IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CRIMINAL APPLICATION NO. 2 OF 2018

THE KING **APPLICANT**

V

ZITA SHOL **RESPONDENT**

BEFORE:

Madam Justice Hafiz Bertram	President (Ag.)
Madam Justice Minott-Phillips	Justice of Appeal
Mr. Justice Bulkan	Justice of Appeal

C. Vidal SC, Director of Public Prosecutions, for the Applicant/Appellant
A. Sylvestre for the Respondent

JUDGMENT

6 June 2022 and 28 September 2022

BULKAN, JA

[1] The respondent was one of four persons tried on a single indictment comprising multiple counts, arising out of an incident that occurred on August 30th, 2015 in Indian Creek Village in the Toledo District of Belize. The respondent along with her older sister, Santa Shol, were indicted on two counts, the first charging them with Harm, contrary to s. 79 of the Criminal Code, Cap. 101 of the Laws of Belize, and the second charging them with Abetment of Rape, contrary to s. 20(1)(a) read along with s. 46 of the said Criminal Code. For the sake of completeness, a third person (who is the husband of the respondent) was charged on a single count of Abetment of Rape while the fourth accused (the husband of the respondent's sister) was charged with Rape, contrary to s. 46 of the Criminal Code. All these charges were in relation to a single victim, a young woman of 23 named Gracelia Sam.

[2] The respondent and her co-accused pleaded not guilty. At the conclusion of the trial on July 26th, 2018, they were all found guilty, whereupon they were immediately remanded into custody pending sentence. A sentencing hearing was duly held and on October 29th, 2018 the trial judge in an oral decision sentenced the respondent and her sister to time served for both

offences, the third co-accused to five years' imprisonment for Abetment of Rape and the fourth accused to ten years' imprisonment for Rape, though the time spent on remand following conviction was deducted from the latter two sentences. This meant that for her convictions of Harm and Abetment of Rape, the respondent served a total of 3 months' imprisonment. It is against this decision that the Crown seeks leave to appeal under s. 49(1)(c) & (2)(c) of the Court of Appeal Act, Cap. 90 of the Substantive Laws of Belize, on the ground that the sentence imposed by the trial judge was "unduly lenient".

[3] Although a single ground forms the basis of the appeal, three substantive issues arise for consideration: first, was the trial judge entitled to depart from the mandatory minimum sentence fixed by statute for the offences of Rape and Abetment of Rape; second, if he was so entitled, was the sentence unduly lenient, as the Crown contends; and third, if the sentence was indeed unduly lenient, should any further proceedings against the respondent be permanently stayed, on the ground that the period which has elapsed for the hearing of this appeal is inordinately long and thus a breach of her right to be tried within a reasonable time under s. 6(2) of the Belize Constitution? Counsel for the respondent also raised a preliminary objection as to time, which must be determined at the outset.

[4] Counsel for the Respondent noted that the Notice of Motion was filed on November 20th, 2018, while the affidavit in support from Lucio Shal was filed 10 months later on September 16, 2019. Counsel acknowledges that the application was filed within the 21-day period as stipulated, but argued that under Order II, rule 18(2) of the Court of Appeal Rules it should have been supported by an affidavit. Since an affidavit was only filed 10 months later, the submission was that the application for leave to appeal was not properly filed within the prescribed time. In response, the Crown pointed out that Order II applies to civil appeals, while criminal appeals are governed by Order III. Rule 1 of Order III sets out the manner in which criminal appeals are to be made, and contains no requirement for an affidavit in support. Further, the Crown added, there is no rule which extends the requirements of civil appeals under Order II, rule 18 to the requirements for criminal appeals.

[5] This preliminary point can be disposed of shortly, for the applicable rules are indeed separated into distinct categories governing civil and criminal appeals. Whereas counsel for the respondent has relied on rules pertaining to civil appeals, the Crown's application was made in a criminal matter pursuant to s. 49(1)(c) and s. 49(2)(c) of the Court of Appeal Act, Cap. 90.

The possibility of an appeal by the prosecution after a verdict of acquittal is a reform to criminal practice and procedure, which traditionally did not allow such appeals. Unfortunately, however, while this substantive change was made to the law, many of the details were not addressed to govern this newly inserted procedure. Thus, the time for filing criminal appeals (or applications for leave) has come to be governed by s. 27 of the said Act, which stipulates a period of 21 days after conviction or sentence for doing so. Moreover, criminal appeals are governed by Order III and not Order II of the Rules and, as pointed out by the learned Director of Public Prosecutions, nowhere in Order III is there any requirement for any application for leave to be supported by an Affidavit. The requirements specific to civil appeals, and particularly that in rule 18(2) requiring a supporting affidavit, do not apply to criminal appeals.

[6] We note that some of this uncertainty may have been occasioned by the fact that not all of the procedural requirements and the accompanying forms governing appeals have caught up with the "new" procedure of prosecution appeals. However, such a critical matter as that of time cannot be read into the legislation by implication. The current framework as contained in s. 27(1) of the Act stipulates that notice of an application for leave to appeal must be brought within 21 days of conviction or sentence, and in such manner as directed by the appeal rules of court. Nowhere in the latter is there a requirement for an affidavit in support of any application. In this matter, since the application for leave was duly filed within the 21-day period, it complied with the extant procedural requirements, so the Respondent's preliminary objection must therefore be dismissed. We turn now to the substantive issues raised in the appeal, though before addressing them it would be useful to summarize the events that gave rise to these charges and the eventual conviction.

A. Factual background

[7] On the day in question, August 30th, 2015, a marathon football match was held in the village, attended by both parties and their respective friends. Later in the day, as the victim was returning home along the highway, accompanied by two friends and a cousin, an altercation broke out with one of the four accused. Words were exchanged and things quickly escalated. One group comprising the respondent and three others attacked the victim, in the course of which she was beaten about her body. In a bizarre twist, they tore off the victim's blouse and bra, pulled her into the bush at the side of the road, and then began to encourage the fourth accused to rape her. The third accused then held her hands as the respondent and her sister loosened the victim's belt. The fourth accused then pulled down her pants and penetrated

her with his penis. This ordeal only came to an end when the victim's two friends finally intervened and pushed the fourth accused off. She barely had time to pull up her pants when another resident of the village drove up in a vehicle and the victim, now naked from the waist up, was helped inside. She went home first to get properly dressed, and then directly thereafter went to report the incident – first to the Alcalde and then to the Punta Gorda Police Station. After giving a statement, she was taken to the hospital where she was medically examined by a doctor.

[8] It was on the basis of this evidence that the jury convicted all four defendants, finding the respondent and her sister guilty of Harm and Abetment of Rape. Given the strength of the evidence led and the pivotal role played by the respondent, this verdict was hardly a surprise. Aside from the victim's testimony, the prosecution led independent evidence from the driver of the vehicle who rescued the victim and confirmed that she emerged with a torn blouse and without a brassiere. Further, and crucially, the medical examination conducted that very night revealed that the victim not only sustained bruises and scratches "all over her body", but that she was also bleeding in the walls of her vagina. According to the doctor who testified at trial, the latter condition was consistent with genital bleeding following sexual intercourse.

[9] At the sentencing hearing, which was conducted over several days, the acting Chairman of the Village, a relative of all four convicted persons, testified on their behalf. He described them as "honest, well behaved, [and] hard-working". Assessing the involvement of the respondent and her sister as "a far cry from the rape of the victim", the trial judge concluded that the mandatory sentence of 8 years' imprisonment was wholly disproportionate, excessive and a breach of s. 7 of the Belize Constitution which guarantees protection against the imposition of inhuman and degrading treatment or punishment. He then proceeded to sentence the respondent and her sister to time served, which amounted to 3 months' imprisonment on both convictions, and ordered their immediate release from detention. That sentence was viewed with such consternation by the Crown as to inspire this present application for leave to appeal. I turn therefore to the issues raised for determination.

B. Departure from the mandatory minimum sentence

[10] Section 20 of the Criminal Code provides explicit instructions with regard to the conviction and sentencing of accomplices. Sub-s. (2) thereof stipulates that where a crime is committed during the continuance of the abetment, the person abetting shall be deemed guilty

of that crime and under sub-s. (3) is liable to be punished as s/he would be for committing that crime. In other words, where someone abets a crime which is actually committed, that person is liable to the same penalty prescribed for the completed offence. This meant that on conviction for Abetment of Rape, the respondent and her sister should have been sentenced to a minimum of 8 years' imprisonment, that being the mandatory minimum sentence upon conviction for rape, under s. 46 of the Criminal Code. The first question that therefore arises is whether the trial judge was entitled to depart from the statutory minimum, particularly since s. 160(2)(b) of the Indictable Procedure (Amendment) Act singles out rape as one of the crimes for which a court may *not* go below the prescribed mandatory minimum sentence.

[11] On this point, the Respondent argues that the trial judge was clearly influenced by the requirement of proportionality and the constitutional guarantee under s. 7 of the Belize Constitution not to be subjected to inhuman and degrading punishments. The Crown's objection, however, is that the trial judge provided no explanation for why he departed from the statutory minimum, and in doing so acted of his own motion without giving the parties any opportunity to make submissions. These are both valid positions, but there are some nuances that require closer examination.

[12] Mandatory sentences have always created some tension and are justifiably viewed with caution. Sentencing is a quintessential judicial function, so the tension results from the fact that a fixed penalty forecloses judicial discretion. Nonetheless, it is conceded that every branch of government has a role to play in the criminal justice process, including that of punishments: the executive sets policy, the legislature implements that policy by enacting crimes with attendant penalties, and the judiciary administers justice in individual cases, including through the sentencing of offenders.[1] Where a particular activity becomes a persistent or grave societal problem, as in the case of drug trafficking or gang activity, policy-makers and legislatures have resorted to mandatory penalties as one means of ensuring consistency in judicial approaches and ultimately eradicating the problem. For this reason, mandatory sentences have traditionally

[1] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CCT South Africa) per Ackermann J at [23]-[26]; *Reyes v the Queen* (2002) 60 WIR 42 (PC Bel) per Lord Bingham at [25].

not been regarded as a usurpation of the judicial function or contrary to the principle of separation of powers,[2] including by this Court.[3]

[13] While there are signs of increasing intolerance of mandatory sentences, there is no need now for a lengthy analysis of this trend as courts have consistently insisted that mandatory sentences must also conform to human rights standards.[4] This means that where a mandatory sentence is regarded as producing a disproportionate outcome, it may be struck down for violating the prohibition against the imposition of inhuman or degrading punishments, a standard constitutional guarantee.[5] Jurisdictions from across the Caribbean and the wider Commonwealth[6] as well as a plethora of international courts and human rights bodies[7] have invalidated mandatory sentences on this basis, maintaining that it is inhuman to treat all persons convicted of a particular crime identically, when among individual cases there may be crucial differences in the circumstances relating both to the offence and offender. The underlying rationale is that by foreclosing any opportunity for individualization, mandatory penalties are an affront to human dignity, which is a core value promoted by the prohibition on cruel and inhuman punishments. Perhaps the most illuminating treatment of this subject lies in the judgment of Lord Bingham in *Reyes v the Queen*,[8] an appeal from this court which concerned the mandatory death penalty. There, after an exhaustive review of authorities from across common law jurisdictions, Lord Bingham concluded:

> *"To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect."*[9]

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[2] *Hinds v R* (1975) 24 WIR 326 (PC Jam) per Lord Diplock at p 341; *Francis and Hinds v the State* (2014) 86 WIR 418 (CA TT), per Bereaux JA at [197].
[3] *Zuniga v AG* unreported Civil Appeal Nos. 7, 9 & 10 of 2011 (decision dated 3 August 2012), affirmed *AG v Zuniga* (2014) 84 WIR 101 (CCJ Bel), but cf. *Nervais v R* [2018] CCJ 19 (AJ), 92 WIR 178 (CCJ Bar).
[4] *AG v Zuniga* (2014) 84 WIR 101 (CCJ Bel) at [61].
[5] In Belize see s. 7 of the Constitution.
[6] *Hughes v the Queen* (2001) 60 WIR 156; *Mithu v State of Punjab* [1983] 2 SCR 690 (SC India); *State v Makwanyane* 1995 (3) SA 391 (CC Sth Africa)
[7] See, for example, *Thompson v Saint Vincent and the Grenadines* (2000) UNDOC/CCPR/C/70/D/906/1998.
[8] *Reyes v the Queen* [2002] UKPC 11, (2002) 60 WIR 42 (PC Bel).
[9] Ibid at [43].

[14] Notably, while this trend gained prominence with the death penalty, it has been expressly acknowledged – also in *Reyes v the Queen* – that the need for proportionality and individualized sentencing is not confined to capital cases.[10] However in non-capital cases, judicial approaches as to the effect of disproportionality have not been uniform. In *Aubeeluck v the State* [2011] 1 LRC 627, another decision of the Privy Council on appeal from Mauritius, the issue for determination concerned the constitutionality of a mandatory minimum sentence for trafficking in narcotics. The Board noted that the effect of the constitutional prohibition on inhuman and degrading punishments (also contained in s. 7 of the Mauritius Constitution) is to outlaw "wholly disproportionate penalties".[11] The Board then held that when confronted with a mandatory minimum sentence fixed by statute, there are three courses open to a court to ensure there is no violation of the constitutional protection – to invalidate the law providing for the mandatory sentence; to read it down and confine the mandatory penalty to a particular class of case only; or simply to quash the sentence in the case under consideration if to impose the full mandatory period of imprisonment would be disproportionate in those specific circumstances. In this case, the Board rejected the more expansive routes and opted for the third one. In striking down the sentence of 3 years' imprisonment that had been imposed on the appellant for trafficking in narcotics, their Lordships factored in that he was dealing with only a small quantity just barely over the limit that raises the presumption of trafficking and that he hitherto had a clean record.[12] The significance of this approach is that it attempts to accommodate the legislative intention as far as possible, in that mandatory sentences are not automatically invalidated in all cases. Not only is there the possibility of reading them down, but also a court can depart from them on an individual basis where the circumstances demand.

[15] This 'proportionality' approach was followed by this Court in *Bowen v Ferguson* (Cr App 6/2015, decision dated 24 March 2017), where the sole issue for determination was the constitutionality of a sentence of 3 years' imprisonment and a fine of $10,000.00 for possession of 1.3 grams of cocaine with intent to supply. This was a mandatory sentence required for possession of more than 1 gram of cocaine, so the appellant became subject to it because he had .3 grams over the threshold. In a majority judgment, this court held that the mandatory sentence was grossly disproportionate, given the small amount of cocaine in the appellant's possession alongside his previously unblemished record. The majority reasoned that if a

[10] Ibid at [37].
[11] *Aubeeluck v the State* [2011] 1 LRC 627 (PC Maur) at para [21].
[12] Ibid at [37]-[38].

mandatory sentence is found to be grossly disproportionate or such as to outrage the standards of decency, it would violate the constitutional prohibition on inhuman and degrading punishments. Relying on *Aubeeluck*, the court held that the three courses identified by the Privy Council in that case were likewise available to it and opted merely to quash the sentence of 3 years' imprisonment. In other words, instead of invalidating the entire section providing for the mandatory sentence, the majority accepted the *Aubeeluck* approach that it could simply quash the specific sentence in the appeal before it, thereby leaving the mandatory sentence intact for possible future application.

[16] Regrettably, however, there is no consensus among Belizean courts on whether this nuanced approach is the appropriate one. Not long before *Bowen* was decided, in *Zuniga v AG of Belize*, this court expressed materially different views. Here too the constitutionality of a mandatory penalty was in issue. Finding it to be "grossly disproportionate", this court unanimously declared the provision to amount to an inhuman and degrading punishment and thus invalid pursuant to s. 7 of the Constitution. In a detailed and thoughtful judgment, Mendes JA considered but ultimately rejected the approach taken in *Aubeeluck*, namely that which would leave the law intact and only invalidate sentences amounting to a grossly disproportionate penalty on a case-by-case basis. Noting that the Privy Council in *Aubeeluck* did not explain why invalidating the entire provision would be plainly inappropriate in the circumstances of that case, Mendes JA turned to *R v Ferguson* [2008] 1 SCR 96, quoting with approval the critique by the Canadian Supreme Court of this case-by-case approach. *Ferguson* held that invalidating the sentence altogether is the preferable approach where it is found to be grossly disproportionate, for a variety of reasons. These were, in brief: (i) that asserting a power to depart from a mandatory penalty in a specific case contradicts Parliament's intention in enacting the mandatory penalty in the first place; (ii) reading down or avoiding mandatory penalties which constitute cruel or unusual punishments undermines the Constitution's supremacy as well as its explicit provision in s 52(1) that any law inconsistent with it is void to the extent of its inconsistency; (iii) allowing courts to depart from a mandatory penalty on a case-by-case basis generates uncertainty; and (iv) leaving the law intact deprives Parliament of the opportunity to remedy the defect that leads to unconstitutional outcomes in individual cases.

[17] Mendes JA regarded this reasoning as highly persuasive and opted to follow it, and so invalidated the entire sub-section 3 of the law which contained the mandatory penalties in question. Crucially, on further appeal, the CCJ did not overturn or otherwise criticise Mendes'

rejection of the *Aubeeluck* case-by-case approach, only disagreeing with him on the scope of his order. In other words, while the CCJ agreed that the unconstitutional penalty would be struck down in its entirety, they opted to sever this provision only so that the rest of the law was left intact. However, by not pronouncing on this point – and specifically whether Mendes JA was correct in rejecting the *Aubeeluck* case-by-case approach – two possible options exist: that of *Zuniga* where the law providing the mandatory penalty is declared unconstitutional and the more limited alternative of *Aubeeluck* and *Bowen* where the law is left intact and only its application in a specific case invalidated where that result is deemed to be grossly disproportionate.

[18] The upshot of all this is that the trial judge was clearly entitled to follow the *Aubeeluck* approach of departing from the mandatory sentence in the specific case before him, as it had most recently been adopted by this court in *Bowen v Ferguson*. However, the objection by the Director of Public Prosecutions ("the Director") to him taking this course without offering the Crown an opportunity to comment on any alleged disproportionality in the mandatory sentence is equally valid. In the face of divergent approaches at the appellate level on the correct approach to mandatory sentences, the Director's objection assumes even greater force. In the *Queen v Gilbert Henry*, the CCJ had strong words where the court of appeal reversed itself by delivering a written judgment that was different from the oral decision it had given at the end of the hearing, relying partly upon a ground that had been abandoned during the hearing to do so. The CCJ described the court of appeal's failure to invite further written submissions from the affected parties before reversing itself as a "significant procedural lapse".[13] Noting that the Director had been explicitly told not to address the court on a point that formed a main thrust of the decision, the CCJ explained:

> *"Parties should be given an opportunity to address the court on issues which will be the subject of a decision or comment by the court. Elementary principles of natural justice dictate that this must be so. Nor are written submissions adequate, given the customary practices in the adversarial system as normally practised in these courts."*[14]

[13] *Queen v Gilbert Henry* [2018] CCJ 21 (AJ) at [25].
[14] Ibid at [36].

[19] Thus in the circumstances of this case, where the trial judge was inclined to depart from the statutorily-imposed minimum sentence, he should have invited submissions from the Crown on the proportionality of the penalty and whether it was correctly assessed as inhuman and degrading contrary to s. 7 of the Constitution. This was no trivial departure, and as the guardian of the public interest the Director would have had much to contribute both on the assessment of the nature of the mandatory penalty in general as well as the legitimacy in the circumstances of this case of departing from it. Although it was in theory open to the trial judge to depart from the mandatory sentence if he regarded it as excessive and thus contrary to s. 7 of the Constitution, he ought to have obtained the input of the affected parties before doing so. Thus, while we do not disagree that extant authorities permitted the course taken, in proceeding as he did the trial judge lapsed procedurally. It accordingly falls now to this court to determine whether he was justified in regarding the mandatory sentence as excessive and imposing instead a sentence of 3 months' imprisonment for Abetment of Rape.

C. Was the sentence unduly lenient?

[20] As stated above, after the guilty verdict the trial judge conducted a sentencing hearing. It appears to have been a fairly modest exercise, with only one character witness testifying on behalf of the convicted persons, who described them as "honest, well behaved, [and] hard-working". In his statement of reasons, the trial judge noted the features of the offence and then identified both aggravating and mitigating factors. In relation to the respondent the former were the gravity of the offences, the joint physical attack on the victim who was rendered defenceless, the premeditated nature of the offence of causing harm, and the heinousness of the offence abetted by them. The mitigating factors were identified as being the respondent's hitherto clean criminal background, the remorse expressed, and the responsibility taken for her actions. It should be noted that not all these factors are grounded in evidence, for neither counsel appearing on behalf of the respective parties could identify how either offence was premeditated or what responsibility for her actions was taken by the respondent. At any rate, the trial judge proceeded to reference the proportionality principle, opining that the offence for which the respondent was convicted is a "far cry from the rape of the victim", which in his view rendered the mandatory sentence of 8 years' imprisonment wholly disproportionate, excessive, and a breach of s. 7 of the Constitution. For that reason, he sentenced the respondent to the time served of 3 months imprisonment on both counts, to run concurrently, ordering her immediate release from remand.

[21] In its application for leave to appeal this sentence as unduly lenient pursuant to s. 49(2)(c) of the *Court of Appeal Act*,[15] the Crown submitted through the Director that the trial judge was misguided both in law and in fact. Senior Counsel Ms. Vidal pointed out the various statutory provisions which increased the penalty for the offence of Harm and laid down a mandatory penalty for Rape; she also relied upon s 160(2) of the *Indictable Procedure (Amendment) Act* which specifically excludes judicial discretion in departing from the mandatory minimum in relation to convictions for rape. In oral argument, the Director submitted, in the alternative, that even if the mandatory sentence could be viewed as excessive, the actual sentence of three months' imprisonment was far too lenient in all the circumstances; with this sentence, she submitted, the trial judge minimized the gravity of the offence for which the respondent was convicted, made a false distinction between rape and abetment of rape, and mischaracterized the nature and degree of the respondent's actions, giving her belated expression of remorse exaggerated and unwarranted importance. It would undermine the justice system and the rule of law more generally, she argued, if such a manifestly trivial sentence were to remain as a precedent in relation to such a grave offence.

[22] In answer to these submissions, Mr. Sylvestre for the Respondent submitted that despite the lack of arguments before the trial judge, he was clearly influenced by the proportionality principle, evidenced by his explicit reference to *Davis and Ambrister v COP* [2013] 1 LRC 213, a relevant authority from the Bahamas on this issue. Moreover, although the trial judge did not articulate detailed reasons for his view that the sentence was disproportionate, he concluded that imposing the mandatory minimum would constitute a breach of s. 7 of the Constitution. This he was clearly entitled to do. The actual sentence, Mr. Sylvestre argued, was not unduly lenient given that it was a custodial one, so that at no point did the trial judge contravene any applicable sentencing principle.

[23] Against this background, the first question to be resolved is whether this court can interfere with the sentence imposed, and if so, how should such a discretion be exercised. There is little difficulty in answering this, as s. 30(3) of the Court of Appeal Act explicitly empowers this court, if it thinks it fit on an appeal against sentence, to quash the sentence passed at trial and substitute in its place another sentence, whether more or less severe. Case law has helpfully expanded on the nature of this discretion. The starting point acknowledges that trial judges are

[15] Cap. 90, Substantive Laws of Belize [2000].

best placed to sentence offenders, having presided over the trial leading to conviction and observed all parties in the course thereof. That said, appellate courts are obliged to step in where necessary, "to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law."[16] There is longstanding authority for this principle, which has been repeatedly endorsed,[17] including most recently by the CCJ in *Ramcharran v the DPP* [2022] CCJ 4 (AJ) where they elaborated upon the role of appellate courts as including the following: (i) to ensure that principles of sentencing are properly applied; (ii) to ensure that sentences are not demonstrably unfit or unjust; (iii) to provide clarity and guidance to lower courts; and (iv) to develop the law, including in directions that appropriately respond to evolving notions of justice and changing realities.[18] These guidelines have proven to be immensely helpful to this court in the instant appeal.

[24] Sentencing is a notoriously difficult exercise. Duties are owed to multiple stakeholders but the individual to be sentenced is not an abstraction, so the challenge lies in striking the appropriate balance among these competing considerations. There is no precise formula on which to rely, so the task of applying the overarching principles to the offender and offence in question requires competence, common sense, sensitivity, and humanity, and even experienced judges must proceed with care. For this reason, the CCJ has insisted that where the prospect of lengthy incarceration looms, the trial judge should start by conducting a separate sentencing hearing after conviction. Doing so would ensure all the relevant factors in mitigation and aggravation, including psychological assessments and victim impact statements where available, can be thoroughly canvassed.[19] Gone are the days of sentencing on the spot, following cursory submissions from counsel on behalf of the accused, replaced instead by a more scientific and less *ad hoc* and summary process which aims at achieving the most rational and equitable result, and one in keeping with prevailing trends.

[25] The process requires a sentencing court to pay due regard to all the circumstances relating to both offence and offender. This covers a comprehensive range of factors, such as the gravity of the offence itself (and whether it involves violence), the manner in which it occurred (was it premeditated, highly organized, involving more than one participant), the

[16] *Pompey v the DPP* [2020] CCJ 7 (AJ), per Saunders PCCJ at [2].
[17] *Ramphaul v Thomas* [1955] LRBG 234; and see *Lashley v Singh* [2014] CCJ 11 (AJ) at [30].
[18] *Ramcharran v the DPP* [2022] CCJ 4 (AJ) at [16].
[19] *Pompey v the DPP* [2020] CCJ 7 (AJ), per Saunders PCCJ at [32].

specific role played by the convicted person, and the prevalence of the offence in general. Against this, the nature of the offender must be taken into account (antecedents including age, character and any other relevant fact) as well as the impact on the victim.[20] These various factors can be classified according to how they contribute to the main goals of sentencing, namely: retribution (to punish the offender), deterrence – both general and individual, prevention (which aims at preventing the convicted person from re-offending), and rehabilitation (to facilitate the re-entry of the convicted person back into society).[21]

[26] Given the variety of considerations that are potentially relevant, trial judges inevitably have significant discretion when deciding what to prioritize and how to strike the appropriate balance. No *a priori* position can be adopted on what is appropriate, for the exercise must be carried out in context. That said, a barrage of cases in the past decade have reiterated the foundational principles that should guide the sentencing process, and it would be useful to highlight the most prominent of these. Notably, factors such as the gravity and prevalence of the offence are accorded significant weight, though increasingly modern sentencing trends eschew traditional approaches of "locking up the offender and throwing away the key", focusing instead on rehabilitation and reform.[22] Courts have acknowledged frankly that these factors are not all equal, with the public interest, and specifically, the public interest in punishing and ultimately preventing crime, having the greatest resonance.[23] Equally important is the need for consistency, so that all things being equal there should not be stark disparities in the treatment of similar offences.[24] Ultimately, securing public trust and confidence in the administration of justice and maintaining fidelity to the rule of law are overriding goals, these being described by Jamadar JCCJ as "integral" to the sentencing process and its outcomes.[25]

[27] Measured against these goals and considerations, the consternation of the Crown with the sentence of 3 months' imprisonment for Abetment of Rape appears to be fully justified. To his credit, the trial judge did conduct a sentencing hearing and obtained perspectives from various parties. Thereafter, however, he regrettably fell into error when assessing and balancing

[20] *State v Sydney* (2008) 74 WIR 290, per Cummings JA at 295.
[21] *Benjamin v R* (1964) 7 WIR 459, per Wooding CJ, quoted with approval in *Lashley v Singh* [2014] CCJ 11 (AJ) at [31] and *Alleyne v R* (2019) 95 WIR 126.
[22] *Ramcharran v the DPP* [2022] CCJ 4 (AJ).
[23] *Ramphaul v Thomas* [1955] LRBG 234; *Lashley v Singh* [2014] CCJ 11 (AJ) at [32]; *Alleyne v R* (2019) 95 WIR 126.
[24] *Persaud v R* [2018] CCJ 10 (AJ) at [32].
[25] *Pompey v the DPP* [2020] CCJ 7 (AJ) at [53].

the aggravating and mitigating factors before him. This is most evident in his assessment, after acknowledging the gravity of the offence in question and the joint attack on the victim, that the respondent and her sister "played a less egregious role" than the other accused who restrained the victim, and further that the sisters' involvement was "a far cry from the rape of the victim." These observations demonstrate a misapprehension both of the law and the evidence.

[28] Abetment of Rape is obviously not the same as rape, but it is an exaggeration to treat these offences as immeasurably far apart in culpability. The law has long recognised that accomplices play an integral role in bringing about the actual crime – were it not for their facilitation and encouragement the crime might not even be committed – which no doubt explains why abetment is punishable in like manner as the completed offence under s. 20(4) of the Criminal Code. Theory aside, the evidence led in this case as to the nature of the respondent's participation is not of a trivial nature. It was she, along with her sister, who physically attacked the victim, the evidence of which remained in the scratches and bruises about the victim's body as independently recorded by the examining doctor. It was she, along with her sister, who participated in stripping the victim of her blouse and bra, leaving her naked from the waist up and publicly humiliated, as independently attested to by the witness Petrona Pop who rescued the victim at the end of this ordeal. It was she, along with her sister, who verbally encouraged the actual rape, and then assisted the rapist by helping to loosen the victim's belt. These were not minor acts of assistance. They provided both material and psychological support to the rapist, and were every bit as crucial as the act of the third accused who held the victim down while she was being raped. Analysed in this light, it becomes clear that both in law and in fact the respondent's contribution was material, and by describing her actions as a "far cry from the actual rape", the trial judge misled himself.

[29] Not only did the trial judge minimize the nature of the respondent's actions, he placed exaggerated importance on the remorse she expressed. Remorse is indeed a valid mitigating factor, but it is of greatest value if expressed early enough in the form of a guilty plea, which saves the public the time and expense of a trial and shields the victim from the compounded trauma of having to re-live the events in question for a public audience. This very court has already declared that remorse expressed after conviction attracts merely a minimum discount.[26] In this case, as the Director pointed out, not only did the respondent plead not guilty (as was

[26] *R v Pedro Moran* Cr. App 1 of 2017, decision dated 6 October 2020, at [34]-[35].

her right), but she cross examined the victim to suggest that she was intoxicated and called a witness to advance the theory that it was she who was in fact the victim. Her expression of remorse, then, came only after conviction. While it is certainly welcome and surely provides some vindication to the victim, its belated expression cannot erase or outweigh the enormity of the crime and the aggravating features of this offence, as discussed above.

[30] Conversely, other factors were not accorded the appropriate weight, aside from cursory references to them by the trial judge in the course of his reasons. The most crucial of these is the nature of the offence itself, the gravity of which is impossible to overstate. Though authority for this view is hardly needed, the trial judge referenced *R v Christopher Milberry* [2003] 2 Cr. App. R. 31, where the gravity of rape was clearly stated and the need for a custodial sentence emphasised. In addition, the trial judge acknowledged that sexual offences are prevalent in Belize. Together, these considerations should have motivated greater emphasis on the retributive and deterrent aspects of the sentences of all four convicted persons, but – as discussed above – the trial judge was unduly and unjustifiably influenced by his perception of the gulf between abetment and the rape itself. Even so, this distinction operated only to the benefit of the female defendants.

[31] This brings us to a final concerning aspect of the respondent's sentence, namely that of its disparity from the one meted out to the third accused, Albert Canti, who did not rape the victim but like the respondent and her sister played an enabling role. A close examination of Canti's actions does not reveal any conduct that was materially different from that of the respondent. Like the respondent, Canti took part in the beating inflicted on the victim. Like the respondent, he verbally encouraged the rape – though in her testimony the victim actually singled out only the respondent and her sister (and *not* Canti) as repeating the chants of "rape her, rape her". Like the respondent, Canti lent physical assistance to the rapist – he by holding down the victim and she by loosening her belt. Indeed, the aggravating and mitigating factors identified by the trial judge in relation to Canti were identical to those identified in relation to the respondent. Yet, despite such striking parallels, Canti was sentenced to 5 years' imprisonment (minus the 3 months in remand) – a material and shocking deviation from the sentence of 3 months' imprisonment awarded to the respondent. Given that the roles of these three persons were virtually indistinguishable, the disparity in the sentences they received upon conviction for the identical offence is unjustifiable. As pointed out in *Persaud v R*, parity in sentencing is "fundamental to any rational and fair system of criminal justice", essential to

maintaining public confidence in the system.[27] Aside from societal perceptions, it is plainly unfair to differentiate between persons in situations of such similarity and in the absence of other mitigating factors. In this case, the evidence led as to the role of these persons – the respondent and Canti – cannot support such a dramatic difference in their respective sentences.

[32] For these reasons, we find that the trial judge erred in principle by imposing a sentence of 3 months' imprisonment on the respondent for both offences of Harm and Abetment of Rape. In relation to the latter conviction, the punishment was the proverbial 'slap on the wrist', perversely insufficient for what is an extremely grave offence. Not only did the trial judge mischaracterize the legal nature of Abetment of Rape, he appeared not to appreciate the totality of the respondent's involvement and over-emphasised her belated expression of remorse. Moreover, by sentencing a co-accused to a much longer period of imprisonment, he differentiated between them for no reason connected with the nature of their actions or of the offence. Accordingly, and in order to correct this material discrepancy and ensure both consistency and fairness to all parties, including the co-accused, the Crown's application for leave must be granted and the sentence of 3 months' imprisonment quashed. However, as to what course must now be taken in relation to the respondent, we turn to the final issue raised on this application, namely that of the claimed breach of the constitutional right to trial within a reasonable time.

D. Trial within a reasonable time

[33] In further submissions filed with leave of the court, the respondent argued that these proceedings, including the appellate process, have been delayed to the point of amounting to a breach of her right to be tried within a reasonable time pursuant to s. 6(2) of the Constitution. Expanding on this claim, Mr. Sylvestre noted that the incident in question occurred in August 2015, so that any sentence substituted by this court now would mean that it has taken 7 years – from 2015 to 2022 – to finally conclude this matter. Relying on *Marin v the Queen*, and in particular the judgment of Barrow JCCJ on the issue of delay, counsel submitted that the time which has elapsed since conviction and appeal means that the respondent would have been in such uncertainty and agony as to render it inhuman to incarcerate her at this stage.[28]

[27] *Persaud v R* [2018] CCJ 10 (AJ) at [32]-[33].
[28] *Solomon Marin v the Queen* [2021] CCJ 6 (AJ), per Barrow JCCJ at [116]-[118].

Accordingly, he urged the court to order a permanent stay of all further proceedings and in particular on the imposition of a longer custodial sentence on the respondent.

[34] In response, the Director vigorously contested these claims, arguing first of all that there has been no inordinate delay. Meticulously documenting the course of these proceedings, the Director noted that only one year elapsed between the incident and the completion of the preliminary inquiry (from August 2015 to December 2016) and then another two years passed before the respondent was tried, convicted and sentenced (December 2016 to 29 October 2018). Three years for the completion of a trial is not, objectively viewed, a long period, but going even further the Director explained that the case was not tried with greater speed because the respondent and her co-accused were all unrepresented, and it was in an effort to be fair that every reasonable opportunity was afforded to them to retain counsel.

[35] The period since conviction to the present amounts to just under 4 years, and here again while this is not an inordinately long time, the Director explained why the appeal was not heard even earlier. The Crown's appeal was filed within the statutory time limit, but thereafter an initial delay arose because the respondent's sister failed to appear at the hearing (in February 2020) and then because of the global pandemic which resulted first in no sitting of the courts in March and June 2020 and then in a delay in the preparation of the record. Once the record was completed and the Crown duly filed its submissions at the beginning of 2021, the respondent took almost one year to file her response, only doing so in January 2022. Thereafter, she obtained leave to file further submissions (ironically, the ones alleging this very point of delay), further delaying the hearing from March to June 2022. This timeline and the accompanying reasons were not contested by the respondent. Bearing this in mind, the Director submits that there has been no breach of the respondent's rights under s. 6(2) of the Constitution. Even if there has been a breach, she submits in the alternative that the remedy of a permanent stay sought by the respondent would be manifestly disproportionate.

[36] The scope and meaning of the right to a hearing within a reasonable time has been repeatedly dissected by a variety of courts and international bodies. It has been consistently pointed out that delay in the administration of justice is harmful in a variety of ways: principally, it reduces the chance of a fair trial as witnesses disperse and memories fade, and it presents the unsavoury choice between extensive remand periods or granting bail, which risks the twin perils of either incarcerating the innocent or allowing a guilty person to re-offend or

disappear altogether. Moreover, as delays become endemic, public trust in the administration of justice is inevitably undermined, which can in turn lead to further damage.[29]

[37] Having acknowledged this, there is no easy solution to the problem and courts faced with a claim related to delay must balance a multitude of competing considerations. A consistent feature of the cases decided under s. 6(2) and its equivalent in Constitutions across the Caribbean is that the right to be tried within a reasonable time is not absolute but must be balanced against the public interest in the attainment of justice: *Flowers v the Queen* [2001] 1 WLR 2396 (PC Jam). One of the earliest cases to comprehensively discuss this right was *Bell v the DPP* (1985) 32 WIR 317; [1985] AC 397, 2 All ER 585. There, it was stipulated by the Privy Council in an appeal from the Court of Appeal of Jamaica (at pp 327-8) that the right of an accused to be tried within a reasonable time must in every case be balanced against the interest of the public in having him tried. Delivering the judgment of the Board in *Bell*, Lord Templeman adopted the criteria laid down in *Barker v Wingo* 407 US 514 (1972), a decision of the United States' Supreme Court, as relevant in determining whether an accused person has been deprived of his right to a speedy trial, namely: (i) the length of the delay, (ii) the reason advanced for the delay, (iii) the efforts by the defendant to assert his rights, and (iv) the prejudice to the defence.

[38] In assessing the first criterion as to the time period, it was pointed out that the impact of the delay would vary with the circumstances of each case, so that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge" (*Barker* at 530). In relation to the reason for the delay Lord Templeman again quoted *Barker*, where it was said (at 531) that "A more neutral reason such as negligence or over-crowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant." In other words, deliberately making an accused wait for trial is obviously wrong, whereas the familiar challenges to court administration as a backlog of cases are viewed neutrally. Regarding the last factor, prejudice is highly relevant as it impacts not only the ability of a person to defend himself or herself but can also have a deleterious effect on a defendant's state of mind, by having to endure the constant stress and anxiety of pending prosecution.

[29] See further *Gibson v the AG* [2010] CCJ 3 (AJ), per Saunders and Wit JCCJ at [48]-[49].

[39] Since *Bell*, a number of subsequent cases have considered and refined the treatment of this right. The volume of jurisprudence generated under this clause is evidence of the ubiquity of the problem of overcrowded lists, overburdened personnel and meagre resources. It can be no surprise therefore that in *Sookermany v DPP* (1996) 48 WIR 346 the Court of Appeal of Trinidad and Tobago held that the right of an accused to be tried in a reasonable time must in every case be balanced against the public interest in having him tried. Crucially, in performing this balancing exercise, a court might properly take into account the prevailing system of legal administration and current economic, social and cultural conditions, including any scarcity of financial resources.

[40] The above perspective is not meant to give courts or the system in general, *carte blanche* to leave defendants languishing while awaiting trial, but is simply an acknowledgement of contextual realities and constraints. Indeed, given the acknowledged harm that delays wreak upon the administration of justice, appellate courts need to avoid undue latitude to the authorities concerned, lest there be no incentive for reform. In *Joseph and Boyce v R* [2006] CCJ 3 (AJ), 69 WIR 104, Wit J noted that (at para 13) "it is for the State to organise their domestic legal system in such a way that it can effectively ensure the right of every person charged with a criminal offence to be tried without undue delay or within a reasonable time". Ultimately, in interpreting the application of this right, courts are made to confront the perennial task of balancing individual rights against public interests, which is the inescapable tension of rights guarantees. No more can be asked of a court than to approach each such conflict of rights with an appreciation of the relevant considerations. In the final analysis, the observations of Lord Carswell in *Boodhoo v Attorney General of Trinidad and Tobago* [2004] UKPC 17 at [14] are pertinent:

> *'Citizens who are engaged in litigation have to face a number of possible hazards. The members of a court consisting of an even number of judges may divide evenly, so giving rise to the need for a rehearing. A jury may have to be discharged or a judge to recuse himself at an advanced stage of a trial, without anyone having been at fault. A judge may die or take ill before concluding the hearing of a case or before judgment is given. These constitute the ordinary risks inseparable from litigation, which cannot be laid to the door of the state or be regarded as breaches of constitutional rights. There are limits to the obligation of a state to provide a remedy for misfortunes of this kind.'*

Clearly, the risks mentioned by Lord Carswell do not comprise the sum total of misfortunes that may occur in the course of a trial. Ultimately, it is the duty of those tasked with administration to navigate delays, the familiar as well as the unexpected, rationally and transparently and always with an appreciation of a litigant's rights.

[41] Where a breach of this right is established, there is no automatic result and the remedy granted is invariably tailored to suit the circumstances, particularly the stage at which the delay occurs. Courts have made different orders depending on the circumstances, most particularly the stage at which the delay occurs, so that remedies have included an order for the trial to commence, or even for the defendant to be admitted to bail on a charge of murder, the court declining to stay further proceedings,[30] or for a reduction in sentence where the delay comes about during the appellate process.[31] Ultimately, what has been repeatedly stressed is that there is no automatic entitlement to a permanent stay of all further proceedings or far less the quashing of a conviction for a breach of this right, given the public interest in the punishment and prevention of crime. As such, a permanent stay is regarded as a wholly exceptional remedy.[32] In cases where such an exceptional course has been ordered, it has been for periods of delay in excess of a decade,[33] and even for such periods a permanent stay is not automatic. Thus, for example, in *Aubeeluck v the State*, despite a delay of more than 11 years, the Privy Council did not consider a custodial sentence off the table and remitted the matter to the Supreme Court to determine the sentence.[34]

[42] In this case, the time it has taken to complete the trial or for the appeal to be heard cannot be described as inordinately delayed, and the total period of 7 years which has elapsed since the crime was committed is considerably less than what has occurred in other cases where a breach of this right has been found. Even if on its own this period may be seen as somewhat lengthy, it is certainly not inordinate given that the State has diligently prosecuted the matter at every stage and any delays have been due to factors wholly outside its control. As the

[30] *AG v Persaud* (2010) 78 WIR 335.
[31] *Gibson v the AG* [2010] CCJ 3 (AJ) at [64]; *Singh v Harrychan* [2016] CCJ 12 (AJ) at [29].
[32] *Gibson v the AG* [2010] CCJ 3 (AJ) at [62]; *Boolell v the State* [2006] UKPC 46, [2007] 2 LRC 483 (PC Mauritius) at [32]; *Queen v Gilbert Henry* [2018] CCJ 21 (AJ) at [41].
[33] *Bridgelall v Hariprashad* (2017) 90 WIR 300 (CCJ Guy); *Fraser v the State* [2019] CCJ 17 (AJ) (CCJ Guy); *Marin v the Queen* [2021] CCJ 6 (AJ).
[34] *Aubeeluck v the State* [2011] 1 LRC 627 (PC Maur).

Director submitted, a once-in-a-lifetime pandemic prevented any hearing for most of 2020, and when sittings of this court resumed it was the respondent herself who delayed by almost one year in filing her submissions. At earlier stages, the prosecution did not rush to trial purely because it sought to accommodate the efforts of the accused persons to secure counsel. Given these circumstances, there is no justification for finding a violation of the guarantee of a speedy trial under s. 6(2), and in fact it would be perverse to do so when the respondent herself contributed to part of that delay by her unexplained failure in filing documents in time. Accordingly, the respondent's submission that to sentence her at this stage would be a violation of s. 6(2)'s guarantee of trial within a reasonable time is rejected.

[43] Having said this, however, this Court notes that an appeal has been pending since 2018, so there is merit to the contention that the Respondent possibly experienced some anxiety at the prospect that her sentence could be overturned. Nonetheless, this factor alone cannot justify a permanent stay of any further proceedings, given the gravity of the offence in question and bearing in mind that a permanent stay is justified in only the most exceptional circumstances. As discussed above, Abetment of Rape is to be treated like Rape itself in terms of sentencing, and there is no disputing that both the offence itself and the circumstances of its commission are exceedingly serious. As pointed out by the Director, the aggravating factors listed by the trial judge in relation to the fourth accused (who performed the act of rape) apply with equal force to the respondent: the offence itself is a heinous one, it was committed in public, in daylight, and in full view of others (including children), and it was a physically and psychologically traumatic experience which caused the victim considerable (public) humiliation. To this we must add the fact, as noted by the trial judge himself, that the offence of rape is prevalent in this jurisdiction. Considered against the respondent's belated expression of remorse, a custodial sentence of much longer duration is required in this case, even if the mandatory minimum sentence is not applied. As to what is appropriate, we note further that the trial judge saw fit to sentence the third accused, Albert Canti, to 5 years' imprisonment (less the three months on remand awaiting sentence) upon conviction for the identical offence. Since the respondent's actions were no less heinous than those of Canti, and bearing in mind the need for consistency in sentencing as pointed out by the CCJ in *Persaud*,[35] a similar period of 5 years' imprisonment would have been the appropriate sentence for the respondent as well. However, in light of the fact that she has been at large since 2018, we would discount 3 years,

[35] *Persaud v R* [2018] CCJ 10 (AJ) at [32]-[33].

3 months for the period that elapsed (not counting the time between April 12, 2021 and January 10, 2022 when the respondent's submissions were delayed) for any anxiety she may have experienced, along with an additional 3 months for the period that the respondent spent on remand following her conviction on July 26, 2018. This would make for a total deduction 3 years, 6 months from the sentence of 5 years' imprisonment, requiring therefore that the respondent now serve the balance of 1 year, 6 months' imprisonment.

E. Disposition

[44] In conclusion, we reiterate that the sentence of time served, amounting to three months' imprisonment, was unduly lenient for the offence for which the respondent was convicted. While the trial judge may not have erred in departing from the mandatory minimum of 8 years' imprisonment, the sentence of 3 months' imprisonment was unduly lenient, especially since a co-accused who was also found guilty of the same offence was sentenced to 5 years' imprisonment less time spent on remand. We therefore sentence the respondent to the same period of 5 years' imprisonment, though deducting 3 years, 6 months therefrom to take into account the period while this appeal has been pending along with the period spent on remand following conviction.

[45] Accordingly, we grant the Crown's application for leave to appeal, treat it as the appeal itself, and allow the appeal against sentence. The sentence of 3 months' imprisonment is quashed and in its place the Respondent is sentenced to a period of 1 year and 6 months imprisonment. The Court further orders that the Respondent present herself to the Police at the Belmopan Police Station by 10 am on 3rd October, 2022 for transportation to the prison at Hattieville.

For the avoidance of doubt, her sentence shall continue to run on the day she presents herself or is otherwise taken into custody by the Police.

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HAFIZ-BERTRAM, P (Ag.)

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MINOTT-PHILLIPS, JA

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BULKAN, JA