

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C95 OF 2023

BETWEEN:

THE KING

and

CM¹

Convicted

Appearances:

Mr Robert Lord, Crown Counsel for the King

Convicted- Self-represented

2024: May 6; 7; 8
June 7
July 19

SENTENCING

**ASSAULT OF A CHILD BY PENETRATION; RAPE OF A CHILD - JUDGE ALONE
TRIAL-DECISION**

¹ Names have been anonymized for the protection of the VC, a minor.

Introduction

- [1] **NANTON, J.:** CM (hereinafter referred to as “the Convict”) was indicted for one count of Assault of a Child by Penetration contrary to **Section 47B of the Criminal Code** which occurred on the 4th day of April 2022, and one count of Rape of a Child contrary to **Section 47A of the Criminal Code**² hereinafter “the Code” which occurred during the period 5th October 2021 and 17th day of December 2021.
- [2] The Convict was indicted on the 7th day of November, 2023. He first appeared before this Court on the 23rd January 2024 when he was arraigned and pleaded Not Guilty to both counts on the indictment.
- [3] His trial by Judge Alone began on 06th May 2024 pursuant to **Section 65 A (2)(g) of the Indictable Procedure Act.**³
- [4] The Court, having considered all the evidence, found the Convict guilty of the two counts of the indictment, and the matter was adjourned for a separate Sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**⁴.
- [5] The Court requested various reports and information to attempt to construct a fair and informed Sentence. The Court is now in receipt of the following reports:
- i. Social Inquiry Report
 - ii. Psychiatric Report
 - iii. Criminal Antecedent Record
 - iv. Victim Impact Statement

² Chapter 101 of the Substantive Laws of Belize Revised Edition 2020

³ Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

⁴ [2020] CCJ 7 (AJ) GY at para 32

Penalties Under Statute

Count 1: Assault of a Child by Penetration contrary to Section 47 B of the Criminal Code

[6] Section 47B of the Criminal Code states:

Every person who intentionally penetrates the mouth, vagina or anus of another person who is under the age of sixteen years with a part of his body other than his penis or anything else and that penetration is sexual in nature, commits the offence of assault on that person and is liable on conviction on indictment to imprisonment for not less than twelve years but may extend to imprisonment for life.

Count 2: Rape of a Child contrary to Section 47 A of the Criminal Code

[7] Section 47A states:

Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to—

(b) imprisonment for not less than fifteen years, but may extend to life, where that other person was under the age of fourteen years at the time the offence was committed.

[8] The sections above must be read in conjunction with Section 160 (1) of the Indictable Procedure Act⁵ (the IPA) which provides:

(1) Where any person is convicted of a crime punishable by a mandatory minimum term of imprisonment under the Code or any other enactment, the court may, if it considers that the justice of the case so requires, having regard to special reasons which must be recorded in writing, exercise its discretion to sentence the person to a term of imprisonment, as the case may be, less than the mandatory minimum term prescribed for the crime for the Code or other enactment, as the case may be.

[9] The Court has considered the constitutionality of the mandatory minimum sentence set out above, and whether the Court is bound by said statutory minimum when

⁵Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020

viewed against **Section 7 of the Constitution** which provides that “no person shall be subjected to torture or to inhuman or degrading punishment or other treatment”

[10] The decision of our Court of Appeal in **R v Zita Sho**⁶ is instructive, per Bulkan JA:

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 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.

⁶ Criminal Application No. 2 of 2018

- [11] The Court reasons that it is clearly entitled to follow the **Aubeeluck**⁷ approach of departing from the mandatory sentence in specific cases where to abide by the mandatory minimum will result in a disproportionate sentence. This approach has similarly been adopted in **Bowen v Ferguson**.⁸
- [12] 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, however; if on the facts of the particular case the Court finds that the mandatory minimum is so disproportionate as to be inhuman and degrading punishment, then the Court is obliged to depart from it in protection of the Convict's rights pursuant to **Section 7 of the Constitution**.
- [13] For the reasons outlined below, the Court thinks that this is not such a case where an imposition of the mandatory minimum penalty will be disproportionate.
- [14] Additionally, this Court has considered the propriety or otherwise of a custodial sentence relative to both offences having regard to the provisions of the **Penal System Reform (Alternative Sentences) Act**, (the "PSRAA") which states:
- "28.-(2) ...the court shall not pass a custodial sentence on the offender unless it is of the opinion,*
- (a) where the offence is a violent or sexual offence (as defined in section 7 of this Act), that only such a sentence would be adequate to protect the public from serious harm from the offender.*
- [15] The Court has taken into account the prevalence, gravity and seriousness of this offence, the irreparable harm inflicted on the VC who was a child of tender years, the need to punish the Offender as well as the need to protect the society from serious harm by the Offender. In light of the guidance and the principles of sentencing adumbrated by the CCJ jurisprudence, and the statutory requirement under the PSRAA that the gravity of the punishment must meet the gravity of the offence, the Court thinks it appropriate to impose a custodial sentence. The public

⁷ [2011] 1 LRC 627

⁸ Cr App 6/2015, decision dated 24 March 2017

interest in punishing sexual offences against children is served by a custodial sentence, and the Court must deter the Convict himself and others from preying on the young and innocent. For these reasons, the Court considers that the imposition of a custodial sentence is appropriate in relation to both counts on the Indictment.

- [16] 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**⁹ on the issue of the formulation of a just sentence, as highlighted by 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 (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.”

- [17] The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP**¹⁰ 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.

⁹ (2018) 93 WIR 132

¹⁰ [2022] CCJ 4 (AJ) GY

[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)."

The Facts

- [18]** The facts accepted by this Court at trial was that on a date unknown between the 5th October 2021 and 17th day of December 2021; the Convict, who was the step-grandfather of the VC raped the VC who was 7 years old at the time by inserting his penis into her vagina and that on 4th April 2022 the Convict intentionally penetrated the vagina of the VC with his finger, the VC at the time being 7 years old.

Analysis

- [19]** In considering the construction of an appropriate sentence, the Court is guided by the conceptual framework for sentencing sexual offences against children discussed by the CCJ in Linton Pompey v DPP¹¹, per Jamadar JCCJ:

"[45] Children are vulnerable. They need to be protected. Children are developing. They need to be nurtured. Children are precious. They must be valued. Society has these responsibilities, both at private individual levels and as a state. Sexual offences against children, of which rape may be one of the most vicious, and rape by a person in a relationship of trust in the sanctity of a family home the most damaging, is anathema to the fabric of society. The idea of it is morally repugnant. Its execution so condemned, that the State has deemed, as an appropriate benchmark, imprisonment for life as fit punishment in the worst cases.

[46] The Universal Declaration of Human Rights asserts as its first principle, that all humans are born free and equal in dignity and rights. Children, minors, and all vulnerable young persons are owed a special duty of

¹¹ [2020] CCJ 7 (AJ) GY.

protection and care, by both the society at large and the justice system in particular, to prevent harm to and to promote the flourishing of their developing and often defenceless personhoods. They, no less than, and arguably even more than, all others, are entitled to the protection and plenitude of the fundamental rights that are guaranteed in Caribbean constitutions...Thus, just as an accused must be afforded all rights that the constitution and the common law assure, so also must care be taken to ensure that victims, especially those that are children, minors, and vulnerable, are also afforded the fullness of the protection of the law, due process and equality.”

- [20] The Court would, as is the prescribed procedure under **Persaud**, consider the aggravating and mitigating factors of the offending and then individualise the sentence by adjusting, if appropriate, by considering those factors vis a vis the Offender.
- [21] The Court finds instructive the identification of the aggravating and mitigating factors of both the offending and Offender for this type of offence in the “**Compendium Sentencing Guideline of The Eastern Caribbean Supreme Court Sexual Offences**”¹².
- [22] The approach this Court adopts pursuant to the guidance of the ECSG is to assess the starting point for the offences. Firstly, by a consideration of the consequences of the harm flowing from the offence and the particular culpability of the Offender. An appropriate range is then identified. Thereafter, the aggravating and mitigating factors are considered, and an appropriate starting point is determined within that identified range. Factors relative to the Offender are identified, which may result in an upward or downward adjustment to the starting point, or in some cases no adjustment at all. Once that figure is determined, the Court will then go on to consider the totality principal and the usual credits for guilty plea (none in this case) and deductions for any time spent in pre-trial custody (also none in this case).

¹² Re-Issue, 8th November 2021.

Assault of a Child by Penetration: The Starting Point

- [23] The Court considers the harm caused by this offending as high, because in its view there was psychological harm caused to the VC, who was a mere 7 years old at the time of the offence. The VC noted in her Victim Impact Statement that these incidents affected her joy for life- something that no child should be robbed of, that she experiences bad dreams and difficulty functioning at school, and her grades have suffered because of it.
- [24] The Court also assessed the seriousness i.e. culpability of the Offender to be high due to the following factors: there was significant abuse of trust in a family setting, repetition of sexual offences and the extremely tender age of the VC.
- [25] The ECSG states that offences falling within category 2 of harm i.e. high and with a high level of seriousness should attract a starting point between the range of 35-65% of the maximum penalty.
- [26] Having established the range, the Court will now determine the exact starting point by reference to the following aggravating and mitigating factors of the offence- taking care not to double count factors already considered:

Aggravating Factors

- Significant age difference.
- Parties lived together in the same house: abuse of familial trust.

Mitigating Factors

- No violence or threats of violence.

[27] The CCJ, in the Guyanese case of **AB v DPP**¹³ noted that, “*Child abuse casts a shadow the length of a lifetime.*” In that case, they found life sentences with a minimum term of 20 years imprisonment for sexual activity with a child were neither excessive nor severe. Secondly, they highlighted the significance of the factor of the abuse of trust as exists in this case. The Court, thirdly, takes notice of the National Assembly’s intention as to the appropriate Sentence for this offence by setting a mandatory minimum term, and there is nothing on this offending to trigger the Court’s constitutional discretion to go under that minimum.

[28] After considering the above principles and the facts of this case, in particular the abuse of trust and the tender age of the victim, the Court chooses a starting point of 60% of the maximum penalty of life imprisonment. The Court, therefore; sets the starting point at a determinate sentence of **18 years** imprisonment.

Rape of a Child: The Starting Point

[29] The Court considers the harm caused by this offending as high, because in its view there was psychological harm caused to the VC who was a mere 7 years old at the time of the offence. The VC noted in her Victim Impact Statement that these incidents affected her joy for life- something that no child should be robbed of, that she experiences bad dreams, and difficulty functioning at school, and her grades have suffered because of it.

[30] The Court assessed the seriousness i.e. culpability of the Offender to be high due to the following factors: repetition of sexual offences, there was significant abuse of trust, and a significant disparity of age.

[31] The ECSG states that offences falling within category 2 of harm i.e. high and with a high level of seriousness should attract a starting point between the range of 35-

¹³ [2023] CCJ 8 (AJ) GY.

65% of the maximum penalty, which for this offence is life imprisonment where the Victim is under the age of fourteen years.

[32] Having established the range, the Court will now determine the exact starting point by reference to the following aggravating and mitigating factors of the offence- taking care not to double count factors already considered:

Aggravating Factors

- Significant age difference.
- Parties lived together in the same house- abuse of close familial relationship.

Mitigating Factors

- No violence or threats of violence.

[33] The Court determines that a starting point at 65% of the maximum sentence of life imprisonment as an appropriate starting point. The Court; therefore, sets the starting point for rape of a child at **20 years** imprisonment.

Factors Affecting the Offender

[34] The following factors have been considered relative to the Offender:

Aggravating Factors

- The Convict is a retired police Inspector- a person who was entrusted by the country of Belize to protect its citizens, and ought to have known and done better.

Mitigating factors

- No previous convictions.

- [35] To the starting points outlined above, the Court makes an upward adjustment for the fact that the Convict is a former high-ranking police officer with whom much is expected. Members and former members of the protective services should protect the public, but instead the Convict irreparably damaged a vulnerable member of his household. For this reason, the Court finds it appropriate to make a three (3) year upward adjustment to the starting points outlined above.
- [36] The Court has considered that the Convict is the breadwinner for his wife, and she also relies on him to take her to her doctor appointments and to assist generally in her daily healthcare. In the context of this case, the Court does not find that this factor militates against the imposition of a custodial sentence as pleaded by the Convict, nor that it would be in those circumstances appropriate to award a deduction. Almost every prisoner can attest to having responsibilities however that does not in every case mitigate against appropriate punishment.
- [37] In this case, the Court also notes that from the reports of his family members; the Convict was not always a model husband or father, and there were even allegations of abuse against his wife. The Court wishes to state plainly that it has not considered this allegation as an aggravating factor.
- [38] On the contrary, the Convict's previous unblemished criminal record is a factor that the Court has considered, and for which the Court will award the Convict one (1) year deduction from the starting point.
- [39] That leaves a net upward adjustment of two (2) years for each offence. For the count of Assault of a Child by Penetration that resulting figure is twenty (20) years and for the count of Rape the resulting figure is twenty-two (22) years.
- [40] The Court must also have regard to the totality principle outlined by the CCJ in Pompey as the Convict is being sentenced for two offences, per Saunders PCCJ:
"[33] So far as the totality principle is concerned, in cases where it is necessary to sentence someone for multiple serious offences, before pronouncing sentence the judge should:

(a) Consider what is an appropriate sentence for each individual offence;

(b) Ask oneself whether, if such sentences are served concurrently, the total length of time the prisoner will serve appropriately reflects the full seriousness of his overall criminality;

(c) If the answer to (b) above is Yes, then the sentences should be made to run concurrently. If the answer is No and it is felt that justice requires a longer period of incarceration so that the sentences should run consecutively, test the overall sentence against the requirement that it be just and proportionate;”

[41] The Court answers the question under (b) as yes – and therefore orders that the sentences should be made to run concurrently so that the overall sentences are just and appropriate.

[42] The Court notes that in **Romeo da Costa Hall v The Queen**¹⁴ the CCJ highlighted the importance of awarding full credit for the time spent in pre-trial custody; however, in this case the Convict was released on bail soon after he was charged and as such no pre-trial custody considerations apply.

Disposition

[43] The sentence of the Court is as follows:

- i. On Count 1 of the indictment for Assault of a Child by Penetration the sentence is twenty (20) years imprisonment.
- ii. On Count 2 of the indictment for Rape of a Child the sentence is twenty-two (22) years imprisonment.
- iii. The sentences are to run concurrently with effect from the date of his conviction; that is 7th June 2024.

[44] The Court also makes the following orders:

- i. The Court orders, pursuant to **Section 65(1) (a) of the Criminal Code**, that the Convict undergo mandatory counselling, medical, and psychiatric

¹⁴ [2011] CCJ 6 (AJ)

treatment as the appropriate prison authorities deem necessary to facilitate his rehabilitation.

- ii. The Court orders, pursuant to **Section 65(1)(b) of the Criminal Code**, that the Convict 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.

Candace Nanton

High Court Judge

Senior Courts Belize

Dated 19th July, 2024