

**IN THE SUPREME COURT OF BELIZE, A.D 2022
(CRIMINAL JURISDICTION)**

CENTRAL DIVISION

INDICTMENT C38/2022

THE KING

v

CHARLES MARTINEZ

-

(RAPE OF A CHILD)

Appearances:

Mr. Robert Lord, Crown Counsel for the Crown

Mr. Norman Rodriguez and Mr. Hubert Elrington S.C. for the Accused

Hearing Date:

2023: December 20th.

Delivery Date:

2023 December 20th.

CRIMINAL LAW – RAPE OF A CHILD CONTRARY TO SECTION 47 (A) OF THE CRIMINAL CODE, CHAPTER 101 OF THE SUBSTANTIVE LAWS OF BELIZE (REVISED EDITION) 2020, AS AMENDED BY THE CRIMINAL CODE (AMENDMENT) (NO.2) ACT, ACT NO. 12 OF 2014.

Accused Convicted

SENTENCE JUDGEMENT

SANDCROFT, J.:

[1]. The accused was convicted as follows:

Count 1

Statement of Crime

Rape of a child, contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014.

Particulars of Offence

Charles Martinez, on three occasions between the 10th day of September 2019 and the 10th day of November 2019, at Belize City, in the Belize District, in the Central District of the Supreme Court, raped JG, a person under the age of sixteen years, to wit, nine years of age.

Background

[2]. The Convict, Charles Martinez, on three occasions between the 10th day of September 2019 and the 10th day of November 2019, at Belize City, in the Belize District, in the Central District of the Supreme Court, raped JG, a person under the age of sixteen years, and who was nine (9) years of age at the time of the alleged incident.

[3]. At approximately 8:00 p.m. on November 9, 2019, the complainant was sitting at home alone watching television when she felt someone pull her hair. Upon turning around, she encountered the accused, Charles Martinez, who took her to the back of Shamiel Bowen's house, where he threatened her to keep quiet while he sexually assaulted her and forced her to engage in oral sex.

[4]. After being discovered in the bathroom by Jevon Bowen (JB), the accused fled the scene. The complainant was transported to the police station and gave a statement alleging Charles Martinez had sexually molested her.

[5]. The accused was later arrested and charged with one count of Rape of a Child, contrary to **section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014.**

[6]. It was around 8:00 p.m. on November 9, 2019, when the complainant was alone watching television at home when she felt someone pull her hair. When she turned around, she observed the accused, Charles Martinez, whom she had been acquainted with for approximately two (2) years. He pulled her by the hair and threatened to kill her if she made any noise/alerted anyone.

[7]. His sexual misconduct took place in the bathroom of Shamiel's house for approximately five (5) minutes when he forced her to suck his penis (performing fellatio on him) in the bathroom. The accused fled the scene on his motorcycle after being discovered by an eyewitness who saw him in the bathroom with his penis in the complainant's mouth. It was reported to the police that the complainant had been sexually molested by Charles Martinez, so she was taken to the police station to give a statement.

[8]. The police accosted him at his residence and arrested him for rape of a child, which is contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act,

Act No. 12 of 2014. In addition, the complainant claimed that Charles Martinez had also forced her to suck his penis in the same bathroom two other times.

[9]. I tell the officer that I go the yard several time to see my common law wife and my child, so how they going to bring up an allegation like that, I am a respectable person, I never had a criminal record before, I tell them is spoil yuh wah spoil my reputation and frame my character, which I was mad and frustrated too. When I went in the vehicle, they carried me to Precinct 1 Police Station, I asked the police if I could speak to them to find out what happened and what was the problem, but they did not speak to me. My common law wife called my mother and father and told them what happened after that. I said to the officer, why yuh nuh bring the people dem so I could talk to dem and see is who. The officer said yuh deh pon lock down right now, I seh I deh pon lock down fi something I don't know about, the officer told me that you are going to stay in the station until Monday, that was the first time I went to police station your Honour and it was very frustrating, at that time I started to cry in the cell and ask God why dem people had to do that because I never hurt no one, never did have criminal record, it was a new experience to me, a very bad experience; sleeping on the concrete floor, it hurt me the most lord when they got me far from my child and family. I tell the officer, how I would do something like that and I have my kids, I don't want to see my children grow up without their father, I know how it feel. I lay behind the bars and think about my common law wife and children. I never thought that something like that would happen to me. It is like dividing my whole future. When I lay there in the cell, all things run through my mind, why do they have to do me like that, when you are wrongfully accused, it hurts a lot. I was building my house and told my wife that I would take her away from there because I don't like how they live. Every-time you live around family, it is a problem, worst

when you live in poverty. Yes there is a lot of house in that yard and a lot of people are there. Thanks to my father I got my house and land and moved my family to another location, now they are happy, I move them your Honour, when you live in poverty, I want better for my family. My common law wife is educated, so that is why they were jealous of her too, they did not want her for me and me for her. They wanted me for one of their next family member, but I did not have any love for that next person. My common law wife sticks by my side, and when people see you are happy, they try to tear you apart, I always try to be the best father for my child, for my daughter Miracle and my son CJ, they mean the world to me. That is why I always try to work hard for my children and show them the right way, cause I know how it feels to have nothing to eat, I don't want to go and rob and be incarcerated. I try to do the best for my children, my father Charles Sr. has always advised me. I want to tell the Court today that I am not a criminal and that these false allegations that they bring against me I forgive them, but they are making my family and wife suffer in the society. And for the record your Honour, God always open the way cause He is the way the truth and the life. I am still hurting inside.

Discussion of Sentencing Principles

[10]. The court in considering an appropriate sentence must have regard, and take into consideration the aims of punishment, which are deterrence, retribution, rehabilitation and prevention. During the sentencing process the court should never lose sight of the element of mercy. In **S v Rabie** 1975 (4) SA 855 A.D. at 862 D- F Holmes JA said the following in this regard:

“[...] with particular reference to the concept of mercy-

- (i) It is a balanced and humane state of thought.
- (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
- (iii) It has nothing in common with maudlin sympathy for the accused.
- (iv) It recognises that fair punishment may sometimes have to be robust.
- (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
- (vi) The measure of the scope of mercy depends upon the circumstances of each case.”

[11]. The court further has to strive to balance, which means it has to consider all the facts, factors and circumstances evenly for the attainment of the aims of punishment as set out above. These facts, factors and circumstances should furthermore include the personal circumstances of the accused; the offence, taking into account all the things which had been committed (which includes the circumstances under which it had been committed); as well as the interest of society. In considering the aforementioned factors, the court, should at all times strive to impose a proportionate sentence without over or under emphasising any of these circumstances at the expense of the other.

[12]. Also by way of introduction, in **S v Mhlakazi**¹, the Supreme Court of Appeal stated the following in respect of the object of sentencing:

“The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court’s duty to impose

¹ 1997 (1) SACR 515 (SCA).

fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.

Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive.”

[13]. To this must be added the following stated by Lewis JA in **S v Nkomo**² namely:

"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

[14]. Additionally, this division in **S v Obisi**³ states that:

"It is true that traditionally mitigating factors, including the fact that the accused is a first offender, are still considered in the determination of an appropriate sentence. The nature of the crime, the brazenness, the callousness and the brutality of the appellant's conduct show that he attaches no value to other people's lives, or physical integrity, or to their dignity."

[15]. Regard is also to be had to the weighing and balancing of the "triad" of primary sentencing considerations formulated by the then Appellate Division in **S v Zinn**⁴ These are:

(i) the crime, (ii) the offender, and (iii) the interests of society.

² 2007 (2) SACR 198 (SCA) at 201E-F.

³ 2005 (2) SACR 350 (WLD).

⁴ 1969 (2) SA 537 (A) at 540G.

[16]. Equally instructive is the then Appellate Division decision in **S v Khumalo**⁵ which states:

“Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

[17]. Per Goldstein J in **S v Ncheche**.⁶

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator, and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely. In this case, the complainant lived in a shack, without the security enjoyed by many citizens in more affluent circumstances. Unfortunately, very many people in our country still live in these circumstances and are entitled to look to the courts for protection.

...

The word must go out to the cities and to the suburbs, to the towns and to the townships, and to the countryside that Parliament has directed the courts to punish the perpetrators of gang rape and child rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and that the courts will not shrink from their duty of carrying out this directive however painful it may be to do so.”

⁵ 1973 (3) SA 697 (A).

⁶ (A1261/04, A1261/04) [2005] ZAGPHC 21 (23 February 2005) at paras [35] and [38].

[18]. More recently, per Opperman J in **Mazivi v S**:⁷

“Rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the lawmaker has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances.”

The absence of substantial and compelling circumstances

[19]. On particularly the question of the rape of JG, the defendant was convicted of a serious crime for which the legislature has found it necessary to promulgate a minimum sentence of life imprisonment/fifteen (15) years, unless the trial court finds that substantial and compelling circumstances exist which oblige the court to deviate from imposing such a sentence.

[20]. This court also considered the circumstances impacting on the defendant and balanced them against the legitimate interests of society. This court understandably found that there were no substantial and compelling circumstances, and the defendant, despite invitation by this court and being legally represented, failed to assist. There is nothing substantial and compelling in the defendant’s circumstances.

[21]. If anything, there are various aggravating circumstances underscoring the appropriateness of this court’s imposition of the legislated minimum sentence. They also

⁷ (A8/2018) [2018] ZAGPJHC 443 (20 June 2018).

strongly militate against the presence of substantial and compelling circumstances. These, separately and cumulatively and in no specific order of importance, include:

(i) the defendant is a friend of the family of the virtual complainant and father figure— a trusted and privileged position which he abused;

(ii) his insistence that the virtual complainant be put through the traumatic experience of the trial, being cross-examined therein, having her honesty impugned and then her having to suffer the accompanying stigma that ordinarily follows as a complainant in a criminal trial of this nature – “[i]n effect, he victimised her again;

(iii) his lack of remorse, both during the trial and in the sentencing proceedings;

(iv) the unavoidable conclusion that appellant poses a grave danger to society;

(v) there is nothing to suggest any contrition on his part or any prospect of rehabilitation; and

(vi) there is nothing that diminishes the appellant’s moral blameworthiness.

The personal circumstances of the Accused

[22]. Charles Martinez Jr. is 33 years of age. He was born and grew up in a very strict home centred on godly values and attended the Seventh day Adventist church with his mother and

father. At a later stage, he moved to another part of Belize City and came to live with his girlfriend, with whom he has two children. He is one of several children and enjoys good familial relations with his siblings.

[23]. The convict is the father of two (2) children that were born to him. He states in his Social Inquiry Report that he was employed as a construction worker specializing in tiling and plastering for some years now and that he has been working most of his life to support his mother, father, girl-friend and his children.

[24]. All things considered, the convict had no regard for the complainant's tender age, nor the physical and emotional integrity, and dignity of the complainant. He selfishly robbed her of her innocence. The evidence of the complainant understandably reflects shock and sadness at the fate her brother suffered, but, at the same time, an admirable respect for justice and our courts. It is incumbent upon the judicial system to maintain this respect.

[25]. The accused has shown no remorse for his actions, in respect of all the offences he has committed. In **S v Matyityi**,⁸ Ponnann JA had the following to say on this aspect:

14 "There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding

⁸ 2011 (1) SACR 40 (SCA) para 13.

actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

[26]. None of these circumstances and facts are applicable because the convict has steadfastly refused to take responsibility for his actions especially in regard to the deceased. In both instances, the violence was perpetrated towards a woman and a girl child. And in considering an appropriate sentence, the court takes into consideration what Wallis JA said in **Director of Public Prosecutions, Western Cape v Prins and Others**:⁹

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act).”

⁹ 2012 (2) SACR 183 (SCA) para 1.

[27]. Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment - which has been prescribed for a very specific reason - simply because such circumstances are, unwarrantedly, held to be present.

[28]. The convict's circumstances are outweighed by the gravity of the offence. In respect of the rape of a child, the minimum sentence provisions recognise the gravity of the offence and the public's need for an effective sanction. As stated by other jurisdictions, cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. There is also, as already mentioned, nothing apparent that reduces the defendant's moral blameworthiness.

[29]. As regards the interests of society, the courts are inundated with mounting number of cases involving rape of minors by adult men. Society is pleading with the courts to impose stiffer sentences in order to deter would be offenders. Rape cases not only leave the victims permanently traumatized but also the family members of the victims as well as the family members of the perpetrators. I am sure that your children are deeply disappointed with what you have done. You will be separated from them for a considerably long time. They will grow without a father figure around them.

[30]. In response to the society's cry, the courts have been doing their best to address the scourge of rape. In this connection with respect to the offence of rape, the Supreme Court said the following in **S v Libongani**¹⁰ at para 26:

'[26] I associate myself with the sentiments above, rape and the murder of women, wherever the crimes rear their ugly faces, should be visited with severe punishments. Our society is undoubtedly embarrassed by the killing and raping of women and children on a daily basis. The promulgation of the Combating of Rape Act is a serious effort the legislature undertook in an attempt to arrest the scourge. The courts should join that fight, in some cases where possible, should show no mercy.'

[31]. I should mention in this regard which, I consider as a notorious fact for this court to take notice of without extraneous evidence, the fact that Parliaments, as the representatives of various societies, debated several amendments to their Sexual Offences legislations in their societies with the intention to increase the prescribed minimum sentence of 15 years to a higher limit. That is being done in response to the constant demand by society for the increase of sentences in rape cases. In this connection courts are thus expected to 'join that fight' in order to address the tide of the rape cases in our community.

[32]. I fully associate myself with the view expressed by the Supreme Court of Namibia in the two mentioned judgments and will adopt the approach dictated by the said Supreme Court when considering an appropriate sentence with regard to the offence of rape of a child for which you have been convicted, in order to reflect the interests of society in the sentence. Mr Charles Martinez, quite apart from the fact that the minimum sentence of 15 years applies

¹⁰ S v Libongani 2014 (1) NR 187 (SC).

in your case for the reasons I will state later, I am of the view that, it would be in the interest of society that you be removed from society for a long period so as to prevent you from committing sexual exploitation of minor boys. I hope that by the time you will be released, you will have lost the appetite for committing those heinous crimes.

[33]. Society demands that wanton criminal acts as displayed by the accused should not be left unpunished. It demands of the courts to send out a clear and strong message that such acts of criminality will not be countenanced and further demands that the strictest and severest punishment should be meted out to individuals such as the accused. It is also for these reasons that the law has prescribed certain sentences that the court should impose in cases like these.

[34]. In order to inform its sentencing discretion this court has heard from both the convict in person and the prosecution through emotional submissions as well as oral argument in court. However, on the persuasive authority of **Rep v. Nkhoma (Confirmation Case No. 3 of 1996 (3 of 1996))** [1996] MWHC 7 the court is reminded and the court bears in mind the distinction between sentencing principles and the purposes for sentencing. In that decision the judge emphasized that the sentencing court cannot attain any of the purposes of sentencing (such as retribution, deterrence, incapacitation, reformation and rehabilitation) at the expense of the sentencing principles. In that regard it has further been highlighted that an appropriate sentence must achieve proportionality, equality as well as restraint.

[35]. My very learned brother Prof Kapindu, J in **Fabiano Maliko-v-Rep**, Criminal Appeal No. 13 of 2020 (unreported) where the court articulated some very sound and expansive

principles which courts must apply in dealing with cases of child abuse and defilement specifically. In his usual judicial eloquence, the learned judge outlined the gravity of the offence of defilement from physical, physiological as well as psychological perspectives.

[36]. It was the view of that court that such petty arguments have the risk of trivializing what is otherwise a very serious occasion, bearing in mind the nature and gravity of the offence of defilement itself. In the final analysis the court underscored the principle that the seriousness of the offence was reflected in the maximum penalty set out in the law (which is life imprisonment). It was the conclusion of the court in **Fabiano Maliko** that the sentencing court should properly account for such social revulsion to defilement by imposing correspondingly meaningful penalties upon conviction. With reference to what was described as a reasonable estimation of expected life span of the offence, a sentence of 40 years was imposed on Fabiano Maliko.

[37]. In the considered opinion of this court, the argument from the defendant misses the whole point of sentencing: in this instance an underage child (whom the law has deemed incapable of consenting to sexual acts) was taken advantage of by a family friend. The victim is the boy child. No such culture or belief would be countenanced as somehow diminishing the responsibility which the offender bore in that scenario; that some would even suggest displays the real depth of vulnerability such girl children are exposed to in our jurisdiction. In considering the appropriate penalty this court would rather mete out an order that clearly says to the offender that one cannot hide behind such gross and abusive values to plead for mercy or lenience when the law has finally caught up with them.

[38]. It is a longstanding and fundamental principle that sentences are tailored according to the nature of the offence, the particular circumstances of the offender and the interests of society. This is in line with the notion that mandatory minimum sentences can be flexible, to the extent that the court may find the pathway to substantial and compelling circumstances. The balancing act does not require of one to search in the dark, as it turns back to the path of the traditional factors of sentencing. All the factors traditionally considered in sentencing continue to play a role and must be cumulatively considered in the determination of substantial and compelling circumstances.

[39]. This court is not convinced that there are substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment in respect of the offences for which such a sentence prescribed. Given the totality of the circumstances of this case which includes his personal circumstances as well as the circumstances relating to the offence and the interests of society, the only appropriate sentence, the court can impose is one of long-term imprisonment which would have the effect to permanently remove the convict from society. In fact in cases like this, retribution and deterrence to come to the fore, whilst rehabilitation, will play a relatively smaller role.

[40]. It is now settled law, following several authorities by the apex Court and other jurisdictions, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. The sentence must not be manifestly excessive in the circumstances of the case, or the trial court must not overlook some material factor or take into account some wrong material, or act on a wrong principle.

[41]. In light of the gravity of the crime committed and the court having come to the conclusion that the Convict is considered a threat to little girls, the emphasis, as regards the objectives of punishment, must fall on prevention, deterrence and retribution. To this end, the accused cannot escape a lengthy custodial sentence. In this instance the mitigating factors in favour of the accused are far insufficient to be regarded as retribution for the rape he committed. Against this background and bearing in mind that rape of a child usually attracts a lengthy custodial sentence, the question is what period of imprisonment would be just and fair in the circumstances? It is settled law that the period of imprisonment must be reasonable in relation to the seriousness of the crime and care should be taken not to overemphasise the interests of society at the expense of the interests of justice and that of the offender.

[42]. In this case I have taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above. I have also taken into account the Convict's mitigation on sentence and the period spent in pre-trial custody. I have stated before, and I will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which is a reflection of the societal detestation of defilement exclude sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service order et al.

Disposition

[43]. Based on all these considerations, it is the determination of this court that a sentence of 20 years imprisonment effective would be appropriate. Thus Charles Martinez is hereby

condemned to serve a term of 20 years imprisonment for his conviction for the offence of rape of a child contrary to section 46 (1) of the Criminal Code of Belize. The sentence will run from 16th November 2023, the date of his conviction. He is to serve 15 years before eligible for parole by the parole Board.

Dated the 20th day of December, 2023

RICARDO O'N. SANDCROFT
Justice of the High Court