

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CRIMINAL CASE NO. 4 OF 2022

REX

and

P. P

Appearances: Ms. Patrice Hickson, Senior Crown Counsel for the Crown
Mr. Michael Maduro, Counsel for the Defendant

2022: November 25

2023: January 20

JUDGMENT ON SENTENCING

[1.0] **Thomas W.R. Astaphan, K.C., J:** Given the fact that the Virtual Complainant was a child under the age of 13 at the time of the offences; combined with the sexual nature of the facts in this case; bearing in mind the relationship between the Defendant and the Virtual Complainant is one of Step-Father and Step-Daughter, the name of the Defendant in the heading is reduced to the initials “P.P.” so as to protect the identity of the young Virtual Complainant. Hereinafter, the Defendant and the Virtual Complainant will be referred to as “P” and “K”/”child – victim” respectively.

“P..... robbed me of my childhood and has taken away my sanity and my dignity. My mom married this man and brought him to live in our home and I never expected him to do this malicious act to me. He is a demon and a heartless individual who has no regards for young girls” [Victim Impact Statement dated 10th. January, 2023]

[1.1] These are the words of the child victim, K, born on 17th December, 2008, written on 10th. January, 2023. At 8 years old K was indecently assaulted by her mother’s then boyfriend, P, in 2017.

- [1.2] Between 1st September, 2019 and 30th September, 2019, at age 10, she was the victim of sexual intercourse inflicted upon her by the said P.
- [1.3] Between the 1st of January, 2020, and the 31st December, 2020, when aged 11, she was *again* the victim of sexual intercourse inflicted upon her by the said P.
- [1.4] In January, 2021, at the age 12, K was *again* the victim of sexual intercourse inflicted upon her by the said P.
- [1.5] Each of these three latter acts inflicted upon the child – victim by P constitutes the offence of *Rape* contrary to section 117(1) of the Criminal Code of these Virgin Islands, which statutory offence, punishable by a maximum of life imprisonment, does, by virtue of subsection (6)(a) of section 117, contain the lesser included offence of *Statutory Rape* contrary to section 118, which is punishable by imprisonment for a maximum of 14 years.
- [1.6] P was not charged with *Rape* contrary to section 117 of the Code.
- [1.7] He was also not charged with *Statutory Rape*, contrary to section 118 of the Code.
- [1.8] By the time of these three latter defilements of K, P had married her mother, and was therefore the child - victim's step-father.
- [1.9] P was charged upon indictment on four counts; three Counts of *Incest* in relation to the acts of sexual intercourse, contrary to section 122(1) of the Criminal Code, punishable by imprisonment for a maximum of 10 years, and one Count of *Indecent Assault* in relation to the touching of the child – victim's derriere, contrary to section 124 (1) of the said Code, punishable by imprisonment for a maximum of 5 years.
- [1.10] Upon his arraignment on 21st November, 2022, P pleaded not guilty to each count, and he was tried by a Jury of his Peers who rendered a verdict of Guilty on each count at 4:05 p.m. on Friday, 25th November, 2022.
- [1.11] This is the Judgment on Sentencing.

THE FACTS AS WERE FOUND BY THE JURY BY THEIR VERDICTS OF GUILTY ON EACH COUNT

[2.0] The Assault – Count 4:

- (i) On a day in December, 2017, after Hurricane Irma had hit the Virgin Islands in September of that year, the child - victim asked P to assist her in taking her mattress from her bed in her room, to her mother's bedroom.
- (ii) After he had taken the mattress off the bed, he leaned it against the wall. The child - victim was then standing on the bedframe. P walked over to her and touched her on her derriere. She was 8 years old. P was her mother's boyfriend who enjoyed a residential visitation relationship.
- (iii) The child - victim wrote a letter stating that P had touched her, and that she wanted to kill herself. She crushed the letter and threw it in her room. Sometime later, her mother found the letter, confronted the victim about its contents, and she responded that she was joking.
- (iv) The Jury found P guilty of this Indecent Assault - Count 4. The maximum penalty for this offence is 5 years in prison.

[2.1] The First Act of Incest – Count 1:

- (i) One weekend day in 2018 while the child - victim's mother was away from home at work, the child - victim was in her bedroom.
- (ii) P entered the bedroom, lifted her up, placed her on the bed, held her two hands in one of his hands, moved her pants and underwear to the side, took out his penis and entered her. She was 9 years old. He was her mother's husband; her step-father.
- (iii) The Jury found P guilty of Incest – Count 1. The maximum penalty for this offence is 10 years in prison.

[2.2] The Second Act of Incest – Count 2:

- (i) One weekend, between January, 2018 and December, 2020, the victim's mother's friend came to spend the night with them.
- (ii) The victim and her mother's friend were in the victim's bedroom.
- (iii) P came by the bedroom door and asked the victim to do something for him. She left her room.
- (iv) P carried her to the living room. He told her "let's go to the living room", and he walked beside her. She described this as he carrying her.

- (v) The child sat on the couch in the living room.
- (vi) P lifted the child's leg, moved her pants and underwear aside, took out his penis and had sexual intercourse with her.
- (vii) The child pushed P off and went to her room.
- (viii) The victim said that P told her that she must not tell her "mother because I don't want to hurt her".
- (viii) The Jury found P guilty of Incest – Count 2. The maximum penalty for this offence is 10 years in prison.

[2.3] The Third Act of Incest: - Count 3

- (i) Around noon on a day in January, 2021, the child was in her mother's room packing her mother's bag. Her mother was on the road.
- (ii) P entered the room, forcibly placed the child on the bed, moved her shorts and underwear to the side and had sexual intercourse with her.
- (iii) K went to her room and locked herself in until her mother returned home.
- (iv) The child described her pants which she was wearing on this occasion as "P.E. shorts above knee, just above knee", and on the other two occasions as "tights" that are worn by girls "under their school skirts ". A "stretchy" material. On each occasion P wore basketball shorts.
- (vi) The Jury found P guilty of Incest – Count 3. The maximum penalty for this offence is 10 years in prison.

[2.4] K told the Court that on each occasion when P assaulted her she was scared to tell her mother – that is, until September, 2021 when she told her brother who lives overseas, on a Facetime call, and he told their mother.

[2.5] Upon being confronted by the child's mother in the presence of K, P clasped his hands, got on his knees and began to beg the victim saying that "this is jail wuk".

[2.6] The child's mother called P's mother and told her that P was molesting her daughter. P and K were in the room, and K's brother was present via Facetime as well. The call was on speakerphone. P said that he touched the child, "but [I] don't know what came over [me]."

[2.7] K, stated in her Victim Impact Statement of 10th January, 2023, *"After this traumatic time of my life, I began going through the darkest of darkest days that I have ever experienced. There were days where I thought I did not have a life. I felt so unloved and even though sun was shining, my life appeared to be so dark and quickly went downhill."*

FORMULATION OF SENTENCE

[3.0] This Court is required to apply the principles enunciated by Sir Denis Byron, Chief Justice, as he then was, in the case of **Desmond Baptiste, et. al v R. Crim App No 8 of 2008 (SVG)** and the **Sentencing Guidelines** promulgated by the Eastern Caribbean Supreme Court.

[3.1] In **Baptiste**, the Main Objectives of sentencing are stated as being:

- (i) **Retribution** – in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;
- (ii) **Deterrence** – to deter potential offenders and the offender himself from recidivism;
- (iii) **Prevention** – aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and,
- (iv) **Rehabilitation** – aimed at assisting the offender to reform his ways so as to become a contributing member of society.

These principles are borne in mind throughout this sentencing construction.

[4.0] The **Sentencing Guidelines** consist of six Steps which the Court is obliged to follow, unless there is good reason for departure.

[4.1] **STEP 1:** The first step in constructing the sentence is to establish the starting point for the offence. In order to do so, the Court is required to assess the seriousness of the offence and its consequences by reference to the harm caused.

[4.2] There are four Stages within Step 1.

- [4.3] The First Stage requires an assessment of the evidence in order to establish the category of the offence by reference to the harm caused by the offence. There are three categories: **Category 1 – Exceptional; Category 2 – High, and Category 3 – Significant.**

I shall examine the evidence in relation to each separate offence for which P was convicted together, and the finding of the Consequence category will be in respect of each.

- [4.4] **Category 1 – Exceptional** contains six elements the presence of which establishes the offence as a category 1 consequence. This list is not declared to be exhaustive.

Elements: (i) Extreme psychological and/or physical harm supported by evidence (this can come from the victim).

(ii) Extreme degradation/humiliation

- (a) The Victim's Impact Statement, from which two excerpts are quoted above, says this at its fourth to sixth paragraphs:

"From being sociable with my friends to not being able to socialize at all, it all felt like everything was just taken away from me. There were days I would not speak to anyone. I was absolutely embarrassed. School was no longer a place for me to learn. It was a place where children would look and stare at me, from different side of their eyes and I felt as if they were bad talking me. When I found out they were talking about my situation it bothered me to where I would not go to classes or assembly. This took a heavy toll on me academically, dropping off the honour roll and failing in my subjects that I would ace. On one occasion some students wrote about the incident on the bathroom wall which resulted in me getting angry and wanting to fight ...

I completely lost my self-esteem. No one had any idea of what I was really going through. They saw my face but deep inside I was tearing up, crying long days and nights, praying to God hoping my days would be over. I even contemplated taking my own life. My body became numb and life was not meaningful to me anymore.

Every day a different negative thought crept into my mind but I thank God that he kept me in a strong enough state of mind where I lasted through those days. I felt like my world was going to end sooner than later. My freedom was taken. My livelihood was gone. It was me against the world. Every day I looked in the roof and asked God why me because I did not

deserve this. No young girl should have to experience this terrible feeling. I do not wish my dreadful situation upon my biggest enemy."

- [4.5] I find that both Elements (i) and (ii) are firmly and undoubtedly established for all four offences by what is quoted above from the Victim Impact Statement of this, now 14-year-old child.
- [4.6] Elements (iii), (iv), (v) and (vi) are:
Use of extreme force;
Victim is under 10 years of age;
Victim is 65 years and over;
STI results as a consequence of the offence.
- [4.7] What constitutes "extreme force"? Does it have to be that the child – victim must be beaten? Physically put into pain? Or does it suffice that the perpetrator forces himself on the child – victim and sexually assaults her? Is "extreme force" the same for a child – victim as it is for a robust 25-year-old woman? Is it a mechanical "thing" capable of objective definition? Or is it the impact on the victim; particularly a child – victim who is 8 years old when the assaults began, and who continued to be victimized by her then Step-Father forcing himself upon her and having sex with her between the ages of 10 and 12 years old?
- [4.8] I am of the considered opinion that "extreme force" is, in the context of a sexual offence against a child – victim, not to be restricted to physical force alone, but includes the manner of inflicting the sexual assaults upon the child – victim, the relationship between the child – victim and the perpetrator, and the continuum over which these assaults took place compendiously. K gave evidence of her being scared to complain to her mother about the assaults. P told her, at least on one occasion, not to tell her mother of the assault. The assaults all took place within the Sanctuary of the child – victim's Home. On at least one occasion P held the child – victim's hands – effectively rendering her helpless – and sexually violated her.
- [4.9] I find on the facts of this case, that the Convict employed extreme force against the child – victim in carrying out each of his several sexual assaults against her, save for the sexual assault in 2017.
- [4.10] The child – victim was under 10 years old when the sexual assault for which P was convicted occurred in 2017, and I so find.

[4.11] Neither of elements (v) and (vi) are engaged.

Note: That the elements are disjunctive is evidenced by the fact that elements (iv) and (v) cannot both be present at the same time, if there is only one victim, like in this case.

[4.12] Based upon the foregoing findings, the Category of the offences are each **Category 1 – Exceptional**.

[5.0] **The Second Stage: Seriousness of the Offences**

There are two levels of seriousness: Level A – High and Level B – Medium.

[5.1] This Stage says that “Levels of seriousness” may be demonstrated by one or more of the following: (what I refer to as ‘elements’). There are 14 listed elements, five of which I find to be present based on the evidence in this case.

[5.2] They are:

- (i) In relation to the Incest offences, penetration of the child – victim’s vagina;
- (ii) In relation to all offences, abuse of position of trust – Step – Father,
- (iii) In relation to at least one conviction of Incest, steps were taken to prevent when P told K not to tell her mother about the sexual intercourse which he had inflicted upon K.
- (iv) In relation to all the offences, there was a significant disparity in age – the child victim was an 8-year-old when the Indecent Assault occurred, and 10 and 12 when the other Incest offences occurred – and P was an adult man at all times.
- (v) Over the period January 2018 to January 2021, P committed Incest by force against K a total of 3 times. I consider that three sexual assaults against a child over a 3-year period to be frequent.

[5.3] In the result, I find the **Seriousness Level to be Level A - High**.

Third Stage

[6.0] Having determined the consequence and level of seriousness of the offences, I now determine the Starting Point of the sentences.

[6.1] The Guidelines say that at Category 1 consequence and Level A seriousness the Starting Point is 65% of the maximum sentence, with the range being 50-80% of the maximum sentence.

- [6.2] 65% of the maximum sentence for Counts 1, 2 and 3 is 6.5 years (six years and six months, or 78 months). 65% of the maximum on Count 4 is 3.25 years (three years and three months, or 39 months).

Fourth Stage

- [7.0] The Fourth Stage addresses the Aggravating and Mitigating Factors of the offence.

[7.1] **Step 1 - Aggravating and Mitigating factors of the offence:**

- (i) Having engaged in stages 1 and 2, the victims tender age, the frequency and manner of the assaults, and the relationship between the victim and the perpetrator, there are no aggravating factors of the offence.
- (ii) There are no mitigating factors of the offence.

[7.2] **Step 2 – Aggravating and Mitigating factors of the offender**

Aggravating factors:

- (i) The convict has shown no remorse. In fact, he has demonstrated a callous indifference to the offences he has committed against the child – victim.
- (ii) The Social Inquiry Report, at page 11, says this: *"Notably, he did not acknowledge his responsibility in carrying out the offences. Mr. P's expressions of remorse were also focused on how the offence negatively affects his reputation."* I will add six months to each sentence, so that on each of Counts 1, 2 and 3 it now is 7 years, and on Count 4 it now is 3 years and 10 months.
- (iii) Further, in the Social Inquiry Report, P blames the child – victim and her mother for his committing the offences at page 11: *"Mr. P expressed acceptance of his guilt in the commission of the offences. However, he maintained that his sexual contact with the victim was consensual and sought to justify the same by blaming the victim's alleged seductive behavior, identifying the difficulties within his intimate relationship and lack of sexual fulfilment as factors which influenced his offence."* At page 6 of the Report this is stated: *"He alleged that in response (to allegations made by his wife of his infidelity) [his wife, the victim's mother] withheld sexual*

intimacy and would 'nag' him about the reports, which he claimed in turn made him vulnerable to the victim's alleged advances" Further, at page 2 of the Report this is stated: "Mr. P accepted that he had committed (the offences). However, he maintained that he had not raped the victim and attributed the offences occurrence to the victim's reportedly provocative behavior. He stated 'I sorry about that and I apologize. I don't like that my name tormented by names like 'rape' and 'molested'. I'm not that kind of person.'" I will add 1 year to Counts 1, 2 and 3 so that they are now at 8 years each.

- (iv) Shockingly, Mr. P as an adult person and her Step-Father should have immediately reported her alleged provocative and seductive behavior, rather than succumb to it, if indeed it ever happened.

Mitigating Factors:

- (i) The convict has no prior convictions. Minus 1 year from Counts 1, 2 and 3, and on Count 4. Now, the sentences on each of Counts 1, 2 and 3 is 7 years, and on Count 4 is 2 years and 3 months.

[8.0] Step 3 Guilty Plea

This is not applicable.

[9.0] Step 4 Sentencing for more than one offence and Dangerousness

- [9.1] Given the conduct of the convict with respect to his repeated sexual attacks on the child – victim, his relationship to her by virtue of marriage, and his denial of responsibility, along with him blaming the victim and his wife, I consider him to be a clear and present danger to society.

SENTENCES

- [10.0] Based on the foregoing, I hereby impose the following sentences:

1. On Count 1, Incest by a Man, P is sentenced to **7 years** in prison.
2. On Count 2, Incest by a Man, P is sentenced to **7 years** in prison.
3. On Count 3, Incest by a Man P is sentenced to **7 years** in prison.

Reflecting society's and the legislatures abhorrence for this offence, and for the offender, and given the severe impact on the child – victim as manifested in her victim impact statement these sentences on Counts 1, 2 and 3 are to run consecutively.

4. On Count 4, Indecent Assault, P is sentenced to **2 years and 3 months** in prison.

The sentence on Count 4 is to run concurrently with the sentence on Count 1.

[10.1] P is to be given credit for time spent on remand.

[10.2] In accordance with Section 9 (1) of the Parole (Amendment) Act, 2014, and given the egregious nature of his offences, he shall be eligible for parole after having served 160 months of his sentence, as well as having completed an approved counselling or rehabilitation programme.

Thomas W. R. Astaphan K.C.

High Court Judge (Ag.)

By the Court


Registrar