

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 166/1979
	)	
vs.	)	Violation of Title 14
	)	\$298(5)
ZEPHANIAH SMITH,	)	
	)	
Defendant.	)	
	)	

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PETERSEN, Judge

MEMORANDUM OPINION

This case is before the Court on defendant Zephaniah Smith's motion for an order dismissing the criminal charges against him on the grounds that the statute under which he is charged, 14 V.I.C. §298(5) is violative of the equal protection clause of the Fourteenth Amendment^{1/}. For the reasons set forth herein, defendant's motion will be denied.

The Virgin Islands aggravated assault and battery statute, 14 V.I.C. §298 sets forth a series of seven aggravating conditions which, if present in conjunction with an assault, elevate the crime of simple assault and battery, 14 V.I.C. §299, to the more serious offense embodied by 14 V.I.C. §298. Subsection (5) defines an assault as aggravated when it is committed by one "being an adult male, upon the person of a female or child; or being an adult female, upon the person of a child."

^{1/} Equal protection of the law is guaranteed to the people of the Virgin Islands by §3 of the Revised Organic Act of 1954 and Pub. L. 90-496, §11, 82 Stat. 841, eff. Aug. 23, 1968.

It is conceded that the statute does not discriminate between males and females when the assault victims are children. Defendant maintains, however, that the statute does discriminate by imposing a more severe punishment upon one group of persons, adult males, than it does upon another class, adult females when the assault victim is also an adult female.^{2/} Defendant thus contends that the legislature has created a classification based upon sex which runs afoul of the Fourteenth Amendment and denies him equal protection of the law.

It is a fundamental principal that the Fourteenth Amendment does not prohibit state legislatures from treating different classes of persons differently. Reed v. Reed, 404 U.S. 7, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Much to the contrary, legislative bodies are accorded wide deference in establishing reasonable classifications for purposes of promoting the health, welfare and safety of its citizens; Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), and such discretion is essential in enacting classifications establishing criminal penalties. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942); Liberti v. York, 246 A.2d 106 (Conn. 1968).

The Fourteenth Amendment simply mandates that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920). This is the crux of traditional "rational basis" equal protection analysis.

^{2/} Defendant's argument presupposes the condition that no serious bodily injury has been inflicted.

Defendant vies for the application of a stricter standard of review in this action because a sex based classification is involved. In this jurisdiction, however, the rational basis test is the yardstick by which such claims are measured. Considering the question whether a wife, like her husband, has a cause of action for loss of consortium, the court in Benjamin v. Cleburne Truck & Body Sales, Inc., 13 V.I. 545 (D.V.I. 1976) noted the following:

"While it has been maintained that classifications based upon sex are inherently suspect thereby warranting strict judicial scrutiny, Frontiere v. Richardson, 411 U.S. 677, 682 (1973); or, alternatively, that such classification must be subjected to an intermediate level of review, San Antonio School District vs. Rodriguez, 411 U.S. 1, 106 (1973), (Marshall J. dissenting); The Supreme Court has consistently held that such legislation need only be supported by some rational basis to be sustained. Stanton v. Stanton, 421 U.S. 7, 13, (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 653; Reed v. Reed, 404 U.S. 71, 76 (1971)."

This court thus concludes as did the District Court in Benjamin v. Cleburne, supra, that "rational basis" is the standard by which this gender based equal protection claim must be gauged.

Defendant therefore has the rather substantial burden of proving that the aggravated assault and battery statute, prescribing as it does an enhanced penalty for assaults committed by adult males upon adult females is arbitrary and unreasonable. People v. Grammer, 342 N.E.2d 371 (Ill. 1976). Towards this end, defendant argues that subsection 5 was included in the aggravated assault statute because females were considered to be the weaker of the two sexes and were liable to suffer more harm when assaulted. He then suggests that although this might have been the case in 1921, today, with the advent of the Equal Rights Amendment it no longer holds true.

It is correct that the original aggravated assault statute, which included the present subsection (5), was enacted as part of the 1921 Code. However, as recently as 1971, the legislature reevaluated the statute deleting three of the ten subsections. Nevertheless, subsection (5) was reinstated without change, indicating legislative approval of the judicial interpretations of that provision rendered up to that date. Southerland, Statutory Construction, (4th ed) §4521.

As the Court views it, this provision exemplifies a considered legislative judgment that females warrant a special protection from male attackers but that this same degree of protection from other females is uncalled for. Clearly, it is not only the potential for harm stemming from the common disparity in physical stature, but also a consideration of the incidence of the crime as well as the degree of punishment necessary for deterrence, which has motivated this classification. The Court is mindful of the fact that the legislature is not constrained in the exercise of its discretion

"to ignore experience which marks a class of offenders or a family of offenses for special treatment." Skinner v. Oklahoma, 316 U.S. 535 at 540, (1942).

As the Supreme Court directs, the legislature must be "given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary & invidious." McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). Accordingly, if any state of facts and circumstances may reasonably be envisioned which would justify the classification, it must be upheld. People vs. Grammer, supra; People vs. McCabe, 275 N.E.2d 407 (Ill. 1971). Defendant's reliance upon "changing attitudes about the equality of the sexes" in support of his conclusion that the provision is unconstitutional will not serve to sustain his burden of proof. The Court is of the opinion that it is for the legislature and not the

judiciary to evaluate such changes and where appropriate, to incorporate them into the law. See Paiewonsky vs. Paiewonsky, 8 V.I. 421 (3d. Cir. 1971).

Defendant has clearly failed to establish that 14 V.I.C. 298(5) works arbitrarily to place persons in categories on the basis of criteria wholly unrelated to the purpose of the statute. Reed vs. Reed, 92 S.Ct. 251, 404 U.S. 71, 30 L.Ed.2d 225, (1971). His motion will therefore be denied.

The Court will reserve decision on the question of whether the statute is unconstitutional as applied to this defendant until after a hearing on the merits.

DATED: January 3, 1980, 1979

Eileen R. Petersen
EILEEN R. PETERSEN
Judge