IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N4/2022

BETWEEN

THE KING

and

IAN GOMEZ

Offender

Before:

The Honourable Mr. Justice Raphael Morgan

Appearances:

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

Mr. Leslie Hamilton for the Offender

2024: June 26th

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

MORGAN, J.: Mr. Ian Gomez (the Offender) was indicted and pleaded guilty during the course of his trial to one count of Sexual Assault contrary to **section 45A (1)** and one count of Unlawful Sexual

Intercourse with a person above the age of Fourteen but under the age of Sixteen contrary to **section 47 (2)** of the **Criminal Code**[1], ("the Code").

[1] The 1st count alleged that on a day unknown between the 31st May 2020 to the 1st July 2020 the Offender intentionally touched the buttocks of C[2], the Virtual Complainant (the VC), a person under the age of 16, that touching being sexual in nature and without her consent. The 2nd count alleged that the Offender on the 1st day of September, 2020 carnally knew the VC a person above the age of fourteen years but under the age of sixteen years.

[2] The trial began by Judge alone before this Court, pursuant to **section 65 A (2)(a)** of the **Indictable Procedure Act**[3] (the IPA), with the arraignment of the Accused on 22nd April, 2024.

[3] For the offence of Sexual Assault the Crown was required to prove the following:

a) The Accused touched the VC's buttocks.
b) That touching was intentional.
c) That touching was sexual in nature.
d) The Accused knew or could have with reasonable diligence, found out that C was under 16 or he knew that she was not consenting or had no reasonable belief in her consent[4].

[4] For the offence of Unlawful Sexual Intercourse with a person above the age of fourteen but under the age of sixteen (Unlawful Sexual Intercourse contrary to section 47(2)) the Crown was required to prove the following:

a) The Offender had sexual intercourse with the VC;
b) The VC was under above the age of fourteen but under the age of sixteen.

[5] Consent or lack thereof is not an element that needs to be proven for a charge of Unlawful Sexual Intercourse contrary to section 47 (2) as the age of consent in Belize is sixteen(16). However, the fact

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020.
[2] Anonymized to protect the identity of the VC who was a minor at the time
[3] Cap 96 of the Substantive Laws of Belize (Revised Edition) 2020
[4] The Court in this reqard is guided by the decision of the Court of Appeal in **Leiva v R Criminal Appeal no 16 of 2009** para 38

that the Offender had reasonable cause to believe that the virtual complainant was sixteen (16) at the time of the offence is a mitigating factor where the particular offender is charged for the first time under section 47(2). This is in contrast to the offence of Rape where the lack of consent is an element of the offence and must be specifically proven.

[6] The trial began with the reading of agreed evidence of four witnesses pursuant to **Rule 10 of the Criminal Procedure Rules (CPR)** and **section 106** of **the Evidence Act**[5] (**the EA**):

a) **Oscar Vallederez** – Crime Scene Technician who testified to visiting the scene of the crime and taking photographs and through whom the photographs OV 1-4 depicting the scene were tendered.

b) **Marcelino Matus (Justice of the Peace)** – who testified to witnessing the 1st interview under caution of the Offender.

c) **Roberto Melendez (Justice of the Peace)** – who testified to witnessing the 2nd interview under caution of the Offender.

d) **PC Alvin Castillo** – who testified to extracting the video footage of the two interviews of the Offender and burning it onto two DVDs which were tendered into evidence and marked respectively **AC1** and **AC2**.

[7] The Crown then called the VC who completed her evidence in chief and began to be cross examined. During the course of the cross examination of the VC, Counsel for the Offender along with Counsel for the Crown asked for the matter to be stood down. When the matter was recalled Counsel for the Offender indicated the possibility of a change of the Offender's plea to a plea of Guilty. The matter was then adjourned to facilitate the taking of the requisite instructions.

[8] The Offender entered a plea of guilty on the 25th April, 2024 and the matter was adjourned for a separate sentencing hearing pursuant to the guidance of our apex court the Caribbean Court of Justice (CCJ) in **Linton Pompey v DPP**[6].

[5] Cap 95 of the Substantive Laws of Belize Revised Edition 2020
[6] [2020] CCJ 7 (AJ) GY at para 32

[9] On the 4th June 2024 the Court held a mitigation hearing where the Offender called the following witnesses:

1. Daniel Lanza
2. Roawani Gomez

[10] The Offender also made a dock statement at his mitigation hearing. Submissions were also made on sentence by both Counsel for the Offender and Counsel for the Crown.

[11] In order to arrive at a fair and appropriate sentence in the instant matter, the Court was also provided with the following:

a) Social Inquiry Report
b) Antecedent Record of the Offender
c) Victim Impact statement of the VC

[12] The Court now proceeds to pass sentence.

Legal Framework

[13] The ideological aims/principles of sentencing were identified by the Caribbean Court of Justice (CCJ) in **Lashley v Singh**[7]. 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.

[7] [2014] CCJ 11 (AJ) GY

[14]These principles were restated and emphasised by Jamadar JCCJ in **Pompey**[8]. 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[9].

[15]In determining whether or not to impose a custodial sentence for an offence where there is no fixed minimum custodial term, a Court must have regard to the provisions of the **Penal System Reform (Alternative Sentences) Act**[10] (PSRASA) (where relevant):

> *"28.-(1) This section applies where a person is convicted of an offence punishable with a custodial sentence* ***other than one fixed by law****.*
>
> *(2) …****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****;*
>
> *…*
>
> *31.-(1) … a court in sentencing an offender convicted by or before the court shall observe the general guidelines set forth in this section.*
>
> *(2) The guidelines referred to in subsection (1) of this section are as follows,*
>
> ***1. The rehabilitation of the offender is one of the aims of sentencing, except where the penalty is death.***
>
> ***2.*** **The gravity of a punishment must be commensurate with the gravity of the offence…***(emphasis added)*

[16]Before arriving at the sentence in a particular matter the Court must first ascertain what the appropriate starting point should be. This has been the subject of guidance by the CCJ in the Barbadian case of **Teerath Persaud v R**[11], 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***

[8] Ibid

[9] Alleyne v The Queen [2017] CCJ (AJ) GY

[10] Chapter 102:01 of the Substantive Laws of Belize, Revised Edition 2020, see section 25.

[11] [2018] 93 WIR 132

***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)*

[17] The Court is also reminded of the guidance given by Barrow JCCJ in **Calvin Ramcharan v DPP**[12] 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)*

[18] The maximum penalty for Sexual Assault is twelve (12) years as prescribed by **section 45A (1) (ii)** of the Code. In accordance with the general principles of sentencing a maximum sentence ought properly to be reserved for cases that fall into the category of the 'worst of the worst'. There is no fixed minimum term prescribed for the offence of Sexual Assault in the Code.

[19] The Court is unaware of any guideline cases from our territorial Court of Appeal in Belize which set out the sentencing range for the offence of Sexual Assault. The Court has however taken note of 1st instance judgements of Cumberbatch J in **The Queen v Randolph Coleman**[13] (a sentence of 5 years imposed for one count), Pilgrim J in **The Queen v Giovanni Burn**[14] (a sentence of 4.5 years imposed for one count) and Nanton J in **R v Whitfield Flowers**[15] (a sentence of 5 years each was imposed for two counts)

[12] [2022] CCJ 4 (AJ) GY
[13] Indictment No. C7 of 2016
[14] Indictment No. C75 of 2020
[15] Indictment No. C55 of 2022

where the Courts imposed sentences for Sexual Assault. These sentences were all arrived at after a full trial was conducted and the Accused was found guilty.

[20] 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 similarly 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).

[21] 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].

[22] The Court is also helpfully assisted by the general guidance of our Court of Appeal in **The King v Zita Shol**[16] 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**.

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

> [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 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**……..

[23] 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**[17] where the Court declared the legislative provision unconstitutional and severed the portion of the section that was unconstitutional. The other approach being that adopted by the Privy Council in **Aubeeluck v The State**[18] where the section is left intact and only its application in the specific case invalidated, 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**[19] and also in **Zita Shol**.

[24] 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.

[25] 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. While

[17] [2014] CCJ 2 (AJ)
[18] [2011] 1 LRC 627
[19] [2008] 1 SCR 96

the Court is careful before importing sentencing guidelines or approaches from other jurisdictions which may not share the exact Belizean experience, guidance gleaned from our shared collective Caribbean experience in terms of the sentencing of similar offences, in similar societies facing similar socio-economic and crime prevalence issues, can be of great assistance in understanding and fixing an appropriate sentence. In that regard the Court finds extremely helpful the **Sexual Offences Compendium Sentencing Guideline of the Eastern Caribbean Supreme Court (ECSG Guidelines)**[20] where the offences charged in the instant matter would fall under **Indecency** and **Unlawful Sexual Intercourse** respectively.

[26]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.

The factual basis for the Sentence

[27]As the Offender changed his plea to one of guilty during the course of the trial there was no determination of the facts by this Court prior to the change in plea. In those circumstances, the Court is therefore tasked

[20] November 2021 re-issue

before proceeding to sentence with ascertaining the factual basis on which the Court should sentence the Offender. In circumstances such as these, the parties can place before the Court for its consideration an agreed factual basis for sentence and eliminate the need for any further calling of evidence particularly from the Offender. It should be noted that the Court is not bound to accept the version of facts agreed by the parties.[21]Any rejection of the agreed version of facts should be accompanied by reasons justifying the rejection.

[28]It emerged during cross examination of the VC that the case for the Offender was that the VC told him she was sixteen during the conversations that they had at her workplace. This was also during the period when the incidents forming the basis for the indictment are alleged to have happened. This suggestion was rejected by the VC but it appears to the Court that the plea of the Offender was made on that basis. There is therefore a factual issue that the Court needs to resolve before it can settle on the basis for the sentence of the Offender.

[29]A legal issue also therefore arose as to whether the Court could resolve this factual issue and sentence the Offender on the basis of the version of the facts put forward by the Crown without hearing evidence from the Offender. On this issue the Court found helpful two decisions emanating from the English Court of Appeal in **R v Mottram**[22] and **R v Archer**[23].

[30]In **Mottram** the Appellant was jointly charged with three other co-defendants for corruption. The other three co-defendants all pleaded guilty at various points in the trial prior to the Appellant. The case for the Crown at trial was that the corrupt scheme emanated from the Appellant while the Appellant's case was that he was not the originator of the scheme. The Appellant changed his plea during the course of his evidence in Chief when the trial judge indicated that he intended to direct the jury that based on the Appellant's evidence there was no defence to the charge of corruption. The trial judge proceeded to sentence the Appellant on the basis that he was the originator of the corrupt scheme without calling upon the Appellant to finish his evidence in chief and be cross examined. The Court of Appeal found that the

[21] Archbold 2023 para 5A-328
[22] (1981) 3 Cr. App. Rep. (S) 123
[23] (1993) 15 Cr. App. Rep. (S) 387

trial judge was wrong to have sentenced the Appellant based solely on the case for the Crown at trial without hearing evidence from the Offender first.

[31] In **Archer**, the Appellant was initially charged with one count of rape. During the course of the trial, the alleged victim gave evidence and at the end of her evidence the prosecution amended the indictment to include two further counts of indecency and unlawful sexual intercourse with a girl. The Appellant through his Counsel had informed the Crown that if those two charges were added to the indictment he would plead guilty to those two charges. After the amendment the Appellant pleaded guilty to the two new charges and the jury was discharged from giving a verdict on the charge of Rape. At the time of sentencing the trial judge had only heard evidence from the alleged victim. Both the Appellant and the alleged victim were fourteen (14) years old at the time of the offence. The trial judge then proceeded to sentence on the basis of the Crown's case that the alleged victim had not consented to sexual intercourse or the Appellant was reckless as to whether she consented although the Appellant had throughout the matter maintained that the alleged victim had consented. The Court of Appeal held *inter alia* that it was clear that the Appellant had pleaded guilty on the basis that the alleged victim had consented. While the trial judge was not bound to accept that basis, the trial judge was wrong to have sentenced the Appellant on the basis of the Crown's case without first hearing evidence from him to determine his state of mind at the time of the offence.

[32] This approach was also endorsed by the Belizean Court of Appeal in **Victor Cuevas v The Queen**[24].

[33] It is the Court's understanding from the authorities set out above that it is this Court's task to ascertain the factual basis for sentence before proceeding to sentence the Offender. In ascertaining that basis, it would be improper to proceed to sentence without hearing from the Offender first especially if the basis upon which the Offender entered his plea is materially different to the Crown's case[25]. The Court is also not bound to accept the agreed version of the facts provided by the parties if to do so would not be in the interests of justice.

[24] Criminal application for leave to appeal no. 17 of 2007 para 15
[25] See also Archbold 2023 para 5A-350

[34] The parties jointly submitted a document entitled 'Agreed Facts' but there was, as expected, disagreement between the parties as to whether the Offender had been told by the VC that she was sixteen years of age during the course of their interactions and prior to the day that they had sexual intercourse. As stated before, it is clear in the mind of the Court that the Offender has pleaded guilty on the basis that he was told by the VC that she was sixteen years of age. The presence of reasonable cause for such a belief would be considered a mitigating factor as this is the Offender's first time being charged with an offence under section 47(2).

[35] The Court is also aware that a Newton hearing is not appropriate in circumstances where the dispute is as to a fact that only goes to mitigation, as matters of mitigation are not normally dealt with by way of Newton hearing[26]. Although in certain circumstances, the Court may invite Counsel for the Offender to have the Offender give evidence of matters within his own knowledge[27].

[36] The Court therefore in order to ascertain the factual basis for the sentence of the Offender had regard to the following:

a) The agreed facts submitted by the parties;
b) The dock statement made by the Offender.

The Agreed Facts

[37] In the month of June 2020 on a precise date unknown, the VC accompanied her mother LC to her work at Sunrise Store located in Trial Farm Village, Orange Walk District, Belize.

[38] On a day in June, the VC remained in the store while her mother went upstairs to work. While at the store sometime after lunch, the Offender arrived selling some chips.

[39] The VC and the Offender went into the bodega to count the chips. While counting the chips, the Offender then stretched his hand towards her and touched her buttocks and told her that she has a big buttocks.

[26] See Archbold 2023 para 5A-340
[27] [2004] EWCA Crim 2256

The VC told her mother sometime thereafter but she told the Offender immediately that she would report him to the police if he touched her again.

[40] On another occasion in the month of June 2020 on a precise date unknown, the VC accompanied her mother to Sunrise Store and remained downstairs cleaning the shelves of the store when the Offender arrived. As the VC kept cleaning the shelves, the Offender came closer to her and then touched her buttocks and told her that she has a big buttocks. The VC told the owner of the store what the Offender did to her.

[41] On the 1st September 2020 the VC also accompanied her mother to Sunrise Store and remained downstairs at the store where she weighed dog food to pack on the shelves. At around 10:00 am the VC saw the Offender arrive at the shop and they started a conversation. During the conversation, the VC stopped and went into the warehouse to get more dog food. The Offender followed her into the warehouse and said to her "De ya tiempo te tenia ganas" which translates to "from a long time I desired you". The Offender then went closer to the VC and attempted to take off her blouse but she managed to push him away and exited the warehouse.

[42] The VC saw the Offenders' nephew outside of the store and told him what the Offender tried to do. He said not to pay the Offender any attention.

[43] The VC went back to the warehouse to get dog food and the Offender was still in the warehouse. The Offender asked the VC if she got scared to which she replied "Yes". He then laughed and told her "You know I could give you money, like $200, to a virgin gyal deh pay $500, I could give you $200 Belize if you want". The VC told him jokingly "Yes man". The Offender laughed and said ok, then he walked away.

[44] A little later when the VC entered the warehouse to get a different brand of dog food, the Offender entered the warehouse and stood infront of her and pushed her and she fell on top of the bags of dog food and supported herself up with her elbows. The Offender then attempted to take off her blouse but the VC hesitated and he stopped. The Offender then pulled down her pants and underwear to below her knees and used his arms to push her legs almost to her shoulders and placed his penis in her vagina. The

Offender moved back and forth for about five minutes. He made a noise, stopped moving and brought down her legs. The Offender then told her "No worry, I wa pay you the $200."

[45] On that same day Carlos Marin, a store worker, arrived at Sunrise Store and went to the warehouse where he found a purple condom wrapper. He started questioning the virtual complainant. Carlos Marin later found a used condom in the bodega and told LC about his findings and to question the VC about it.

[46] On the 2nd September 2020 after LC saw the used condom, she questioned the VC who then said that the Offender used the condom on her.

[47] On the 5th September 2020 the VC and her mother visited the Orange Walk Police Station where a report was made.

[48] On the 9th September 2020 the VC was taken to the Northern Regional Hospital where a medical examination was conducted. Dr. Abbey Manzanero found that the VC's hymen was not intact.

[49] On the 6th October 2020 the Offender was formally arrested and charged with the offence of Unlawful Sexual Intercourse and thereafter on the 27th April 2021, he was arrested and charged with the offence of Sexual Assault. The Offender was indicted on the 11th January 2021 for one count of Sexual Assault contrary to section 45(A) (1) (a) and one count of Unlawful Sexual Intercourse contrary to section 47(2) of the Code.

[50] Trial commenced on the 22nd April 2024 and on the 23rd April 2024 the VC testified in court of the sexual assault and the unlawful sexual intercourse. During cross examination, Defence Counsel put to the VC, "In that conversation, one of those conversations, you told him you were 16 years of age." The VC responded "I never shared with him my age. Most of the people at Mrs. Esther knew I was 15 years of age." It was put twice to the VC that she was 15 years and 10 months at the time of the incident on the 1st September 2020 and on both instances the VC maintained that she was 15 years old. It was also put to her that she doesn't remember the contents of the conversation and that the conversation was about her size and body structure. The VC stated that most of the time he was talking in a perverted way.

[51] On the 23rd April, 2024, while the VC was being cross examined, the Offender indicated through his Counsel the possibility of a guilty plea. On the 24th April 2024 the Offender through his Counsel confirmed that he would enter a guilty plea to both counts on the indictment. The guilty plea was formally entered in Court on the 25th April 2024.

The Dock Statement by the Offender at the mitigation hearing

[52] The Offender in his dock statement at the mitigation hearing didn't dispute most of the facts for the Prosecution. He specifically accepted that sexual intercourse happened with the VC and didn't dispute the facts as to how the physical act of sexual intercourse unfolded. However he maintained that the VC had told him that she was sixteen years of age and upon realizing that his belief that she was sixteen was not a defence to the charge, he accepted his wrongdoing and changed his plea to guilty.

The Court's accepted factual basis for the sentence of the Offender

[53] Having considered the agreed facts and the dock statement of the Offender it is clear that there is no dispute as to the circumstances of the count for Sexual Assault. The Offender has accepted that on a date unknown between the 31st May and the 1st July 2020 he touched the buttocks of the VC without her consent. The Court therefore accepts the agreed facts submitted by the parties with respect to the offence of Sexual Assault as the factual basis for the sentence of the Offender on that offence.

[54] The Court however considered the agreed facts and the dock statement of the Offender made during mitigation and found that there are two possible bases on which the Offender could be sentenced for the Offence of Unlawful Sexual Intercourse contrary to section 47(2):

a) The Offender had no cause to believe, reasonable or otherwise, that the VC was under the age of 16 at the time that he had sexual intercourse with her in the warehouse (the basis put forward by the Crown).
b) The Offender had reasonable cause to believe that the VC was sixteen years of age at the time that he had sexual intercourse with her in the warehouse (the basis put forward by the Offender).

[55] The Court therefore carefully considered the dock statement of the Offender to see whether the Court accepted the basis upon which his plea was made. The Court pursuant to the guidance of the Privy Council in **DPP v Walker**[28] reminds itself that it can give whatever weight it wishes to the dock statement of the Offender. This treatment of a dock statement was endorsed by the CCJ in **August and Anor v R**[29].

[56] Upon careful consideration, the Court accepts the dock statement of the Offender and believes that the VC told the Offender that she was sixteen prior to the commission of the offence. After the initial incident of sexual assault it is the VC's evidence that she continued to have conversations with the Offender and that he would be talking in a perverted manner. The Court finds it illogical that the VC would not tell the Offender her age after he touched her inappropriately on more than one occasion especially since he expressed an interest in her and she indicated that she would call the police.

[57] As to whether this amounts to reasonable cause for believing, the Court further notes that there was nothing in the surrounding circumstances to suggest that she was not sixteen as notably the VC was working in the bodega on weekdays and not in school. While the VC said under cross examination that everyone who frequented the shop knew her age, even if the Court accepts that assertion, there is nothing on the evidence to suggest that the Offender, specifically, knew her age as fifteen.

[58] The Court accordingly finds that the Offender had reasonable cause to believe to that the VC was 16 years of age.

[59] The Court therefore will proceed to sentence the Offender for the offence of Unlawful Sexual Intercourse contrary to section 47(2) on the basis that when he had sexual intercourse with the VC, who was under the age of 16, he had reasonable cause to believe that she was sixteen years of age as a result of being told that by the VC.

[28] [1974] 1 WLR 1090 at 1096
[29] [2018] 3 LRC 552

The mitigation hearing

[60]At the mitigation hearing the Offender called the following witnesses:

1. **Daniel Lanza** – who testified that he is an Aviation Crew Chief and Assistant Pastor at Ladyville Evangelical Church. He has known the Offender for over three years and is his direct supervisor. He testified as to how indispensable the Offender is to his company, his assistance in helping the Phillip Goldson Airport win Best Airport in 2023 and the fact that the Offender has never had a disciplinary incident at work. He further added that the Offender has told him about the incident and indicated that it caused great distress to him and his family. The Offender has also expressed his deep remorse about the incident and the hurt that he caused the VC for a lifetime. He described the Offender as a family man who is very important to his eldest son who is doing extremely well in school.

2. **Roawani Gomez** – sister of the Offender – who testified that the Offender is a humble and responsible person who was diagnosed with dyslexia at a young age. She also indicated that the Offender didn't finish primary school and left school to work with their mother to support the family. He took up the role as the male head of the family. The Offender also along with her, worked to support his mother when she was diagnosed with cancer. She further testified that the Offender also helps with their two older brothers who are unable to do much for themselves. She also described the Offender as a great father to his children a ten year old boy and two girls (three years old and five years old respectively). She asked the court for mercy as the Offender has expressed his remorse about what he has done and to the family.

[61]The Offender further stated in his dock statement that he was sorry to the family of the VC for the hurt that he caused them and admitted that he did what the Crown alleged in the facts. He also acknowledged that he had let his family down with what he had done. He asked the Court to have mercy on him as he is the sole caretaker for his family as his wife is unable to work due to a hernia and her primary school education.

The Victim Impact Statement

[62] The VC provided a victim impact statement where she indicated that reliving the facts of what the Offender did to her, during her evidence, caused her depression which resulted in self-harm. Since the incident she has suffered from anxiety which heightened when she had to prepare to give evidence at trial.

[63] As a result of the effect that the preparation for trial had on her, she lost her job as she could not concentrate. She further suffered intimacy issues with her partner which resulted in the end of her relationship.

[64] She felt relieved that the Offender accepted responsibility for his actions and asked the Court for justice.

The Reports

Social Inquiry Report

[65] A Social Inquiry Report was submitted on behalf of the Offender. For the report, the Offender was interviewed as well as family members of the Offender. The Court noted the following:

a) The Offender dropped out of school in STD 5 and supported his family (extended and immediate) ever since that time.
b) He is the sole caretaker for his immediate family and his family may struggle to make ends meet if he is incarcerated.
c) The Offender also assists his two brothers who cannot walk properly due to a health condition with their legs.
d) All persons interviewed indicated that the Offender is hardworking, respectful and had previously not given any trouble to his family or community.

Antecedent Report

[66] The Offender has no previous convictions.

Submissions by the Defence

[67] The Defence submitted that the Court should set a starting point of five (5) years for both offences.

[68] The Defence further submitted that the Court should accept the statement of the Offender that at the time of the offence he was told by the VC that she was sixteen years of age. The Defence also submitted that the Court should take into account as mitigating factors the remorse of the Offender, the fact that no force was used during the sexual intercourse, the reasonable belief held by the Offender that the VC was sixteen years of age at the time that they had sexual intercourse and the Offender's previous good Character.

[69] The Defence invited the Court in its deliberations to not to pay great weight to the disparity in age between the VC and the Offender at the time (sixteen years versus thirty two years). The Defence however accepted that the full one third (1/3) discount may not be applicable in these circumstances having regard to when the plea was taken.

Submissions by the Crown

[70] The Crown submitted that a custodial sentence is warranted and the starting point should be seven (7) years for both offences.

[71] The Crown further submitted that the aggravating features of the offence were the impact on the VC both at the time of the offence and as a result of cross examination, the age disparity between the VC and the Offender and the offer of money for sexual intercourse to the VC.

[72] The Crown accepted as a mitigating factor the clean antecedent record of the Offender and the evidence of his Good Character submitted at his mitigation hearing. The Crown also submitted that his guilty plea should be counted as a mitigating factor.

[73] The Crown also submitted that the full one third discount was not appropriate in the circumstances and the Court should look at the totality principle in deciding whether the sentences should run concurrently or consecutively.

Analysis

Conceptual Framework for sentencing in cases involving child victim

[74] 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**[30]:

> *"[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 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."*

[30] Ibid

[75] 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 offence.

The Starting Point

Sexual Assault

[76] The Court is guided by the provisions of the **PSRASA** and the authorities cited above.

[77] Pursuant to the **PSRASA** the Court must first consider whether the offence of Sexual Assault committed in this case is so serious that only a custodial sentence can be justified for the offence. In the instant matter the Court finds that only a custodial sentence can be justified for the offence. The Court agrees with Jamadar JCCJ in **Pompey** that children (including teenagers) ought to be protected. They are among the most vulnerable of society and they at times also need to be protected from themselves. The facts of this offence, in particular the significant disparity in age between the victim and the Offender, warrant the imposition of a custodial sentence. The Court does not consider the imposition of a non-custodial sentence to be appropriate as such a sentence would send a message that does not reflect the abhorrence that society shows for instances where men who have attained the age of majority engage in behaviour such as happened in this case, with children that are significantly younger than them.

[78] Having found that the offence warrants a custodial sentence, the Court finds guidance in setting the starting point from the ECSG Guidelines entitled '**Indecency**'. These guidelines are in accordance with the learning from the CCJ in **Persaud**. The Court having regard to the age disparity between the Offender and the victim, the age of the victim at the time of the Sexual Assault and the serious psychological impact that the offence has had on the victim has assessed the consequence of this offence as High 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 30% to 45% of the maximum penalty. The Court assesses that on these facts the appropriate notional starting point is 30% of the maximum penalty which amounts to four (4) years.

[79]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) One of the incidents occurred after the protestations of the VC.
d) The offence occurred at a public place, the VC's workplace where anyone could have happened upon the Offender and the VC including the VC's family.
e) There were multiple incidents of sexual assault.

[80]The Court considers the following as mitigating features of the offence:

a) The VC was not subject to any violence or threats of violence during the assault.
b) The VC was not subject to any additional degradation during the course of the assault for example being made to undress etc.
c) The assault did not last for a very long time.

[81]The Court considers that the aggravating features of the offence outweigh the mitigating features of the offence and warrants an upward adjustment of one (1) year leaving a starting point of five (5) years.

Unlawful Sexual Intercourse contrary to section 47(2)

Application of the Mandatory Minimum Sentence

[82]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 in the circumstances 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**[31] and the decision of the Court of Appeal in **Bowen v Ferguson**[32].

b) The commission of the offence does 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 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.

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

Starting Point

[84] The Court again 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 serious psychological impact that the offence has had on the victim has assessed the consequence of this offence as High 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 25% to 55% of the maximum penalty.

[85] The Court therefore assesses that the appropriate notional starting point for the offence of Unlawful Sexual Intercourse in this matter is 50% of the maximum penalty which amounts to a notional starting point of five (5) years.

[31] Criminal Appeal no. 35 of 2019
[32] Ibid

[86]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) Offence was committed at a public place, the VC's workplace where anyone could have happened upon the Offender and the VC including the VC's family
d) There was an accompanying offer of payment made for the sexual intercourse which had the effect of cheapening the VC

[87]The Court considers the following as mitigating features of the offence:

a) The VC was not subject to any gratuitous violence or threats of violence during the sexual intercourse.
b) The Offender was told by the VC "Yes man" when he approached her for sex.

[88]The Court considers that the aggravating features of the offence outweigh the mitigating features of the offence and warrants an upward adjustment of two (2) years leaving a starting point of seven (7) years.

Consideration of the circumstances of the Offender

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

[90]For the Offender the Court finds as mitigating his previous good character which emerged from his clean antecedent record, his Social Inquiry Report and the evidence that was proffered on his behalf at mitigation. Through the mitigation hearing and report, the Court was able to glean that the Offender is hard working, family oriented, dedicated, a good father and well liked within his family. The incident appears to have caused great stress to himself and his family members.

[91] The Offender's genuine remorse which was shown in his dock statement at his mitigation hearing is also noted in his favour as a mitigating feature.

[92] The Court also finds as a mitigating factor the family background of the Offender. Through the reports and the mitigation the Court gleaned that should he be incarcerated his family will find it difficult to make ends meet. The Court in this regard is guided by the **Sentencing Handbook of Trinidad and Tobago**[33] 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.

[93] The Court finds in accordance with **section 47(2)** that the fact that the Offender had reasonable cause to believe that the VC was 16 years of age is a mitigating factor in favour of the offender for that offence. The Court however notes that while the Code prescribes that this is a mitigating factor to be taken into account for sentencing, the weight ascribed to it depends on the facts of the matter in which it is raised and is at the discretion of the Court. The Court does not lose sight of the fact that part of the purpose of the legislation is to protect children from being preyed upon by predatory adults. In circumstances where there is a great disparity in age between the Offender and the victim the Court considers that such a belief may carry significantly less weight than in others. In this case there is such a disparity in age as the Offender was in his thirties and almost twice the age of the VC.

[94] The Court finds that there are no aggravating features of the Offender.

[95] In the opinion of this Court a downward adjustment for the offence of Sexual Assault is warranted in the amount of two (2) years leaving a notional sentence of three (3) years.

[96] The Court also 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 five years.

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

Discount for Guilty Plea

[97] 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]

[98] 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 a Defendant had to plead guilty before the entering of the plea.

[99] In the instant matter, as noted before, the plea was taken after the VC was taken through her evidence in chief, made to relive the incidents with the Offender and also subject to partial cross examination. The Offender was informed of his options upon arraignment in the High Court including engaging in the plea process and the possible reduction in sentence for a guilty plea. The matter was then case managed before Lord J and fixed for trial. The matter was then fixed for trial on several dates in 2023 before eventually coming to trial before this Court in March 2024.

[100] In the mind of the Court it cannot be said in the circumstances of this case, particularly having regard to the fact that the plea was taken mid-trial, that the plea was made at the earliest possible opportunity.

[101] The Court accordingly will award a 25% reduction in the sentence for the guilty plea taken by the Offender.

[102] The discount when applied to the notional term set out above for the offence of Sexual Assault amounts to nine (9) months. This leaves a final term of two (2) years and three (3) months for the offence of Sexual Assault.

[103] The discount when also applied to the notional term set out above for the offence of Unlawful Sexual Intercourse contrary to section 47(2) amounts to one (1) year and three (3) months. This leaves a final term of term of three (3) years and nine (9) months.

Consideration of the Totality Principle

[104] 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[34].

[105] 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[35].

[34] Pompey ibid per Saunders PCCJ at para 16
[35] Pompey ibid per Saunders PCCJ at para 33

[106] 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.

Credit for time served

[107] This issue does not arise on the facts of the case as the Offender was on bail throughout the proceedings. Accordingly this leaves a final term of two (2) years and three (3) months for the offence of Sexual Assault and a final term of three (3) years and nine (9) months for the Offence of Unlawful Sexual Intercourse contrary to section 47(2).

Ancillary Orders

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

Disposition

[109] The order of the Court in respect of the Offender Ian Gomez is as follows:

a) On the offence of Sexual Assault the Offender is sentenced to a term of **two (2) years and three (3) months** to commence today
b) On the offence of Unlawful Sexual Intercourse contrary to section 47(2) the Offender is sentenced to a term of **three (3) years and nine (9) months** to commence today.
c) The sentences are to run concurrently.

Raphael Morgan
High Court Judge
Dated: 26th June 2024