IN THE CENTRAL MAGISTRATES COURT OF SOLOMON ISLANDS

AT HONIARA

(Criminal Jurisdiction)

Criminal Case **No: 990 of 2019**

REGINA

-V-

TREVOR KEPSY

Coram: HOLLISON F (PRINCIPAL MAGISTRATE)

Appearances:

Mr Jonathan L Auga, Senior Legal Officer, Office of the Director of Public Prosecutions, for the Crown

Mr Benham Ifuto'o, Principal Legal Officer, Public Solicitors Office, for the Defendant

Date of Mitigation hearing: 16th December 2020

Date of Sentence: 21st December 2020

Notice: *This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication.*

SENTENCE

INTRODUCTION

1. The defendant Mr Trevor Kepsy was found guilty and convicted following a trial for one count of Indecent Assault contrary to section 141(1) of the *Penal Code* [Cap 26], and one count of Incest contrary to section 163 (2)(b) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment) (Sexual Offences) Act 2016.*

SUMMARISED FACTS

2. The defendant's name is provided above and he is from Pagoe Village, Choiseul Province. The defendant is married and has two children. He was 39 years old when he committed the second offence in 2019, and 33 years old when he committed the first offence in 2013. He is now around 40 years old.

3. The complainant is JB and she is the biological daughter of the defendant.[1] She is currently 14 years of age. Throughout the sentence she will be referred to as the complainant or victim.

[1] The complainant's name is suppressed, she will be referred to her initials "JB" or the "complainant" to protect her identity.

4. The complainant's mother and the defendant are now separated.

Count 1: Indecent Assault Contrary to section 141 (1) of the *Penal Code* [Cap 26]

5. The first incident occurred in 2013 on an unknown date at their family home in West Honiara on Guadalcanal in the Guadalcanal Province. The complainant was asleep in her room at the material time and her father went to her and woke her up. The defendant laid beside her. The defendant then told her a story about a monkey that had a girlfriend. After the defendant told her the story, he widened her legs and licked her vagina. He also rubbed his penis on her vagina.

6. The defendant and the complainant's mother were still together at the material time in 2013. The defendant did not tell anyone about the incident until she was interviewed by the Police for an incident which is now the subject of the second count in this present case.

7. On or about the 1st October 2019, the complainant made a statement to the Police at Rove Police Headquarters in Honiara.

Count 2: 1 Count of Incest-S 163(2)(b) of the *Penal Code* [CAP 26] (As Amended)

8. The second incident occurred on the 28th September 2019 at Panatina in Honiara on Guadalcanal. On that day, the defendant and the complainant were staying at Namoruka in West Honiara.

9. Earlier that day, the defendant and the complainant went to Tinge Ridge also in West Honiara to visit a relative of the defendant whom the complainant called uncle.

10. The defendant left her at Tinge Ridge with the complainant's uncle and went to Tana beach, and returned with another person. By that time, the defendant was drunk already.

11. Whilst at Tinge Ridge, the defendant and the complainant went to Namoruka. They went to one of her uncle's house there. They sat under the house and had conversations or telling stories with their relatives. After chatting for a while, they all dispersed.

12. The defendant walked down to a nearby stream and called the complainant to go to him. So the complainant went to him. The defendant told her that he noticed that she and one of her (the defendant's cousin) uncles were having eye contacts the whole time they were having conversation.

13. Later, the defendant and the complainant both boarded a bus and they disembarked at Town Ground and went to another uncle's (defendant's relative's) house there.

14. Whilst at Town Ground in West Honiara at the said uncle's house, her dad and her uncle had a conversation about her and the other uncle who were allegedly having eye contacts.

15. The complainant's uncle then asked her if that was true and she answered in the negative. The complainant responded that she was not aware of any eye contacts she had with her uncle. However, the defendant interjected by saying in pidgin "you no liar" which means "stop telling lies".

16. After that conversation, her dad's relatives left and her uncle went into the house, and it was just the two of them who remained outside. The defendant told her that he would do to her what he had been intending to do to her. By then it was dark and it was around 7pm.The defendant and the complainant took a bus and headed eastwards. Whilst they were on the bus, the defendant asked for her opinion whether she wanted for them to go to Panatina, Henderson or Mount Austin. The complainant did not respond and she started crying. The defendant then told her that she was making unnecessary noise and that it was getting other people's attention.

17. The defendant and the complainant dropped off at the bus stop at Panatina. They walked to the Panatina field and he said that was not a good place. They walked up to a place and the top of that place is flat and there were some bricks nearby. The defendant led her to an area under a tree. The defendant left his bag there and he told her to sit down but she refused. The defendant told her to lay down and she continued to refuse his demands.

18. The defendant suggested to her that after they had sex, and if she ever wanted to have a relationship with any boy she would have the freedom to make a choice.

19. The defendant told her to lay down but she refused. The defendant then searched for a stone and came back threatening her to lay down for if she did not comply, she would be stoned. As a result, she laid down. The defendant told her to remove her clothes. She pulled down her trousers as demanded. The defendant then removed his own clothes.

20. The defendant told the complainant to spread or widen her legs which she did. He went on top of her. He then pushed his penis into her vagina.[2] She stated that it was painful and that his father's penis got into or entered her vagina.

21. They had sexual intercourse for quite a while and then the defendant stopped. The defendant stood up and put his trousers on and the complainant also put her trousers on as well.

[2] She stated in pidgin as follows: "hem pushum koko blo hem inside lo kan blo me"

22. The defendant told her that if she ever wanted to have a relationship with any boy, then she could do so.

23. They then walked towards the bus stop and they got onto a bus and headed for White River. They went to Uncle Nelson's house. Upon their arrival, some people at Uncle Nelson's house were out watching boxing.

24. The complainant sat at the hammock outside the house and it was only her father that entered the house at the time. When her father entered she was still at the hammock and later she went into the house. There were other people who were at the house but she did not know them well and she did not tell anyone about the incident. She then slept.

25. On the 29th September 2019 in the morning, she woke up and she opened the house and went outside. She saw her dad and another uncle who were still sleeping.

26. She went outside and met a cousin sister of hers. She walked to a place called Crime Land just on the other side of the stream and then returned to Uncle Nelson's house. Upon her return the defendant had woken up and he was there. The complainant told the defendant that she would go and report what he did to her last night to Aunty Pretty and the defendant cried and urged the complainant not to do that. Then she told him that she was going and despite his protests, she crossed the stream and walked up to Wind Valley searching for her Aunty Pretty.

27. The complainant reached Wind Valley and she met Aunty Pretty and her son who were on their way to a canteen to buy something.

28. Aunty Pretty asked her where she was heading to and she said she was there visiting. Aunty Pretty told her that Kayla was at home and she could go to Kayla.

29. She went to Aunty Pretty's house and Kayla who is Aunty Pretty's daughter was there. Kayla asked how she was and she said "I am here to tell you something", and she Kayla asked "what was it". She told her that her father was jealous of her last night. She continued and informed her that her dad took her to Panatina on the same night. She said they got on to a bus and dropped off at Panatina. She said she cried whilst on the bus. She said they reached the Panatina field and they went further up to a nearby area. She said she told Kayla about her dad asking her to remove her clothes. She told Kayla that her dad raped her.

30. Aunty Pretty then returned with some doughnuts and Kayla relayed to her mother the same story.

31. The complainant also told Pretty the same story of what happened to her the night before (last night). So her aunty asked her if the defendant was still at White River and she answered in the affirmative.

32. On that same day, the defendant went voluntarily to the Central Police Station in Honiara. The defendant's cousin brother Mr Nelson and two others went and picked the defendant at the Central Police Station. The defendant had asked to be placed in the cell, however, Nelson told him that cannot be done at that stage.

33. The defendant was taken to one of their relatives at Henderson awaiting investigation.

34. The matter was reported to the White River Police and the complainant was referred to the Rove Police Station in Honiara.

35. The defendant was later arrested, charged and remanded in custody.

DISCUSSION AND ANALYSIS

36. In ***Tii v Regina*** [2017] SBCA 6; SICOA-CRAC 14 of 2016 (5 May 2017),[3] the Court of Appeal explains that the approach to sentencing should be as follows:

> *21. A sentence should be crafted to attain the goals of punishment, deterrence and rehabilitation.*
> *22. The starting point should be consideration of the facts of the offence and of the appropriate range of penalty for the offence constituted by those facts. Then any aggravating circumstances should be identified.*
> *23. The sentencing judge's attention should then turn to facts relating to the offender – his antecedents (including personal circumstances and criminal history, if any) and mitigating factors such as youth, remorse, or plea of guilty (including the circumstances in which the plea was entered). Intoxication may be an explanation for an offender's conduct, but not an excuse for it: in other words, it should not be treated as a mitigating factor*

37. The offence of sexual assault under the old legislation in section 141 (1) of the *Penal Code* [Cap 26] carries a maximum sentence of 5 years imprisonment. [4]

38. Whilst the offence of incest under section 163(2)(b) of the *Penal Code* [Cap 26] as amended by the Sexual Offences (Amendment) Act 2016 attracts a maximum sentence of 10 years imprisonment.[5]

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[3] *Tii v Regina* [2017] SBCA 6; SICOA-CRAC 14 of 2016 (5 May 2017),
[4] *Penal Code* [Cap 26], s 141(1)

[5] *Pena Code* [Cap 26], s 163 (As amended) states as follows:

(2) A person commits an offence if the person has sexual intercourse with another person who is a close family member of the person.

Maximum penalty:

Aggravating Features

39. **Premeditation and repeated offending.** The evidence indicates that the defendant premeditated both offences in this present case. In the first offence in 2013, the defendant committed the offence when the mother of the complainant was not at home. This was to ensure that he had the freedom to execute his sexual desires and plans. He entered the room while the complainant was sleeping, he went and laid beside her, he woke her up and told her a story about a monkey that had a girlfriend, he then widened her legs, licked her vagina and rubbed his penis on her vagina.

40. In the second incident on the 28th September 2019, about 7pm, the defendant took the complainant from Town Ground to Panatina in Honiara by Public bus. Before they took the bus, the defendant was not happy about the complainant having eye contacts earlier that day purportedly with her uncle (a cousin of the defendant). The defendant also told her that he would do her what he was planning and intending to do to her own daughter. Whilst they were on the bus heading eastwards, the victim was crying and the defendant asked for her opinion whether she wanted to go to Panatina, Henderson or Mount Austin. They dropped off and walked up to Panatina field, and the defendant said that was not a good place, and walked further up. When they reached a spot which was described as a flat place, the defendant insisted for her to lay down and threatened to stone her. The defendant suggested to her that she would have the freedom to have relationship with any boy after they had sex. The defendant had sexual intercourse with her by pushing his penis into her vagina which was painful to her. The evidence demonstrated that the defendant pre-meditated these offences.

41. **Psychological effect and trauma.** The first incident occurred in 2013 when the complainant was 7 years old when her very own father indecently assaulted her by licking her vagina. The second incident occurred when she was 13 years old last year. The victim broke down in court and cried on the 6th of October 2020 which was supposed to be the first day of the trial in this matter. The victim would live her life knowing very well the sordid and evil actions that her father did to her. It would definitely haunt her. If other people finds out about this case, people may mock or use this story to belittle her. In ***Regina v Ningalo - Sentence*** [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)[6]: the High Court rightly commented as follows:

In Solomon Island's culture, the stigma of a child having been violated by her own father is one that can last for a considerable part of the child's life, if not her entire life. The child loses her self-esteem and the shame inhibits the child from enjoying the freedom of

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(b) in any other case – 10 years imprisonment

[6] *Regina v Ningalo - Sentence* [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)

movement and association that she needs in order to enjoy life to the full. The emotional and psychological damage done to the child can also be of immense proportion.

42. **Age Disparity.** The defendant was 39 years old and the complainant was 13 years old when the second incident occurred. This is a huge disparity of 25 years. It was also noted in the Judgment that the defendant turned 13 years old on the 6th of September 2019, and she was only 13 years old and 22 days old when the incident occurred. That is a sad way of reaching the 13th birthday only to be faced with such a horrific and despicable treatment by an ungrateful and selfish father. Had the offence been committed on the 5th of September 2019 or prior, the defendant would have been charged under subsection 2(a) which attracts a life imprisonment, and the matter would have been committed to the High Court.[7]

43. **Breach of trust.** The defendant breached the trust and bond between a father and a daughter when he committed the offences of indecent assault and had sexual intercourse with the victim who is his biological daughter. In ***Hagataku v Reginam*** [1993] SBHC 61; HCSI-CRC 8 of 1993 (14 July 1993)[8], the Court held that the offences of incest between father and daughter are generally more serious in gravity than offences of incest between brother and sister. As the father, he is the head of the family and his role is to protect his children from harm and violence, and to ensure that they get the best possible future and life that they are entitled to.The defendant committed the sexual offences against her daughter not once but twice. In ***Regina v Ningalo - Sentence*** [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)[9]; the Court held as follows:

> *The seriousness of the offence of* ***incest****, or any other sexual offence for that matter, lies in the fact that it is an offence, which is committed out of a selfish desire for sexual gratification in total disregard for the rights and dignity of the victim. Such behavior amounts to nothing more than a betrayal of the child's expectations for parental protection. It also amounts to abuse of authority and it is a very serious breach of trust on the part of the father.*

44. **Intoxication.** The defendant was intoxicated when he committed the offence of incest. Those who committed an offence whilst under the influence of alcohol cannot use that as an excuse and the court may consider that as an aggravation.

45. **Use of threat and violence.** The defendant used a stone to threaten the complainant in relation to the second offence. He threatened the complainant with the stone that if she did not give in to his demands, he would stone her. The facts revealed that the complainant feared him and gave in. She took her trousers out. He then laid on top of her and had sexual intercourse with

[7] *R v Gathomana [2020] SBHC 10; HCSI-CRC 178 of 2019 (6 March 2020)*
[8] *Hagataku v Reginam* [1993] SBHC 61; HCSI-CRC 8 of 1993 (14 July 1993
[9] *Regina v Ningalo – Sentence* [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)

her. The use of the threat to accomplish his immoral and evil desires must be considered as an aggravating factor.

46. **No sign of remorse.** The defendant put the Crown to strict proof during the trial. He never saved the complainant the trauma of recounting the horrible experience of what happened to her. It was a painful and shameful experience indeed for her to recount what her father did to her. It was noted in the judgment that she broke down and cried on the first day of the trial, and that must have been very hard and excruciating for her.

Mitigating Factors

47. The offender is also entitled to certain mitigating factors and they are no previous conviction (first offender), cooperation with the Police, personal circumstances, and pre-sentence custody. I will elaborate more on this in the coming paragraphs.

Comparative Sentences.

Indecent Assault s 141 of the *Penal Code* [Cap 26]

48. In ***Regina v Rukarae*** [2016] SBMC 14; Criminal Case 511 of 2015 (9 June 2016)[10], the defendant is the grandfather of the 10 year old victim. The accused was charged with two counts of indecent assault contrary to section 141(1) and 141(3) of the *Penal Code* [Cap 26]. The Court sentenced the defendant to 3 years imprisonment and I year imprisonment respectively which were to be served concurrently. The grandfather and the victim lived in the same house. In the first incident, the offender showed his penis to the victim, and this was while he was standing close to the victim. In the second incident, the accused silently walked over to her, held her buttock and turned her to face up from her original sleeping position. The accused then pushed his hand into the victim's trousers.

49. In ***Regina-v-Pana Sentence***[2013] SBHC 88; HCSI-CRC 402 of 2008(16th July 2013)[11], the defendant was charged with one count of indecent assault contrary to section 141(1) of the Penal Code (count 1) and one count of defilement contrary to section 142(1) of the *Penal Code* [Cap 26]. Concerning the indecent assault (count 11) contrary to section 141(1) of the *Penal Code*, the defendant in that case was sentenced to 2 years imprisonment.

50. The sentencing tariff for sexual assault under section 141(1) of the *Penal Code* [Cap 26], ranges from approximately less than a year up to three years imprisonment. The court also understands that bound over and suspended sentences have also been issued by the courts in this jurisdiction in the past but the most common type of sentencing is one of immediate custodial sentence.

[10] ***Regina v Rukarae*** [2016] SBMC 14; Criminal Case 511 of 2015 (9 June 2016)
[11] ***Regina-v-Pana Sentence***[2013] SBHC 88; HCSI-CRC 402 of 2008(16th July 2013)

Starting Point

51. The present sexual assault charge is quite serious because it involved the licking of the vagina and rubbing of his penis to her vagina which in my view is very invasive, and must attract an immediate custodial sentence. Its severity is comparable to the case of ***Rukarae*** which attracted 3 years and 1 years imprisonment terms for both counts respectively.[12] Hence, it must receive something close to or lesser than the sentence in ***Rakurae.*** Hence, I am of the view that 24 months imprisonment should be appropriate as a starting point. The defendant did not plead guilty so he is not entitled to the one-third deduction for an early guilty plea, however, he is still entitled to some mitigating factors.

52. **First offender.** The defendant is a first time offender and has no record of previous criminal record or conviction. I deduct 3 months to reflect this.

53. **Cooperation with the Police**. He cooperated well with the Police during the investigation. I deduct 1 month to reflect his cooperation with the Police.

54. **Personal Circumstances.** He is a parent and has parental duties and he is presently 40 years old. However, it must be noted that he has failed his parental duties when he committed these offences against his daughter in 2013 and 2019. I am not sure whether the complainant would ever go to him when he is released because of what he did. He has failed his responsibility as a parent. However, I accept that he may still be able to take care and raise his son who was born after the complainant. Hence, I also take into account his personal circumstances. I deduct 2 months to reflect this.

55. Hence, I am satisfied that the 18 months imprisonment (1 year and 6 months) is appropriate for the first count.

Incest

56. In ***Regina v Ningalo - Sentence*** [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)[13]; the defendant was sentenced to 4 years imprisonment for the four counts of incest. It must be noted that in the *Ningalo case*, the defendant was charged under the old legislation prior to the enactment of the *Penal Code (Sexual offences) (Amendment) Act 2016*.[14]

[12] ***Regina v Rukarae*** [2016] SBMC 14; Criminal Case 511 of 2015 (9 June 2016)
[13] *Regina v Ningalo - Sentence* [2013] SBHC 44; HCSI-CRC 78 of 2008 (15 April 2013)
[14] *Penal Code (Sexual offences) (Amendment) Act 2016*

57. In ***R v Zonga*** [2019] SBMC 12; Criminal Case 70 of 2018 (21 February 2019)[15], the defendant was sentenced to 4 years imprisonment for one count of incest contrary to section 163 (2) of the *Penal Code (Cap. 26)* as amended by the *Penal Code (Amendment) (Sexual Offences) Act 2016* and *Common Assault* contrary to section 244 of the *Penal Code (Cap 26)* after pleading guilty to the said charge. That case involved the father of the victim having sex with his daughter who was 17 years old.

58. *In* ***R v Tabangara*** [2020] SBMC 9; Criminal Case 2 of 2020 (6 April 2020)[16]; the defendant pleaded guilty to three (3) counts of Incest and a count of attempted incest on his own biological daughter. The offence of *Incest* is provided for under section 163 (2) (b) of the Penal Code (Cap. 26) as amended by (Amendment) (Sexual Offence) Act 2016, and *Attempted* ***Incest*** under section 163 (5) (b) of the *Penal Code* (Cap. 26). The daughter was 15 years old. The defendant was sentenced to 4 years imprisonment for first two counts of incest and 5 years for the third count, and 3 years and 6 months for the attempted incest charge which were all ordered to be served concurrently giving a total sentence of 5 years imprisonment.

59. The sentencing tariff for an incest under section 163(2)(b) of the *Penal Code* [Cap 26] as (amended) is between 4 years and 5 years as illustrated in the cases that were commenced after the *Sexual Offences (Amendment) Act 2016*. For instance in *Zonga*, the defendant pleaded guilty to the said offence and he was sentenced to 4 years imprisonment.[17] In *Tabangara*, the defendant pleaded guilty to three counts of incest contrary to section 163 (2)(b) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment) (Sexual Offences) Act 2016*.[18] The defendant in *Tabangara* was sentenced to 4 years imprisonment for the first two counts and 5 years imprisonment for the third count of incest. The defendant in this present case did not plead guilty so he must receive at least a sentence higher than the Zonga case. I am also satisfied that an immediate custodial is sentence is warranted for the second charge because of the severity of the offending. This present case is more serious than the *Zonga* and *Tabangara* cases when comparing the ages of the victims to this present case.[19] The victims in those two cases were 15 and 17 years old and they were older than the victim in this present case who was 13 years old.

60. I am also mindful of the maximum sentence that I can impose for a single count which is only 5 years imprisonment as prescribed under section 27 (1)(b)(i) of the *Magistrates Court Act* [Cap 20].[20] I am also aware that section 27(4) of the *Magistrates Court Act* [Cap 20][21] provides as follows:

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[15] *R v Zonga* [2019] SBMC 12; Criminal Case 70 of 2018 (21 February 2019)
[16] *R v Tabangara* [2020] SBMC 9; Criminal Case 2 of 2020 (6 April 2020)
[17] *R v Zonga* [2019] SBMC 12; Criminal Case 70 of 2018 (21 February 2019)
[18] *R v Tabangara* [2020] SBMC 9; Criminal Case 2 of 2020 (6 April 2020)
[19] *R v Zonga* [2019] SBMC 12; Criminal Case 70 of 2018 (21 February 2019); *R v Tabangara* [2020] SBMC 9; Criminal Case 2 of 2020 (6 April 2020)
[20] *Magistrates Court Act* [Cap 20] (as amended), s 27

[21] *Magistrates Court Act* [Cap 20] (as amended), s 27(4). In *Prasad v Regina* [2013] SBHC 3; HCSI-CRC 505 of 2011 (6 February 2013), the High Court held:
[7] It seems clear that the various pieces of legislation provide that a Magistrate may impose consecutive sentences for two or more offences, up

(4) In the case of consecutive sentences imposed by a Magistrate's Court in respect of two or more distinct offences arising out of the same facts it shall not be necessary for such Magistrate's Court to send the offender for trial before a Principal Magistrate's Court or the High Court, as the case may be, by reason only that the aggregate punishment for the several offences in respect of which such sentences are imposed is in excess of the punishment which it is competent to impose on conviction for a single offence:

Provided that the aggregate punishment imposed in the form of consecutive sentences shall not exceed twice the amount of the punishment which such Magistrate's Court is competent [my emphasis] to impose in respect of one offence in exercise of its ordinary jurisdiction.

Starting Point

61. After having considered the relevant factors and the circumstances of this case, I am of the view that a starting point of 60 months (5 years) imprisonment is appropriate for this present case. I will now consider the mitigating factors and give due allowances. I also note that the defendant did not plead guilty which led to the trial so he is not entitled to the one-third deductions from the starting point.[22]

62. **First offender.** The defendant is a first time offender and has no record of previous criminal record or conviction. I deduct 3 months to reflect this.

63. **Cooperated well with the Police.** He cooperated well with the Police. I deduct 1 month to reflect his cooperation with the Police.

64. **Personal Circumstances.** He is a parent and has parental duties. However, as I have said, he has failed his parental duties when he committed the offences to his daughter in 2013 and 2019. I am not sure whether the complainant would have the courage to ever go to her father upon his release because of what he did to her. Nevertheless, I accept that he may still be able to take care and raise his son who was born after the complainant. I deduct 2 months to reflect this.

65. Hence, I am satisfied that 4 years and 6 months (54 months) imprisonment is appropriate for one count of incest contrary to section 163 (2)(b) of the *Penal Code* [Cap 26] as amended by

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to a total of twice the Magistrate's normal sentencing jurisdiction, that is, in the case of a Principal Magistrate, 10 years imprisonment, or $2,000, or both.

[22] In *Regina v Liva* [2017] SBCA 20; SICOA-CRAC 17 of 2017 (13 October 2017):

As to mitigation, this man is a first offender and we accept he is entitled to a very substantial discount for pleading guilty at the earliest possible stage. This spared the victim from having to give evidence and confronting her father in the most awful of circumstances.

the *Penal Code (Amendment) (Sexual Offences) Act 2016.* This sentence (4 years and 6 months) is around 45 to 46 percent of the maximum sentence of ten years imprisonment.

Sentencing for a number of offences

66. The principle of proportionality could be an issue when it comes to number of offences for the purposes of sentencing. Professor Eric Colvin explains that:

> *Proportionality may be a difficult issue when a person is to be sentenced for more than one offence. Imposing a number of separate, cumulative sentences could create a crushing burden, disproportionate to the criminality involved. The principle of totality has been developed to avoid this outcome.*
> *The totality principle holds that a court sentencing an offender for more than one offence should not simply impose a number of separate, cumulative sentences. It should instead consider what would be an appropriate aggregate sentence.* [23]

67. In ***Bade v Reginam*** [1988] SBHC 10; [1988-1989] SILR 121 (21 December 1988), His Lordship Ward CJ stated that:

> *When considering sentence for a number of offences, the general rule must be that separate and consecutive sentences should be passed for the separate offences. It is trite to point out that a man who commits, say, five offences should receive a heavier sentence than a man who only commits one of them.*
>
> *However there are two situations where this rule must be modified. The first, that where a number of offences arise out of the same single transaction and cause harm to the same person there may be grounds for concurrent sentences, does not concern this appeal save to say that the learned magistrate correctly applied this principle in ordering a concurrent term for the malicious damage caused to Solo Lae's house during the burglary.*
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> *The second occasion for modifying the general rule arises where the aggregate of sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case. Thus, once the court has decided what is the appropriate sentence for each offence, it should stand back and look at the total. If that is substantially over the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the total should be reduced to a level that is "just and appropriate" to use the test suggested in Smith v. R. [1972] Crim.L.R. 124. Equally, if the total sentence, although not offending that test, would still in the particular circumstances of the person being sentenced, be a crushing penalty, the court should also consider a reduction of the total.*

[23] Eric Colvin et al "Criminal Law in Queensland and Western Australia: Cases and Commentary"-Sentencing Principles (6th Edition, 2012) 948.

68. In ***Regina v Hoka*** [2012] SBHC 152; HCSI-CRC 159 of 2011 (10 December 2012)[24], Pallaras J, stated that the sentences for charges of an attempted rape occurred on different days separated by time over two years should be ordered to be served consecutively. However, his Lordship said that:

> *22. This approach would result in a head sentence of 22 years (3.5 +4+4.5+5+5). I am conscious that this would be a crushing sentence if fully imposed and that in accordance with the totality principle, I ought to reduce it to avoid such an outcome.*
>
> *23. The method by which this result can be achieved has been the subject of consideration in the High Court of Australia in the case of Mill v R in which the Court said:*
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> > *"Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."[2]*

69. In ***Johnson-v-Regina*** [2004] HCA 15; (2004) ALR 346[25] at [26], Gummow, Callinan and Heydon JJ of the High Court of Australia said as follows:

> *The joint judgment in Mill expresses of a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrence. Pearce does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served. To do that, is not to do what the joint judgment in Pearce holds to be undesirable, that is, to have regard only to the total effective sentence to be imposed on an offender. The preferable course will usually be the one which both cases commend but neither absolutely commands.*

70. In ***Angitalo v Regina*** [2005] SBCA 5; CA-CRAC 024 of 2004 (4 August 2005)[26], the Court of Appeal of Solomon Islands stated that:

> *The fundamental underlying principle is that a sentence should reflect the true criminality involved in the offences, without on the one hand punishing the offender more than once for the same or essentially the same criminal conduct or, on the other hand, failing to punish the offender for committing a crime. This will almost always be a matter of fact and degree, requiring the exercise of judicial discretion. The fundamental rule is the Court*

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[24] ***Regina v Hoka*** [2012] SBHC 152; HCSI-CRC 159 of 2011 (10 December 2012)

[25] ***Johnson-v-Regina*** [2004] HCA 15; (2004) ALR 346

[26] ***Angitalo v Regina*** [2005] SBCA 5; CA-CRAC 024 of 2004 (4 August 2005)

should ensure that both the end result does not exceed what is the appropriate punishment for the offender's criminal conduct, considered as a whole, and that result adequately punishes the offender for the crimes actually committed. It should be observed, moreover, that the language adopted by Ward CJ is indicatory rather than mandatory.

71. As per the ruling in ***Angitalo***[27], the courts should ensure that the punishment for the offender's criminal conduct commensurate with the gravity of the offences. More importantly, the Court of Appeal said that the language adopted by Ward CJ in the *Bade case* is *indicatory* rather than *mandatory*. The Court of Appeal concluded in the *Angitalo case* as follows:

> *We consider that, with respect to the learned magistrate and the learned sentencing judge, in the particular and exceptional circumstances here, the offences of going armed in public (which only occurred in the courtroom) and assaulting the court officer on the one hand and stealing the court papers on the other could not properly be regarded as separate offences. The immediate victims were, of course, different but that this was so merely reflected different aspects of the same transaction. Putting it another way, the degree of overlapping involved in the commission of the two offences was so great that they were in the relevant sense part of the same or single transaction. We would observe that, even if it was right to regard the violence offences and the theft as separate offences, the very substantial degree of overlapping could not have justified the mere aggregation of the two sentences that were passed on each offender. The overall sentence that was passed necessarily involved a marked degree of double counting and must have been wrong in law for this reason, if for no other. It is unnecessary for us to deal with this issue further since we have we have concluded, with respect, that the learned Magistrate and Brown J must have misdirected themselves as to a material consideration to have concluded as they did.*
>
> *It follow that the appeals must be allowed and the sentences ordered to be served concurrently.*

72. In this present case, I am satisfied that there is no degree of overlapping in these two offences as the first offence was committed in 2013 and the second one in 2019, and they cannot be caught in the rule held in *Angitalo* which stated that "the degree of overlapping involved in the commission of the two offences was so great that they were in the relevant sense part of the same or single transaction."[28] In ***Sahu v Regina*** [2012] SBHC 122; HCSI-CRC 504 OF 2011 (3 October 2012)[29], the High Court stated that:

> *[18] The Respondent submits that even if the learned sentencing Magistrate made no specific acknowledgement that he had applied the totality principle, that this is not an end to the argument. In the case of Bu'uga v Regina[4], Apaniai J in dismissing the appeal said "While the Magistrate may have committed an error in not applying the totality*

[27] *Angitalo v Regina* [2005] SBCA 5; CA-CRAC 024 of 2004 (4 August 2005)
[28] ***Angitalo v Regina*** [2005] SBCA 5; CA-CRAC 024 of 2004 (4 August 2005)
[29] ***Sahu v Regina*** [2012] SBHC 122; HCSI-CRC 504 OF 2011 (3 October 2012)

principle, the question still remains whether the 6 years and 4 months adequately and fairly represents the totality of the criminality in ....the offences."

[19] I accept this argument of the Respondent. What is of primary importance therefore is that the end result is adequate, appropriate and just. The sentence must reflect what is considered by the sentencing court to be the true criminality of the conduct involved in the offence. It would be arbitrary and in my view wrong to try to circumscribe these complex assessments any further than the accepted limits of judicial discretion.

73. I also remind myself from what was said in *Angitalo* that as a sentencing magistrate I must not "on the other hand, [fail] to punish the offender for committing a crime. This will almost always be a matter of fact and degree, requiring the exercise of judicial discretion." In other words, I must make sure that the defendant is punished for both offences and not for the second offence only as apparently they did not arise out of the same transaction.

74. Having said that and after having taken into account the sentencing principles such as punishment, deterrence and rehabilitation, and the available comparative sentences in this jurisdiction, I now sentence the defendant to 1 year and 6 months (18 months) imprisonment for one count of indecent assault contrary to section 141(1) of the *Penal Code* [Cap 26]. I also sentence the defendant to 4 years and 6 months (54 months imprisonment) for one count of incest contrary to section 163 (2) (b) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment) (*Sexual Offences) Act 2016 at Honiara in the Guadalcanal Province, on the 28th September 2019.

75. These two offences occurred on different occasions, and I adopt the principle and approach taken by Pallaras J in ***Hoka***,[30] and in exercise of my judicial discretion as highlighted in ***Angitalo***,[31] I agree that offences that occurred on different days separated by time over a number of years should be ordered to be served consecutively. Hence, I am the view that these two offences should be served consecutively as they occurred in 2013 and 2019 respectively which would give a total of 6 years imprisonment. I will now consider the totality principle and whether it has a crushing effect on the defendant.[32] In ***Fa'afunua v Regina*** [2004] SBHC 131; HCSI-CRAC 296 of 2004 (10 September 2004)[33]; his Lordship Palmer CJ held as follows:

The totality principle can arise from two situations. (i.) Where a number of offences arise from the same transaction; and (ii) where an offender currently serving a term of imprisonment is being sentenced for other separate offences. In both instances the court is required to look at the totality of the sentence to be imposed and to ensure that an appropriate sentence is imposed for the criminality of the offender.

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[30] ***Regina v Hoka*** [2012] SBHC 152; HCSI-CRC 159 of 2011 (10 December 2012)
[31] ***Angitalo v Regina*** [2005] SBCA 5; CA-CRAC 024 of 2004 (4 August 2005)
[32] ***R v Kavei*** [2019] SBHC 69; HCSI-CRC 143 of 2017 (22 July 2019)
[33] *Fa'afunua v Regina* [2004] SBHC 131; HCSI-CRAC 296 of 2004 (10 September 2004)

76. In ***R v Kavei*** [2019] SBHC 69; HCSI-CRC 143 of 2017 (22 July 2019); his Lordship Palmer CJ stated as follows:

> *Taking into account the totality principle and noting that if each of the sentences are to be made consecutive (resulting in a total of 29½ years), will have the effect of a crushing sentence on him. Balancing the principles of deterrence, retribution, prevention and rehabilitation as much as is possible in the circumstances of this case, I am satisfied an appropriate sentence should be 5 years. This in my view should accurately reflect those principles of deterrence and retribution in this case as well as taking his personal and mitigating circumstances into account.*

77. After having regard to the totality principle, I am of the view that it will have a crushing effect on the defendant, and taking into account the brief delay, I order that one (1) year should be deducted from the 6 years imprisonment.[34] That would give a total of 5 years imprisonment for the defendant to serve for both charges and offences.

78. Hence, I am satisfied that 5 years imprisonment reflects the overall criminality of the offences that the defendant committed for both charges in this present case.

CONCLUSION

79. This is a sad case which involved the defendant who took advantage of his own biological daughter for his own sexual gratification. The actions of the father can be termed as sodomy, sordid and evil. He failed his responsibility to protect his very own daughter. He is selfish and treated his daughter as his girlfriend, and as someone or an object to fulfil his own sexual desires. He took his daughter around the city on the day of the offending as though the complainant was his girlfriend. He accused her of very petty issues such as having eye contacts with her very own uncles (defendant's cousin). He took her to Panatina in the capital's east after 7 pm and then said this place was not appropriate, and took her further to the crime scene. A reasonable father would not take his daughter to a place like Panatina at night because in custom, and in accordance with biblical principles and more importantly the law, it is forbidden for him to date her, and to involve intimately and romantically, and to have any sexual relationship with the victim. Instead he had sex with her. Earlier before they boarded the bus for Panatina, the defendant stated that he would do to her what he had been intending to do to her. That clearly shows planning and premeditation on the part of the defendant. It must be made clear that she is not the defendant's wife or girlfriend for him to treat her like that.

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[34] ***Bolami v Regina*** [2011] SBCA 26; CA-CRAC 9 of 2011 (25 November 2011); Bu'uga v Regina [2011] SBHC 163; HCSI-CRAC 396 of 2011 (9 December 2011)

80. How could he even have the courage to tell his daughter or the complainant that after they had sex, she would have the freedom to have a boyfriend? She was barely 14. The defendant saw it fit that if he had sex with her, then she would be allowed to have a boyfriend at the age of 13. That is absolutely absurd, injudicious and selfish on the part of the defendant. This is a very serious form of sexual violence and incest because the victim was 13 years and 22 days old at the time of the offending.

81. The second offence was exacerbated by the use of violence including threat and weapon (a stone) against the victim which forced her to submit herself to be unlawfully and sexually abused by her very own father by way of penile penetration and vaginal sexual intercourse. These sexual offences must be condemned in the firmest and toughest terms which can be translated by lengthy and deterrent sentences, which I hope to achieve in this present case. These sentences should teach the defendant a good lesson, and should be able to send a deterrent message and warning to the general public and like-minded persons such as the defendant that sexual violence is punishable with lengthy custodial sentences.

82. I also note that the defendant has been remanded since 2019. I am satisfied that the sentence must be retrospectively commenced on the date of first remand and/ or arrest in 2019.

ORDERS

83. The orders of the Court are as follows:

1] Count 1: The defendant Mr Trevor Kepsy is sentenced to 18 months (1 year and 6 months) imprisonment for one count of indecent assault contrary to section 141(1) of the *Penal Code* [Cap 26].

2] Count 2: The defendant Mr Trevor Kepsy is sentenced to 4 years and 6 months imprisonment for one count of incest contrary to section 163 (2) (b) of the *Penal Code* [Cap 26] as amended by the *Penal Code (Amendment) (*Sexual Offences) Act 2016.

3] The sentences are to run consecutively and therefore the total sentence is 6 years imprisonment. However, after having considered the totality principle and its crushing effect that it may have on the defendant and also the brief delay, I deduct another 1 year from the 6 years imprisonment, and the defendant shall serve a total (final) of 5 years imprisonment for both counts.

4] The total final sentence of 5 years imprisonment shall be retrospectively commenced on the first date of remand in 2019.

5] The complainant's name is suppressed permanently, and she shall only be referred to as JB or the complainant.

6] Right of appeal within 14 days.

7] I order accordingly.

PRINCIPAL MAGISTRATE FELIX HOLLISON

THE COURT