THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CLAIM NO. ANUHCR 2012/ 0118

BETWEEN:

THE KING

Claimant

AND

PHILMORE FARELL

Defendant

Appearances:
Mr. Sherfield Bowen for the Defendant
Ms. Rasheeda Jonas, Crown Counsel for the Claimant

2026: February 16; 17

RULING ON NO CASE SUBMISSION

[1] **PERSAD, J (Ag).:** The defendant Philmore Farell was indicted on a charge of having sexual intercourse with a mentally subnormal person, this offence is contrary to section 11 of the Sexual Offences Act (Act 9 of 1995 of the Laws of Antigua and Barbuda).

[2] The particulars of the offence being that: Philmore Farrell, between the 1st and 28th days of February, 2022, at Jennings Village in the Parish of St. Mary in Antigua and Barbuda, had sexual intercourse with Carissa Charles, a mentally subnormal person.

[3] The Sexual Offences Act provides as follows:

11. (1) Where a person under circumstances that do not amount to rape has sexual intercourse with another who is mentally subnormal and who is not the person's spouse, that person is guilty of an offence and is liable on conviction to imprisonment for fifteen years.

(2) It is a defence for that person to prove that he did not know and had no reason to believe that the other person was mentally subnormal.

(3) In this section "mentally subnormal" means state of arrested or incomplete development of mind which includes a significant impairment of intelligence and social functioning and is irresponsible conduct on the part of the person concerned.

(4) No proceedings for an offence under this section shall be instituted except by or with the consent of the Director of Public Prosecutions who shall have regard *inter alia* as to whether or not any abuse in relation to the mentally subnormal person has been committed.

[4] Before the Court is an application by defence counsel making a submission of no case. Mr. Bowen, on behalf of Mr. Farrell, makes several submissions to this Court. He submits that when one looks at the elements of the offense for which Mr. Farrell is charged, the elements require, that the prosecution must prove among other things, that the victim in this case, Carissa Charles, was a mentally subnormal person. Mr. Bowen indicates to the Court is that he is of the view that the evidence, as presented by the Crown, in the course of their case, does not address overtly or at all that Ms. Charles is a mentally subnormal person.

[5] In other words, he relies on the first limb from ***R v Galbraith*** [1981] 1 WLR 1039, which says that if there is no evidence to support an essential element of the offense, then the case must fall.

[6] Ms. Jonas, on behalf of the Crown, takes a different view. She argues that there is evidence of a nature which, when put together, is capable for the jury to reach the conclusion that Ms. Charles was a mentally subnormal person. She submits that this court can leave it to the jury to determine whether Ms. Charles was a mentally subnormal person.

[7] From the legislation, section 11(3) defines "Mentally subnormal as a state of arrested or incomplete development of mind which includes a significant impairment of intelligence and social functioning and is irresponsible conduct on the part of the person concerned."

[8] This is the definition that the legislators in Parliament in their wisdom, laid down as the test for "mental sub normality".

[9] Mr. Bowen's argument is very simple. He submits there is no admissible evidence of mental sub normality or of arrested or incomplete development of the mind. Ms. Jonas, on the other hand, says, yes, there is, but it is of a nature where the jury could decide.

[10] Before I get into the question of the evidence, there were two other issues I invited both counsel to address me on, and I'm going to just deal with it very quickly. The first was, and this comes from subsection 4 of the legislation, "no proceedings for an offence under this section shall be instituted except by or with the consent of the DPP who shall regard, *inter alia,* as to whether or not any abuse in relation to a mentally subnormal person has been committed".

[11] The Court of its own motion did raise this issue because having done a search of the file, the Court was unable to find any evidence of the consent. Having raised this issue, Crown Counsel indicated that there was, in fact, communication and consent given by the learned Director of Public Prosecutions. This disposes of this issue in my view.

[12] However, I am going to make the observation that since it is a requirement under the legislation that consent be given, and it is not unusual, there are occasions when Parliament may require the consent of the DPP to initiate a charge, and such consent is necessary for the charge to be laid.

[13] I would strongly recommend, for future reference that when a charge is being initiated that requires the consent of the DPP, that there be some sort of formalized record of it, in a form that the Court has access to. In previous years, I have noticed this

particular requirement in other jurisdictions where, on the actual information or the charge giving rise there is an endorsed consent given by the DPP for the initiation of the charge, and it is signed by the Director.

[14] The second issue that I raised, was what evidence there was that the virtual complainant in this matter was married. And there is such evidence. Ms. Jonas pointed the Court to the relevant evidence on that area, which this Court accepts. So those two issues are adequately disposed ofin terms of the concerns of the court.

<u>Approach of the Court to Submissions of No Case</u>

[15] An accused's right to make a no case submission is long established and has long been recognised in this jurisdiction in the case of ***<u>Riley vs Barron</u>*** **<u>(1965) 8 WIR 164 at165</u>**.

Phillips J.A. at 165 letter H

A submission that there is no case can be properly made and upheld

(a) When there has been no evidence to prove an essential element of the alleged offence; and

(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict.

[16] In ***<u>Sanjit Chaitlal v The State</u>*** **<u>(1985) 39 WIR 295</u>** the Court of Appeal dealt at length with the approach the courts should adopt in dealing with a submission of no case to answer. In delivering the judgment of the court Bernard J.A. (as he then was) said at Page 311 Letter "e":

In *R v Galbraith* (1981) 73 Cr App Rep 124, the decision which has caused this court to examine the various authorities, the English Court of Appeal (Criminal Division) had cause to examine the position when there is a no-case submission. Speaking of the doubts which attended the approach of the judge upon a no-case submission at the close of the prosecution's case, Lord Lane CJ said (at page 125):

> "There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the

> jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between, on the one hand, a usurpation by the judge of the jury's functions and on the other, the danger of an unjust conviction."

And after referring to the dictum of Lord Widgery CJ in R v Barker quoted earlier in this judgment, he continued thus (at page 127):

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."

If by the preference of the second school of thought is meant that it is only where there is no evidence upon which a jury properly directed could convict that the judge should stop a case, we respectfully beg to disagree. We are of opinion that this is too restricted a view for, while it may cover the case where the verdict is unsafe and unsatisfactory, it does not seem to meet the situation where the verdict is unreasonable or cannot be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion). We feel that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there is no miscarriage of justice.

[17] In **Director of Public Prosecution's Reference (No.2 of 1980) (1981) 29 WIR 154** a decision of the Court of Appeal of Guyana where the question was considered Luckhoo J. A. expressed his view in this way at page 167:

> "A judge would have to decide what were the constituent (or essential) elements of an offence. If the facts adduced by the prosecution in proof of the offence fell short of proof of any of the Constituents of that offence it would be the function of the judge as a matter of law to direct the jury to acquit.

If, on the other hand, the prosecution adduced evidence in proof of each and every essential element of the offence, thereby making out a prima facie case against an accused, it would be the function of a judge to leave those issues of fact for the jury's consideration and the function of that jury to resolve the issues of facts.
So, put in these general terms, whether there was any evidence on which a jury might convict would be a question of law for a judge to decide. Should he so decide, he must leave the matter with them as judges of the facts.

A question posed during the hearing of the reference was: what would be the position if evidence was adduced by the prosecution on each of these constituents of the offence, but that evidence was very weak, either so manifestly unreliable or so discredited as a result of cross-examination that no reasonable tribunal could safely convict on it? It was not denied that in such cases a judge could properly direct a jury to return a verdict of 'Not Guilty'.

In so doing, I should think that he would be acting from an inherent sense of justice in the conduct of a trial so as to avoid a perverse verdict being given against an accused. Counsel for the accused said that the trial judge would be acting ex debito justitiae. I would describe such a direction not as one resulting from a decision on a point of law arising at the trial, but as one given by virtue of an overriding discretion vested in the judge in the fair administration of a jury to ensure that justice did not miscarry."

[18] In ***Anand Mohan Kissoon and Rohan Singh v The State* (1994) 50 WIR 266** the Court of Appeal of Guyana held as follows

The fact that inconsistencies in a witness's evidence may have weakened the prosecution case against an accused is no ground for the trial judge withdrawing the case from the jury; a case should only be so withdrawn in the extreme circumstances that the prosecution witnesses are totally discredited.

[19] Similarly in ***Taibo (Ellis) v R* (1996) 48 WIR 74** the JCPC held as follows:-

On a submission of no case to answer, the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed.

[20] We move now to the question of the resolution of the issue of whether there is evidence to show mental sub normality. I am going to start by saying no one in this case has given overt evidence that Faye Charles suffered from a mental sub normality or arrested development of the mind.

[21] What we do have, is an amalgam of evidential testimony from the mother who gives evidence that the VC was premature, she was slow, and she was in intensive care for a couple weeks. That she did not walk until she was 7 or 8 and that she still behaves like a child, she does not hear or talk properly. She does have a mind of her own. She does not talk like us and her speech is not developed.

[22] You also have the evidence of the Virtual Complainant's teacher who is a special education teacher who assists persons with disabilities to become educated to the point where they are self-sufficient. According to this witness, we trained them in education, and she did teach the VC for five to six years, she was somewhere between 12 or 13 when she started teaching her. And that would have said that she would have been exposed to Carissa between the ages of 13 to 18 or 19.

[23] The Crown relies on the evidence of Ms. Ingrid Daniel. Ms. Daniel tells you that she has a certificate in dyslexia. She's been. She works at the Antigua and Barbuda

Centre for Dyslexia and is currently holding the position of an education program coordinator. She gave her degrees and her experience and her training, and the court had no difficulty in deeming her, as an expert in educational testing, having regard to her experience and her training.

[24] Ms. Daniel stated that she interacted with the VC and she did tests and she administered tests, that is what she would normally administer and she prepared a report. And out of that report, at the end of all her testing, she came to a conclusion that the cognitive function was that the VC was that of a child age 4 to 5 average.

[25] This is where the issue is, because at the end of the day, it's a question of is there any evidence of mental sub normality? Most importantly is there evidence to meet the definition of arrested development, of a state of arrested or incomplete development of the mind.

[26] It seems to the Court that there is nobody who speaks to the issue of whether the Virtual Complainant was suffering from an "arrested developmental" within the meaning of mental sub normality.

[27] In the Courts view there is plainly no evidence on that issue. The question that the Court has to think about is whether, it can take the amalgam of what the mother, the teacher, and Ms. Ingrid Daniel said as being sufficient?

[28] The Court, in considering the submissions made by both sides, found itself asking the question because it is clear that mental sub normality does include a significant impairment of intelligence and social functioning. But the Court has to ask, well, what is meant by 'significant'.

[29] Is it in every case of an impairment of intelligence or social functioning, that a person can be said to have an arrested or incomplete development of the mind? How much is significant? What is a sufficient level of impairment or social functioning to determine mental sub normality?

[30] The court is not able to answer that question, nor is it the court's function to do that. Simply put, the court has to act on evidence in the case. Essentially what Ms. Jonas is saying is that I can leave this to the jury for them to figure out.

[31] I have to say that this suggestion does cause the court some disquiet. The Court is, in a sense, reluctant to do that. The purpose of a jury is to determine issues of fact, it is well accepted that jurors do not know everything about everything, and therefore, sometimes the prosecution must bring evidence to provide them with opinions of experts where necessary.

[32] As a general rule opinion evidence is inadmissible: ***Hollington v F Hewthorn and Co Ltd*** [1943] KB 587 (CA).

A tribunal of fact is comprised of ordinary persons who cannot possibly know everything. In some cases, therefore, expert opinion evidence is admissible because the drawing of certain inferences calls for an expertise which the tribunal simply does not possess. The field of expertise is large and always expanding; and includes medical, scientific, engineering and technological issues, handwriting, market values and matters of an artistic or literary nature as well as foreign law. At common law a person did not qualify as an expert on foreign law unless he had practical experience (although not necessarily as a lawyer) in the country in question. Knowledge derived solely from study did not suffice.

[33] Additionally the fact that an expert witness has impressive qualifications does not, by that fact alone, make his opinion on matters of human nature and behaviour within the limits of normality, any more helpful than that of the tribunal of fact. For example, jurors do not need psychiatrists to tell them how ordinary people who are not mentally ill are likely to react to the stresses and strains of life, so in **R v Chard**, 1972 56 Cr App R it was held that on a trial for murder, the judge had properly refused to admit the evidence of a medical witness on the intention of the accused to kill because, there being no question of insanity or diminished responsibility, the jury were able on the basis of their ordinary experience to judge for themselves the state of the accused's mind at the relevant time.

[34] In this case, we have allowed Ms. Daniel to give her opinion on cognitive level as a result of the testing, training and the interview that she did. However, Ms. Daniel is

not an expert who is able to give an opinion on ‘arrested development” or incomplete development of the mind, nor is she qualified to give evidence on mental sub normality. This she acknowledged when she gave evidence.

[35] I think with the greatest respect to the Crown, that is where their case falls short, because can I leave this to the jury. I think the answer must be no.

[36] What is required is evidence from someone who is qualified to say that the VC suffers from a mental sub normality or that the young lady suffers from a state of arrested or incomplete development of the mind. This is an essential element of this crime. That is the allegation against Mr. Farrell and the evidence as presented, although it may go to the question of intelligence and social functioning.is not enough as that's not the test.

[37] At the end of the day, the test is that there must be a ‘significant impairment’ of intelligence. A significant impairment of social functioning. The question of degree is not something that I could tell the jury that they could make a finding on.

[38] Nor can I expect that members of the public in Antigua and Barbuda are qualified to come and say that the Virtual Complainant is suffering from a mental sub normality. It must be remembered that in this case the Virtual Complainant never gave evidence. Even if that was not the situation in this particular case, can I ask members of the public to look and say from how somebody looks that they have a mental sub normality?

[39] The principles of law are very well established. Matters such as questions of mental sub normality, such as whether or not somebody is suffering from arrested or incomplete development of the mind are matters for expert evidence. In the absence of any qualified expert coming to address the specific mental sub normality point. The Court does not see that there is any admissible evidence on the Crown's case that deals with that issue. An issue which falls squarely as an essential element of the offence.

[40] Nor is the court inclined to leave that to a jury to figure this out on their own without the guidance of proper evidence from the appropriate witness on this essential element. Accordingly, in the circumstances, the submission of no case is upheld. This court will have to bring back the jury and direct that they bring in a verdict of not guilty in relation to Mr. Farrell.

Justice Rajiv Persad SC

High Court Judge (Ag)

By the Court

Registrar