of the Privy Council in **Callachand v The State** [2008] UKPC 49 as well as the Caribbean Court of Justice in the Barbadian case of **Romeo Da Costa Hall v The Queen** CCJ Appeal No. Cr. 1 of 2010 [2011]CCJ 6 (AJ) provides assistance on this point.

[27] At paragraph 26 of the majority decision their Lordships of the Caribbean Court of Justice had this to say:-

> The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the

sentence he would have passed but for the time spent by the prisoner on remand. The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his or her reasons for not granting a full deduction or no deduction at all. Goldstein J in **S v Vilikazi** (supra) at p. 142 stated that in granting credit for time spent on remand the Court is "driven to eschew simple subtraction and fudge the period of awaiting trial, thereby doing substantial but perhaps less than perfect justice." While there is an element of truth in this statement, even without the complication of time spent in pre-trial custody, sentencing is never an exact science particularly when a serious offence is involved.

[28] There appears to be some difference of opinion between the majority in Da Costa Hall and Mr. Justice De Wit who delivered a separate judgment in the matter. He explains his reluctance to agree with the majority at paragraph 30 in the following terms.

> For the most part I am in agreement with the majority judgment delivered by Nelson J. We agree that the lower courts did not apply the appropriate principles in arriving at the sentence of six years and that the appeal should therefore be allowed. We also agree, in principle, that time spent in custody should fully or at least substantially be taken into account by the sentencing judge when calculating the length of a custodial sentence. We further agree that this constitutes a prima facie rule from which the judge may only depart in a limited number of cases.
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> We agree, moreover, that there are basically three methods by which credit can be given for time spent in custody, to wit (a) reducing the sentence, (b) backdating the sentence or (c) imposing the proper sentence while declaring that the time spent in custody will count as time

served under the sentence. It would appear that we all agree that method (c) is the most preferable and that method (a), to say the least, is flawed.

Nevertheless, the majority has settled on the latter approach, somewhat uncomfortably and reluctantly it would seem, on the ground that the other two methods are not available in Barbados as there are no statutory provisions allowing either of them. It is on this very point that I respectfully beg to differ with my colleagues for the reasons I will set out in this judgment. Before coming to these reasons, however, I would like to add some observations and some remarks of my own.

[32] Mr. Justice De Wit then proceeded to review the courts discretion to take time spent in custody into account in sentencing. At paragraph 34 Justice De Wit reasoned as follows:-

Besides the countries of the Commonwealth Caribbean there are some other common law countries that do not have statutory provisions for crediting time spent on remand, notably Botswana, South Africa and Mauritius. Clearly, these countries acknowledge that at common law their courts have a discretionary power to give or to decline credit for time spent on remand when sentencing a convicted person.

But even so, since the 1980's it has been the practice of the courts in Botswana that, as a rule, time spent on remand is to be taken fully into account, although, in exceptional cases and for compelling reasons to be stated in the judgment departure from that practice is possible. The situation in South Africa is admittedly less clear. According to a leading author "The courts have stopped short of saying that the term of confinement whilst awaiting trial should be subtracted from the term of imprisonment which the court considers appropriate, but in practice this is probably the basic intention." It is true, though, as revealed by South

African case law that the courts do not yet appear to have adopted a consistent and transparent approach to this issue.

Finally, the courts in Mauritius following the recent decision of the Privy Council in **Callachand and another v The State** would seem to have adapted their practice in that they now give full credit for time spent on remand except when there are compelling reasons not to do so.

The conclusion reached in the judgment of the majority is therefore in accord not only with the judgment of the Privy Council in Callachand but also and, in my view more importantly so, with the prevailing views of States and courts throughout much of the world on the subject.

[32] At paragraphs 38-40 of this decision, Justice De Wit explored the relationship between the fundamental rights provision of the Barbados Constitution and relied on the basic tenets of fairness to explain where he disagreed with the conclusion of the majority. In particular he stated as follows:-

> It would seem that the Constitution of Barbados does not provide a clear legal basis for giving full credit for time spent in custody. The Constitution, however, does guarantee both the fundamental right to liberty (section 13) and the presumption of innocence (section 18(2) (a)). It is also true that while the former provision does state that "No person shall be deprived of his personal liberty", it continues, however, by saying "save as may be authorised by law". This expression particularly applies to the situation where a person is incarcerated "in execution of a sentence of a court … in respect of a criminal offence of which he has been convicted". But it equally includes the situation where a person is held on remand "upon reasonable suspicion of his having committed … a criminal offence under the law of Barbados" even though "every person who is charged with a

criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty".

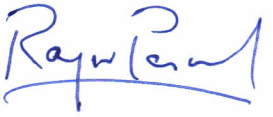
The Constitution of Barbados does not mention nor does it imply a clear obligation for the courts when deciding on the sentence of the prisoner to give credit for the time spent in custody. However, under that supreme law all institutions, the courts included, are duty bound to act rationally, reasonably and fairly, in which context the two provisions do seem to have some relevance.

It would appear then that the legal basis for giving full credit is basic fairness, the avoidance of injustice or, formulated more positively, the interest of justice. Liberty is clearly highly valued by the Constitution. Liberty should therefore be the golden rule and detention, however it is called and for whichever reason it is imposed, must remain the exception to that rule. In an "ideal" world the presumption of innocence would require the courts not to incarcerate a person until he or she has been found guilty. But in the real world that is simply not possible. There are, perhaps unfortunately, many situations which make it necessary to detain some people before they are tried. This is especially unfortunate if that person is eventually found to be innocent. But even in the case of a conviction it would be unfair to the prisoner not to acknowledge, in a very real and effective manner, that he has, albeit with hindsight, de facto been serving his sentence from the day he was detained. Clearly, and I paraphrase here the words of the Supreme Court of Canada (Arbour J) in **Wust v The Queen** and the AG for Ontario, pre-trial detention (sometimes called "dead time") is not intended as punishment but it is, in effect, felt as punishment in the same way as if it were based upon a sentence. As succinctly stated by Arbour J: '"Dead time" is "real" time'! And justice, I would add, can only be obtained, or perhaps at best be Caribbean realities.

[33] I find this reasoning attractive and it would seem to this court that in the absence of express statutory provisions allowing for backdating and or the reduction of sentences a court operating within the Caribbean under the fundamental rights and freedoms provisions enshrined in the Commonwealth Caribbean Constitutions would be entitled to credit a person in custody for the spent on remand.

Conclusion

[34] Having regard to all the matters outlined above this court considers a term of 8 years imprisonment to be an appropriate sentence to be imposed having regard to the aggravating and mitigating factors present in this case. The Court also wishes to indicate that the time spent on remand is to be counted as part of the sentence.



Rajiv Persad
High Court Judge