COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 51 of 2022

BETWEEN

STEVE LUCIANO BAIN aka CANO

Appellant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Sir Brian Moree, JA

APPEARANCES: **Ms. Myra Russell, Counsel for the Appellant**
Mr. Kendall Carroll III, Counsel for the Respondent

DATES: **17 May 2022; 29 June 2022; 5 September 2022; 12 October 2022; 15 November 2022**

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Criminal appeal – Incest – Indecent assault – Minor child – Good character direction – Vye direction – Mushtaq direction – No case submission – Hearsay evidence - Confession – Turnbull warning – Sections 4, 13 & 17 of the Sexual Offences Act – Sections 38, 39(1), (2)(e) and 159 of the Evidence Act

The appellant was charged was incest and indecent assault contrary to section 13(1)(a) and section 17(1)(a), respectively, of the Sexual Offences Act. The particulars are that sometime in December 2019, while at New Providence, the appellant did have unlawful sexual intercourse and indecently assault P.W., the appellant's 6 year old niece. On 31 August 2021, after a trial in the Supreme Court, the appellant was found guilty on both counts. The appellant was sentenced to 9 years imprisonment on the charge of incest and 3 years on the charge of indecent assault minus his time spent on remand. Both sentences are to run concurrently. The appellant now appeals his conviction and sentence.

The appellant appeals his conviction on grounds relative to a good character direction, Vye direction, Mushtaq direction, the Judge's rejection of his no case submission, admission of hearsay evidence, the Judge's failure to give a Turnbull warning, and the Judge's direction on the appellant's confession. The appellant further appeals his sentence on the basis that it is unduly severe.

Held: The Appeal is dismissed; convictions and sentences are affirmed.

A defendant must distinctly raise his good character either through his own evidence, on oath or affirmation, or by witnesses called on his own behalf; and that evidence must disclose that he has a good character in the "legal sense". The Court is satisfied that the appellant was not entitled to a good character direction on both limbs of credibility and propensity even though he went into the witness box and testified during the trial.

In relation to the complaint on the Mushtaq direction, in the Court's view, the Judge gave an adequate direction on the issue of voluntariness of the record of interview.

The Court is satisfied that the Judge did not err when she did not accede to the no case to answer submission made on the appellant's behalf; nor did she err when she did not remove the first count, incest, from the jury's consideration because evidence had been adduced sufficient for the jury to consider.

Regarding the appellant's claim of admission of hearsay evidence, the Court is of the view that Dr. Carroll used her report merely as an aide memoire.

Relative to the Turnbull warning, there was evidence that the appellant admitted to placing his penis on the virtual complainant's belly and leg. This was sufficient evidence for the jury to conclude that the appellant was the person who had done acts to the virtual complainant. Further, the appellant did not challenge the identification of himself as the "uncle" mentioned by the virtual complainant as being mistakenly made.

Considering the appellant's complaint on sentence, the Court is of the view that the Judge did not take into consideration anything she ought not to have, nor did she fail to consider anything she should have. It cannot be said that the appellant's sentences are unduly severe or harsh.

AG v Richard George Campbell SCCrApp No. 30 of 2004 considered
Aramah 76 Cr. App. R. 190 mentioned
Barrow v The State [1998] AC 846 considered
Commissioner of Police v Linty Stuart MCCrApp. No. 139 of 2016 considered
Donna Vasyli v Regina SCCrApp. No. 255 of 2015 considered
Keith Billam and Others Appeals and Applications (1986) 82 Cr. App. R. 347 considered
Kevin Charles King v The Attorney General MCCrApp. No. 13 of 2006 considered
Muirhead v The Queen [2008] UKPC 40 considered
Prince Hepburn v Regina SCCrApp No. 79 of 2013 considered
R v Aziz [1996] AC 41 considered
R v Cooper [1969] 1 All ER 32 mentioned
R v Galbraith [1981] 1 W.L.R. 1039 considered
R v Mushtaq [2005] 3 All ER 885 considered
R v Smith [2013] EWCA Crim 1011 distinguished
R v Turnbull [1977] QB 224 considered
R v Vye [1993] 1 WLR 471 considered
Regina v Roberts [2016] 1 BHS J. No. 70 considered
Singh v The State [2005] UKPC 35, [2006] 1 WLR 146 considered

Stafford v Director of Public Prosecutions [1973] 3 All ER 762 considered
Taylor v COP No 52 of 2015 mentioned
Teeluck & Anor v. The State (Trinidad and Tobago) [2005] UKPC 14 considered
Thompson v The Queen [1998] 2 WLR 927 applied
Valentino Dorsette v Regina SCCrApp. No. 224 of 2016 mentioned
Van Stark v R (2000) 56 WIR 424, 429 considered
William Sturrup v The Attorney General SCCrApp. No. 4 of 2007 considered

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J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Isaacs, JA:

1. The appellant was convicted on 31 August 2022, of incest, contrary to section 13(1) of the Sexual Offences Act ("the SOA") and indecent assault, contrary to section 17 of the SOA, in a jury trial before Madam Justice Jeanine Weech-Gomez ("the Judge").

2. On 1 April 2022, the appellant was sentenced to nine years imprisonment for incest and three years imprisonment for indecent assault. The sentences are to run concurrently. On 1 April 2022, he lodged a Notice of Appeal; but on 17 July 2022, he filed an Amended Notice of Appeal outlining the following grounds:

> **"1. That the learned judge failed to give a good character direction.**
>
> **2. That the learned judge erred in law and in fact when she failed to give a Vye Direction.**
>
> **3. The verdict is unsafe as the failure of the judge to give a good character direction did affect the safety of the verdict.**
>
> **4. That the learned judge erred in law and in fact when she failed to give a Mushtaq Direction.**
>
> **5. That the learned judge erred when she rejected the appellant's no case submission.**
>
> **6. The learned Judge erred when she failed to adequately direct and assist the jury in relation to the medical evidence, which amounted to hearsay, where this was the primary evidence of the prosecution.**
>
> **7. The Learned Judge erred in the fact and law by not removing count 1 from the Jury.**

8. The verdict is unsafe and unsatisfactory having regard to the circumstances of the case.

9) Whether the learned judge erred in law and in fact when he failed to give a Turnbull Warning.

10) The learned judge erred in law and in fact when she failed to direct the jury in regards to the confession.

11) The sentence is unduly harsh and/or severe."

Brief Summary of the Case

3. It was alleged that sometime in December 2019, the appellant rubbed his penis on his niece's vagina and on another occasion, indecently assaulted her. I note that the appellant was charged initially with incest only, but the indictment was amended at the commencement of his trial to include the indecent assault charge.

4. Both counts allege that the incest and indecent assault occurred in December 2019. The virtual complainant ("the VC") testified remotely but provided little details of the events that grounded the two charges. Her mother, Megan Strapp ("Ms. Strapp"), provided the bulk of the details. She told the jury in response to a question during evidence in chief:

"Q. Okay. And what, if anything, happened on the 26th of May, 2020?

A. Me and my daughter was currently doing chores around the house and cooking. And 'round, it was during lunch time when we was making the lunch together, I started to ask my daughter questions, like, "if anybody touches your private part" and she stated her uncle.

Q. She stated what, sorry?

A. She stated her uncle. She stated, yes. Her uncle.

Q. And did you observe your daughter doing anything, at this time?

A. Yes. She was pointing at her private part.

Q. I'm sorry?

A. She was pointing at her private part." (At pages 313-4 of the transcript)

5. Ms. Strapp also gave an indication of when the offence(s) may have happened, that is, at a FNM Christmas party near the FNM headquarters. She admitted that she suggested the offence allegedly occurred at the FNM Christmas party. Ms. Strapp also identified the "uncle" that the VC mentioned as the appellant.

6. The appellant testified on his own behalf and was questioned extensively by Ms. Russell and in cross-examination by Mr. McHardy. He also called witnesses in his defence. Nonetheless, he was convicted on both counts. He launched an appeal against his convictions and sentences.

7. I pause here to note the appellant's response to questions posed by Ms. Russell at page 787 of the transcript:

> **"Q. Did you place your penis inside Peyton Whitfield?**
>
> **A. On her.**
>
> **Q. Did you tell Sergeant 3273 Jewel Gray that you placed your penis inside Peyton Whitfield?**
>
> **A. On her."**

8. So the jury were informed by the appellant that he had placed his penis on the VC.

Ground 1 - The Judge failed to give a good character direction

Ground 2 - The Judge erred in law and in fact when he failed to give a Vye Direction

9. Inasmuch as grounds 1 and 2 relate to the issue of good character, I propose to address them together.

10. Ms. Myra Russell, Counsel for the appellant, contended that in the course of the trial, the matter of the appellant's good character arose. She adverted our attention to the evidence elicited from Mr. Wentworth Newry, a Defence witness, as he was being questioned by the jury:

> **"Madam foreman: Yes ma'am.**
>
> **What type of person is Steve Bain, in your opinion?**
>
> **The Witness: To me, I would say he's a simple-minded -- what we would say like he's a simple person.**
>
> **Madam Foreman: When you say simple, what does that mean?**
>
> **The Witness: I mean he's not like a normal person.**
>
> **MADAM FOREMAN: Is Steve kind? Considerate?**
>
> **MS. RUSSELL: One at a time.**
>
> **MADAM FOREMAN: Okay. Is he kind?**
>
> **THE WITNESS: Yes, he is kind. Yes.**
>
> **MADAM FOREMAN: Considerate?**

THE WITNESS: I would say considerate.

MADAM FOREMAN: Is he troublesome?

THE WITNESS: No, he's not.

MADAM FOREMAN: Is he quiet?

THE WITNESS: Yes, he is quiet. Yes.

MADAM FOREMAN: Outspoken.

THE WITNESS: No. He don't say much." (At pages 855-6 of the transcript)

11. Ms. Russell argued that Mr. Newry's evidence put before the court below the appellant's good character; and as such, the Judge was required to address the jury on the issue. There does not appear to be any dispute between the parties that the appellant was a person of good character and thus, entitled to a good character direction on both the credibility and propensity arms of the direction. This reference to the credibility and propensity arms of the good character direction may be traced back to earlier authorities, for example, **R v Aziz** [1996] AC 41, **R v Vye** [1993] 1 WLR 471 and **Teeluck & Anor v. The State (Trinidad and Tobago)** [2005] UKPC 14.

12. Mr. Kendall Carroll, Counsel for the respondent, submitted that there was no error committed by the Judge in not giving the jury a good character direction because the appellant had not raised it during the trial. He submitted that Newry's evidence was not good character evidence in the legal sense as that term refers to whether a person has any criminal antecedents, whereas the evidence of Newry did no more than show the appellant's nature and general demeanour.

13. Mr. Carroll also adverted our attention to pages 1075-6 of the transcript where the Judge, when concluding her summing up to the jury, made enquiries of Counsel:

"Counsel, having regard to the circumstances, before the jury retires I inquire of you if there are any matters which I have not dealt with which I ought to have dealt with? Whether there are any comments that you deem need to be brought to the juror's attention in the circumstances?

MR. MCHARDY: Nothing further, my lady.

THE COURT: Ms. Russell?

MS. RUSSELL: Nothing further, my Lady."

14. Mr. Carroll appears to suggest that by her response, Ms. Russell must have been satisfied that the issue of good character did not arise during the trial and thus, there was no necessity for the Judge to address the jury on the issue.

15. While the failure of Counsel to bring a particular matter to the court's attention when asked if there was something not mentioned or adequately covered in the summation, may be a telling point in argument that an issue not raised is of no moment, it must be appreciated that in the heat of battle a point may be overlooked by Counsel for either side. Therefore, the failure may sometimes be excusable and an appellant may still be given leave to canvass the point on appeal.

16. Moreover, if evidence was led which was sufficient to raise the matter of the appellant's good character, the Judge would have been obliged to direct the jury on the issue even if it had not been raised by the Defence. This would go to the Judge's duty to ensure that the trial was fair.

> "**The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial**."

See **Von Stark v R** (2000) 56 WIR 424, 429.

Discussion

17. In **Teeluck v The State of Trinidad and Tobago** [2005] UKPC 14, Lord Carswell set forth a series of propositions at paragraph 33 of his judgment as to when a good character direction should be given to a jury:

> **"33.(i) When a defendant is of good character, ie, has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: Thompson v R [1998] AC 811, [1998] 2 WLR 927, following R v Aziz [1996] AC 41, [1995] 3 All ER 149, and R v Vye [1993] 3 All ER 241, [1993] 1 WLR 471.**
>
> **(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: R v Fulcher [1995] 2 Cr App Rep 251 at 260, [1995] Crim LR 883. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a**

good character direction could not have affected the outcome of the trial: R v Kamar, Times, 14 May 1999.

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a good character direction is always relevant: Berry v R [1992] 2 AC 364 at 381, [1992] 3 All ER 881; Barrow v The State [1998] AC 846 at 850, [1998] 2 WLR 957; Sealey and Headley v The State [2002] UKPC 52 at para 34, [2003] 3 LRC 269.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: Barrow v The State [1998] AC 846 at 852, following Thompson v R [1998] AC 811 at 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: Thompson v R, ibid."

18. The significance of a good character direction may be gleaned from paragraph 5 of Lord Steyn's judgment in the House of Lords case of **Regina v Aziz** [1996] A.C. 41, where he said at page 50, inter alia:

> **"50.…The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance..."**

19. Additionally, in **R v Smith** [2013] EWCA Crim 1011, Pitchford, LJ delivered the judgment of the English Court of Appeal in a matter where a defendant was deprived of the benefit of a good character direction due to a misunderstanding related to his antecedents. A police

national computer antecedent report had been provided to the defendant's lawyer, which contained an erroneous representation that the defendant had been convicted of an assault occasioning bodily harm. This caused the lawyer not to adduce any evidence of good character and the trial judge did not give a good character direction.

20. The brief facts of the case were that the defendant submitted a claim for severe disablement allowance representing that he was 80% disabled in consequence of an accident at work. He received benefits to which, according to the Prosecution, he was not entitled because after an award had been made in his favour, he had obtained gainful employment by representing that he was "fit and active".

21. Paragraphs 4 and 5 of the judgment are, inter alia, as follows:

> **"[4] … It was agreed evidence that no notification to the department of work and pensions either by telephone or in writing could be found in the department's records. It was however the Appellant's assertion in interview under caution and in evidence that he had telephoned the DWP in 2003 and 2007 to inform them of his change of circumstances. According to his evidence he had been told to write in and his wife had done that for him. The Appellant's wife gave evidence in support of that case.**
>
> **[5] The trial judge directed the jury to consider whether they were sure that the Appellant had not notified the department on at least one occasion in 2003 that he was no longer severely disabled."**

22. In **Smith**, the jury convicted the defendant after less than two hours of deliberation, causing the court to observe at paragraph 7 of the judgment that the "jury clearly disbelieved the Appellant and his wife". The defendant appealed and his appeal was allowed. In delivering the judgment of the court, Pitchford, LJ said:

> **"[11] It is now submitted by Mr Carville that had the judge been aware that the Appellant was a man of good character, he would undoubtedly have provided the jury with a good character direction. We agree. Secondly, it is submitted that the verdict of the jury is unsafe. Had the jury been informed of the two respects in which good character affected their deliberations upon the evidence, they might reasonably have come to a different conclusion about the credibility of the defence. Again, we agree. The court has said on several occasions that a good character direction is an essential component of a summing-up when the jury is**

> **considering evidence of dishonesty, particularly by a man of middle years with no convictions. It may be that the evidence of dishonesty was compelling and that a good character direction could not have saved the Appellant. We cannot however be sure of that."**

23. In my view, **Smith** is quite similar to the present appeal, although it involved dishonesty and the present appeal involves sexual offences. However, a distinguishing feature between **Smith** and the appellant's case is that in **Smith**, an excuse was proffered by Mr. Smith that struck at the very foundation of the charge laid against him and which, if believed by the jury, entitled him to a complete acquittal; whereas, in the appellant's case, the record of interview ("ROI") reveals admissions by the appellant that suggest he committed the offences charged.

24. There is no gainsaying that a defendant of good character is entitled to have a good character direction given to the jury as to the relevance of his good character to his credibility and a further direction as to its relevance to the likelihood of his having committed the offence charged. In my view, however, the appellant's grounds raise two questions: 1) what constitutes "evidence of good character" sufficient to require a trial judge to give a good character direction to the jury, to wit, is it only the lack of criminal antecedents that satisfies the requirement or can good character be demonstrated through other evidence, for example, good behaviour, generosity, altruism or other benevolent acts? And 2) what happens if a defendant is entitled to a good character direction by a trial judge, but none is given? As to the second question, I propose to address it in ground three of my judgment.

25. I have posed the first question because Ms. Russell relies on Mr. Newry's answers to the questions put to him by the jury. No evidence was led by the defence that the appellant had no previous convictions or that he had never been arrested by the police before - which statement would lead to an inference that he had no previous convictions – so as to raise the issue of good character in the legal sense.

26. At paragraph 34 of **Muirhead v The Queen** [2008] UKPC 40, their Lordships Carswell and Mance, concurring with Lord Hoffman, stated:

> **"34. The Board has been told in a number of appeals that there was until recently a widespread misunderstanding in the Caribbean jurisdictions about the necessity to adduce evidence of good character, so that the judge might give the appropriate direction to the jury, and the way in which it could be done. Be that as it may, it has now been made clear in a series of cases before the Privy Council that it is important that a defendant <u>who is of good character in the legal sense</u> should be given the**

> **benefit of the direction which is now standard in the criminal process in England and Wales, and that where the defendant is entitled to such a direction and likely to benefit from it, it is the affirmative duty of his counsel to ensure that the court is made aware of his character, through direct evidence given on his behalf or through cross-examination of the prosecution witnesses. The judge's duty to give the direction only arises when such evidence is before the court: *Thompson v The Queen* [1998] AC 811." [Emphasis added]**

27. In **Donna Vasyli v Regina** SCCrApp. No. 255 of 2015, the appellant had complained that the trial judge had failed to direct the jury about her good character because evidence had been adduced through a housekeeper and a family friend that introduced it. Counsel for Mrs. Vasyli, Ms. Montgomery, had posited:

> **"74. … that from the evidence of Myles Pritchard and Nicolaza Quintana, whose statements were read into the record, and here I paraphrase, a picture appeared of a woman who had for many years endured the vicissitudes of marriage to an alcoholic and abusive husband but who yet retained the capacity for compassion and care toward that husband when he fell and injured himself the very night she is alleged to have killed him. This Ms Montgomery submits redounded to her good character."**

28. I concluded that the incidences of good character that Counsel said was illustrative of Mrs. Vasyli's good character, merely "demonstrated nothing more than the quality of a relationship"; and not good character in any real sense. Thus, the issue did not arise to require the trial judge to direct the jury on it.

29. In the Privy Council decision of **Thompson v The Queen** [1998] 2 WLR 927, Lord Hutton at page 955 stated, inter alia:

> **"However, if it is intended to rely on the good character of the defendant, that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution: see *per* Lord Goddard C.J. in *Rex v. Butterwasser* [1948] 1 K.B. 4. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge."**

30. This passage from **Thompson**, mirrors proposition (v) in **Teeluck**, particularly the following excerpts:

> "**The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses**" and "**The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself**".

31. It should be noted that in **Vasyli**, the Court (Allen, P, Isaacs and Crane-Scott, JJA) were ad idem on the point that Mrs. Vasyli had not distinctly raised the issue of good character, "by direct evidence elicited from her or given on her behalf, nor was it elicited by the defence at the trial through cross-examination of the prosecution witnesses". In my judgment, a defendant must distinctly raise his good character either through his own evidence, on oath or affirmation, or by witnesses called on his own behalf; and that evidence must disclose that he has a good character in the "legal sense", to wit, he has no criminal antecedents.

32. Although I have considered whether evidence of good character in the sense of no previous convictions (the legal sense) must be placed before the trial judge and jury, I am satisfied that the appellant was not entitled to a good character direction even though he went into the witness box and testified on his own behalf. In **Aziz**, Lord Steyn said at page 157:

> **"*(b) The defendant who testifies***
>
> **There has been a settled rule since 1989 that where a defendant testifies the judge must give a direction as to the relevance of good character to the defendant's credibility: see *R v Berrada* (1989) 91 Cr App R 131. Until *R v Vye* there was no corresponding duty in respect of the relevance of good character to propensity. It was considered that it was a matter for the trial judge's discretion. In *R v Vye* the court laid down that trial judges should give a direction in respect of the relevance of good character to propensity. Counsel invited your Lordships to rule that this part of the judgment in *R v Vye* is wrong."**

33. Lord Steyn went on to reject Counsel's invitation to rule **Vye** was wrong. Although **Aziz** suggests that a defendant who testifies is entitled to a good character direction as to his credibility, in my view, it is necessary for the defendant to testify as to those aspects of his character that would lead to a conclusion that he has a good character so that there is

evidence led to that effect. In fact, the evidence led through the appellant himself was that he had committed an offence. At page 787 of the transcript the following appears:

> **"Q. Did you place your penis inside Peyton Whitfield?**
> **A. On her.**
> **Q. Did you tell Sergeant 3273 Jewel Gray that you placed your penis inside Peyton Whitfield?**
> **A. On her."**

34. Hence, a direction as to the appellant's good character in the teeth of his admission would have made a nonsense of the direction's purpose; and only serve to confuse the jury.

35. I am satisfied, therefore, that the Judge did not err in law or fact when he did not give a Vye direction; nor did he fail to do so because: 1) the appellant did not adduce any evidence of his good character while in the witness box; and 2) he essentially admitted to the offences while testifying before the jury. There is no merit in these grounds.

Ground 3 – The verdict is unsafe as the failure of the judge to give a good character direction did affect the safety of the verdict

36. Ms. Russell submitted that the Judge ought to have given a good character direction to the jury and that by failing to do so, the verdict rendered by the jury is unsafe. Her hypothesis is that this was essentially a case of "he says/she says" as there was no forensic evidence produced by the Prosecution linking the appellant to the crimes, which heightened the need for a standard good character direction, particularly on the matter of credibility. This was a contest of credibility to convince the jury who they should believe was being truthful.

37. She contended that the appellant was entitled to a good character direction because of the appellant's uncle, Mr. Wentworth Newry, answers to questions posed by the jury. However, as I have stated earlier in my judgment, the issue of the appellant's good character was not raised in the legal sense. The responses of Mr. Newry portray the appellant as kind, considerate and not troublesome. These are laudable qualities but do not rise to the level of putting the appellant's character into issue.

38. Mr. Russell advanced the proposition that even if the appellant was entitled to a good character direction and none was given, that did not automatically result in the quashing of a conviction. He referred to the Privy Council's decision in the Trinidad and Tobago case of **Singh v The State** [2005] UKPC 35, [2006] 1 WLR 146.

39. The brief facts in **Singh** were that Mr. Singh was a lawyer convicted on two counts of corruption, the allegation being that he agreed with Ms. Basdeo, who retained him to act for a client, to bribe two court officials on behalf of the client who was seeking bail. At paragraph 5, Lord Bingham outlined what was alleged to have occurred during a meeting between Mr. Singh and Ms. Basdeo:

> **"5. On 11 November 1999 there took place a meeting crucial to the outcome of this case. It was between Basdeo and the appellant at the magistrates' court. No one else was present and no record of the meeting was made. According to her, the appellant said that John would get bail but that she had to pay the sum of $TT40,000 for him to get it, and the money had to be paid to him for him to give to the magistrate and to Corporal Bynoe, the prosecutor. She wanted time to raise the money, but he pressed her for an answer, saying that he had to tell the magistrate whether she would pay the money or not. She agreed to do so. The appellant denied that any such conversation took place. He told Basdeo that he wanted to be paid the balance of his fee, $TT40,000, and would make an application for bail when he had been paid"**

40. At paragraph 21, Lord Bingham set out the following:

> **"21. As a practising lawyer with no criminal convictions, no recorded blemish on his professional reputation and a commendable record of involvement in community activities, the appellant was entitled to the benefit of a full good character direction to the jury. Such a direction should have related both to his credibility as a witness and to the lack of any propensity to commit crimes of the kind charged against him. The credibility ingredient in this case was of particular importance, since the crucial issue for the jury's decision concerned the conversation between the appellant and Basdeo on 11 November 1999 (see para 5 above). The jury had to decide whether they believed Basdeo, a woman of admittedly bad character, or whether the appellant's account might be true"**

41. The trial judge had addressed only the propensity limb of the good character direction when he "summarised the appellant's evidence about his background and upbringing, referring to his sporting and cultural activities in his native district and reminding them that the appellant had never been convicted of any criminal offence" but neglected to address the issue of credibility. While the directions of the trial judge may have been inadequate,

> **".. [t]he omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence**": (para. 30 of Singh).

The omission does require the Court to examine the evidence in the case to determine whether the jury would have inevitably convicted the appellant even if a good character direction had been given. See **Barrow v The State** [1998] AC 846.

42. The Prosecution's evidence arrayed against the appellant lay in the main in the interview of the appellant with Sergeant Gray and the ROI produced; and the evidence of the VC, despite its brevity. I do place some reliance on the evidence of Dr. Shakera Carroll about her examination of the VC and her explanation of certain medical terms.

43. Ms. Russell asked us to note that the division of the jury on the charge of incest was 7 to 2. This suggests that two jurors were unconvinced on the state of the Prosecution's case that the burden of proof had been discharged to the requisite criminal standard, that is, beyond a reasonable doubt; and had the appellant been given the benefit of a good character direction, he may have been the recipient of an outright acquittal.

44. Bearing in mind that the jury had before them the ROI and the admission of the appellant that he had rubbed his penis on – and I infer from the question posed that he had put his penis in the VC's vagina – the VC's vagina; and the Judge's direction on the elements of the offence of incest, the jury would have inevitably convicted the appellant on the incest count. A similar outcome would have been inevitable in respect of the indecent assault count.

45. I have concluded in my treatment of grounds 1 and 2 that there was no merit in them for the reasons stated above. There was no necessity for the Judge to give a good character direction and the fact that none was given could in no way affect the safety of the convictions. In the circumstances, there is no merit in this ground.

Ground 4 – The learned judge erred in law and in fact when she failed to give a Mushtaq Direction

Ground 10 - The learned judge erred in law and in fact when she failed to direct the jury in regards to the confession.

46. Ms. Russell submitted, inter alia, that the Judge ought to have given the jury a "Mushtaq" direction because the appellant had been denied food and access to a bathroom while in police custody prior to his interview with the officers.

47. The term 'Mushtaq direction" is derived from a decision emanating from the English House of Lords, that is**, R v Mushtaq** [2005] 3 All ER 885. An issue arose pertaining to how the courts should treat a confession that was or might have been obtained by oppression by the person who made it, notwithstanding that it might be true. In his summing up to the jury, the trial judge had told them, inter alia:

> **"Nevertheless, it is for you to assess what weight should be given to the confession. If you are not sure for whatever reason that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true you may rely on it <u>even if it was or may have been made as a result of oppression or other improper circumstances</u>." [Emphasis Added]**

48. In a judgment with whom the majority of the court agreed, Lord Roger of Earlsferry stated at pages 903-904:

> **"903. In my view, therefore, the logic of s 76(2) of PACE really requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In giving effect to the policy of Parliament in this way, your Lordships are merely reverting to the approach laid down by the Court of Criminal Appeal (Lord Goddard CJ, Byrne and Parker JJ) in *R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680 Giving the judgment of the court, Byrne J ([1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684) quoted the well-known words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at 609-610, [1914-15] 1 All ER Rep 874 at 877:**
>
> > **'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE."**

49. I note the appellant's evidence in examination in chief at page 787 of the transcript where the following appears:

> **"Q. Were you fed before your interview Mr.Bain?**
>
> **A. Yes, ma'am"** (lines 8-9)
>
> …
>
> **"Q. Can you tell the court if you use the bathroom while detained by the police?**
>
> **A. That's at CID I use the bathroom there, but not at the police.**
>
> **Q. Not?**
>
> **A. Not at Carmichael Road Police Station.**

Q. How many times in total?

A. At CID?

Q. No, how many times in total since you were detained for this matter did you use the bathroom whilst, before being charged?

A. Well, only one day." (lines 20-31)

50. I also note the exchange at page 788 of the transcript:

"Q. Did they ask you whether you wanted legal counsel?

A. Yes, ma'am.

Q. Was this before or after they did not caution you?

A. After they caution me.

Q. What was your response?

A. No, ma'am."

51. Contrary to the assertion of Ms. Russell that the appellant was oppressed due to the withholding of food and denial of use of the bathroom, thereby resulting in the appellant implicating himself in the offences, the appellant testified that he had been fed and used the bathroom while at the Criminal Investigation Department before he was interviewed.

52. In the Judge's directions to the jury on the issue of the voluntariness of the admissions allegedly made by the appellant in the ROI at pages 1073-4 of the transcript are as follows:

"What about the record of interview, was it given voluntarily? Are you satisfied by the contents? Are you satisfied he was cautioned? Was the record of interview lawfully obtained? Did Steve Bain understand the questions being asked? Does it appear that he was in any way confused or under duress? Did Sergeant Gray exclude or misquote the evidence? You had an opportunity to observed (sic) **him on the video, how did he appear to you during the interview? Does the record of interview in your opinion amount to a confession? Did he confess because he was remorseful? The weight you attached** (sic) **to it like all the other evidence is entirely up to you jurors?**

If you are satisfied, members of the jury, that the record of interview in fact amounts to a confession and was or

> **may have been obtained by oppression or unlawfully obtained you should disregard it and place absolutely no weight on it. If however you are satisfied that it was not obtained by oppression as jurors it will be up to you what weight you attached** (sic) **to it."**

53. Mr. Carroll submitted that the Judge's direction was more fulsome than the directions the jury received in **Valentino Dorsette v Regina** SCCrApp. No. 224 of 2016, and the Court found that direction to be proper.

54. In my view, the direction that the Judge gave to the jury adequately focused their attention to the issue of the voluntariness of the ROI and their sole role in determining that issue. Furthermore, there was nothing in the appellant's evidence that raised a scintilla of oppressive or improper conduct by the police officers sufficient to impel the Judge to provide more directions to the jury than she did in fact give. In the premises, I find no merit in these two grounds.

Ground 5 - the learned judge erred when she rejected the appellant's no case submission

Ground 7 - The Learned Judge erred in the fact and law by not removing count 1 from the Jury

55. Ms. Russell submitted that the Judge erred both when she rejected the no case submission made on the appellant's behalf and when she refused to remove count 1, the incest count, from the jury's consideration.

56. Sergeant 3273 Jewel Gray testified that she conducted an interview with the appellant and prepared a ROI based on her questions put to the appellant; and his responses. The ROI was made an exhibit in the trial as "SB-5". Reproduced below is a representation of the exchanges found in the ROI, beginning at question 11:

> **"QUESTION 11: I have information that sometime during December 2019 or around the Christmas time when Peyton was by your house you put your penis into her vagina. What can you tell me about this?**
>
> **ANSWER 11: My penis, I only rub it. I never push it in. sometimes I take my things and rub but never push it in.**
>
> **QUESTION 12: I have information that you would also lay on top of Peyton and put your penis into her vagina. What can you tell me about this?**
>
> **ANSWER 12: no, ma'am. I never lay on top of her.**
>
> **QUESTION… how many times did you let Peyton climb on top of you while you rub your penis on her vagina?**

ANSWER 13: I always put my nieces and nephew on my belly but this is my first time like I say I rub my penis on her, I have a niece now pregnant but I never touch them this the first time because of pressure. Cheaper I did stay in Freeport… I "just" knew this would happen

QUESTION 14: How many times did you rub your penis on Peyton Vagina?

ANSWER 14: I rub it there three times and after that I juck off and she asked me one time what I was doing and I said nothing because I was the other way jucking off.

QUESTION 15: why did you rub your penis on Peyton vagina?

ANSWER 15: 'Cause my uncle – I don't know if – well, my cousin was telling me my uncle wife grammy do obeah on the family, the set who live in the house with her and plenty times when I hear the demons I does open my bible or play music. The minute I don't open my bible or fall in a deep sleep or go outside to smoke it does happen,

QUESTION 16: Did you know what you did to Peyton, your niece, was wrong?

ANSWER 16: Yes. That's why I does ask her for forgiveness whenever I rub my penis on her vagina I would say please forgive me and I ask her mother one time in front of her please forgive me I would ask her in my room, please forgive me and she say yes, uncle." (At pages 600-1 of the transcript)

57. In the seminal case of **R v Galbraith** [1981] 1 W.L.R. 1039, Lord Lane said:

"How then should the judge approach a submission of 'no case'?

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

58. I had said in **Vasyli** at paragraph 119:

"119 The Judge should have heeded the view expressed by King, CJ in Questions of Law Reserved on Acquittal (No. 2 of 1993) (1993) 61 SASR 1, 5 which was endorsed by Lord Carswell in DPP v Selena Varlack, Privy Council Appeal No. 23 of 2007–- a case cited by the Judge in his ruling–- when speaking on how a judge was to approach a submission of no case:"He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond a reasonable doubt, and therefore exclude any competing hypothesis as not reasonably open on the evidence. ...

If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a

reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence"""

59. Section 13(1) of the Sexual Offences Act ("SOA") states, inter alia, that:

> **"13. (1) Any person who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent, grandchild, uncle, <u>niece</u>, aunt or nephew, as the case may be, has <u>unlawful sexual intercourse</u> with that other person, whether with or without the consent of that other person, is guilty of the offence of incest and liable to imprisonment —**
>
> **(a) if he is an adult who commits the offence with a minor, for life;**
>
> **…"** [**Emphasis added**]

60. Section 17 of the SOA provides as follows:

> **"17. (1) Any person who —**
>
> **(a) indecently assaults any other person;**
>
> **(b) does anything to any other person with the consent of that other person which, but for such consent, would be an indecent assault, such consent being obtained by false and fraudulent representation as to the nature and quality of the act,**
>
> **is guilty of an offence and liable to imprisonment for eight years.**
>
> **(2) It is no defence to a charge of an indecent assault committed on a person under fourteen years of age, to prove that that person consented to the act of indecency."**

61. Sexual intercourse is defined in section 4 of the SOA as follows:

> **"4. For the purposes of this Act, "sexual intercourse" includes —**
>
> **(a) sexual connection occasioned by any degree of penetration of the vagina of any person or anus of any person, or <u>by the stimulation of the vulva of any person or anus of any person, by or with —</u>**
>
> **<u>(i) any part of the body of another person</u>; or**

(ii) any object used by another person,

except where the penetration or stimulation is carried out for proper medical purposes; and

(b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person,

and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act." [Emphasis added]

62. It is evident, therefore, that the act of sexual intercourse, which is an element of the offence of incest, may be committed merely by the stimulation of the vulva of a person, unless it is shown that such stimulation was done for proper medical purposes.

63. Dr. Carroll's testimony at pages 401-2 of the transcript discloses the following:

"Q. And can you also explain what a Vulva is?

A. The Vulva is the female genitalia or female private area that you can see from the outside. So, that includes what they call the Lips which are the Labia, you have the outer Labia which people may describes (sic) **as the mound covering the vagina area, you have the inner Lips which are the thinner clips** (sic) **towards the inside of the Vulva and then you have towards the top you have the Clitoris, below that is the Urethra Orifice or the opening where urine comes out and then below that would be the vagina.**

Q. How can the Vulva be stimulated?

A. Stimulation is usually manual. Whether its an instrument of (sic) **body part or another type of object.**

Q. Can you give an example of how it can be stimulated. An example.

A. For example if a person masturbates, that's stimulation by them self. If a person touches a penis to the vagina or a Vulva and there is stimulation of the clitoris that can happen there as well. If they use an object such as a sex toy and put it on the Vulva that's stimulation as well."

64. The evidence led in support of the charge of indecent assault was that the VC was six years old at the time the offences were allegedly committed against her. Further, it emerged from the ROI that the appellant admitted that he rubbed his penis on the VC's vagina:

> **"QUESTION 11: I have information that sometime during December 2019 or around the Christmas time when Peyton was by your house you put your penis into her vagina. What can you tell me about this**
>
> **ANSWER 11: My penis, I only rub it. I never push it in. Sometimes I take my things and rub but never push it in.**
>
> **QUESTION...how many times did you let Peyton climb on top of you while you rub your penis on her vagina?**
>
> **ANSWER 13: I always put my nieces and nephew on my belly but this is my first time like I say I rub my penis on her…**
>
> **QUESTION 14: How many times did you rub your penis on Peyton vagina?**
>
> **ANSWER 14: I rub it three times and after that I juck off and she asked me one time what I was doing and I said nothing because I was the other way jucking off."**

65. I note that in cross-examination, Sergeant Gray admitted that the appellant admitted to one offence; and that, having listened to the audio of the video that had been made at the time of the interview, the appellant had said that he had just rubbed "it" and not "on the VC's "vagina" as is recorded in the ROI. However, "it" may be inferred to be a reference to the VC"s vagina since the question posed, referenced her vagina.

66. It is evident, therefore, that given: 1) the definition of sexual intercourse, i.e. stimulation of the vulva; 2) the doctor's evidence about the vulva being that "female private area that you can see from the outside" and that manual stimulation of the vulva may be by use of a body part; and 3) the appellant's statement that he rubbed his penis on the VC's vagina three times, the offence of incest had been disclosed by the Prosecution's evidence at the close of their case.

67. I am satisfied that the Judge did not err when she did not accede to the no case to answer made on the appellant's behalf; nor did she err when she did not remove the first count, incest, from the jury's consideration because evidence had been adduced sufficient for the jury to consider. It would have been an intrusion into the territory of the jury for the Judge to have preempted their consideration of that evidence by withdrawing the case from them.

68. I find no merit in these grounds.

Ground 6 – Whether the learned Judge erred when she failed to adequately direct and assist the jury in relation to the medical evidence, which amounted to hearsay, where this was the primary evidence of the prosecution

69. Ms. Russell submitted that the hospital form used by Dr. Carroll to refresh her memory fell within the category of hearsay evidence; and relied on section 38 of the Evidence Act, which says:

> **"38. When a fact is proved by evidence —**
>
> **(a) that a statement as to the fact was made by any person;**
>
> **(b) that a statement as to the fact is contained or recorded in any book, document or other record,**
>
> **the fact is said to be proved by hearsay evidence."**

70. She complains that nothing was said by the Judge about hearsay to the jury.

71. Mr. Carroll countered that the hospital form used by Dr. Carroll was an exception to the hearsay rule pursuant to section 39(1) and (2)(e) of the Evidence Act:

> **"39. (1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.**
>
> **(2) Hearsay evidence may be admitted —**
>
> **…**
>
> **(e) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept;"**

72. I am satisfied that neither section is relevant to the present circumstances since the doctor merely used the report as an aide memoire, that is to say, to refresh her memory about an examination she had conducted on the VC. As Mr. McHardy represented to the Judge at pages 397-8 of the transcript, the intention of the Prosecution was to have the doctor "refresh her memory and take the court through her notes".

73. Section 159 of the Evidence Act states:

> **"159. A witness may, while under examination, <u>refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court</u>**

> **<u>considers it is likely that the transaction was at that time fresh in his memory</u>." [Emphasis added]**

74. There is no merit in this ground.

Ground 8 - The verdict is unsafe and unsatisfactory having regard to the circumstances of the case

75. Ms. Russell invited the Court to take a broad view of the case, analyse the evidence, the Judge's summation and the conduct of the trial as a whole to determine whether, in our view, the convictions are supported by the evidence and is safe and satisfactory. She relied on passages from **R v Cooper** [1969] 1 All ER 32 per Widgery, LJ and **Stafford v Director of Public Prosecutions** [1973] 3 All ER 762.

76. Lord Kilbrandon in **Stafford** at 769 paragraph C observed:

> **"The setting aside of a conviction depends on what the appellate court thinks of it—that is what the statute says. If it were necessary to expand the question which a member of the court, whose thoughts are in question, must put to himself, it may be, 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory? If I have I must quash. If I have not, I have no power to do so'."**

77. I have adhered to Ms. Russell's invitation and considered the case in the round. I am satisfied that the trial was conducted fairly. I have no lurking doubt about the safety of the convictions.

Ground 9 - Whether the learned judge erred in law and in fact when he failed to give a Turnbull Warning

78. Ms. Russell submitted that due to poor identification evidence from VC, the Judge ought to have given the jury a Turnbull direction. Ms. Russell's submission seems to be based on the fact that at the time the offences were alleged to have occurred, the VC had reported that the room was dark.

79. Mr. Carroll submitted that a Turnbull direction was unnecessary because the VC and the appellant were well known to each other as she was his niece. Further, the VC had identified the appellant from a photo array. He also pointed out that during his time in the witness box, the appellant admitted that he had put his penis on the VC' belly and leg. Moreover, when asked by the jury if he thought that was the right thing to do, the appellant responded that it was not. (See pages 817 and 818 of the transcript).

80. At page 787 of the transcript, the appellant was asked by Ms. Russell about what he had done; and he responded:

"Q. Did you place your penis inside Peyton Whitfield?

B. On her.
R. Did you tell Sergeant 3273 Jewel Gray that you placed your penis inside Peyton Whitfield?
B. On her."

81. In **R v Turnbull** [1977] QB 224, Lord Widgery said at page 228, inter alia, that where the:

> **"correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the Jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."**

82. In my view, this ground is untenable. There was evidence that the appellant admitted to placing his penis on the VC's belly and leg. That was sufficient evidence upon which the jury could arrive at a conclusion that the appellant was the person who had done acts to the VC despite the paucity of evidence from the VC herself as to who may have committed the offences.

83. More tellingly, the appellant did not challenge the identification of himself as the "uncle" mentioned by the VC as being mistakenly made.

84. I would dismiss this ground.

Ground 11 – The sentence is unduly harsh and/or severe

85. Ms. Russell contended that the sentencing pertaining to incest was at large; and the appellant has no antecedents.

86. At paragraph 4.25 of her written submissions, Ms. Russell outlined the sentencing exercise conducted by the Judge:

> **"4.25. The trial judge conducted a sentencing hearing during which she heard from Senior Probation Officer, Mrs. Jennis McKenzie and probation officer, Mrs. Kishlyne Dean; relied on a psychiatric report by Dr. John Dillet, a consultant forensic psychiatrist and the trial judge also heard submissions by Counsel."**

87. This appears to me to have been a thorough ventilation of matters that would impact the Judge's sentencing discretion.

88. Ms. Russell referred to **Commissioner of Police v Linty Stuart** MCCrApp. No. 139 of 2016, **William Sturrup v The Attorney General** SCCrApp. No. 4 of 2007 and **Kevin Charles King v The Attorney General** MCCrApp. No. 13 of 2006. She suggested that the appropriate range of sentences that the Judge should have considered were four years imprisonment for incest and twelve months for indecent assault.

89. **Linty Stuart** was an application by the Crown for leave to appeal out of time the sentence imposed on the respondent, which application was refused. It is not of much assistance to the appellant as the case was tried before a magistrate and involved a fifteen year old girl; and the question whether the sentence was unduly lenient was not determined.

90. In **Sturrup** the appellant was convicted of indecent assault and sentenced to twelve months imprisonment. The appellant had touched the hip and vagina of a ten year old girl. This case was also tried in a magistrate's court.

91. In **King**, the appellant was convicted in a magistrate's court of indecent assault and sentenced to one year's imprisonment.

92. I note that the cases of **Sturrup** and **King** were decided when the punishment for indecent assault was seven years for a first offence and the punishment for indecent assault was eight years imprisonment. The maximum punishment for incest has been increased tremendously, namely, life imprisonment.

93. Mr. Carroll submitted that inasmuch as the maximum sentences that could be imposed for the offences of incest and indecent assault were life and eight years imprisonment, respectively, the sentences imposed by the Judge could not be said to be unduly severe or harsh. Unlike the appellant, the respondent did not provide any comparators by which the appellant's sentences may be compared.

94. I do not consider the respondent's argument to be necessarily sound. Although the maximum sentence which the appellant could have received for the two offences exceeded what he received, it is necessary to consider whether the sentences he received were commensurate with the circumstances of the offences charged and with the circumstances of the appellant. As Adderley, JA said at paragraph 36 in **Prince Hepburn v Regina** SCCrApp No. 79 of 2013:

> **"36. In exercising his sentencing function judicially the sentencing judge must individualize the crime to the particular victim so that he can, in accordance with his legal mandate, identify and take into consideration the aggravating as well as the mitigating factors applicable to the particular perpetrator in the particular case. This includes but is not limited to considering the nature of**

> **the crime and the manner and circumstances in which it was carried out, the age of the convict, whether or not he pleaded guilty at the first opportunity, whether he had past convictions of a similar nature, and his conduct before and after the crime was committed. He must be ensure that having regard to the objects of sentencing: retribution, deterrence, prevention and rehabilitation, that the tariff is reasonable and sentence is fair and proportionate to the crime. Each case is considered on its own facts."**

95. As noted by Ms. Russell in her written submissions, the Judge heard from a number of persons in reference to the appropriate sentences the appellant ought to receive. In her sentencing remarks made on 1 April 2022, the Judge said, inter alia:

> **"The convict now 41 years of age was 39 at the time of the commission of the offences: He is single and has no children. He is a high school graduate and has over the years maintained odd jobs, at the time of the commission of the offence he was employed at Shell service station as a pump attendant. His family in particular his paternal family and his employer provided complementary commendations on his behalf. He has had no prior convictions.**
>
> **The Crown submits that this offence falls within the mid-upper spectrum of the sentencing scale of the most serious offences and noted that the convict actions were (1) an egregious breach of trust and (2) significant lifelong damage the virtual complainant will suffer were among the aggravating factors which far outweigh any mitigating factors.**
>
> **Counsel for the convict has asked the court in mitigation for Leniency and has asked the court to take into account a number of factors. She submits that the only aggravating factor is the egregious breach of trust and has highlighted what in her opinion were nine mitigating factors in favor of the convict."** (At page 1142 of the transcript)

96. And later at page 1143:

> **"I have also considered the other factors raised by her and note her submission that the convict is remorseful, whilst I accept that he appears to be remorseful based on**

his demeanor and to some extent his evidence lead at trial the Court finds it difficult to dismiss the fact that the Defendant not only did not plead guilty at the first available opportunity but put the crown through what can best be described as a protracted trial having caused the victim to be put through what was evident a very painful and difficult situation as she had to relive the horror of December 2019.

The report by the Department of Rehabilitate/Welfare Services (DRC) indicates that the convict is capable of rehabilitation and contains pleas for leniency by family members. Dr. John Dillet the Consultant Forensic Psychiatrist at Sandilands Rehabilitations Centre stated that the convict has a current diagnosis of Compulsive Sexual Behavior Disorder and that he continues to be monitored by psychiatric services"

97. The Judge set out the relevant statutes before continuing her recitation of the circumstances for her consideration:

"In deciding on the appropriate sentence, consideration must be given to general principles of sentencing. Halsbury Law, Volume 11, sub-two, paragraph 1188, on the Aims of Sentencing states that the aims of the sentencing are now considered to be retribution, deterrence, and protection; And (sic) **modern sentencing policy reflects a combination of several of all of these aims. Retribution, public revulsion of the offense and to punish the offender for his wrongful conduct. Deterrence sentences are aimed a** (sic) **deterring not only the actual offender from further offenses, but also potential offenders from breaking the law.**

The importance of re-formation of the offender is shown by the growing emphasis laid upon it by much modern legislation. However, the protection of society is often the overriding consideration in addition to reparation which is now also an important object of sentencing.

I have had the opportunity to review the evidence lead at the trial together with the relevant provisions of statute law with respect to sentencing and I also have taken into account the case law, the mitigating and aggravating

> **factors and the plea in mitigation made on behalf of the convict.**
>
> **Having regard to all the circumstances in this case, the authorities submitted and having balanced the mitigating factors in favour of the convict against the aggravating factors. I find that a sentence of imprisonment is an appropriate one.**
>
> **I therefore sentence the convict on the charge of Incest to a term of nine (9) years AND on the charge of Indecent Assault to a term of three (3) years. Both sentences are to run concurrently further I will take into consideration the time that the convict has spent on remand being from 29th June 2020. This period is to be deducted from his sentence of 9 years which takes effect from the date of his conviction on the 31st August 2021."** (Pages 1144-5 of the transcript).

98. In **Regina v Franklyn Roberts** [2016] 1 BHS J. No. 70, a case arising in the Supreme Court Stephen Isaacs, J (as he then was) was confronted with a sixty-five year old grandfather who had been charged with two counts of incest and one count of attempted incest; and who had pleaded guilty to the charges. Roberts suffered from a number of illnesses: "peripheral motor neuropathy of his lower limbs (nerve damage) bilateral cataracts, possible diabetic retinopathy and early kidney disease." Having touched on the four objectives of sentencing mentioned in **Taylor v COP** No 52 of 2015: retribution, deterrence, prevention and rehabilitation, concluded at paragraphs 21-2:

> **"21 In this case incarceration will create a burden on the prison medical facilities as they would have to replace the constant care and vigilance now provided by Roberts' wife. Further, incarceration would be aimed at retribution for offences that Roberts does not seem to remember.**
>
> **22 Although Roberts has pleaded guilty, I am not able to go further than to impose a sentence of six (6) years on each count, to run concurrently, such sentence however, is hereby suspended. Should there occur a similar incident with any young person over the next six (6) years, Roberts will be called upon to serve his suspended sentence at the Bahamas Department of Correctional Services."**

99. Isaacs, J had referred to a passage from the oral judgment of Sawyer, P in **AG v Richard George Campbell** SCCrApp No. 30 of 2004, which bears repeating in this appeal:

> **"18. In our judgment, where a person who is a mature person is convicted of a sexual offence with a minor - whether or not there is any relationship of trust - the only question is not whether or not they would go to prison, but for how long. Where they are in a relationship of trust with a minor, there can be no doubt that imprisonment is the only method of punishment for that type of offence. We say that without doubt at all. Children are not things. They are not objects. They are to be protected. They are not to be abused in any form, let alone sexual forms. That is something they must try to decide when they are of a mature age, whether or not they wish to yield to a particular person. It is not for the person in a position of trust to breach that trust by corrupting them before they can handle the effects of such actions."**

100. Campbell, an adult, had been convicted of unlawful sexual intercourse with an eleven year old girl, the daughter of his live-in paramour. The Crown had appealed an unduly lenient sentence passed upon him by the trial judge. In setting aside the trial judge's sentence and substituting a sentence of seven years imprisonment, Sawyer, P stated at page 4;

> **"We think that the minimum sentence that should be imposed in cases of this kind is not less than seven years."**

101. As a result of a successful appeal to the Privy Council, and on the invitation of their Lordships, the Court reheard the Attorney General's appeal and sentenced Campbell to four years imprisonment. During that re-sentencing, Sawyer, P referred to the English cases of **Keith Billam and Others Appeals and Applications** (1986) 82 Cr. App. R. 347 (rape) and **Aramah** 76 Cr. App. R. 190 (drug trafficking). The learned President noted at paragraph 26:

> **"26. If the respondent was married to the virtual complainant's mother he may have been charged with the offence of incest which, according to the records of the courts and the public authorities is on the increase in The Bahamas and which is a major contributing factor to the breakdown in the value system of the country. These were all matters known to this court at the time of sentencing in 2005 and which, in their opinion, could not be ignored."**

Regrettably, the increase noted by the President appears to have continued its upward trajectory.

102. In **R v Billam and other appeals and applications** [1986] 1 All ER 985 at page 987 Lord Lane sought to draw together various strands of sentences imposed in cases of rape; and summarized their general effect:

> **"For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who had broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.**
>
> **At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate. Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.**
>
> **The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.**
>
> **The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on**

> **all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.**
>
> **The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance."** [**Emphasis added**]

103. The Judge did not take into consideration anything she ought not to have, nor did she fail to consider anything she should have. In my view, the Judge paid due regard to section 185 of the CPC:

> **"185. The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed and may hear counsel on any mitigating or other circumstances which may be relevant."**

104. It cannot be said that the sentences imposed on the appellant in the circumstances of the case, to wit, an adult in a position of trust who has breached that trust and who required the VC to re-live the trauma in a contested trial**,** are unduly severe or harsh.

105. I find no merit in this ground of appeal.

Conclusion

106. For the reasons given in this judgment, I can find no merit in the appeal. It is therefore dismissed and I affirm the convictions and sentences.

The Honourable Mr Justice Isaacs, JA

107. I agree.

The Honourable Madam Justice Crane-Scott, JA

108. I also agree.

The Honourable Sir Brian Moree, JA