IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N13/2024

BETWEEN

THE KING

and

AMIN CARRILLO

Offender

Before:

The Honourable Mr. Justice Raphael Morgan

Appearances:

Mrs. Shanidi Urbina, Dovini Chell and Lavinia Cuello for the Crown

Mr. Leslie Hamilton for the Offender.

2024: April 26th, May 30th, June 25th, July 3rd, July 15th

SENTENCING – UNLAWFUL SEXUAL INTERCOURSE WITH A PERSON ABOVE THE AGE OF FOURTEEN BUT UNDER THE AGE OF SIXTEEN

MORGAN, J.: Amin Carrillo ("the Offender") was indicted on seven counts of Unlawful Sexual Intercourse with a person above the age of fourteen (14) but under the age of sixteen (16) contrary to **section 47(2)** (**Unlawful Intercourse contrary to section 47(2)**) of the **Criminal Code**[1], ("the Code").

[1] The matter was first called in the High Court on the 26th April 2024 where the Offender, who was unrepresented at the time, indicated his intention to plead guilty to six of the seven counts on the indictment.

[2] Before accepting the plea, pursuant to rule 9.13(i) of **the Criminal Procedure Rules (the CPR)**, the Court satisfied itself through questioning the Offender personally, of the following:

a) That the Offender accepted that he committed six of the offences on the indictment as alleged,
b) That the plea to the six counts on the indictment was made by the Offender voluntarily; and
c) That the plea was made with an appropriate understanding of the consequences particularly the possibility of a custodial sentence.

[3] The Court accepted the plea of the Offender to counts 2-7 on the indictment and the Crown withdrew Count 1 of the indictment.

[4] The matter was adjourned for a separate hearing in accordance with the guidance from our apex Court the Caribbean Court of Justice (CCJ) in **Linton Pompey v DPP**[2]. The Court made also consequential orders for the following documents in order to arrive at a just and appropriate sentence:

a) Victim Impact Statements
b) Social Inquiry Report on behalf of the Offender
c) Antecedent Report of the Offender

[5] On the 30th May 2024 the Offender appeared again, this time represented by Counsel. The Court enquired from the Offender whether his guilty plea would be maintained and the Offender indicated that

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020.
[2] [2020] CCJ 7 (AJ) GY

it was. As the Social Inquiry Report was not yet ready the Court adjourned the mitigation hearing of the Offender.

[6] The mitigation hearing of the Offender was held on the 25th June 2024 where the Offender called two witnesses and gave a dock statement. Submissions on sentence were also heard from Counsel for the Offender and Counsel for the Crown.

[7] The Court will now proceed to sentence.

Legal Framework

[8] The Court reminds itself of the ideological aims/principles of sentencing which were identified by the CCJ in **Lashley v Singh**[3]. These were set out as follows:

a) The public interest, in not only punishing, but also in preventing crime ("as first and foremost" and as overarching),
b) The retributive or denunciatory (punitive),
c) The deterrent, in relation to both potential offenders and the particular offender being sentenced
d) The preventative, aimed at the particular offender;
e) The rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law-abiding member of society

[9] These principles were restated and emphasised by Jamadar JCCJ in **Pompey v The DPP**[4]. The import or significance of each principle may differ from case to case as a Court engages in the individualised process of sentencing the particular offender[5].

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[3] [2014] CCJ 11 (AJ) GY
[4] [2020] CCJ 7 (AJ) GY
[5] Alleyne v The Queen [2017] CCJ (AJ) GY

[10] A court in determining the appropriate sentence in a particular matter must first ascertain what the starting point should be. This has been the subject of guidance by the CCJ in the Barbadian case of **Teerath Persaud v R**[6], per Anderson JCCJ:

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

[11] The Court is also reminded of the guidance given by Barrow JCCJ in **Calvin Ramcharan v DPP**[7] on this issue:

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

[6] [2018] 93 WIR 132
[7] [2022] CCJ 4 (AJ) GY

[12] The offence of Unlawful Sexual Intercourse contrary to section 47(2) carries a mandatory minimum or fixed penalty of five (5) years and a maximum penalty of ten (10) years. The Court is unaware of any guideline cases from our territorial Court of Appeal which sets out a sentencing range for Unlawful Sexual Intercourse contrary to section 47(2).

[13] As Unlawful Sexual Intercourse contrary to section 47(2) carries a mandatory minimum sentence or fixed penalty the Court is guided by **section 160** of **the IPA**:

> **160.**–(1) **Where any person is convicted of a crime punishable by a mandatory minimum term of imprisonment under the Code** or any other enactment, **the court may, if it considers that the justice of the case so requires, having regard to special reasons which must be recorded in writing, exercise its discretion to sentence the person to a term of imprisonment, as the case may be, less than the mandatory minimum term prescribed for the crime for the Code** or other enactment, as the case may be. [emphasis mine].

[14] The Court is also mindful of the general guidance of our Court of Appeal in **The King v Zita Shol**[8] where Bulkan JA indicated as follows:

> **[12] Mandatory sentences have always created some tension and are justifiably viewed with caution. Sentencing is a quintessential judicial function, so the tension results from the fact that a fixed penalty forecloses judicial discretion**. Nonetheless, it is conceded that every branch of government has a role to play in the criminal justice process, including that of punishments: the executive sets policy, the legislature implements that policy by enacting crimes with attendant penalties, and the judiciary administers justice in individual cases, including through the sentencing of offenders. **Where a particular activity becomes a persistent or grave societal problem, as in the case of drug trafficking or gang activity, policy-makers and legislatures have resorted to mandatory penalties as one means of ensuring consistency in judicial approaches and ultimately eradicating the problem. For this reason, mandatory sentences have traditionally not been regarded as a usurpation of the judicial function or contrary to the principle of separation of powers including by this Court**.
>
> [13] While there are signs of increasing intolerance of mandatory sentences, there is no need now for a lengthy analysis of this trend as courts have consistently insisted that mandatory sentences must also conform to human rights standards. This means that **where a mandatory sentence is regarded as producing a**

[8] Criminal Application for leave to appeal no. 2 of 2018

disproportionate outcome, it may be struck down for violating the prohibition against the imposition of inhuman or degrading punishments, a standard constitutional guarantee. Jurisdictions from across the Caribbean and the wider Commonwealth as well as a plethora of international courts and human rights bodies have invalidated mandatory sentences on this basis, maintaining that it is inhuman to treat all persons convicted of a particular crime identically, when among individual cases there may be crucial differences in the circumstances relating both to the offence and offender. **The underlying rationale is that by foreclosing any opportunity for individualization, mandatory penalties are an affront to human dignity, which is a core value promoted by the prohibition on cruel and inhuman punishments**……..

[15] Bulkan JA also went on to identify that there are two different judicial approaches after a finding of disproportionality of the sentence. One is the approach adopted by the CCJ in **Zuniga et al v The AG**[9] where the Court declared the particular piece of legislation unconstitutional and severed the portion of the section that was unconstitutional to bring it into conformity. The other approach is that adopted by the Privy Council in **Aubeeluck v The State**[10] where the particular piece of legislation is left intact and only its application in the specific case invalidated, in a circumstance where its imposition would result in a sentence that was grossly disproportionate. The **Aubeeluck** approach was followed by the Belizean Court of Appeal in **Bowen v Ferguson**[11] and also in **Zita Shol**.

[16] The Court therefore understands that in the process of arriving at the appropriate sentence for Unlawful Sexual Intercourse contrary to section 47(2) the Court must consider whether the imposition of the mandatory minimum sentence in this case will be grossly disproportionate. Should the Court decide that the imposition of such a sentence would be grossly disproportionate in the circumstances, the Court can, following the **Aubeeluck** approach and **section 160** of **the IPA**, impose a sentence that is less than the mandatory minimum sentence without needing to invalidate the law in its entirety.

[17] As there are no guideline cases emanating from our Court of Appeal in respect of a range for either offence, the Court has looked to see whether guidance can be gleaned from the experience of any of our neighbours within the Commonwealth Caribbean with respect to the sentencing of similar offences. The Court found extremely helpful the **Sexual Offences Compendium Sentencing Guideline of the**

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[9] [2014] CCJ 2 (AJ)
[10] [2011] 1 LRC 627
[11] [2008] 1 SCR 96

Eastern Caribbean Supreme Court (ECSG Guidelines)[12] where the offence charged in the instant matter would fall under **Unlawful Sexual Intercourse**.

[18] The sentencing approach under the ECSG Guidelines is as follows:

a) Constructing a notional starting point by assessing the harm and seriousness of the offence – this notional starting point is assessed as a percentage of the maximum sentence.
b) Adjusting the starting point upwards or downwards for any aggravating or mitigating features of the offence not already considered in setting the notional starting point.
c) Adjusting the figure upwards or downwards taking into account the aggravating and mitigating features of the Offender.
d) Crediting the Offender for a guilty plea where applicable.
e) Where sentencing for more than one offence, consideration is given to the totality principle in order to assess whether a further adjustment to the sentence is needed and also to consider the question of concurrent or consecutive sentences.
f) Crediting the Offender for any time spent in pre-trial custody.
g) Finally, the Court considers what if any ancillary orders are applicable or necessary.

Agreed Facts

[19] On the 5th of October 2020, C[13], the Virtual Complainant (VC) and her little sister began living with the accused the Offender and his common law wife, Maria Trejo at San Lazaro Village, Orange Walk District, while her parents resided in San Pedro Town, Belize District for work.

[20] On the 20th of August 2021, Maria Trejo packed her bags and left the house after she discovered a text message that the Offender sent to the Virtual Complainant.

[12] November 2021 re-issue
[13] Anonymized to protect her identity as she was a minor at the time of the offence

[21] In October 2021, on a precise date unknown, at around 9:00 pm, the VC went to the Offender's bed and talked to him. Thereafter, they began kissing. The VC took off her pants and underwear and he took off his boxers. The Offender went on top off the VC and inserted his penis in her vagina. He moved his penis in and out of her vagina for about four minutes. After that, she went to take a bath and returned to sleep with the Offender.

[22] In November 2021, on a precise date unknown, at around 9:00 p.m., the VC went on the Offender's bed where they talked and later kissed. The VC then took off her pants and her underwear and the Offender took off his boxers. He then went on top of her and inserted his penis inside her vagina. He moved his penis in and out of her vagina for about four minutes. Thereafter, she remained on the bed to sleep.

[23] In January 2022, on a precise date unknown, at around 9:00 p.m., the VC went on the Offender's bed and they kissed. The VC then took off her pants and her underwear, and he took off his boxers. The Offender then went on top of the VC and inserted his penis in her vagina. He moved his penis in and out of her vagina for about four minutes. She then went to take a shower and returned to the Offender's bed to sleep.

[24] In February 2022, on a precise date unknown, at around 9:00 p.m., the VC went on the Offender's bed and they kissed. The VC took off her pants and her underwear, the Offender then took off his boxers. He went on top of the VC and inserted his penis in her vagina and moved his penis in and out of her vagina for about four minutes. The VC and the Offender thereafter got dressed. The VC went to take a bath and returned to sleep on the bed with the Offender.

[25] On the 27th of March 2022, the VC's mother visited and asked her whether it was true that she was sleeping on the bed with the Offender. The VC denied it to her mother.

[26] On the 6th of April 2022, at around 9:00 p.m., the VC laid on the bed with the Offender and they kissed. She took off her pants and her underwear. The Offender then took off his boxers. He then went on top of her and inserted his penis in her vagina and moved his penis in and out of her vagina for about four minutes. Thereafter, she took a bath and returned to the bed with the Offender to sleep.

[27] On the 10th of April 2022, the VC went to San Pedro Town, Belize District to visit her mother and father. On the 17th of April 2022, the VC's mother found audio messages from the Offender and confronted her daughter. She also had the VC call the Offender in her presence and she asked him why he spoke to her daughter in such a manner. On the 18th of April 2022, the VC's mother told her she will take her for a medical examination. Later in the night of that same date, the VC approached her mother and told her that she had sexual intercourse with the Offender once. On the 19th of April 2022, after being asked by her mother, the VC confessed to her mother that she had sexual intercourse with the Offender on more than one occasion.

[28] After having spoken to the Offender and reminding him of a promise he made to her, specifically that when her mother found out the truth about them he would assist her, on the 22nd of April 2022, the VC left San Pedro Town, Belize District and met the Offender at Belize City, Belize District. They headed to San Lazaro Village, Orange Walk District thereafter. On that same date around 9:00 p.m., while lying in bed, the VC took off all her clothes and the Offender took off all his clothes. He then got on top of her and inserted his penis in her vagina. He moved his penis in and out of her vagina for about four minutes. Thereafter, the VC went to take a bath and returned on the bed and slept with the Offender.

[29] On the 23rd of April 2022, the VC's mother went to San Lazaro Village, Orange Walk District and searched for her daughter. The Offender had gone out to buy and saw someone that resembled the VC's mother. The VC and the Offender, suspicious that the VC's mother was in the village, went to his farm, in the night to stay for the night. On that same date at around 10:00 p.m., the VC's mother and father, accompanied by the police arrived at the farm. The Police then escorted the VC and the Offender to the Orange Walk Police Station.

[30] On the 24th of April 2022, a medical examination was conducted on the VC where Dr. Erlindo Chi found that her hymen was not intact.

[31] On the 25th of April 2022, the Offender was formally arrested and charged for seven counts of unlawful sexual intercourse. On the 25th of March 2024, he was indicted for seven counts of Unlawful Sexual Intercourse contrary to Section 47(2) of the Code.

The Mitigation hearing

[32] At the mitigation hearing the Offender called two witnesses:

a) Armando Carrillo – Farmer - who testified that he knows the Offender for years as they work together. He knows the Offender to be a responsible and trustworthy person who gets along with everyone.

b) Ramiro Alvarado – Missionary – who testified that he has known the Offender all his life and attends church with him on Sundays. He also offers counselling to the Offender who he knows as a calm, friendly and sincere person. The Offender has shared with him what happened and indicated that he felt repentant and remorseful about what happened.

[33] The Offender also gave a dock statement where he indicated that he was very remorseful for what happened and he begged for the forgiveness of the Court and the family of the victim. He further indicated that if there was anything that he could do to give the family peace he would do it, if given the opportunity.

Victim Impact Statement

[34] The Court received two victim impact statements by means of affidavit from the mother of the VC and the VC respectively.

[35] The VC deposed that she left San Lazaro Village so that she could restart her life and be at peace. At her new location she enrolled in school and found a job so that she could financially support herself and her family. She further indicated that since the incidents she has lost contact with family and friends in San Lazaro. She left it up to the Court to decide the faith of the Offender.

[36] The mother of the VC deposed that as a result of the incident she became very depressed and still cries today whenever she thinks about it. As a result of the incident she had to relocate the VC to where she lived as she was rebellious and reluctant to come and live with her. The relationship between herself and her daughter was very tense but it is now better. She further indicated that the situation hurt her very much as she feels the VC was taken advantage of and still does not understand that she was a victim of

the Offender. As a result of the incident she has cut off contact with all family members in San Lazaro Village as the incident totally ruptured the relationship among the family members, her daughter and herself.

The Reports

Social Inquiry Report

[37]From the Social Inquiry Report submitted on behalf of the Offender, the Court was able to glean the following:

a) The Offender is an introverted individual who is also hard working, kind, respectful, dependable and now deeply religious.
b) The Offender is the sole income earner for his household which consists of himself, his nine month old child and his current partner.
c) The Offender currently works on his farm and in his free time indulges in hunting, fishing and planting.
d) The Offender left school at standard V so that he could support his family and as a result is not fully literate in English.
e) The Offender suffers from medical disorders as he currently has heart disease and his spinal discs are damaged.

Antecedent Report

[38]The Offender has no previous convictions.

Submissions by the Defence

[39]The Defence's main submission was two-fold. The first being this was an appropriate case for the Court to exercise its discretion pursuant to **section 160** of the **IPA** not to impose the mandatory minimum sentence. The Defence prayed in aid of this submission paragraph 61 of the CCJ's Judgement in

Zuniga[14]. The second being, should the Court agree with the submission that the mandatory minimum ought not to be imposed, that a custodial sentence in this case was not the only option that the Court should consider. The Defence suggested that the Court consider all the sentencing options available, having regard to the particular facts of this case, including alternative sentencing options such as probation[15] and a fine[16].

[40] In aid of this submission the Defence proffered that the Court should have regard to the remorse of the Offender, his previously clean record and the good character evidence given on his behalf at the mitigation hearing. The Defence also asked the Court to have regard to the particular circumstances of the case which show that the VC was not forced, threatened or groomed with respect to the incidents with the Offender.

[41] On the issue of the discount that should be given to the Offender for his guilty plea, the Defence submitted that he should be awarded the full 1/3 discount for his plea which was made at the earliest opportunity.

Submissions by the Crown

[42] The Crown submitted that there was no objection from the Crown should the Court not impose the mandatory minimum sentence in these particular circumstances. The Crown however submitted that a custodial sentence is appropriate in the circumstances and the appropriate starting point should be 8 years having regard to the age gap between the Offender and the VC at the time which was almost 27 years at the time of the incident. In applying the totality principle the Crown further proffered that concurrent sentences for all six offences should be imposed.

[43] The Crown further submitted that the Court should have regard to the following as additional aggravating factors:

[14] [2014] CCJ 2 (AJ)
[15] Pursuant to the Probation of Offenders Act Cap 120 of the Substantive Laws of Belize Revised Edition 2020
[16] Pursuant to section 164 of the Indictable Procedure Act

a) The Abuse of Trust as the Offender was entrusted by the mother of the VC to take care of the VC and her sister and ended up in a relationship with the VC.
b) The repeated incidents of Unlawful Sexual Intercourse.
c) The attempts by the Offender to hide the VC from the authorities and her mother after it was suspected that they were looking for her.

[44] The Crown accepted as mitigating circumstances the following:

a) The VC was not threatened, forced or groomed into the relationship with the Offender and it appeared that she approached the Offender initially at the start of their relationship.
b) The previously clean record of the Offender.
c) The genuine remorse of the Offender.
d) The Good Character evidence submitted on behalf of the Offender at the mitigation hearing.

[45] The Crown agreed with the Defence that the full 1/3 discount for the Offender's early guilty plea was appropriate in the circumstances.

Analysis

Conceptual Framework for sentencing in cases involving child victims

[46] In arriving at the appropriate sentence the Court bears in mind the conceptual framework for sentencing in cases involving child victims which was set out by Jamadar JCCJ in **Pompey**[17]:

> *"[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.*

[17] Ibid

[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 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***.*"* [emphasis mine]

[47] This philosophical underpinning was also emphasized by the CCJ in **Calvin Ramcharran** and **AB v DPP**. The Court considers that the guidance is equally apt here as the VC was a teenager at the time of the offences.

Application of the Mandatory Minimum Sentence

[48] As indicated above, a conviction under **section 47(2)** of the Code carries a mandatory minimum sentence of five (5) years with a maximum of ten (10) years. Per **section 160** of the **IPA** and the guidance of the Court of Appeal in **Shol**, the Court is entitled to depart from the mandatory minimum if the Court is of the opinion that the imposition of such a sentence will be grossly disproportionate in its effect. The Court also notes that **section 160** encompasses the **Aubeeluck** approach which the Court is inclined to follow in these circumstances. The Court considers that in this case the imposition of the mandatory minimum will be grossly disproportionate for the following special reasons:

a) The Offender is of previous Good Character and his character is a factor that the Court can take into account in deciding whether to depart from the mandatory minimum see **Darren Martinez v The King**[18] and the decision of the Court of Appeal in **Bowen v Ferguson**[19].

b) The commission of the offences, while multiple, do not fall into the category of the worst of the worst which warrants the imposition of the maximum sentence and the starting point is likely to

[18] Criminal Appeal no. 35 of 2019
[19] Ibid

be at the lower end of the sentencing range. Therefore with the mandatory minimum set at five years the imposition of the mandatory minimum sentence may see the Offender lose the benefit of the discount that ought to accrue to him for pleading guilty.

[49] The Court will therefore not impose the mandatory minimum sentence on the Offender.

Is a custodial sentence warranted in the circumstances?

[50] Having decided not to impose the mandatory minimum sentence, the Court must now address its mind to whether a custodial sentence is warranted in the circumstances.

[51] Sentencing is one of the most difficult tasks that a judge has to engage in while exercising their many judicial functions. The Court while sentencing, engages in balancing a number of different factors and interests including but not limited to the interests of the victim, the rights of the Offender and the interest of society in ensuring that crimes are appropriately punished. In having regard to society's interests, the Court must take care to ensure that the eventual sentence adequately reflects society's abhorrence of the crime which the Offender has committed. Sentencing as part of its deterrent function, *vis a vis* would be offenders, must send a message that crimes of a similar nature will not be tolerated or given inordinately lenient punishments.

[52] The Court accepts that each case must be sentenced on its own facts and each Offender sentenced in accordance with the level of criminality evinced on the facts before the particular sentencing court. However, in sentencing offenders convicted of offences such as these the Court must not lose sight of the fact that part of the purpose of the legislation is to protect vulnerable and impressionable minors from falling prey to predatory adults and quite often to protect them from the rash, impulsive, immature decisions they will make as minors in regards to sexual interactions. The Court must also not lose sight of the maximum penalty that the National Assembly has deemed fit for this offence. It is rare that a non-custodial sentence will be implemented for an offence such as this. An example of such a rare situation **may** be where there is little disparity between the Offender and the victim in terms of age[20].

[20] In some jurisdictions these situations have attracted legislative exemption in the form of the passage of "Romeo-Juliet" laws such s20 of the Children's Act of Trinidad and Tobago Chap 46:01

[53] In circumstances where there is a great disparity in age and repeated acts of unlawful sexual intercourse, such as in this case, the Court finds that a custodial sentence is warranted. A non-custodial sentence will also not adequately reflect society's abhorrence of the crime in general and the offending conduct in particular. The Court has carefully considered the options suggested by the Defence of a fine and probation and does not find that either of those punishments are appropriate in the circumstances.

Starting Point

[54] The Court found considerable assistance in establishing the appropriate starting point from the ECSG guidelines where this offence would fall under the guideline for Unlawful Sexual Intercourse. The Court having regard to the age disparity between the Offender and the victim and the abuse of the position of trust by the Offender has assessed the consequence of this offence as significant and the seriousness of the offence as high. For such a classification the ECSG guidelines provide a range for the establishment of the notional starting point as between 5% to 35% of the maximum penalty.

[55] The Court wishes to emphasize at this juncture, that adults who are entrusted with the responsibility of caring for young children have a duty to ensure that the children are protected and nurtured. Engaging in a sexual relationship with a ward is the antithesis of that very protecting and nurturing regardless of whether the child is an active and willing participant as happened in this case. There are boundaries that ought to be maintained between adult and child and ward and guardian. It goes without saying that a breach of these boundaries by the adult/guardian will be appropriately punished by a sentencing Court.

[56] The Court therefore assesses that the appropriate notional starting point for each offence of Unlawful Sexual Intercourse in this matter is 20% of the maximum penalty which amounts to a notional starting point of two (2) years.

[57] Following the ECSG Guidelines the Court now looks at the other aggravating and mitigating features of the offence to arrive at the actual starting point. The Court considers the following as additional aggravating features of the offence (outside of those used to establish the consequence and seriousness of the offence):

a) The nature of the offence
b) The prevalence of the offence
c) The repeated incidents of Unlawful Sexual Intercourse
d) The attempt to hide the VC when the mother of the VC came looking for her
e) The VC and the Offender appeared to be in a romantic relationship
f) The relationship between the Offender and the VC caused significant damage to the relationship between the VC, her mother and their extended family

[58] The Court considers the fact that the VC was not subject to any gratuitous violence or threats of violence during the sexual intercourse as a mitigating factor.

[59] In the circumstances, the Court considers that the aggravating features of the offences significantly outweigh the mitigating features of the offences and warrants an upward adjustment of Four (4) years leaving a starting point of six (6) years.

<u>Consideration of the circumstances of the Offender</u>

[60] At stage two of the methodology in **<u>Persaud</u>**, a Sentencing Court must then consider the aggravating and mitigating circumstances of the offender in order to individualize the sentence.

[61] For the Offender, the Court finds as mitigating his previous good character which the Court gleaned from his clean antecedent record, the Social Inquiry Report and the good character evidence submitted on his behalf at the mitigation hearing. The Court noted from the hearing that the Offender was hard working, respectful, deeply religious, kind and calm. The Offender also appears to be family oriented.

[62] The Court also takes into account the genuine remorse of the Offender shown at his mitigation hearing as a mitigating feature.

[63] The Court also finds as a mitigating feature the family background of the Offender. The Court learned that the Offender is a father of a nine month old child for whom he is the primary caregiver as his current partner does not work. The Court in taking this into account as a mitigating factor is guided by the

Sentencing Handbook of Trinidad and Tobago[21] where '**Family Background of the Offender**' is listed as one of the general mitigating factors that a Court can have regard to while deciding on the appropriate sentence.

[64] The Court notes that while the Defence did not make mention of it as a specific mitigating factor but the Social Inquiry Report does mention that the Accused has a heart condition and spinal problems with the alignment of his spine. The Court, on the weight to be accorded to the illness of the Offender in the sentencing process, found helpful the authority of **Attorney-General's Reference No 14 of 2015**[22]. In that case a 90-year-old diabetic, who had suffered a stroke, heart attack and an onset of dementia was convicted of historical sexual offences and was given a 2-year suspended sentence on the ground of those medical issues. The EWCA found that sentence unduly lenient, quashed it and increased it to 5 years imprisonment noting that even with those medical issues the public interest must be considered, per Lady Justice Hallett DBE, VP:

> *"[16] **The principles are clear. A sentencing judge is entitled to make some allowance for an offender's medical condition… However, such allowance is limited. The court cannot lose sight of the overall and principal purposes of sentencing, particularly in cases as serious as this**." (emphasis added)*

[65] In the instant matter, while the Court accords some weight to the illness of the Offender, such weight is limited as the Court notes that despite these illnesses the Offender is still able to participate in labour intensive activities such as hunting, fishing and planting in his free time. The Court therefore does not see that the Offender's illnesses will prevent him from serving any custodial term that may be imposed.

[66] The Court finds that there are no aggravating features of this Offender.

[67] The Court therefore considers that a downward adjustment for the offence of Unlawful Sexual Intercourse contrary to section 47(2) is warranted in the amount of two (2) years leaving a notional sentence of four (4) years.

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[21] Sentencing Handbook 2016 General Considerations – General Mitigating Factors (All Offences)

[22] [2015] EWCA Crim 949.

Discount for Guilty Plea

[68] The next issue that the Court must consider is the question of the appropriate discount for the guilty plea by the Prisoner. The nature of the appropriate discount was discussed in **Persaud** where the court indicated:

> *"A guilty plea was in the public interest as it avoided the need for a trial, saved victims and witnesses from having to give evidence and saved costs.* ***Best sentencing practice suggested that the discount should be approximately one-third for a guilty plea entered at the earliest possible opportunity, with a sliding scale for later pleas to at least ten per cent****."* [emphasis mine]

[69] The quantum of the appropriate discount for the plea of guilty in the particular circumstances of this case turns on whether or not the Offender can be said to have pleaded guilty at the earliest possible opportunity. The phrase 'earliest possible opportunity' ought not to be applied rigidly by the Court but must be given a contextual application appropriate to the circumstances of each case. The Court must assess the realistic opportunities, if any, that an Offender had to plead guilty before the entering of the plea. The exact time at which the Offender took the plea is but one consideration for the Court when deciding if the plea was taken at the earliest opportunity.

[70] In the instant matter the Offender pleaded guilty at the first hearing before the High Court indicating immediately upon arraignment his intention to plead guilty. He did not waver even after retaining Counsel. In the circumstances, the Court considers that his plea was taken at the earliest possible opportunity and that the full 1/3 discount ought to be awarded.

[71] The discount when applied to the notional term set out above leaves a final term of two years and eight months for each offence of Unlawful Sexual Intercourse contrary to section 47(2).

Consideration of the Totality Principle

[72] As the Court is sentencing the Offender for separate sexual offences that were committed at different times albeit against the same VC, the Court must consider the application of the totality principle in determining a just and fair sentence. This principle comes into play generally when the Court is sentencing an Offender for multiple offences and has to consider the overall quantum of the sentence in

a bid to ensuring that the overall sentence accurately and proportionately reflects the punishment for the offending behaviour before the Court[23].

[73] The principle also looms large when the Court is considering whether to impose concurrent or consecutive sentences. 'In deciding whether to impose consecutive sentences the Court should adopt the following approach:

(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[24].

[74] The Court having determined the appropriate sentence for the individual offences finds that there is no need for the sentences to be served consecutively. The sentences if served concurrently, will accurately reflect, the seriousness of the offending behaviour before the Court.

<u>Credit for time served</u>

[75] This issue does not arise on the facts of this case as the Offender was on bail throughout the proceedings. Accordingly, this leaves a final term of two (2) years and eight (8) months for the offences of Unlawful Sexual Intercourse contrary to section 47(2).

[23] Pompey ibid per Saunders PCCJ at para 16
[24] Pompey ibid per Saunders PCCJ at para 33

Ancillary Orders

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

Disposition

[77] The order of the Court in respect of the Offender Amin Carrillo is as follows:

a) On each offence of Unlawful Sexual Intercourse contrary to section 47(2) the Offender is sentenced to a term of **two (2) years and eight (8) months** to commence today.

b) The sentences are to run concurrently.

c) The Offender is to undergo mandatory counselling, medical and psychiatric treatment as the appropriate prison authorities deem necessary to facilitate his rehabilitation.

Raphael Morgan

High Court Judge

Dated: 26th June 2024