**IN THE SENIOR COURTS OF BELIZE**

**CENTRAL SESSION-BELIZE DISTRICT**

**IN THE HIGH COURT OF JUSTICE**
**(CRIMINAL JURISDICTION)**

**INDICTMENT NO: C75 OF 2020**

**THE KING**

**and**

**GIOVANNI BURN**

Prisoner

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|---|---|
| **Before:** | **The Honourable Mr. Justice Nigel Pilgrim** |
| **Appearances:** | **Ms. Romey Wade, Crown Counsel for the Crown.**<br>**Mr. Darrell Bradley for the Prisoner.** |
| **Dates of hearing:** | **21st, 22nd and 23rd June 2023; 6th July 2023 and 28th July 2023; and 10th November 2023.** |
| **Date of Delivery:** | **15th November 2023.** |

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**ATTEMPT TO RAPE- SEXUAL ASSAULT- RAPE-SENTENCING**

**[1]** Giovanni Burn ("the Prisoner") was convicted by this Court on 6th July 2023 for the February 2019 offences of attempt to rape, sexual assault and rape contrary to section 18 read along with section 46, section 45A(1) and section 46, respectively, of the **Criminal Code**[1] ("the Code") in relation to SM. Written reasons for conviction were given on the same day of the verdict in accordance with section 65C(1) of the **Indictable Procedure Act**[2] ("the IPA")**.**

**[2]** The Court having obtained the necessary information, the last being the social enquiry report which though ordered on the date of conviction was provided more

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020
[2] Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020

than 3 months after in October 2023, will proceed to attempt to construct a fair sentence for the Prisoner.

## COUNT 1

## The Law

**[3]** In terms of the first count of attempt to rape the Court in its written reasons accepted the evidence of SM that it was only through her resistance that the Prisoner was prevented from penetrating her anus with his penis. In that regard, and pursuant to section 18(2) of the Code, because the crime of rape was, "frustrated by reason only… of circumstances or events independent of his will" the Prisoner is guilty of attempt to rape in the first degree and shall be punished, "in the same manner as if the crime had been completed". The penalty for the offence of attempt to rape would then be the penalty for rape:

> *"46. Every person who commits rape…shall on conviction on indictment be imprisoned for a term which shall not be less than eight years but which may extend to imprisonment for life.;"*

**[4]** In determining the propriety or otherwise of a custodial sentence on these facts the Court must have regard to the provisions of the **Penal System Reform (Alternative Sentences) Act**[3],(the "PSRASA"). Attempt to rape, however, has a sentence fixed by law in that there is a mandatory minimum sentence of 8 years imprisonment, making sections 28 and 29 of the PSRASA inapplicable.

**[5]** The Court then considers section 160(2) of the IPA:

> *"… 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–… an offence under section 46 (rape)…of the Code."*

**[6]** The Prisoner is 50 years old and consequently the above section would apply.

[3] Chapter 102:01 of the Substantive Laws of Belize, Revised Edition, 2020, see section 25

**[7]** The Court then considers, generally, whether outside of the IPA, constitutionally[4], can it impose a sentence lower than the mandatory minimum. The decision of our Court of Appeal in **R v Zita Shol[5]** is instructive, per Bulkan JA:

> *"[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. 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 not been regarded as a usurpation of the judicial function or contrary to the principle of separation of powers, including by this Court.*
>
> *…*
>
> *[14]… 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". 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***

[4] See section 7 of the **Constitution**: "*No person shall be subjected to torture or to inhuman or degrading punishment or other treatment*."
[5] Criminal Application No. 2 of 2018

***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.* ***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 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***.

*…*

*[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**."*
*(emphasis added)*

**[8]** The Court interprets the guidance in *Shol* to be that though the Court is to have considerable regard to the intention of the National Assembly in creating a mandatory minimum sentence if on the facts of this particular case the Court finds that the mandatory minimum so disproportionate as to be inhuman and degrading punishment then the Court is obliged to depart from it in protection of the Prisoner's rights at section 7 of the **Constitution.**.

**[9]** The Court now looks to the guidance of the apex court, the Caribbean Court of Justice (the "CCJ") in the Barbadian case of **Teerath Persaud v R**[6] on the issue or the formulation of a just sentence, per Anderson JCCJ:

*"[46] **Fixing the starting point is not a mathematical exercise**; **it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system**. In striving for consistency**, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender**. **Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point**. **Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular***

[6] (2018) 93 WIR 132

***(or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point. Where appropriate there should then be a discount for a guilty plea. In accordance with the decision of this court in R v da Costa Hall full credit for the period spent in pre-trial custody is then to be made and the resulting sentence imposed**." (emphasis added)*

**[10]** The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP**[7] on this issue, per Barrow JCCJ:

*"[15] In affirming the deference an appellate court must give to sentencing judges, Jamadar JCCJ observed that **sentencing is quintessentially contextual, geographic, cultural, empirical, and pragmatic. Caribbean courts should therefore be wary about importing sentencing outcomes from other jurisdictions whose socio-legal and penal systems and cultures are quite distinct and differently developed and organised from those in the Caribbean**.*

*[16] Jamadar JCCJ noted that in 2014 this Court explained the multiple ideological aims of sentencing. **These objectives may be summarised as being: (i) the public interest, in not only punishing, but also in preventing crime ('as first and foremost' and as overarching), (ii) the retributive or denunciatory (punitive), (iii) the deterrent, in relation to both potential offenders and the particular offender being sentenced, (iv) the preventative, aimed at the particular offender, and (v) the rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law abiding member of society**.*

*[18]… **to find the appropriate starting point in the sentencing exercise one needed to look to the body of relevant precedents, and to any guideline cases (usually from the territorial court of appeal)**." (emphasis added)*

## The Facts

[7] [2022] CCJ 4 (AJ) GY

**[11]** The facts of this case are found in the above-mentioned written reasons which are publicly available on the website of the Senior Courts of Belize[8]. However, the evidence in sum is that on 1st February 2019 the Prisoner, who was well known to SM restrained her at her home and dragged her into her washroom and attempted to force his penis into her anus while saying that tonight was the night that he would "f***" her in her "bottom", and was unsuccessful only because SM "tightened" up her body. He also, in his assault on her, put his finger in her vagina and anus. He forced her to suck his penis while detaining her in the washroom. During the assault he slapped SM so hard that she blacked out and pulled her head so hard that her wig came off. He proclaimed that on that night he would, "treat her like a whore."

## Analysis

**[12]** Belize does not yet have sentencing guidelines, however, the Court found great assistance from the Eastern Caribbean Supreme Court's, **"A Compendium Sentencing Guideline of The Eastern Caribbean Supreme Court Sexual Offences Re-Issue 8th November 2021"[9]** (the Eastern Caribbean Sentencing Guidelines "the ECSG"). The Court considers the ECSG in its sentencing process in reliance of the dicta of the CCJ in **Linton Pompey v DPP[10]** per Jamadar JCCJ:

> ***"[111] Thus, in so far as one may wish to look to other jurisdictions for trends in sentencing, one should first look to relatively comparable jurisdictions, such as those in this region….As I have already alluded to, a truly Caribbean jurisprudence must be born and grounded in the sitz im leben of Caribbean peoples and Caribbean spaces."*** *(emphasis added)*

[8] https://www.belizejudiciary.org/wp-content/uploads/2023/07/Indictment-No.75-of-20-The-King-v-Giovanni-Burn-for-attempted-rape-etc.-Final-Judgment.pdf
[9] Re-Issue, 12th April 2021: https://cms.eccourts.org/wp-content/uploads/2021/11/Sexual-Offences-Compendium-Guideline-Nov-2021-Re-Issue.pdf
[10] [2020] CCJ 7 (AJ) GY

**[13]** However, the Court notes that guidelines are not a strait-jacket and that judicial discretion must remain at the heart of the sentencing process, as noted by the CCJ in the Barbadian case of **Burton and Anor. v R**[11]**.**

**[14]** The Court begins the exercise by first considering the aggravating and mitigating factors in relation to the offence to establish the starting point as suggested by the CCJ in *Persaud*.

**[15]** The features of the offending relevant to the harm caused by this offence[12], in the Court's view, are as follows:

I. Serious psychological harm[13]- The Court accepts the evidence contained in SM'S Victim Impact Statement that this offence has caused her serious psychological harm. In that statement SM said that, "I remember everything that happened that night as it never goes away. It has been a torture to me to live with been (sic) violated, abused and disrespected." She further went on to say that she is broken and, "it's an everyday battle to keep smiling and to be happy for my…sons to see that I am happy". SM said, "I am always so emotional and my oldest son would see me crying and he would say, 'mommy no cry, it will be okay." There is also evidence that SM blames herself for her assault, quite wrongly in the Court's view in that statement. SM concluded that statement by saying, "the scar he has left on me will never heal, he destroyed my whole life…" The Court can accept these statements as the logical consequences of SM's evidence of what occurred on 1st February 2019.

II. Significant degradation/humiliation[14]- The Court also finds that there was significant degradation of SM. The Prisoner told SM that he would, "treat her like a whore", after dragging her on the ground to the washroom causing denuding of her skin in certain areas. The Court finds the words of SM in her impact statement apt, "he dragged me like I was not worth anything".

**[16]** These features would make the consequences of the harm caused by this offence on the ECSG scale as Category 2 high.

[11] 84 WIR 84 at para. 13
[12] P. 5 ECSG
[13] Ibid.
[14] Ibid.

**[17]** The features of the offending relating to the seriousness of the offence[15] are, in the Court's view, as follows:

i. There was the use of threats of violence to prevent reporting- The Prisoner told SM that he would shoot her with his gun if she reported the incident.

ii. There was uninvited entry into SM's home- The Prisoner grabbed SM by her neck and dragged her into her own washroom and assaulted her.

iii. There was a prolonged detention of SM- The sexual assault of SM went on for 30 minutes on her evidence, which the Court accepts.

**[18]** This would make the offending, on the ECSG scale, Level A, high.

**[19]** The ECSG recommends a starting point of 15 years imprisonment[16]. This Court finds this starting point is an appropriate one on the facts of this case.

**[20]** The Court considers the generalised aggravating factors of this offending are as follows:

i. The Prisoner used violence above and beyond what was necessary to achieve his end- The Prisoner would have slapped SM at one point during this ordeal causing her to black out which was unnecessary considering she was already detained.

ii. The offence is serious and prevalent- Belize, as is the Caribbean, is suffering an epidemic of violence against women and the Court's sentence must reflect the significance of that factor.

**[21]** The Court is of the view that there are no mitigating factors in relation to this offending.

[15] P. 6 ECSG
[16] P. 7 ECSG

**[22]** The Court would increase upwards the starting point by 2 years for the general aggravating features of the offending. This would then provide a sentence of 17 years imprisonment.

**[23]** The Court then considers the aggravating factors in relation to the offender. Firstly, the Court indicates that it would give no weight to his 2017 previous conviction for using indecent words nor his minor motor offence convictions in aggravation. The Court would not hold these minor infractions against the Prisoner.

**[24]** The Court however considers as an aggravating factor, the Prisoner's maturity at the time of the offence. He was 45 years old and should have known better.

**[25]** The Court notes the lack of remorse as demonstrated by the Prisoner who maintained, as at trial, in the social inquiry report that he was in a relationship with SM[17], despite his statement of apology in the face of the Court. The Court would increase the sentence by 2 years to 19 years imprisonment.

**[26]** The Court considers in relation to the mitigating factors in relation to the offender that the Prisoner has a positive social enquiry report and character references. The Prisoner was found to be psychiatrically normal by the report of Dr. Alejandro Matus Torres. The relatives and a former supervisor, in the social enquiry report, spoke to the Prisoner as being a hard worker, who grew up in a difficult childhood. His brother, Alexander both in the report and on oath to the Court, spoke to the Prisoner being a breadwinner to 5 children and his taking on the responsibility of caring for his ailing father. Ms. Ingrid Bonilla spoke to the Prisoner being passionate to help others.

**[27]** The Court must however note its concern at the lack of balance in the social inquiry report as there appeared to be no effort to seek the views of the victim/survivor to draw more fulsome conclusions and findings in relation to the Prisoner.

[17] P. 4 of the Social Inquiry Report.

**[28]** The Court would reduce the sentence of the Prisoner by 4 years for his personal mitigation. This would leave a sentence of 15 years imprisonment.

**[29]** The Court considered the guideline cases very helpfully submitted by the Crown, the highest being that of 12 years imprisonment in **Levi Jackson v R**[18] from the local Court of Appeal. The Court appreciates that this sentence is above that. The Court would first note that this was a 2010 decision before the process of sentencing was put on a more transparent and methodical basis as is now set out by the CCJ in *Persaud*. Secondly, the Court has arrived at its sentence closely following 2021 guidelines from a sister Caribbean judiciary which was clearly carefully considered and crafted. Thirdly, the Court also notes that the CCJ has this year in **AB v DPP**[19] upheld the imposition of a life sentence for a sexual offence, albeit with a child, but with many of the aggravating factors extant in this case such as serious psychological trauma. Indeed, the Court relies on the opinion of Jamadar JCCJ in *AB*:

> *"[23] This case may be thought of as difficult to reconcile with this Court's earlier decisions in Pompey and Ramcharran,* ***and to a certain extent it is****. However, in those cases the sentences imposed were clearly manifestly excessive and erroneous (as explained). In this case that is not so.* ***This Court, like the Court of Appeal, will not readily interfere with the exercise of a judicial sentencing discretion that is justifiable, procedurally and substantively.*** *What these three cases demonstrate therefore, are indicators for a range of sentences for sexual assaults on minors (in this case and in Pompey) and young adults (in the case of Ramcharran) by persons in positions of trust, that this Court considers appropriate* ***in their respective circumstances****. This decision is, for that reason, of important precedential value and may be of guidance in similar cases." (emphasis added).*

**[30]** This Court, as indicated above, needs to reinforce the inviolability of the physical integrity of Belizean women and that any breach would be met with serious

[18] Criminal Appeal No. 6 of 2009
[19] [2023] CCJ 8 (AJ) GY

consequences. The Court notes the content of the **Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women**[20], to which Belize is a signatory:

> *"Article 3*
> *Every woman has the right to be free from violence in both the public and private spheres.*
> *Article 4*
> *Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:*
> *…*
> *b. The right to have her physical, mental and moral integrity respected;*
> *…*
> *e. The rights to have the inherent dignity of her person respected…;"*

**[31]** The time spent on remand for this matter is 2 days, before the date of conviction. The Court deducts those 2 days from its sentence.

**[32]** The sentence of the Court is that the Prisoner is to serve a term of imprisonment of.15 years from two days before the date of conviction, namely 4th July 2023, to take into account the two days of pre-trial remand for the offence of attempt to rape. The Court in this regard is exercising its power under section 162[21] of the IPA and following the guidance of our Court of Appeal in **R v Pedro Moran**[22].

## COUNT 2

**[33]** The facts of this offence in sum are that the Prisoner placed his finger in SM's vagina and that she had told him that she was not consenting. The absence of consent is

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[20] Belize ratified this Convention on 25th November 1996.

[21] *162. Every sentence of imprisonment pronounced by the court shall take effect from the first day of the sitting at which it was passed,* ***unless otherwise ordered****.*

[22] Criminal Application No. 1 of 2017 at para. 38: "*[38] S. 162, enables the judge, to make sentencing orders to commence otherwise than, on the date the Order is made. The backdating of the sentence, from the date the offender was taken into remand, avoids any allegation that, the offender has not been credited with the full period spent in remand before sentencing."*

also presumed by law, that is pursuant to section 53A of the Code because violence was done to her before being digitally penetrated and she was detained at the time.

**[34]** The maximum penalty for the offence of sexual assault in these circumstances, pursuant to section 45A(1)(a)(i), is 10 years imprisonment.

**[35]** The consequences[23] and seriousness[24] of the offending are the same as under Count 1 as that offence led into this one and occurred shortly after those events. The ECSG recommends a starting point of 45 percent of the maximum sentence, that is 4.5 years imprisonment. The Court finds that that is an appropriate starting point.

**[36]** The general aggravating factors are the same as in Count 1 and there are no mitigating factors of the offending. This leads the Court to similarly increase the starting point by 2 years leading to a sentence of 6.5 years imprisonment.

**[37]** The Court similarly as in Count 1, will give a net deduction of 2 years imprisonment after weighing the aggravating and mitigating factors relating to the offender, which are the same. This would leave a sentence of 4.5 years imprisonment.

**[38]** The Court would deduct the 2 days spent on remand by the Prisoner.

**[39]** The Court sentences the Prisoner to a term of 4 years and 6 months imprisonment from 4th July 2023 for the offence of sexual assault.

**[40]** The Court, guided by the principles set out by the CCJ in **Bridgelall v Hariprashad[25],** imposes this sentence concurrently to the sentence for attempt to rape as it arose out of one incident.

## COUNT 3

[23] See the guideline for offences of indecency in the ECSG at p. 27
[24] P. 28 ECSG
[25] (2017) 90 WIR 300 at para. 31

**[41]** The facts in support of this count of rape are that the Prisoner forced SM to suck his penis without her consent, as a matter of fact and a matter of law under section 53A of the Code.

**[42]** The sentencing process and findings are the same as in Count 1, as that led to this offence and it occurred shortly after those events, and the sentencing result is the same.

**[43]** The sentence of the Court is that the Prisoner is to serve a term of imprisonment of.15 years from 4th July 2023, for the offence of rape. The Court imposes this sentence concurrently to the sentence for attempt to rape as it arose out of one incident.

## DISPOSITION

**[44]** The sentence of the Court on the three counts of this indictment are as follows:

i. Count 1- Attempt to rape- 15 years imprisonment commencing from 4th July 2023;
ii. Count 2- Sexual assault- 4 years and 6 months imprisonment commencing from 4th July 2023; and
iii. Count 3- Rape- 15 years imprisonment commencing from 4th July 2023.
iv. All these sentences are to run concurrently.

**[45]** The Court orders, pursuant to section 65(1)(a) of the Code, that the Prisoner undergo mandatory counselling, medical and psychiatric treatment as the appropriate prison authorities deem necessary to facilitate his rehabilitation.

**[46]** The Court orders, pursuant to section 65(1)(b) of the Code, that the Prisoner on his release shall not change his residence without prior notification to the Commissioner of Police and to the Director of Human Development in the Ministry responsible for Human Development, Women and Youth, and shall comply with such other

requirements as the Commissioner of Police may specify for the protection of the public.

**Dated 15th November 2023**

**NIGEL C. PILGRIM**
**JUDGE OF THE HIGH COURT OF BELIZE**
**CENTRAL DISTRICT**