

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO. ANUHCR2022/0056

BETWEEN:

THE KING

vs

XZ

Appearances:

Mr. Paulio Williams, Counsel for the Crown

Mr. Arthur Thomas Jr., Counsel for the Defendant

2024: January 16th, 18th, 24th 25th;
February 23rd.

SENTENCING DECISION

- [1] On 25th January, 2024 the offender referred to as XZ¹ was found guilty by a jury of his peers, of Indecent Assault and 2 counts of Incest occasioned on PD, his niece.

The Law

- [2] Section 14(1) of the **Sexual Offences Act, 1995**, states that a person who indecently assaults another is guilty of an offence and is liable on conviction to imprisonment for five years.
- [3] Section 8(1) of the said **Act**, states that a person who commits the offence of incest is liable on conviction to imprisonment - (a) for life, if committed by an adult with a person under fourteen years of age; (b) for fifteen years, if committed by an adult with a person fourteen years of age or more; (c) for two years, if committed between minors fourteen years of age or more.

¹ In order to keep the identity of the victim private the convict and she will be referred as PD and the convict as XZ.

Sentencing Guidelines

- [4] The Court is guided by the Sentencing Guidelines of the Eastern Caribbean Supreme Court, 2021, for Sexual Offences Re-Issued 8th November, 2021. The Court is grateful for the Sentencing Brief as supplied to the Court, by The Crown, prior to the Sentencing Hearing. Below the Court has set out the categories and calculations which the Court will adopt in the instant case.

Count One-step one- Indecent Assault

- [5] The Court will find the starting point by assessing the seriousness and consequent harm of the offence.

First Stage

- [6] At this stage the consequent harm of the offence is considered which includes an assessment of the evidence.
- [7] With a robust assessment of the evidence the Court has deemed that this matter falls into **Category 3- Significant**. The complainant suffered psychological harm and humiliation however there was no use of significant force as it relates to this count. XZ stopped gyrating on her once she woke up.

Second Stage

- [8] At this stage the culpability of XZ is considered in order to assess the seriousness of the offence.
- [9] Upon an assessment of the evidence, the appropriate category appears to be **Level A- High**. This is because of the following:-
- a) There was some contact with the genitalia of the complainant as she explained that her shorts and underwear were pulled down.
 - b) XZ was in a position of trust as he is her uncle and he shared a room with her and other children related to him.
 - c) He made threats to her after the incident to prevent her from reporting the matter.
 - d) There is a significant disparity between their ages; the complainant being 12 years old at the time, and XZ being between 24 and 25 years old.

Third Stage

- [10] The starting point is now determined by an interplay of the consequences and seriousness of the offending.
- [11] When assessed, the starting point falls within the range of 5% to 35%. Based on the nature of the offence and the fact that the complainant's lower garments were pulled down with her genitals exposed, a starting point at the higher end of the scale is most appropriate. In the circumstances a starting point of 30% of the maximum sentence is being applied, that is, 30% of 5 years which amounts to 1 year and 6 months.
- [12] The Court in using 1 year and 6 months as the starting point will be toggled upwards to take into account the aggravating factors by 3 years to bring the time to 3 years and 6 months. One year will be deducted to take into account his previous good character.

Fourth Stage

- [13] The starting point is then adjusted for the mitigating and aggravating factors of the offence. There are no mitigating factors which are readily apparent. However, the aggravating factors are that:-
- a. The incident was committed in the presence of other children who shared the room.
 - b. The complainant was particularly vulnerable, having no relationship with her parents resulting in her being highly reliant on her grandmother and others to include the convict for emotional support and guidance.
 - c. Total lack of remorse as evidenced by the probation report.

Step Two

- [14] At this stage the figure is further adjusted for the mitigating and aggravating factors of the convict. There are no aggravating factors apparent for the offender himself but it must be noted as stated above, that he has no previous convictions.

Step Three

- [15] This step does not apply to the convict as he went to trial.

Step Four

- [16] The Court has determined that XZ be sentenced to serve a term of two years and six months for the indecent assault count. The Court will not adjust further to take into account the totality principle.

Step Five

- [17] Finally, XZ will be credited for time spent on remand prior to trial. He was arrested on 25th October, 2021 and remained in custody until he received bail on 17th January, 2022. He was therefore in custody for 2 months and 24 days.

Counts Two and Three-Incest

Step One

- [18] The Court will firstly establish a starting point by assessing the seriousness and consequent harm of the offences.

First Stage

- [19] At this stage the consequent harm of the offence is considered which includes an assessment of the evidence.
- [20] When the evidence is assessed, this offending is deemed to be of **Category 2- High. The Court finds that although** there is no evidence or allegation of a sexually transmitted disease, the virtual complainant who was 13 years old, suffered psychological harm and humiliation, for which she is still receiving counselling. In the supplemental report by the probation department, in the victim's impact statement, the probation officer further sheds light on the harm caused to the victim by her uncle. There have been suicidal attempts, feelings of betrayal, abandonment, and fear. It was disclosed to the probation officer that ZR said to her that "he will kill her if he is sent to prison". In addition to this, under cross examination in the trial, she testified that the convict had said to her "me don't want hear about this from anyone" after the first sexual violation.
- [21] The complainant having moved from her grandmother's house is a young woman severely at risk. Oral testimony was given by the school counsellor who was counselling the complainant at school. She disclosed that the complainant's grades had fallen and that she had expressed suicidal tendencies and thoughts. The counsellor further disclosed that the

complainant felt a level of betrayal from her grandmother and other family members who refused to believe her complaints and this left her feeling confused, betrayed and hurt.

Second Stage

[22] At this stage the culpability of the offender is considered to assess the seriousness of the offence.

[23] Upon an assessment of the evidence, the appropriate category appears to be **Level A- High**. This is because of the following:-

- XZ specifically targeted his niece as he knew she was vulnerable, not having her parents fully in her life and having to grow up among many other relatives.
- He was in a position of trust as he is her uncle, and he shared a room with her and other children related to him.
- He made threats to her after the incident to prevent her from reporting the matter.
- The offence was repeated.
- There is a significant disparity between their ages; the complainant being 13 years old and the convict being between 25 and 26 years old at the time of the offending.
- He enticed PD to remain silent so as not to cast any suspicion on him as indicated in the supplemental report.

Third Stage

[24] The starting point is now determined by an interplay of the consequences and seriousness.

[25] When assessed, the starting point would be 50% of the maximum sentence, within a range of 35% to 65%. That is, 50% of life imprisonment as the complainant was 13 years old at the time. Since a life sentence is seen as equivalent to 30 years, it would properly be 50% of 30 years which amounts to 15 years' imprisonment.

Fourth Stage

[26] The starting point is then to be adjusted for the mitigating and aggravating factors of the offence. There are no mitigating factors which are readily apparent. However, the aggravating factors are that:-

- The incident was committed in the presence of other children who shared the room.
- PD was particularly vulnerable, having no relationship with her parents resulting in her being highly reliant on her grandmother and others to include the convict for emotional support and guidance.
- The offending was repeated.
- Breach of trust, he was her uncle and she therefore reposed a great deal of trust and confidence in him.

Step Two

[27] At this stage the figure is further adjusted for the mitigating and aggravating factors of the convict. There are no aggravating factors apparent to the offender himself but it must be noted that he has no previous conviction.

Step Three

[28] This step does not apply to XZ as he opted to go to trial.

Step Four

[29] The Court will use a starting point of 15 years. Having heard the testimony of the guidance counselor this morning and having read the supplemental report prepared by Mrs. Carolyn Cornelius Hector the Court is satisfied that this is an appropriate starting point. The 15 years will be toggled upwards to 18 years to take into account the aggravating factors of the offending and 1 year will be taken off for him being a first-time offender.

[30] The Court has considered the totality but will not add anything further. The Court has taken into account the mitigation as put forward by Counsel Thomas Jr. and I have read the reports as set out in the pre-sentence report.

[31] In terms of ancillary orders, I order that XZ undergo intensive treatment for sex offenders, and it is hoped that he can be rehabilitated. However, one cannot change what one does not acknowledge. It appears to this Court that the complete denial on the part of XZ shows a sick mind and a total lack of accountability on his part.

Step Five

- [32] Finally, XZ should be credited for time spent on remand prior to trial. He was arrested on 25th October, 2021 and remained in custody until he received bail on 17th January, 2022. He was therefore in custody for 2 months and 24 days.

Mitigation

- [33] The Court has been urged to consider the principles of sentencing especially retribution and rehabilitation. Counsel is of the view that the convict is a good candidate for rehabilitation. He pointed out that XZ receiving a custodial sentence will also act as a preventative measure and will serve as a deterrent to other like-minded individuals.
- [34] The Court is grateful to the Probation Officer, the Guidance Counsellor and both Counsel for their useful submissions.

Ann-Marie Smith
High Court Judge

By the Court

Registrar