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

CRIMINAL APPEAL NO. 35 OF 2019

DARREN MARTINEZ **APPELLANT**

V

THE KING **RESPONDENT**

BEFORE

The Hon. Madam Justice Hafiz Bertram	President (Ag.)
The Hon Madam Justice Woodstock-Riley	Justice of Appeal
The Hon Mr. Justice Bulkan	Justice of Appeal

L Banner for the appellant
C Vidal SC, Director of Public Prosecutions, for the respondent

JUDGMENT ON CONVICTION

8 June 2022
Promulgated on 5 October 2022

HAFIZ BERTRAM P (Ag.)

Introduction

[1] On 13 September 2017, Darren Martinez ('the Appellant') was indicted for assault of a child under sixteen by penetration contrary to section 47B of the Criminal Code.[1] The particulars of the offence alleged that on 21 February 2016, in Belize City, he penetrated with his finger the vagina of a child of eight years of age ('the victim'). The Appellant was convicted on 17 December 2019 of the offence of assault in a trial before Williams J and a jury in Belize City. On 28 January 2020, he was sentenced to a term of imprisonment of 12 years.

[1] Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2011, as amended by Act No. 12 of 2014

[2] The Appellant appealed against his conviction by notice of appeal dated and filed on 24 December 2019. On 8 June 2022, this Court heard the appeal which was dismissed and the conviction affirmed. We promised to give our reasons later.

[3] The Appellant did not appeal his sentence. However, the Court raised the issue of the appropriateness of the sentence of 12 years imprisonment that had been imposed on him upon his conviction. In response, the learned Director informed the Court that it was her view that the sentence was disproportionate and that the Crown would not oppose an application for leave to appeal against the sentence.

[4] Bearing in mind that leave was required to appeal against sentence and there was no objection to leave by the Director, the Court invited submissions from the parties in relation to an appropriate sentence that should have been imposed on the Appellant. The Court indicated that it will determine the sentence on written submissions and the parties agreed to that proposal. Those submissions were filed accordingly.

[5] We now give our reasons for dismissing the appeal against conviction and our decision on the sentence.

The case for the Prosecution

[6] The main witnesses for the Prosecution were the victim, the mother of the victim and Dr. Luis Chulin ('Dr. Chulin') who examined the victim after the incident.

[7] The mother of the victim testified that she lived at a Belize City address at the upper flat and her daughter, Desi lived at the lower flat in a common law relationship with the Appellant. On 21 February 2016, at about 3:30 pm, the victim who was in a distressed state informed her that the Appellant had inserted his finger in her vagina. She made a report immediately at Euphrates Police Station. The Police then took her and the victim, to Karl Huesner Memorial Hospital ('KHMH') where the victim was examined by Dr. Chulin.

[8] Dr. Chulin testified that he examined the victim at KHMH around 7.45 pm in the presence of her mother, a human resource person and a police officer. He stated that there was redness on the vaginal area with partial tearing of the hymen. At that time there was no active bleeding.

He said the rupture to the hymen, which is the tear, could have occurred within the last 24 to 48 hours. In his opinion, the partial rupture of the hymen could have been caused by a finger.

[9] The victim testified that she knows the Appellant and identified him in the court. She said that she lives in Belize City. On the day of the incident, she was in a room with her two brothers along with the Appellant playing a game. They were playing 'pinch, pinch'. The Appellant pinched her on her bottom. After that she was looking through the window along with her brother and the Appellant. She testified that the Appellant, "*Darren push his finger into my skirt, into my tights, into my underwear and push his finger into my vagina."* The victim then went to her mother's room and told her that the Appellant put his finger into her vagina.

The Appellant's defence

[10] The Appellant gave sworn testimony. He testified that he is a Police Officer on interdiction. He denied the allegation made by the victim. He said that on 21 February 2016, he finished working at 7.00 pm and retired to his apartment at Antelope Street and did not have communication with anyone except his mother.

Grounds of appeal

[11] The Appellant filed two grounds of appeal. The second ground was amended on the day of the hearing of the appeal. These grounds are:

(1) The trial judge in his summation to the jury misquoted and misinterpreted the medical evidence of Dr. Chulin which was prejudicial to the Appellant as the judge failed to highlight the inconsistencies and discrepancies between Dr. Chulin's, the virtual complainant and her mother's evidence; and

(2) The trial judge did not adequately address the jury on false alibi.

Ground 1: Whether the trial judge misinterpreted the medical evidence causing prejudice to the Appellant

[12] Learned counsel, Mr. Banner submitted that the evidence of Dr. Chulin was that he examined the victim on 21 February 2016 around 7:45 pm and in his opinion the injuries he

observed on her vagina occurred between 24 to 48 hours. He contended that this was in stark contrast to the evidence of the victim and her mother that the Appellant penetrated her vagina with his finger on the 21 February 2016, that same day, at around 3:30pm. The Appellant's interpretation of Dr. Chulin's evidence was that the incident took place 24 – 48 hours prior to his examination of the victim. This contradicted the evidence of the victim and her mother, which was that the assault had occurred about 4 hours and 15 minutes before the medical examination.

[13] Mr. Banner argued that the trial judge misquoted the medical evidence since Dr. Chulin's evidence was that the injuries took place between 24 hours to 48 hours, prior to him examining the victim. Further, that the evidence was that the injuries fell within the time frame of 0 to 48 hours.

[14] Mr. Banner further argued that this was a weakness in the Crown's case which was not adequately and accurately addressed by the trial judge in his summation to the jury. That the medical evidence significantly undermines the Crown's case and cast serious doubt on the credibility of the victim. He contended that the Appellant's evidence was that he was not there when the incident took place. That the trial judge's summation failed to address this discrepancy causing prejudice to the Appellant. Counsel submitted that the jurors were not instructed how to deal with the inconsistencies in the evidence and instructed by the judge that if they are in doubt they should resolve it in favour of the Appellant.

[15] Mr. Banner argued that the trial judge should have directed the jury that Dr. Chulin's evidence was that the victim was not assaulted on the 21 February 2016, as alleged by the victim, but a day prior to that. Further, that because of the failure of the trial judge to highlight the inconsistencies of the evidence in his summation, it was imbalanced and the Appellant's case was not fully put to the jury.

[16] The Director in response to this ground argued that it was the Appellant who had "misquoted and misinterpreted" the testimony of Dr. Chulin. The Court agreed with the Director as it was clear from the evidence that the tear he observed was recent and must have been caused at some point *within* the two days prior to the examination of the victim. We were not in agreement with Mr. Banner that Dr. Chulin's evidence was that the tear occurred

24 hours to 48 hours prior to him examining the victim. Dr. Chulin's evidence as shown by the Record[2] was:

> "Q And upon your medical examination at that time, were you able to tell how recent that vaginal….
>
> A It was recent.
>
> Q How recent?
>
> A 24-48 hours
>
> THE COURT: How much to 48?
>
> WITNESS: 24 to 48 hours the most….."

[17] On that aspect of Dr. Chulin's evidence, the trial judge addressed the jury in the following manner:

> "He said as far as he was concerned that rupture to the hymen, the tear, could have occurred up to 48 hours or anything just to 48 hours within the last 48 hours. The Crown is wanting you to believe that it happened, the rupture, that it happened a few hours before falling within that time of 0 to 48; or as he said recent, it could be 24 to 48 going up to then."

[18] The Court could not fault the trial judge on his summation as it was made clear to the jury that the tear was recent and occurred within 24 to 48 hours as testified by Dr. Chulin. There can be no other interpretation to that evidence.

[19] The Court was also referred by the Director to the address by Crown Counsel, in the court below, which confirms that interpretation and which the jury heard,

> "…and he told us that upon examination, (the victim's) hymen was partially torn; the first thing he told us. The second thing, in essence, he told us was that it had been recently torn within, he said probably, the last 48 hours."

[20] The above without a doubt showed that the tear was recent, occurring sometime within the preceding 48 hours. As pointed out by the Director, counsel for the Appellant in the court below, could have addressed this point on the recent tear in cross-examination or further cross-

[2] Page 72 – lines 4 to 10.

examination after the Crown's address. But he had not done so and neither in his address to the jury.

[21] The Court was of the view that Dr. Chulin's evidence showed that the tear was recent and occurred within 48 hours before his examination, which was not inconsistent with the testimony of the victim. Therefore, the trial judge committed no error which caused prejudice to the Appellant.

Ground 2: Whether the trial judge adequately addressed the jury on false alibi

[22] The Appellant's defence was that he was at home on Antelope Street when the incident occurred. He gave sworn evidence and at the end of the cross-examination, the Foreman of the jury asked him whether he knows anyone who could say if he was indeed at Antelope Street at the material time. The answer by the Appellant was:

> "I have my Landlord, Mr. Omar De La Fuente but you know how it goh sometimes with Landlord, nobody noh wah keep track of your movement as a tenant 24 or more. So chances are probably he see or not. But we could give it a try."

[23] Mr. Banner argued that based on the above evidence, the defense of *alibi* was a live issue and as such the trial judge should have directed the jury on it. He submitted that the trial judge should have asked the Appellant if he would like to call Mr. De La Fuente as an alibi witness, but he merely told the jury that he will give them a direction. Mr. Banner referred the Court to that direction.[3]

> "You asked whether he had anyone to say that you were on Antelope Street. He doesn't have to prove that he was at Antelope Street. And even if he was not, if you disbelieve that he was at Antelope Street, it is for the Prosecution to prove to you that he was at the address in question. So, he doesn't have to prove. He doesn't have to bring witnesses to prove that particular point. He has nothing to prove. Remember the burden of proof rest on the Prosecution. It is the Prosecution who has to satisfy you, that look, you weren't at no Antelope Street, despite what you say, that you were in fact at No. 23

[3] page 203, lines 7- 18 of the transcript.

Berkely Street. So, once you are satisfied that he's at No. 23 Berkley Street, the issue as to whether or not there are persons or if he have persons or doesn't have persons to come and say where he was is really mute. He doesn't have to prove that he was there…"

[24] Mr. Banner submitted that the above was a misdirection as the trial judge did not give the jury the requisite "*false alibi*" warning that a false *alibi* is sometimes invented to bolster genuine defense.

[25] The judge in our view, in that part of the summation, properly directed the jury that it was the Prosecution to prove the case against the Appellant. The false *alibi* direction was not given in that part of the summation.

[26] The Court agreed with the learned Director that the trial judge gave the required *alibi* direction in relation to a false alibi.[4] The trial judge said:

"Now the defendant in this case Mr Martinez has pleaded not guilty. He has said, I did not commit the offence as charged. Now he is entitled to say that he is not guilty and it is for the Prosecution to make you feel sure. He went further, he didn't only say that he was not guilty but he went on the witness stand and he gave evidence on oath. He told you a story or his version of the facts that look, I was not at that house on that day. I was at another residence. I didn't leave the premises at all on that day. His evidence would be fresh in your minds, I'm sure, because he said so a few hours ago. Now if you believe his story, if you accept his story, then that means, the Prosecution has not met the requisite standard. They have not proven to you that he is guilty and you accept that what he is saying, that he wasn't there, so you would have to acquit him. You would have to say he's not guilty because you have accepted his story. However, the converse of that is not true. The opposite is not true. What do I mean by that? If you [disbelieve] his story, if you reject his story, if you saying man he's just telling me lies. You cannot say that he is guilty because you [disbelieve] him or you think that he's lying to you. You could only find him guilty on what evidence the Prosecution has led. You cannot find him guilty, he's not charge for lying, he's not charged for not being able to

[4] Pages 179 and 180 of the Record

convince you; he's charged for a specific offence, the particulars of which I will touch on momentarily. **So as I said, if you [disbelieve] his story, it does not [mean] that he is guilty of the offence because people tell lies for all kinds of reasons and some of them, you might say, even for stupid reasons, even when they have a good defence they might tell a lie thinking that that will sound better or bolster their defence when in truth and in fact they might be telling you the gospel truth** (sic)."
(Emphasis added).

[27] The above direction given by the trial judge, in the view of the Court was sufficiently detailed and addressed the required alibi direction.

[28] The Court was of the view that the direction given by the trial judge was in keeping with the *alibi* direction approved by this Court in **Wade and Others v The Queen**[5] at paragraphs 35 and 36:

"[35]….In each case, the defence of alibi was raised and the trial judge told them they should accord it such weight as it deserved. In this connection at pp. 329 –330, he is recorded as saying –

> "…You have to take the statement that they have given in evidence. Their evidence consists of alibi. The law is that as the Prosecution has to prove the guilt of the Accused person he does not have to prove anything including the fact that he was elsewhere at the time. The Prosecution has the onus of disproving the alibi. And even if you conclude that the alibi was false that does not by itself entitle you to convict the Defendant. It is a matter which you may take into account but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence…"

[36] We think these directions were entirely appropriate, fair and adequate….."

[29] We are fortified in our view, that the trial judge gave an adequate direction on false alibi and therefore, we rejected the argument for the Appellant.

[5] Criminal Appeals Nos 28, 29 and 30

[30] In relation to the point that the judge should have asked the Appellant if he would like to call Mr. De la Fuente as an *alibi* witness, the Court was not in agreement with Mr. Banner. The reason being that the Appellant was represented by an able and competent senior attorney. In fact, counsel in the trial below objected to the question from the Foreman,[6] and thereafter closed the case for the defence.

[31] The Court further noted that the trial judge had a duty to advise the Appellant of his rights to call witnesses and this was done[7]:

> "Regardless of which option you choose, to come into the witness box, to give a statement from the dock or to stay there and remain silent, you are entitled to call [a] witness or witnesses on your behalf."

[32] We therefore, rejected that argument that the trial judge needed to advise the Appellant to call Mr. De la Fuente.

Conclusion

[33] It was for those reasons we dismissed the appeal of the Appellant against the conviction. The trial was fair and there was no miscarriage of justice.

DETERMINATION ON SENTENCE

[34] The sentence will be determined on written submissions as indicated at paragraph 4 above. The Court grants the Appellant leave to appeal the sentence of 12 years imprisonment and treats it as the appeal itself, which is allowed. We substitute a sentence of 5 years to commence from the date of conviction.

[35] The sentence imposed upon the Appellant was the mandatory minimum pursuant to **section 47B** of the **Criminal Code**, which states:

> "47B. Every person who intentionally penetrates the mouth, vagina or anus of another person who is under the age of sixteen years with a part of his

[6] Page 153 line 4 to page 154 line 8 of the Record
[7] Page 140 of the Record

body other than his penis or anything else and that penetration is sexual in nature, commits the offence of assault on that person and is liable on conviction on indictment to imprisonment **for not less than twelve years but may extend to imprisonment for life."**

[36] The trial judge was of the view that the aggravating circumstances far outweighed the mitigating circumstances and ought to increase the sentence above the mandated minimum. However, the court purported to exercise leniency and imposed the mandatory minimum of twelve (12) years. The judge said:[8]

"Indeed the aggravating circumstances in this case far outweigh the mitigating circumstances and indeed ought to carry up the sentence from the stipulated minimum. However, in the circumstances of the case Mr. Darren Martinez, the Court, although convinced and satisfied that the aggravating circumstances far outweigh the mitigating circumstances in the plenitude of the leniency and generosity of the Court, I impose the minimum sentence as stipulated in the law of twelve (12) years. That's the sentence of the Court."

Mitigating and aggravating factors

[37] The mitigating and aggravating factors considered by the trial judge upon passing sentence were:

Aggravating factors

1. Age of the victim who was only 8 years old at the time and defenceless;
2. Offence committed in the home of the victim where she should be safe;
3. Appellant was the boyfriend of the victim's older sister and was accepted by the victim's family as a member of the family. He breached the trust of the family. When the incident occurred the parents and other siblings were at home;
4. Appellant was a police officer at the time of the commission of the offence.

[8] Page 252 of the Record

Mitigating factors

1. Appellant expressed remorse;
2. The antecedent record showed that he has no previous convictions;
3. Appellant has a good character.

The trial judge's power to depart from the mandatory minimum sentence

[38] The trial judge was empowered pursuant to section 160 of the **Indictable Procedure (Amendment) Act**[9] (IPA) to sentence the Appellant to less than the mandatory minimum, if the justice of the case so required and if he found special reasons to do so. Section 160 of the IPA[10] states:

> "160.–(1) Where any person is convicted of a crime punishable by a mandatory minimum term of imprisonment under the Code or any other enactment, the court may, if it considers that the justice of the case so requires, having regard to special reasons which must be recorded in writing, exercise its discretion to sentence the person to a term of imprisonment, as the case may be, less than the mandatory minimum term prescribed for the crime for the Code or other enactment, as the case may be.
>
> (2) Notwithstanding the provisions of this section, the court may not sentence an offender who is eighteen years of age or over, to less than the prescribed mandatory minimum term, where the crime he has been convicted of is–
>
> 1. (a) murder; or
> 2. (b) an offence under section 46 (rape), 47(1) (unlawful sexual intercourse with person under the age of fourteen years), 47A (rape of a child) or 62 (incest) of the Code."

[9] Cap 96 of the Substantive Laws of Belize, (Revised Edition) 2020
[10] Cap 96 of the Substantive Laws of Belize, (Revised Edition) 2020

[39] The Appellant did not commit an offence under section 160 (2) (b) and therefore the trial judge was entitled to depart from the statutory mandatory minimum sentence of 12 years. Counsel for the Appellant in the court below, Mr. Twist, explained this position to the trial judge. He referred the trial judge to section 160(1) of the IPA and submitted that the court has a discretion to sentence below the mandatory minimum. Further, that the offence for which the Appellant was convicted under section 47(b) was not included in section 160 (2) (b). Counsel indicated to the trial judge that the legislators did not give any indication as to what are 'special reasons,' and this it seemed as shown by the record posed some difficulty for the trial judge. Mr. Twist urged the trial judge to exercise his discretion and pass a sentence less than the minimum sentence for the following reasons:

1) No previous conviction for a sexual offence;
2) There was only one act of penetration and the Appellant had shown remorse;
3) The Appellant has a good character as shown by the witnesses who testified on his behalf in the mitigation hearing;
4) Almost four years delay since the commission of the offence and the conviction, which breached section 4 of the Belize Constitution.

[40] The trial judge did not find any of the above factors to be special reasons to pass a sentence less than the mandatory minimum of 12 years.

The proportionality of the sentence

[41] During the mitigation hearing, the trial judge had indicated that he would address the proportionality principle in his determination of the sentence but did not do so. This Court during the hearing of the appeal expressed its view that the sentence was disproportionate with the offence committed by the Appellant and invited submissions from Mr. Banner and the Director, which the Court will now consider to re-sentence the Appellant.

The powers of the Court on an appeal against sentence

[42] The powers of the Court on an appeal against sentence are set out at section 30(3) of the Court of Appeal Act,[11] which provides:

> "30. (3) On an appeal against sentence the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[43] In our view, the sentence passed upon the Appellant was not properly individualized to take into account the mitigating factors in favour of the Appellant. In the recent case of **Calvin Ramcharan v DPP[12]**, the CCJ reiterated its dicta in **Linton Pompey v DPP[13]** to show the approach to be taken by an appellate court in relation to sentencing. Barrow JCCJ, delivering the lead judgment of the Court said, at paragraphs 11 and 12:

> "[11] Four opinions from a seven-member bench were delivered in *Pompey*, with the majority opinion being delivered by Saunders PCCJ and Rajnauth-Lee and Jamadar JJCCJ each delivering a concurring opinion and Wit and Anderson JJCCJ delivering a joint dissenting opinion. …..
>
> [12] Saunders PCCJ noted and all opinions were concerned to reaffirm that an appellate court will not alter a sentence merely because the members of the court might have passed a different sentence. Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, **courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court must step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law.** (Emphasis added)

[44] This Court is of the view that the sentence imposed by the trial judge was excessive. As the reviewing Court, we will therefore consider the appropriate sentence to be imposed upon the Appellant.

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[11] Cap 90 of the Substantive Laws of Belize (Revised Edition) 2020
[12] [2022] CCJ 4 (AJ)
[13] [2020] CCJ 7 (AJ) GY

Appropriate sentence

[45] There is no case in Belize similar to the instant case. Mr. Banner for the Appellant relied on the Dominican case of **The State v Steve John**[14] to urge upon this Court that a sentence of no more than five years should be passed on the Appellant. In that case, John was indicted for unlawful sexual connection with the victim, a girl ten (10) years of age, contrary to *Section 4 (2) (a) (i) of Dominica's Sexual Offences Act.*[15] Counsel submitted that section 4 of the *Sexual Offences Act,* No.1 of 1998 of Dominica, is the equivalent to section 47B of the *Belize Criminal Code.*

[46] John, who was 31 years old, on more than one occasion, had inserted his finger into the vagina of his 10 year old biological sister. The court was of the view that the aggravating factors had outweighed the mitigating factors and sentenced John to 7 years imprisonment. The mitigating factors considered included that the accused had no previous convictions and that he was described as a person who was not disruptive. The aggravating factors considered included the tender age of the virtual complainant; the disparity in ages between the accused and his sister; the relationship between the accused and the victim which created trust between them; the acts occurred on several occasions; the prisoner blamed the virtual complainant for the unlawful act; and the fact that the virtual complainant had suffered psychologically from the sexual assault.

[47] Mr. Banner submitted that in **John's case**, the mitigating and aggravating factors are similar to the instant case, as the Appellant is described as a respectable family member with a decent job, and no prior convictions. As for the aggravating factors, Mr. Banner submitted that in both cases, the victims were of a tender age and the convicted persons were in a trusting relationship with them.

[48] Mr. Banner also distinguished **John's case** from the instant case for several reasons: (a) the Appellant's sexual assault upon the victim occurred only on one occasion; (b) the Appellant does not blame the victim for the assault; (c) there has been no report of

[14] Case No. DOMHCR2016/0012, Eastern Caribbean Supreme Court of Dominica
[15] Act No. 1 of 1998

psychological effect on the victim; and (d) the aggravating factors in the instant case are not as grave as those in **John's** case. As such, counsel submitted that the Appellant should be sentenced to imprisonment for a term of no more than five (5) years.

[49] The Learned Director submitted that a sentence of not less than five years should be imposed upon the Appellant. The Director accepted in her written submissions that various acts can give rise to the offence under **section 47B** and that a sentence of 12 years imprisonment may not be commensurate with every such act. Senior counsel further accepted that though the act of the Appellant was egregious, the sentence imposed upon him was not proportionate.

[50] In the view of the Court, section 160 of the IPA could properly have been invoked by the trial judge to pass a sentence commensurate with the crime committed by the Appellant. Further, it is our view that the sentence of 12 years imposed upon the Appellant was excessive.

Mitigating and Aggravating factors

[51] In relation to the mitigating factors, the Court has taken into consideration that the Appellant has no previous convictions, is of good character and expressed remorse for his crime.

[52] The aggravating factors without a doubt outweigh the mitigating factors. However, the Court does not agree with Mr. Banner that the aggravating factors in the instant case are not as grave as those in **John's case.** The Appellant had inserted his finger into the victim's vagina causing a partial tear to her hymen. Once is enough. She would have to live with that trauma for the rest of her life. Further, Mr. Banner submitted that there has been no report of psychological effect on the victim, however, we cannot rule out the fact that she suffered as a result of the sexual assault. A Victim Impact Statement would have been helpful to assist the Court but, we note the reason from the Prosecutor (as shown by the Record) as to why none was filed. The Prosecutor had explained to the trial judge at the mitigation hearing that the victim was too distraught to attend court again to testify. The victim was very distressed when she testified at the main trial and was promised by the Prosecutor that she would not have to

testify again in the matter. If a Victim Impact Statement had been filed, she would have had to make herself available for cross-examination by the defence.

[53] The Court has also considered the nature of the offence of sexual assault committed by the Appellant which is penetration of the victim's vagina with his finger. At the time she was only 8 years old, a defenceless child who was in the sanctity of her home with other family members. We note that a lesser offence of sexual assault, which involves mere touching as created by **section 45A** of the Criminal Code carries a maximum sentence of 12 years imprisonment on indictment where the victim is under the age of 16.

[54] We have also considered that the Criminal Code creates separate offences where there is actual penetration, with or without the male sexual organ which are more serious offences. There was actual penetration by the Appellant and not mere touching hence the charge under section **47B** of the **Criminal Code.** However, the Court has considered that this crime committed by the Appellant was not excluded from the operation of section 160 as in the offence of carnal knowledge of a child under 14 which carries a minimum of 12 years imprisonment.

[55] In the view of the Court, given the mitigating and aggravating factors in this case, and the general scheme of sentencing in the *Criminal Code* in relation to sexual offences, the sentence imposed should not be below 5 years. Further, we have considered that **John's case** from Dominica where 7 years was imposed for a similar crime. In the view of the Court, 5 years imprisonment is an adequate sentence under the circumstances of the instant case.

Conclusion

[56] The appeal against the sentence is allowed. This Court sets aside the sentence of 12 years imprisonment imposed by the trial judge and substitutes therefor a sentence of 5 (five) years imprisonment upon the Appellant to take effect from 17 December 2019.

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HAFIZ BERTRAM P (Ag.)

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WOODSTOCK-RILEY JA

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BULKAN JA