

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION- BELMOPAN

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

INDICTMENT NO. CR202330060C

BETWEEN:

THE KING

and

BRIAN DURAN

Before:

The Honourable Madame Natalie -Creary Dixon, J

Appearances:

Mr Cecil Ramirez, SC for the Crown

Mr Arthur Saldivar for the Accused

2024: February 1, 9, 12, 16, 19, 28
March 21, 25
May 3, 21
June 19, 26, 28
July 11

JUDGMENT ON SENTENCING

[1] **NATALIE -CREARY DIXON, J:** Mr. Brian Duran (hereinafter “the convicted man”) entered a plea of guilty to the offence of Rape of a Child contrary to Section 47(A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020; the particulars being that he raped “BC”(“the complainant”), a person above the age of fourteen years but under the age of sixteen years, to wit, fifteen years of age.

BACKGROUND

[2] On the 4th of January 2021 at about 1:32 pm, the complainant, 15-year-old BC had just taken a shower at home, when she observed the convicted man, who is the nephew of her stepmother, entering her house. He sat in the living room with her stepsister playing video games, whilst BC attended to herself in her room. BC lay on her bed watching videos for about two - three hours. She had a brief exchange with her step-sister, after which she heard the closing of the front door of the house. About two minutes later, the accused walked into her room. Much to her shock, he forced himself on top of her, placed his hands over her mouth, and inserted his penis into her vagina against her will. A report was made to the police and subsequently, he was arrested by the police and charged with the offence of Rape of a Child contrary to section 47 A of the Criminal Code.

On his first Court appearance on February 9, 2024, Mr Duran pleaded “not guilty” to the offence. He maintained his innocence for the next six court appearances. When the trial began on March 25, 2024, after cross-examination of the complainant, the convicted man indicated that he wished to plead guilty of his own free will. The Court then requested the following documents to aid in the sentencing process:

- (1) The Agreed Facts
- (2) A social Inquiry Report (“SIR”)
- (3) Victim Impact Statement
- (4) Criminal Record

SOCIAL INQUIRY REPORT (“SIR”)

[3] According to the report, the convicted man faced several obstacles that hindered his upbringing. At the tender age of twelve (12), he lost his father, with whom he had shared a good relationship. He did not share a close

relationship with his mother; however, he shared a good relationship with his sister. The convicted man has been “fending for himself” since he was thirteen years old; doing whatever jobs he can whilst completing his education. He recently became a father to a baby boy in late November of last year.

[4] Despite maintaining minimal eye contact throughout the interview, the interviewer concluded that the convicted man’s” honesty, openness, and respectful demeanour were consistently demonstrated throughout the interview”. It was also concluded that he has a minimum risk of re-offending. However, the report also stated that - “he expressed that he acknowledged what occurred was wrong but does not feel remorse. It was evident that he does not feel remorse for what occurred as he expressed his thoughts with a straight face. Indicating that the victim had a play in the incident as well and is still in contact with him”. This lack of remorse is explained in the report thus:

“In Brian’s case, he is experiencing a “Reactive attachment disorder (RAD)”, people with RAD show limited emotional responses in situations where those are ordinarily expected. This might show in a lack of remorse after bad behaviour or a lack of response to positive or negative emotional triggers. Individuals with RAD may not appear to want or need comfort from caregivers. Psychologists believe that RAD may result from childhood trauma or unmet emotional or physical needs, which may explain Brian's behaviour as he did not receive the emotional support he needed from his mother as expected after his father's passing. Adults with RAD often have trouble with complex emotions, like trust, compassion, remorse, and empathy, making it extremely hard to develop healthy adult relationships. These feelings may lead to isolation, anger, and depression.”

[5] The Court noted that the convicted did not provide any contact information for any relatives or friends to be interviewed on his behalf despite numerous requests from the interviewer.

VICTIM IMPACT STATEMENT

- [6]** BC said that she initially blamed herself (as did the rest of her family) for the ordeal. She was in deep shock the day after and isolated herself in her room for three months before anyone even noticed. She stopped going to Church so she could avoid the family of the convicted man. She lost focus and went from being on the honour roll at school to being on probation within a year. Although she is at a stage where she no longer feels that she is at fault, she still suffers emotionally as she mentioned being “scared to even take a taxi as she fears she will be attacked.” She is also scared to talk with males who have a romantic interest in her.

THE CRIMINAL RECORD

The convicted has no prior convictions of this nature or otherwise; neither does he have any other matters before the Court.

THE LAW

- [7]** The offence for which the convicted is charged is outlined at Section 47A of the Code which reads:

47A. 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— (a) imprisonment for not less than twelve years, but may extend to life, where that other person was over fourteen but under the age of sixteen years at the time the offence was committed.

- [8]** The provision makes it clear that:

- (a) A judge is mandated to impose a term of imprisonment; and
- (b) That term of imprisonment should be no less than twelve years

- [9]** To further reinforce the point that the court ought not to dispose of this matter other than by way of imposing the custodial sentence fixed by law, the Court notes that Sections 6, 28 s Act”), which speak to the disposition of matters other than by way of a custodial sentence, exclude cases such as the present where a custodial sentence is fixed by law.¹

[10] The Court may however impose a sentence which is *less than* the mandatory minimum sentence. The local Court of Appeal case of **R v Zita Shol No 2 of 2018 (“Shol”)** is instructive. Here Bulcan J.A. acknowledged that it is “in theory open to the trial judge to depart from the mandatory sentence if he regarded it as excessive and thus contrary to s. 7 of the Constitution”.²

[11] Section 7 of the Constitution of Belize reads that “**No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.**” In essence then, **Shol** directs that if on the facts of the 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 accordance with the prohibition against cruel and inhumane punishment enshrined in Section 7 of the Constitution.

[12] The question is raised, however, as to what constitutes “inhuman or degrading punishment”. Is the mandatory minimum of twelve years imprisonment in the convicted man’s case truly too inhuman and degrading a sentence for him? Our local Court of Appeal case of **Edwin Bowen v George Ferguson No. 6 of 2015**, offers guidance, at paragraphs 29 and 30”.

29. *The Privy Council, after a review and discussion of the various provisions of Constitutions and Charters, affirmed the test for determining whether a minimum mandatory sentence amounts to inhuman or degrading punishment as that laid down by Lamer J in R v Smith (above), namely, that: "a sentence must not be grossly disproportionate to what the offender deserves."*

30. *When is a sentence grossly disproportionate such that it constitutes inhuman or degrading punishment? In R. v. Fergusson (above), Chief Justice McLachlin, at paragraph 14, adopted the statement in R v Smith*

² Para. 19

(above) and said that for a sentence to be considered grossly disproportionate, it must be more than excessive, she further commented: "the sentence must be so excessive as to outrage standards of decency" and disproportionate to such an extent that "Canadians would find the punishment abhorrent or intolerable".

[13] Considering the circumstances of this case as outlined in the documents considered above, the Court is of the view that the mandatory minimum of twelve years would be disproportionate; the convicted man has no previous convictions; he was young at the time the offence was committed; he pleaded guilty and has a partly favourable SIR.

[14] However, given the prevalence and gravity of these types of offences, the Court is of the view that a custodial sentence is warranted. The Court is supported by Section 28(2)(1) of the Alternative Sentences Act, which reads:

"...the court shall not pass a custodial sentence on the offender unless it is of the opinion, (a) that the offence was so serious that only such a sentence can be justified for the offence".

The Court formed the view that given the gravity and prevalence of this matter, a custodial sentence is justified."

[15] What then would be an appropriate sentence for the convicted man? The Court is assisted in the formulation of a just sentence, by Anderson JCCJ in the case of **Teerath Persaud v R**³ ("Persaud"), from the Caribbean Court of Justice:

"[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

³ (2018) 93 WIR 132

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. (My emphasis).

- [16]** As is the required sentencing methodology outlined above in Persaud, this Court arrived at a starting point for incarceration by considering the aggravating and mitigating factors of the offence; thereafter the Court individualized the sentence by considering those factors relative to the offender, and thereby adjusting the starting point accordingly.

The aggravating and mitigating factors of the offence

- [17]** The Court was assisted in identifying the aggravating and mitigating factors for this type of offence in the “Compendium Sentencing Guideline of The Eastern Caribbean Supreme Court Sexual Offences” (the “ECSG”). This offence would fall under the ECGS’s guidelines for, “Unlawful Sexual Intercourse”, under the heading “Rape”.

- [18]** The ECSG details a 4-step approach to sentencing. The first step is to consider the harm caused by the offence in this matter; the harm caused would be ranked as ‘high’ because:

(a) there has been some psychological harm done to the victim, (as evidenced in her victim impact statement);

(b) there was a significant use of force

[19] The second stage is to assess the seriousness of the offence. For the fact that there was an abuse of a position of trust since he was the older cousin of the victim, the level of seriousness would be high. The fact that the offence occurred in the sanctuary (home) of the victim also speaks to the seriousness of the offence.

[20] From this assessment of the harm caused by the offence and also the seriousness of the offence, the suggested starting point according to the ECSG would be 50% of the maximum sentence.⁴ The starting point in this case would therefore be fifteen years.

Aggravating and mitigating circumstances of the offender

[21] The Court is now required to individualize the sentence, taking into account the aggravating and mitigating circumstances of the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point.

[22] A mitigating factor in relation to the *offender* is his guilty plea. The **Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts** (the “Sentencing Guidelines”), is instructive in analyzing the discount to be applied.

According to Rule 10.6’ The reduction principle is employed because a guilty plea obviates the need for a trial, saves considerable costs and resources and, in the case of an early plea, saves victims and witnesses from the ordeal of giving evidence’.

In this case, the fact that the complainant had already given evidence when

⁴ Where the maximum sentence is life imprisonment, simply for the purposes of the calculation, ‘x’ is to be treated as 30 years,

the convicted man entered his plea, means that the convicted man will not receive a significant discount. According to the Sentencing Guidelines, the Court may consider a reduction of 15%, “where the offender pleads guilty after the trial has commenced, but before the verdict is given”, as in the present case.⁵ When a 15% discount is applied to this case, the proposed sentence now stands at 13 years and 9 months.

[23] The convicted man also has no prior convictions of this nature or otherwise; the Court would be minded to deduct 3 years for that factor, leaving the sentence at 10 years and 9 months.

[24] The Court also considered the youth of the convicted man at the time the offence was committed. The convicted was 20 years old; even though he was young, the Court noted that he was still an adult male who ought to have known better. For this mitigating factor however, the court deducted one year and 9 months. The sentence is now reduced to 9 years.

[25] The Court noted that the SIR had both positive and negative elements. The positive aspect of the SIR documented that despite losing his father at a young age he remained productive, gainfully employed, and on the right side of the law until now; the negative aspect in the SIR however, stated that the convicted man showed absolutely no remorse for his actions; in fact, he appeared to justify his actions, by stating that the under-aged victim also has a role to play in her assault; however, the Court also considered the explanation given for the lack of remorse shown by the convicted man.⁶ Therefore, in considering the SIR in its entirety, (that is, both the positive and negative aspects), the Court would be minded to deduct two years. The remaining sentence stands at 7 years.

⁵ Rule 10.10 (iii) of the **Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts.**

⁶ The Court considered that the sentencing aims of rehabilitation and deterrence would be applicable in this case.

DISPOSITION

[26] Having reviewed the mitigating and aggravating features of this case, the decision of the Court is that Mr Brian Duran is sentenced to seven years imprisonment, effective July 11, 2024. Whilst incarcerated, he is to undergo counselling and engage in the rehabilitation and behavioural programmes available.

Delivered this 11th day of **July 2024**

[27] This is the Judgment of the Court.

Natalie -Creary Dixon; J

High Court Judge

By the Court Registrar