The Need to Balance the Human Rights of the Defendant against those of the Victim in Gender Based Crimes of Violence

INTRODUCTION

[1] Bold headlines announcing yet another crime against a woman are now commonplace in our societies. For example the Caribbean was appalled when on 14 September 2011 CANA announced that a woman was shot and killed by her husband in St. Vincent and the Grenadines. Her crime? She allegedly tried to serve him with divorce papers. He also killed another woman and injured two other persons who tried to intervene.

[2] Words of condemnation and outrage were heard throughout the land and in particular from that nation's first female Deputy Prime Minister the Rt.Hon. Girlyn Miguel.[1]

[3] Incidents of gender based violence appear to be on the increase in the Organization of Eastern Caribbean States (" the OECS"). Bruce-Lyle J in a recent article in The Vincentian (28 Oct.2011) noted that violence against women had escalated in recent years. He also remarked that there was

[1] She condemned the killing and is reported to have said in a statement- "This morning, our nation was thrown into mourning for the brutal murders which took placed in Campden Park. The Government of St Vincent and the Grenadines condemns this gruesome act and sympathizes with the families who lost their loved ones." She assured Vincentians that "the perpetrators of this horrific act will be brought to justice.

serious abuse in St. Vincent and the Grenadines being committed by husbands against their wives and by men against their common-law wives.[2]

[4] As the president of UN Entity for Gender Equality and the Empowerment of Women ("UN Women") explained : "Violence against women takes many forms, from domestic abuse to rape and child marriages, it is a universal problem. It is a problem that is increasing and a violation of basic human rights. Globally governments have customarily regarded violence against women as a "private matter" that did not require government intervention.[1] Because of the increased attention to domestic violence many countries have taken steps to curb its occurrence"[3].

HUMAN RIGHTS – CONSTITUTIONAL FRAMEWORK

THE INTERNATIONAL NORMS

[5] The principle that everyone is entitled to fundamental human rights without distinction of any kind, such as race, colour, **sex** was first given voice as long ago as 1948 in Article 2 of the **Universal Declaration of Human Rights.**[4]

[6] Yet that did not prove adequate to protect the rights of the female gender and more than 30 years later the **Convention on the Elimination of all**

[2] Bruce-Lyle J. declared "no man has any right to lay his hands on his wife or his common-law-wife. I am sick of what is going on in this country."

[3] http://www.unwomen.org/2011/10/ending-violence-against-women-and-girls/
See Executive Director of UN Women Michelle Bachelet of Chile, at a recently held conference at the Danish Institute for International Studies. in Strandgage Copenhagen, Denmark, on 12 October 2011, "Ending Violence against Women and Girls".

[4] Universal Declaration of Human Rights

Forms of Discrimination against Women ("CEDAW") was promulgated by the United Nations ("the UN"). It was dubbed the Bill of rights for women as it was the first international human rights instrument to specifically address the rights of women**.** **CEDAW** affirms that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms**."**[5] CEDAW spells out the areas in which women experience discrimination and commits countries to amend their laws, construct national gender policies and create institutions to deliver them.

[7] In launching his 2008 campaign, UNiTE to End Violence Against Women, UN Secretary-General Ban Ki-moon observed that "at least one out of every three women is likely to be beaten, coerced into sex or otherwise abused in her lifetime." Such high level concern about gender-based violence has emerged only in relatively recent years. Both CEDAW and the MDGs are silent on the subject.[6]

[8] "Because traditionally violence against women has been seen as a private affair leaving women feeling abandoned by even their closest relatives, the UN reports that many governments now recognize the importance of protecting victims from this form of abuse. Women are predominantly the victims of gender based crimes; **the idea of male dominance in society transcends nationalities, cultures and religions"**. See Kofi Annan.

[5] http://www.un.org/documents/ga/res/48/a48r104.htm, 20/12/1993 48/104 CEDAW

[6] See UN Press release 25 February 2008

THE NATIONAL FRONTS

[9] The Westminster style constitutions which we in the OECS were endowed with upon our coming of age and with which we are all familiar contain fundamental rights provisions and the specific provisions against discrimination on the basis of sex thus mirroring the fundamental rights and freedoms enshrined in the **Universal Declaration of Human Rights.**

[10] How do the Bill of Rights in the Constitutions translate into real life? Do women and girls who suffer abuse at the hands of men have any right in reality? Or phrased differently – are such victim's rights properly protected by society and its ultimate arbiter, the courts?

RIGHTS OF DEFENDANTS

[11] Traditionally, in criminal law the courts have focused on the rights of a person charged with a criminal offence, the defendant. And the courts have been astute to ensure that nothing or no one is allowed to derogate from those rights. See for example the case of Hilroy Humphreys v AG of Antigua of Barbuda 2005/0628.

[12] So we are fully knowledgeable about a Defendant's fundamental human rights and freedom and in particular his rights at trial known collectively as his right to secure protection of the law .Such rights include

e.g., the right to a fair trial within a reasonable time by a lawfully established independent and impartial tribunal, presumption of innocence, etc.[7]

MEASURES TO PROTECT RIGHTS OF WOMEN VICTIMS

[13] But how do the courts view the rights of women and girls who are victims of gender based violence, domestic violence being one of the most prevalent and all pervasive forms? How have they sought to safeguard those rights? The rights of such victims are not categorised as such in our constitutions but it cannot be gainsaid that women and girls are entitled to the same fundamental rights and freedoms as are accorded to everyone under the Constitution and that this should be the guiding principle when considering any measure in force to protect those rights. Further all our member states are signatories to **CEDAW.**

[7] E.g. The Virgin Islands Constitution Order 2007 No. 1678- /2007 -Provisions to secure protection of law.

"Section 16:- (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence shall- (a) be presumed to be innocent until he or she is proved guilty according to law;(b) be informed promptly, as prescribed by law, in a language that he or she understands and in detail, of the nature of the offence charged;(c)be given adequate time and opportunity for the preparation of his or her defence;(d) be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal practitioner of his or her own choice or where he or she is unable to afford to retain a legal practitioner and the interests of justice so require, by a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law;(e) be entitled to examine in person or by his or her legal practitioner the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecutions; (f) be permitted to have without payment the assistance of an interpreter if he or she cannot understand or speak the language used at the trial of the charge; and (g) when charged on indictment in the High Court, have the right to trial by jury...."

And except with that person's own consent the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.

[14] Some measures exist in all the member states to safeguard women rights both during the trial process and in the society at large although they deserve close consideration to assess whether they are adequate or properly deployed. In the time permitted me I will look briefly at some legislative provisions, common law principles, court practice and procedure and sentencing policies which can assist at trials to balance the rights of the Defendant against that of the victim's. In addition, I will consider briefly the domestic violence legislation. (Of necessity and for the obvious reasons I am constrained to refer to what obtains in the Territory of the Virgin Islands in particular, so do forgive me).

LEGISLATION

PROTECTION AGAINST ADVERSE PUBLICITY IN SEXUAL CASES

[15] It has been well researched and accepted[8] that often victims are deterred from giving evidence by publicity or other adverse factors and thus abuse is never reported or goes on unchecked and the offender unpunished. Women and girls have the right to basic human dignity and to enjoy the protection of the law as well as well as anyone else. How can the courts assist?

[8] R v.A [2001]3 All ER 1

[16] **The Virgin Islands Constitution Order** 2007 Article 16(10) declares that all **trials (both civil and criminal) must be in public unless the parties agree otherwise**. However, Article 16 (11) gives the court the discretion to hold trials in private if the law empowers it to do so and the court considers it expedient where publicity would prejudice the interests of justice or in interlocutory proceedings **or in the interests of the welfare of minors or the protection of the private lives of persons concerned in the proceedings** or where it is by law empowered or required to do in the interests of defense, public safety, public order **or public morality.**

[17] And, **Section 46(6) of the Evidence Act 2006** gives the judge the discretion to hold a trial for rape or any other sexual offence **in camera.**[9]

[18] Thus, there is ample power, whether the Defendant objects, or not to hold a trial **in camera** and the court should be proactive in doing so and not wait for the Prosecution to apply but should itself raise it at the case management conference as often prosecutors are so extended that these matters might not be at the top of their agenda. Would holding a trial in camera to protect a woman victim be a disproportionate measure? To do so to my mind will not impact at all on the Defendant's right to a fair trial and will go some way towards ensuring that a victim of gender based violence is not deterred from attending trial because of fear of adverse publicity, resulting humiliation and peer condemnation - all real and

[9] The Evidence Act 2006 s. 46(6) A judge may order a trial for rape or any other sexual offence to be held in camera.

present fears in our small societies where despite attempts at anonymity victims are all too readily identified.

[19] In addition, Section 27(3) of the **Evidence Act** empowers the court to permit evidence to be given by means of technology such as video or television link that permits the virtual presence of the party or witness before the court and allows the court and the parties to hear, examine and cross- examine the witness. And section 46(5) specifically enacts that a complainant in a sexual offence case may give evidence in the manner specified by section 27(3).

[20] These then are all provisions which could be deployed more readily to shield the victim especially child victims who might be afraid or otherwise reluctant for a myriad of reasons to physically appear in court to face her alleged abuser/violator.

[21] In passing I note that the use of screens is employed in England and Wales[10] and this practice can be adopted as our laws provide for lacuna in practice and procedure to be filled by English practice and procedure with the appropriate modifications.[11]

[10] England and Wales Youth Justice and Criminal Evidence Act 1999 section 17(4)

[11] Section 48 of the Criminal Procedure Act Cap.18
All other matters of procedure, not herein nor in any other Act expressly provide for shall be regulated as to the admission thereof, by the law of England and the practice of the Superior Court of Criminal Law in England.

[22] The use of screens was challenged in England[12]. The challenge failed. The court held that the measure was not in breach of a defendant's right to a fair trial.

VICTIMS SUBJECTED TO HUMILIATING, UNDULY ANNOYING, SCANDALOUS OR OPPRESSIVE CROSS-EXAMINATION.

[23] It is often the case that victims can be deterred by the prospect of humiliating or unduly embarrassing cross- examination in sexual offences cases and sometimes the question slips by without the prosecutor noticing. The court can ensure that such questions are not put to victims or if put not answered by using the court's inherent jurisdiction to control its proceedings and by reliance on legislation. See for example, Section 40(1) of the **Evidence Act** [13] which empowers the court to disallow questions in cross-examination that are unduly annoying, intimidating, offensive or indecent or questions which although relevant are asked for an improper purpose. This is a provision the court can use **sui motu** without waiting for a formal objection to be made by the Prosecution.

[24] Furthermore, most professional codes of conduct have similar provisions and the court cannot be too vigilant to remind attorneys of their professional ethics. For example, Barristers in the UK are subject to the

12

[13]BVI Evidence Act Section 40 (1) If a misleading question, or a question that is unduly annoying, harassing, intimidating, offensive, oppressive, scandalous, indecent or repetitive, or a question that is relevant but asked for an improper purpose, is put to a witness in cross-examination, the court may disallow the question or inform the witness that he need not answer the question

code of conduct of the Bar which stipulates that counsel is duty bound not to make statements or ask questions which are merely scandalous or intended to vilify, insult or annoy any person.[14] And see also the OECS Bar Code of Ethics rule 24[15]

EVIDENCE OF PREVIOUS SEXUAL HISTORY IN SEXUAL OFFENCES CASES

[25] Many women and girls, victims of sexual abuse, are constrained from giving evidence because of fear that their previous sexual history will be dragged into the public forum thus causing them public humiliation and condemnation. Lord Slynn of Hadley said in R v A op.cit. para 142- "In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape. In the same case Lord Hutton reiterated those sentiments and underscored the woman's right to be treated with dignity in court and given protection against cross examination and evidence which unnecessarily invades her privacy .

[26] Provisions like those contained in **Section 46 (1) of the Evidence Act** were enacted to put paid to what was called the twin myths - that unchaste

[14] England and Wales Code of Conduct of the Bar, para. 708 g

[15] "R24 An attorney at law shall treat adverse witnesses, litigants and other attorneys at law with fairness and courtesy refraining from all offensive personal references and shall avoid imparting to his professional duties his clients personal feelings and prejudices."

women were not credible and were most likely to have consented to sex. See McLachlin J in **R v Seaboyer [1991] 2 SCR 577.**

[27] Section 46(1) prohibits the accused from asking a complaint in sexual offences about any sexual experience of the complainant with any person other than the accused without the leave of the court. And the court shall only give leave if the court thinks that such evidence is necessary for a fair trial of the accused.[16]

[28] If one bears the victim's rights in mind then it would be easier for the court to determine whether allowing such questions are necessary for a fair trial of the accused. Counsel's suggestions are not evidence and surely it is fair to require an accused seeking leave, to disclose to the court the evidence he will call at trial to support the line of cross-examination he seeks leave to embark on. Often this section is prayed in aid without any merit.

---

[16] BVI Evidence Act Section 46 (1) Where a person is prosecuted for rape or any other sexual offence or for an attempt to commit rape or any other sexual offence, then except with the leave of the court no evidence and no question in cross-examination shall be adduced or asked at the trial by or on behalf of any accused, about any sexual experience of a complainant with a person other than that accused.

(2)The court shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to it in the absence of the jury, if the trial is by jury, by or on behalf of an accused, and on such an application the court shall give leave only if the court thinks that such evidence is necessary for a fair trial of the accused.

(3) For the purposes of this section, "complainant" means a person in relation to whom, in a charge for rape or any other sexual offence, or for an attempt to commit rape or any other sexual offence, it is alleged that the rape or other sexual offence was committed or attempted.

(4) Nothing in this section authorizes evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

[29] I pause here to ask in the light of current trends if this section goes far enough to protect a victim. It permits the defendant to ask questions without leave about **the victim's previous sexual history with him** and this does not matter if it took place years before the complaint or was contemporaneous with the complaint. This could work great injustice. For example ,take an instance (based on an actual case) where a former spouse is accused of raping his ex-wife and he places great reliance on what she used to do when they were married to build a defence of honest belief that she had consented. Do I detect a remnant of one of the twin myths , if once before she said yes in those circumstances then it is all right to assume or infer that she is saying yes every time? Does a woman or girl not have the right to say yes or no to sex on every occasion? Of course the section does not mandate that he seek leave and so he took full advantage of the section, the judge and the prosecutor were not sufficiently aware of what was at stake, and ended up being acquitted.

[30] I note that in England, the legislation (see sections 41-43 of the Youth Justice and Criminal Evidence act 1999) goes much further by disallowing all questions about the previous sexual history of a complainant even that with the Defendant. Evidence of his or her sexual history (in England a man can be guilty of raping another man) with the Defendant can only be embarked on with the leave prior history goes to a relevant issue not being consent or is an issue of consent and the behaviour is alleged to have taken place at or about the same time as the event giving rise to the charge

and the court is of the view that to disallow it would render a verdict unsafe.

[31] This law was challenged as being in breach of the defendant's right to a fair trial and the House of Lords in ***R v A*** were called upon to do a neat balancing act .They dismissed the challenge after much enlightening deliberations.

COMPETENT AND COMPELLABLE WITNESSES

[32] I have had several instances where victims of domestic violence refuse to give evidence when called at trial and the prosecution feels obliged to and enters a **nolle prosequi**.

[33] However, the **Evidence Act** section 20(6) provides that every person is a competent and compellable witness save that a spouse, child and parent of the defendant may object to give evidence for the Prosecution. The court is to satisfy itself that the person knows of his/her right to object and if an objection is made determine it, in the absence of the jury.

[34] The section mandates that court shall not require such a person to give evidence if the court finds that there is a likelihood that harm would or may be caused whether directly or indirectly to the person or to the

relationship between the person and the accused if the person gives the evidence or the nature and extent of the harm outweighs the desirability of having the evidence given[17].

[35] This provision however is subject to s. 20(10)[18] which stipulates that the child parent or spouse of an accused **shall be compellable** to give evidence either for the prosecution or the defence **without the consent of the accused** where the accused is charged with an offence under the Married Women's Property Act Cap 275 ss.14 and 18,the Domestic Violence Act Cap.2/116 s.5 and the Criminal Code 1997 parts 111 (offences against Government and public order),V11 (sexual offences) and X1 (homicide and other offences against the person).

[36] These are measures which can usefully be employed to assist the victim in the trial process and so ensure that her rights are equally protected, for if a victim 's access to justice is in reality restricted then can we claim that a victim's rights have not been abrogated by the very machinery established by the constitutions to protect them? However, we have to first ensure that proper facilities and help exist for protecting the victim if harm is threatened. This the courts can only do with the

[17] (6) Subject to subsection (10), a person who makes an objection under this section to giving evidence or giving evidence of a communication shall not be required to give the evidence if the court finds that
(a) there is a likelihood that harm would or might be caused, whether directly or indirectly, to the person, or to the relationship between the person and the accused, if the person gives the evidence; and
(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

[18] (10) The spouse, parent or child of a person charged with an offence under any enactment mentioned in Schedule 1 shall be compellable to give evidence either for the prosecution or defence and without the consent of the person charged.

assistance of the States who must provide the necessary facilities, the Police and the social welfare services .

DOMESTIC VIOLENCE LEGISLATION

[37] In most member countries the primary legislation which deals specifically with gender based violence is the Domestic Violence Acts. A Government's commitment to implementing legislation to protect the rights of women is of the utmost importance. Legislation to stop violence against women sends a clear message of zero tolerance and confirms that there must be equal treatment of women.

[38] The need to address this social evil is recognized by all Governments of OECS (eg. early this year the Government of Anguilla produced a bill, the Domestic Violence Bill 2011 for public consultation).And, in August the Government of the Territory publicly acknowledged that domestic violence is of grave concern by enacting new domestic violence legislation recognizing that the existing Act (passed in the 1990's) was inadequate. [19]

[39] The new Act entitled, **Domestic Violence Act 15 of 2011** came into force on 3 Oct. The definitions of domestic relationship and domestic violence merit specific mention having regard their scope.

[19] The then Minister for Health and Social Development, the Hon. Dancia Penn- Sallah Q.C. enunciated- [It is] "our obligation and our responsibility to do whatever we can to strike out the problem of domestic violence. There are many ways to do it but one certainly is a stronger legal system and provisions for addressing it."

[40] In the Act “domestic relationship” means “a relationship between an applicant and a respondent in any of the following ways:(a) they are or were married to each other, including marriage according to any law, custom or religion;(b) they are cohabitants or were cohabitants;(c) they are the parents of a child or are persons who have or had parental responsibility for the child, whether or not at the same time;(d) they are family members related by consanguinity, affinity or adoption;(e) they would be family members related by affinity if the persons referred to in paragraph (b) were, or were able to be married to each other;(f) they are or were in an engagement, dating or visiting relationship which includes but is not limited to an actual or perceived romantic, intimate or sexual relationship of any duration; or (g) they share or shared the same household or residence.”

[41] And domestic violence is defined thus:-“ “domestic violence” means any controlling or abusive behaviour that harms or may harm the health, safety or well-being of a person or any child and includes but is not limited to the following (a)physical abuse or threats of physical abuse; (b) sexual abuse or threats of sexual abuse;(c) emotional, verbal or psychological abuse;(d) economic abuse;(e) intimidation;(f) harassment;(g) stalking;(h) damage to or destruction of property; or(i) entry into the applicant’s residence without consent, where the parties do not share the same residence;

[42] And, " **"**economic abuse" includes the unreasonable deprivation of economic or financial resources to which an applicant is entitled under law or which the applicant requires out of necessity including household necessities for the applicant, mortgage or rent payments in respect of the shared residence; or (b) the unreasonable disposal of household effects or other property inwhich the applicant has an interest."

[43] And "emotional, verbal and psychological abuse" is defined as ," degrading or humiliating conduct by the respondent to the applicant, including (a) repeated insults, ridicule or name calling;(b) repeated threats to cause emotional pain;(c) the repeated exhibition of behaviour which constitutes seriousinvasion of the applicant's privacy, liberty, integrity or security.";

[44] These definitions are far-reaching and take on board the full gamut of what in reality can amount to domestic violence including psychological abuse, emotional abuse and economic abuse. It remains to be seen how the courts construe those provisions either in an enlightened and purposive way having regard to the fundamental rights and freedoms of the victims as well as the defendant and endeavoring to strike a proper balance or in the traditional way with little or no regard for the rights of the victim.

[45] The Act gives jurisdiction to both the Magistrate Courts and the High Court to grant ex parte injunctions, occupation orders and other interim

relief on an ex parte basis on behalf of the alleged victim of domestic violence.

[46] In the Territory , victims of domestic violence have also been afforded further protection by the **Justice Protection Act 18 of 2011** which came into force on 3 Oct.[20]. This Act provides for the establishment of a programme for the protection of certain witnesses and other persons and for connected matters. Schedule 2 of the Act makes specific mention of offences involving domestic violence. The programme aims to provide financial, psychological and other services to help participants in the programme. Article 12 Schedule 4 indentifies the scope of protection provided under the programme. The measures may include where necessary;(a) providing accommodation;(b) defraying relocation expenses;(c) providing living expenses;(d) establishing new identities; and(e) providing assistance with rehabilitation.

[47] The foregoing highlights some of the difficulties that victims of gender violence in particular may encounter in deciding whether or not to have the authorities prosecute a case. And the court is called upon to be pro-active and so alert to such difficulties and render whatever assistance is at hand either through social services or other non-governmental agencies. Here, in addition we have the Family Support Network, a non-governmental agency which has done and continues to do invaluable work with families and deals with the many instances of domestic violence.

[20] Virgin Islands, Justice Protection Act 2011, No 18 of 2011

SENTENCING POLICIES

[48] Permit me if perhaps I should trespass briefly on my sister, Hariprashad-Charles' remit as our sentencing practice and procedure raises three areas of concern which I seek leave to address- victim impact statements, our mitigation guidelines in sexual offences cases and written sentencing remarks.

[49] Sir Dennis Byron CJ as he was then in the **Queen v Elton Beazer and Denroy Stevens** said "[Domestic Violence] must be regarded as a very serious crime. The incidence of violence against women in our communities has become a serious problem and the court must attempt to curtail this by its sentencing policies. Unless it does so, the perpetrators of violence against women may very well believe that they have a license to do so unimpeded. **Our sentencing policy must necessarily be directed at changing behaviour, especially those abhorrent to human decency**."[21]

[50] And, Hariprashad-Charles J very recently in the **Queen v Vernon Anthony Paddy** [22]reiterated the court's commitment to sending a message of zero tolerance.[23]

[21] Virgin Islands, CA 1/2001, Queen v Elton Beazer and Denroy Stevens
[22] Virgin Islands, BVIHCR 0020/2010, Queen v Vernon Anthony Paddy
[23] The learned judge said- "It is now the duty of the courts to send out a strong message that domestic violence in any form will not be tolerated and that men do not have an unfettered licence to batter women. The only way the courts can effectively show this is by the sentences that are passed which are aimed at ensuring that the wrongdoer does not repeat the offence and that potential offenders get the message that society will not condone such behaviour".

[51] Courts are mandated at common law when sentencing to take account of all the circumstances of the offence and the offender including the circumstances of the victim. In some States that is specifically enacted. See **BVI Criminal Justice (Alternative Sentencing) Act 2005 section 4[24].**

[52] How can the sentencing court take proper cognisance of the impact of the crime on the victim? Traditionally, the victim gives evidence at trial and her testimony is geared towards establishing the commission of the offence not he consequences. If the defendant pleads or is found guilty then the victim has no direct say in the sentencing process and must look to the Prosecution to speak for her whilst the Defendant can say as much as he likes and even can call witnesses if he so chooses. This is a blatant imbalance in the process. Often the Prosecution is not acquainted with the personal details of the victim and this of course is not surprising in our present climate of shortage of staff and other resources.

[53] We have no legislation or procedural rules about victim impact statements and how they can be deployed at sentencing hearings . The use of victim impact statements is an established English practice and certainly it is not some new-fangled idea seen on American Television. Reference

[24] Criminal Justice(Alternative Sentencing) Act s. 4- " a court in determining sentence for an offence shall have regard to such of the following matters as are relevant and known to t he cour t(a) the circumstances of the offence;(b)other offences(if any) that are to be taken into account;(c)...(d) **personal circumstances of any victim of the offence** ,(e)**injury loss or damage resulting from t he offence**..."

the English guidelines which are illuminating 25 and see also **Hobstaff v(1993) 14Cr.App R605..**

[54] Victim impact statements allow the victim a direct voice at the sentencing hearing and in time could lead to healing and eventual reconciliation more easily than the current approach where one only intuits the impact on a victim. As the Defendant can give evidence at trial if he so wishes and is given every opportunity to speak and call witnesses at the sentencing hearing can it be unjust to accord a voice to the victim at the sentencing hearing and will doing so make for a more just resolution and process? As already noted our laws generally empower the court to apply English practice and procedure where our laws are silent. Personal experience on the Bench has revealed to me how articulate young victims can be about the host of concerns and tribulations visited upon them as a result of the offence which no judge or prosecutor, however well intentioned can begin to imagine. So can we make good that omission by adopting the English practice for a fairer trial for both victim and Defendant?

[25] The victim personal statement (VPS) scheme gives victims an opportunity to describe the wider effects of the crime upon them, express their concerns and indicate whether or not they require any support. give victims the opportunity to state how the crime has affected them - physically, emotionally, psychologically, financially or in any other way; allow victims to express their concerns in relation to bail or the fear of intimidation by or on behalf of the defendant; provide victims with a means by which they can state whether they require information about, for example, the progress of the case; provide victims with the opportunity of stating whether or not they wish to claim compensation or request assistance from Victim Support or any other help agency; provide the criminal justice agencies with a ready source of information on how the particular crime has affected the victim involved.

SENTENCING GUIDELINES IN SEXUAL OFFENCES CASES

Our sentencing guidelines for sexual offences were promulgated by the Court of Appeal (a distinguished bench) in the well known case of Winston Joseph et al v. R.[26] That case was really a series of three cases of appeals against sentence in sexual offences- rape, incest and unlawful carnal knowledge and the court took the opportunity to lay down sentencing guidelines. The Court (Byron CJ delivered the judgment) gave guidelines and gave a list, not meant to be exhaustive, of common aggravating and mitigating factors. Of mitigating factors the court listed at para 19: " ...(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 indications; (iii) Where the **girl of at least 16 years of age made deliberate attempts at seduction."**

[55] Items (ii) and (iii) give food for thought. Note that, the "**defendant's genuine affection**" for a girl with whom he was found guilty of incest, **not the girl's genuine affection for him** is a mitigating factor. This girl could be his daughter say. And can the length of his genuine affection or perhaps we may call it love be further mitigation for instance: I loved her since she was a babe in my wife's arms? Or since she entered puberty? This strikes me as the very antithesis of love, as the essence of love is never to harm the loved one. Although I am aware that the brilliant and sometimes forlorn Oscar Wilde did declaim once from

[26] Criminal Appeal 4 of 2000 Winston Joseph et al v. R

behind certain ancient dreary walls at Reading where he was immured – "For each man kills the thing he loves, Yet each man does not die…"[27].

[56] Does this factor have the unwitting savour perhaps of the court's innate and unrecognized gender bias?

[57] The third factor- the girl made deliberate attempts to seduce him. Does this not have overtones of the good old story- the All Powerful: Adam, why did you eat the apple when I told you not to? Adam: the woman gave it me.

[58] Does not such a factor raise the ancient excuse -blame the woman a veritable Lilith or Lolita and reduce man to a bundle of muscle and nerve rather akin to the lowly amoeba which moves with the slightest sensation? Is this then the hallmark of our new world-–spineless men and seductive women pneumatically enhanced perhaps like the radiant Lenina Crowne?

[27] Oscar Wilde, Ballad of Reading Gaol

SENTENCING REMARKS

[59] The practice, a salutary one no doubt, has grown up of giving written reasons on sentencing and these readily fall into the public domain. Sometimes we give very explicit details of the facts in gender based crimes of violence with little or no heed to the feelings of the victim or how that will impact on her right to privacy. Is it really necessary to do that? If the matter goes on appeal then the court of appeal will have the benefit of the complete transcript of what took place at trial and a victim's sensibilities could be thus spared.

[60] One must also be mindful of the power of gratuitous remarks, sometimes unwittingly made, to the effect that the victim could have sought help sooner or an expression of similar sentiment. These can only serve to act as deterrents to other women and girls coming forward to report and prosecute gender based crimes of violence. Such victims are already faced with sometimes insurmountable obstacles and no one, however unintentionally will like to think that he or she may be adding to those burdens.

DEVELOPMENT AT COMMON LAW OF THE PROVOCATION DEFENCE TO MURDER

[61] I should like to make brief mention of this. The partial defence of provocation[28] often used by persons who are charged with murder might merit another look in the light of the recent case of **Tabeel Lewis v. the State of Trinidad and Tobago** [29].In that case, in Nov.2003 ,Lewis an 18 year old man killed a 63 year old woman with whom he had been having a secret sexual relationship for about a year. The injuries the appellant inflicted on his lover were severe and indicative of very considerable violence. In the opinion of the forensic pathologist, she "died as a result of asphyxiation due to gagging, strangulation and hog-tying" and he found that ," the blunt force injury to the head was "a significant additional contributory factor to death"

[62] The killing occurred because when Lewis sought to break off the relationship that morning the victim threatened to make their affair public and he killed her. He was convicted of murder. The issue whether the trial judge was wrong in not leaving the partial defence of provocation to the jury, was argued on appeal. Both appellate courts held that the judge was correct in not leaving that defence to the jury. However, the Privy Council

[28] Section 151 of the Virgin Islands Criminal Code 1997

(1) Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or things said or both) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man.

[29] [UKPC] 2011 15

had to consider an application to admit fresh evidence - the reports of a clinical psychologist and a forensic psychiatrist made in 2008 and 2009. Both reports intimated that Lewis had particular personality traits- anxious state of mind , vulnerable self esteem and excessive need for privacy and to protect his reputation and so likely that the deceased's threat to expose the relationship could have caused him to panic and kill her. In t he light of those reports the Privy Council felt constrained to allow the fresh evidence and to remit the matter to the court of appeal for further consideration on provocation in the light of the fresh evidence.

[63] Interesting that in that case that no mention was made of domestic or gender based violence and that reports on the Appellant's personality, made several years after the incident, were taken into account. That a case such as this was re-opened on those grounds must cause concern as persons with vulnerable personalities who kill to protect their reputation now seem to have another available loophole to escape the consequences of their actions. When and how can the need to protect one's reputation justify murder, or reduce murder to manslaughter? How obsessive must that need be to qualify? [30]

[30] I note the Privy Council with, perhaps a hint of relief remarked that this partial defence was changed in England to loss of control and that they would leave the Trinidad and Tobago Court of Appeal to grapple with the matter.

CONCLUSION

[64] In recent months we have seen initiatives which will enure to the benefit of women and the world. In India there was a renaming ceremony for girls who were previously called, " Nakusha" meaning " unwanted " by their parents who preferred sons as boys are habitually seen as income earners. 285 girls were given new names of their choosing in an effort to combat the negative attitude towards girls who are often seen as burdens to their families[31].

[65] And significantly, at the recent meeting of the Commonwealth Heads of Government in Perth, Australia, it was agreed to remove gender discrimination in the order of succession to the throne. "Attitudes have changed fundamentally over the centuries and some of the outdated rules — like some of the rules of succession — just don't make sense to us anymore," said British Prime Minister David Cameron. He further said that "The idea that a younger son should become monarch instead of an elder daughter simply because he is a man...is at odds with the modern countries that we have become." [32].

[66] These instances illustrate that steps are being taken at the highest levels internationally to create equality between the genders. The reasons, although obvious, bear repeating and permit me to do so in the words of

[31] http://www.bbc.co.uk/news/world-south-asia-15414796

[32] http://www.cnsnews.com/news/article/eldest-sister-may-now-ascend-british-throne-ahead-younger-brother

Kofi Annan –"When women are fully involved, the benefits can be seen immediately: families are healthier; they are better fed; their income, savings and reinvestment go up. And what is true of families is true of communities and, eventually, of whole countries" [33]

[67] I thank you for your patience and forbearance.

Rita Joseph-Olivetti

Resident Judge

Territory of the Virgin Islands

For Colloquium on Gender Equality and Judging... for ECSC Judiciary.

St.Lucia, 17,18 Nov 2011

[33] 2 New York Times/International Herald Tribune, Saturday 29 December 2002: "IN AFRICA, AIDS HAS A WOMAN'S FACE", By Kofi Annan