

BRITISH VIRGIN ISLANDS
THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

BVIHCR: 2014/003

THE QUEEN

V

DEREK KNIGHT

Appearances:

Mr. Valston Graham, Senior Crown Counsel for the Crown
Mr Patrick Thompson for the Defendant

2014: July 3rd

JUDGMENT

- [1] **Ellis J:** On indictment filed on 15th May 2014 the Director of Public Prosecutions alleged that the Defendant, Derek Knight **(1)** on a day unknown between 1st January 2012 and 31st December 2012 at Pleasant Valley on the Island of Tortola in the Territory of the Virgin Islands, had sexual intercourse with the Virtual Complainant, a girl who he knew to be his daughter contrary to section 122 (1) of the Criminal Code of the British Virgin Islands; **(2)** on an occasion other than that alleged in the previous count and on a day unknown between 1st January 2012 and 31st December 2012 at Pockwood Pond on the Island of Tortola in the Territory of the Virgin Islands, had sexual intercourse with the Virtual Complainant, a girl who he knew to be his daughter; and **(3)** on a day unknown between 31st July 2013 and 1st September 2013 at Pleasant Valley on the Island of Tortola in the Territory of the Virgin Islands, had sexual intercourse with the Virtual Complainant, a girl who he knew to be his daughter.
- [2] On the same indictment, the Defendant is also charged with **(4)** on a day unknown between 1st January 2009 and 31st December 2009 at West End on the Island of Tortola in the Territory of the Virgin Islands, indecently assaulted the Virtual Complainant contrary to section 124 (1) (b) of the Criminal Code of the British Virgin Islands; **(5)** on a day unknown between 1st January 2010 and 31st December 2010 at Carrot Bay on the Island of Tortola in the Territory of the Virgin Islands, indecently assaulted the Virtual Complainant; and **(6)** on a day unknown between 1st June 2011

and 31st December 2011 at Pleasant Valley on the Island of Tortola in the Territory of the Virgin Islands, indecently assaulted the Virtual Complainant.

- [3] On 10th May 2014, the Defendant pleaded guilty to all of the counts on the indictment. A sentencing hearing was conducted on 22nd May 2014, and he is now before the Court for sentencing. The facts of the case are a matter of common ground and are summarized below.

Agreed Facts

- [4] The Defendant is a Jamaican national and the biological father of the Virtual Complainant. The Defendant is married to the mother of the Virtual Complainant and they made their home at various locations throughout Tortola along with the Virtual Complainant who was born on 5th November 1997 and two younger children. At the point when the complaint was made, the family resided at Pleasant Valley.
- [5] The offending began with the first indecent assault which occurred in 2009 when the Virtual Complainant was 11 years old. The Virtual Complainant was asleep on her bed when the Defendant entered her bedroom. While sleeping, she felt someone fondling her breast. She awoke to discover that it was the Defendant. The Virtual Complainant told him to stop. He responded by telling her to be quiet and then he left. The second assault occurred in 2010 at Carrot Bay. The Virtual Complainant was at home in the day when the Defendant entered her bedroom and began fondling her breast while she was sitting on the bed. The Virtual Complainant told him to stop but he refused. He continued to suck on a breast and then performed oral sex on her. The Virtual Complainant cried and the Defendant threatened to kill her if she told her mother. The third indecent assault occurred in 2011 when the family moved to Pleasant Valley, where he touched her genitalia and performed oral sex on her. These incidents comprise counts 4 – 6 of the Indictment.
- [6] There are three acts of incest which are set out in counts 1 – 3 of the indictment. In count 1, the Virtual complainant was at home during the night and her mother was at work. While she was watching TV in the living room, the Defendant approached her and began touching her genitalia. She fought with him to get him to stop but the Defendant pushed her on the bed, pulled off her clothes, pulled off his pants and had sexual intercourse with her. The Virtual Complainant cried, pleading with the Defendant to stop but he continued telling her to shut up. The second incidence of incest occurred when the Defendant took the Virtual Complainant to Carrot Bay to collect school books. On his way back to Pleasant Valley, he drove to an alley in the Pockwood Pond area where he stopped and parked the car. He opened the door where the Virtual Complainant was sitting, pulled off her clothes and had sexual intercourse with her. On his way home, the Defendant armed with a knife threatened the Virtual Complainant saying, *"If you go home and tell your mother, I would kill you"*. In the third incident, the Virtual Complainant was at home lying on her bed when

the Defendant approached her, took off her clothes and began to have sexual intercourse with her. Again, when he was finished, the Defendant threatened to kill her if she told her mother.

- [7] Eventually, the Virtual Complainant wrote a letter to a friend in which she outlined that the Defendant had been sexually molesting her. On 18th September 2013, a report was made to the Police. During the course of the investigation, the Defendant initially denied the allegations when interviewed by the Police but at the first available opportunity, he pleaded guilty.

THE OFFENCES

Incest

- [8] Section 122 (1) of the Criminal Code provides that;

“A man who has sexual intercourse with a woman whom he knows to be his daughter commits an offence and is liable on conviction to imprisonment for a term not exceeding ten years.”

Indecent Assault

- [9] Section 124(1) as amended provides that;

“Any person who makes an indecent assault on a another person commits an offence and is liable on conviction on indictment if on a person of or under the age of thirteen years to imprisonment for a term not exceeding ten years or on conviction on indictment in any other case to imprisonment for a term not exceeding seven years.

- [10] At page 9 – 10 of the Wolfenden Committee on Homosexual Offences and Prostitution (1957) expressed the function of the criminal law in the field of sexual offences in the following way.

“...to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.”

- [11] This is not a duty which should be shirked in any way and it must, in the Court’s view translate into a prescription of appropriate penalties. In this case, the charge of incest carries a 10 year imprisonment maximum while indecent assault involving a girl under 13 years old carries a sentence of imprisonment of 10 years and where the girl is over the age of 13 the maximum sentence is 7 years.

Aggravating and Mitigating Factors

- [12] In **Winston Joseph v The Queen**¹ Byron CJ stated at paragraph 17 that the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors. The sentencer must not only identify the presence of aggravating and mitigating factors, but must embark upon an evaluative process. The aggravating and mitigating factors must be weighed. If the aggravating factors are outweighed by the mitigating factors, the tendency must be towards a lower sentence. Where the mitigating factors are outweighed by the aggravating factors, the sentence must tend to go higher.
- [13] Learned Counsel for the Prosecution referred the Court to the guidance in **Attorney General's Reference (No.1 of 1989)**² for appropriate guidance on the aggravating and mitigation factors relevant to a charge of incest which have been adopted with appropriate modifications by the Eastern Caribbean Court of Appeal in **Winston Joseph v The Queen**. In applying the English guidance, Byron CJ noted that the Court has adopted a sentencing policy which is aimed at combating the growing prevalence of these crimes in the country, while at the same time not denying persons committing these crimes, their basic constitutional rights.
- [14] Counsel for the Prosecution identified the following aggravating factors in respect of incest:
1. The age of the Virtual Complainant when the sexual conduct commenced. There can no doubt that the younger the girl when the sexual approach is started, the more likely it will be that the girl's will was overborne and accordingly the crime would be considered to be more serious. Counsel noted that in this case the Virtual Complainant was 11 years old when the sexual approach commenced.
 2. That the incest has continued at frequent intervals over a long period of time. The facts revealed that the Virtual Complainant endured this repeated abuse from 2009 when she was just 11 years old to 2013. Counsel submitted that the offending disclosed a progression in seriousness and a sliding scale of depravity.
 3. The incest was accompanied by perversions abhorrent to the Virtual Complainant.
 4. The Virtual Complainant was repeatedly threatened with violence.
- [15] Counsel for the Defendant concurs that these aggravating features are applicable in the case at bar. He further submitted that elements of the offence should not be taken to be aggravating

¹ Criminal Appeal No. 4 of 2000 (SLU)

² [1989] 1 W.L.R 1117

features, so that breach of trust and the age disparity between the Defendant and the Virtual Complainant are implicit in the offence and should not be relied on as aggravating.

[16] In this case, the age disparity is in excess of 30 years and the relationship between the Defendant and the Virtual Complainant inherently means that there was significant breach of trust. Having been borne into his family, the Virtual Complainant was entrusted into the Defendant's care and he owed her a responsibility to care and protect her. Even if the Court accepts Counsel's submission in respect to the offence of incest, there is no doubt that these are relevant aggravating factors in respect of the other offence in the indictment.

[17] The Court is cognizant that in sentencing, care needs to be taken to avoid double counting and in that vein these factors can properly be considered in respect of counts 3 – 6 on the indictment which charge the Defendant with indecent assault.

[18] In **R v Donald Rogers**³, Hariprashad – Charles J stated at paragraph 32:

“Although indecent assault is less serious than rape, the latter carrying a maximum penalty of life imprisonment does not make indecent assault any less traumatic to the victim. Thus, in determining an appropriate sentence for this type of sexual offence, the Court will have reference to the various types of harm that can result from the offence, some of which are outlined in the Sentencing Guidelines for Sexual Offences by the Sentencing Advisory Panel 2003, which was referred to by the Crown. These include:

1. Violation of the victim's sexual anatomy;
2. Exploitation of a vulnerable victim;
3. Embarrassment, distress or humiliation of the victim;
4. Infringement of standards of socially acceptable behavior;
5. The physical/psychological harm caused by non-consensual offences; and
6. The relationship between the victim and the offender and the abuse of a position of trust.”

[19] In addition to the factors of breach of trust and the age disparity, Counsel for the Prosecution has indicated that the following aggravating features apply in respect to the Indecent Assault:

1. The assault involved touching the Virtual Complainant's genitalia and a violation of her sexual anatomy involving oral sex; and
2. There were repeated acts of assault.

[20] Both Counsel for the Prosecution and the Defence have identified two mitigating factors namely;

³ CASE NO. 24 OF 2009 (BVI)

1. The Defendant pleaded guilty at the first available opportunity. An appropriate discount must be applied taking into account that the plea saved a great deal of time and public expense and it spared the Virtual Complainant the horror of going into the witness box and being cross examined; and
2. The Defendant has no previous convictions.

Defendant's Personal Circumstances and Plea in Mitigation

- [21] Counsel for the Defendant submitted to the Court that he is a Jamaican national who has been resident in the Territory for over 15 years. He is 45 years old and is employed as a taxi driver. He is married to the Virtual Complainant's mother and is the father of her three children. The Defendant has no previous convictions and he pleaded guilty at the first available opportunity.
- [22] Counsel for the Defendant submitted to the Court that the Defendant is a family man and a breadwinner. As such, he asked the Court to consider a sentence which would facilitate the Defendant returning to his family so that he can continue his role as father.
- [23] Counsel asked the Court not to ignore his apology in which he indicated to the Virtual Complainant that he is sorry for everything. He indicated that the Defendant feels some remorse for his actions.

Impact on Virtual Complainant

- [24] A victim impact assessment was not obtained. As such, the Court ought not to speculate on the effect of the crime on the victim. However, Counsel for the Prosecution indicated to the Court that a course of counselling had been recommended for the Virtual Complainant by the Social Services Department. Although she apparently began the course of counselling, Counsel indicated that it is not currently ongoing.
- [25] Counsel argued that although he is unable to put any formal medical or psychological report before the Court, it is almost inevitable that the Virtual Complainant would have suffered some psychological damage as a result of pervasive threat under which she has lived since she was 11 years old. The Court was provided with a letter written by the Virtual Complainant in which she recounts the progressive abuse and in which she indicates the impact on her ability to function. Her torment is plainly articulated. Counsel submitted that counselling is an appropriate measure in this case and this Court concurs.

Relevant Authorities

- [26] Counsel for the Prosecution provided the Court with several local, regional and English authorities to assist the court in determining the proper starting point and sentencing range for these offences.

He referred the Court to the guiding principles for the sentencing of sexual offenders which were expounded by our Court of Appeal in the consolidated appeals of **Winston Joseph v The Queen, Benedict Charles v The Queen and Glenroy Sean Victor v The Queen**⁴ where at paragraph 15 of the judgment, Byron CJ stated the guidelines for the offence of incest committed against a girl in three categories, ranging from under 13 years to over 16 years.

- [27] In St. Lucia, the maximum sentence for this offence is 15 years, however, like the English Court of Appeal in **Attorney General's Reference (No.1 of 1989)**, Byron CJ was of the view that the gravity of the offence of incest varies greatly according to the age of the victim and the degree of coercion or corruption. At paragraph 15 of the Judgment, the learned Chief Justice noted that the sentencing range where the girl is over 16 years would generally be 3 – 5 years for the first offence and depending on the degree of force used. Where the girl is aged 13 – 16 years a sentence between 3 – 7 years was seen to be appropriate.
- [28] Where the girl is under 13 years, the Chief Justice reverted to the ranges applied in the case of the offence of carnal knowledge and at paragraph 13 of the Judgment, the learned Judge noted that the widest range of sentence is likely to be found in this category. He suggested that starting at a minimum where the girl is not far from her 13th birthday and there are no aggravating factors, the sentence should be 8 years and going upwards. Of course the younger the girl when the sexual approach commences, the more serious the crime.
- [29] The Court notes that these recommended sentencing ranges apply in the case where there has been a conviction after trial. The Court also notes that in the case at bar, the Virtual Complainant would have been over 13 at the time when the offence of incest were committed.
- [30] In the case of incest, Counsel for the Prosecution submitted that there are limited local authorities and guidelines. This is largely because other sexually related charges are preferred by the DPP. Like Counsel for the Defence, he referred the Court to the cases of **David Ramsey v R**⁵ and **David Jobe v R**⁶. In the former case, the Court of Appeal affirmed a sentence of 7 years for a father who was convicted after trial of incest with his 11 year old daughter; and in the latter, the Court of Appeal quashed the conviction of the appellant who had been sentenced to a concurrent term of 8 years imprisonment. The Court notes that in neither case did the Defendants plead guilty. They were both convicted after trials.
- [31] Counsel for the Defence helpfully referred the Court to the English authority of **R v Riley**⁷ in which the Court of Appeal reduced the Appellant's sentence from 6 to 4 years where he pleaded guilty to two counts of incest and one count of indecent assault on his 16 year old daughter. It is worthy to

⁴ Criminal Case No. 4 of 2000 (SLU) [unreported] CA Judgment 17 September 2001

⁵ Criminal Appeal No. 5 of 2004

⁶ Criminal Appeal No. 23 of 2003

⁷ [1980] Crim. LR 801

note that in the United Kingdom, under the Second Schedule to the Sexual Offences Act 1956, the maximum sentence for incest with a girl under 13 (if the age is stated in the indictment) is life imprisonment, while incest by a man with a female over 13 years carries a maximum sentence of 7 years imprisonment.

- [32] While not specifically related to the charge of incest, the Court has also considered the case of **R v Clive McVane**⁸ where the Defendant pleaded guilty to the offence of unlawful sexual intercourse with a female aged fourteen (14) years old not being his spouse. The Virtual Complainant was the Defendant's step daughter and had become pregnant by him; the Court ordered that he sentenced to seven (7) years imprisonment.
- [33] Turning to the relevant sentencing authorities in respect of the charge of indecent assault. Counsel also referred the Court to the cases of **R. v. Camillus Paris**⁹ where the sentence was 9 months, **Calvin Rabsatt v R**¹⁰, where the sentence was 18 months, **R. v. Donald Rogers** where the sentence was 18 months after the Defendant was convicted of indecently assaulting his 15 year old goddaughter and **Andre Penn v R** where the sentence was 18 months¹¹. Again the Court noted that in none of these cases did the Defendant plead guilty.
- [34] Additionally, Counsel for the Defence cited the local authority of **R v Keith Dorset**¹² where a sentence of 18 months was imposed where the victim was under 13 years and the Defendant was her neighbour and a preacher of good character. Additionally, he cited **R v Joel Sprauve** an unwritten judgment in which the Court imposed an 18 month sentence after trial.
- [35] In the English authority of **R v Loff James Lennon**¹³, a sentence of 2 years was imposed where the victim was 9 years and the Defendant was her mother's boyfriend. This was another case involving breach of trust. In that case, Henry L.J. said at page 6:

"It was not the purpose of the judgment to seek to lay down guidelines for sentencing in cases of indecent assault. It is never easy to sentence in such cases. The circumstances of each case will vary greatly.... What the judge must do, as I see it, is to tailor the sentence to the particular facts of the case before the court. In most cases, the personal circumstances of the offender would normally take second place behind the plain duty of the court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may have been the case in former years when the position of the victim may not have been so clearly focused in the public eye".

⁸ Criminal Case No. 2010/0215 (SLU) Cumberbatch J

⁹ Criminal Case No. 2010/0014 (BVI)

¹⁰ Criminal Case No. 2011/0034(BVI)

¹¹ Criminal Case No. 2009/0031 (BVI)

¹² Criminal Case No. 26 of 2005 (BVI)

¹³ [1999] 1 Cr. App. R. (s) 117 CA

[36] The Court finds that those remarks are equally applicable in the case at bar.

[37] From the wealth of authorities submitted by the Crown and the Defence, it is apparent that on a plea of guilty where there has been a breach of trust, sentences between nine to eighteen months' imprisonment have been approved by our courts

THE SENTENCE

[38] As the sentencer, this Court must compare the case at bar with cases from this jurisdiction involving this offence and this has been done. The Court has also born in mind that the main objectives of criminal sanction are as set out in the case of **Desmond Baptiste et al v R**¹⁴:

(1) Retribution - in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;

(2) Deterrence - to deter potential offenders and the offender himself from recidivism;

(3) Prevention - aimed at preventing the offender through incarceration from offending against the law and thus protection of the society; and

(4) Rehabilitation - aimed at assisting the offender to reform his ways so as to become a contributing member of society.

[39] At paragraph 37 of the judgment in **R v Donald Rogers**, Hariprashad – Charles J made the following erudite observation;

“In weighing the gravity of the offence, regard must be had to “the degree of harm to the victim...the level of culpability of the offender... and the level of risk posed by the offender to society.”

[40] The Court is satisfied that the offence of incest with a minor female and the offence of indecent assault are undoubtedly serious ones for which incarceration would normally be the appropriate disposal.

[41] In the instant case, the Defendant's previous good character and unblemished criminal record have been highlighted by learned Counsel for the Defence. The Court has also considered his timely guilty plea which demands the application of the appropriate 1/3 discount. In the Court's view the Defendant has committed grave offences which warrant a custodial sentence. His offending was repeated, progressive and pathological. It is apparent that repeated threats and some degree of force were used to slake his vile intentions on his vulnerable and unwilling victim. Being her natural

¹⁴ Crim. App. No. 8 of 2008 (SVG)

father, he flagrantly violated the position of trust and confidence to which all fathers must aspire and in doing so he desecrated the sanctity of the home.

- [42] The Court also accepts that his actions demonstrate progressive depravity over the course of some 4 years intended to corrupt the Virtual Complainant. Having read the Virtual Complainant's correspondence, the Court has no difficulty in concluding that some psychological harm would have resulted from her experiences. It is apparent that her vulnerable position permitted the Defendant, her father, to exploit her dependence, inexperience and fear. In reporting her torment, she was also clearly conflicted about disrupting relations between her mother and father.
- [43] A strong message also has to be sent out that such crime has no place in a progressive and civilized society and those who seek to prey upon the weak and the vulnerable will receive the full brunt of the law. In sentencing the Defendant, the Court is conscious of the fact that there is a need to send the message out to persons holding positions of trust, be they familial or otherwise, that their obligation is to protect and nurture and not to exploit and victimize. At the same time however, the Court must be prepared to temper justice with mercy.
- [44] In arriving at this sentence, the Court has applied the principles enunciated by Sir Dennis Byron in **Winston Joseph v R**. Having weighed up the aggravating and mitigating factors and having considered all the circumstances of this case, the Court is satisfied that the aggravating factors outweigh the mitigating factors. The Defendant's unrestrained and intemperate campaign of sexual acts against the Virtual Complainant, his natural daughter who is some 30 years his junior and who he has known from infancy demands that society through the courts show its abhorrence of this type of criminality, and the only way the courts can show this is by the sentences they pass.¹⁵
- [45] The Court has considered the submissions of Counsel for the Defendant as to the purported apology which the Defendant addressed to the Virtual Complainant. Having read the transcript of the phone (text) recording, the Court does not accept that it provides any genuine expression of remorse. It appears to the Court that the letter was entirely self-serving in nature and tone and could only have generated more embarrassment and distress for his victim. There is no unequivocal acceptance and acknowledgment of his wrongdoing rather he prefaces an apology on the basis of "*if* he did anything wrong", he describes his offending as a mistake and with unparalleled temerity, he begs his victim to assist him.
- [46] The Court was left in doubt as to whether the Defendant feels any genuine remorse for his actions. In any event the Court is persuaded by the dicta in **Dillon Saul v R**¹⁶ that less weight should be given to the Defendant's remorse where as in this case the offences are so serious.

¹⁵ R v James Henry Sergeant per Lawton LJ

¹⁶ Criminal Case 2008/020 (SVG) at paragraph 10

- [47] The Court fully agrees with Hariprashad – Charles J¹⁷ that while indecent assault is largely a non-penetrative sexual offence it is by no means less despicable. It is in any circumstances a nasty, unpleasant offence which when committed in the context of a clear breach of trust involving a minor child must be suitably censured.
- [48] The Court is also satisfied that an appropriate discount of 1/3 of the notional sentence must be applied in respect of the Defendant's guilty plea at the first available opportunity. At the time of offence, the Virtual Complainant would have been between the ages of 13 – 16. According to the Court of Appeal's guidance in **Winston Joseph** the sentencing range after trial would be 3 – 7 years. On a guilty plea the range would therefore be 2 – 6 years¹⁸. The Court accepts the aggravating factors as highlighted by Counsel and in the Court's view; these outweigh the mitigating factors and place the offending at a higher threshold.
- [49] Turning now to the offence of indecent assault, the United Kingdom Sentencing Guidelines Council, Definitive Guideline: Sexual Offences Act 2003, the recommended starting point for indecent assault, considering a maximum custodial sentence of 10 years is 2 years with a range of 1 - 4 years where the offence involves contact with genitalia of victim by offender using part of his or her body other than the genitalia or an object. While in the Eastern Caribbean region, the sentences for this offence tend to fall on the lower end of the range. Sentences involving victims under thirteen have ranged locally from a fine of \$1,400 or 6 months imprisonment¹⁹ to a 3 year suspended sentence²⁰ to 18 months²¹ to 5 years²² and to 2 years regionally.²³
- [50] Again, the Court is satisfied that an appropriate discount of 1/3 must be applied in respect of the Defendant's guilty plea. The aggravating and mitigating features identified at paragraphs 19 and 20 are relevant. The Court has also considered the age disparity and the obvious breach of trust are also aggravating features.
- [51] Having considered all of these matters, the Court sentences the Defendant as follows:
- i. In respect of counts 1 the sentence is 6 years
 - ii. In respect of counts 2 the sentence is 6 years
 - iii. In respect of counts 3 the sentence is 6 years
 - iv. In respect of counts 4 the sentence is 18 months
 - v. In respect of counts 5 the sentence is 18 months

¹⁷ R v Donald Rogers

¹⁸ Attorney General's Reference at page 1123 letters A- B

¹⁹ R. v. Terry Hodge, BVI Criminal Case No. 11 of 2004 [unreported].

²⁰ R v Keshawn Huggins, BVI Criminal Case No. 13 of 2008 [unreported]

²¹ R. v. Kevin Dorsett,

²² R. v. Lloyd Arthur, BVI Criminal Case No. 7 of 2004 [unreported];

²³ Gladstone Gooderidge v The Queen, Criminal Case No. 13 of 1997 (SVG)

[52] The Court recognizes that as at the dates reflected in Count 6 on the indictment, the Virtual Complainant would have been over the age of 13. The operating maximum sentence would therefore be 7 years rather than 10 years. Taking this into account and taking into the 1/3 discount of the notional sentence for the guilty plea;

vi. In respect of count 6, the sentence is 12 months

Consecutive/ Concurrent Sentence

[53] At the conclusion of his submissions, Counsel for the Prosecution encouraged the Court to order that the Defendants sentence in respect of the charge of indecent assault run consecutively rather than concurrently with sentences imposed in respect of the charge of incest.

[54] Counsel stated three reasons why he did not believe that concurrent sentences would be appropriate. First, he noted that this is not case of a one-off incident. The offences occurred over a period of 3 years at frequent intervals with no regard for the sanctity of the home and the presence of young children and his wife. (2) The incest and indecent assault was not in any way mutual but was committed by force and (3) the use of repeated threats places the offending at a higher threshold. Counsel also submitted that it cannot be said that the offences arose out of the same transaction – the indecent assault commenced when the Complainant was 11 years old while the incest came later when she was 13 years old.

[55] Counsel submitted that because of the repeated abuse over a period of years, this is an appropriate case where consecutive sentences should be imposed. He cited in support, the case of **R v Joel Sprauve**, an unwritten decision of this High Court which is currently on appeal.

[56] Counsel also cited the case of **Attorney General's Reference** (Nos. 120, 91 and 119 of 2002 [2003] 2 All. E.R. 955. At paragraph 19 of that judgment the court observed that where a court imposes concurrent sentences for separate offences which could justifiably be made consecutive, it may properly increase the level of the overall sentence to take account of the principle of totality.

[57] Counsel submitted that totality is not merely a reducing factor when considering the effect of consecutive sentences; it may increase the length of the sentences made to run concurrently in order to bring the total to a level proper to reflect the gravity of the offences. He noted that consecutive sentences are generally served when the offences arise out of different incidents (more than one transaction), there is a combination of offences where it is important that each is separately recorded and it needs to ensure that all the offences are appropriately punished. He argued that in the case at bar the facts reveal extreme indifference to the wellbeing of a child.

[58] Not surprisingly Counsel for the Defendant invited the Court not to impose a consecutive sentence. He argued that none of the authorities cited contemplate a consecutive sentence. Further, in

assessing whether to impose a consecutive sentence for indecent assault, he invited the Court to consider **Blackstone's Criminal Practice (2012) paragraph E 2.11** which provides as follows:

[59] Counsel for the Defendant submitted that the totality principle should be the Court's guiding principle and he invited the Court to order that the sentences be served concurrently.

[60] It is clear that where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour. The Court adopts the following statement from D. A. Thomas, *Principles of Sentencing* where at pp 56–57 he states that:

'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate".

[61] The principle has been stated many times in various forms:

"when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".

[62] These general principles have repeatedly been approved by our courts. While there is clear authority for the contention that questions of concurrence or accumulation is a discretionary matter for the sentencing judge, the Court accepts that such discretion must be viewed within a context which applies the principle of totality. It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence.

[63] Although it is not a binding precedent, the Court is guided by the case of *Cahyadi v R*²⁴ in which the New South Wales Court found that in applying the principle of totality, the question to be posed is -- whether the sentence for one offence can comprehend and reflect the criminality of the other offence. At paragraph 27 of the judgment, Howie J observed that if the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent; otherwise there is a risk that the combined sentences will exceed that which is

²⁴ (2007) 168 A Crim R 41 at [12] and [27]

warranted to reflect the totality of the two offences. If not, then the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality.

[64] Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. The nature of the offence and the particulars of the offender are relevant. Also, factors relating to the victim or victims should be considered. The nature of a crime is a critical factor. The Court accepts that as a matter of general principle that where two offences committed during the course of a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two.

[65] While there is no legal prescription against consecutive sentences in such circumstances, the Court is mindful that in adding up the sentences for each offence, it must consider if the aggregate length is just and appropriate given the maximum statutory sentences prescribed. At page 1124 of **Attorney General's reference (No.1 of 1989)** the English Court of Appeal was faced with the same dilemma and after the considering the matter, the learned Judges concluded;

“We debated whether a proper sentence of 18 months imposed in respect of the serious indecent assault on R should be ordered to run consecutively to the six years. Technically, there is no reason why this should not be done, but in our judgment it would make the totality of the sentence too great.”

[66] Given the maximum sentence prescribed by the legislature in respect of these offences, this Court concurs with Court of Appeal's conclusion. The sentences are therefore to run concurrently.

[67] The Court was advised that the Defendant has been on remand since 25th September 2013. The Defendant is therefore entitled to be credited for the time spent on remand and such the Court orders that his sentence is to commence from the date when he was imprisoned on remand, 25th September 2013.

[68] The Court will order that the Virtual Complainant continue to receive psychological intervention from a suitably qualified practitioner over such intervals as may be determined by the said practitioner. The Court will also order that the Defendant be provided with the necessary counselling for sexual offenders of his type for as long as is considered necessary by the appropriate medical practitioner.

Vicki Ann Ellis
High Court Judge