

IN THE SENIOR COURTS OF BELIZE
CENTRAL SESSION- BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

INDICTMENT NO. C118 OF 2023

BETWEEN:

THE KING

and

EXJAVIER MOH

Before:

The Honourable Madame Natalie Creary-Dixon, J

Appearances:

Mr. Cecil Ramirez, Senior Crown Counsel, for the Crown

Mr. John Nembhard, for the Accused

2024: 14, 20 May
04, 21, 28 June
04, 17, 30 July
17, 30 September
23 October

SENTENCING JUDGMENT

[1] **NATALIE CREARY-DIXON, J:** On July 18, 2024, after a contested trial, EM (hereinafter referred to as “the Convicted man”) was found guilty of one count of assault of a child by penetration contrary to section 47B of the **Criminal Code Chapter 101 of the Substantive Laws of Belize Revised Edition 2020 (“the Code”)** and one count of sexual assault contrary to Section 45A (1)(a)(i) of the Code, wherein he used his finger to penetrate the vagina of “MA”(“the complainant”) on June 16, 2022, and sucked her skin above her breast on June 27, 2022.

EM now stands to be sentenced by the Court.

The Court requested and received the following documents in order to construct a fair sentence:

- (1) The Social Inquiry Report
- (2) The Victim Impact Statement
- (3) The Antecedent Report

THE SOCIAL INQUIRY REPORT(SIR)

[2] The SIR described the 58-year-old convicted man as exhibiting deep faith, hard-working and resilient; honest and forthright; the main breadwinner for his family of three children, uncle, grandmother, and mother. Interestingly, he told the interviewer that “what is being said about him is untrue”, yet the interviewer concluded that “it was evident that he feels remorse for what occurred”. There were no areas of concern as the convicted man himself announced that he did not display any traumatic events or experience any neglect or abuse himself; He is a minimum risk of re-offending.

THE VICTIM IMPACT STATEMENT

[3] The 14-year-old virtual complainant (“VC”) stated that her life has never

been the same since the incident; her life ended up in a downward spiral, “because of Exjavier Moh who I have known from I was little taking advantage of me”. She now faces judgment from her sister and her previously good relationship with her mother was destroyed because her mother was disappointed in her. She finds it extremely difficult to concentrate in school; she was sent to live with her father but ran away and was eventually placed in a home. She also has behavioural issues and became rebellious. She finds herself crying and overwhelmed at times and is very depressed. She is currently seeing a Counsellor as she was emotionally and psychologically affected.

CRIMINAL ANTECEDENT HISTORY

- [4] The convicted man had a previous conviction for use of deadly means of harm with intent to do harm”, as well as a minor infraction for not wearing a mask.

THE LAW

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

- [5] Section 47B of the Criminal Code states:

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

Count 2: Sexual Assault Contrary to Section 45A(1) (a)(i) of the Code

- [6] According to Section 45A(1)(a)(i):

(i) *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) ...

(iii) *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.”*

[7] The above offences carry terms of imprisonment upon conviction. The Court considered the appropriateness of imposing a custodial sentence. In this regard, the Court considered the following provisions of the Penal System (Alternative Sentences) Act:

Section 28(1) 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”.

Section 31 (1) goes on to state that:

“... 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... 2. The gravity of a punishment must be commensurate with the gravity of the offence....”

[8] Before concluding this exercise of determining the appropriateness or otherwise of a custodial sentence, the Court must also consider the objectives of sentencing as outlined in the decision of the CCJ in **Calvin Ramcharran v DPP [2022] CCJ 4 (AJ) GY** on this issue, per Barrow J CCJ:

[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.

[9] The Court therefore concluded that a custodial sentence is warranted because:

(i) The offence is quite serious; the virtual complainant has suffered psychological and emotional damage for which she is still undergoing counselling.

(ii) This offence is prevalent in the Cayo District and by extension in Belize; a custodial sentence would serve the sentencing aim which addresses the public interest in preventing and punishing sexual offences.

(iii) There is a need to deter the convicted man and others from taking advantage of innocent children

[10] Having considered that a custodial sentence is warranted, the Court now looks to the apex Court the Caribbean Court of Justice in the decision of **Teerath Persaud v R (2018) 93 WIR 132** for assistance in constructing a just sentence.

[11] The Court would, as is the prescribed procedure under **Persaud**, consider the aggravating and mitigating factors of the offending to arrive at a starting point. The Court would then individualize the sentence by adjusting the starting point, if appropriate, upon considering the aggravating and mitigating factors of the offender.

[12] As Belize does not yet have its own sentencing guidelines, the Court finds instructive, the "**Compendium Sentencing Guideline of The Eastern**

Caribbean Supreme Court (“the ECSG Guidelines”) The approach to sentencing in the ECSG, is in accordance with the methodology suggested in **Persaud**.

In accordance with **Persaud** and the ECSG, the first step in constructing the sentence is to first assess the starting point for offences by considering 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 of the offence are considered, and an appropriate starting point is determined within that identified range.

Factors relative to the Offender are then identified, which may result in an upward or downward adjustment to the starting point, or in some cases no adjustment at all.

Credit is also applied for a guilty plea (not applicable this case) as well as deductions for any time spent in pre-trial custody (also not applicable in this case).

The remaining figure is thereafter assessed against the totality principle, to ensure that the sentence which is imposed is neither too lenient or excessive, but is commensurate with the gravity of the offence.

Assault of a Child by Penetration: The Starting point

[13] The Court assessed the harm caused by the offence as high (category 2), because of the age of the victim who was a mere 12 years old at the time; and also because of the psychological impact of the offence on the victim (the victim is still attending counselling on account of the ordeal).

[14] The Court next assessed the seriousness of the offence (that is the culpability of the Offender) to be high due to the following factors: (a)

there was an abuse of the position of trust; the convicted man destroyed the trust in the family setting as the once close relationship between the mother and victim was damaged and they are now estranged; (b) the significant disparity in age between the parties (the victim was 12 and the convicted man was over 50 years old); (c) the convicted man threatened to harm the complainant's family if she told anyone about the incident.

[15] 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 30- 60% of the maximum penalty, with a suggested starting point of 45% of the maximum penalty¹. Given the aggravating factors of the offence, such as the significant age disparity and the abuse of trust, this Court is of the view that a more appropriate starting point would be 50% of the maximum sentence. This figure would also be in alignment with sentences normally imposed in this region, for this type of offence². The starting point would therefore be 15 years.

[16] Having established the starting point, the Court will now look at the aggravating and mitigating factors of the **offence** - taking care not to double count factors already considered- to make any necessary adjustments to the starting point.

Aggravating Factors of the offence

These types of offences are very prevalent in the Cayo District where the incident occurred. For this factor, there would be an upward adjustment of the starting point of 2 years.

¹ Where the maximum penalty is life, "x" represents 30 years

² An example of the sentences imposed for these types of offences is found in the CCJ's decision of **AB v DPP, 2019] IEHC 214** a case from Guyana, which found that life sentences with a minimum term of 20 years imprisonment for sexual activity with a child were appropriate.

Mitigating Factors of the offence

There were no physical injuries to the victim save and except for the act of penetration; in addition, no weapon was used in the commission of the offence. For this, the Court would deduct the 2 years just added and now will individualize the sentence from a suitable starting point of 15 years.

- [17] The Court takes notice of the mandatory minimum offence to be imposed for this offence. The Court is aware that on the authority of Section 160 (1) of the Indictable Procedure Act, the Court the Court may depart from the mandatory minimum sentence where the circumstances of the case so warrant it:

(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.

- (1) This statutory exception is supported by the case of Zita Shol 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*”.³

- (2) 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

³ Para. 19

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.

- (3) 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 (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".

- [18] Considering the circumstances of this case, the Court is of the view that the mandatory minimum of twelve years would not be disproportionate because the convicted man was significantly older than the VC; further, there was evidence that he knew her age at the time he committed the offence; he also abused the trust reposed in him as a family friend; he destroyed a family unit; the VC suffered emotional and psychological harm; he threatened the VC; Lastly, the assault was ongoing as the

second offence happened a mere two weeks after the first.

The Court is satisfied that a starting point of 15 years imprisonment, is appropriate.

As required in the sentencing methodologies mentioned above, the Court will further consider any aggravating and mitigating circumstances of this offence and offender, that were not considered in arriving at the starting point.

Aggravating feature of the offence

[19] The Court considered that an aggravating feature of the offence is the convicted man's forcible confinement of the VC in order to carry out the offence: he locked her in the bus (from his driver's side); the Court considers that an upward adjustment of 2 years is warranted in the circumstances; this would take the sentence to 17 years.

[20] Secondly, there was contact with the genitals. As this is the inherent nature of the offence of penetration, the Court will not make an upward adjustment for this factor, as it would already have been considered.

[21] There are no other mitigating factors of this offence, that have not already been considered. The Court will now individualize the sentence by making a downward or upward adjustment to the starting point for the mitigating and aggravating factors relative to the **offender**.

Factors Affecting the Offender

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

Aggravating Factors •

The convicted man had a few traffic violations such as failing to wear a mask in 2020; driving a motor vehicle without insurance in 2021 and driving a motor vehicle with alcohol concentration above the prescribed limit. The Court did not consider that there should be an upward

adjustment for these infractions that were unrelated to the present case.

Mitigating factors •

The Court considered that the convicted man has no prior convictions of this nature. For this, the Court grants a downward adjustment of 2 years, taking the proposed sentence down to 15 years.

- [23] The Court further considered the convicted man's positive SIR: The report assessed the convicted man as a hard-working family man. The report further stated that the convicted man has a low to medium risk of offending; this, the Court considered favourably, and will add that the convicted man is not beyond rehabilitation; the Court hastens to add however, that this factor this does not negate the stance that a custodial sentence is warranted due to the severity and prevalence of this offence as well as the particular aggravating features of this case. In the circumstances, for the fact that the convicted man has a low risk of offending, is hardworking, and a family man, the Court considers that the cumulative effect of his positive SIR is a downward adjustment of 3 years. The remaining sentence is 12 years.

Starting point-Sexual Assault

- [24] This count is covered under the ECSG heading for sexual offences, and indecency. Under this heading, the harm caused by this offending would be high, because there was psychological harm caused to the VC who was a mere 12 years old at the time of the offences. The VC noted in her victim impact statement that these incidents affected her relationship with her family, and she feels overwhelmed and cries at times.
- [25] Under the Guidelines the Court assessed the seriousness i.e. culpability of the Offender to be high because there was contact with the VC's

genitals; a significant disparity in age between the convicted man and the VC; more than one count; abuse of position of trust and a threat made to the VC.

- [26] Under the Guidelines, offences falling within category 2 of harm i.e. high and with a high level of seriousness should attract a starting point of 45% of the maximum penalty, which for this offence is 12 years. 45% of 12 amounts to 5.4; when deducted from 12 to arrive at the starting point, the resulting figure is 6.6. (rounded down to 7), the starting point for this offence is 7 years.

There are no other aggravating or mitigating features of this offence that have not already been considered in arriving at a starting point.

The Court now makes the upward or downward adjustment to this figure, relative to the aggravating and mitigating factors of the **offender**.

Aggravating factors relative to the offender

- [27] The convicted man seems to have been grooming the VC to have a sexual relationship with her; he has previous convictions for minor offences; he threatened the VC. As these factors have already been considered in relation to arriving at the starting point, no adjustments will be made at this point.

Mitigating factors relative to the offender:

- [28] The convicted man's SIR describes him in favourable terms. The Court will again indicate that this does not negate the stance that a custodial term is warranted. The Court will however make a downward adjustment of 2 years, taking the sentence to 5 years.
- [29] In the penultimate stage of this sentencing process, the Court must also have regard to the totality principle outlined by the CCJ in the case of

Linton Pompey, as the Convict is being sentenced for two offences, at paragraph 33, that case outlines that:

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 the appropriate sentence for each individual offence; (b) Ask oneself whether, if such sentences are served concurrently, the total length of time that the prisoner will serve appropriately reflects the full seriousness of his crime; if so, then the sentences should be made to run concurrently. If not, and it is felt that justice requires a longer period of incarceration, then the sentences should run consecutively, test the overall sentence against the requirement that it be just and proportionate;”

In the present case, the total length of time that the convicted man will serve appropriately reflects the gravity of the offences, and his overall criminality; the Court therefore orders that the sentences should be made to run concurrently, to reflect a just and appropriate sentence.

Time spent on remand

[30] The Court notes that in **Romeo da Costa Hall v The Queen**⁴ the CCJ highlighted the importance of awarding full credit for the time spent in pre-trial custody; however, in this case, the Convict was on bail throughout the trial and was remanded only after conviction. No adjustment was therefore made for time spent in pre-trial custody.

Disposition

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

- (i) On Count 1 of the indictment for Assault of a Child by Penetration the sentence is twelve (12) years imprisonment.

⁴ Criminal Appeal No. 15 of 2008

(ii) On Count 2 of the indictment for Sexual assault the sentence is five years

The sentences are to run concurrently with effect from the date of this judgment that is 23rd October 2024.

[32] The Court also makes the following orders:

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

Given this 23rd day of **October 2024**

[33] This is the Judgment of the Court.

Natalie Creary-Dixon; J
High Court Judge

By the Court Registrar