



[2022] JMSC Crim 1

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CRIMINAL DIVISION**

**CLAIM NO. MNCT2019CR00064**

<b>BETWEEN</b>	<b>REGINA</b>	<b>PROSECUTION</b>
<b>AND</b>	<b>MARCADO ROWE</b>	<b>DEFENDANT</b>

**IN COURT**

**Ms Natallie Malcom Assistant Director of Prosecution and Mr. Daniel Kitson-Walters- Crown Counsel for the Director of Public Prosecution.**

**Mr. Charles Benbow for the Defendant.**

**Heard: 8<sup>th</sup> of December 2021 & 1st of February 2022**

**Sexual Intercourse with a Person under Sixteen- Person In Authority**

**SHELLY-WILLIAMS J**

**Background**

- [1] The complainant, is a student at a high school in Manchester, whilst the defendant was a teacher at the said high school. On 27<sup>th</sup> day of May 2019, the complainant went in to the defendant's office to do an assignment. Whilst in his office, the defendant kissed the complainant, pulled down her underwear, put her to lay down on his desk and had sexual intercourse with her.
- [2] The complainant started to cry and indicated that she was in pain. The defendant stopped having sexual intercourse with her, but then indicated to the complainant that he 'wanted more' the following Wednesday.

- [3] The complainant went home shortly afterwards and her mother noticed blood on her tunic. The complainant's mother took her to the Police Station to make a report. The complainant was taken to the doctor who noted certain injuries and swabs and samples from the complainant. The defendant was subsequently arrested and a deoxyribonucleic acid (DNA) sample was taken from him. The DNA results indicated that the defendant could not be excluded.
- [4] The defendant pleaded guilty on the 8<sup>th</sup> day of December, 2021 for having sexual intercourse with a person under sixteen years, he being a person in authority.

## The Law

### Case Law

- [5] The case law gives some guidance as to the type of sentences that are to be imposed in these cases. McDonald – Bishop, JA in the case of **Blake (Samuel) v R** [2015] JMCA Crim 9, dealt with the issue of sentencing in sexual offences cases. In that case, the defendant was given a sentence of four years for having sexual intercourse with a person under the age of sixteen years. McDonald-Bishop JA stated at paragraph 32 of her judgment that :-

*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.*

- [6] In the Canadian case of **R v Lee** 2012 ABCA 17 (Can LII) at paragraph 141, the learned judge stated: “

*A key value in a starting point is its reflection of a preliminary evaluation, for proportionality purposes, of the gravity of the offence and the degree of responsibility of the offender in a typical case.*

- [7] In **R v Rayon Mason**, [2009] JMCA Crim 56/07 Panton P indicated the approach judges should adopt in these cases. The learned President stated at page 4 that:

*We trust that the young men, and indeed the old men too, because the old men are doing it, will recognize that girls are to be left alone and those who interfere with them sexually can expect nothing but imprisonment. We urge the courts below not to fail to impose imprisonment in these situations. If men will not hear, then, they will feel."*

### **Statute**

- [8] The accused was charged pursuant to the Sexual Offences Act. In particular, he was charged pursuant to Section 10 (4) for having sexual intercourse with a person under sixteen he being a person in authority, which states that :-
- (1) *Subject to subsection (3), a person who has sexual intercourse with another person who under the age of sixteen years commits an offence.*
- (4) *Where the person charged with an offence under subsection (1) is an adult in authority, then, he or she is liable upon conviction in a Circuit Court to imprisonment for life or such other term as the Court considers appropriate, not being less than fifteen years, and the Court may, where the person so convicted has authority or guardianship over the child concerned, exercise its like powers as under section 7 (7).*
- (5) *Where a person has been sentenced pursuant to subsection (4), then, in substitution for the provisions of section 6 (1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the Court shall specify a period of not less than ten years which that person shall serve, before becoming eligible for parole.*
- [9] This statute dictates a mandatory minimum of fifteen years once a person is convicted for this offence. The law, however makes provision for a discount where there is a guilty plea.
- [10] 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.

42. D – (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 on 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 43H, as may be relevant.

42H. 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 42(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 in 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;*

### **Sentencing Guidelines**

[11] The court promulgated sentencing guidelines in January 2018. In the sentencing guidelines, as it relates to having sexual intercourse with a person under sixteen being a person in authority, the usual starting point is fifteen years with the usual range being between 15 to 20 years.

### **Aggravating circumstances**

[12] There are a number of aggravating circumstances in this case which I have to consider. These include :-

1. *The defendant was the complainant's teacher.*
2. *The defendant had sexual intercourse with the complainant on the school grounds.*
3. *The defendant had sexual intercourse with the complainant in her school uniform.*
4. *The defendant indicated to the complainant that he wanted to have sexual intercourse with her again.*

5. *The age of the complainant ie fourteen years.*

### **Mitigating circumstances**

1. *The defendant pleaded guilty.*
2. *The defendant has a good antecedent report.*
3. *The defendant has a good social enquiry report.*

### **Time custody**

[13] It is now a settled position that the defendant must be given full credit for the time spent in custody. This was stated in the case of **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P, writing on behalf of the court, at paragraph [34] of the judgment, stated the following:

*...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."*

[14] I will reduce the sentence of the defendant by the time spent in custody.

### **The Sentence**

[15] In approaching this case I took into consideration the age of the accused, the plea in mitigation, the witness called by the defence on sentencing and the relevant law. This offence carries with it a statutory minimum of 15 years. I will start at 15 years due to the aggravating circumstances listed above, I will increase his sentence by five years to twenty years.

[16] The defendant pleaded guilty in this case. He was not pleaded at the first opportunity, however, he pleaded on the first opportunity after the DNA results were disclosed to him. I will consider this as an early guilty plea albeit not on the first relevant date. I have to also consider that the evidence against the defendant was overwhelming. A DNA sample was taken from the defendant and the forensic certificate from the Government Forensic Laboratory indicated that the defendant could not be excluded. I would also consider that in the circumstances any large

discount from the sentence would shock the public conscience. I will therefore award a twenty percent discount for the guilty plea. This would reduce the sentence to sixteen years.

- [17] I will reduce the sentence by one year for the defendant's good antecedent report and a further one year for his good social enquiry report. This would further reduce the sentence to fourteen years.
- [18] Full credit has to be granted to the defendant for the time he has been in custody for this offence which is two months and two weeks.
- [19] The defendant is therefore sentenced to thirteen years, ten months and two weeks. Pursuant to Section 10(5) of the Sexual Offences Act, the sentence of the court is that the defendant is to serve ten years before becoming eligible for prole. Due to the facts in this case, where the offence was committed, by a teacher with a student, on the school grounds, the defendant's name is to be added to the Sex Offender Register.