

**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Criminal Division**

**CRI/VBI/287/11/2021**

**Between**

**REX**

**AND**

**VAKEITO MELKEVA FERGUSON**

**Before:** The Honourable Madam Justice Guillimina Archer-Minns

**Appearances:** Ms. Janessa Murray for the Crown  
Ms. Cassie Bethel for the Convict

**Hearing Date:** 25 April 2024

**RULING – SENTENCING DECISION**

**Criminal Law – Sentencing – Criminal Procedure Code Act, Chapter 91 (as amended) – Sexual Offences Act, Chapter 99 – Unlawful Sexual Intercourse contrary to section 10(1)(a) of the Sexual Offences Act, Chapter 99 – Custodial sentence of 10 years imposed less time spent on remand**

**INTRODUCTION**

1. Vakeito Melkeva Ferguson, the Convict named herein, is a 35-year-old Bahamian male who was convicted of the following offence:

Unlawful Sexual Intercourse contrary to section 10(1)(a) of the Sexual Offences Act, Chapter 99 (as amended).

2. The Convict was found guilty of the said offence on 1 February 2024 by an 8-1 majority verdict yielded by a jury of his fellow peers.
3. On 25<sup>th</sup> April 2024, the Court heard submissions from the Counsel for the Crown and Convict with regard to the sentencing of the Convict. Sharon Brennen, Trainee Probation Officer attached to the Department of Rehabilitative/Welfare Services, also provided *viva voce* evidence in relation to a probation report

dated 15<sup>th</sup> April 2024, which she prepared relative to the Convict. The probation report was admitted into evidence and marked as “Exhibit P-1”.

4. The Court reserved its ruling on sentencing and undertook to produce a written ruling on the same on 23<sup>rd</sup> May 2024. The Court does so now.

### **FACTUAL BACKGROUND**

5. The brief factual background of this case as advanced by the Crown and accepted by the jury is as follows: that sometime between 1 March 2021 to 31 March 2021, the Convict, while at New Providence, did have sexual intercourse with the virtual complainant, Y.S., a female under fourteen (14) years of age, the daughter of his fiancée, by inserting his penis into her vagina. Thereafter, the Convict threatened the virtual complainant into secrecy.
6. The Convict was subsequently arrested, arraigned, and charged with three counts of unlawful sexual intercourse contrary to section 10(1)(a) of the Sexual Offences Act, Chapter 99. The Convict pleaded not guilty to the charges and stood trial in the Court. On 1 February 2024, the Convict was found guilty on count one by an 8-1 majority verdict yielded by a jury of his fellow peers. The jury was directed to acquit the Convict on counts two and three as there was no evidence adduced by the Crown during the trial to support those two charges in law.
7. Upon conviction, the Convict was remanded to The Bahamas Department of Correctional Services pending the production of a probation report for use in the sentencing phase.

### **PROBATION REPORT**

8. The probation report included interviews from two female friends of the Convict who spoke favourably of him and could not envisage him committing the offence. Notably, for reasons known only to them, the Convict’s mother and fiancée refused to participate. This notwithstanding, there was an indication that they continue to provide financial and emotional support for him.
9. The probation report essentially provided, that –
  - (i) the Convict was raised in a matriarchal family structure. His mother was ultimately responsible for the stewardship of him and his siblings.
  - (ii) academically, the Convict advanced satisfactorily, earning his high school diploma;
  - (iii) the Convict enlisted in the Royal Bahamas Police Force where he served for almost thirteen years as a Constable and resigned therefrom in January 2020. Thereafter, his income was derived from performing security jobs and manual labour;

- (iv) health-wise, the Convict is reported to have the sickle cell anaemia trait, which causes fatigue. In May 2023, he was diagnosed with fatty liver disease, a condition his doctor warned could lead to liver failure. The associated symptoms purportedly include constant pain below his rib cage. To counteract this he requires vitamin C, exercise, and other natural remedies. There is no known mental health deficiency in the Convict's family;
- (v) the Convict has no criminal record;
- (vi) the Convict has admitted to overindulging in alcoholic beverages and illicit drugs, attributing these to work-related stress, ensnarement in the legal system, and his public shaming;
- (vii) the Convict maintains his innocence and blames the virtual complainant for fabricating this offence on him together with her father. Additionally, he berated the police for a flawed investigation and his legal representative for not satisfying his expectations.
- (viii) the Convict bemoaned his accommodations at The Bahamas Department of Correctional Services. He alluded to being confined to his cell as he is concerned for his safety since he is a former police officer. All of which causes him to have nightmares and insomnia;
- (ix) the virtual complainant remains steadfast that the Convict perpetrated sexual violence on her and threatened her into secrecy. She feels betrayed by her mother who continues to stand by the Convict. She remains angry at her mother for attempting to persuade her to withdraw her complaint and for choosing to believe the Convict instead of her. The virtual complainant requested a confinement of thirty-five (35) years for the Convict; and
- (x) both the Convict and the virtual complainant now look to the Court for justice.

### **THE CROWN'S SUBMISSIONS**

10. Counsel for the Crown contended that the Court, in deciding the appropriate sentence for the Convict, must have regard to the mitigating and aggravating factors of this case. Additionally, the Court ought to consider the well-known principles of sentencing, namely, deterrence, retribution, prevention, and rehabilitation. Deterrence, in the circumstances of this case, should be the most determinative principle that the Court considers in determining an appropriate sentence for the Convict. A message must be sent to the public that violence against women and children, particularly, sexual violence, will not be tolerated.
11. Counsel for the Crown also highlighted the aggravating factors for the Convict as follows: (i) the seriousness of the offence; (ii) the prevalence of sexual violence perpetrated against women and children in this jurisdiction; (iii) the Convict's position of trust with the virtual complainant; (iv) the Convict's lack of remorse for his actions; and (v) the age of the virtual complainant at the time of the offence.



12. The two mitigating factors identified by Counsel for the Crown in favour of the Convict are: (i) his age; and (ii) previous good character.
13. Counsel for the Crown finally submitted that the Convict ought to receive a custodial sentence ranging between 10 – 15 years. Reliance was placed on the authorities of **Franky Eugene v The Attorney General SCCrApp No. 221 of 2015** and **Dwight Bethel v Regina SCCrim App No. 58 of 2015**.

### **THE CONVICT'S SUBMISSIONS**

14. Counsel for the Convict equally invited the Court to consider the four well-known principles of sentencing and urged upon the Court to consider rehabilitation as the most determinative principle when considering the appropriate sentence for the Convict. Counsel for the Convict contended that the Convict is an individual capable of being rehabilitated.
15. Counsel for the Convict accepted the aggravating factors identified by the Crown against the Convict but also highlighted the mitigating factors in favour of the Convict, namely, (i) his previous good character; (ii) he was gainfully employed prior to his remand and subsequent to his release on bail; (iii) he has a dependent child of four (4) years old; and (iv) he can be rehabilitated.
16. Counsel for the Convict further advanced that when sentencing, the Court should not only have regard to the nature, character, and commission of the offence but also the circumstances of the offender. It is only after all of these factors have been considered can the appropriate sentence be derived.
17. Moreover, the probation report highlights the Convict's prior employment history, and desire to be reunited with his family, especially his four-year-old son whom he financially supports. The probation report also describes the Convict as a good person with a big heart and an individual who can be rehabilitated. In the circumstances, the Convict should be sentenced to a term of four (4) years imprisonment less time spent on remand. Reliance was placed on the authorities of **Christopher Joesph McQueen v The Director of Public Prosecutions SCCrApp No. 18 of 2021**, **Ricardo Burrows v The Director of Public Prosecutions SCCrApp No. 48 of 2022**, **The Attorney General v Ricardo George Campbell SCCrApp No. 30 of 2004**, and **The Director of Public Prosecutions v Maurice Reynolds VBI No. 167/9/2020**.

### **LAW AND ANALYSIS**

18. Sentencing is the ultimate judicial function whereby the Court, prior to being *functus officio*, must balance the interests of all the parties concerned, namely, the Convict, virtual complainant, and the public, in an attempt to achieve a just and appropriate punishment for the Convict given the circumstances of the case.
19. **Section 6 of the Criminal Procedure Code Act, Chapter 91 (as amended)** bestows upon the Court the jurisdiction to pass any sentence authorized by law in respect of the offence for which it is to be imposed.

20. The Court of Appeal in its decision of **The Attorney General v Quincy Todd SCCrmApp No. 56 of 2010** lends helpful guidance to the Court when considering the exercise of its sentencing function. At paragraph 44 of the decision, John JA pronounced as follows:

“Sentencing is a judicial function and by far the most important function a trial judge has to perform. In the absence of statutory limitations, the judge has a wide discretion. That discretion must, however, always be exercised in a judicious manner, that is to say, the judge is duty bound to take several matters into consideration. It has been said that he must take into consideration the aggravating as well as the mitigating factors. Consideration must be given to the nature of the crime and the manner in which it was perpetrated. At the end of the day, the judge using judicial experience, taking into consideration the relevant caselaw and guidance given in earlier cases is left to determine what is fair and reasonable bearing in mind that no two cases are alike. It is a difficult balancing exercise.”

21. The Court is also guided by the dicta of Charles J (as she then was) in **R v Hepburn BS 2013 SC 149** wherein that Court recognized that a trial court in exercising its sentencing function must have regard to the four classical principles of sentencing and apply them to the facts of the particular case at hand. The four classical principles of sentencing include (i) retribution, (ii) deterrence; (iii) prevention; and (iv) rehabilitation.

22. In that decision, Charles J cited the dicta of Sir Dennis Byron CJ (as he then was) in **Desmond Bannister v The Queen (Criminal Appeal No. 8 of 2003 – Saint Vincent and The Grenadines)** wherein that court adeptly provided context to the meaning of each classical principle of sentencing, stating as follows:

Retribution – at first glance tends to reflect the Old Testament biblical concept of an eye for an eye, which is no longer tenable in law. It is rather a reflection of society’s intolerance for criminal conduct...

Deterrence – deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behaviour...

Prevention – the goal here is to protect society from those who persist in high rates of criminality...

Rehabilitation – here the objective is to engage the prisoner in activities that would assist him with reintegration into society after prison. However, the success of this aspect of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced



by executive policy such as the availability of structured activities to facilitate reform.”

23. Notwithstanding that sentencing is a judicial function, it is parliament that stipulates the range in which a sentence may be imposed for a particular offence. Unlawful Sexual Intercourse with a person under fourteen (14) years is governed by **section 10(1)(a) of the Sexual Offences Act, Chapter 99**. It states as follows:

“10. (1) Any person who –

(a) has unlawful sexual intercourse with a person under fourteen years of age, whether with or without the consent of the person with whom he had unlawful sexual intercourse ...

is guilty of an offence and liable to imprisonment for life.”

24. As noted by **section 10(1)(a)** of the referenced Act, the commission of an offence under this section carries a maximum penalty up to life imprisonment. The above-mentioned legislative provision does not fix a sentence for the said offence. Consequently, the legislative provision leaves it to the Court to decide, within that maximum, the appropriate sentence for each convicted person having regard to the particular circumstances of that case. Therefore, the Court, in determining an appropriate sentence for a person convicted of such offence, must not only be guided by the relevant legislative provision but also judicial authorities.

25. In **Dwight Bethel (supra)**, the majority likened unlawful sexual intercourse to a rape offence that involves sexual intercourse with a minor who by law cannot consent to the act.

26. In this decision, the Court of Appeal upheld the conviction and a twelve-year sentence of an appellant who engaged in sexual intercourse with a dependent child. The appellant was married to the virtual complainant's mother and the parties cohabitated together. The first sexual encounter occurred when the virtual complainant was about eleven (11) or twelve (12) years of age and while her mother was at work. The sexual encounters continued on several occasions when the appellant would pick up the virtual complainant from Junior Achievement at night or when school was dismissed early. Save for where the virtual complainant became pregnant and the appellant counseled and assisted her in obtaining an abortion, the facts of this decision are similar to the facts of the present case and assists the Court in determining a just and appropriate sentence for the Convict in this instant case.

27. In **Regina v Oscar Ingraham VBI No. 54/2/2013**, Charles J (as she then was) at paragraph 26 adjudged:

“[26] ... Rape is an abomination. It is highly culpable, both in the moral sense and in its almost total contempt for the personal integrity and autonomy

of the female. I reaffirm what I said in *Franklyn Huggins v The Queen* BVIHCR 2009/001 at paragraph 17:

“Short of homicide, rape is the “ultimate violation of self”. 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.”

28. In **Albert Alexander Whyley v Regina SCCrApp & CAIS No. 184 of 2012**, a case involving unlawful sexual intercourse with a girl aged 9 years old, the Court of Appeal substituted a life sentence imposed for a sentence 30 years to run from the date of conviction. Allen P adjudged:

“24. We believe that we owe it to the children of The Bahamas to protect them from people who would prey on them and have sexual intercourse with them at the age of nine. They deserve our protection and we believe the sentence of 30 years is appropriate.”

[Emphasis added mine]

29. In **Dwayne Gordon v Regina SCCrApp & CAIS No. 74 of 2014**, a case involving incest between the appellant and his biological daughter of 15 years of age, the Court of Appeal endorsed the above-mentioned dicta expressed in **Albert Alexander Whyley (supra)**. In that decision, the Court of Appeal affirmed a 25-year sentence imposed on the appellant. Allen P pronounced:

“Counsel also urged us to find that the learned judge’s reliance on *Albert Whyley v Regina SCCrApp & CAIS No. 184/2012* was wrong in that it was distinguishable from *Whyley*, because in *Whyley* there is evidence which established that he was a serious sex offender and posed a danger to young children, hence the need for a deterrent sentence imposed in *Whyley*.

Although *Whyley* is not a case for incest like this one, this court in *Whyley* emphasized the need for the protection of our children. As the court said in *Whyley*, the courts of The Bahamas owe it to our children to protect them from those who would prey on them and have sexual intercourse with them. In that sense, there is a golden thread that runs through both cases, namely the protection of our children. It is obvious from the sentence expressed by the learned judge in this case in imposing the sentence of 25 years that deterrence was primarily the object of the sentence.

In this case, there is only one mitigating factor, and that is that the appellant has no previous convictions. Weighed against that are numerous aggravating factors, particularly, in our view, the use of violence against his biological daughter to have his way with her, an egregious breach of trust. This young girl ought to have been able to expect protection from her father not abuse or violation.”

[Emphasis added mine]



30. In **Franky Eugene v The Attorney General SCCrApp No. 221 of 2015**, the Court of Appeal dismissed an appeal against conviction and affirmed a 12-year sentence imposed on an appellant who was convicted of the rape of the virtual complainant; an individual he shared an intimate relationship with up until the time of the alleged commission of the offence.
31. In that decision, the virtual complainant agreed to meet with the appellant at his house. She was desirous of resolving a family dispute. They spoke on the couch for about 30 to 40 minutes at which time, and according to the virtual complainant, the appellant harassed her to have sex with him. She told him no. Thereafter, she began the journey home when she noticed the appellant following her. He then grabbed her and pulled her into nearby bushes where he raped her by placing his penis into her vagina. Afterwards, the virtual complainant stated that the appellant threatened to kill her and her family if she told anyone. Nevertheless, she ran home and told her mother and sister, and the police were contacted. The appellant was subsequently arrested, charged, tried, convicted, and sentenced.
32. In **The Attorney General v Richard George SCCrApp No. 48 of 2022**, the Court of Appeal set aside a 7-year sentence and substituted it with a 4-year sentence where the Respondent, a person in a position of trust, was convicted of unlawful sexual intercourse with the virtual complainant, the daughter of his live-in paramour, and threatened her with homelessness if she reported to anyone what transpired between them.
33. However, the **Richard George (supra)** decision is distinguishable from the present case before the Court. In that decision, the Court of Appeal in deciding the appropriate sentence for the Respondent, took into consideration that the Respondent's constitutional right to be tried within a reasonable time had been breached, he was a man of previous good character, and that he had no complaint of a similar nature with respect to the time he was awaiting trial.
34. Equally important, the Court is further satisfied that the Court of Appeal decision of **Ricardo Burrows v The Director of Public Prosecutions SCCrApp No. 48 of 2022** and the Supreme Court decision of **The Director of Public Prosecutions v Maurice Reynolds VBI No. 167/9/2020** are distinguishable from the present case before the Court and are unhelpful in helping the Court to determine a just and appropriate sentence for the Convict. Neither authority concerned a convict who was in a position of trust at the time the offence was committed and/or a convict who threatened the virtual complainant into secrecy.
35. Both Counsel for the Crown and Convict highlighted the mitigating and aggravating factors relative to the Convict. The Court is satisfied that the mitigating and aggravating factors relative to the Convict are as follows:

#### **Mitigating Factors**

- i. the Convict's age;
- ii. the Convict is a man of previous good character;



- iii. the Convict has no previous complaints of a similar nature with respect to the time he was awaiting trial; and
- iv. the health and mental state of the Convict.

#### **Aggravating Factors**

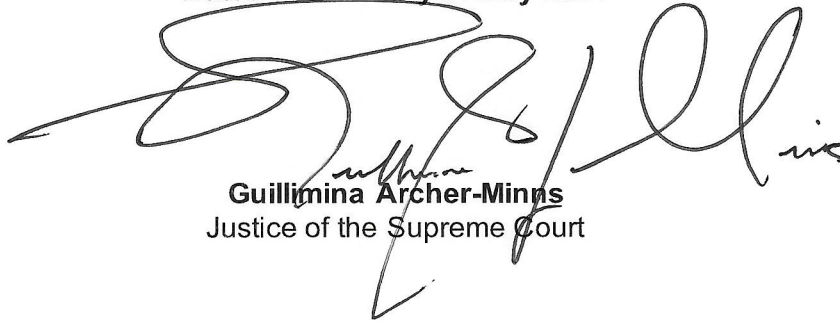
- i. the seriousness of the offence;
- ii. the prevalence of violence perpetrated on women and children in this jurisdiction;
- iii. the age of the virtual complainant at the time of the offence;
- iv. the Convict's position of trust with the virtual complainant; and
- v. the lack of remorse on the part of the Convict.

36. The Court, while considering the four classical principles of sentencing, is satisfied that deterrence, retribution, and rehabilitation are most paramount and determinative with respect to the present case.
37. Rape and/or unlawful sexual intercourse is an egregious offence that has long-lasting effects on its survivors. Rape and/or unlawful sexual intercourse is a violation of a virtual complainant depriving the virtual complainant of the right to make a voluntary and informed decision to engage in intimate activity such as sexual intercourse with the person of his/her choosing. It is particularly aggravating when rape and/or unlawful sexual intercourse is orchestrated by a person in a position of authority or trust. Such acts are intolerable and must be met with the strictest condemnation. Sentencing decisions handed down by the Courts in relation to these offences must demonstrate society's abhorrence, contempt, and non-participation in condoning the behaviour of the perpetrators of rape and/or unlawful sexual intercourse under any circumstance.
38. The Convict not only deprived the virtual complainant of her self-dignity and personhood but he was in a position of trust at the time the offence was committed. Instead of protecting the virtual complainant, he inflicted harm on her. He has placed the virtual complainant in a most precarious situation and undoubtedly added to her inability to trust others in the future.
39. The Court is duty-bound to protect women and children from all forms of violence, particularly, sexual violence. This is particularly so given that violence against women and children has exponentially increased not only in The Bahamas but the wider Caribbean region. They deserve all the protection afforded to them in law.
40. The appropriate sentence, in this case, must be one that not only deters the Convict from repeating a similar offence upon his release but must also deter other members of society from committing similar offences. An unequivocal message must be sent that the Court view rape and/or unlawful sexual intercourse as serious and will impose appropriate sentences on individuals convicted of these offences to demonstrate such seriousness and the Court's unacceptance of such conduct.

**CONCLUSION**

41. The Court, having regard to the foregoing reasons, the submissions of Counsel, the circumstances of this case, and the relevant law, is satisfied that the appropriate sentence for the Convict would be 10 years less time spent on remand. The sentence is to run from the date of conviction, on 1 February 2024.
42. While the Convict has expressed no interest in enrolling in any of the programmes and/or classes at The Bahamas Department of Correctional Services, should the Convict so wish to do so in the future and the opportunity and availability permits, it is recommended that the Convict is so enrolled. It is also recommended that the Convict be provided with counselling during his period of incarceration.

**Dated the 23<sup>rd</sup> day of May 2024**



**Guillimina Archer-Minns**  
Justice of the Supreme Court