BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

BVIHCR 2009/0031

BETWEEN

THE QUEEN

-V-

ANDRE PENN

Appearances:

Mr. Wayne Rajbhansie, The Director of Public Prosecutions, Mr. Valmont Graham, Senior Crown Counsel, Ms. Faulkner, Senior Crown Counsel for the Crown
Mr. Jerome Lynch Q.C. for Mr. Andre Penn

2014: November 12
2015: February 16, June 15

Criminal Law – Sentencing – Sexual Offences – Unlawful Sexual Intercourse with a Girl Under 13 – Buggery – Indecent Assault – Ranges of Sentence – Aggravating and Mitigating Features – Serious Breach of Trust – Offences Committed Frequently – Vulnerable Victim – Grooming - Significant Difference in Age Between Offender and Victim – First Offender – Positive Good Character - Whether a Mitigating Feature if Minor Victim Willing Participant – Whether a Not Guilty Plea Relevant to Determination of the Starting Point Sentence – Benchmark Sentence of 8 years for Unlawful Sexual Intercourse – Benchmark Sentence of 4 years for Buggery – Benchmark Sentences of 20 months and 3 years for Indecent Assaults.

Criminal Law - Sentencing - Retrial - Original Jurisdiction being Exercised on Sentencing – To be Based on Relevant Principle – Whether Sentencing Court to have Regard to Sentence at First Trial – Whether Sentencing Court may Impose Sentence of Greater Severity.

Criminal Law – Sentencing – Consecutive and Concurrent Sentence – Totality Principle – Overall Sentence to be Fair, Just and Proportionate Reflecting Criminality as a Whole – Three Categories

of Offences - Whether Global Sentence may be Constructed by Combining Concurrent and Consecutive Sentences.

Criminal Law – Sentencing – Delay in Proceedings – Time Lost on Successful Appeal of First Conviction – Defendant's Responsibility for Delay - Defendant Utilizing Available Legal Means to Quash Indictment – No Ruling that Applications Frivolous or Vexatious – Some Applications Meritorious – Delay also Attributable to Significant Constitutional Point Raised on Fair Trial Provisions – Whether Reduction in Sentence to Mark Delay Appropriate.

DECISION ON SENTENCING

[1] **RAMDHANI J. (Ag.)** On the 13th December 2014, Andre Penn, the 'defendant' was convicted of eleven counts charged on a twelve-counts indictment relating to various acts of indecent assault, unlawful sexual intercourse with a girl under the age of 13 years, and buggery, all committed against a minor between years 2006 and 2009.

[2] This has been the second trial of the charges on this indictment. On the first trial, the defendant was convicted of all twelve counts. On this occasion, the jury returned a verdict of not guilty of the 12th count on the indictment. On his convictions on the eleven counts, the court ordered that a social inquiry report be prepared and that a victim impact statement be presented to the court at the sentencing hearing that took place on the 16th February 2015.

The Facts Relevant to Sentencing

[3] The Learned Director has presented to this court a very useful bundle by way of sentencing guidelines in which he has captured to relevant facts that must have led to the verdicts of guilty in this case.

[4] The offences were committed over the years 2006 to 2008 and committed against a young girl, SG, the biological niece of the defendant's wife who had been placed in their care. He and his wife became, during the relevant period, the primary caregivers of this child who was born in St Vincent to a mother who had never cared for this child. The child came to

the BVI at the age of 8 years. Prior to that she had been living with her paternal grandmother from the time she was just months old. Here in the BVI, she spent a few months with her father and then was moved to another aunt, and finally in that very year she was placed in the care of the defendant and his wife to live with them in their two-bedroom house in Josiah's Bay. The defendant had a son from another union who visited and spent a spent an occasional few days once in a while. Effectively however, it was the defendant, his wife and the complainant who lived alone in the Josiah's Bay home during the relevant years.

[5] As between he and his wife, it was defendant who spent more time with the complainant assisting her with her homework. He had been a past teacher, and it was undisputed that he acted generally as her mentor. On afternoons from school, she would arrive at his office, either coming there on her own or being dropped off by her own biological father. The office, occupying office space on two levels with a conference room on the lower level, was located in a building on Main Street, Road Town. There at his office, she would wait until he would leave for the day, picking up his wife at her workplace before going home.

[6] Early in 2009, whilst in school one day, she fell ill. Her insistence that no one call her aunt or the defendant, and her general manner caused the teachers to become very concerned and they began to question her. She eventually disclosed that the defendant had been molesting her. She was taken to the hospital and it was discovered that she had a yeast infection, and in the doctor's opinion, she had been sexually active. That very day the authorities stepped in and she was removed from the home of the defendant.

[7] The complainant was unable to recall the exact date each offence occurred but remembered the particular years and the order in which each one occurred. The counts were all crafted accordingly.

[8] **Count One – Indecent Assault** – The incident grounding this charge occurred in 2006. The evidence in the case showed that the defendant kept his clothes in the complainant's bedroom and on one occasion when he came in to hang up his pants, he kissed the

complainant and her lips and 'kept moving' along, leaving the room. On another occasion, shortly after this incident, he again came into the room. This time he kissed her longer on her lips and now touched her vagina through her clothing.

[9] **Count Two – Indecent Assault** - The incident grounding this count occurred in 2007 at his office in Main Street in Road Town. 'It was a school day. The defendant had collected the complainant from her aunt's store to do some work at his office. While at his office, he checked to ensure that no one was in the offices below his. He returned and locked the door and told the complainant to close the windows. He told the complainant to sit on his lap and he touched her vagina. This touching lasted until her aunt called to be picked up. They then left the office.'

[10] **Count Three - Indecent Assault** - The third incident grounding this particular charge also occurred in 2007. This one too, took place in the defendant's office, but this time it was a on a weekend. The defendant told his wife that he would take the complainant to his office to assist him in some filing. At the office he touched her breast telling her that they would get bigger soon. He also touched her vagina in the conference room.

[11] **Count Four – Indecent Assault** - The fourth incident, the subject of this charge, also occurred in 2007. This time it was in the complainant bedroom at the home in Josiah's Bay. It was in the night. The defendant touched the complainant's vagina and showed her how to suck his penis and she sucked it.

[12] **Count Five – Indecent Assault** - This was another incident in 2007, this time occurring at the office of the defendant. After she had arrived at his office, at about 5.00 p.m. he checked downstairs to so if anyone was there and then told her that a 'Mrs. Peters' was there but that 'she was no problem'. He inserted his finger in the complainant's vagina and kissed her. He asked him why he was inserting his finger and he told her that he was preparing her for the 'real thing'. He was doing this for a while until her aunt called to be picked up. He told her not to tell anyone anything because he could get into serious trouble.

[13] **Count Six – Unlawful Sexual Intercourse with a Girl under the Age of 13 years** – the defendant's sexual molestation escalated after the events grounding count five. One weekend in 2007, he told his wife that he would take the complainant to his office so that she could assist him with some filing. At his office, he touched and put his finger in her vagina and asked her if she wanted the 'real thing'. She told him 'yes'. He had a condom and asked her to help him put it on his penis as his hand was sweaty. She said that she was on her back with her knees up on his office chair. He put his penis in her vagina. He 'pushed in and out until he cum'. When he was finished he went into the office kitchen. She followed him and saw him putting water in the condom. She asked him about this and he said he was doing this to ensure that it had not burst. When they left, he threw the condom away.

[14] **Count Seven - Unlawful Sexual Intercourse with a Girl under the Age of 13 years** – The incident grounding this charge also occurred in 2007. It was at his office in Road Town. It was a school day. He told her that he had something to show her. He made sure that no one was in the office downstairs and then after closing the door and windows, he accessed a website on his computer with the webpage address of 'backpage.com'. He used this to access a number of other websites and found those containing pornographic material. He and she watched the porn together. He asked her is she wanted to have sex and she told him 'yes'. She helped him put on the condom. He fingered her vagina. He told her he was fingering her to make her vagina wider. He pushed his penis in her vagina and had sexual intercourse with her until he ejaculated.

[15] **Count Eight – Indecent Assault** – The next time the defendant sexually molested the complainant was again in 2008. This time he indecently assaulted her. It was at the home in Josiah's Bay. It was in the night and the defendant's wife was in the shower. The complainant said they did the '69'. He came into her bedroom and 'sucked' the complainant's vagina and she sucked his penis. He ejaculated in her mouth.

[16] **Count Nine – Buggery on a Girl Under the Age of 13 Years** – The next sex act was the most perverted act yet. It occurred in 2008. At school the complainant was being taught about sexual diseases. In addition, the students were informed that there would soon be a random sexual examination of students as was the practice when entering the higher grade. She had become concerned that an examination would reveal that she was having vaginal sex. She came home and she told the defendant about this concern. He then suggested that if such a possibility existed in relation to vaginal sex, that they should have anal sex in future. The first such act occurred in the defendant's office in Road Town. It was a school day. She had been to sporting practice and was picked up by her own biological father and taken to the defendant's office just after 5.00 p.m.. He asked her if she wanted to have sex in her anus and she said 'yes'. She knelt down in his chair. He spat on his hand and rubbed it on his penis and he also spat on her anus. He pushed his penis in her anus and began to push it in and out. She felt weird. When he was ready to ejaculate he pulled out his penis and ejaculated on her back. He cleaned it off her with a napkin.

[17] **Count Ten - Buggery on a Girl Under the Age of 13 Years** – The next act was also an act of buggery. This too in 2008, but this time in occurred in the home. He came into her room to hang up his pants. He kissed her. He went to his bedroom and turned on the light there. He returned to her room. She was on her knees on the bed. The defendant used spit to lubricate his penis and he placed his penis in her anus. When he was ready to ejaculate, he again ejaculated on her back. This time too he used a napkin to wipe it off her.

[18] **Count Eleven – Indecent Assault** – The last act the jury found him guilty of was an act of indecent assault. This was in 2008 at the home in Josiah's Bay. It was a weekend and the aunt had gone to a funeral. He told the complainant that he had something to show her, and brought a bag from his vehicle. He had sex tapes in the car. He put them on and told her to watch. She got bored. While she was combing her hair, the defendant came into her room and touched her breast and then knelt down in front of her and 'sucked' her vagina.

He suggested a bath together. They were in the shower when they heard the aunt's car returning. She hurriedly put on her clothes and opened the door for the aunt.

The Court's Consideration on Sentencing

[19] As part of this sentencing, the court received and considered very useful guidelines from the Director's office and a psychological assessment of the victim and a victim impact statement. A plea in mitigation by Mr. Lynch Q.C. on behalf of the defendant was also considered.

The Plea in Mitigation

[20] In making the oral plea in mitigation on behalf of the defendant by Mr. Lynch Q.C. did not lead any witnesses, but by way of some evidential material asked the court to consider a letter from one Reverend Nihal Abeyasingha of the 'Our Lady of Perpetual Help Church', Tyrells in Antigua. He then pointed the court to the positive character traits of the defendant, and challenged some of the matters that the guidelines had identified as aggravating features with regards the offending. Learned Queen's Counsel's focus, however, was on certain legal arguments which he submitted, should guide the approach that this court on the sentencing. I will treat with this issue first as it will inform my approach to this matter.

Should a Court Impose a Greater Sentence on Convictions on a Retrial

[21] The first of these arguments was grounded on Paragraph 2 of Schedule 2 of the Criminal Appeal Act 1968 of the United Kingdom. Learned Queen's Counsel submitted that this was a retrial of the charges on the indictment and that the court was not at large in the sentencing process to impose any sentence which it considered just and appropriate, but was bound to approach the process by using the first sentence, that of 12 years imposed at the first trial as the starting point. He submitted that having regard to certain aspects of

the case, the court would only be entitled to give a sentence lesser than 12 years on this occasion.

[22] Paragraph 2(1) of Schedule 2 of the Criminal Appeal Act 1968 UK which Mr. Lynch Q.C. relied on, reads in full:

> *"Where a person ordered to be retried is again convicted on retrial, the court before which he is convicted may pass in respect of the offence any sentence authorized by law, not being a sentence of greater severity than that passed on the original conviction."*

[23] Mr. Lynch Q.C. accepted that this section was not binding on this court. He urged however, that this court should be persuaded to follow the underlying principle expressed by the provision as it represented the modern approach that a court should take in sentencing on a retrial. He pointed out that English Rule was nearly 50 years old and submitted that it was designed to ensure that a convicted person is not prevented from appealing convictions by any fear that if by chance the ultimate result is that the charges are ordered to be retried he then runs the risk of being sentenced to a greater sentence.

[24] The Learned Director who had not dealt with this in the sentencing guidelines was invited to address the court on this point. He in turn stated that the conviction having been quashed, the second court was at large to treat with all the issues including sentencing afresh without regard to the sentence imposed on the first trial. He pointed this court to section 37 of the **West Indies Associated States Supreme Court (Virgin Islands) Act, Cap 80** to make the point that even the court of appeal had a power to increase sentence.

[25] Mr. Lynch in response on this last point pointed out that the Court of Appeal's power to increase sentence was one that was only exercised when the actual sentence was being appealed either by the defendant or the prosecution. There had never been any appeal on the sentence imposed at the first trial.

Analysis and Findings

[26] As a general starting point, on a sentencing following convictions on a retrial, a court is entitled and required as a matter of law to fix an appropriate sentence having regard to all the applicable legal principles, the facts of the particular case and the personal mitigating features of the defendant. A court in considering what is an appropriate sentence following a retrial is not engaged in a process of 'resentencing' but one of 'sentencing' in which it is exercising a fresh and independent jurisdiction.[1]

[27] Whilst the English provisions do not apply to the BVI, I am of the view that the underlying jurisprudence grounding the English provision has some application to this jurisdiction. This jurisprudential common sense is also to be seen in other jurisdictions that have also recognize as a notional approach a sentence of greater severity than that imposed on the first trial, is not to be ***ordinarily*** imposed following convictions on a retrial.

[28] One such jurisdiction is New South Wales where the Supreme Court in **R v Gilmore** (1979) 1 A Crim. R 416 explained the basis for the policy. There the learned Chief Justice stated:

> *"The policy consideration underlying the specification of the upper limit on sentence is twofold. In the first place, a person whose conviction is tainted in that the first trial was defective to an extent not capable of being saved by the proviso, should not, in fairness, be required to run any risk of suffering a heavier sentence on a new trial as a consequence of exposing on appeal the defective nature of the first trial. It is in the public interest in ensuring orderly and proper administration of the criminal law that defects in trials should be challenged and laid bare on appeal. As a corollary to this, it is wrong that any person should suffer ill-founded criminal judgment in consequence of a defective trial, and feel constrained to avoid exposing that defect lest on a new trial a heavier sentence be passed.*
>
> *In the second place, the passing of a heavier sentence on a new trial could be seen by the convicted person, as well, perhaps, by others in the community at large, as possibly importing some element of retribution by the machinery of criminal justice in consequence of the conviction on the first trial having been successfully overthrown. Any such impression would, of course, be groundless. But, at the same time, it is highly desirable to avoid any possible basis for permitting the operation of the system to be exposed to criticism of such a nature."*

[1] This point was well made in R v MM (2002) 135 A Crim R 216

[29] The courts of New South Wales did in fact recognize that there could be good reason for the second sentencing court to depart from the first sentence. This point was made clearly in **R v Bedford** (1986) 5 NSWLR 711, where the court reaffirmed that a second court should not 'ordinarily' impose a sentence of greater severity than the first. The Chief Justice stated:

> *"The word 'ordinarily' must be given full room to operate. It might perhaps have been preferable to have expressed this view as a prima facie approach rather than elevating it to a principle.*
>
> *Where the judge at the new trial considers that the circumstances of the case do call for a longer sentence he will not be absolutely fettered by the approach prima facie to be adopted. He is both at liberty, and indeed obliged, to give effect to his own assessment. It could be expected, however, that, if he did take the view that a longer sentence were called for than that passed at the first trial, then there would be a specific indication of the reasons leading him to this view."*

[30] The New South Wales cases clearly show that as a general rule the first sentence should assist in setting a starting point. They also show that the courts of that jurisdiction should depart from the first sentence for good reason that would include determinations that the first sentence was manifestly inadequate, or that greater degrees of criminality have been shown at the second trial. As one court stated:

> *"….a judge at a second trial need not perpetuate a sentence which is manifestly inadequate. That was the approach of this Court in Merritt (No 2) and of James J in Hannes. …the judge at a second trial might pass a heavier sentence if he or she makes findings of fact bearing upon the offender's criminality significantly different from those made by the judge at the first trial."*[2]

[31] Even in the UK, section 36 of the **Criminal Justice Act 1988** now gives the Attorney General the power to ask the Court of Appeal to reconsider and vary sentence that has been imposed by the trial court on the basis, *inter alia,* that it was manifestly inadequate. Such a power is exercisable where the Attorney General has only sought to challenge the sentence that was imposed after the retrial, this being a sentence that was equivalent to the first sentence.

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[2] Tarrant v The Queen 171 A Crim R 425 2007 WL 1684823; [2007] NSWCCA 124; [2008] ALMD 1713

[32] What these cases have also shown, and I am prepared to accept for the purposes of this sentencing exercise, is that the second court should not lightly impose a different sentence. Where a court is about to impose a sentence different from the first sentence, it should give due considerations to the principles set out above especially the need to ensure that future defendants are not deterred from filing a meritorious appeal. A convicted defendant should never have to be fearful that if he is successful on his appeal and a retrial is ordered, he would be met with the possibility of a greater sentence if he were to be found guilty on his retrial. It would be useful if a court on retrial that fixes a sentence different from the sentence on the first trial, give reasons for not imposing the same sentence. I consider that at least in relation to one of the categories of the offences, a different sentence is warranted. I will identify that offence later on in this judgment.

Other Relevant Principles on this Sentencing

[33] The purpose of any sentence imposed by the court is not to simply punish a criminal defendant. In seeking to find the appropriate sentence, a court must be concerned with the protection of society, the deterrence of the offender and of others who may be tempted to offend, retribution, reformation of the offender and reparation in relation to the harm cased b the offence. 'The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence. These were enunciated by Chief Justice Wooding in the case of **R v Sargeant**[3] and expounded upon by Chief Justice Byron in **Desmond Baptiste v The Queen**[4] as; the retributive or denunciatory, the deterrent vis-à-vis potential offenders, the deterrent vis-à-vis the particular offender, the preventive which aims at preventing the particular offender from again offending by incarcerating him for a long period and the rehabilitative object of sentencing, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of Society.'[5]

[3] [1975] 60 Cr. App R 74
[4] Consolidated Criminal Appeal No. 8 of 2003
[5] The Crown's Guidelines

[34] In cases of this nature, in fashioning a sentence the court really must consider three broad dimensions. The 'first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk posed by the offender to society.'[6]

[35] It is for these reasons that a sentencing court, with the relevant principles in mind, must identify and examine the aggravating and mitigating features of the case.

[36] This must be an evaluative process. Where the aggravating features outweigh the mitigating features, the tendency must be towards a higher sentence. Where the mitigating features outweigh the aggravating features the tendency must be towards to lower sentence.[7]

[37] Before going on to identify and evaluate the aggravating and mitigating features in this case, as a matter of approach it would be proper and necessary for a court to have regard to the maximum penalties set by statute for each offence, and having regard to the court's wide discretion on sentencing, the applicable benchmark of starting point for each of these offences. It is against this background that aggravating and mitigating features should be considered.

[38] With regards suggesting the appropriate ranges or benchmarks, the Crown has presented this court a detailed summary of relevant yardstick cases, both local and English. These are **R v Kemuel Dublin** Criminal Case No. 19 of 2005 (Unreported); **R v Roland Allen** Criminal Case No. 8 of 2011 (Unreported); **R v Joel Sprauve** Criminal Case No. 3 of 2010 (Unreported); **R v Bevern Smith** Criminal Case No. 13 of 2000 (Unreported); **R v Lloyd Arthur** Criminal Case No. 7 of 2004 (Unreported); **R v Nelson Callwood** Criminal Case No. 17 of 2009; **R v M** [2002] NICA 49

[6] The UK Sentencing Advisory Panel referred to in R v Millbery [2002] All ER (D) 99 (Dec)
[7] Winston Joseph v R Criminal Appeal No. 4 of 2000 per Byron CJ at para. 17

[39] I acknowledge that when courts fix a nominal benchmark or starting point as regard the sentence for any offence, this arises out of the experience of the courts in finding that appropriate balance having regards to the principles of sentencing.

Unlawful Sexual Intercourse with a Girl Under 13 years of Age

[40] The maximum sentence that may be imposed on an offender for the offence of unlawful sexual intercourse with a girl under the age of 13 years is fourteen years. The relevant provision is section 118 (1) of the Criminal Code 1997 which provides:

> *"Any man who has sexual intercourse with a girl of, or under the age of 13 years, commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years"*.

[41] In the guidelines the Crown has presented with me summaries of a number of cases. They have proven to be useful in finding the appropriate benchmark for this offence in this case. I gratefully adopt their summaries:

> **R v Kemuel Dublin**[8] **-** In this case 'Dublin was found guilty for one count of Unlawful Sexual Intercourse with a girl of or under the age of 13 years and one count of Indecent Assault with a girl under 13 years. The complainant was his cousin and they were frequent visitors to each other's home. She assisted with the care of his infant daughter. She ***was 11 years old*** and ***he was 28 years*** old at the time. The defendant was sentenced to ***8 years imprisonment*** for the offence of ***Unlawful Sexual Intercourse*** and twelve months for indecent assault. The sentences were ordered to run concurrently.
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> **R v Roland Allen**[9] – The defendant pleaded guilty to two counts of unlawful sexual intercourse with the girl of, or under the age of 13 years and one count of unlawful sexual intercourse with a girl over the age of 13 years but under the age of 16 years. He was sentence to 8 years imprisonment on each of the first two offences. The facts show that the defendant had befriended the victim by offering

[8] Criminal Case No. 19 of 2005 (Unreported)
[9] Criminal Case No. 8 of 2011 (Unreported)

her a ride on her way from school. On two such occasions he took her to his residence, where he committed the offences. One significant aggravating feature was that the defendant videotaped the first sexual encounter. The sentences were ordered the run concurrently.

R v Joel Sprauve[10] **–** The defendant was convicted for the offences of unlawful sexual intercourse with a girl under the age of 13 years and buggery. He was sentenced to 10 years for the first offence and 3 years for the second. The sentences were ordered to run consecutively. Among the aggravating features were the breach of trust (the defendant was the victim's father) and the disparity between their ages.[11]

R v Bevern Smith[12] **-** The defendant was convicted of two counts of unlawful sexual intercourse with a girl under the age of 13 years. Both the victim and the defendant were known to each other and were accustomed to frequent each other homes. On one occasion he took her to the beach and had sex with her and then took her to a friend's house where he left her. The friend then had sex with her. The friend was tried separately. The defendant was sentenced to 12 years imprisonment on each count to run concurrently.

[42] I have also noted the several cases referred to in the judgment on sentencing at the first trial of these offences. Among those which were not mentioned in the present guidelines are:

R v Kerril Gilbert[13] **–** The defendant pleaded guilty to one count of unlawful sexual intercourse with a girl of or under the age of 13 years. He was sentenced to three and a half years imprisonment.

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[10] Criminal Case No. 3 of 2010 (Unreported)
[11] The Crown has pointed out that the offending was less frequent and not for such a prolonged period as in this case.)
[12] Criminal Case No. 13 of 2000 (Unreported)
[13] Criminal Case No. 6 of 2006 (Unreported)

R v Shem Jackson[14] – The defendant was found guilty of three counts of unlawful sexual intercourse with a girl of or under the age of 13 years. The victim was 11 years at the time of the offences and the defendant was 22 years old. He had a conviction record but not for similar offences. He was sentenced for five years imprisonment on each count to run concurrently.

[43] In **Winston Joseph,** Byron CJ stated that for the offence of unlawful carnal knowledge of a female under thirteen years of age which carries a maximum sentence of life imprisonment in Saint Lucia:

> *"...starting at a minimum where the girl is not far from her 13th birthday and there are no aggravating factors at **8 years** and going upwards. It scarcely needs to be said the younger the girl when the sexual approach commences the more serious the crime. The existence of a maximum sentence of life imprisonment for this offence would allow a rapid escalation of the term of imprisonment as the age of the complainant decreases."* [emphasis supplied]

[44] Commenting on this, the learned trial judge in fixing a sentence on the first trial stated that if the starting point for this offence is eight years in a jurisdiction with a maximum of life imprisonment, then the starting point should be seven years in this jurisdiction with a maximum of 14 years. The Crown has submitted that this court should fix a new starting point and should fix it at eight years in a case where the defendant pleads not guilty.

[45] I have considerable difficulty with agreeing with my learned sister judge, and even with the guidelines filed by the Crown. The territories of our region bear real similarities with each other. I cannot see how the starting point could be 8 years in St Lucia where this offence is equally prevalent and an offender is liable to a maximum of life imprisonment (where life imprisonment actually mean the natural life of the person), and where the maximum here in the Virgin Islands is 14 years, the starting point should logically be 7 years or the same 8 years as the Crown would have it. With the greatest deference to the first court, our courts in the dispensation of justice must approach these matters with consistency. Any departure from established guidelines must be based on good reason. In my view, using a scale of proportionality between these two jurisdictions, the starting point for this offence without

[14] (2004) Referred to in the decision of Hariprasad-Charles J in the first trial.

any aggravating features in this jurisdiction should be five years with a equally rapid escalation in the sentence as the age of the victim decreases.

[46] I must also say that a starting point should be fixed in any case without reference to whether there has been a plea of guilty or not. Pleas of guilty are only to be considered only after the court has actually gone through the considerations and has set a benchmark sentence in the case.

[47] I also note in this regard that even with all the aggravating features of this case, on the first trial with a starting position of 7 years, with the victim being between nine and eleven years of age when the offences were committed, the trial judge gave the defendant 8 years. This must have been based on the totality principle as it is otherwise inexplicable how the final sentence for this offence could simply be increased by one year from the starting point in a case with all these aggravating features especially the breach of trust and the age of the victim at the date of the offences.

Indecent Assault

[48] The maximum sentence that may be imposed on an offender for the offence of Indecent Assault is ten years. The relevant provision is section 124 of the **Criminal Code 1997** as amended by Act No 8 of 2006 of the Laws of the Virgin Islands. This section states that:

> *"Any person who, makes an indecent assault on another person commits an offence and is liable (b) 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;"*

[49] This offence can be committed in a variety of ways, ranging 'from groping to near rape at the other end'[15]. The point has been made but equally it has been recognized that this is a 'nasty unpleasant offence'[16]. The cases and the sentences bear this out.

[50] I have already mentioned **Kemuel Dublin**[17] where the defendant was sentenced to 12 months for indecent assault. A series of cases relating to sentences for this offence was

[15] R v Court [1988] 2 All ER 223 at C quoted with approval by Justice Charles in R v Penn at page 18
[16] Court (ibid)

mentioned in the judgment on sentence at the first trial. As the court stated: 'Sentences involving victims under thirteen have ranged locally from a fine of $1,400.00 or six months imprisonment, to a three year suspended sentence, to 18 months, to five years, to 2 years regionally, and 3 years in the UK.'

[51] At the first trial, the court did not make reference to any starting point or benchmark, but imposed a sentence of 18 months for each of these offences. The Crown has suggested that the starting point should be 2 years. Having regard to the cases, I would think that it would be difficult to find a starting point applicable to all cases for this offence as it could be committed by a mere touch in one case and to even digital penetration in another case. I would however be prepared to suggest that in the circumstances of this case, the starting point should be eighteen months to move upwards for aggravating features.

Buggery

[52] The maximum sentence that may be imposed on an offender for the offence of buggery is ten years with or without hard labour. The relevant provision is found in **The Offences Against the Person Act Chapter 53** by its section 56 which states that:

> *"Whosoever is convicted of the abominable crime of buggery committed either with mankind or with any animal, shall be liable to be imprisoned for any term not exceeding ten years, with or without hard labour."*

[53] I agree with the guidelines that the starting point for the offence of buggery should be three years.

The Aggravating Factors

[54] A court is required to identify and have regard to aggravating and mitigating factors in these types of case. In **Winston Joseph**, Sir Dennis Byron listed the more common aggravating and mitigating factors. Of the former he stated that these were not to be considered exhaustive or ranked in any particular order.

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[17] Criminal Case No. 8 of 2009 (Unreported)

[55] The question of aggravating factors also relates what are the types of harm that may relate from the particular offence. Some of these factors are outlined in the **Sentencing Guidelines for Sexual Offences by the Sentencing Advisory Panel 2003**, which was referenced by the judge at the first trial. These include:

(i) Violation of the victim's sexual anatomy;
(ii) Exploitation of the Vulnerable Victim;
(iii) Embarrassment, Distress or Humiliation of the Victim;
(iv) Infringement of Standards of Socially Acceptable Behaviour;
(v) The physical psychological harm caused by non-consensual offences;
(vi) The relationship between the victim and the offender.
(vii) Abuse of a position of trust

[56] The Aggravating Factors in this case are as follows:

1. The acts occurred at frequent intervals and over the three-year period 2006 to 2008. I agree that this abuse was a deliberate conduct of molestation carried out over the three-year period. Whilst the frequency of the commission of some of the offences does not arise with regards some of the specific offences, to my mind it does not make this any less an aggravating feature when regard is had to the overall criminal conduct of the defendant.

2. Another aggravating feature in this case is the fact that there was a significant age difference of about 30 years between the defendant and the complainant. The complainant was approximately 10 years old at the time the sexual molestation was committed and the defendant was approximately 40 years old. I was urged by Mr. Lynch Q.C. that this difference in age should not really be given any weight as an aggravating feature or any significant weight at all for as he says, the very nature of the offences requires that the victim be under the age of 13; it does not really matter that the offender is 18 or 40 years old. I disagree. The authorities have shown and I agree that it makes a

difference when men of mature years who have lived their life and have gained experience and hopefully some strength of character those men ought to be better able to resist temptation. An offender who is socially immature is regarded as not being as culpable. An offender who is socially immature is regarded as not being as culpable. See **R. v Petrie (Marcus)** 2014 WL 7717364.

3. Another aggravating feature in this case was that his offending entailed him exploiting a vulnerable young girl. The defendant was aware that constant threats were made to this victim to send her back to St. Vincent and the Grenadines if she did not behave herself. This fear undoubtedly rendered her more vulnerable and affected her inclination to complain. Mr. Lynch Q.C. in mitigation submitted that this really fell on the breach of trust feature of this case. I of the view that this is really a separate and apart aggravating feature as her special vulnerability has really little to do with the breach of trust. It helped him to breach the trust, but is it not the breach of trust.

4. The acts of sexual molestation were accompanied by perversions (fellatio and buggery). Mr. Lynch Q.C. urged and I agree that this really affected the overall criminal conduct, and not the individual offences as these acts were all charged separately. I agree.

5. A serious aggravating feature of this case was the grooming that took place. For the outset, when he came into her bedroom in their small two-bedroom house in 2006 to hang up his pants, and he kissed her on her lips and walked out, he had started this process of grooming. He started with these minor touches, progressing into indecent assaults that grew in their aggravating nature, including digital penetration to, as he expressly said, to prepare her the real thing, then to sexual intercourse. He also showed and taught her how to access pornographic material as means of stimulation and taught her to perform oral sex.

6. Another aggravating feature is that he ejaculated in the complainant's mouth on one occasion and on her back on another occasion. It was urged on his behalf that this really could not be an aggravating feature. I disagree; this adds to the aggravation.

7. With regard to the indecent assault, some of them included direct contact with the genitalia and digital penetration. For those that involved this fellatio and digital penetration, this was an aggravating feature.

8. The complainant has suffered emotionally and psychologically, which continues even to today. It has been urged on his behalf that over the years with these types of offences, the offence itself is about assault and harm, and such harm is part of the offence. It has also been urged that she had made considerable progress. I have noted the report, which the parties agreed, would be part of this hearing. I note that Dr. Rubaine considered that the complainant social deficit pose a serious threat to her ability to live and achieve independence. In her report the Doctor states:

> *"The complainant over the duration of her life will require mild to moderate supervision as she navigates a world that will judge her based on established expectations, without knowledge of the alleged horrors that have essentially arrested her cognitive growth and development. She will find it difficult to engage in normal relationships with others, and may encounter interpersonal difficulties in her personal and professional life."*

The doctor added that:

> *"It is in this clinician opinion that [the complainant] continue with therapeutic interventions, in order to adequately address her social skills deficit and her emotions regarding her assault."*

9. Another aggravating feature was that some of the offences betrayed the sanctity of the home – the bedroom of the complainant.

10. It is also an aggravation that this complainant was a virgin and lost her virginity to the defendant. It was urged that this was integral consequence of sex with

minors below the age of 13. I do not see whether it is normal or not, how it should not be viewed otherwise than aggravating.

11. The Director's guidelines also asked this court to view the denial of gifts that the defendant had promised the complainant as an aggravating feature. Now he was clearly using the promises of gift to keep her pliant to his needs to satisfy himself, whilst it was clear that he never had any intention to give her anything. Not for one second am I suggesting that if an offender gives gifts, that it would not be aggravating. That to my mind is also aggravating but it would of course ultimately depend on the circumstances of each case. In this case, he was using these promises as a tool with regards this vulnerable child so that he could fulfill his sexual depravation.

12. Perhaps the greatest aggravating feature in this case is the abuse of authority and the gross breach of trust. This complainant was entrusted to this defendant and his wife. They fell in *loco parentis*, as if they were her parents. He is standing in the shoes of her guardian and primary caregiver. He was the one who assisted her with her homework and spent more time with her. All in the family circle trusted him. It was to his office she would go after school, to sit there with him to gain some positive life benefit from him. Even the biological father would drop her off at the defendant's office. There must have developed a bond as it were between father and child in the early points of this relationship. This changed because of his actions. He betrayed the trust imposed in him of the complainant, the father, and other family members who felt that he was the fit and proper person whose home and care she should be sent to. He had this child so compliant that even she told him that there was a risk that he would be found out because of the proposed random medical examination at her school with regards the vaginal intercourse, he was able to suggest and get her to agree to anal sex. This was a deliberate and cynical decision for his purely selfish gratification, so that he would be allowed to continue his acts without being discovered.

The Mitigating Factors

[57] Mr. Lynch Q.C. did not call any witnesses at the sentencing hearing, but he made a strong plea in mitigation on his behalf. The mitigating features in this case are as follows:

1. The defendant is a man of good character. Not only is there nothing in law known against him. He has lived an exemplary life. He has been an accomplished teacher and a member of legislative assembly for four years. He has contributed to society.

2. He is married with two children one of these being a minor.

[58] It was urged that the fact that the fact that she consented in some way (though not in law) should also be viewed in his favour. In a case where the child is under the age of 12 and the offender is at least 30 years older, there can no mitigation in this.[18] In these circumstances I have regarded it as not adding to the aggravation. The fact that he has also not shown any remorse will also not operate in his favour neither will it add to the aggravation.

[59] It was also urged that the fact that no physical violence or threats were used in the commission of the offences should also be viewed as a mitigating feature of the case. I disagree. If violence and or threats were used they would have been considered aggravating. I cannot see how if he simply abused his position of trust and did not have to use violence or threats to get his way, it should be seen a mitigating feature.

[60] In this case, this defendant mitigating factors have been greatly outweighed by the aggravating features of this case. Any claim to credit for his positive good character and contribution to society must be greatly reduced by the fact that this in an offending which involved a gross breach of trust over a prolonged period as well as other less serious

[18] See Winston Joseph v R Criminal Appeal No. 4 of 2000

aggravating features. It is also well established that good character weighs less in the scale of justice where the offending is serious and include a multiplicity of offences over a long period.

[61] In deciding what would be an appropriate sentence in this case, I am ever cognizant of the aims of sentencing. These are well established as (1) the retributive or denunciatory, (2) deterrent vis-à-vis potential offenders, the deterrent vis-à-vis the particular offender, (3) the preventative which aims at preventing the particular offender from offending, and (4) the rehabilitation object of sentencing so that he may resume his place as a law abiding member of society.

[62] The cases submitted to me shows among other matters there is prevalence of sexual offences in this jurisdiction. As one judge commented many of the offenders are persons known to the victim and many times are related to the victim. These are not cases where the offender waits in the darkness of night behind some bush or in some 'creepy alley' and pounces on the victims. These are people trusted and known to the victim. When these offences are committed by people known to the victim, they not only cause all the usual harm that sexual crimes bring to the victim, but they result in changing the social support base of the victim forever, and damages perhaps even destroys the victim ability to trust close family members ever again. In this case, the victim has lost her innocence and the result was that she was also removed from the home she had grown accustomed to.

[63] There are those in our society who must, it seems, be reminded that the true test of character is measured by the actions one performs and the responses when one is faced with temptation. A true measure and mettle of a man must be taken when he is drawn into the fire of life and he returns well tempered, strong of character and capable of holding his head up with some claim to dignity. In part, this comes from his ability to keep the trust of those who repose such trust in him, and not to betray this in the most disgraceful and gross manner.

[64] The abuse and sexual molestation of anyone, and even more so, young children, are serious offences and are prevalent in this jurisdiction. They will not be tolerated and a strong message must be sent. Offenders will face the full force of the law. The base instinct in all offenders must be brought out into the open and the light and face the full glare of justice. This is a case in which the principles of retribution in the denunciatory sense and deterrence will weigh more in the balance. In this case the considerably less weight is to be given to the factor of rehabilitation.[19]

[65] The court must be prepared to impose proper sentences to prevent such crimes from being committed, whilst at the same time not lose sight of the applicable legal principles. I reminded by Woodhouse P in **R v Puru[20]** that judges in fixing the appropriate sentence in sexual cases ought to be cognizant of the strong feelings of the society 'concerning the uncivilized abuse and coercion of women' and young girls which the crime represents. He cautioned however, that the sentencing judges':

> *"…judicial obligation is to ensure that the punishment they impose in the name of the community is itself a civilized reaction, determined not on impulse or emotion but in terms of justice and deliberation."*

[66] The point must always be made that in the course of imposing an appropriate sentence and dealing with public requirements of deterrence and retribution a court must be careful to be swayed neither by favour nor clamour'.[21]

[67] It has been urged on this court that he is the father of a minor child. Well it must be said I have taken consideration of this. This will not however, bar or reduce the sentences to be imposed in this matter. Prison sentences inevitably result in hardship to family members and young children. That is the consequence of such sentences. An offender will not be allowed to shield himself under the hardship that his offending has created for his family. As one court noted, 'the courts must not shirk their duty by giving undue weight to personal or sentimental factors. The public, which includes many people who struggle to bring up

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[19] See Dwight Bibby v Commissioner of Police, Magisterial Criminal Appeal No. 47/2003; Roger Naitram and Other v R [2010] ECSCJ No. 330

[20] [1985] LCR 817

[21] R. v Richards (Lee) [1998] 2 Cr. App. R.(S.) 34

their children with moral standards, would be poorly served if the courts gave in to the temptation."

[68] I have had regard to all of the principles set out above, and evaluated the aggravating features and mitigating features in this case. I have had regard to the defendant positive good character. I have noted and given due regard to the fact that this defendant will forever have the stain of these offences on him. That his life has changed forever. The things he was once capable of pursuing, such as public office, is no longer possible if reason prevails in our world.

[69] With all this, my initial task therefore is to look at each count and fix a sentence before I go on to consider the issue of consecutive sentences and the totality principle.

[70] I now turn to the look at each count and to fix first an appropriate sentence.

Fixing the Sentences – Considering Each Offence

[71] For the indecent assault conviction. There are seven counts. These are counts 1, 2, 3, 4, 5 8 and 11. The do not all only involve the same degree of aggravation. I consider that the 1st and 2nd counts, those that do not involve any fellatio or digital penetration, should really start on the lower end of the scale. Having regard to my evaluation of the aggravating features put in the scale with the mitigating features, I therefore consider that 20 months is suitable sentence for counts one and two. Counts 3, 4, 5, 8 and 11 have the added element that they involve fellatio and digital penetration. The sentence should reflect these aggravating features. These offences will therefore carry a term of three years on each count.

[72] Moving on the unlawful sexual intercourse, I consider that here the starting point should be as the guidelines has suggested. Both of these offences really should have a starting point of 5 years. Having regard to the aggravation as set out above, these offences are at the higher end of the range. I will therefore impose eight years for each of these offences.

[73] On the two counts relating to buggery, using a starting point of 3 years and having regard to the features of the case, he is sentenced to four years imprisonment on each count.

Consecutive or Concurrent Sentence

[74] A court must impose a separate punishment for each offence an offender is found guilty of. As has been established, 'prison sentences may run concurrently or consecutively, or there may be a mixture of concurrent and consecutive sentences.'[22]

[75] I agree with the guidelines and Mr. Lynch also appears to be agreeing that this is a suitable case for the imposition of a combination of concurrent and consecutive sentences. I repeat the guidelines as it represents the law in this area. 'Consecutive sentences are wrong in principle if they are imposed for offences which arose out of single incident.[23] However a sentence should not be concurrent simply because of the similarity of conduct or because it may be seen as part of one course of criminal conduct…. Where an offender is convicted of several similar offences committed at different times he could be sentenced to consecutive terms of imprisonment.'

[76] The authorities show clearly that where an offender commits a number of sexual offences over an extended period of time, it would be proper to impose consecutive sentences in relation to each.[24]

[77] It has been accepted that separate terms of imprisonment ordered to run consecutively is permissible even where the final combined sentence is greater what could have been ordered for any single offence.[25]

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[22] Blackstone's Criminal Practice 2012 edition para. E2.11
[23] See Noble [2003] 1 Cr App R (S) 312; see also
[24] R v L (R A) [2015] EWCA Crim 996; R v K (P G) [2015] EWCA Crim 1002
[25] See Prime (1983) 5 Cr App R (S) 127 cited in Blackstone's Criminal Practice 2012 para. E2.11

[78] These offences were not committed over a short period of time.[26] Each was a separate act committed on a different occasion. There is therefore good reason presumptively why all the sentences should run consecutively.

The Totality Principle

[79] It is accepted that when consecutive sentences are being considered, the sentencing court must impose a global sentence that is a measured response to the offender's criminality as a whole. This is the totality principle in operation. It has been said:

> *"The totality principle is that a total sentence should be arrived at which reflects all of the offending behaviour and is a just and proportionate sentence. There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive components. The overriding principle is that the overall sentence must be just and proportionate. It therefore matters not how the sentence was constructed."*[27]

[80] In seeking to find what is 'just and proportionate' the court must have regard to the 'offending behaviour as well as the factors personal to the offender as a whole'[28]. When 'cases of multiplicity offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces.' The court must look at the overall criminality and ask itself what is the appropriate total sentence for all the offences combined.[29]

[81] In approaching this task to find the appropriate total sentence, a count is permitted to direct that some of the sentence be lumped together as being concurrent sentences, but then be made to run consecutive with other sentences.[30]

[82] I now turn to that task. To my mind consecutive sentences for each of the offences charges will result in 16 years 16 months for the indecent assaults, plus 16 years for the

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[26] R v Baboukhan [2015] EWCA Crim 863
[27] R v Reynolds (Thomas) [2015] EWCA Crim 85
[28] UK Sentencing Council Definitive Guidelines June 2012; see R v C [2014] EWCA Crim 2607
[29] R v Gribbin (Daniel Peter) [2015] EWCA Crim 736
[30] R v Reynolds (Thomas) [2015] EWCA Crim 85; The People (at the suit of the Director of Public Prosecutions), Respondent v Abdulakim Yusuf, Applicant [2008] 4 IR 204A-G's Reference (No 2 of 2009); R v JQ [2009] NICA 44; See for example R v W [2014] NICA 71; R v Jones (Christopher John) [2015] EWCA Crim 31

unlawful sexual intercourse, plus 8 years for the buggery charges making a total of 41 years and 16 months. This is a startling result and far exceeds what a just and appropriate sentence should be.

[83] In applying the totality principle I am satisfied that these offences shall fall in three categories – these being the seven counts of indecent assault as the first category, the two counts of unlawful sexual intercourse with a girl under the age of 13 being the second category and the two counts of buggery being the third category. I am also satisfied that in this case, the sentence imposed in each category should run concurrently and those sentences for each category should run consecutive with the sentence for every other category. So that on an application of the totality principle:

- For the indecent assaults (Counts1 and 2 = 20 months each, and Counts 3, 4, 5, 8 and 11 = 3 years each – all the run concurrently) he will serve 3 years.
- For the Unlawful sexual intercourse – 8 years on each count to run concurrently with each other.
- For the Buggery – 4 years on each count to run concurrently with each other.

All then amounting to a total sentence of 15 years.

[84] I take one final look at this again, and again ask whether this is now a proper sentence, whether it is just and proportionate? Again going through the circumstances of this case and taking the matter in the round and looking at the factors personal to the defendant, I am satisfied that this is an appropriate sentence and it is a just and proportionate sentence in this case. These offences took place over three years - Eleven in all - Derailing and destroying a child's childhood - Involving serious aggravation.

The Issue of Delay

[85] The court however, is not finished. There is one other matter of general mitigation I must have regard to. This is the issue of delay raised by Mr. Lynch.

[86] There is authority for the proposition that where the proceedings has lasted for an overly long period it could have the effect of breaching the defendant's convention right to the fair trial within a reasonable time. Even where there is no issue of any breach of the right to a fair trial with a reasonable time it has been held that delay:

> *"… is of relevance if not to a formal assessment of Article 6 then undoubtedly to the broader question of what a just sentence is when eventually and belatedly conviction occurs."*[31]

[87] The case have shown that where there has been a prolonged delay in a matter, it may have the effect of mitigating and reducing the ultimate sentence, as it might really not be an appropriate sentence having regard to this delay.[32]

[88] Authority has shown that some meaningful discount should be given in cases of serious delay.[33] Having a criminal charge hanging over one's head for a prolonged period, without resolution has been accepted by the courts as itself representing a form of punishment. This man has been arrested and charged some 6 years ago. His first trial ended in 2011 and his conviction overturned in 2012. It is now February 2015.

[89] Asked to address me on this point, the Learned Director submitted that most if not all the delay was caused by the defendant's attempt to manipulate the courts with his various and many application. I am of the view that there has been some element of this when this defendant sought to make applications on the eve of trials particularly so in relation to this last trial he had earlier been given an opportunity to raise issues and raised none.

[90] I must say, however, that first he brought a meritorious appeal when the Court of Appeal overturned his conviction. The time therefore, spent and lost on the first trial cannot be laid at his feet.

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[31] Per Hughes LJ VP at paragraph 19 in Attorney General's Reference No 79 of 2009 [2010] EWCA Crim 338 See also Spiers v Ruddy [2008] 1 A.C. 873

[32] R. v Kerrigan (David Joseph) 2014 WL 5833936

[33] South Wales Fire and Rescue Service v Smith [2011] EWHC 1749 (Admin); R. v McGuigan (Mark) 2014 WL 7253716

[91] He has since then brought some applications that have required much legal analysis resulting in a number of written decisions, two even from the Court of Appeal.[34] At least one application, the one involving the jury point did have considerable merit; this court ruled in his favour. A defendant who maintains his innocence and uses the system in an attempt vindicate his innocence cannot be fault for making applications for that purpose. No court has ruled that he has acted in a manner to abuse the system. I am in not position to make such a ruling now. Further, I note that on several occasions, trial dates were put off so that the relevant court could hear each of the applications.

[92] Our Court of Appeal considered this matter on its own motion in **Winston Joseph v R** Criminal Appeal No. 4 of 2000. In **Winston Joseph**, the defendant had been sentenced to eight years imprisonment for unlawful carnal knowledge committed on the 16th February 1994, against a neighbour's child, a girl under the age of 13. He had been arrested in August 1994 and the preliminary inquiry began in November 1994. The defendant however, was discharged in April 1995 by the magistrate on the prosecution's failure to lead any evidence of the girl's age. The Director of Public Prosecutions then invoked his powers to reopen the inquiry and direct that the magistrate take further evidence. In March 1996, the birth certificate was then tendered at the reopened Preliminary Inquiry. It was not until April 1999 the indictment was issued. The defendant had been at liberty since his discharge in 1995. In November 1999, he was arraigned before the high court and pleaded not guilty. On his trial he was found guilty. On the issue of delay the Court of Appeal stated:

> *"The predominant circumstances which we think should influence the punishment in this case is the fact that he came up for punishment more than six years after he had committed the offence due to the malfunction of the system of justice. It worked in a slow and peculiar manner which is hard to justify. The appellant had had this hanging over his head all this time. The delay has been a substantial interference with his rights and must have affected his life. There is no indication that he has committed any other offence in the 6 year period while he was on bail. Thus the issue of rehabilitation seems to have been covered. We are satisfied in*

[34] The published decisions are as follows: Andre Penn v DPP of the BVI Criminal Appeal No. 7 of 2013 decision of Baptiste CJ (Ag.) delivered on 23rd July 2013; Andre Penn v The DPP and The Attorney General of the BVI Claim No. 166B of 2013 decision of Ellis J delivered 25th July 2013; R v Andre Penn Criminal Case No. 39 of 2009 decision of Persad J dated 22nd November 2013; Andre Penn v R Criminal Appeal (Application) No. 6 of 2013, decision of Baptiste J.A. delivered on the 29th September 2014.

> *the circumstances of this case, the fact of the conviction has vindicated the complainant, and served society's purpose of condemning the crime we do not think there is any particular benefit to the complainant or to society for the appellant to commence serving a normal term so after the commission of this crime. Had this case taken the normal course of trial within a reasonable time, the appellant would have served his sentence by the time this case came on for trial. In the circumstances of this case we feel that the justice requires that a substantial discount be given for the delay in bringing this matter on for sentence. I would therefore order that the sentence be varied to a term of two and a half years."*

[93] It is to be noted in **Winston Joseph**, the Court of Appeal justified this substantial discount of nearly 75% of the original sentence in part on the fact that there were no aggravating factors directly connected with the offence. This is a different case. It is a case of many aggravating factors. Further some of the delay must be laid at the feet of the defendant.

[94] I am of the view that this man's life has been forever changed. Having regard to the time and effort he spent trying to avoid this trial, it is clear that this matter took up most of his daily life. He would have been subject to the glare of much negative public attention. All of this would have added to his anxiety.

[95] For these reasons, as a matter of discretion, whilst some discount will be given it will not be as substantial as in the Winston Joseph's case. He is entitled to a discount for each category of offence.

[96] I have measured the discount against each of the category with a 1 year discount on the indecent assault charges, a 3 years discount on the unlawful sexual intercourse charges, and a 1 year discount on the buggery charges. He shall therefore serve a sentence of 10 years in total. I agree that the time spent on remand is to be taken into account.

[97] It is hoped that he spends this time in serious reflection and prayer that he be ready to return to society at the end of his sentence. It is this court's fervent hope that the sentence shall send a message to all likeminded persons out there. These courts will not treat lightly with sexual offences, especially those committed against minors. If not for the delay the appropriate sentence in this case would have been a total of 15 years.

[98] This Court also urges victims to speak out, as this complainant did. Let these offences come to light. Make sexual offenders accountable. This complainant must be commended for her courage in pursuing this matter through six years and two trials. This must have been a journey of real turmoil for her. It might be at an end but only time will tell as these processes may yet continue. In any event this Court hopes that she able move on with her life and that she lives a happy and productive life.

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Darshan Ramdhani
High Court Judge (Ag.)