IN THE HIGH COURT OF BELIZE

(CRIMINAL JURISDICTION)

CENTRAL DIVISION

INDICTMENT No. C44/2022

BETWEEN:

THE KING

v

BRANDON GONZALEZ

-

UNLAWFUL SEXUAL INTERCOUSE

Defendant

Appearances:

Mr. Riis Cattouse, Crown Counsel for the Crown

Mr. Orson J. Elrington, Counsel for the Accused

2023: July 17th;

2023: December 20th.

SENTENCE JUDGMENT

1. **SANDCROFT, J.:**

Count 1
Statement of Crime

Unlawful Sexual Intercourse, contrary to section 47 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

Brandon Gonzalez, on a precise date unknown between the 1st day of October 2014, in San Pedro Town, Ambergris Caye, in the Belize District, in the Central District of the Supreme Court, had unlawful sexual intercourse with Jenellie Eiley, a person under the age of sixteen years, to wit, seven years of age.

2. JE stated that she lives in San Juan Area with her mother, Samirah Gonzalez, her grandmother, Irma Gonzalez, her grandfather, Samuel Gonzalez Sr., little sister, ZE and brother, GC, 3 uncles, Samuel Gonzalez Jr., Brandon and Leo Gonzalez, 1 cousin, Norman Gonzalez and her aunty, Janelle Cowo. Brandon Gonzalez is 5 feet 8 inches, fair complexion with low straight hair with tattoos on both hands. Her house is an orange in colour bungalow house with a split level floor. It has 3 rooms and a bathroom, kitchen and hall area. She shared a bedroom with her mother, her little sister, little brother and her uncle Brandon Gonzalez. The room they stayed in is painted blue in colour and has 1 bulb and 4 windows. Her uncle Brandon sleeps on a single bed and she, her mom and her sister sleeps on the double bed. When her mother is not at home, she and her sister are left in the care of her grandmother. In the second week of October 2014, 3 weeks before Halloween in the evening, she was at home watching YouTube videos in the hall area

alone when her uncle Brandon came home and told her to come and watch the videos on the phone in his room. This is the same room where she sleeps. She got up and went into the room and sat on the bed. The room was well lit by bulb. Brandon came beside me and watched YouTube videos for about 5 minutes. During this time there was nothing blocking her view of Brandon and there was no one else in the room. Brandon was wearing a red Dickies pants and a grey t-shirt, she was wearing a short jeans pants and a tank top. Brandon got up after watching 5 minutes of YouTube videos and went to lock the door. She knows he locked the door because she heard the locking noise of the knob. He then turned the lights off. Brandon came back on the bed and put a sheet over them both. She knows it was Brandon because he was still watching videos on the phone and the glare from the phone was bright enough for her to still see his face. They were also the only two persons in the room at the time when he locked the door. Brandon did not say anything. He took off his pants and took off my pants and underwear. He took the phone out of her hand and placed her to lie on her back. He then got on top of her, she felt his penis inside her and he began to move up and down on top of her. This caused her to feel pain. He did this for about 15 minutes. The whole 15 minutes Brandon had his penis in her vagina going up and down on top of her, he did not say anything and neither did she because she was scared. She knows it was Brandon because only she and him were in the room. She didn't see Brandon put on a condom. When he was done he got off her and told her to put on back her clothes which she did. Brandon took her to the door and told her to get out. Before she left he whispered in her ears, "mek sure you nuh tell nobody or else I wa beat u". She didn't know what to do, and she was scared so she didn't tell anyone. She went to take a shower right after. She felt some sticky coming from her vagina as she showered. She got dressed and went outside to play with her little brother and sister. Her mom had built a one bedroom wooden bungalow house in the yard about 5 feet away from her grandmother's house and had moved her, and her little brother and sister into it. So she would try to avoid Brandon as much as possible. She spent

more time in her mom's new house more and more so she didn't have to see or be around Brandon. She began learning about sexual abuse at school and what it could do to a person's body and different kind of STI's. On June 23rd, 2019 at 5:00 p.m. she was walking the beach with her mother and her little brother and sister when her mom started to ask her why she was behaving strange and she told her what Brandon had done to her.

3. Pursuant to an informal Plea Agreement between the Prosecution and the Defence, the Defendant Brandon Gonzalez plead guilty to Unlawful Sexual Intercourse with JE.

4. Convict was not forced , bribed or given any remuneration to plead guilty to the offence of Unlawful Sexual Intercourse with JE.

5. Convict gave this plea of his own free will and volition and stated that no one had forced him or threatened him to give this guilty plea to the offence of Unlawful Sexual Intercourse with JE.

6. He was treated fairly and with respect by his attorney-at-law.

7. He was treated fairly and with respect by the Court.

8. The Crown stated that it would be seeking a custodial sentence and that a suspended sentence in the circumstances would be too lenient.

9. The Defence consented that an SIR could be ordered with but that the Prosecution was to provide the antecedents of the Convict and the victim impact statement.

Sentencing Principles Discussion

10. The overarching principle for sentencing is proportionality, requiring that a sentence is proportionate to the seriousness of the offence.

11. When determining the proportionate sentence to be imposed, the court will have regard to the various purposes of sentencing:

> (1) In cases involving those aged 18 and over at date of conviction the court must have regard to the following:
>
> (a) Punishment
>
> (b) Crime reduction (including deterrence)
>
> (c) Reform and rehabilitation
>
> (d) Public protection
>
> (e) Making of reparation.

12. Determining seriousness involves numerous components:

> (1) Assess culpability and harm. Harm includes that caused, intended to be caused or harm which the offence might foreseeably have caused.
> (2) Previous convictions are to be treated as an aggravating factor. A previous conviction is an offence for which the conviction was obtained prior to the commission of the offence(s) before the court for sentence.[1]

13. In view of the seriousness of the use of deadly means of harm with intent to cause grievous harm of which the accused men pleaded guilty, the legislature has decreed that the court is obliged to

[1] Darrigan [2017] EWCA Crim 169

impose a sentence of being liable to imprisonment for 10 years unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

14. Punishment must fit the criminal, as well as the crime, be fair to society and be blended with a measure of mercy. When sentencing an accused, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in **S v Zinn**[2]. These factors are:

(i) the personal circumstances of the offender, including his character, conduct in life and personality, and everything that influenced the commission of the offence;

(ii) the nature and seriousness of the offence committed; and

(iii) the interests of the community, including the necessity for a level of uniformity in sentencing.

15. It is, ultimately, often a matter of reconciling competing but not incompatible interests in order to ensure a fair and just sentence. An appropriate and judicious balance must be struck. A sentencing court is under a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion.

16. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at varied and myriad conclusions.

17. In **S v Van Loggenberg**[3] Willis J said that a sentence has five important functions (at [6]):

[2] 1969 (2) SA 537 (A)
[3] 2012 (1) SACR 462 (GSJ)

(i) It must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;

(ii) it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again;

(iii) it must enable the possibility of correction, unless this is very clearly not likely;

(iv) it must be protective of society, in other words, society must be protected from those who do it harm;

(v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated.'

18. The five important functions referred to above should also be read with the following 'basic principles pertaining to sentencing' as formulated by Myburgh AJ in **S v Tsotetsi**[4]:.

'(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

(b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in **S v Zinn**.

(c) Regard must be had to the interests of society (the third element of the **Zinn** triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

(d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from reoffending and the deterrence of would-be offenders.

[4] 2019 (2) SACR 594 (WCC) at [29]

(e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.'

The offence

19. The Accused man had unlawful sexual intercourse with the complainant.

The offender

20. Turning to the personal circumstances of the Accused: The Accused is approximately 26 years old and was 17 years old at the time of the commission of the offence. He is not married and he is not a father. His employment as earned an average income of BZ 1000 per month from which he maintains himself.

21. Accused is a first-time offender.

The community

22. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has congealed into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and

the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

23. The court has to consider whether the personal circumstances of the Accused constitute circumstances that are substantial enough to avoid being called flippant in order to deviate from the prescribed minimum.

24. There is a chasmic crater between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine or authentic remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine or heart-felt contrition can only come from a mental assent, appreciation and acknowledgement of the extent of one's foible. 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 enveloping 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 and contrition 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 wholesome appreciation of the consequences of those actions.

25. The Accused does not deny his hand in stabbing the complainant. He pleaded guilty and did not put the Crown to prove all the allegations. And, it would appear that he has a gnawing pain of conscience or at least some appreciation and acknowledgment for the extent of his foible.

26. Sentencing must serve as deterrence of others who consider embarking on a life of crime. The message that must go out to others in the community, must be that even though a perpetrator may try to evade the long arm of the law, he will be found, linked to offences and will have to stand his trial and face conviction and sentence.

27. Although the interests of society and the deterrence and sense of conveying the anger of society at the Accused must be reflected in the sentence, the offender must not be sacrificed on the altar of deterrence and punitive actions. Human beings are not goods to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others bears no relation to the gravity of the offence, the offender is being used essentially as a means to another end and the offender's dignity assailed and assaulted.

28. I do not have an augmenting perturbation that imposing the prescribed minimum sentence on the Accused would be unjust, taking into account all the circumstances.

29. I consider that the aforementioned circumstances, in conjunction with each other, do justify a finding of substantial and compelling reasons, and do allow for a reduction in sentence.

30. It is a commonplace of modern sentencing doctrine that, in choosing the appropriate sentencing option in each case, the sentencing judge must always have in mind what Lawton LJ characterised, in his oft-quoted judgment in **R v Sergeant**[5], as the four "classical principles of sentencing". These are retribution, deterrence, prevention and rehabilitation. In **R v Everald Dunkley**[6], P Harrison JA explained that it will be necessary for the sentencing judge in each case to apply these principles, "or any one or a combination of ... [them], depending on the circumstances of the particular case". And ultimately, taking these well established and generally accepted principles into consideration, the objective of the sentencing judge must be, as Rowe JA (as he then was) explained in **R v Sydney Beckford and David Lewis**[7], "[to] impose a sentence to fit the offender and at the same time to fit the crime".

31. But in arriving at the appropriate sentence in each case, the sentencing judge is not at large. The view that "[u]ltimately every sentence imposed represents a sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process"[8], has now given way to a recognition of the need for greater objectivity, transparency, predictability and consistency in sentencing. As one Australian commentator has observed[9] –

> **"In order to have a coherent, transparent and justifiable sentencing system, the relevant principles must not only be articulated, but prioritized and weighted."**

32. Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**[10], to "make a

[5] (1975) 60 Cr App 74, 77
[6] RMCA No 55/2001, judgment delivered on 5 July 2002, page 3
[7] (1980) 17 JLR 202, 203
[8] Williscroft v R [1975] VR 292, 299-300 (Supreme Court of Victoria)
[9] Mirko Bagaric, Sentencing: From Vagueness to Arbitrariness: The need to abolish the stain that is the Instinctive Synthesis, (2015) UNSW Law Journal, Volume 38(1) 76, at page 113
[10] At page 4

determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise". More recently, making the same point in **R v Saw and others**[11], Lord Judge CJ observed that "the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features".

33. In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice[12]. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence.

34. However, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

[11] [2009] EWCA Crim 1, para. 4

[12] See, for example, the old leading case of R v Harrison (1909) 2 Cr App R 94, 96, per Channell J; and R v Byrne and others (1975) 62 Cr App R 159, 163 per Lawton LJ. See also R v Everald Dunkley, per P Harrison JA, at page 6.

35. Before leaving this aspect of the matter, I should allude in parenthesis, with admiration and commendation, to the not so recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others v The State**[13]. In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer and others**[14], the court defined the starting point as "… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender". Hence, factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

36. I have mentioned **Aguillera and others v The State** for the purposes of information only. But it seems to us that, naturally subject to full argument in an appropriate case, the decision might well signal a possible line of refinement and cystallisation of our own approach to the task of arriving at an appropriate starting point in this jurisdiction.

37. While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC)[15], the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance

[13] Crim. Apps. Nos. 5, 6, 7 and 8 of 2015, judgment delivered on 16 June 2016
[14] [2005] NZLR 372
[15] Established pursuant to section 170(9) of the Criminal Justice Act 2003 – see, in particular the Definitive Guideline, Overarching Principles: Seriousness.

from case to case, among them will generally be at least the following (in no special order of priority):

(i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed;

(ii) premeditation;

(iii) use of a firearm (imitation or otherwise), or other weapon;

(iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims;

(v) offence committed whilst on probation or serving a suspended sentence;

(vi) prevalence of the offence in the community; and

(vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.

38. As regards mitigating factors, a plenitude of authors has cited with approval Professor David Thomas" comment[16] that "[m]itigating factors exist in great variety, but some are more common and more effective than others". Thus, they will include, again in no special order of priority, factors such as:

(i) the age of the offender;

(ii) the previous good character of the offender;

(iii) where appropriate, whether reparation has been made;

(iv) the pressures under which the offence was committed (such as provocation or emotional stress);

[16] David A Thomas, Principles of Sentencing, 2nd edn, page 46

(v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment);

(vi) the offender's capacity for reform;

(vii) time on remand/delay up to the time of sentence;

(viii) the offender's role in the commission of the offence, where more than one offender was involved;

(ix) cooperation with the police by the offender;

(x) the personal characteristics of the offender, such as physical disability or the like; and

(xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list.

39. This list is now largely uncontroversial. However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial.

40. This decision was applied by the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen**[17], an appeal from the Court of Appeal of Barbados, in which Wit JCCJ, in a separate concurring judgment, remarked the emergence of "[a] worldwide view ... that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court".

[17] [2011] CCJ 6 (AJ), para. [32]

41. Additionally, as regards the plea of guilty, such a plea must, as P Harrison JA (as he then was) stated in **R v Collin Gordon**[18], "attract a specific consideration by a court". The rationale for this has been variously explained. In **Keith Smith v R**[19], for instance, a decision of the Court of Appeal of Barbados, Sir Denys Williams CJ observed that "[i]t is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done". And in **R v Collin Gordon**, P Harrison JA said this[20]:

> **"The rationale in affording to an offender the consideration of discounting the sentence because of a guilty plea on the first opportunity is based on the conduct of the offender. He has thereby frankly admitted his wrong, has not wasted the court's time, thereby saving valuable judicial time and expense, has thrown himself on the mercy of the court and may be seen as expressing some degree of remorse."**

42. The view that a plea of guilty may be treated as an expression of remorse on the part of the offender has been adopted by many courts on more than one occasion. The plea of guilty is to be characterised as an indication of repentance and a resignation to the treatment of the court. And, most recently, in other cited authorities it has been reiterated that "the authorities have observed that a plea of guilty in and of itself may very well be regarded as an indication of remorse"[21].

43. The extent of the allowable discount for a guilty plea has never been fixed. But the authorities make it clear that all will depend on the circumstances of the particular case. Therefore, in **Joel Deer v R**[22], Phillips JA stated that "[t]he amount of credit to be given for a guilty plea is at the

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[18] SCCA No 211/1999, judgment delivered on 3 November 2005, page 4.
[19] (1992) 42 WIR 33, pages 35-36. This statement was recently referred to with approval by Brooks JA in the judgment of this court in Jermaine Barnes v R [2015] JMCA Crim 3, para. [11]
[20] At page 5
[21] At para. [32] of Kurt Taylor v. R, SCCA.
[22] [2014] JMCA Crim 33, para. [8]

discretion of the judge". Phillips JA went on to refer to **R v Buffrey**[23], in which Lord Taylor CJ stated that, as a general rule "something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial". The editors of Archbold[24] stated that English Court of Appeal cases suggest that "it is normally between one-fifth and one-third of the sentence which would be imposed on a conviction by a jury". Among the relevant considerations for the sentencing judge will be the strength of the case against the offender ("an offender who pleads guilty in the face of overwhelming evidence may not receive the same discount as one who has a plausible defence"), as well as the timing of the plea. As regards the latter, a plea offered on the first opportunity which presented itself to do so before the court may qualify the offender for the maximum allowable discount, while a plea offered at some later stage during the prosecution might attract some lesser discount.[25]

44. As far as I am cognizant, there is no decision of the Court of Appeal of Belize explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this sentence judgment should be addressed by sentencing judges. However, it seems to me that the following sequence of decisions to be taken in each case, which I have adapted from the SGC's definitive guidelines[26], derives clear support from the authorities to which we have referred:

(i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

(iii) consider any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, any reduction for a guilty plea; and

[23] (1993) 14 Cr App R (S) 511, 514
[24] Archbold: Criminal Pleading, Evidence and Practice, 1992, para. 5-153
[25] See R v Everald Dunkley and see also R v Hall [2007] 2 Cr App R (S) 42
[26] See Andrew Ashworth, Sentencing and Criminal Justice, 5th edn, page 32

(v) decide on the appropriate sentence (giving reasons)

Sentence Range

45. As has been seen, the Criminal Code of Belize empowers the sentencing judge to sentence a person convicted of a breach of section 47 to be liable to imprisonment for 10 years. The range of options given to the sentencing judge is therefore wide, no doubt reflecting the view of Parliament that, as with any other offence, offences committed in breach of section 47 may vary widely in seriousness, as will the particular circumstances of each offender who is brought before the court. In other words, as Hilbery J puts it in a similar context in the renowned older case **R v Ball**[27] –

> **"Our law does not ... fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of the case."**

46. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of **Opoya -v- Uganda** (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in **James -v-Young** 27 Ch. D. at p.655 where North J. said:

> **"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".**

47. This line of argument was further stated in the case of **NOO v REPUBLIC [2019] eKLR** where Mativo J had this to say thereon: -

[27] (1951) 35 Cr App R 164, 166

"8. It seems to me beyond argument the words "shall be liable to" does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. From the comments made by the Magistrate cited above, the learned Magistrate did not address himself to the question whether or not the said provision conferred discretion to him. Differently stated, his discretion in the matter before him remained un exercised. As a consequence, he imposed the maximum sentence. Alternatively, he misconstrued the said provision to be mandatory and imposed a life sentence, hence, the exercise of his discretion in pronouncing the sentence was unfairly influenced by the said misdirection of the law or failure to exercise his discretion properly or both.

9. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.[7]The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.[8] Also, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[9]"

48. The term shall be liable to imprisonment for life has received Judicial pronouncement in several cases where the courts have come to conclusion that it is not mandatory and that the court may give any sentence up to life imprisonment.

49. Counsel for the defendant drew the court's attention to rape cases and factors that were considered to be substantial and compelling circumstances. In **S v Kauima**[28] the trial court imposed a sentence of 13 years' imprisonment on a rape charge wherein the rape victim was a toddler of 5 years old. The accused was 18 years at the time of the commission of the offence. In the **Kauima** case the court held that the accused's youthfulness, the accused being a first offender and the pre-trial incarceration period of 2 years and 7 months amounted to substantial and compelling circumstances. In a similar vein, the court also refers to **S v Lukas**[29] wherein the victims of the rape charges were aged 13 and 14 years respectively whereas the accused was 20 years at the time of the commission of the offence. The accused was 23 years at the time of sentencing and was the mother of three children. She hailed from a household plagued by poverty and misfortune with parents who were suffering from ill health and would not be able to care for the minor children. The court in Lukas considered the cumulative effect of the aforementioned factors and held that it constituted substantial and compelling circumstances.

50. The Courts in other Commonwealth jurisdictions, have by judicial precedents expounded on the test above and justified interference on appeal if a trial Court has committed a misdirection of fact or law which by its nature, degree or seriousness is such 'that it shows directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably' (see: **S v Pillay** 1977 (4) SA 531 (A) at 535D-G; if a material irregularity has occurred in the proceedings (**S v Tjiho**, supra, at 336B); if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock (**S v Salzwedel and Others** 2000 (1) SA 786 (SCA) at 790D-E); or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of Appeal would have imposed had it been the Court of first instance (**S v Van Wyk**, supra, at 447I); **S v Petkar** 1988 (3) SA 571 (A) at 574C); if there

[28] S v Kauima (CC 07/2011)[2013] NAHCNLD 35 (20 June 2013).
[29] S v Lukas (CC 15-2013) [2015] NAHCMD 186 (10 August 2015).

has been an overemphasis of one of the triad of sentencing interests at the expense of another (**S v Zinn** 1969 (2) SA 537 (A) at 540F-G; and **S v Salzwedel and Others**, supra at 790F; or if there has been such an excessive devotion to further a particular sentencing objective that others are obscured (**S v Maseko** 1982 (1) SA 99 (A) at 102F).'

51. It was common cause between the parties herein that the applicable mandatory minimum sentence was that of 15 years' imprisonment which could be departed from in the event of a positive finding of substantial and compelling circumstances. Furthermore, both parties cited **S v Lopez**[30] indicative thereof that they subscribe to the general guidelines set out therein as regards to substantial and compelling circumstances.

52. Our law recognizes that youthful offenders lack maturity and that their blameworthiness cannot be measured against that of adults. Thus, in principle, the sentencing of youthful offenders should, to the extent that it is possible, be approached with a preference for rehabilitation. In this regard it was stated in **S v Erikson**[31] that it is necessary for the court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society, as well as the interests of the juvenile. The interests of society are not best served by disregarding the interests of a youthful offender, for an ill-considered form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. Young offenders should ordinarily be treated differently compared to adults when it comes to sentencing. The reason for this is that youthful offenders, such as the convict are, prima facie, regarded as immature. A youthful person often lacks maturity, insight,

[30] S v Lopez 2003 NR 162 (HC).
[31] S v Erikson 2007 (1) NR 164 at 167A-B.

discernment and experience and, therefore, acts in a foolish manner more readily than a mature person.[32]

53. 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'[33]

54. In applying this test to the circumstances of the case at hand, I am of the firm conviction that the following relevant considerations, cumulative considered, justifies a departure from the mandatory minimum term of imprisonment:

a. The youthful age of the appellant at the time of the commission of the offence,
b. The appellant served almost four years in pre-trial incarceration,
c. The appellant's state of having had almost no formal schooling,
d. The appellant had suffered a heavy brain injury as a child,
e. The loss of a mother at age 11, which is indicative of a gap in the healthy development of the value system of the appellant,
f. The impoverished household where a government pension was the only source of income for the father, the appellant and two other siblings,
g. The appellant being a first offender,
h. The appellant tendered a guilty plea,
i. The serious nature of the offence in question and
j. That the victim suffered psychological distress as a result of the incident.

[32] Ibid at p 166F-G.

[33] *Lopez supra p 174.*

55. I do not profess to claim that sentencing is an easy task. At least for me, it is not, but that does not stop one from attempting to reach that balance. In the case of substantial and compelling circumstances it is not to be done on trivial grounds, as mandatory minimum sentences mete out a standardised response to severe offences. Notwithstanding, sentences are individualised in our jurisdiction. 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.

56. Having concluded that the circumstances herein warrants a departure from the mandatory minimum term of imprisonment, all that remain is to consider what would be an appropriate sentence. In the matters of **Kauima**, **Kangulu** and **Lukas**, the offence was that of rape and the prescribed term of imprisonment was 15 years. The sentences were reduced to 13, 12 and 8 years respectively on the basis of substantial and compelling circumstances. As for the offence of attempted rape, this court has come across the matters of **S v Nakanene**[34] and **S v Pieters**[35] wherein a term of five years imprisonment has been imposed in the respective cases.

[34] S v Nakanene (CC 5/2016) [2018] NAHCMD 385 (29 November 2018).

[35] *S v Pieters* (CC 48-2009) [2015] NAHCMD 118 (27 May 2015).

57. In light of the gravity of the crime committed and the court having come to the conclusion that the accused is considered a dangerous person, the emphasis, as regards the objectives of punishment, must fall on prevention, deterrence and retribution. To this end, the accused cannot escape a custodial sentence. In this instance the mitigating factors in favour of the accused are far insufficient to be regarded as retribution for the sexual offence he committed. Against this background and bearing in mind that unlawful sexual intercourse 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.

The Starting Point

58. The sentence range has been established by authorities from the Court of Belize to be between 15 years to life imprisonment. The starting point in this matter will be identified as 10 years because of the overwhelming circumstances that of his youthfulness at the time of the offence and one other that was identified as aforementioned

Aggravating factors

59. The starting point, having been identified as 10 years, the next step in the analysis would be to identify the aggravating factors, which would lead to an upward adjustment in the starting point.

60. This court sees two other aggravating factor which are the very tender age of the complainant and the threat made to her. These would move the starting point up to 12 years.

Mitigating factors

61. There are two mitigating factors which have been identified; these were that the defendant's youthful age, and the plea in mitigation done by attorney-at-law for the accused, show good prospects for rehabilitation on the part of Brandon Gonzalez. These would lead also to a downward movement of the starting point to 10 years.

Reduction for guilty plea

62. It is established by law, that a guilty plea merits a specific consideration by the court as a mitigating factor and is, therefore, a legitimate consideration for discounting or reducing a sentence that would have otherwise been imposed after a trial.

63. In this case, the defendant did plead guilty at an opportune stage in the proceedings in the court. The prosecution had set a trial date when his counsel indicated that he wished to be pleaded. The authorities are pellucid that a plea offered at an early opportunity, which presented itself, merits a higher discount than one offered at a later stage of the proceedings. The court must, however, have regard to the strength of the case against the offender. In this case, the evidence outlined by the defence and prosecution does allow for this court to assess the strength of the case against him and the availability or unavailability to him of a possible or viable defence.

64. In cases of this nature it is not uncommon to reason that the emphasis should fall on deterrence and retribution as objectives of punishment. First and foremost, the court must ensure that the accused be prevented from repeating similar crimes. Secondly, the sentence must not only deter the accused, but should also deter others from committing similar or other serious crimes. In this case, the extent of maliciousness exhibited during the commission of the crime under consideration.

65. In the present matter the court, in my view, should guard against imposing a sentence that takes away any realistic hope of release and which, in effect, amounts to an informal life sentence.

66. The message going out from this court today must be clear, namely, the courts will not shirk its duty to uphold the rule of law in society and to protect and defend the rights of others, in particular, that of the innocent and vulnerable, against unscrupulous criminals. In view thereof it is inevitable to come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the crime committed and the circumstances under which it took place, considered together with the legitimate interests and expectations of society. Moreover where society, as in this instance, needs protection against the accused.

67. It seems, in keeping with the dictates of the relevant authorities, that in such circumstances, a discount of one-fourth would be reasonable. That would reduce the sentence to be imposed, following the plea of guilty, to approximately 7 years.

68. I wish to make one thing pellucid. I am very well aware of the cases that point towards sentences of 15 years and higher for unlawful sexual intercourse offences that are on the criminal end of the spectrum, regardless of mitigating factors that might exist. But I also know that sentencing ranges are guidelines. Although an important tool, it is but one that should guide me in my task.

69. Unfortunately the distress and hardship that the accused's misdeeds have brought upon himself and love ones is an unfortunate consequence of crime and not something the court can regard as an aggravating circumstance. Neither can the court allow its sympathy for them to deter it from imposing the kind of sentence dictated by the interests of justice and society.

70. This sentence will deter and denounce. It should not be forgotten that I am not imposing a jail sentence on a mature and young first-time offender. While not one of relatively variegated given for this kind of case, it still is a significant reformatory sentence. Given the particular circumstances of your case, I find that the sentence will deter others. It will send a message that the use of deadly means to cause dangerous harm will not be accepted. But it will also show those who are aware of the facts of your case that those important sentencing objectives can be reached without an undue heavy hand, but rather by punishment that is measured. Not handed out blindly or excessively. Based only upon fear.

71. Sentence/Orders

1. The sentence of 7 years imprisonment is imposed on Brandon Gonzalez.
2. Three (3) of the seven years are to be suspended for three (3) years, Brandon Gonzalez is to spend only four (4) years incarcerated. During the 3 years of suspension, Brandon Gonzalez is not to commit any other offences.
3. Three (3) years of Counselling at the Community Rehabilitation Division is also ordered for Brandon Gonzalez upon his release from prison.
4. The sentence is to be reckoned as having commenced as of today's date.

Dated the 20th day of December, 2023

RICARDO O. SANDCROFT

Justice of the High Court