

BRITISH VIRGIN ISLANDS

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

BVIHCR2009/0031

BETWEEN:

THE QUEEN

-v-

ANDRE PENN

Appearances:

Mrs. Elizabeth Hinds Director of Public Prosecutions and Ms. Jude Hanley, Crown Counsel
for the Crown

Mr. Dane Hamilton QC and Mr. Herbert McKenzie for the Defendant

2011: March 25

2011: March 31

JUDGMENT ON SENTENCING

(Criminal Law – Sentencing – Offences against the Person – Sexual Offences – Unlawful
sexual intercourse with a girl under thirteen – Indecent Assault – Buggery – Sentence-
Matters to be considered)

Introduction

[1] HARIPRASHAD-CHARLES J: On 2 March 2011, the defendant, Andre Penn was found
guilty by a unanimous jury of the following offences:

- (i) 7 counts of Indecent Assault committed between 2006 and 2008 on a girl
under 13 years of age;
- (ii) 2 counts of unlawful sexual intercourse committed in 2007 and 2008
respectively with a girl of or under 13 years of age; and
- (iii) 3 counts of buggery committed in 2008 on a girl of or under 13 years of
age.

[2] Mr. Penn is now before the court for sentencing on these 12 counts.

The salient facts

[3] The salient facts of the case as presented by the Learned Director of Public Prosecutions, Mrs. Hinds are as follows: Mr. Penn is married to one of the Virtual Complainant's (the "VC") aunts. The VC was born in December 1996 in St. Vincent & the Grenadines. She came to the British Virgin Islands ("the BVI") in 2005. From about March 2006, the VC began living with Mr. Penn and her aunt. Prior to that, she was raised by various members of her father's family. She has never lived with both of her parents.

[4] While living with the Penns, the VC and Mr. Penn had a very good relationship. He assisted his wife in taking care of the VC. He transported her to school. He kept her at his office after school until his wife was ready to go home. He would leave with the VC to collect his wife and they would all go home to Josiah's Bay together. He assisted the VC with her school work. He along with his wife visited her school to speak with her teachers. All in all, they were interested in the welfare of the VC.

[5] Before September 2008, the VC took the bus from school. She would be at her aunt, Mrs. Frett's business premises or with her grandmother or at Mr. Penn's office from between 3:30 p.m. to after 6 pm. From September 2008, the VC took extra lessons. The arrangement was that her father would collect her after lessons ended and he would take her to Mr. Penn's office. She would arrive there shortly after 5:00 p.m. On Fridays, her school would close early and she would use the bus to either go to Mrs. Frett's store or to Mr. Penn's office.

[6] The VC occupied the second bedroom in Mr. Penn's home. It was the bedroom in which Mr. Penn kept his clothing even before the VC had moved in. He continued keeping his clothes in her room.

[7] On 11 February 2009, the VC was ill at school. She unwillingly spoke to her teachers. As a result, the school called in the Social Development Officers and the Police. The VC was taken to Peebles Hospital where she was medically examined. Her hymen was missing.

- She identified Mr. Penn as the person who had sexual intercourse with her. She was also found to be suffering from a yeast infection. That very day, she was removed from Mr. Penn's home and taken to reside with Mrs. Frett and her family. As a result of what the VC told the police, charges were instituted against Mr. Penn.
- [8] No specific dates were given so the charges were framed between 1 January and 31 December in the relevant year. Additionally, the levels of seriousness varied from count to count.
- [9] The VC's evidence was to the effect that Mr. Penn began the assaults on her from 2006. It began by him entering her room to hang up his pants and while doing so, he kissed her on her lips and kept moving. Again, in 2006, he entered the VC's room. He kissed her longer on her lips and touched her vagina through her clothing. [First Count - Indecent Assault]
- [10] In 2007, an incident occurred at Mr. Penn's Office at Main Street, Road Town. It was a school day. Mr. Penn collected the VC 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 his office door and told the VC to close the windows. He called the VC to sit on his lap and he touched her vagina. She took off her panty because he was pulling her pubic hair and it was hurting her. The touching lasted until her aunt called to be picked up. They left. [Second Count - Indecent Assault]
- [11] In 2007, there was an incident at Mr. Penn's office. It was a week end. Mr. Penn told his wife that the VC was going to help him do some filing. At the office, the VC turned on the computer upstairs. Mr. Penn went downstairs and turned on another computer. He returned upstairs and began to touch the VC's breasts saying that they will get bigger soon. After, the VC took off her clothes and went downstairs in the conference room and Mr. Penn entered and touched her vagina. [Third Count - Indecent Assault]

- [12] In 2007, at home in the VC's bedroom at Josiah's Bay, an incident occurred. It was in the night. Mr. Penn touched the VC's vagina and showed her how to suck his penis and she sucked it. [Fourth Count - Indecent Assault]
- [13] In 2007, at Mr. Penn's office at Main Street, Road Town. It was a week day and the VC was in his office. At 5:00 pm, Mr. Penn went downstairs and returned upstairs. He said to the VC that Ms. Peters was there but she was no problem. He touched the VC's vagina and kissed her. He warned her not to tell anyone because he could get in serious trouble. He told her he was placing his finger in her vagina and preparing her for the real thing. He had his finger in her vagina until her aunt called. [Fifth Count - Indecent Assault].
- [14] In 2008, at home at Josiah's Bay, another incident occurred. It was in the night. Her aunt was in the bathroom. Mr. Penn sucked the VC's vagina and she sucked his penis. He "cum" [ejaculated] in her mouth. [Eight Count - Indecent Assault].
- [15] In 2008, at home at Josiah's Bay, yet another incident took place. It was a week end. The VC's aunt had gone to a funeral. Mr. Penn told the VC that he had something to show her. He later brought a yellow bag out of his vehicle. In the bag were sex tapes which he allowed her to watch. She got bored. When she was combing her hair, Mr. Penn touched her breast and sucked her vagina. He suggested a bath together which they took. While bathing, she heard her aunt's car. She hurriedly put on her clothing and went to open the door. [Eleventh Count - Indecent Assault]
- [16] In 2007, at Mr. Penn's office at Main Street, Road Town, something else happened. It was a weekend. Mr. Penn told his wife that the VC was going to help him to do paper work. At the office, he touched the VC's vagina and put his finger into her vagina. He asked the VC if she wanted the real thing and she answered in the affirmative. Mr. Penn left and went for condoms. He placed his finger in her vagina. He said it was to get her vagina wider to put the thing inside. Mr. Penn asked the VC to help him put on the condom because his hand sweats a lot and the condom would slip. The VC was on her back with her knees to her shoulder in his big chair. He took his time and put his penis into her vagina. He pushed in

and out until he 'cum'. When he was finished, he poured water into the condom. When the VC asked why, he told her it was to ensure it was not burst. He had wiped her with a tissue and she saw a little blood on it. [Sixth Count - Unlawful Sexual Intercourse with a girl of or under the age of 13]

[17] Another incident occurred at Mr. Penn's office at Main Street, Road Town. It was a weekday. While the VC was in his office, Mr. Penn told her that he had something to show her. When it was about 5:00 p.m., he went downstairs to ensure that no one was there. He returned. After the windows and door were closed, he pulled up *backpage.com* on the computer and visited other websites. He allowed the VC to view the porn site until she was wet. He then asked her if she wanted to have sex and she answered in the affirmative. She helped him to put on the condom. He fingered her vagina until it got wider. He told her why he was fingering her. He pushed in his penis and had sexual intercourse with her until he 'cum'. [Seventh Count - Unlawful Sexual Intercourse with a girl of or under the age of 13]

[18] In 2008, another incident occurred in Mr. Penn's office at Main Street, Road Town. It was a week day. The VC's father took her to Mr. Penn's office at about 5:00 to 5:15 p.m. Mr. Penn asked the VC if she wanted sex in her anus and she said "yes". She knelt down in his chair. He began to push his penis into her anus but it would not go in so he spat on her anus and in his hand. He rubbed the saliva onto his penis, put his penis in her anus and began to push it in and out. She felt weird. When Mr. Penn 'cum', he put it on her back, went to the kitchen for a napkin and cleaned it off her. [Ninth Count - Buggery on a girl under the age of 13 years]

[19] In 2008, something occurred in the night at their home at Josiah's Bay. Mr. Penn entered the VC's bedroom to hang up his pants. He kissed her. He then went to his bedroom and turned on the light in his room. He returned to the VC's room. She was on her knees on the bed. Mr. Penn used "spit" to lubricate and he placed his penis in her anus. When he 'cum', he placed it on her back and used a napkin to wipe it off. [Tenth Count - Buggery on a girl under the age of 13 years.]

- [20] Another incident occurred in 2008 at Mr. Penn's office at Main Street, Road Town. It was a weekday. The VC's father took her to Mr. Penn's office. Mr. Penn checked on the persons downstairs. He returned and said Ms. Peters was there but she was no problem. He began to kiss the VC and asked her if she wanted sex in the anus. She said yes. She knelt down in his chair. Mr. Penn used his saliva as a lubricator and pushed his penis in and out of her anus. He then took his penis out and pumped his "cum" in a cup. [Twelfth Count - Buggery on a girl under the age of 13 years.

Plea in mitigation

- [21] Mr. Penn called two character witnesses, Mr. Samuel Jack Husbands, an attorney-at-law who has been living in the BVI since October 1992 and Mrs. Jenny Wheatley, his former teacher and one-time supervisor. Another character witness, Rev. Nihal Abeyasingha of Our Lady of Perpetual Help Church, Antigua submitted a letter to the court.
- [22] Mr. Husbands testified that he has known Mr. Penn since he arrived in the BVI. He knows him to be a man of good character. He beseeched the court to extend as much mercy as it possibly can.
- [23] Mrs. Wheatley, aged 71, was Mr. Penn's teacher before becoming his supervisor while he taught at the High School. She knows Mr. Penn as a caring person who went beyond the call of duty. She described him as "trustworthy" and asked the court to temper justice with mercy. Both Mr. Husbands and Mrs. Wheatley expressed surprise at the jury's verdict but they respect it.
- [24] Father Nihal also spoke in glowing terms about Mr. Penn. He found Mr. Penn to be very pleasant, open and honest in his replies to some very intrusive questions which Father Nihal asked when he was preparing Mr. Penn to marry Cassandra Glasgow according to the rites of the Catholic Church.
- [25] In sum, all three witnesses implored the court to temper justice with mercy.

[26] Learned Queen's Counsel, Mr. Hamilton also asked the court for clemency for his client. He implored the court not to destroy Mr. Penn for his single fall from grace. He said that there is a dichotomy in the life of Mr. Penn that is troubling and that can only be seriously bridged by the reality of justice which this court extends to him. He highlighted the fact that Mr. Penn was not only a teacher but also, a legislator. Mr. Penn's character, says Mr. Hamilton QC, is underscored by the people of East End who put him in the Legislative Council in 1995 to represent their interest. Mr. Hamilton supplicated that the court tempers justice with mercy. He advocated for rehabilitation, one of the cardinal principles of sentencing.

[27] Mr. Penn has no previous convictions.

Victim Assessment Report

[28] The Crown submitted a Victim Impact Statement, dated 17 March 2011 and prepared by Dr. Virginia Rubaine, Clinical Psychologist. Dr. Rubaine said that estimating the impact of pervasive sexual abuse perpetrated against a victim requires an understanding of the psychological dynamics of trauma. Sexual abuse can be analyzed in terms of four trauma-causing factors: (1) *Traumatic sexualization*: a process in which a child's sexuality is shaped in a developmentally inappropriate and interpersonally dysfunctional fashion as a result of sexual abuse; (2) *Betrayal*: the dynamic by which children discover that someone on whom they were vitally dependant has caused them harm; (3) *Powerlessness*: the process in which the child's will, desires, and sense of efficacy are continually contravened; and (4) *Stigmatization*: the negative connotations that are communicated to the child around the experiences that then become incorporated into the child's self-image.

[29] She concluded:

"It is patently obvious that the victim has been exposed to all of the dynamics listed above. Given the current circumstances, the victim's prognosis is poor to fair. The victim will most likely require therapeutic intervention for the rest of her life in order to facilitate her coping with the atrocities committed against her. Further, the familial discord which has arisen from the abuse has essentially fractured what was once a close-knit supportive unit, which will further compound the lasting consequences of the violation. The abuse has not only stolen this child's

innocence but also her sense of well being and her understanding of the world and the people in it. The impacts of childhood sexual abuse into adulthood can best be described as a chronic debilitating illness that requires life-long intervention.”

[30] On 23 September 2010, Dr. Rubaine prepared a “Treatment Summary’ wherein she stated that the VC had attended therapy sessions over the preceding nineteen (19) months. It was noted that the VC had *“significant deficits in her social skills...These deficits coupled with [her] desire to be accepted may increase her vulnerability to dangerous situations that require good social judgment to navigate.”*

[31] Dr. Rubaine also noted that the VC was cooperative but initially reserved, however, “[A]s the therapeutic alliance was strengthened the VC shared her distress as she recounted in detail what the alleged perpetrator had done. According to [the VC] she is “very mad” that the alleged perpetrator is lying about what he did to her and she wants him to tell the truth.”

[32] Dr. Rubaine concluded:

“[The VC] has benefited from the absolute support her family and the system have provided her... She should continue with therapy in order to build upon the work that has already been completed. With continued psychological intervention, [she] can overcome her alleged past trauma and grow up to be a productive, successful adult.”

[33] Shortly after the incidents, the VC was also examined by psychologist, Dr. Sylvia Buntin-Simmons. She was examined on two separate occasions. Dr. Simmons’ report provides useful background information about the VC and her sexual encounters with Mr. Penn which she graphically described to the psychologist. Her assessment revealed that *“the VC suffers from signs of mild depression but no suicidal ideation. She appears to be guarded and withdrawing from peers which are usually typical of a victim who has been sexually abused.”*

Submissions for the Crown

[34] Mrs. Hinds helpfully provided a plethora of judicial authorities on sentencing for these sexual offences. These included several authorities from this jurisdiction, the region and England. The local authorities relied upon are:

- o The Queen v Kemuel Dublin¹ - On 22 February, 2011, Mr. Dublin was found guilty and sentenced to 12 months imprisonment on one count of Indecent Assault and 8 years imprisonment on one count of Unlawful Sexual Intercourse with a girl of or under the age of 13 years. These sentences are concurrent.
- o The Queen v. Donald Rogers² – The defendant was sentenced to 18 months imprisonment upon conviction for indecently assaulting his god-daughter who was 15 years old at the time of the commission of the offence.
- o The Queen v. Nelson Callwood³ - The defendant pleaded guilty and was sentenced to 6 years imprisonment for one count of Buggery and 3 years imprisonment for one count of Indecent Assault. The sentences are concurrent.
- o The Queen v Kerril Gilbert⁴ - The defendant pleaded guilty to one count of Unlawful Sexual Intercourse with a girl of or under 13 years. He was sentenced to 3 ½ years imprisonment.
- o The Queen v Shem Jackson (2004) - A jury found Mr. Jackson guilty on three count of unlawful sexual intercourse with a girl of or under the age of 13 years. The virtual complainant was 11 years old at the time of intercourse and the defendant was 22. He had a conviction record but not for similar offences. He was sentenced to five (5) years imprisonment on each count to run concurrently.

¹ Criminal Case No. 8 of 2009 [unreported].

² Criminal Case No. 24 of 2009 –written judgment on sentencing delivered on 25 June 2010.

³ [Criminal Case No. 17 of 2009] Commitment on Sentencing – Tab 6.

⁴ [Criminal Case No. 6 of 2006] Commitment on Sentencing – Tab 6.

- o The Queen v Lloyd Arthur⁵ - Lloyd Arthur, a pastor, was convicted on two counts of Indecent Assault committed on a child under the age of thirteen [13] years. He was sentenced to 5 years imprisonment for each count to run concurrently.
- o The Queen v Bevern Smith⁶ - On 19 October 2000, the defendant was sentenced to 12 years imprisonment having been found guilty on two counts of Unlawful Sexual Intercourse with a girl under 13 years. The defendant had met the girl who had known him. He took her to the beach and had intercourse with her. He was later with her at a friend's house. He left the house and his friend had sexual intercourse with the girl. At another time, he was with the girl at another friend's house and he had sexual intercourse with her. The defendant and another person were charged but were not tried together.

[35] The regional authorities relied upon included the seminal Court of Appeal decision of *Winston Joseph v. R.*, *Benedict Charles v. R.*, and *Glenroy Sean Victor v. R.*,⁷ which laid down the guidelines for sentencing in sexual offences. A number of English authorities were also referred to by the learned Director of Public Prosecutions including *R. v. Christopher Millberry et al*⁸, *R v Loff James Lennon*⁹, *Attorney General's Reference Nos. 91, 119 and 120 of 2002*¹⁰, *Attorney General's Reference No. 7 of 1997*¹¹ and *R. v. Puru*.¹²

[36] In *Winston Joseph v. R. et al* [supra], at page 9, Sir Dennis Byron CJ identified the aggravating as well as the mitigating factors that the Court must consider when imposing the appropriate sentence. The aggravating factors were identified as:

⁵ [Criminal Case No. 7 of 2004]

⁶ Crim case No. 13 of 2000

⁷ Criminal Appeal No. 4 of 2000, Criminal Appeal No. 8 of 2000 and Criminal Appeal No. 7 of 2000 (consolidated).

⁸ [2003] 2 Cr. App. R. (S) 31 CA.

⁹ [1999] 1 Cr. App. R. (S) 19 CA.

¹⁰ [2003] 2 Cr. App. R. (S) 55 which provides guidelines in relation to sentencing for sexual offences.

¹¹ [1997] Crim. L.R. 908..

¹² (1985) LRC [Crim.] 817. The Court discussed how aggravating factors could affect the length of the sentence.

- i. If the girl has suffered physically or psychologically from the sexual assault.
- ii. If it has been accompanied by abhorrent perversions e.g. buggery or fellatio.
- iii. Violence is used over and above the force necessary to commit the offence.
- iv. The offence has been frequently repeated.
- v. The defendant has previous convictions for serious offences of a violent or sexual kind.
- vi. The victim has become pregnant as a result of the crime.
- vii. The victim is either very young or very old.

[37] The mitigating factors are identified as follows {at paragraph 19}:

- i. A plea of guilty should be met by an appropriate discount, depending on the usual considerations, that is to say how promptly he confessed and the degree of contrition and other relevant factors.
- ii. Where incest was consensual, in the case of a girl at least 16 years of age if it seems that there was a genuine affection on the part of the defendant rather than the intention to use the girl simply as an outlet for sexual inclinations.
- iii. Where the girl of at least 16 years of age made deliberate attempts at seduction.
- iv. Where the defendant is a first offender and/or is a youth.

[38] In the instant case, Mrs. Hinds submitted that the only mitigating factor is that Mr. Penn has no previous convictions. However, she suggested that good character is only of minor significance.¹³ She identified ten aggravating factors and suggested that the circumstances of this case warrant the upper limits of the maximum sentence that the court can impose. She identified the following nine aggravating factors namely:

¹³¹³ R v Billam [1986] 8 Cr. App. R (S) 48.

1. **Breach of trust** in that Mr. Penn was the VC's uncle-in-law, her aunt's husband, who had been performing the role of her guardian. The VC regarded Mr. Penn as her uncle. She looked up to him. He supervised her with her school work and looked after her after school. He was trusted with the care of the VC by his wife and by her father. [Mr. Penn was a legislator when the 1997 Criminal Code was enacted. He was elected in 1995. He must therefore be judged as a man fully aware of the consequences of the breaches of the Criminal Code].
2. There was a considerable age gap between the VC and Mr. Penn - about 30 years. At the time of the sexual assaults, the VC was very young. She was between 9+ and 12 years old. [The young age would have been taken into account in the charges based on the age of the VC.][Mr. Penn was born in 1966.]
3. Mr. Penn ejaculated or caused the victim to ejaculate.¹⁴
4. The offences were frequently repeated.
5. Mr. Penn *used the VC* simply as an outlet for his sexual inclinations.
6. The **degree of coercion** used by Mr. Penn in the commission of the offences: he cautioned the VC not to tell anyone and when she drew his attention to her learning of communicable disease, he then progressed from having sexual intercourse with the complainant to buggery.
7. Mr. Penn showed pornographic web sites and pornographic movies to the VC.
8. Mr. Penn 'groomed' the VC' or set the stage for her to agree to take part in sexual activity with him.¹⁵ There were a variety of sexual activities carried out on the VC. This method ensured that she was ready to perform the acts he required. Mr. Penn

¹⁴ See [TAB 5 SGC – Sentencing Guidelines Council Definitive Guidelines page 34 Part 2B.- Tab. 5 Panel's advice to the sentencing Guidelines Counsel page 79]

¹⁵ [SGC – Sentencing Guidelines Council Definitive Guidelines page 50 Part 3A para. 3A.12] Tab. 5.

corrupted the young child and groomed her into being a satisfying sex partner who never said 'no' to anything he suggested.

9. The VC has been psychologically affected. It was opined that: 'she will most likely require therapeutic intervention for the rest of her life in order to facilitate her coping...'¹⁶

Court's considerations

[39] The maximum penalty for the relevant charges is as follows:

Indecent Assault - 10 years¹⁷;

Unlawful Sexual Intercourse with a girl of or under 13 years - 14 years¹⁸

Buggery - 10 years¹⁹.

Unlawful Sexual Intercourse with a girl of or under 13

[40] In *Franklyn Huggins v The Queen*,²⁰ I said:

"Short of homicide, it [rape] and I should now add, unlawful sexual intercourse with a girl of or under the age of thirteen, is the 'ultimate violation of self'²¹. It is a violent crime because it normally involves force, or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. **Along with other forms of sexual assault, it belongs to that class of indignities against the person that cannot ever be fully righted and that diminishes all humanity.** [emphasis added].

[41] Offences of this kind nearly always result in a custodial sentence. In *R. v Christopher Millberry* [supra], Lord Lane, referring to the general guidelines as to sentencing for rape in *Roberts and Roberts*²² had this to say:

"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence.... A custodial

¹⁶ [Victim impact Statement page 2 final paragraph. Tab. 1a].

¹⁷ Criminal Code 1997, section 124(1)(b) as amended by Act No. 8 of 2006, section 20.

¹⁸ Criminal Code 1997, section 118(1) as amended by Act No. 7 of 2002, section 4.

¹⁹ Offences Against the Persons Act, section 56, CAP 53 of the Laws of the Virgin Islands.

²⁰ BVIHCR2009/001 –unreported- Written Judgment delivered on 13 July 2010.

²¹ Byron E. White.

²² (1982) 4 Cr. App. R. (S) 8. See page 3 of Millberry's judgment.

sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly, to emphasise public disapproval. Thirdly, to serve as a warning to others. Fourthly, to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case.”

- [42] When sentencing, the court must always bear in mind the classical principles of sentencing which could be summed up in four words “retribution, deterrence, prevention and rehabilitation.” In *R. v. Sargeant*²³, Lawton L.J. said:

“Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.”

- [43] In addition, judges have an obligation to bring deliberate judgment to bear in determining the appropriate sentence. In *R v Puru*, Woodhouse P. made a litany of remarks in relation to rape. However, these observations may apply generally to other sexual offences. He said at page 819:

“The judges do actually live in society and share with other citizens the same strong feelings concerning the uncivilized abuse and coercion of women which this crime represents. But their 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.”

- [44] He continued at page 821 [g]:

“The Court certainly must and actually does keep in mind the public anxiety and the natural public resentment that such conduct occasions. That very fact, however, inevitably poses very difficult sentencing problems when the matter is not by reference to individual cases but in a wider way. Rape always involves a disgraceful exercise of physical power over the victim and degradation of her human personality.

But there are some cases which have particularly aggravating features. There are cases involving very young girls or elderly women. There are deplorable examples of gang activity. There are instances of the victim being snatched off the street or invaded in the privacy of her own home. And there are cases involving serious

²³ 60 Cr. App. R. 74.

physical violence or acts of sexual perversion and other forms of degradation. So clear distinctions must inevitably be drawn to take care of bad and finally the worst kinds of case. There is the added fact that if this margin is not kept in mind in relation to lesser offences then there could be the grave risk of the more serious attacks, even to the point of murder, by offenders who thought that there was nothing to be gained by a residual restraint which might lead to detection.

The extent to which all this can properly be translated into length of sentence must inevitably vary from case to case. The important consideration is to ensure that there is an appropriate degree of flexibility left to the Judge so that the punishment can actually be made to fit the crime. “

[45] Sentencing involves a two-stage process that requires consideration of both aggravating and mitigating factors. The Court must seek to determine, what sentence does the seriousness of the offence itself merit? Further, can that sentence be reduced in light of mitigation relating to the offender?²⁴

[46] Next, sentencing guidelines provide assistance to the Court, but are not determinative of the sentence. As noted by Carswell LCJ and Coughlin J in the North Ireland Court of Appeal:

“Guidelines are of use in maintaining a degree of consistency in sentencing, but they are not to be slavishly followed, since the sentencer in any given case has to determine what is appropriate for the individual case before the court. Mitigating and aggravating factors in the particular case will have to be taken into account in determining the final disposition. Reported previous decisions may provide a benchmark, but it should be observed that in some reported cases there may be unstated factors, eg co-operation with the police, which have influenced the length of sentence. It should also be borne in mind that levels of sentence may move upwards, or downwards, depending on the prevalence and danger to the public of any type of offence.²⁵

[47] Our Court of Appeal has already laid down guidelines for sentencing in offences of a sexual nature in *Winston Joseph et al*. These are merely guidelines intended to assist the judge in sentencing. They are not intended to be slavishly followed since they do not lay down the correct sentence.

²⁴ <http://www.inbrief.co.uk/court-judgements/sentencing.htm>

²⁵ *Murdock, R v* [2003] NICA 21.

[48] Sir Dennis laid down the benchmark for sentencing for unlawful sexual intercourse with a girl of or under 13. At paragraph 13, he stated;

“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.[emphasis added]. It scarcely needs 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.”

[49] I bear in mind that Sir Dennis was referring to a jurisdiction [Saint Lucia] where the maximum sentence for this offence is life imprisonment whereas in this Territory, it is 14 years. Taking this into consideration, I believe that a starting point of 7 years where there are no aggravating factors may be considered an appropriate starting point in this Territory based on a 14-year maximum sentence.

[50] This is the starting point. The existence of aggravating factors may significantly increase the sentence. So, in considering the appropriate sentence to be imposed, I am also required to engage in the evaluative process by weighing the mitigating and aggravating factors as expounded by Sir Dennis in *Winston Joseph et al* and recently endorsed by our Court of Appeal in *Roger Naitram et al v The Queen*.²⁶ At paragraph 17 of *Winston Joseph et al*, Sir Dennis stated as follows:

“The actual sentence imposed will depend upon the existence and evaluation of aggravating and mitigating factors...It is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark upon an evaluative process. It must weigh the mitigating and aggravating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating factors are outweighed by the aggravating factors the sentence must tend to go higher.”

²⁶ HCRAP2006/005, HCRAP2006/006 and HCRAP2006/008 [Antigua & Barbuda] CA. Judgment delivered on 15 December 2010, per Baptiste J.A.

[51] Sir Dennis went on to list the more common aggravating and mitigating factors although that list is not exhaustive and the factors are not ranked in any particular order.²⁷ In the present case, the Crown has identified nine aggravating factors. However, I am mindful that care needs to be taken to ensure that there is no double counting where an essential element of the offence charged might, in other circumstances, be an aggravating factor, for example, the age of the VC and breach of trust. Double accounting, which could be the result if guidelines were applied indiscriminately, should be avoided".²⁸ As stated in Huggins' case:

"...care needs to be taken to ensure that there is no double counting where an essential element of the offence charged might, in other circumstances, be an aggravating factor, for example, the age of the VC."

[52] In this case, the prosecution has included "a considerable age gap" among the aggravating factors. However, they note that the age of the victim was already taken into account in framing the charges. It is evident that, in the case at bar, four of the aggravating factors identified in *Winston Joseph et al* are present namely: (1) The victim has suffered psychologically, especially in terms of the impact to her family unit and support. She may or may not be able to overcome the trauma of this event. Her prognosis at this stage is unclear. At the very least, she will require therapeutic intervention for some time to come. (2) Some of the offences have been accompanied by perversion, i.e. both buggery and fellatio were involved. (3) The incidents of abuse were frequently repeated over a long period, this is reflected in the number of offences charged. (4) There was a considerable age gap between Mr. Penn and the VC.

Indecent Assault

[53] With respect to these seven counts of indecent assault, this case reminds me of *The Queen v Donald Rogers* [supra], relied upon by the prosecution, where I said.

"Indecent assault is largely a non-penetrative sexual offence but no less despicable on that account. In the words of Lord Griffiths: "...*although the offence*

²⁷ See paragraph 12 of the judgment.

²⁸ *R v Millberry* (William Christopher) [2003] 2 Cr App R (S) 31 CA

of indecent assault may vary greatly in its gravity from an unauthorized teenage sexual groping at one end of the scale to a near rape at the other, it is in any circumstances a nasty, unpleasant offence ..."²⁹

Although indecent assault is less serious than rape, the latter carrying a maximum penalty of life imprisonment, that does not make indecent assault any less traumatic to the victim. Thus, in determining an appropriate sentence for this type of sexual offence, the Court will have reference to the various types of harm that can result from the offence, some of which are outlined in the Sentencing Guidelines for Sexual Offences by the Sentencing Advisory Panel 2003, which was referred to by the Crown. These include:

- o Violation of the victim's sexual anatomy;
- o Exploitation of a vulnerable victim;
- o Embarrassment, distress or humiliation of the victim;
- o Infringement of standards of socially acceptable behavior;
- o The physical/psychological harm caused by non-consensual offences;
- o The relationship between the victim and the offender and
- o Abuse of a position of trust

In weighing the gravity of the offence, regard must be had to "*the degree of harm to the victim,...the level of culpability of the offender.. and the level of risk posed by the offender to society*"³⁰ In *R v Loff James Lennon* [supra], Henry L.J. had this to say [at page 6]:

"It was not the purpose of the judgment to seek to lay down guidelines for sentencing in cases of indecent assault. It is never easy to sentence in such cases. The circumstances of each case will vary greatly. What the judge must do, as I see it, is to tailor the sentence to the particular facts of the case before the court. In most cases, the personal circumstances of the offender would normally take second place behind the plain duty of the

²⁹ *R v Court* [1988] 2 All ER 223 at C.

³⁰ *R v Millberry et al* [2003] 2 Cr App R (S) 31.

court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may have been the case in former years when the position of the victim may not have been so clearly focused in the public eye”.

- [54] Nevertheless, while ten (10) years is the maximum sentence for indecent assault on a person under the age of thirteen years, overall, the sentences for this offence tend to fall on the lower end of the range. Sentences involving victims under thirteen have ranged locally from a fine of \$1,400 or 6 months imprisonment,³¹ to a 3 year suspended sentence,³² to 18 months,³³ to 5 years;³⁴ to 2 years regionally;³⁵ to 2 years,³⁶ and 3 years³⁷ in the UK.

Buggery

- [55] In this Territory, buggery is a rarity. It is not as common as the two other sexual offences. Nonetheless, it is serious because it carries a maximum sentence of 10 years. The case of *Nestor Callwood* [supra] may be the only decided case in this Territory. The defendant was sentenced to 6 years imprisonment for buggery after he pleaded guilty.
- [56] Returning to the facts of the case, it is unfortunate that Mr. Penn has labeled the VC, a chronic liar. She became the accused when in fact, she was the victim. From Dr. Rubaine’s Treatment Summary, she stated: “According to the [VC], *she is “very mad” that the alleged perpetrator is lying about what he did to her and she wants him to tell the truth.*”

³¹ The Queen v Terry Hodge, BVI Criminal Case No. 11 of 2004 [unreported].

³² R v Keshawn Huggins, BVI Criminal Case No. 13 of 2008 [unreported]: victim was the Defendant’s 11 year old sister, no judgment on sentencing.

³³ The Queen v Kevin Dorsett, BVI Criminal Case No. 26 of 2005 [unreported], Judgment on Sentencing 18 October 2005: the defendant was her neighbor and a preacher, of good character.

³⁴ The Queen v Lloyd Arthur, BVI Criminal Case No. 7 of 2004 [unreported]: the Defendant was a pastor, convicted on two counts indecent assault. Sentenced to 5 years imprisonment on each count, to run concurrently.

³⁵ Gladstone Gooderidge v The Queen, Criminal Case No. 13 of 1997 (St. Vincent and the Grenadines) [unreported]: Defendant, a stranger, put his penis in the mouth of 6 year old victim and touched her vagina.

³⁶ R v Loff James Lennon [1999] 1 Cr.App.R. (s)117 CA: Defendant, mother’s boyfriend, masturbated in front of 9 year old victim.

³⁷ Attorney General’s Reference No. 7 of 1997, [1997] Crim.L.R. 908: Sentenced to 3 years each on 4 counts involving victims ages 12 – 15 and also sentenced for 7 counts of buggery.

[57] In my opinion, this case has caused not only emotional and psychological pain to the VC and her immediate family but to Mr. Penn and his immediate family, a very well- respected family in this community. Their presence and support for him during the entire trial is indicative of their unrelenting support. Essentially, no-one is a winner in this case. It is a painful day for all concerned. No punishment can repair the damage done to the parties but justice must be seen to be done and it must also be tempered with mercy.

[58] Last year, in the Huggins case, this court observed that:

“Crimes of a sexual nature particularly where the victims are young school children, are on the rise in the BVI. Of the 25 criminal cases for trial in [this] Criminal Assizes, at least 10 are matters of a sexual nature. The time has come for the court to send out a stern warning that these crimes will not be tolerated. Society is utterly fed up with our adult male population who prey on young school-children for their sadistic sexual satisfaction. Worse of all, nearly all the time, the rape is committed by someone you know. Not a creepy man in the alley.”

[59] The victims of these kinds of sexual assaults must carry their memories with them for the rest of their lives. It is therefore society’s business that these victims must not carry the burden of silence and shame and must come to court and prosecute these matters like the VC did.

[60] I also take into account the fact that the VC, in so far as a child can be said to consent, was a willing participant in all of these sexual assaults. I commend her for her bravery but she should have done so earlier. I say so very cautiously bearing in mind that many are still afraid to come forward.

The sentence

[61] Having regard to the starting point of 7 years for a contested case of unlawful sexual intercourse with a girl of or under 13, such as the present, and taking all matters into consideration, including the recent Court of Appeal judgment of *Roger Naitram et al v The Queen* [supra], where our Court of Appeal held that the sentence of 8 years imposed by the high court judge was not excessive for a charge of this nature, I also impose a similar sentence of 8 years on the count of Unlawful Sexual Intercourse with a girl of or

under 13 years. Indeed, the aggravating factors far outweigh the mitigating factors. There are two counts and the sentence on each count of 8 years will run concurrently.

[62] With respect to the indecent assault counts, I will sentence Mr. Penn to 18 months imprisonment on each count, to run concurrently with each other.

[63] With respect to the buggery counts, he is sentenced to 2 ½ years on each count to run concurrently with each other.

[64] I have grouped these offences into three categories: (1) indecent assault; (2) unlawful sexual intercourse with a girl of or under the age of 13 years and (3) buggery. Each of the categories will run consecutively with each other.

[65] For the avoidance of any doubt, Mr. Penn is sentenced to 12 years imprisonment from 2 March 2011, the date of his conviction.

[66] I will order some counseling for the VC. This will be determined by the clinical psychologist, Dr. Virginia Rubaine.

Indra Hariprashad-Charles
High Court Judge