**IN THE HIGH COURT OF SOLOMON ISLANDS**

Criminal Jurisdiction

Criminal Case No 256 of 2023

**REX**

**-V-**

**L S**

Date of Hearing: 11 August 2023

Date of Sentence: 6 March 2024

CITATION: REX v LS

CATCH WORDS: Increase or rise of sexual offences - Minister's speech – presenting Bill in parliament – Law Reform Commission Report – CEDAW; persistent sexual abuse – drafting of Information – a suggested format; aggravating factors – mitigating factors; persistent sexual abuse – repetition of offending – whether to be considered an aggravating factor or is it subsumed in the offence itself – considered an aggravating factor; sentencing principles; persistent sexual abuse of child (daughter) – incestuous relationship – more serious; Defence Counsel conceding to Prosecutions list of authorities with an exception – no counter argument by Defence Counsel to list of authorities submitted by prosecutions.

LEGISLATION: Penal Code (Amendment) (Sexual Offences) Act 2016; Constitution of Solomon Islands;

CASES REFERRED TO: State v Tigi [2013] PGNC 114; N5307 (18 July 2013); Regina v Funifaka [1997] SBHC 31; HC-CRC 033 of 1996 (6 June 1997); Pana v Regina [2013] SBCA 19; Regina v Liva [2017] SBCA 20; Regina v Phoboro [2013] SBHC 8; Bara v Reginam [2018] SBCA 10; SICOA-CRAC 36 of 2017 (11 May 2018); Regina v Fred Gwali, Criminal Case No. 175 of 2020; Bade v R [2023] SBCA 39; SICOA CRAC 9017 of 2023 (13 October 2023); State v Makis [2012] PGNC 243; N4888 (24 July 2012)

OTHER MATERIALS CONSIDERED OR REFERRED TO: Minister's speech – Reading of the Bill in parliament; Law Reform Commission - Second Interim Report (Sexual Offences) June 2013; Universal Declaration of Human Rights;

**APPEARANCES:**

Ms. Naqu. H for the Prosecution
Mr. Kausimae. H for the Defence

**Talasasa PJ:**

## SENTENCE

## INTRODUCTION

1. At the time of handing down sentence in this case, Defence Counsel Mr Henry Kausimae has sadly passed away. I would like to pay tribute to Mr Kausimae the late, for his assistance to court through his submissions both written and oral. Mr Kausimae will be sadly missed not only in my court as an experienced and willing practitioner in assisting court, but also within the legal fraternity in this jurisdiction.

2. Now, the sentence. The prisoner was convicted on his own plea, for one count of 'persistent sexual abuse of a child,' contrary to section 142 (2) as read with section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016, on Wednesday 19 July 2023.

3. The Information charged that the prisoner had sexual intercourse with the victim on three separate occasions on separate dates at Foko Settlement and Susubona Village in Isabel Province, between the dates 1 January 2018 and 30 November 2022.

4. It is an agreed fact that the victim is the biological daughter of the prisoner.

5. The court noted in the file that the victim was born on 6 August 2006 which was not revealed in the Summary of Facts. I requested for the birth certificate which was then provided by the prosecutions by way of an attachment to a cover letter, addressed to the Judge Associate on 26 September 2023.

6. The Birth Certificate was filed and now part of court record.

7. The victim was attending school, and was in Grade 4 in the year 2018 when the prisoner first started his series of acts of unlawful sexual intercourse with her.

8. The second incident the prisoner had sexual intercourse with the child was in 2019 when she was in Grade 5; the third incident was in 2022 when the victim was in Form 2 at Moana (or Muana) Community High School.

9. The three separate incidents of sexual intercourse with a child under 15 years gave rise to the charge of 'persistent sexual abuse.'

10. The summary of facts was read in court by the prosecutions and agreed to by the defence.

11. The summary of facts set out the background to the three incidents that constituted the charge and how the offending occurred.

12. The Court conducted your sentence hearing on 11 August 2023.

13. After that, the Court reserved its ruling and to deliver it on notice. I now do so.

## SUPPRESSION OF IDENTITY OF VICTIM

14. To protect the identity of the child, I will use the initials 'L E.'

15. To avoid the victim being identified, I have also ordered to use the initials 'LS' to refer to the prisoner.

16. I accept that this case given its nature might be given some wider publicity. I have given orders that if the case is reported in the media or through other means, any information that might identify the victim is suppressed.

## PREVALENCE OF THE OFFENCE

17. I note from the charge and facts presented that this is a serious offence, especially when such a crime of violence is committed against a child; and so, in considering sentence I do not take that fact lightly.

18. I also note that this type of offending, i.e. sexual offending (sexual cases), has been on a steady increase over the years.

19. I also note that with regard to sexual offences generally, the Law Reform Commission in its previous report has highlighted the same. Other government institutions and civil society organisations have been vocal about the trend in recent years.

20. Parliament in its wisdom responded through the enactment of the Penal Code (Amendment) (Sexual Offences) Act 2016. This legislation provided the statutory framework governing sentencing for sexual offences.

21. The Honourable Minister who holds the portfolio for justice and legal affairs stated this at the time the Bill was presented in parliament:

> "This Bill is a demonstration of the strong policy commitment of the Government, the Law Reform Commission and the Ministry for Justice and Legal Affairs to stamp out the crime of sexual assault and exploitation and to ensure that offenders are Prosecuted and given appropriate penalties for their violent behaviour." (Emphasis mine)
>
> "Solomon Islands need to enact these offences in order to comply with internal obligations, under the convention on the elimination of reforms on violence against women and the convention on the rights of the child. Solomon Islands is party to this important human rights conventions and therefore has an obligation to enact local laws. That upholds and strengthens the protections provided by international law. This bill is very significant in addressing many of the issues raised by the United Nations Committee, CEDAW constructive dialogue held in Geneva in early 2015."

> This is new and important legislation for Solomon Islands; it is an attempt to stop a growing problem in our society that is distractive and demeaning for our women and children. This bill is not for the powerful people and powerful interests in our society. This bill is to help the vulnerable, the disabled, the abused and the victims of sexual violence and exploitation. They are the most powerless people in our society. They may be our mothers, our sisters, our sons, our nieces, our nephews, or our daughters. They are certainly our constituents.
> Some have already been killed and maimed by violent offenders. Some have been degraded and humiliated. Many have never spoken out. It is our job to ensure that the law speaks out for them and brings them some redress.
> This bill is your opportunity to leave a legacy that makes a contribution to improving the safety and security of the most vulnerable and powerless people of Solomon Islands. I urge you examine the proposed draft bill and support this initiative to improve the safety and the lives of those who cannot defend themselves from the horror of sexual violence and exploitation.
> Let us do this, together, for those brothers and sisters. Let us be counted amongst those good people who took the stand against evil. Let us help the vulnerable and the down trodden to achieve dignity, peace and safety in our society."

22. The people have spoken through their legislative voice - parliament has spoken.

23. The Court of Appeal continues to provide the jurisprudence governing sentencing (have also expressed the role that the High Court plays in sentencing).

24. But as we see through the cases that have been and are being dealt with by court post amendment, the offending continues.

25. If I may add, about 97-98% on the cause list for me has been sexual offences.

26. I remind myself though; that each case is to be dealt with on its own merits and I will deal with the prisoner according to the facts of the case before me (prisoner's own case).

**THE INFORMATION**

27. For more than once during Mentions as well as at the time of the arraignment, there were discussions between the Bench and the Bar about the style of drafting the Information in a charge for 'persistent sexual abuse of a child,' offence.

28. I sought Counsels' assistance to clarify for me if the Information has been drafted as it should be. Counsel Helen Naqu, very helpfully, went to great lengths researching on how other jurisdictions draft charges for 'persistent sexual abuse of a child,' offences.

29. Whilst Ms Naqu was not able to locate a template on point, Ms Naqu was able to draw the court's attention to related templates used in the District and Supreme Courts of Queensland.

30. I found some helpful references on point in the Papua New Guinea case of State v Tigi [2013] PGNC 114; N5307 (18 July 2013), where His Honour Kirriwom J commented the same and suggested a better draft.

31. I have reproduced a draft drawing from the PNG suggested template for consideration in this jurisdiction. It will be up to the office of the Director of Public Prosecutions how it sees fit but a tidier and neater draft would be preferable and in the words of Kirriwom J, 'cut out the monologue of repetitiveness.'

32. The present draft which was pleaded to by the prisoner reads as follows:

**STATEMENT OF OFFENCE.**

Persistent Sexual Abuse of Child contrary to section 142 (2) and section 163 (2) of the Penal Code, Cap.26 as amended by the Penal Code (Amendment) (Sexual Offences) Act, 2016.

**PARTICULARS OF OFFENCE.**

That LS of Susubona Village, Susubona Ward, Isabel Province, at Foko settlement and Susubona Village, Isabel Province did engage in acts that constitutes persistent abuse against Ms LE on three occasions between 1 January 2018 and 30 November 2022 as follows:

1. That LS of Susubona Village, Susubona Ward, Isabel Province, at Foko Settlement, Isabel Province, on an unknown date between 1 January 2018 and 31 December 2018, did have sexual intercourse with LE, a close family member who to his knowledge is his biological daughter.

2. That LS of Susubona Village, Susubona Ward, Isabel Province, at Susubona Village, Susubona Ward, Isabel Province, on another unknown date between 1 January 2019 and 31 December 2019, did have sexual intercourse with LE, a close family member who to his knowledge is his biological daughter.

3. That LS of Susubona Village, Susubona Ward, Isabel Province, at Susubona Village, Susubona Ward, Isabel Province, on another unknown date between 1 November 2022 and 30 November 2022, did have sexual intercourse with LE, a close family member who to his knowledge is his biological daughter.

*A suggestion*

33. It would be appreciated if the Information is drafted in this way (drawing from the PNG experience):

*XY of (address) is charged that between 1st day of January 2018 and 30th day of November, 2022 persistently abused the victim WZ (sexually), over a (duration) period, in that:*

*a. The said XY on three occasions had sexual intercourse with victim WZ then 12 years old.*
*b. The said XY on three occasions sexually penetrated the victim WZ then 12 years old by inserting his penis into the victim's vagina.*
c. *The said XY on three occasions sexually penetrated the* victim *WZ then 12 years old by inserting his penis into the victim's vagina.*

*And at all material times there was in existence relationship of trust, authority and dependency between the accused and the said victim.*

## PENALTY – AGGRAVATING AND MITIGATING FACTORS

34. Both counsels highlighted in their submissions that the maximum penalty for the offence in section 142 (2) is life imprisonment.

35. I thank Counsels for their submissions and discussions on the aggravating and mitigating factors.

### PROSECUTIONS SUBMISSIONS

36. The prosecutions listed the following which she submitted are aggravating factors:

a. The victim was a young girl. She was 12 years of age at the time of the first offending in 2018. This continued in 2019 and 2022 when she was 13 and 15 years of age respectively. Her young and tender age is a serious aggravating feature. The accused had robbed her of her innocence.
b. The accused took advantage of the young girl's **vulnerability inside their home**. A home is supposed to be a safe haven for a child such as the Complainant in this matter. Sadly, the defendant took advantage of her vulnerability inside the family home.
c. **Disparity of age**: The accused was about 34 years old when the first incident took place in 2018. Hence, the age difference between the accused and the victim is about 22 years.
d. **Repetition of the offending**: There were three instances of Incest put together under this one offence. The accused had sexual intercourse with the victim by way of penile penetration on all three occasions.
e. **Breach of Trust:** The accused is the biological father of the victim. There is trust being that the accused is a close family member. The accused ought to care, respect and protect the victim, instead he acted otherwise when he committed the offence,

therefore he breached the responsibility he held as the father and the trust that victim had placed upon him.

vi. **Emotional and Psychological harm**: The emotional and psychological harm to the Complainant cannot be measured but the scars will remain in her heart and mind affecting her life. We humbly submit for Court to consider taking Judicial notice on the psychological effect of the sexual assault on the young complainant.

(ii) Regina v Liva [2017] SBCA 20 at paragraph 25 approved the comment in R v Bonuga [2014] SBCA 22: "There may have been no evidence that the victim suffered severe or lasting psychological harm. However, we consider that judicial notice needs to be taken of the devastating effect on the victims of sexual offending, especially young victims as in this case. The psychological trauma cannot be ignored."

(iii) In Pana v Regina [2013] SBCA 19 at [17] the Court stated; "We suggest that, in all but the most exceptional case, the sole fact that the child is below the age of consent should in itself bring the starting point to eight years whether the conviction is for rape or defilement. The actual age of the victim should still be taken into account as a possible aggravating factor over and above that. It would not amount to double accounting because it is the fact the victim is a child which brings the case into the eight-year starting point and so the actual age may be considered as an additional factor. Its aggravating effect on the sentence will usually be greater the younger the child."

37. Defence Counsel Kausimae submitted that he has no issues with the list of the aggravating factors identified by the prosecutions. The only issue he has relates to 'repetition of the offending,' which was identified by the prosecutions as an aggravating factor.

38. Counsel Kausimae submitted that the charge emanated from the three separate incidents. The repetition of the incidents was part and parcel of the offence for which the prisoner was charged. Hence, Counsel Kausimae argued that the repetition in that regard should not be elevated as an aggravating factor. For without that repetitious act (3 incidents), the charge for persistent sexual abuse would not have been made out, says Counsel Kausimae. With respect, as highlighted later in the sentencing remarks, I disagree with Counsel's submission on this point.

39. Counsel for the prosecutions also pointed out that there are mitigating factors that can be considered in this case. Although the court is required to consider the mitigating factors, however mitigating and subjective factors must not outweigh the objective seriousness of the offence. In this case, counsel for the prosecutions submitted that given the circumstances of the offending, that matters personal to the prisoner will not justify a substantial reduction to any sentence the Court wants to impose.

40. Counsel found comfort in the words of Pallaras J in Regina v Phoboro [2013] SBHC 8 also remarked:

> "...it is well established that in cases of sexual assault, matters personal to an accused are likely to have less impact on the sentence than with other serious offences."

41. Counsel for the prosecutions referred this court to the Court of Appeal case of **Mulele v Director of Public Prosecution and Poini v Director of Public Prosecution** in which the Court of Appeal set out some guidance in relation to factors that are to be considered when passing sentence in sexual assault cases. They stated that each case must depend on its own facts but factors that should be considered are:

    i. Disparity of age
    ii. Abuse of a position of trust
    iii. Subsequent pregnancy
    iv. Character of the girl herself

42. Prosecutions submitted that in this case, the age difference between the accused and the victim is 22 years. The prisoner is in a position of trust as he is the biological father of the victim and further that the victim is a young girl below the age of consent.

43. In so submitting, Counsel for the prosecutions noted that the prisoner was a church catechist at the time of offending and was 34 years old then. He is now 38.

44. He has been in custody since his time of remand – 20 January 2023.

**DEFENCE SUBMISSIONS**

45. Counsel for the prisoner submitted that there were three (3) instances of incest put together under one charge or Information. Despite, only one sentence should be passed irrespective of the three (3) incidents, says Counsel. I agree on the basis that the three (3) incidents particularized in the Information qualified the charge under section 142 (2) as read with section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016. It did not constitute separate counts to warrant separate sentences.

46. To avoid confusion in the future, I have, earlier in these sentencing remarks suggested for the prosecutions how to draft the Information in respect of this offence. However, that is a matter for the prosecutions.

## SENTENCING PRINCIPLES

47. Counsel for the prosecutions submitted that when determining the appropriate sentence, the Courts must maintain a balanced approach to sentencing. Counsel referred to the case of R v Timothy Sulega (Unrep. Criminal Review Case No. 113 of 1999).

48. Counsel says that Courts have developed principles of sentencing which guide the exercise of the sentencing discretion, namely deterrence, separation (protection/prevention), rehabilitation and retribution. The task of the sentencing judge is to decide which principles apply to a given sentence. In some cases, a judge will give a balanced consideration of all

principles. In other cases, a judge will emphasise one principle over the others. Counsel referred to the case of Johnson Tariani v R [1988-89] SILR 7.

49. Counsel further submitted that the question the Court must ask itself is whether the public interest in this case will be served by retribution and deterrence of the offender and others from committing this sort of offence, or whether the public interest will be better served by the rehabilitation of the offender. Counsel referred to the case of R v Maeli Rinau (Unrep. Criminal Review Case No. 18 of 1996).

**SENTENCING METHOD**

50. The prosecutions referred me to the case of Bara v Reginam, [2018] SBCA 10; SICOA-CRAC 36 of 2017 (11 May 2018) where the Court of Appeal set out the process a sentencing judge should follow:

> [15] With appropriate guidance, where available, a sentencing judge should **identify a starting point.** From the starting point, there will be an adjustment to take into proper account factors which make the offending more serious (aggravating features) or may serve to suggest that the sentence is too harsh, and often more related to the offender than the offence (mitigating features). This requires the judge to set out what he regards as aggravating and mitigating when he intends to take them into account in the final sentence or reasons why he intends not to take them into account.
>
> [16] After identification of the aggravating and mitigating features and how they affect the starting point, reference should be made to the effect, if applicable, of an early guilty plea. Where a discount is to be given that should be indicated. Where no discount is to be given, a reason for that decision should also appear in remarks made on sentencing. Equally, where no allowance is to be made for presentence periods of custody served relating to the offending before the court reasons should be given. See Tii v R 2016 SBCA 14.
>
> [17] Finally, the **totality of the sentence should be examined** to ensure that the end results properly reflect the criminality involved in the offending.
>
> [18] Following this sentencing structure, published sentencing remarks should include, inter alia, the identified starting point, aggravating and mitigating features, account taken of the plea, the application of the totality principle and a discussion of credit for pre-sentence custody. [emphases added]

51. In his submission in reply, Counsel Kausimae for the Defence submitted that the Defence adopts the Crown's submissions with reference to the case authorities on the principles and methods of sentencing.

> At paragraph 24[1],
>
> "The Defence adopts the Crown's submissions with reference to the case authorities on the principles and method of sentencing. This should assist the Court in providing

[1] Defence Submissions on sentence and mitigation, paragraph 24

some useful guidelines in the exercise of the sentencing process in this particular case."

**SENTENCING AUTHORITIES**

52. Counsel Naqu further assisted court by referring to case authorities on sentencing. Counsel submitted as follows:

> "There is no tariff judgment for offending of this nature but the comparative cases below may be of assistance to the Court in setting a starting point. Comparative cases demonstrate the principles or parameters of sentencing for particular offending conduct; however, they should not be used as binding precedents to reach a sentence in a particular case."

53. As Counsel Naqu correctly submitted that these authorities are not binding on this court, however, they might provide useful guidance in considering sentence on like offence. I agree.

54. I outlined below the part of the submission by Counsel Naqu with reference to those cases:

17. In R v Romwane the defendant is charged with one count of persistent sexual abuse contrary to section 142 (2) of the Penal Code (cap 26) as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016. Her Ladyship referred to the starting point in the case of R v Ramaia, HCSI-CRC of 2019 of 4 years imprisonment. Having considered the mitigating factors she is of the view that the starting point should also be 4 years imprisonment. She reduced the sentence by 2 years for the mitigating factors. The defendant was sentenced to 2 years imprisonment.

18. In R v Ramaia, the defendant is charged with the offence of persistent sexual abuse of a child under 15 years contrary to section 142 (2) of the Penal code. The judge emphasized on the level of seriousness and concern with this type of offence. Ward CJ... "The starting point in this type of case without any aggravating or mitigating features, in a non-contested case is eight years Where aggravating features exist, there should be an increase in the sentence of imprisonment to be imposed." The court ordered a sentence of four years considering the period spent in custody is to be deducted from the sentence and also for early guilty plea.

19. In R v Gwali the defendant is charged with the offence of persistent sexual abuse of a child contrary to section 142 (2) of the Penal Code (Amendment) (Sexual Offences) Act 2016. The complainant's is the defendant's step daughter. In this case, the court reiterates what was set out in R v Pana [12]that the starting point in this type of offence without any aggravating or mitigating feature, in a non-contested case is 8 years. In Gwali, the starting point is 10 years, after considering the aggravating factors, another 3 years added. Deducted 6 years and 3 months for the mitigating factors. The defendant was sentenced to 6 years and 9 months imprisonment. The period spent in custody to be deducted from the sentence. The defendant was sentenced to 6 years and 9 months imprisonment.

20. In R v Wilson Mae, the defendant was charged with Persistent Sexual Abuse of Child contrary to section 142 (2), section 140 (1) and (2) of the Penal Code, Cap 26 as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016. The defendant engaged in sexual intercourse and Indecent Act with the 15 year old Complainant on four separate occasions. The Court imposed starting point of 6 years. After considering

the aggravating and mitigating features, the defendant was sentenced to 4 years imprisonment.

21. In R v Losberry Lewa the defendant was charged with Persistent Sexual Abuse, contrary to section 142 (2), section 136 F (1) and section 163 (2) (b) of the Penal Code, Cap 26 as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016. The defendant engaged in sexual acts (rape and incest) with the Complainant on five different occasions. The defendant was 38 years of age on first occasion and Complainant was 16 years old. The defendant woke her up whilst she was sleeping in her home and demanded for her to remove her trousers. Then he had penile sexual intercourse with her. He had sexual intercourse with her on three other occasions outside the house, On the final occasion he had sexual intercourse with the Complainant inside the family home again. The Court referred to R v Soni [2013] SBCA 13 and R v Ligiau and Dori [1986] and imposed a starting point of 8 years as the defendant was convicted after trial. After considering the aggravating and mitigating features, the defendant was sentenced to 11 years and 8 Months imprisonment.
22. The sentencing tariff for persistent sexual abuse of child ranges from 2 years to 1 1 years and 8 months imprisonment.

55. Counsel for the prosecutions submitted that despite the authorities referred to above, each case must turn on its own individual facts and in sentencing the predominant principal is that cases must be dealt with and decided on their own set of facts. In Sahu v Regina [2012] SBHC 122, the Court stated,

> "It is well accepted that the technique of comparing sentences imposed in different cases is of limited assistance and provides only imperfect guidance as to the appropriate sentence in any given case." However, to ensure uniformity and coherence, past cases can be of significant assistance.

56. Counsel Naqu submitted that the worst aspect of sexual intercourse cases within the family and society is that the accused is one of the very people to whom the victim would normally expect to turn to for support and protection. Counsel submitted that the present case is similar to the facts of R v Losberry Lewa as the victim is the biological daughter of the accused and there was repeated offending of sexual intercourse inside the family home. However, the Sentence in this matter, may be at a lower end than in R v Losberry in light of the early guilty plea, says Counsel.

57. Counsel Naqu further submitted that after considering the aggravating and mitigating factors, the end sentence should reflect the gravity of the offending, the culpability of the offender and to send a clear message to the offender and the wider community that such offending will not be tolerated.

58. In reply, and consistent with the position taken by the prosecutions, Counsel Kausimae for the Defence submitted that although comparative sentences could be an useful guide in sentencing, the sentence to be imposed in each particular case must turn on its own individual facts and circumstances. Counsel highlighted that no facts in two cases are exactly the same.

59. Defence Counsel also referred to the case of Sahu v Regina [2012] SBHC 122 to support his submission on this point. The same case had been referred to by the prosecutions.

At paragraph 41[2],

"The Defence concurs with the Crown's submissions that in sentencing the predominant principle is that cases must be dealt with and decided on their own facts."

**CONSIDERATIONS**

Approach to sentencing like offenders.

60. I note the case authorities referred to me by counsels for the prosecutions and defence in their submissions on the principles of sentencing and the approach that I should take when sentencing the prisoner. I agree and take note of those authorities.

61. I agree with counsels that in the final consideration, this case will turn on its own facts and circumstances. But as is well expounded by the court in Sahu v Regina,[3] past cases can be of significance as they provide useful guidance to ensure uniformity and coherence in sentence. I note that this court is obliged to follow guidelines set out by the Court of Appeal and would be of great help if counsels refer to Court of Appeal cases.

62. I note, however, the submissions by Counsel for the prosecutions that there is no tariff for such offending set out by the Court of Appeal but there have been cases decided by the High Court.

63. I also note the reaction of the court in this jurisdiction to such offending. One case that was referred to me by both counsels is the case of Regina v Fred Gwali, Criminal Case No. 175 of 2020, where Chief Justice Palmer stated as follows:

> "7. .... the age of the victim at 12 years when the offending commenced. The law of the country considers sexual intercourse with a child below the age of 13 years an extremely serious offence, reflected by the maximum penalty of life imprisonment that can be imposed. That sets this type of case aside from other sexual offending and the courts have a duty to reflect this by imposing appropriate sentences which will send out a clear message of deterrence to the public. Any sexual offending involving a child below such age is not only an imprisonable offence but can attract a lengthy prison sentence, depending on the presence of aggravating and mitigating factors.
> 8. Her young and tender age is a very serious aggravating feature. The immediate adverse impact from such offending is that it not only robs the child of her innocence, but shows a total disregard to the safety, health and the well-being of such a small child. Every child has a right to be protected from such self-indulgent and abusive invasion of her personality and dignity. (Emphasis is mine)

[2] Defence Submissions on sentence and mitigation, at paragraph 41
[3] Sahu v Regina [2012] SBHC 122

64. In a recent Court of appeal judgement on sentence in Bade v R [2023] SBCA 39; SICOA CRAC 9017 of 2023 (13 October 2023)

> "What has frequently been overlooked, both in sentencing submissions, and sentences imposed, is that is a starting point, and that serious uplifts for aggravating features will often be required. As we have said previously such an uplift is almost certainly in years rather than weeks or months."

65. I refer to a case in another jurisdiction where the court in that case expressed strong sentiments about such offending. The Criminal Code of Papua New Guinea, Section 229D (1) defines what amounts to 'persistent sexual abuse of a child,' that is, 'when sexual penetration occurs on two or more occasions.'

66. The law in Solomon Islands (Section 142(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016) defines the offence of 'persistent sexual abuse of a child,' as engaging in an act constituting a sexual offence for three or more separate occasions.

67. Here is an observation of the National Court of Papua New Guinea when sentencing an offender convicted of a similar crime, 'persistent sexual abuse of a child.' In State v Makis [2012] PGNC 243; N4888 (24 July 2012), at paras 9-12, Kawi J stated as follows:

> *9. This incestuous relationship between father and daughter occurred over a long period between 1st of December 2007 and 31st March 2008, a period of about 3 months. Brunton AJ described such relationship between a father and daughter in the case of The State –v- Mitige Neheya [ 1994] PNGLR 71 in the most explicit terms as follows:*
>
> *"An incestuous act with a child is a circumstance of aggravation of the severe kind. It is a gross betrayal of the most sacred relationship of a father and daughter. When young girls are the victims, it is difficult to imagine that the girls will not be scarred emotionally, perhaps for life".*
>
> *10. In my view such incestuous act between a father and daughter is a horrendous and heinous and evil inspired crime. The parameters of section 229D is wide enough to catch any prohibited sexual relationship such as an incestuous relationship between father and daughter or mother and son. Such sexual acts between father and daughter is a gross betrayal of the sacred bond that exists between a father and her daughter. The law of course prohibits a man from having sex with any persons he knows to be of his lineal descendants, such as between father and daughter, sister or mother and son. Section 229D in my view even prohibits rape and sexual penetration. The victim of such sexual acts or an incestuous relationship is put to a feeling of shame and embarrassment in the eyes of her community such that she will carry that social stigma for the rest of her life. She will be the subject of gossip amongst her*

*peers and be the subject of much ridicule and will be shunned at in the community. She is nothing but a mere laughing stock to be shunned at in the community.*

*11. Perpetrators or a sexual predators like the prisoner here who prey on the flesh of their own daughters in order to achieve this most despicable and degradable acts are sick human beings who should be ostracised from the community of decent and peace loving and law abiding human beings. They should be banished from human society ..... (Emphasis is mine)*

*12. As Kandakasi J observed in The State -v- Donald Keimou (2001) N2295, "Incest is an offence even between willing participants. The main reason for this prohibition, apart from scientific reasons, is to maintain the security, love, respect, honour, trust, happiness, peace and joy of the family unit and blood relations for a better and stronger family, community and a nation".*

52. The prisoner before me is being dealt with in full compliance of laws[4] in Solomon Islands and International Human Rights[5], i.e. respecting and according to the prisoner the rights recognised by law.

53. Based on the facts and circumstances of this case, I do note the evil that was brewing in the mind of the prisoner that then culminated in the offending – the preying on the flesh of his own daughter in order to satisfy his own selfish desire for pleasure. It is not only despicable but degradable and evil. It is not going to be tolerated in any way.

54. To the prisoner, this incestuous relationship occurred over a period of some 4 to 5 years. It took that long for your own daughter, the victim, to find the courage and the opportunity to tell someone about it which eventually led to your arrest. The law prohibits a man from having a sexual relationship with a person who you know to be of a lineal descendant, such as between father and daughter. Yet you found pleasure in engaging in that prohibited relationship for that period. You found pleasure in that sexual relationship whilst your daughter was traumatised at all fronts. In the Victim Impact Statement (VIS) she stated that she felt shame and sorry and had terrible sleeping from what had happened to her. She said that she didn't feel the same anymore about her future. Is that the kind of a personality that a father would want to see in his child?

55. I note on the Summary of Facts agreed to by both Counsels that the prisoner was about 39 years of age when the alleged offending started in 2018.

56. The antecedent reference made by counsel for the prosecutions in her submissions stated the prisoner's date of birth as 22 July 1984. That shows that the prisoner would have been

[4] Section 10, Constitution of Solomon Islands;
[5] Article 7, Universal Declaration of Human Rights.

33 and 34 in 2018. The prisoner will turn 40 in July this year. The antecedent referred to by the prosecutions mentioned the prisoner as a catechist. I note this is a religious position in church and so the expectation of the church and the community is a holy and responsible position.

57. The victim would have been around 11 and 12 years of age when the offending started in 2018.

58. I find the following facts: -

(i) The prisoner is related to the victim as her biological father.
(ii) On the first occasion, the victim and her family lived at Foko settlement, in Isabel Province. She was in grade 4. The victim was sleeping at night at their house when the prisoner woke her up and told her to keep quiet and remove her trousers. She was scared of the prisoner because he would beat her and her siblings if they disobeyed him.
(iii) The victim removed her trousers and the prisoner proceeded to remove his trousers as well. He then had sexual intercourse with her by way of penile penetration.
(iv) The second incident occurred on an unknown date between 1 January 2019 and 31 December 2019 when the victim was in grade 5 and her family resided at Susubona Village, Isabel Province.
(v) The prisoner approached the victim at night whilst she was sleeping and woke her up. He then had sexual intercourse with the victim by way of penile penetration.
(vi) The third incident occurred on another unknown date between 1 November 2022 and 30 November 2022 at Susubona Village, Isabel Province. On this occasion, the victim's mother was away with her sister to attend graduation ceremony at Allardyce School in Isabel Province. The victim was asleep at night when the prisoner woke her up. He then told her to keep quiet and not to cry or shout.
(vii) The victim was afraid but she knew that her father would beat her if she does not obey him.
(viii) He then widened her legs and climbed on top of the victim.
(ix) She felt the prisoner's penis penetrated her vagina and was painful.
(x) The victim was also scared and ashamed so she cried.
(xi) The prisoner continued to move his buttock in sexual motion until he ejaculated.

(xii) After he ejaculated, the prisoner wore his trousers and warned the victim not to report to her mother or anyone else.

(xiii) The victim however reported to her cousin sister and her aunty.

(xiv) The victim's aunty reported the matter to police and the prisoner was eventually arrested.

**CONCLUSION**

59. Your actions warrant an immediate custodial sentence.

60. In her written submissions the prosecutions did not suggest a particular starting point but gave an outline of previous cases that have sentenced like offenders or offenders charged with a similar offence. However, during the oral hearing of submissions, when probed by court, Counsel Naqu mentioned a starting point of 10 years with an end sentence of 6 to 11 years.

61. Likewise, Defence Counsel did not suggest a particular starting point in his written submission but like the prosecutions referred this court to a number of authorities that Counsel submitted can provide some useful guidelines for sentencing in sexual offence related cases in terms of sentencing starting points, says Counsel.

62. When asked by court during his oral submissions as to the starting point, Counsel Kausimae stated, for most exceptional cases, a starting point of 8 years would be appropriate. For this case, it should be lower, say 5 years, Counsel retorted. That should give a final sentence of 5 to 10 years for this matter, says Counsel.

63. Counsel Kausimae submitted that he has perused the authorities referred to by Counsel Naqu and found no issue with them and as far as it relates to those cases, Counsel says he offers no counter-argument. In his own words, Mr Kausimae stated,

> 'Defence ... concedes to the Crown's submissions on them.'

64. The maximum penalty for this offence is life imprisonment.

65. For the offending in the circumstances of this case, I consider an uplift to a starting point of 10 years.

66. Hence, I will impose on you a starting point of 10 years' imprisonment. I find that the offence you have committed is very very serious and warrants a higher sentence. I find that the aggravating factors outweigh the mitigating factors. Your actions, in my opinion demonstrate that you have no regard for the sanctity of your marriage, for your children, the welfare and future of the victim and for the law.

67. I agree and adopt the views of the prosecutions on aggravating factors. I find the following aggravating factors:

(i) The victim was a young girl. She was 11 or 12 years of age at the time of the first offending in 2018, a child of a young age.

(ii) The offending continued in 2019 and 2022 when she was 13 and 15 years of age, respectively. The prisoner, as a father should have turned his mind away from the evil deeds after the first incident. He didn't.

(iii) The prisoner was at the time in a position of responsibility. His Counsel highlighted that he was a church catechist in the village. Whilst I take note of this as a mitigating factor urged upon me by his Counsel, I view that that position of responsibility is also a relevant matter that aggravates the offending. He should have known the wrong he was engaged in for the period of persistency. It is clear from the facts, at the time of the offending, the prisoner deliberately disregarded his catechism responsibility. I take this fact against him.

(iv) Her young age is a serious aggravating feature. The prisoner had robbed her of commencing teenage life without a scar. The accused took advantage of the young girl's **vulnerability inside their home, a family home**. A home is supposed to be a safe haven for a child as in this case. Palmer, J (as he then was) in **Regina** v **Funifaka** [1997] SBHC 31; HC-CRC 033 of 1996 (6 June 1997) said this of a person's home when a number of offenders in an unlawfully causing grievous harm unlawful wounding case:

> "People are entitled to feel safe and secure in their homes ..., and to have a good night's sleep and rest without being disturbed. It is plain common sense that a person's house is out of bounds to anyone whether in custom, the law or whatever religious beliefs that one might have. (In English law, an Englishman's home is known as his castle, a place of refuge and safety). It is the same here, and the courts have a duty to protect society from such persons with criminal minds." (Emphasis is mine).

(v) The incidents occurred at night. The victim was asleep at her home. Even if the house was owned by the father, the victim should feel safe at home.

(vi) **Disparity of age**: The accused was about 34 years old when the first incident took place in 2018. Hence, the age difference between the accused and the victim is about 22 years.

(vii) **Repetition of the offending**: There were three instances of Incest put together under this one offence. The accused had sexual intercourse with the victim by way of penile penetration on all three occasions. Despite the argument by Counsel Kausimae for the prisoner, I accept repetition of the offending as an aggravating factor.

(viii) **Breach of Trust:** The accused is the biological father of the victim. There is trust being that the prisoner and the victim are close family members. They are father and daughter. I agree with what the prosecutor says,

> "The accused ought to care, respect and protect the victim, instead he acted otherwise when he committed the offence, therefore he breached the responsibility he held as the father and the trust that victim had placed upon him."

(ix) **Emotional and Psychological harm**: The emotional and psychological harm to the Complainant cannot be measured but the scars will remain in her heart and mind affecting her life. The prosecutor urged this court to consider taking Judicial notice on the psychological effect of the sexual assault on the young complainant. Reference was made to the case of Regina v Liva where court pointed out that court may take judicial notice of the trauma suffered by the victim even if there is no evidence of such.

Regina v Liva [2017] SBCA 20 at paragraph 25 approved the comment in R v Bonuga [2014] SBCA 22: "There may have been no evidence that the victim suffered severe or lasting psychological harm. However, we consider that judicial notice needs to be taken of the devastating effect on the victims of sexual offending, especially young victims as in this case. The psychological trauma cannot be ignored."

In Pana v Regina [2013] SBCA 19 at [17] the Court stated; "We suggest that, in all but the most exceptional case, the sole fact that the child is below the age of consent should in itself bring the starting point to eight years whether the conviction is for rape or defilement. The actual age of the victim should still be taken into account as a possible aggravating factor over and above that. It would not amount to double accounting because it is the fact the victim is a child which brings the case into the eight year starting point and so the actual age may be considered as an additional factor. Its aggravating effect on the sentence will usually be greater the younger the child."

I take that into account in my consideration of sentence.

68. In consideration of the circumstances of aggravation which I outlined above; I will add an additional 30 years to your sentence making it a total of 40 years.

69. I accept the mitigating factors submitted on your behalf by Counsel Mr Kausimae. I consider that the guilty plea you entered had spared this court a lot of time and resources as well as avoiding the potentiality of the victim coming to court and re-live the trauma that she had been through, whether by cross examination or just what might be a hostile environment of a court room to a person of such an age. It is a strong mitigating factor and I give allowance for your guilty plea. I deduct 5 years from the total sentence.

70. With other mitigating factors that were urged by your counsel for this court to take into account, I do take them into account:

    a. you are a first-time offender. That means you did not have a brush with the law until the year 2018;

b. the reconciliation that was carried out. I note the compensation ceremony which was recorded and a copy of the minutes was attached to your Counsel's submissions.

c. Counsel Kausimae submitted that the prisoner was truly remorseful for what had happened. He is prepared to face the consequences of his acts, says Counsel. I take note of that the same.

d. The young family that the offender left behind at home. I take note that the family depended largely on him for their livelihood as submitted by his Counsel.

e. I take note that the prisoner's wife is a village dweller and have no formal employment, as submitted by his Counsel. Counsel also submitted that other siblings of the victim are still at school and their future education is now at stake in terms of support for their school fees.

f. I take note that the prisoner was a catechist for the village church. Counsel submitted that the village church will miss the service of the accused and his contribution to their church work until they find a replacement.

71. For those other mitigating factors, I deduct a further 2 years making it to a total term of 33 years imprisonment to serve.

72. I note that you are now 39 years old. You will turn 40 in July of this year.

73. Time spent in remand and awaiting sentence is to be taken into account in the final sentence to serve.

**ORDERS**

**I make the following orders:**

**1. Length of sentence imposed: 33 years imprisonment**

**2. Pre-sentence period in custody to be deducted:**

**3. Time to be served in custody: 33 years less pre-sentence period/time spent in custody**

**THE COURT**

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Justice Ronald Bei Talasasa Jr

**PUISNE JUDGE**