EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CRIMINAL CASE NO. 2 OF 2013

BETWEEN:

THE QUEEN

AND

RAYMOND HARRISON

Appearances:

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

2014: July 11th

JUDGMENT

[1] **ELLIS J:** Raymond Harrison, "the Defendant" was arraigned on an indictment which charged him with three offences. On count 1, Unlawful Sexual Intercourse with a girl over the age of 13 but under the age of 16 years contrary to section 119 of the Criminal Code 1997. On count 2, Rape contrary to section 117 of the Criminal Code 1997 and on count 3, he was charged for Possession of Child Pornography contrary to section 284A (2) (c) of the Criminal Code 1997, as amended. On arraignment, he pleaded not guilty to all three (3) counts on the indictment. A trial commenced and on 11th July 2014, he was convicted on all three counts by a unanimous jury. A sentencing hearing was subsequently conducted and the Defendant is now before the Court for sentencing.

Facts of the case

[2] The Defendant is a Jamaican national. Following an introduction by his wife, he became a close family friend of Mrs. Alecia Smith, the mother of the Virtual Complainant, Shanice Rose "the Complainant". As a close family friend, he was

allowed to supervise and correct Mrs. Smith's children including the Complainant. In addition, both families participated in social gatherings at each other's home. The relationship between the families was a close one with the Defendant assuming a father-like role to the Complainant.

[3] The facts which gives rise to counts 1 & 2 on the indictment occurred at Cow Wreck Bay Beach and Loblolly Bay Beach on the Island of Anegada.

Count 1 - Cow Wreck Bay Beach

[4] On a date unknown between June 30th 2010 and September 1st 2010, the Complainant was on her way from steel band practice when the Defendant who was driving a rental car offered her a ride. The Defendant drove to Cow Wreck Bay Beach, told the Complainant to get out of the vehicle and asked to have sexual intercourse with her. The Complainant agreed subject to the Defendant taking her home before 5:00 p.m. The Complainant removed her pants and underwear, the Defendant removed his pants and boxers and they engaged in sexual intercourse. The Complainant also stated that at some point, the Defendant started to put his penis in her mouth. Thereafter, the Defendant drove the Complainant home before 5:00 pm.

Count 2 - Loblolly Bay Beach

[5] On a date unknown between June 30th 2010 and September 1st 2010, the Complainant, her siblings and her cousins were on the beach at Loblolly Bay swimming. The Defendant was at the beach in the presence of Sylon Forbes and other friends. The Complainant went to use an open bathroom to rinse off. As she was coming from the bathroom, the Defendant approached her. He was carrying a knife and ordered her back to the bathroom. She backed up to the bathroom and the Defendant told her he was going to have sexual intercourse with her.

[6] The Defendant threatened to use the knife on her if she screamed. The Defendant then had sexual intercourse with her without her consent. In the process, the Complainant sustained a cut on her hand from the Defendant's knife. After the Defendant left, the Complainant observed that she was bleeding. She used a paper towel to prevent the blood from spreading and returned to the water. She soon observed blood in the water. When her cousin inquired about the bleeding, the Complainant denied knowing the source of the bleeding and left the water.

Count 3 – Child Pornography

[7] Sometime during the night of 22nd March 2013, the Complainant's mother Mrs. Alecia Smith received information which resulted in her visiting and confronting the Defendant at his home. The Defendant admitted that he had received some naked photographs of the Complainant, but did not disclose to her the source. Following the confrontation, Mrs. Smith visited the Anegada Police Station where she made a report.

[8] Constable Williams received the report and carried out the initial investigations. He visited the home of the Defendant, where he was met in company of one Sylon Forbes. Constable Williams informed the Defendant of the report made by Alecia Smith. On being informed of the report, The Defendant admitted to the Police that he received some naked photographs from Sylon Forbes and that they included naked photographs of the Complainant. He told the Police that one of the photographs showed the Complainant's body with her vagina, breast and face exposed against an open background. The Defendant stated that he received the photographs on his Nokia cellular phone and had possession of the photographs for a period of about one week after which he deleted the photographs.

[9] The Defendant repeated his oral admissions of possession of the photographs in a caution statement to Constable Williams and in an audio/visual interview conducted by Detective Sergeant Bobb. He was formally arrested and charged by the Police. The disputed issue for the jury in respect to count 3 was whether the Defendant kept the photographs for an unreasonable time before deleting them. By their verdict, they concluded that the Defendant having received the photographs did not delete them within a reasonable time.

Expert Evidence

[10] The Crown called Mrs. Brenda Fahie who was deemed an expert in School Psychology. At the request of the Complainant's mother, Mrs. Fahie carried out an evaluation of the Complainant. She gave evidence as to the mental development and cognitive functioning of the Virtual Complainant. According to Mrs. Fahie, the Complainant has an IQ level of 57 and suffers from mild retardation. At the age of sixteen years, the Virtual Complainant was also diagnosed as having a cognitive functioning of a six or seven year old.

The Offences – Legislated Penalties

Unlawful Sexual Intercourse with a Girl under 16 years

[11] Section 119 of the Criminal Code of the British Virgin Islands 1997 provides that any man who has sexual intercourse with a girl, over the age of 13 years and under the age of 16 years commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.

Rape

[12] Section 117 (1) of the Criminal Code 1997, as amended by the Laws of the Virgin Islands stipulates that any person who commits rape is liable to imprisonment for life.

Possession of child pornography contrary to Section 284A (2) (c) of the Criminal Code of the British Virgin Islands 1997 as amended

[13] Section 284A (2) (c) of the Criminal Code 1997, as amended by the Laws of the Virgin Islands stipulates that any person who is convicted of child pornography is liable to imprisonment for a term not exceeding fourteen (14) years.

[14] 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."

[15] 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.

Defendant's Personal Circumstances and Plea in Mitigation

[16] Counsel for the Defendant advised the Court that the Defendant is a Jamaican National who has resided in this Territory for the past 14 years. He is employed as chef. He is married and together with his wife he resides at Anegada with his 2

young children. He also has two other children who reside in Jamaica. All of his children are of school age and are dependent on him for support.

[17] On administering the allocutus, the Defendant elected to say nothing prior to sentencing. His Counsel indicated that an apology or any show of remorse would be wholly inconsistent with the defence. However, Counsel advised the Court that the Defendant has no previous convictions and that he has been in custody since 27th March 2013.

Aggravating and Mitigating Factors

[18] A sentencer must take into account both the crime and the criminal. In so doing, the sentencer should take into consideration and be guided by the aggravating and mitigating factors, in so far as they exist.

[19] 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.

[20] Counsel for the Prosecution identified the following aggravating factors are applicable in relation to Counts 1 and 2[2]:

i. Deliberate targeting of a vulnerable victim;
ii. Prevalence of sexual offences;
iii. The use of threats, or force;
iv. The disparity in ages between the defendant and the victim;
v. Breach of trust;
vi. Repeat offending;
vii. Sexual intercourse accompanied by acts abhorrent to the victim: i.e. fellatio

[1] Criminal Appeal No. 4 of 2000 (SLU)

[2] Counsel for the Prosecution noted that on occasion, two or more of the factors listed may describe the same feature of the offence and care needs to be taken to avoid "double-counting"

[21] Save for the prevalence of sexual offences, Counsel for Defendant concurred with aggravating factors listed. He referred the Court to an excerpt of the UK Sentencing Guidelines which deals with the criteria of "**Seriousness"** and in particular how the issue of prevalence is addressed.

> 1.38 The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type.
>
> 1.39 There may be exceptional local circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm being caused to the community. It is essential that sentencers both have supporting evidence from an external source (for example the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area and are satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

[22] He also referred the Court to paragraph 169 of the **Stockdale and Devlin Sentencing (Criminal Law Library)**. Finally, Counsel referred the Court to the appellate judgment of Barrow JA in **Dwight Dookie v R**[3] where at paragraph 13 the learned Judge stated:

> "The prevalence of sexual offences in Saint Lucia requires the court to be mindful of the important public dimension of criminal sentencing, which includes protecting the public by punishing the offender, or reforming him, or deterring him and others, or preventing him from committing further crime, or all of these things. The court needs to be mindful, as well, of the importance of maintaining public confidence in the sentencing system. However, those considerations must be balanced by the core consideration that the sentence imposed should be no longer than is necessary to meet the penal purpose that the court intended. Sentencing, it must be acknowledged, is essentially subjective even when appropriate guidelines are followed."

[3] Criminal Appeal No. 001 of 2007 (Saint Lucia)

[23] Counsel contrasted this approach with the appellate approach adopted by the learned George-Creque JA (as she then was) in **Shaulee Fahie v R**[4]**.** That case concerned offences of aggravated burglary involving the use of firearms and after concluding that these offences were highly prevalent in the Territory**,** the Learned Judge observed at paragraph 10**:**

> "Which of these factors will be predominant in determining an appropriate sentence will depend on the particular circumstances of each case. Quite apart from these however, certain common factors will also be brought into the equation such as the prevalence of the types of crimes in the society, as well as the general desirability of ensuring a measure of consistency in sentences for like offences. There is good reason for this. It affords a level of certainty by providing a yardstick for the sentencer. It may also have a deterrent effect on the potential offender, and thus promote a measure of confidence by the public in the criminal justice system as a whole."

[24] Counsel for the Defendant urged to the Court to adopt the approach of Barrow JA, which he stated was consistent with the approach of UK sentencers. He submitted that prevalence should not be regarded or applied as an aggravating feature in sentencing but rather it should be generally considered when assessing the question of deterrence.

[25] This position was opposed by Counsel for the Prosecution who insisted that the prevalence of the sexual offences in the Territory is an aggravating factor which increases the seriousness of the offence.

[26] In relation to Count 3 Counsel for the Defendant referred the Court to the UK Sentencing Guidelines for offence of possession of indecent photographs of the child and submitted that the following aggravating factors are applicable:

i. The age and vulnerability of the child depicted;
ii. Abuse of trust;
iii. The child depicted is known to the Defendant.

[27] Counsel for the Prosecution concurred with this submission.

[4] Criminal Appeal No. 3 of 2008

[28] Both Counsel agree that an operating mitigating factor is the previous good character of the Defendant. However Counsel for the Prosecution noted that the more serious the offence, the less weight should be attributed to this factor.[5] Counsel submitted that as in the case of **Desmond Baptiste v R**, the offence of rape is a very serious offence as illustrated by the sentence of life imprisonment.

[29] He submitted that similar sentiments have been expressed in respect of the offence of possession of child pornography. Counsel referred the Court to the judgments in **Mouscas v R**[6] and **R v Padberg**[7] where the courts stressed that for offence child pornography, general deterrence is necessarily important. He submitted that in those circumstances, because offence of possessing child pornography is frequently committed by persons of previous good character less weight will be afforded to persons of previous good character.

[30] Counsel also submitted that the Defendant's early admission of the possession of the offending photographs is another mitigating factor which may be applied by the Court.

The "Prevalence" Factor

[31] Generally, the aggravating and mitigating features identified are relevant. The Court is mindful however that care needs to be taken to ensure that there is no double counting where an essential element of the offence might, in other circumstances, be an aggravating factor. Appropriate adjustments have therefore been made to suitably reflect the aggravating features in the offences for which the Defendant is before the Court.

[32] The Court has considered the submissions of both Counsel as it relates to the appropriate application of the prevalence factor in sentencing. This is by no means and new problem. In fact courts in many other jurisdictions have had to grapple with this thorny issue. In the United Kingdom the sentencing guidelines prescribe that prima facie, the seriousness of an individual offender case should be judged on its own dimensions of harm and culpability rather than as part of some collective social harm. It is only in exceptional cases that prevalence of an offence should influence sentencing levels. Before a Court can be satisfied that there is a compelling need to treat the offence more seriously than elsewhere, it is essential

[5] Desmond Baptiste v R
[6] [2008] NSWCCA 181
[7] [2010] 107 SASR 386

that the Court be armed with independent current and accurate information and data in order to justify claims that a particular crime is prevalent in particular area.

[33] Generally the UK approach seems to have garnered the most support. In fact in Victoria, Australia, the question of whether prevalence is properly to be regarded as 'a sentencing fact' was considered and definitively answered in the case of **Downie & Dandy [1998] 2 VR 517.** In that case Callaway JA expressed the provisional view that prevalence is not a sentencing fact. He observed that:

> "5. *My own provisional view, foreshadowed in* Johnston *(unreported, Court of Appeal, Vic, No 20/96, 30 August 1996) p 2, is one that is skeptical of the equation of prevalence with sentencing facts in the ordinary sense. The latter are either circumstances of the offence or of the offender or both. Prevalence is not a circumstance of the offender. Subject to the observations of the Lord Chief Justice in* Cunningham *[1993] 1 WLR 183 at 187; [1993] 2 All ER 15 at 18; (1992) 14 Cr App R(S) 444 at 448, it is not a circumstance of the offence. It is a circumstance of other offences, which may have a bearing on general deterrence and, as Zeeman J pointed out in* Everett *(1994) 72 A Crim R 422 at 441, denunciation in the instant case….*
>
> *6. What might be called, without disparagement, the academic view does not represent the practice of the criminal courts in this State or in a number of other jurisdictions. The cases are legion of its being taken for granted that various offences, such as armed robbery, or even armed robbery of a particular kind, are prevalent… Authorities have never been lacking in relation to local prevalence….*
>
> *7. The practice of the courts goes well beyond the kind of judicial notice described by Isaacs, J in* Holland v Jones *(1917) 23 CLR 149 at 153-154, nor should the observations of Winneke CJ in* Piercey *[1971] VR 647 at 650-651 be read as confining prevalence to such as may be established by admissible evidence or judicial notice….*
>
> *9. If that analogy is correct, all that is required is that a court should be sure that an offence is prevalent before weighting the instinctive synthesis in favour of general deterrence and giving less weight to mitigatory factors, as explained in such cases as* Peterson *[1984] WAR 329 at 332; (1983) 11 A Crim R 164 at 167-168. Even if the judge is sure that an offence is prevalent or locally prevalent, an increased sentence is not inevitable. There may be countervailing factors of greater significance*."

[34] This Court is persuaded that this is the correct approach. Prevalence will very rarely be a dominant or main factor in sentencing but to the extent that it can be established, prevalence can affect a sentencer's assessment of seriousness of the offence. Where an offence is prevalent, the Court can place increased importance on the sentencing purposes of general deterrence and retribution and ultimately this may lead a court to increase the sentence for that offence. In this way, this factor could be regarded as a circumstance of aggravation.

[35] It is therefore apparent that when applying the prevalence factor, the judicial approach must be clinical and measured. What is also clear that is that if prevalence of the offence is to have a critical effect on sentence, it should be established with as much care and particularity as possible. This view has been endorsed even in our regional jurisdictions.

[36] In **Devon Mitchell v R**[8] after considering the **Winston Joseph** judgment in which the Court of Appeal made the following observation;

> "The court has to adopt a sentencing policy which is aimed at combating the growing prevalence of these crimes in our country, St. Lucia while at the same time not denying persons committing these crimes the application of the basic human rights prescribed by our Constitution."

Barrow JA went on to note that;

> "The specific information that founded the reference by the Chief Justice to the growing prevalence of sexual crimes in St. Lucia was not stated. In the instant case counsel for the appellant said he was not in a position to dispute the information given by counsel for the prosecution that, in the forthcoming assizes, of the 102 cases on the list 51 were cases of sexual offences. This court noted that on the list of appeals for the sitting at which the instant appeal was heard 5 of the 9 High Court criminal appeals were in relation to sexual offences.
>
> The prevalence of sexual offences in Grenada requires the court to be mindful of the important public dimension of criminal sentencing, which includes protecting the public by punishing the offender, or reforming him, or deterring him and others, or all of these things."

[37] Later, **in Michael Jeffery v R**[9] the Court of Appeal in considering the issue of prevalence, noted that Counsel in the matter had been presented with and had

[8] Criminal Appeal No.10 OF 2003

accepted the accuracy of the information given by the prosecution on the prevalence of sexual offences in Grenada. The generally held appellate view is that if a court is proposing to impose a heavier than usual sentence on the basis of increased prevalence, it should only do so if proper and sufficient evidence is available to the court and after having given the parties the opportunity to address on this issue.

[38] Counsel for the Prosecution submitted statistics of the number of sexual offences before the current Assizes and he posited that such matters were in the majority. Where the Prosecution proposes to apply this factor to increase the sentence, it is the Court's view that some form of statistical analysis or expert law enforcement evidence of any increase in offending would be critical. The Court is not satisfied that sufficiently cogent information was presented in the case at Bar and Counsel for Prosecution would be wise to ensure that that this is not repeated in the future.

Relevant Authorities

[39] 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.**

[40] In respect of offence at Count 1 - Unlawful Sexual Intercourse with a Girl under 16 years, Counsel referred the Court to **R v Winston Blackette**. In that case, following a trial, the Defendant was convicted of unlawful sexual intercourse with a girl under the age of 16 years. In that case, the complainant was 14 years at the time of the commission of the offence. He was sentenced to 4 years imprisonment.

[41] In **R v Clyde Conrad Linton** - The defendant pleaded guilty to three counts of unlawful sexual intercourse with a girl under the age of 16 years. The Defendant was over 30 years at the time of the offence. He was sentenced to 2 years imprisonment.

[42] **R v Benson Thomas**[10] - Following trial, the defendant was convicted on a single count of unlawful sexual intercourse with a girl under 16 years. The Defendant was 27 years at the time of the offence and was sentenced to 4 years imprisonment.

---

[9] Criminal Appeal No.4 OF 2004

[10] No.21 of 2008(unreported)

[43] **R v Dellon Williams** - Following trial, the defendant was convicted of unlawful sexual intercourse with a girl under the age of 16 years. He was initially sentenced to 5 years imprisonment. His sentence was revised by the trial judge the following day and he was sentenced to 3 years imprisonment. The complainant became pregnant as a result of the offence.

[44] **R v Sylon Forbes**[11] – The Defendant was tried on an indictment which charged him with Rape and Child Pornography. The offences relate to the same complainant in this case. Following trial, he was found not guilty for rape, but convicted for unlawful sexual intercourse with a girl over the age of 13 years but under the age of 16 years. He was also convicted for child pornography. The defendant was sentenced to 5 years imprisonment for unlawful sexual intercourse and 3 years imprisonment for child pornography.

[45] In respect to offence at Count 2- Rape, Counsel submitted that there are plethora of relevant judicial authorities where the victim or complainant was an adult female. However, in cases involving young victims, Counsel noted that the position varies.

[46] Counsel also cited the case of **R v *Millbery and Others***[12], in which Lord Lane CJ outlined five factors which warranted the imposition of a custodial sentence for the offence of rape. He observed;

> "Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. A custodial sentence is necessary for a variety of reasons. First of all, to mark the gravity of the offence. Secondly, to emphasize public disapproval. Thirdly, to serve as a warning to others. Fourthly, to punish the offender and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case."

[47] In **Millbery and Others**, the Court concluded that the starting point for sentence after a contested trial for rape should be 8 years, if any of the following aggravating factors are present:

[11] Criminal Case No. 5 of 2013
[12] [2003] 2 Cr. App R (S) 31

i. the rape is committed by two or more offenders acting together;

ii. the offender is in a position of responsibility towards the victim (e.g., in the relationship of medical practitioner and patient or teacher and pupil), or the offender is a person in whom the victim has placed his or her trust (e.g., a clergyman, an emergency services patrolman, a taxi driver, or a police officer);

iii. the offender abducts the victim and holds him or her captive;

iv. rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability;

v. racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (e.g., homophobic rape);

vi. repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped);

vii. rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

[48] Counsel for the Prosecution also cited several regional authorities. He noted the seminal authority of **Winston Joseph et al v R**[13] in which Byron CJ provided starting points in respect to various sexual offences. In respect of the offence of rape, the court considered that an appropriate starting point would be 8 years where there are no aggravating factors.

[49] Counsel was at pains to note however that the Court in that case considered the appropriate staring point as it relates to the rape of an adult and not a child victim. In regard Counsel submitted that the Court should consider the useful guidance afforded in the United Kingdom authorities. First, Counsel referred the Court to paragraphs B 3.9 and B 3.10 of **Blackstone's Criminal Practice 2013**, where the learned authors observed that in the case where the victim is a child between the ages of 13 - 16, the recommended starting point is 10 years with a sentencing range between 8-13 years depending on the aggravating and mitigating factors.

[13] Criminal Appeal No. 4 of 2000

[50] Turning to the local and regional authorities, Counsel for the Prosecution noted that in **R v Franklyn Huggins,** the defendant was sentenced to 12 years for the rape of his 15 year old step-daughter. **R v Claudius Frett,** the defendant was sentenced to 12 years for raping his daughter who was a high school student at the time. In **R v Kelvin Turnbull**, the defendant was sentenced to 10 years each for two counts of rape of a 13 year old child he drove to school. In **R v Curtis Bruce**, the defendant was sentenced to 14 years for rape of an 11 year old girl with a mental disability (Mr. Bruce changed his plea to guilty during trial after introduction of DNA evidence); and in **R v Malcolm Spencer**, the defendant was sentenced to 7 years on a guilty plea for rape of a 15 year old girl who was mentally challenged.

[51] In respect to offence at Count 3 – Possession of Child Pornography, Counsel submitted that there is a dearth of local and regional authorities. The lone local authority cited was **R v Sylon Forbes,** a case involving the same complainant as the case at bar. Following trial, the defendant was found guilty of possession of child pornography. The defendant was sentenced to 3 years imprisonment for that offence.

[52] Counsel submitted that in these circumstances, the Court should have regard to international judicial authorities. He cited authorities from Canada and New South Wales and he noted that the courts in these jurisdictions have stressed that general deterrence is a particularly important consideration in sentencing for offences of this kind.

[53] Counsel cited the case of **R v Thompson**[14] in which Kourakis CJ referred to his judgment in **R v Padberg**[15] where he described the importance of general deterrence in the following way:

> "The abuse of children in that way, wherever in the world it occurs, cannot be tolerated. The global distribution network provided by the internet is likely to have increased the abuse of children worldwide. I accept that in a sense, the enormous volume of material accessed by the respondent loses some of its significance as a measure of the depravity of his conduct because of the quantity of material available which can be accessed and the ease with which it can be downloaded through the internet. On the other hand, the enormity of the material downloaded by the respondent, and the even greater morass of material available through the internet, is

[14] [2014] SASCFC 33
[15] (2010) 107 SASR 386, [41]-[45]

an indication of the extent of the global abuse of children to which I have referred. Everyone who accesses child pornography gives a reason for, and in that sense encourages, the continued abuse of young children. The authorities to which the Chief Justice has referred emphasise the paramount importance of deterrence. The application of that legal policy should not be delayed. Unfortunately, many offenders against these statutory provisions will present with pathetic personal circumstances. If leniency is extended to all or many of the offenders with similar personal characteristics, it will not be possible to implement a policy of deterrence as the paramount consideration. It is for that reason that many authorities recognise the relatively reduced scope to extend leniency on the basis of an offender's personal circumstances. In the face of the paramount importance of deterrence, few offences committed by accessing and possessing images in the most serious two categories are ever likely to be committed in circumstances which warrant a complete suspension of the term of imprisonment which must, almost invariably, be imposed.

It is in the very nature of this type of offending, which often involves the sharing of electronic files between offenders, that the court's approach to sentencing will quickly be communicated to those with a predilection to access child pornography. In my view, it is also likely that those individuals will find the prospect of immediate imprisonment a strong deterrent. These offences cause much suffering and are difficult to detect. It is of the utmost importance that sentences which have a strongly deterrent effect are imposed. There was no aspect of the respondent's circumstances which could reasonably be regarded as sufficiently differentiating him from the generality of other offenders so as to displace the need for a sentence with a high level of deterrence. I acknowledge that where a sentence, although manifestly inadequate, is consistent with existing, albeit erroneous sentencing patterns, there may be good reason to refuse leave notwithstanding the error.

I acknowledge that that is all the more so where the respondent to a prosecution appeal is a first-time offender who was not sentenced to an immediate term of imprisonment. However, the establishment and maintenance of sentencing standards for offences of this type which have a strongly deterrent effect is a matter of urgency and outweighs considerations which are personal to the respondent."

[54] Counsel submitted that a custodial sentence was warranted here because the paramount consideration was general deterrence. He recommended that the Court adopt the approach in **DPP v D'Alessandro**[16], where at paragraph 25, the Court set out the sentencing principles applicable to offences of this kind as follows:

> (1) "First, the nature and gravity of the offending ordinarily falls to be determined by reference to the four criteria adumbrated by Johnson in **R v Gent.**
>
> (a) The nature and content of the material, in particular, the age of the children and the gravity of the sexual activity depicted.
>
> (b) The number of images or items possessed.
>
> (c) Whether the material is for the purpose of sale or further distribution.
>
> (d) Whether the offender will profit from the offence.
>
> In the case of child pornography for personal use, the number of children depicted and thereby victims is also regarded as relevant considerations.
>
> (2) Secondly, the general deterrence is regarded as the paramount sentencing consideration – because of the public interest in shifting the provision and use of child pornography and less or limited weight is given to an offender's prior good character because it had been the experience of the courts that such offences are committed frequently by persons otherwise of good character.
>
> (3) Thirdly, a sentence of immediate imprisonment would ordinarily be warranted, but it is recognized that there are cases where a sentence which does not involve a period of actual custody is not precluded."

[55] The Court is also satisfied that in determining the objective seriousness of the offending, a range of additional factors may be relevant: (1) The age of the children depicted - **D'Alessandro [2010] VSCA 60, Gent [2005] NSWCCA 370;** (2) The period and length of possession - **DPP v Smith [2010] VSCA 215, Fulop [2009] VSCA 296;** (3) The frequency of access –**Fulop**; (4) Whether the files were stored or sorted **-Fulop**; (5) Whether the offender took steps to conceal their offending behaviour –**Mouscas [2008] NSWCCA 181**; (6) Whether there was a breach of trust, i.e. in a quasi-parental relationship - **Heathcote [2014]**

[16] [2010] 26 VR 477

VSCA 37 and whether the offender was involved in the sale or distribution of child pornography, or received a profit, or was a mere consumer **D'Alessandro [2010] VSCA 60**; **DPP v Smith [2010] VSCA 215**.

[56] In reply, Counsel for the Defendant invited the Court to refer to the UK Sentencing Guidelines for the offence of possession of indecent photographs of the child.[17] He first noted that there is a significant disparity in the maximum sentences prescribed by the UK (5 years) as opposed to the BVI (14 years). He noted further that the sentencing in the UK ranges from community orders – 3 years custody. Counsel submitted that given that the offending does not involve the possession of images involving penetrative sexual activity, that the Defendant's offending would fall within categories B and C. In the former, the range is a high level community service order – 18 month imprisonment with a starting point of 26 weeks imprisonment while in the case of the latter, the range is a medium level community order – 26 weeks imprisonment with a starting point of a high level community order.

[57] Counsel agreed that a custodial sentence was warranted but he submitted that the offending is on the lower range of the sentencing scale. He submitted that the Defendant's offending does not rise to the level of **Sylon Forbes** who not only took the offending pictures, kept them on his computer, but also shared them with this Defendant. This was not disputed by Counsel for the Prosecution.

The Sentences

[58] 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**[18]:

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

ii. Deterrence - to deter potential offenders and the offender himself from recidivism;

iii. Prevention - aimed at preventing the offender through incarceration from offending against the law and thus protection of the society; and

[17] Section 160 of the UK Criminal Justice Act 1988
[18] Crim. App. No. 8 of 2008 (SVG)

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

[59] 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."

[60] The Defendant has committed a grave offence which warrants a custodial sentence. A strong message also has to be sent out that crime has no place in this Territory and those who seek to prey upon the defenceless will receive the full brunt of the law.

[61] Upon examination of the facts in this case as established by the Prosecution and accepted by the Jury, the Court finds that the aggravating factors outweigh the mitigating factors in respect of this Defendant. In sentencing the Defendant, the Court is conscious of the fact that there is a need to send the message out to all residents in this Territory that such odious crimes against the vulnerable will not be tolerated. At the same time, the Court is prepared to temper justice with mercy.

[62] The Court has taken into consideration the principles of sentencing as cited herein, the mitigating and aggravating factors and the gravity of the offences. In the instant case, the Defendant's previous good character and unblemished criminal record have been highlighted by learned Counsel for the Defence and the Court has also taken into careful consideration learned Counsel's submissions and his plea in mitigation.

Unlawful Sexual Intercourse with a Girl under 16 years

[63] The Court is satisfied that this offence is undoubtedly a serious one for which incarceration would normally be the appropriate disposal. At the time of offence, the Virtual Complainant would have been under the age of 16. According to the Court of Appeal's guidance in **Winston Joseph**, the sentencing range after trial would be 3 – 7 years[19].

[19] 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.

[64] The Court accepts the aggravating factors as highlighted by Counsel for the Prosecution and agreed by Counsel for the Defence and in the Court's view these outweigh the mitigating factors and place the offending at a higher threshold. There is no question that the Virtual Complainant in this case was a vulnerable victim. Her underdeveloped social and intellectual capabilities would have been obvious to anyone and the Court has no doubt that the Defendant would have been fully aware of her limitations. When she should have been surrounded by caring nurturing adults, he callously took advantage of her, exploited her vulnerabilities and in so doing, abused her trust and the trust of her family.

[65] The Court also noted the age disparity between the Defendant and the Complainant who at the date of trial was just over 16 years old. His maturity coupled with the close relationship between the families enabled him to assume a rather parental role which he abused. In the Court's view, this is a serious offence which merits a custodial sentence of sufficient length to adequately reflect the purpose for which it was intended; that is, punishment of the offender, deterrence of other potential offenders, protection of society and if at all possible, rehabilitation of this offender

[66] In light of all the circumstances of this case and having considered all of these matters, the Court sentences the Defendant in respect of Count 1 to 5 years imprisonment

Rape

[67] The offence of rape carries the maximum penalty of life imprisonment. This penalty underscores the gravity of the offence and places it in the category of very serious offences such as murder, manslaughter, robbery and grievous bodily harm which nearly always warrant in custodial sentences.

[68] The Court notes and concurs with the observations of Hariprashad-Charles J in **R v Franklyn Huggins**[20] where at paragraph 17 of her judgment she stated that:

> "Short of homicide, it [rape] is the 'ultimate violation of self'. **It is a violent crime because it normally involves force, or the threat of force or intimidation to overcome the will and the capacity of the victim to resist.** Along with other forms of sexual assault, **it belongs to that class of indignities against the person that cannot ever be fully righted and that diminishes all humanity."** [Emphasis added]

[20] BVIHCR 2009/001; Judgment delivered July 2010

[69] Also, in **R v Christopher Millberry,** Lord Lane, referring to the general guidelines as to sentencing for rape in **Roberts and Roberts**[21] stated:

> "Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence…. A custodial sentence is necessary for a variety of reasons. First of all, to mark the gravity of the offence. Secondly, to emphasise public disapproval. Thirdly, to serve as a warning to others. Fourthly, to punish the offender, and last but by no means least, to protect women (or in this case, young girls). The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case."

[70] The Court has considered the guidance afforded by the Court of Appeal judgment in **Winston Joseph v R** in which the Court prescribed that for rape committed on an adult without aggravating or mitigating features, 8 years should be taken as the starting point in a contested case.

[71] The Court accepts learned Counsel's submission that such guidance is limited, in that it does not specifically address the rape of a young victim/child. Bearing in mind that the maximum penalty for rape in the UK is equivalent to that of the BVI, the Court concurs that useful assistance can be drawn from the UK authorities. The Court considered the relevant extracts of **Blackstone's Criminal Practice 2013**[22] where, the learned authors observed that in the case where the victim is a child aged 13 and over but under 16, the recommended starting point is 10 years with a sentencing range between 8-13 years depending on the aggravating and mitigating factors.

[72] Bearing in mind, the age of this Complainant when the offence of rape took place, the Court is of the considered view that the appropriate starting point is 10 years.

[73] In **Winston Joseph v R** where at paragraph 17 of the judgment, Sir Dennis Byron CJ stated that the actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors. The Court 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.

---

[21] (1982) 4 Cr. App. R. (S) 8; See page 3 of the Millberry's judgment
[22] Paragraphs B 3.9 and B 3.10

[74] For the most part, the Court accepts the aggravating factors as identified by Counsel for the Prosecution. Here the victim was under the age of 16 years. The Court finds that the Complainant's mental deficiency and abuse of trust are aggravating features which have already been considered. The jury also found that in the course of committing this offence, the Defendant used a knife as a weapon to put the victim in fear and to secure her compliance. It is apparent that the Defendant used more force than was necessary to commit the offence.

[75] Upon examination of the facts in this case as established by the Prosecution and accepted by the Jury, the Court finds that the aggravating factors outweigh the mitigating factors in respect of this Defendant.

[76] The Court has taken into consideration the principles of sentencing as cited herein, the comparable judicial authorities, the mitigating and the gravity of the offence. The Court has also taken into careful consideration Learned Counsel's plea in mitigation.

[77] Having regard to all the matters outlined above, this court considers a term of 11 years imprisonment to be an appropriate sentence to be imposed having regard to the aggravating and mitigating factors present in this case.

Possession of Child Pornography

[78] Under section 284A (2) (c) of the Criminal Code, a person who intentionally has child pornography in his possession commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. It is very apparent from the term of imprisonment prescribed that this is a serious offence.

[79] The Court has no doubt that operating on the legislator's mind is that fact that "such offending facilitates the physical abuse of children by creating a market for child pornography. There is a real danger that it will fuel the fantasies of child sexual assault offenders and may be used to 'groom' potential child sexual assault victims. Ultimately, the offending creates an additional layer of trauma for the child victims who must live with the knowledge that images of their abuse exist in perpetuity and may resurface at any time. Ultimately this offence is pernicious and

may promote a distorted view of reality where children are seen as appropriate sexual partners for adults"[23].

[80] As Simpson J, in the case of **R v Booth**[24] stated:

> "It seems to me that possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime."

[81] **R v Stroempl**[25] explained this in the following way:

> "The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense, possessors such as the appellant instigate the production and distribution of child pornography — and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place."

[82] As a sentencer the Court is required to compare the case at bar with cases comparative sentences involving this offence and to the extent available and this has been done. Given the dearth in local and regional authorities, the Court was forced to cast a wider net. Although these authorities are not binding on this Court, it is not disputed that they are of persuasive authority.

[83] In considering these authorities the Court took into account the caution expressed in the case **DPP (Cth) v D'Alessandro**, where the court stated that in the context of Commonwealth child pornography offences, exact comparisons between cases could not be made because no two cases were identical. The Court noted that the problem was especially pronounced because "*although the nature and content of the material bears directly upon the seriousness of the offence, it is generally if not invariably impossible to compare the material in one case with that in another*".

---

[23] Excerpt from the Judicial Commission of New South Wales Publication - **Sentencing Offenders Convicted Of Child Pornography And Child Abuse Material Offences** by Pierrette Mizzi, Tom Gotsis, Patrizia Poletti; DPP (Tas) v Latham [2009] TASSC 101 at paragraph 33

[24] [2009] NSWCCA 89

[25] (1995) 105 CCC (3d) 187 at 191

[84] Notwithstanding this, what is abundantly evident is that the Courts in approaching the sentence of an offender with regard to the charge of possession of child pornography emphasize deterrence as the main aim of sentencing.

[85] In assessing the objective seriousness of this offence, the Court has considered the factors in **R v Gent**. These include (1) the nature and content of the pornographic material — including the age of the children; (2) the gravity of the sexual activity portrayed; (3) the number of images or items of material possessed by the offender; (4) whether the possession or importation is for the purpose of sale or further distribution; and (5) whether the offender will profit from the offence.

[86] The facts of this case disclose that the Defendant received 3 - 4 unsolicited photographs of the Complainant. It is also apparent that there was only one photograph of the Virtual Complainant that depicted her in a naked state and with her breast and vagina exposed. He kept these photos electronically until he deleted them from his phone about 1 week later. The photos did not display any overt sexual acts and there is no evidence that the Defendant intended that they be shared, sold or distributed.

[87] In determining the offence category, the Court is satisfied that the Defendant's conduct falls within the lower category of culpability. In that regard, the Court has considered the dicta of Byer J in **R v Sylon Forbes** where the learned Judge noted that:

> "In looking at the sentence that the Legislature sought to impose, that general principle of deterrence is quite evident, but this Court has to also recognize that the sentence set by the Legislature was also meant to capture a wide range of behaviour within the offence as this sentence is also referable to publication and production as well as to possession of child pornography.
>
> This Court is of the view that it can be argued that the more egregious and injurious behaviour relating to child pornography are the production and publication of the images which are captured by the definition in the Criminal Code. The Court is of the opinion that these offences should therefore attract a higher tariff in sentences that are meted out. Therefore, when considering the offence of possession of child pornography without any aggravating factors of publication or production, this Court is of the view that as unsavoury as this offence is, that a sentence for this offence should be on the lower end of the scale."

[88] The Court has also considered the starting point prescribed by the UK sentencing guidelines where the offence of possession carries a maximum penalty of 5 years[26]. The Court also noted that in **R v Sylon Forbes**, Byer J observed that where there is only a charge of possession without the additional offences as mentioned in the said Section 284(2), that an appropriate benchmark or starting point would be 7 years. The Court accepts Counsel for the Defendant submission that the offending conduct in the case at bar does not involve the same level of culpability as Sylon Forbes.

[89] In the case at bar, the Court accepts that the relevant aggravating features are the age and vulnerability of the Complainant depicted in the photos, the fact that she was known to the Defendant and the fact that the Defendant abused the position of trust. Consistent with the dicta in **Mouscas v R,** the Court has accorded little weight to the previous good character of the Defendant as a mitigating factor. The Court has however taken into account the Defendant's cooperation with the Police during their investigation of this offence.

[90] This Court is of the view that this offence must carry a term of imprisonment to encapsulate the "primary principles [of]…denunciation and general deterrence" However, this must be considered in light of the culpability of the Defendant. The Court is mindful that in sentencing the degree of culpability and harm are important factors.

[91] Given the assessed seriousness of the offence and the aggravating and mitigating factors operating, the Court sentences the Defendant to a term of 12 months imprisonment.

Concurrent/ Consecutive Sentences

[92] It is common ground between Counsel that consecutive sentences may be artificial in all the circumstances. In the Court's view, this position is entirely consistent with the general sentencing principles. Ultimately, the Court must ask the question: Can the sentence for one offence encompass the criminality of all the offences?

[26] Category A starting point of 1 year; Category B staring point 26 weeks and Category C staring point of High Level Community Order

[93] Asking that question in this particular case and in relation to these three offences could only result in the answer 'Yes.' The Court will therefore order that the sentences are to run concurrently.

Conclusion

[94] The Court therefore sentences the Defendant as follows:

i. **In respect of Count 1, the sentence is 5 years imprisonment**
ii. **In respect of Count 2, the sentence is 11 years imprisonment**
iii. **In respect of Count 3, the sentence is 12 months imprisonment**

[95] The Court was advised that the Defendant has been on remand since 27th March 2013. The Defendant is therefore entitled to be credited for the time spent on remand and as such the Court orders that his sentence is to commence from the date when he was imprisoned on remand, 27th March 2013.

Vicki Ann Ellis
High Court Judge