

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CRIMINAL CASE NO. 22 OF 2021

THE KING

v

H.O.A

Appearances: Ms. Patrice Hickson, Senior Crown Counsel for the Crown

Mr. Israel Bruce, Counsel for the Defendant

2023: March 21

JUDGMENT ON SENTENCING

Lord Byron, '[Darkness](#)'.

"I had a dream, which was not all a dream.
The bright sun was extinguish'd, and the stars
Did wander darkling in the eternal space,
Rayless, and pathless, and the icy earth
Swung blind and blackening in the moonless air;
Morn came and went—and came, and brought no day ..."

*The names of the parties to this matter – the Virtual Complainant ("V.C.") and the convicted prisoner ("**the convicted prisoner**", "**the prisoner**", "**the convict**", or "**the father**", used interchangeably, and of witnesses whose depositions I will reference – shall not be used in this Judgment on Sentencing in order to protect the V.C. who is still, and was at all material times a Minor, and given the nature of the offences to which three of the Indicted Counts the convict pleaded Guilty.*

[1] **Thomas W.R. Astaphan, K.C., J (Ag):** On the 16th February, 2023, the Convict pleaded Guilty to three Counts on a six-count Indictment which was laid upon him by the Honourable Director of Public Prosecutions for these Virgin Islands. These six counts were all for Incest alleged against the Convict

by the Crown for having sexual intercourse with his natural daughter, the V.C. who was, at all times a Minor Child.

- [2] The Three Counts to which the prisoner pleaded Guilty are:

Primo

INCEST: Contrary to section 122 (1) of the Criminal Code of these Virgin Islands, by having sexual intercourse with the V.C., whom he knew to be his daughter, on 1st March, 2021, on the Island of Tortola. The V.C., who was fifteen years old at the time, was his natural daughter.

Secondo

INCEST: Contrary to section 122 (1) of the Criminal Code of these Virgin Islands, by having sexual intercourse with the V.C., whom he knew to be his daughter, on 9th April, 2021, on the Island of Tortola. The V.C., who was fifteen years old at the time, was his natural daughter.

Tertio

INCEST: Contrary to section 122 (1) of the Criminal Code of these Virgin Islands, by having sexual intercourse with the V.C., whom he knew to be his daughter, on 16th April, 2021, on the Island of Tortola. The V.C., who was fifteen years old at the time was his natural daughter.

- [3] The Counts set out the particulars of the offences charged against the prisoner, who at the time of the offence was 37 years old, and the facts which underpin in support of those particulars are to be furnished by a perusal of the depositions of two witnesses whose interactions with the V.C. were proximate to the events charged in the aforementioned Counts, and to whom she reported the events.
- [4] Having pleaded guilty to those Counts, the prisoner is taken to have accepted and admitted (a) the said particulars, and (b) the essential facts to be gleaned from the said depositions.
- [5] With respect thereto, the prisoner takes issue with only one alleged fact which is to be found both in the deposition of D.P., (see page 23 of the deposition), and the Submissions of the Crown, namely, that the V.C. reported that her father would call or text her to tell her that he was on his way, and she should ready herself for his arrival – which she alleged was preparatory to his sexual assaults upon her, and which would be followed by such sexual assaults. This I shall bear in mind as we go forward.

The Undisputed Facts – In Brief

- [6] The V.C. was at all material times the fifteen-year-old natural daughter of the convicted prisoner. (VIDE: the Birth Certificate of the V.C.).
- [6.1] On 1st March, 2021, 9th April, 2021, and on 16th April, 2021, the convicted prisoner had sexual intercourse with his “Blood” daughter. (see the Counts on the Indictment pleaded to by the prisoner).
- [6.2] The father would sometimes make the child consume alcoholic beverages before he subjected her to his sexual assaults. When she resisted drinking the substances, he would force her to do so. (page 23 of the depositions – that of D.P).
- [6.3] The father would, in return for him granting the V.C. permission to go out, demand and have sexual intercourse with his child. (page 22 of the depositions – that of D.P).
- [6.4] The convicted prisoner would be aggressive towards the V.C., and he would physically assault her in order to have sexual intercourse with her, especially when she attempted to resist. He would slap her, and hit her in the mouth. (ibid, page 23).
- [6.5] He would sometimes give her a “small pink pill to swallow” after he had completed his sexual assault upon the child. And also he would give her a warm Guinness to drink. This ‘pink pill’ is described by D.P. as “the Morning Pill” (ibid. pp. 23 & 24).
- [6.6] The father had sexual intercourse with his child without using a condom. (ibid. p 23).

The Disputed Fact – Brief That It Is

- [7] It is the contention of the convict that he never called or texted his child-victim telling her to prepare herself for his arrival.
- [7.1] Why would she lie about this? In the context of her comprehensive complaints to D.P. (pages 20 – 24 of the deposition) and her concise complaint to A.L. (pages 25 – 28 ibid.), I find it very difficult to accept the proposition of the convict that this did not occur. This was not a significant factor in the complaint to D.P. It appears to have been contextual, so as to show the general pattern of the father’s egregious conduct towards his daughter.

- [7.2] While I do not accept the convict's version of this evidence, in the interests of Justice, I will render it a neutral factor in this sentencing exercise.

The Victim's Impact Statement

- [8] The child-victim wrote an impact statement which I will set out faithfully, and in full.

"So About 4 years ago my life took a turn. The man I knew as my father violated me, by sexually abusing me. I did skip meals for days at a time. I felt like I was 'dirty'. I became restless. I was filled with fatigue from not sleeping. I had lash outs at teachers and friends from being frustrated and not being able to say why I was always in a bad mood. I did blame myself. I felt it was my fault for not speaking up the first time. I started doing horribly in school, barely scraping a passing grade. I felt like I didn't have a choice because he was the only person who I had to take care of me. I had nightmares about it sometimes. I can't even think about it for too long without crying. I would usually just gaze out and ruin other peoples mood. I lost a lot, including my self esteem. I' m still trying to build back the enthusiastic self like before. Just slowly healing back."

(signed by the child victim).

- [8.1] The above was handwritten by the 15-year-old victim of sexual abuse inflicted upon her by her biological father. The bold, italics and underlining were supplied by the Court.

The Road To Sentence

- [9] On the journey to sentence, the Court is required to apply the ***Eastern Caribbean Supreme Court's Compendium Sentencing Guidelines re-issued on 8th November 2021***, and to apply the Law as set out in the seminal case of ***Desmond Baptiste, et. Al. v R Crim App No 8 of 2008 (SVG)***.
- [9.1] Baptiste sets out the Main Objectives of sentencing as (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 from offending, and the offender himself from recidivism; (iii) **Prevention** – aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and (iv) **Rehabilitation** – aimed at assisting the offender to reform his ways so as to become a contributing member of society.
- [9.2] The Court has considered each of the above four main objectives of sentencing, and, has formulated the sentence which follows, treating them harmoniously – though different they are – with the Guidelines.

[9.3] The Guidelines contain six steps which are to be taken on this journey, and **STEP 1** comprises Four Stages.

[9.4] The Guidelines state: “**STEP 1** – The first step in constructing a sentence is to establish the starting point for the offence.

An incest case requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are four stages within Step 1.”

[9.5] **FIRST STAGE**

Consequence:

There are three categories of consequence of the offence: **Category 1 – Exceptional; Category 2 – High** and **Category 3 – Significant**. In assessing the harm caused by the offence, the Court is required to consider and assess the evidence.

Category 1 sets out five factors to be considered. They are;

- i. Extreme psychological and/or physical harm supported by evidence (this can come from the victim)
- ii. Extreme degradation/humiliation.
- iii. The victim is under 13 years.
- iv. The victim is particularly vulnerable.
- v. Pregnancy results as a consequence of the offence.

Category 2 sets out four factors to be considered. They are:

- i. Serious psychological and/or physical harm supported by evidence (this can come from the victim)
- ii. Significant degradation/humiliation.
- iii. Victim is under of 16 years of age.
- iv. STI results as a consequence of the offence.

Category 3 sets out one factor to be considered. That is:

- i. Category 1 and 2 factors are not present.

- [9.5.1] **The Crown** submits that the offences to which the convict has pleaded guilty are Category 2 consequences because of (i) “Serious psychological and/or physical harm, (ii) Serious degradation/humiliation, and (iii) the child-victim was under 16 years of age when the three offences occurred.”
- [9.5.2] **The Prisoner** submits that the offences are also Category 2 consequences because “the virtual complainant was under the age of 16.”
- [9.5.3] Interestingly, both parties justified their submissions on, in the Crown’s case, three factors of the four contained in category 2, - serious psychological/physical harm, significant degradation/humiliation, and age (under 16), and the Prisoner, one factor of the four – age (under 16).
- [9.5.4] They seem to accept, by their own submissions, that in determining Consequence, the Court does not have to find *all* of the factors listed under each Category to be present for the Court to determine the Consequence to be in that particular Category.
- [9.5.5] The only evidence we have of the psychological/physical harm and the degradation/humiliation suffered by the child is her Impact Statement.
- [9.5.6] Of the factors in **Category 1** the only two of the five factors not potentially present are the under 13 age factor, and the no pregnancy resulting factor. Thus, there are potentially three of the five factors available. These three factors are, if they exist, to be found in the Impact Statement of the V.C.
- [9.5.7] The only factor in **Category 2** which is not potentially present is that STI did not result as a consequence of the offences. Thus, there are potentially three of the four factors present.
- [9.5.8] Two of the three remaining factors are common to both categories, and differ only in the descriptor employed – **Extreme** psychological and/or physical harm, and **Extreme** degradation/humiliation in **Category 1**, while in **Category 2** they are described as **Serious** psychological and/or physical harm, and **Significant** degradation/humiliation. Thus, one must examine the Impact statement to assess, both qualitatively and quantitatively, the level of the “consequences” of the prisoner’s acts against the V.C.

[9.5.9] Psychological and/or physical harm:

Psychological:

- i. "I did skip meals for days at a time."
- ii. "I felt I was 'dirty'."
- iii. "I became restless. I was filled with fatigue from not sleeping"
- iv. "I had lash outs at teachers and friends from being frustrated and not being able to say why I was always in a bad mood."
- v. "I did blame myself."
- vi. "I felt it was my fault for not speaking up the first time."
- vii. "I started doing horribly in school."
- viii. "I felt like I didn't have a choice because he was the only person who I had to take care of me."
- ix. "I had nightmares about it sometimes."
- x. "I can't even think about it for too long without crying."
- xi. "I would usually just gaze out and ruin other peoples mood."

Physical:

- i. D.P said in her deposition – quoted above at paragraph [6.5] – that the V.C. told her that her father would slap her and hit her in the mouth when she resisted his sexual assaults, and if, during the acts she made "too much noise".
- ii. "...he would put her against the bed forcefully" (page 23 of the depositions – D.P.)

Degradation/humiliation:

- i. "I did blame myself."
- ii. "I felt like it was my fault..."
- iii. "I felt like I didn't have a choice..."
- iv. "I lost a lot, including my self esteem."
- v. "I am still trying to build back the enthusiastic self like before."
- vi. "Just slowly healing back."

The Victim is particularly vulnerable:

- i. "I felt like I didn't have a choice because he was the only person who I had to take care of me."
- ii. The sexual abuser is her father.
- iii. The V.C. lived alone with the prisoner.

[9.5.10] Based upon the V.C.'s foregoing well-articulated impact of the sexual assaults upon her, it is the Court's assessment that the psychological harm is more than just "serious"; it is extreme.

The degradation/humiliation impact is likewise greater than “significant”. It is in the Court’s judgment extreme, and, it is beyond argument that the child is “particularly vulnerable”.

[9.5.11] In consequence, it is the Court’s judgment that the **Consequence is Category 1**.

SECOND STAGE:

[10] “The second stage is to consider seriousness by assessing the culpability of the offender. Levels of seriousness may be demonstrated by one or more of the following.”

[10.1] There are two Levels: “**Seriousness – Level A – High**, and **Seriousness – Level B- Lesser**.”

[10.2] Level A – High consists of 12 factors, while Level B is “Any other case”.

[10.3] **Counsel for the prisoner** submits that the seriousness is “**Level A – High**” (see paragraph 7 of Counsel’s written submissions where it is stated that “... the following are taken into consideration; (a) position of trust breached, (b) the offence was repeated, (c) the disparity in age between the offender and the offended (d) it can be said that the VC was in a somewhat vulnerable position.”); and **Counsel for Rex**, at paragraph 12, page 2 of their submissions, submits that the seriousness is **Level B – Lesser**. Counsel founds this submission thus: “ ... there was an abuse of a position of trust, specifically targeting a vulnerable child, significant disparity of age and the offence was frequently repeated.”

[10.4] This Court agrees with both Counsels’ identification of the existing elements under Level A – High. What the Court is somewhat perplexed by is the Crown’s submission that, given their identification of 4 Level A elements, they still submit that it is a Level B seriousness matter.

[10.5] For the reasons which follow, the Court finds that the seriousness of offence is **Level A – High**.

i. There was an abuse of position of trust.

ii. The convict specifically targeted a vulnerable child.

lii The offence was frequently repeated – between the 1st day of March, 2021, and the 16th. Day of April, 2021, he sexually abused the child victim. That is too frequent. In fact, one occasion is one too many, and three in that time-frame is frequent

iv He used violence against the child.

v There is a significant age disparity.

vi The evidence discloses behavior by the prisoner which is guised intimidation.

THIRD STAGE:

- [11] This stage provides a Table to identify the Starting Point of the sentence, with the range of the sentence.
- [11.1] Having therefore found the Consequences to be Category 1, and the Seriousness to be Level A, mandates that the Starting Point is 65% of X, with X being the maximum sentence permitted by the Act – 10 years' imprisonment and the Range being 50% to 80% of the ubiquitous X.
- [11.2] **The Starting Point FOR EACH COUNT is therefore 6.5 years, or 78 months, and the Range is between 5 and 8 years (60 months and 96 months).**

FOURTH STAGE

STEP 1

- [12] Having determined the Starting Point, the Court is now required to consider the aggravating and mitigating factors *of the offence*, and to adjust up or down accordingly.

AGGRAVATING FACTORS

- i. The act of sexual intercourse was repeated. Add 6 months to the SP = 84 months;
- ii. The prisoner had sex with the child in order for her to be able to go out to meet her friends. Add 6 months. The sentence now stands at 90 months.
- iii. The prisoner made the child use alcohol in preparation for his sexual abuse of her. Add 6 months. Sentence is now 96 months.
- iv. There is uncontested evidence of the prisoner ejaculating in the child victim. Add 18 months. The sentence is now 114 months.
- v. Violence was used against the child. Add 6 months. The sentence now stands at 120 months.
This is the maximum permitted by the section.
- vi. The child was under the age of 16 years old.
- vii. The prisoner would punish the child by having sexual intercourse with her.
- viii. The V.C is the blood child of the prisoner.

- ix. It is misfortunate that the last three aggravating factors can attract no uplift of the sentence.

MITIGATING FACTORS

- [13] There are no mitigating factors *of the offence*.

STEP 2

- [14] The Court will now consider the Aggravating and Mitigating Factors *of the offender*.

- [14.1] There are no aggravating factors *of the offender*.

- [14.2] The mitigating factors of the offender are (i) he has no previous convictions. While the prisoner's submissions state that he has shown remorse, there is nothing, other than that submission, before this Court to establish this. The Court will reduce the sentence by 3 months, and it now stands at **117 months**.

STEP 3

- [15] Credit is to be given for the Guilty Plea. Contrary to Counsel for the prisoner's submission, the record shows that the guilty pleas entered were not entered at the earliest practicable opportunity. In fact, the Court's Record shows that the prisoner appeared in Court on 14th January, 2022, on 18th February, 2022, on 14th March, 2022, on 12th April, 2022, on 13th June, 2022, with Counsel for the first time, on 28th September, 2022, on 7th October, 2022, on 20th October, 2022, on 25th October, 2022, on 24th November, 2022, when he pleaded 'Not Guilty', on 10th February, 2023, and on 16th February, 2023, when he changed his Pleas to Counts four, five and six to 'Guilty'. It cannot, therefore, be seriously argued that the prisoner entered "...a guilty plea ... at the earliest practicable opportunity." In fairness to the prisoner, the Court will assume that the earliest practicable opportunity would have been the 13th June, 2022, when he appeared with Counsel. I note that he entered Not Guilty Pleas on 24th November, 2022. In these circumstances, the Court is not inclined to give any credit for the guilty plea entered on 16th February, 2023. The Guidelines state that "Credit will usually reduce significantly the later the plea." In this case the Pleas were entered on the day the trial was to commence. Therefore, the Court will reduce the sentence by 5% for his guilty pleas which reduces the sentence for each offence to 111.5 months which I will round down to 111 months for each offence

STEP 4

- [16] Step 4 requires the Court to consider whether to adjust the figure if there is more than one offence. Given the nature and frequency of the offences, their impact on the young child victim, the abhorrence which Society and the Legislature holds such offences and offenders, the danger to society of the offender, having looked at the totality of the criminal behavior, and the Court having asked itself what is the appropriate sentence for each (and compendiously) all three offences of Incest, the Court declines to make any adjustment to the 111-month sentence on each Count.

STEP 5

- [17] Credit is to be given for time spent on remand. The Court does not have the time which the prisoner has spent on remand, but that time is to be deducted from the total sentence which shall be passed on the prisoner.

STEP 6

- [18] There are no ancillary orders which the Court can make in this case. The child's father has sexually abused her; he is going to prison for that conduct.

Sentence

- [19] In all of the circumstances the prisoner is sentenced as now follows:

On Count Four – Incest, the prisoner shall serve **111 months in prison**.

On Count Five – Incest, the prisoner shall serve **111 months in prison**.

On Count Six – Incest, the prisoner shall serve **111 months in prison**.

The sentences shall run consecutively, for a total of 333 months in prison, less time spent of remand.

- [19.1] The prisoner shall be eligible for Parole after serving 240 months of the sentence, and having completed an approved counselling or rehabilitation program, pursuant to section 9 of the Parole Act of these Virgin Islands.

- [20] Finally, it would be remiss if the Court were not to ask the question ‘why wasn’t the prisoner charged with Rape, contrary to section 117. (1) of the Criminal Code?’
- [20.1] Section 117. (1) states that “A man who rapes a woman commits an offence and is liable on conviction to imprisonment for life.”
- [20.2] Subsection (2) of section 117 defines rape as: “A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse did not consent to it, and ... (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consented to it.”
- [20.3] “Woman” is defined in section 116. (1) of the Code as “woman” includes a girl”
- [20.4] Subsection (5) deems a woman not to have consented “...if her acquiescence to sexual intercourse is obtained by threat of force or use of force, or by means of threats or intimidation of any kind, or by fear of bodily harm, ...”
- [20.4.1] The evidence on the depositions support the foregoing: (see the deposition of D.P)
- [20.5] On a charge of rape the jury “... may find the accused guilty of ...” any of the lesser included offences set out in sections 118, 119, - sexual intercourse with a girl under 16 years old - 124, 129, 130, 131 or 183.
- [20.5.1] The same evidence supports some of these lesser-included offences.
- [20.5.2] Counts of Incest could have also been charged on the Indictment, along with rape.
- [21] The Court started this judgment with a quote from Lord Byron’s poem “Darkness”, which represents the turmoil which a young lady would experience where she is subjected to sexual acts by her father, like in this case.
- [22] Therefore, the Court chooses to end this judgment with a more optimistic and uplifting ode, so that young lady can look to the “painted sky” to complete her slow healing process – “Just slowly healing back.” (Victim Impact Statement).

[22.1] It is the fervent prayer of this Court that the young child overcomes the devastating impact of her father's criminal acts against her, and finds herself again, her mental and spiritual freedom, and Peace.

“Be”

*Lost
On a painted sky
Where the clouds are hung
For the poet's eye
You may find him
If you may find him*

*There
On a distant shore
By the wings of dreams
Through an open door
You may know him
If you may*

*Be
As a page that aches for a word
Which speaks on a theme that is timeless
And the one God will make for your day*

*Sing
As a song in search of a voice that is silent
And the sun
God will make for your way*

*And we dance
To a whispered voice
Overheard by the soul,
Undertook by the heart
And you may know it
If you may know it*

*While the sand would become the stone
Which begat the spark
Turned to living bone
Holy, holy
Sanctus, sanctus*

*Be
As a page that aches for a word*

*Which speaks on a theme that is timeless
While the one God will make for your day*

*Sing
As a song in search of a voice that is silent
And the one God will make for your way*

Writer(s): Gilbert Becaud, Neil Diamond “

[23] There can be no more heinous, evil and destructive act that a man can commit than that of having sexual intercourse with his own child. There is, and can never be any legitimate mitigating factor for such an offence. There is no worse betrayal of a child by her father than this.

[23.1] The child victim will grow into a young woman. She will see herself in the mirror and feel shame. Not a shame of her own, but a shame inflicted upon her by her own father. She will be shadowed by those shameful acts of her own father for the rest of her life.

[23.2] She will feel diminished, through no doing of her own, but because of the wicked man who her father is.

[23.3] She will hold her child in her arms and, with tears in her eyes and a heart broken by her father, wish for that child that she will never have to endure that which the Mother has been made to endure by her shameless father.

[23.4] She will sit on her porch, gazing at her young grandchildren playing happily and innocently in the yard and, with her ever-present tears in her eyes, beg The Lord to spare them that which she has had to endure for her entire life because of a father who lacked empathy; who was selfish; who was wicked; who was evil; who changed her life forever – for the worse – just to satisfy his sick lust.

[23.5] All the while she will blame herself, though blameless, for the despicable acts of her own father.

[23.6] The prisoner was not charged under section 117 of the Code, as well he could have been. Had he been so charged, he would have had to face the Mighty Sword of Justice that emanates from a liability to a Life Sentence.

[24] But for the constraints of the maximum sentence of 10 years in prison under the section which the convict was charged, he would have faced the Sword of Damocles; as well he should.

[24.1] The constraints of the Sentencing Guidelines – from which a court may depart, with good cause – restricted the sentences passed, taking into account what had to be taken into account. But for this, ‘Retribution’, as contemplated in Baptiste, would have seen its day with the prisoner being visited with the maximum possible sentences for these wantonly wicked crimes against his own child. His own daughter. His own Blood.

[24.2] There can be no pretense of “Rehabilitation” for this man. The only rehabilitation that is of moment, is that of his own child whom he has so callously hurt.

[24.3] Deterrence would have been faithfully engaged if this convicted man was charged appropriately, and sentenced accordingly. Prevention would then have been adequately served.

Quod Erat Demonstrandum

[25] This is the Judgment of the Court.

Thomas W. R. Astaphan K.C.
High Court Judge (Ag.)

By the Court

Registrar