COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp & CAIS No. 39 of 2023

BM

Appellant

v

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honorable Sir Michael Barnett, President,**
The Honorable Mr. Justice Evans, JA
The Honorable Madam Justice Charles, JA

APPEARANCES: **Mr. Raymond Rolle, Counsel for Appellant**
Ms. Darnell Dorsette, Counsel for Respondent

DATE: **8 February 2024; 22 February 2024**

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Criminal Appeal- Rape- Incest- Section (13)(1)(a)of the Sexual Offences Act- Tape Recordings- Character Direction- Corroboration- Inadmissible evidence- Media Publication of the Trial- Whether conviction and sentence were unduly harsh?

In October, 2022, the appellant, BM, was convicted on two charges of incest with his biological daughter, the virtual complainant. The appellant was eventually sentenced to 25 years in jail for each charge, with the terms running concurrently. The appellant lodged a Notice of Appeal in March 2023 challenging both the conviction and sentence on multiple grounds, inter alia, that the verdicts were unreasonable in light of the evidence presented, the sentences imposed were excessively harsh, and that the judge made various errors during the trial, including the admission of inadmissible evidence (a tape recording), the failure to declare a mistrial after media publication of trial details, the provision of a flawed summary of the appellant's case, the omission of an adequate instruction on the appellant's good character to the jury, and the failure to instruct the

jury on the absence of corroborating evidence. Following a hearing on 8 February 2024, the Court of Appeal reserved its decision.

Held: The appeal is dismissed and the convictions and sentences are affirmed.

There was no evidence to suggest that the tape recording was in any way tampered with by anybody. The recording was not illegal, highly relevant, and its probative value outweighed any prejudicial effect. Whether the jury accepted that the voice recording was that of the daughter and the appellant was a matter for them. They heard the oral testimony of the daughter and the appellant, they heard the recording and there was no evidence to suggest it had been tampered with.

It was appropriate for the judge to give good character direction to the jury. The judge's direction could have been more robust and complete. In particular it does not contain the propensity limb of the good character direction. There is nothing to show that the appellant had the propensity to commit these kinds of offences. Further, the statement that ***"Good character has nothing to do with whether or not he has committed this offence"*** undermines the effectiveness of the good character direction. Good character is important in assessing the credibility of the appellant and whether or not he committed the offences which he has vehemently denied. The direction ought to have been more robust, full and clearer. However, the weakness of the direction did not render the verdict unsafe, given the strength of the recorded conversation, the veracity and authenticity of the conversation in which they heard the appellant's voice and pleas.

The appellant's complaint about the publication of trial details in the media is dismissed as there was no evidence the jury was exposed to anything beyond what was admitted in court. The judge properly instructed the jury to consider only the evidence presented at trial. There is nothing in this to suggest that appellant did not have a fair trial.

There is also no merit in the appellant's complaint about the judge's summary of his defense, as the jury undoubtedly understood the appellant's denial of the incidents and the recorded conversation and judge's direction to the jury regarding corroboration is full and fair in making clear the issues for the jury to decide.

The 25-year concurrent sentences for each count are consistent with previous cases and within the range of reasonable sentences given the serious nature of the offences. Consequently, the appeal is dismissed, and the convictions and sentences are upheld.

R v Stevenson [1971] 1 W.L.R. 1 considered
R v Robson **(**1970) Crim App Rep 450 considered
Brown v The State [2012] 82 WIR 418 considered
Dwayne Belazaire v DPP SCCrApp. No. 51 of 2021 considered
Christopher McQueen v DPP SCCrApp No.18 of 2021 considered
Chin v R [2018] 3 LRC considered

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by a father against convictions for two counts of incest. He was sentenced to prison for twenty-five years on each count to run concurrently. He also appeals against the sentences.

2. The facts can be put quickly. The virtual complainant testified that the appellant, her biological father, had sex with her against her will on two separate occasions. The first was in 2015 when the daughter was 15 years old and the second in 2016 when the daughter was 16 years old. It is not necessary to record in this judgment the details of the sexual encounters. Suffice it to say that the daughter said that the appellant took away her virginity in the 2015 incident.

3. The daughter did not immediately make a complaint to her mother or to the police.

4. The daughter also testified that in January, 2017 she had a conversation with her father by telephone. In that conversation she discussed with her father that she was traumatized by the incidents. She recorded that telephone call. After that call she told her mother about the incidents and played the recording of the conversation to her mother. They then reported the matter to the police. She gave the phone to the police and a police officer downloaded the recording of the telephone conversation.

5. At the trial, an objection was taken by counsel for the appellant to the admission of the recording. The transcript does not show the basis of the objection. The trial judge did not accede to the objection and the recording of the conversation was played to the jury.

6. At the trial, the appellant testified in his own defence and called two witnesses. He denied that any of the two incidents ever took place. He also said that the telephone conversation was fictitious as it was not him or his voice on that tape and that the telephone conversation never took place. He suggested that the daughter was lying on him because (inter alia) he refused to buy her a car.

7. After a direction by the judge, the jury after deliberating for less than two hours unanimously found the appellant guilty on both counts of incest. A sentencing hearing subsequently took place and the judge imposed the two 25 years' sentences to run concurrently.

8. The appellant has now appealed his convictions and sentences.

9. The grounds of appeal are:

> **"That the Learned Judge erred in law when she allowed in evidence the alleged telephone recording between the virtual complainant and the Appellant. The Learned Judge failed to assure that the recording was the original and authentic.**
>
> **The Learned Judge misdirected herself and as a result permitted inadmissible evidence to be given in the case and as a result the Appellant could not obtain a fair trial.**
>
> **That the Learned Judge failed to exclude prejudicial evidence contrary to Section 78 of the Evidence Act.**
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> **The Learned Judge failed to declare a mistrial after when intimate details of the matter was published in the daily Newspaper and on Social Media.**
>
> **The Learned Judge failed and erred when she gave a defective summary in relation to the Appellant's case. As a result the Appellant did not receive a fair trial.**
>
> **The Learned Judge failed to give an adequate Good Character direction to the jury in relation to the credibility or propensity of the Appellant in relation to the matter.**
>
> **The Learned Judge failed to put the Defence case in a fair and balance way. The Learned Judge ought to have put the Appellant's case in the form of an affirmative statement rather than rhetorical questions.**
>
> **The Learned Judge failed to direct the jury that there was no evidence capable of corroboration.**
>
> **The sentence of 25 years for each offence is unduly harsh."**

10. I will consider the grounds under the following heads:

> **Tape recording**
>
> **Good character direction**
>
> **Publicity**
>
> **Fairly putting the Appellant's case**
>
> **Corroboration**
>
> **Sentencing**

The Tape Recording

11. The appellant argues that the recording **ought** not to have been admitted into evidence. He said:

> **"My Lords, we will say, and we say, my Lords, that that tape recording ought not to have been permitted. It was a secondary recording, allegedly, of a phone conversation that took place from a phone, my Lords. We say that the original of that recording ought to have been in court. And there ought to have been verification with respect to the call: the call logs, the timing of the calls; the telephone companies, whether it is BTC or ALIV, whomever it was, ought to have been called in and verified a call took place from number A to number B, verifying it to be the appellant's. We say there was no authenticity done with respect to that recording. There was no expert evidence led to say that the recording --the voice or voices on the recording were that of the appellant and the VC. The evidence that was led in, my Lords, we say, was just done on a fanciful whim of whatever the VC said."**

12. With respect, it is our view that the submission has no merit. It is not suggested that the recording of the telephone call by the daughter was illegal. The Listening Devices Act does not prohibit a person from recording a telephone call to which that person was a party. It cannot be said that the telephone conversation was irrelevant to the issues raised at the trial. It was highly relevant. Not could it be argued that its prejudicial effect outweighed its probative value.

13. As cited earlier, the appellant argued that the prosecution had failed to prove its authenticity as it did not adduce into evidence the actual telephone which would have showed the telephone number to which the call was made and when the call was made.

14. For this he relied on two decisions of the English courts in **R v Stevenson** [1971] 1 W.L.R. **1 and R v Robson** (1970) Crim App Rep 450. In our view neither of those authorities support the proposition that the judge erred in admitting the recording into evidence.

15. In **Stevenson**, the prosecution sought to introduce electronic tape recordings of human voices alleged to be conversations the defendants and one of the witnesses for the prosecution. The defence alleged that the recordings have been fabricated and are not originals. In that case the judge excluded the evidence because "it is plain that there was opportunity for someone to have interfered with the original and putting it at its lowest, there is clear evidence before me that some interference may have taken place".

16. However, Kilner Brown J was clear as to the principle regarding the admissibility of recordings. He said:

> **As a general rule, any material which is relevant, and of probative value is admissible. It matters not how it was obtained. To the general rule that all relevant matter is admissible there are two exceptions. The first exception, which stems historically from the former prohibition on an accused person, giving evidence on his own behalf, is that oral or written statements, which incriminate the accused and are made by him must be voluntary and our inadmissible if obtained by intimidation or inducement. The second exception, which involves a pragmatic test, found it on natural justice, is that a judge has a discretion to exclude matter the prejudicial effect of which excludes its probative value.**

17. The decision in **Stevenson** was referred to subsequently in the case of **R v Robson**. In that case Shaw J said:

> **I may say in passing that in a recent criminal trial (R. v. Stevenson and Others (1970) 55 Cr.App.R. 171; [1971] 1 W.L.R.1) where a similar question arose, it was contended that the standard of proof of originality was that which applied to any issue which had to be resolved by the jury in such a trial, namely, proof beyond reasonable doubt. That is, of course, right if and when the issue does come before the jury as a matter they have to decide as going to weight and cogency.**
>
> **In the first stage, when the question is solely whether the evidence is competent to be considered by the jury at all, the judge would be usurping their function if he purported to deal not merely with the preliminary question of admissibility but also with the ultimate issue of cogency.**
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> **My own view is that, in considering the limited question of admissibility, the judge is required to do no more than satisfy himself that the prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court. If that evidence appears to remain intact after cross examination, it is not incumbent on the judge to hear and weigh other evidence with might controvert the prima facie case. To embark on such an inquiry seems to me to trespass on the ultimate function of the jury.**(my emphasis)

18. In the present case there was no evidence to suggest that the recording was in any way tampered with by anybody. The daughter said that she recorded the conversation on her phone, she gave the phone to the police officers. The police officers downloaded the conversation on a CD and that CD was introduced into evidence by the police officer who downloaded it. In our judgment, there is no basis for the submission that the recording was not admissible or if admissible ought to have been excluded under section 178 of the Evidence Act.

19. Whether the jury accepted that the recording was that of the daughter and the appellant was a matter for them. They heard the recording and they heard the voices of the daughter and her father in their oral testimony.

20. The ground that the recording was wrongly admitted cannot succeed.

Good Character Direction.

21. This case turned on the credibility of the daughter and that of the appellant. Both gave evidence that contradicted each other.

22. As the judge was about to conclude her directions to the jury, she inquired whether there were other directions that she ought to give which had not yet been given. Counsel for the prosecution suggested that the judge should give a good character direction. Surprisingly, counsel for the appellant had not himself raised the issue.

23. The judge then proceeded to give a direction in the following terms:

> **This defendant is one of good character meaning that nothing is known of him. He has never been before the Court before. So for that reason, he having denied the charges that have been brought against him, he is asking that you take into consideration that he has not previously been involved or committed any offences; and so therefore you ought to give consideration, give him credit for his good character. That ought to be weighed in the scheme of things when you are reviewing the evidence and what he has said before the Court as being the truth. Good character has nothing to do with whether or not he has committed this offence. You have to look at the evidence in relation to whether these offences would have been committed, but also what he is saying to you is that you accept him as a credible witness because he is of good character. He has never been involved or committed any offences and so therefore, that ought to be a plus for him when you have to decide whether or not he is a credible witness and was speaking the truth in relation to what you accept in relation to this matter.**

24. The appellant submits that this direction was not robust enough. In particular in does not contain the propensity limb of the good character direction.

25. In **Steve Luciano Bain v R** SCCrApp. No. 51 of 2022 Isaacs JA said:

> **"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"**

26. As Lord Kerr said in **Brown v The State** [2012] 82 WIR 418:

> **"Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witness on either side is directly in issue the need for a good character direction is more acute"**

27. In our judgment it was appropriate to give a good character direction in this case. There is also some force in the submission that this direction was not robust enough. In particular it does not contain the propensity limb of the good character direction. That there is nothing to show that the appellant had the propensity to commit these kinds of offences. Further, the statement that ***"Good character has nothing to do with whether or not he has committed this offence"*** undermines the effectiveness of the good character direction. Good character is important is assessing the credibility of the appellant and whether or not he committed the offences which he has vehemently denied. The direction ought to have been more robust, full and clearer.

28. However it is settled law that ***"the failure to give a good character direction where the defendant was entitled to one does not automatically render the verdict unsafe"*** see **Chin v R** [2018] 3 LRC at paragraph 27.

29. In our judgment the weakness of the good character direction given in this case does not make this verdict unsafe. The credibility of the daughter and the lack of credibility in the appellant's denial is strengthen if not made absolute by the contents of the telephone conversation between the daughter and the appellant. At no stage doing the conversation did the appellant deny that anything happened between him and his daughter. He simply begged his daughter not to tell the police because it would mean that he would go to jail. He accepted that he understood how and why the daughter was traumatized by what he did to her.

30. Once the jury accepted the veracity and authenticity of the conversation in which they heard the appellant's voice and pleas, a guilty verdict was almost inevitable.

31. This is the same approach that this court took in **Dwayne Belazaire v DPP** SCCrApp. No. 51 of 2021 where it said at paragraph 34

"I am satisfied that given the cogency of the circumstantial evidence mounted by the Prosecution against the appellant, a good character direction by the Judge to the jury would not have the affected the outcome of the trial."

Publicity

32. The appellant complains about the publication in the newspapers of the evidence led at the trial and in particular the details of the telephone conversation. He said:

> **"Our second ground, my Lords, with respect to the appeal is that the court during the time of the trial failed to stop the trial or order a mistrial after intimate details of the case was publicized in the newspaper and in social media. My Lords, at page 146 to 150 of the transcript, you will see the record was read in -- it was read into the record all the vehement comments that were made with respect to the trial as it was going on at that time. And particular reference was made to counsel of the appellant at that time. My Lords, I don't know if the court would like me to go through that --**
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> **THE PRESIDENT: I am not sure what you are saying. Are you saying that the publication -- did they publish material that was not admitted into evidence and the jury saw things or read things that were not admitted into evidence?**
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> **MR. ROLLE: Part of the difficulty we had, my Lords, is the fact that this all went -- everything went uphill or haywire when this recording was played in court. It appears that, if I am not mistaken, the exact recording was reported -- whatever was said in the recording was reported in the newspapers and thereafter --**
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> **THE PRESIDENT: Yes, but it was done in open court. So they are reporting something that was done in open court in the presence of --**
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> **MR. ROLLE: Yes, my Lord. And the difficulty --**
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> **THE PRESIDENT: So why does that affect the fairness of the trial? The jury heard it?**
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> **MR. ROLLE: My Lord, there was no question put --there was no issues put to the jury as to whether or not they were aware of the newspaper clippings or newspaper readings or social media, for that matter.**
>
> **THE PRESIDENT: Yeah, but they heard the tape themselves."**

33. I should emphasize that the reference by counsel for the appellant to pages 146 to 150 of the transcript of the trial is a reference to a discussion in the absence of the jury.

34. There is no merit in this complaint. There is no evidence that the jury read or heard any information that was not adduced before them in evidence. During the trial the judge gave the usual admonition that the jury must only consider the evidence led during the trial.

35. For example she said:

> **"Members of the jury, you have come to your decision, whatever it is, as to the guilt or the innocence of BM purely on the evidence that you heard here in this court room. I ask you, Madam foreperson and members of the jury, to discard from your mind anything that you may have heard on the outside of this courtroom be it by way of newspaper articles or by way of social media or by any other means whether it was prior to or during the course of this trial. Your focus ought to be only on that which was adduced here in this courtroom. Nothing more, nothing less. Any perceptions that you might have on the prevalence of crime in general in relation to what is happening in our country or to this particular crime of incest with which you are concerned, you have to leave that outside of the jury room. You have to put that completely out of your mind. I urge you, members of the jury, only to have regard, I cannot emphasize enough, you only ought to have regard to what was adduced here in this courtroom. You have seen and you have heard the testimony of each of the witnesses called by the prosecution as well as the defence. You ought not allow anything extrinsic of these proceedings of which you are apart to have any bearing whatsoever during your deliberations of this matter. You ought to carefully assess the evidence that was adduced here in the court room. Sift through it, assess it and then determine what you will accept and that which you will reject and then come to a decision with an unclouded, impartial mind. I ask you, members of the jury, not to be influenced by any prejudice against or sympathy for the defendant because he is a relatively young man, and is a father, the virtual complainant who is now herself a young woman and is of Haitian heritage or for anyone who may be connected with this case for that matter, or for any other reason which may not have been specified by this Court."**

36. There is nothing in this to suggest that appellant did not have a fair trial.

Fairly Putting The Appellant's Defence

37. Counsel for the appellant did not develop this ground fully at the hearing. The appellant's defence was a denial that the incidents took place and a denial that it was his voice on the recording of the telephone conversation and that the conversation never took place. He claimed that the daughter was lying on him for perverse reasons. He suggested that she was angry because he did not assist in regularizing her citizenship status, and because he refused to buy her a car. He also suggested that she was bitter because he treated his son more favourably than her. There can be no doubt that the jury understood his defence. It was simply an issue of credibility which was a matter for the jury. The judge was clear in her direction to the jury that the burden was on the prosecution to prove its case and the jury could not convict simply on the weakness of the defence's case.

38. There is no merit in this complaint.

Corroboration

39. As a matter of law the evidence of a virtual complainant in a case involving sexual assault does not have to be corroborated. But a judge is obliged to give the jury a warning on the dangers of convicting an accused in the absence of independent evidence which supports the evidence of a complainant. Because of its importance, I set out in full the judge's direction to the jury on the issue of corroboration. She told the jury:

> **"Madam foreperson, members of the jury, the prosecution relies principally on the evidence of the virtual complainant relative to both of these charges. There is a particular direction I must give you with respect to corroboration. Now. I want you to pay particular attention to this because this is the legal term and I will try to break it down to you as simply as I can. Corroboration is independent evidence that is evidence which does not come from the virtual complainant herself, which confirm in some important respect not only the evidence that the offence was committed, but that it was committed by the defendant. So, corroboration is independent. It is separate and apart from what the virtual complainant said. It is something totally different apart from what the virtual complainant has told you that in some important respect indicates that the offence was committed and that it was committed by the person accused. So, I say confirm in some important respect because it is not necessary that there should be independent evidence of everything that the virtual complainant told you. It is for me to point out to you the evidence which, if you accept it, is capable of independently confirming what the virtual complainant has told you. I shall do this later in the summing up, but it is for you to decide whether what I point out to you does in fact provide**

independent confirmation of the virtual complainant's evidence. I repeat, the case for the Crown stands or falls on the evidence of the complainant. The only other independent evidence what you can give consideration to as confirming in some important respect what the virtual complainant has told you is the voice recorded conversation between the virtual complainant and the defendant which the virtual complainant said she recorded on her cell phone on the 26th of January, 2017, after she had spoken with her mother and made the decision to report the matter to the police. This recorded conversation was downloaded from the virtual complainant's phone by Detective Corporal Nikeita Pickstock. He produced it on the CD. It was entered into evidence and marked as an exhibit in these proceedings which you will have. Exhibit P-3, the content of that exhibit was played. And therein you would have heard what appeared to be a female voice confront a male, a person with a male voice about sexually encounters engaged in and the female telling the male of her decision to tell about what he had done to her. Therein the male voice, the complainant, the virtual complainant identified was that of her dad. The male admitted to what was put to him by the female regarding the sexual encounters and was heard pleading with the female whom she said was her father not to tell as it would cause him to go to prison. Well, the defendant during the course of cross-examination by his counsel and during his own testimony before the Court vehemently denied that the male speaking in that recording was him and advanced that that recording was a fraud. Members of the jury, you would have heard the recording yourself. The virtual complainant says that she was the individual responsible for making it, and that it was a conversation between her and her dad, the defendant before the Court. You would think that the virtual complainant would know the voice of her dad. She knew the number that she called and she was familiar with his voice. Having had the opportunity to speak with him over and repeatedly. After all, that was her dad. That notwithstanding, I must warn you, members of the jury, that the defendant has said that's not his voice. That recording was a fraud.

Now, you have to think about that. A child that age would have to go through a great extent to manipulate or orchestrate something of that magnitude. Everyone nowadays has a smart phone. They are recording all sorts of things on these smart phones and these young people are tech savvy. They may not know much about other things but when it comes to technology,

they know how to work it. She said she downloaded an app, she called her dad's number, she told him what she was thinking about doing. She recorded the conversation.

But I want to warn you, I want to warn you about that because, you know, members of the jury, many times you can call someone, and you just start speaking to the person on the other end thinking that it is the person whom you intended to speak with only to find out later in the conversation as it goes on, no, this is not the person. This is not who I thought I was speaking to. It happens. Mistaken voice identification can be made in the same way as that of visual identification.

Sometimes you see someone and you think it is someone you know. It happened to me just the other day I was in the store. Somebody was calling out this name, I didn't respond and the person came right up to me and said is this calling out another name. I just smiled and said no, I'm not. He said you look like her. I said no, I don't know the person. How many times that has happened to you with visual identification. So the same thing can happen with voice identification. Sometimes people speak alike. It very well may be I don't know, but the question you have to ask yourself is this: Is that the case, mistaken voice identification with this recording with this conversation? Did the virtual complainant confirm that that was her father? Is there anything in that recording that gives the impression that the parties speaking did not know one another or was unfamiliar with the subject matter of the conversation?

Because if you are speaking with someone and it is not the person that you intend to speak with, they would quite readily say, "Oh, sorry, are you trying to speak with me or what is this you are talking about? Do you have the right person?" That is what someone would normally say or do. If that were the case. So, you can legitimately ask yourself, is that the position in respect to this recording? Does the recording give the impression that the parties speaking did not know one another or was unfamiliar with the subject matter of the conversation? Is the virtual complainant herself mistaken in relation to the person with whom she had a conversation with on the 26th of January, 2017?

Is the recording a fraud, an elaborate fabrication or cunning attempt as suggested by the defendant perpetrated by the

virtual complainant to implicate him in these allegations? That's a matter for you.

Over the past several weeks, you would have had the opportunity to hear the voices of both the virtual complainant and the defendant. The recorded conversation you will have with you during your deliberation of the matter. If necessary, you can listen to it again and determine for yourselves whether the voice sounds to be that of the virtual complainant and the defendant or otherwise. You will have to determine for yourself whether you accept this aspect of the evidence or not to the extent that the male voice in the recording is that of the defendant. You must use extreme care and caution when assessing this bit of evidence. As indicated, you would have heard the voice of both the virtual complainant and the defendant multiple times during the course of this trial. During these time (sic), it is for you to determine whether on such occasions when you would have heard the voices you were paying more attention to what was being said by the virtual complainant or the defendant and less (sic) to the voices of the two. Were you paying attention, particular attention to the voice of each given the virtual complainant's evidence that the voices contained in the recording were those of her as well as her father? The father before the Court said it is not his voice and the tape is a fraud. There is no expert evidence before the Court in respect to this bit of evidence that is of voice identification. If you agree with the father that that is not his voice in that recording or if you are not sure that it is, then you will have to reject the content of that recording and you cannot rely on it. If you accept what the defendant said that that that's not his voice, that's a fraud, if you accept that, you cannot rely on it, and even though I said that it's independent evidence that you can rely upon, or if you reject it because you are not sure that it is his voice or you agree and accept what he said that that is not his voice, then it cannot be used as corroborating evidence to that of the virtual complainant or used as independent evidence implicating the defendant with respect to the charges. If, however, after careful consideration of the recording, if you do accept it and if you do accept what the virtual complainant has told you that it is her voice, it is her dad's voice and there is no manipulation, no fraud involved and that the recording is authentic and that you are satisfied beyond a reasonable doubt that the male voice is that of the defendant and that he admitted to his involvement in the sexual encounters, the subject of the

conversation, the admissions made therein, you may use them as corroborating evidence with that of the virtual complainant which directly implicates the defendant in relation to the matter before the Court. There is no other evidence which directly implicates the defendant with respect to these charges. The only evidence is from the virtual complainant herself as well as that from the recording but that's only if you accept it. If you accept that the defendant was a participant in it and that it is an authentic recording. It is only then that you may use the contents of the same to confirm or support what the virtual complainant has told you."

40. The judge's direction to the jury cannot be faulted. It was full and fair. The judge made it clear to the jury what the issue was in this case and what they had to decide.

41. This complaint cannot be upheld.

Sentencing

42. The appellant complains that the sentence of twenty five years on each count to run concurrently is unduly harsh. He does not complain that the sentence is illegal as the maximum sentence is life imprisonment. He does not suggest that the sentencing judge took into account matters that she ought not to have taken into account, nor does he suggest that she did not take into account some matter that she ought to have taken into account. He simply says that the sentence is unduly harsh and outside the range within which a reasonable judge ought to have imposed in the circumstances of this case.

43. The law is this regard is settled. In **Christopher McQueen v DPP** SCCrApp No. 18 of 2021 Isaacs JA said:

"19. As I enter upon a consideration of this ground, I keep at the forefront of my mind Lord Hewart's dictum in R v Gumbs (1927) 19 Cr. App. R 74, a case involving an appeal against the severity of sentence:

"…Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence; for this Court to revise a sentence there must be some error in principle."

44. A sentence is not unduly harsh if it is within the ranges of sentences that a judge could reasonably impose.

45. In imposing the twenty five years sentence the judge said:

> **"The law evidently considers incest with a minor as a most serious and grave offence, thus attracting a maximum sentence of life imprisonment here in The Bahamas.**
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> **In Attorney General Reference No. 1 of 1989 the Court of Appeal therein provided guidelines for sentencing in cases of incest by a father with a daughter.**
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> **In Dwayne Gordon v Regina, Court of Appeal Supreme number 74 of 2014 a sentence of 25 years was imposed upon the conviction of an appellant for incest with his biological daughter of 15 years. The decision in Gordon followed an earlier decision of Albert Alexander Whylly v Regina Supreme court appeal number 184 for 2012. Although not an incest case was one regarding sexual acts on a minor child 9 years old. A sanction of 30 years was imposed. However, unlike the Whylly case in which the appellant had previous convictions the convict relative to this case has no previous convictions.**
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> **The Court during its deliberation of this matter also took into consideration the content of the probation report to the extent that the convict is a 48 year old divorced father of two who is financially responsible for his minor son who has been diagnosed with a brain tumor and is receiving ongoing treatment.**
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> **The Court also took note of the views expressed by the family and friends of the convict to the effect that he is regarded as a loving individual who is a non-troublesome, supportive, kind, friendly, respectful and a great provider. This notwithstanding, some of those interviewees believed that the convict was guilty of the offences albeit that they had a different perspective of circumstances surrounding the same.**
>
> **Others expressed their disbelief as to his involvement which was out of character. Despite the varying views regarding the convict's commission of the offences all interviewees indicated their continued support of him.**
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> **The Court was also mindful of the victim's impact assessment to the extent that the virtual complainant expressed the traumatic effects of her father's conduct upon her. Indicating that from the day her father forced himself on her and had sexual intercourse she has been mentally affected, resulting in**

low self-esteem and has experienced anxiety attacks. Moreover it has left her feeling nasty, disgusted, embarrassed, ugly, lost, and ruined with a dark cloud looming over her. With the passage of time, being baptized in a Christian faith together with the love and support of her mother and boyfriend with whom she shares a two year old daughter, have all assisted in her overcoming the many challenges.

The purpose of sentencing.

The Court agree and fully endorse the position posited that the purpose of sentencing must always be proportionate to the gravity of the offence and must promote a sense of responsibility in the offender for the offences submitted. The object of sentencing is to promote a respect for the law, maintain order, maintain a peaceful and safe society and discourage the acts of crime by the imposition of sanctions. Deeply rooted within this purpose are essentially the concept of the deterrence, retribution, prevention and rehabilitation.

Defence counsel advanced before the court that the convict is not beyond redemption. Evidently the convict has no history of previous unlawful sexual offences, or for that matter offences of any other kind. And there was no expert evidence advanced in the form of a psychiatric or psychological report to suggest otherwise.

This, notwithstanding the Court views the acts of the convict upon his daughter as reprehensible and the ultimate breach of trust of a parent, in this case a father who is expected to love, nurture, care, safeguard and protect his child from harm, danger or abuse of any kind of potential perpetrators. But instead of being that protective parent he is the very one who would have, by his actions, humiliated, abused and violated his own child of such tender years. Not once, but twice, repeatedly breaching her trust and even openly compared her to her own mother. Further, the convict lacked contrition. Notably at no point during the course of the trial or the sentencing process did the convict or counsel on his behalf express remorse for his conduct's. Matter of factly there was a consistent denial of the acts and as referenced in the probation report the convict maintained his innocence asserting that the virtual complainant made up the allegations against him and denied being verbally recorded by the virtual complainant claiming that it was a voice over.

Even in the face of the jury's verdict the convict has failed to take responsibility for his actions, blaming the virtual complainant for the predicament in which he now finds himself.

It is the view of the Court that the virtual complainant, a child, in the circumstances advanced in this case, certainly need protection and therefore adopts the views expressed by the Court in the case of Whylly and I quote.

"The courts in The Bahamas owe it to our children to protect them from those who would prey on them and have sexual intercourse with them at the age of 9 years."

The case at hand involves a 15 year old, slightly older. But unlike the case of Whylly the child was his own biological daughter. There is a golden thread which runs through both of these cases, namely the protection of children.

As such a clear and strong message must be sent to those who would take the liberty to prey upon and violate the very essence and virtue of our children here in The Bahamas. Such behavior cannot be tolerated or condoned.

The Court adopts the views expressed by the Court of Appeal in Attorney-General v Richard George Campbell number 30 of 2004. And I quote. "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."

The Court considered the plea in mitigation by defence counsel, the submissions of Crown counsel, the probation report, the authorities of Dwayne Gordon, Albert Alexander Whylly, Palmer 1988, 10 criminal appeals, Richard George Campbell number 30 of 2004, Attorney General Reference Number 1 of 1989, Attorney General vs Adolphus Ellis No. 1 of 2005, and all matters touching and concerning the sentencing process.

Having done so the Court is of the view that in this case the aggravating factors outweigh the single mitigating factor and in all of the circumstances of this case, contrary to what was advanced by defence counsel as to the imposition of an alternative measure to dispose of this case, the convict is deserving of a term of imprisonment.

There was a fundamental breach of trust on the part of the convict. It was incumbent upon him to protect the virtual complainant from abuse, even from his own abuse. His actions in the Court's view were preconceived, calculated and a total disregard for the virtual complainant's fundamental right to make a decision to engage in sexual activity on her own terms within the confines of the law when and with whom she so willingly chose. The convict on his own ill-conceived plan took away the innocence of the virtual complainant who at that time was a child of tender years by engaging in sexual intercourse not once, but twice. Even after apologizing to her after the first encounter and assuring her that it would never happen again. Actions which the law forbids him to do resulting in potentially long-term psychological effects on the virtual complainant.

As a result, of such egregious acts the convict must now suffer the consequences of his actions for which he has shown very little to no remorse. All relevant factors having been considered including the aggravating factors which outweigh the single mitigating factor, the Court can be no more lenient than to impose a term of imprisonment of 25 years on each count. The sentences are to run concurrently and are to take effect from the date of conviction."

46. In our judgment, the judge's sentencing ruling cannot be faulted. The sentences are consistent with sentences previously affirmed by this court particularly in **R v Gordon**. In the circumstances there is no basis for this court interfering with the sentences as unduly harsh.

47. We have no lurking doubt as to the safety of the convictions or the propriety of the sentences. For these reasons this appeal is dismissed and the convictions and sentences are affirmed.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Evans, JA

The Honourable Madam Justice Indra Charles, JA