IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C42 of 2023

BETWEEN:

THE KING

And

MB[1]

Convict

Appearances:

Mr. Robert Lord Crown Counsel for the King

Ms. Sherigne Rodriguez Counsel for the Convict

2024: July 29; 30

August 2; 28

October 7

November 01

SEXUAL ASSAULT; RAPE OF A CHILD- SENTENCING

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

Introduction

[1] **NANTON, J.;** MB (hereinafter referred to as "the Prisoner") was indicted for the following offences:

i. Sexual Assault contrary to **Section 45 A of the Criminal Code.**

ii. Rape of a child contrary to **Section 47 A of the Criminal Code**.

iii. Assault of a Child under 16 by penetration contrary to **Section 47 B of the Criminal Code.**

iv. Rape of a Child contrary to **Section 47 A of the Criminal Code.**

[2] The trial by Judge Alone began on the 29th of July, 2024 pursuant to **Section 65 A (2)(g) of the Indictable Procedure Act.**[2]

[3] The Court, having considered all the evidence, found the Prisoner guilty of the first, second and fourth counts of the indictment, and the matter was adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP** [3]. The Prisoner was acquitted on the third count.

[4] The Court requested the following reports to attempt to construct a fair and informed sentence. The Court is now in receipt of the following reports:

i. Social Inquiry Report

ii. Psychiatric Evaluation Report

iii. Criminal Antecedent History Record

iv. Victim Impact Statement

[5] The Court held a sentencing hearing and the following witnesses gave evidence of mitigation on behalf of the Prisoner:

i. Mr. Decoy Flores

[2] Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

[3] [2020] CCJ 7 (AJ) GY at para 32

ii. Ms. Jordanna Bowman

[6] The Court has also received written submissions on sentencing from the Crown and Counsel on behalf of the Prisoner.

[7] The Court has carefully considered the above and is now prepared to pronounce sentence.

Summary of the Facts

[8] The facts accepted by this Court was that on the 14th day of December 2021 the Prisoner touched the vagina of the VC, that touching being sexual in nature and without her consent, and that on that day he raped her by inserting his penis into her anus without her consent.

[9] On the 20th December 2021, the Prisoner again raped the VC by inserting his penis into her anus without her consent.

[10] At the time of both of these incidents the VC was 12 years old.

The Law

[11] **Section 45 A states:**

> 1) Every person who intentionally touches another person, that touching being sexual in nature, without that person's consent or a reasonable belief that that person consents, and where the touching involved–
>
> (a) that person's vagina, penis, anus, breast or any other part of that person's body; commits an offence and is liable –
>
> (ii) where that person was under sixteen years at the time the offence was committed, on summary conviction to a term of imprisonment for a term of seven years or on conviction on indictment to a term of imprisonment for twelve years.

[12] **Section 47A states:**

> *Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to–*
>
> > *(i) imprisonment for not less than fifteen years, but may extend to life, where that other person was under the age of fourteen years at the time the offence was committed;*

[13] **Section 47A** above must be read in conjunction with **Section 160 (1) of the Indictable Procedure Act**[4] (the IPA) which provides:

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

[14] The Court has considered the constitutionality of the mandatory minimum sentence set out above, and whether the Court is bound by said statutory minimum when viewed against **Section 7 of the Constitution** which provides that *"no person shall be subjected to torture or to inhuman or degrading punishment or other treatment"*

[15] The decision of our Court of Appeal in **R v Zita Shol**[5] is instructive, per Bulkan JA:

> *Mandatory sentences have always created some tension and are justifiably viewed with caution. Sentencing is a quintessential judicial function, so the tension results from the fact that a fixed penalty forecloses judicial discretion. Nonetheless, it is conceded that every branch of government has a role to play in the criminal justice process, including that of punishments: the executive sets policy, the legislature implements that policy by enacting crimes with attendant penalties, and the judiciary administers justice in individual cases, including through the sentencing of offenders. Where a particular activity becomes a persistent or grave societal problem, as in the case of drug trafficking or gang activity, policy-makers and legislatures have resorted to mandatory penalties as one means of ensuring consistency in judicial approaches and ultimately eradicating the problem. For this reason, mandatory sentences have*

[4]Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020
[5] Criminal Application No. 2 of 2018

> *traditionally not been regarded as a usurpation of the judicial function or contrary to the principle of separation of powers, including by this Court. … [14]… In Aubeeluck v the State [2011] 1 LRC 627, another decision of the Privy Council on appeal from Mauritius, the issue for determination concerned the constitutionality of a mandatory minimum sentence for trafficking in narcotics. The Board noted that the effect of the constitutional prohibition on inhuman and degrading punishments (also contained in s. 7 of the Mauritius Constitution) is to outlaw "wholly disproportionate penalties". The Board then held that when confronted with a mandatory minimum sentence fixed by statute, there are three courses open to a court to ensure there is no violation of the constitutional protection – to invalidate the law providing for the mandatory sentence; to read it down and confine the mandatory penalty to a particular class of case only; or simply to quash the sentence in the case under consideration if to impose the full mandatory period of imprisonment would be disproportionate in those specific circumstances. In this case, the Board rejected the more expansive routes and opted for the third one. In striking down the sentence of 3 years' imprisonment that had been imposed on the appellant for trafficking in narcotics, their Lordships factored in that he was dealing with only a small quantity just barely over the limit that raises the presumption of trafficking and that he hitherto had a clean record. The significance of this approach is that it attempts to accommodate the legislative intention as far as possible, in that mandatory sentences are not automatically invalidated in all cases. Not only is there the possibility of reading them down, but also a court can depart from them on an individual basis where the circumstances demand.*

[16] The Court reasons that it is clearly entitled to follow the **Aubeeluck**[6] approach of departing from the mandatory sentence in specific cases, where to abide by the mandatory minimum will result in a disproportionate sentence. This approach has similarly been adopted in **Bowen v Ferguson**.[7]

[17] The Court interprets the guidance in **Shol** to be that though, the Court is to have considerable regard to the intention of the National Assembly in creating a mandatory minimum sentence; however, if on the facts of the particular case the Court finds that the mandatory minimum is so disproportionate as to be inhuman and degrading punishment then the Court is obliged to depart from it in protection of the Prisoner's rights pursuant to **Section 7 of the Constitution**.

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[6] [2011] 1 LRC 627

[7] Cr App 6/2015, decision dated 24 March 2017

[18] For the reasons outlined below, the Court thinks that this is not such a case where an imposition of the mandatory minimum penalty will be disproportionate.

[19] Additionally, this Court has considered the propriety or otherwise of a custodial sentence relative to both offences having regard to the provisions of the **Penal System Reform (Alternative Sentences) Act**,(the "PSRAA") which states:

> *"28.-(2) …the court shall not pass a custodial sentence on the offender unless it is of the opinion,*
>
> *(a) where the offence is a violent or sexual offence (as defined in section 7 of this Act), that only such a sentence would be adequate to protect the public from serious harm from the offender.*

[20] The Court has taken into account the prevalence, gravity and seriousness of these offences, the irreparable harm inflicted on the VC, who was a young child, as well as the need to protect the society. In light of the guidance and the principles of sentencing adumbrated by the CCJ jurisprudence, and the statutory requirement under the PSRAA that the gravity of the punishment must meet the gravity of the offence, the Court thinks it appropriate to impose a custodial sentence. The public interest in punishing sexual offences against children is served by a custodial sentence and the Court must deter the Prisoner himself and others from preying on the young and innocent. For these reasons, the Court considers that the imposition of a custodial sentence is appropriate in relation to the 3 counts for which he is convicted.

[21] The Court now looks to the guidance of the Apex Court, the Caribbean Court of Justice (the "CCJ") in the Barbadian case of **Teerath Persaud v R**[8] on the issue or the formulation of a just sentence, as highlighted by Anderson JCCJ:

> *"[46] Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other*

[8] (2018) 93 WIR 132

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."

[22] The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP**[9] on this issue, per Barrow JCCJ:

"[15] In affirming the deference an appellate court must give to sentencing judges, Jamadar JCCJ observed that sentencing is quintessentially contextual, geographic, cultural, empirical, and pragmatic. Caribbean courts should therefore be wary about importing sentencing outcomes from other jurisdictions whose socio-legal and penal systems and cultures are quite distinct and differently developed and organised from those in the Caribbean.

[16] Jamadar JCCJ noted that in 2014 this Court explained the multiple ideological aims of sentencing. These objectives may be summarised as being: (i) the public interest, in not only punishing, but also in preventing crime ('as first and foremost' and as overarching), (ii) the retributive or denunciatory (punitive), (iii) the deterrent, in relation to both potential offenders and the particular offender being sentenced, (iv) the preventative, aimed at the particular offender, and (v) the rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law abiding member of society.

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

[9] [2022] CCJ 4 (AJ) GY

Analysis

[23] In considering the construction of an appropriate sentence the Court is guided by the conceptual framework for sentencing sexual offences against children discussed by the CCJ in **Linton Pompey v DPP**[10], per Jamadar JCCJ:

> *"[45] Children are vulnerable. They need to be protected. Children are developing. They need to be nurtured. Children are precious. They must be valued. Society has these responsibilities, both at private individual levels and as a state. Sexual offences against children, of which rape may be one of the most vicious, and rape by a person in a relationship of trust in the sanctity of a family home the most damaging, is anathema to the fabric of society. The idea of it is morally repugnant. Its execution so condemned, that the State has deemed, as an appropriate benchmark, imprisonment for life as fit punishment in the worst cases.*
>
> *[46] The Universal Declaration of Human Rights asserts as its first principle, that all humans are born free and equal in dignity and rights. Children, minors, and all vulnerable young persons are owed a special duty of 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."*

[24] The Court would, as is the prescribed procedure under **Persaud,** consider the aggravating and mitigating factors of the offending and then individualise the sentence by adjusting, if appropriate, by considering those factors vis a vis the Offender.

[25] The Court finds instructive the identification of the aggravating and mitigating factors of both the offending and Offender for this type of offence in the "**Compendium**

[10] [2020] CCJ 7 (AJ) GY.

Sentencing Guideline of The Eastern Caribbean Supreme Court Sexual Offences"[11](the "ECSG").

[26] The approach this Court adopts pursuant to the guidance of the ECSG is to assess the starting point for the offences firstly, by a consideration of the consequences of the harm flowing from the offence and the particular culpability of the Offender. An appropriate range is then identified. Thereafter, the aggravating and mitigating factors are considered and an appropriate starting point is determined within that identified range. Factors relative to the Offender are identified which may result in an upward or downward adjustment to the starting point, or in some cases no adjustment at all. Once that figure is determined, the Court will then go on to consider the totality principal and the usual credits for guilty plea and deductions for any time spent in pre-trial custody.

Assessing the Starting Point

[27] The CCJ, in the Guyanese case of **AB v DPP**[12] noted that, *"Child abuse casts a shadow the length of a lifetime."* In that case they found life sentences with a minimum term of 20 years imprisonment for sexual activity with a child were neither excessive nor severe. Secondly, they highlighted the significance of the factor of the abuse of trust as exists in this case. The Court, thirdly, takes notice of the National Assembly's intention as to the appropriate sentence for these offences by setting a mandatory minimum term, and there is nothing on this offending to trigger the Court's constitutional discretion to go under that minimum.

[28] Having considered local authorities on sentencing in Belize, including those cases submitted for consideration by both sides, the Court has observed that the usual range for offences of rape is between 15 to 25 years imprisonment. [13]

[11] Re-Issue, 8th November 2021.
[12] [2023] CCJ 8 (AJ) GY.
[13] R v Charles Martinez Indictment No C38 of 2022; R v Claudio Mai Indictment C95 of 2023; R v WF Indictment No C0055 of 2022; R v VC C 003 of 202; R v Bairo Gomez; R v Cyril Casimiro

[29] The Court considers the consequence or harm caused by this offending as high, (although not exceptional). The VC was a 12 year old child at the time of the offending and suffered some physical harm, shame and embarrassment following this incident. Her family life has also been disrupted significantly as the offending caused a division in her family.

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

[31] The ECSG states that offences falling within category 2 of harm i.e. high and with a high level of seriousness should attract a starting point between the range of 35-65% of the maximum penalty, this of course leaves room for the worst of the worst.

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

Aggravating Factors

- Seriousness and prevalence of sexual offences in Belize especially in the context of familial relations.
- Repeated incidents.
- Abuse of trust.
- Physical Trauma to the Victim- laceration to anus classified as harm.

Mitigating Factors

- There are none

[33] After considering the above principles and the aggravating and mitigating factors of the offences, the Court assesses a starting point of **8 years** imprisonment for the offence of sexual assault the and **22 years** for the two counts of rape.

Factors relative to the Offender

Aggravating factors

- No aggravating factors relative to the Offender.

Mitigating factors

- Dependants who are heavily reliant on the Prisoner.
- No prior convictions or pending matters.
- Good character as evidenced from the Prisoner's Character witnesses (distinguished from the absence of previous convictions).

[34] For the Prisoner's mitigating factors, the Court considers that a downward adjustment of two (2) years to the starting point for Rape and one (1) year to the starting point for Sexual Assault is appropriate. For the offence of Sexual Assault, this results in a net sentence of **7 years** and for the offences of Rape that results in a net sentence of **20 years**.

Totality Principle

[35] The Court must also have regard to the totality principle outlined by the CCJ in ***Pompey*** as the Prisoner is being sentenced for two counts of Rape, per Saunders PCCJ:

> *"[33] So far as the totality principle is concerned, in cases where it is necessary to sentence someone for multiple serious offences, before pronouncing sentence the judge should:*
> *(a) Consider what is an appropriate sentence for each individual offence;*
> *(b) Ask oneself whether, if such sentences are served concurrently, the total length of time the prisoner will serve appropriately reflects the full seriousness of his overall criminality;*

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

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

Pre-Trial Custody

[37] The Court notes that in **Romeo da Costa Hall v The Queen**[14] the CCJ highlighted the importance of awarding full credit for the time spent in pre-trial custody. At the time of his arrest, the Prisoner had spent approximately one week (rounded upwards) in pre- trial custody. That time will be deducted from his sentence.

Disposition

[38]. The sentence of the Court is as follows:

i. On Count 1 of the indictment for Sexual Assault the sentence is **6 years 11 months and 23 days imprisonment.**
ii. On Counts 2 of the indictment for Rape the sentence is **19 years 11 months and 23 days imprisonment.**
iii. On Count 4 of the indictment for Rape the sentence is **19 years 11 months and 23 days imprisonment.**

The sentences are to run concurrently with effect from the date of oral verdict, which is 28th August 2024.

[39] The Court also makes the following orders:

[14] [2011] CCJ 6 (AJ)

i. The Court orders, pursuant to **Section 65(1) (a) of the Criminal Code**, that the Prisoner undergo counselling, medical and psychiatric treatment as the appropriate prison authorities deem necessary to facilitate his rehabilitation.

ii. The Court orders, pursuant to **Section 65(1)(b) of the Criminal Code**, that the Prisoner on his release shall indicate his residence to the Commissioner of Police and to the Director of Human Development in the Ministry responsible for Human Development, Women and Youth, and shall comply with such other requirements as the Commissioner of Police may specify for the protection of the public.

Candace Nanton
High Court Judge
Senior Courts Belize
Dated: 01st November, 2024