

**IN THE SENIOUR COURTS OF BELIZE
CENTRAL SESSION – CITY OF BELMOPAN, CAYO DISTRICT**

IN THE HIGH COURTS OF JUSTICE

Indictment No. C16 of 2022

Between:

The King

and

[1] **Assir Chavez**

Defendant

Appearances:

Ms. Natasha Mohamed, counsel for the King.

Mr. Hurl Hamilton, counsel for the Defendant.

Dates:

Trial Dates:	2024:	April 24 April 30 May 1, 6, and 22
Judgment Date:	2024:	June 14
Sentencing Date:	2024:	December 16

JUDGMENT ON SENTENCING

[1] **CUMBERBATCH, HON. MR. FRANCIS M.;** J:The convicted man was convicted for the offences of Rape of a Child aged 10 years old contrary to the provisions of

section 47A of the **Criminal Code**¹ CAP 101 of the Substantive Laws of Belize (Revised Edition) 2020 and assault of the said child by intentionally penetrating the vagina of the said child with his finger, that penetration being sexual in nature contrary to the provisions of section 47B of the **Criminal Code**² aforesaid. These offences were committed on a date unknown between the 15 January and 1 February 2020.

- [2] After the conviction of the convicted man aforesaid the court ordered a social inquiry report be produced and a report be provided on his conduct whilst an inmate at the Belize Central Prison. A date was set for a sentencing hearing.

The Facts

- [3] The victim visited the home of the convicted man and together with his nieces she was playing a game of hide and seek. The convicted man joined the game and at one stage pulled the Virtual Complainant into his room and raped her. Afterwards whilst the victim and her friends were watching television the convicted man sat next to her and under the cover of a blanket placed his finger in her vagina.

¹ CAP101 Criminal Code of the Substantive Laws of Belize Revised Edition 2020

47A. Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to—
(a) imprisonment for not less than twelve years, but may extend to life, where that other person was over fourteen but under the age of sixteen years at the time the offence was committed; or (b) 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.

² CAP101 Criminal Code of the Substantive Laws of Belize Revised Edition 2020

47B. 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.

The Social Inquiry Report

- [4] This report discloses that the convicted man was brought up by his grandparents. He was able to complete his primary education and also attended secondary school which was financed by his earnings from various jobs and contributions from his grandparents. He also became a partner in his grandfather's busito business.
- [5] The convicted man expressed his remorse to the virtual complainant and what he did to her. He revealed to the Community Rehabilitation Officer that he had undergone a period of depression and with guidance from his grandfather sought the assistance of a therapist. He is not known to be a violent person nor apart from one traffic offence is he known to be involved in criminal activities.
- [6] The convicted man's grandfather also gave live testimony on his behalf and stated that at an early age he taught him to work and perused his school reports. He further stated that after he lost his job and was unable to pay the convicted man's school fees the convicted man found odd jobs to earn money to allow him to remain in school and pursue his studies. He sought the court's leniency.
- [7] Carlos Ramos an Evangelical pastor also testified on behalf of the convicted man. Mr Ramos knows the convicted man as a congregant at his church and as a fellow busito driver. He describes the convicted man as a good and respectful person who does not get into trouble. He too sought the court's leniency and asks the court to afford the convicted man a second opportunity in life.
- [8] The secretary of the Busito Association testified that the convicted man is known to be an honest and respectful driver of whom he has not received any complaints of

misconduct from his passengers. He too seeks the court's leniency in sentencing the convicted man.

The Prison Report

- [10] This report states that the convicted man has not violated any prison rules since his incarceration awaiting sentence. He has not participated in any rehabilitation programs.

The Victim Impact Statements

- [11] The court received victim impact statements from the victim and her mother. The victim disclosed the traumatic effects she experienced as a result of being raped. She remarked that the convicted man took her innocence, happiness and childhood none of which could be replaced. She stated that she lived in a protected home and did not realise the nature and extent of the dangers in the world outside of her home.
- [12] The victim's mother stated that prior to this incident her daughter was happy, playful and outgoing. However thereafter she isolated herself, and her self-confidence deteriorated. The mother went on to state that she regrets not being as strict with her daughter as her parents were with her, hence, she continues to hold some guilt for what happened to her daughter.

Submissions

- [13] Mr Hamilton for the convicted man submitted that at the time of the commission of these offences the convicted man was on the cusp of adulthood in that he was just 18 years old. The SI report indicated that he has only been previously convicted for minor traffic offences. The convicted man he submits is genuinely sorry and has expressed his remorse. He reminded the court of the testimony of each of the character witnesses. He referred the court to the C/A decision of **Darren Martinez**

*v The King*³. In that case the appellant was convicted for the offence of assault of a child under the age of sixteen years contrary to the provisions of section 47B of the **Criminal Code**. The court departed from the mandatory minimum sentence imposed by the learned trial judge and reduced the sentence to one of 5 years imprisonment.

[14] Defence Counsel further submitted that the convicted man has a very good family support system to assist him in his re-entry to the society as a factor to be considered. He also asked the court to consider a reduced sentence on the grounds of delay.

[15] Ms. Mohammed for the Crown submitted that the decision cited and relied on by defence counsel only supports the convicted man for the conviction for assault of a child under 16 years of age contrary to section 47B of the **Criminal Code**. She further contends that section 160(2)⁴ of the **Indictable Procedures Act** expressly prohibits the court from making a reduction of the mandatory minimum sentence of 15 years imprisonment for the offence of rape of a ten-year-old child.

[16] Crown Counsel asked the court to consider the traumatic impact and psychological effects of the rape committed to the virtual complainant as set out in the victim

³Criminal Appeal No. 35 of 2019 pages 16 – 17 paras. 55 - 56

⁴Indictable Procedure Act CAP 96 section 160 of the Substantive Laws of Belize Revised Edition 2020

160.-(2) Notwithstanding the provisions of this section, the court may not sentence an offender who is eighteen years of age or over, to less than the prescribed mandatory minimum term, where the crime he has been convicted of is— (a) murder; or (b) an offence under section 46 (rape), 47(1) (unlawful sexual intercourse with person under the age of fourteen years), 47A (rape of a child) or 62 (incest) of the Code.

impact statement and not to depart from the mandatory minimum sentence provided in section 47A of the **Criminal Code**.

The Law

[17] I will apply the classical principles of sentencing, to wit, retribution deterrence, prevention and rehabilitation to the facts and circumstances of the case at *bar*.

Retribution

[18] The facts disclose that immediately prior to being raped the virtual complainant and her friends of similar age were engaged in playing the game of hide and seek a game which is popular amongst children of that age, The convicted man purported to join the game with them and during the course thereof proceeded to lure the Virtual complainant into his bedroom and rape her. Shortly thereafter whilst under the pretence of watching a movie he sat next to the virtual complainant and under cover of a blanket rubbed her leg and placed his finger in her vagina.

[19] The effects of the convicted man 's conduct caused and according to her Victim Impact Statement continues to cause the virtual complainant to isolate herself and she worries about how she lost her innocence. The court must show its abhorrence for these dastardly acts of sexual abuse of minor girls by the sentence it imposes.

Deterrence

[20] This phenomenon of unlawful sexual activity involving little girls has attained alarming proportions within this jurisdiction. Indeed, a pilot project for the creation of a full-time sexual offences court has recently been concluded by the Senior Court of this jurisdiction.

[21] There could be no doubt that the convicted man targeted the Virtual complainant for his sexual predilections and after raping her proceeded to assault her by placing his

finger in her vagina. This principle is intended to deter those for are prone to re-offend and to deter those members of the society who may be contemplating offending in like manner.

Prevention

[22] This principle is intended to deter those repeat offenders for whom the sound of the shutting of the iron cell door has no effect and are likely to re-offend and those persons for whom a lengthy or indeterminate sentence would be appropriate.

Rehabilitation

[23] The fact that the convicted man has committed two horrific sexual offences against a ten-year-old child on the same day reeks of the possibility of him having a predilection for paedophilia. The prison report has disclosed that the convicted man has not commenced any rehabilitative program to assist him in controlling the urge to commit similar offences on his release from custody.

[24] Therefore, the court must impose as a part of his sentence an order for his rehabilitation to include attending programs to avoid committing sexual offences against minors or at all.

[25] The court will now consider the aggravating and mitigating factors herein.

[26] Aggravating Factors

1. The seriousness of these repeat offences.
2. The vulnerability of the victim because of her age.
3. The breach of trust the victim held with the convicted man who is the uncle of her playmates.
4. These offences were planned and premeditated,
5. The severe psychological harm to the virtual complainant.

6. The prevalence of these offences within the jurisdiction.

[27] Mitigating Factors on the Offence.

There are no mitigating factors relating to the commission of the offences.

[28] Mitigating Factors Relating to the Offender.

1. The convicted man 's prior clean criminal record.
2. The remorse expressed by the convicted man both when interviewed for the Social Inquiry Report and in court during his sentencing hearing.
3. The favourable remarks made of the convicted man by his relatives, his pastor and Secretary of the Busito association.

Sentence

[29] I have evaluated and balanced the aggravating and mitigating factors aforesaid and find that the aggravating factors substantially outweigh the mitigating ones. These offences were most heinous. The well thought out plans by the convicted man to pretend to be a participant in the game of hide and seek whilst intending to sexually abuse the virtual complainant and the execution thereof with its attendant consequences must be met with an appropriate sentence.

[30] The Virtual complainant has been deprived of the opportunity to participate in a consensual act of sexual intercourse for the first time after having attained maturity and with a person of her choice in an atmosphere of mutual love and affection.

[31] The court must unequivocally show its abhorrence for the convicted man 's horrendous conduct by the sentence it imposes.

[32] Sections 47A and 47B of the **Criminal Code** provide thus:

“47A. Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to–

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

47B. 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”.

[33] Section 160(1)(2) of the ***Indictable Procedures Act*** provides thus:

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.

(2) Notwithstanding the provisions of this section, the court may not sentence an offender who is eighteen years of age or over, to less than the prescribed mandatory minimum term, where the crime he has been convicted of is–

(a) (b) murder; or an offence under section 46 (rape), 47(1) (unlawful sexual intercourse with person under the age of fourteen years), 47A (rape of a child) or 62 (incest) of the Code”.

[34] Defence Counsel has submitted aforesaid that the court should take into consideration the favourable conditions applying to his client as stated aforesaid as good and sufficient reasons to impose lower sentences for the offences for which the convicted man has been convicted below the mandatory minimum sentences aforesaid.

[35] Crown Counsel submits that in respect of the conviction for the rape of a child the court is excluded from so doing pursuant to the provisions of section 160(2) of the **Indictable Procedures Act**.

[36] The court accepts that notwithstanding the fact that the court is not excluded from imposing a lower sentence than that prescribed in section 47B of the **Criminal Code** there must be special reasons for the court to impose a lower sentence, therefore.

[37] The court has considered the favourable remarks made about the convicted man aforesaid such as his willingness to work part time to earn money for the payment of his school fees after his grandfather was unable to do so, the fact that apart from minor traffic offences the convicted man has stayed within the ambit of the law. He

is considered to be a hard worker as a busito driver for which he has not had complaints made against him to the Busito Association.

[38] These factors without more do not constitute special reasons for the exercise of The Court's discretion aforesaid to impose a sentence lower than the mandatory minimum sentences of fifteen years and twelve years' imprisonment for convictions contrary to sections 47A and 47B respectively. Thus, the Court must go on to consider the proportionality principle aforesaid.

[39] Section 7⁵ of the **Constitution** provides thus:

"...No person shall be subjected to torture or to inhuman or degrading punishment or other treatment". (Emphasis added)

[40] Having considered the facts and circumstances in the commission of these offences and the personal circumstances of the convicted man, I find that the sentence of 5 years imprisonment as imposed by the C/A in **Martinez v The King** for the offence contrary to section 47B of the **Criminal Code** to be inadequate when I take into consideration the fact that this offence was committed after the convicted man had already raped and humiliated the virtual complainant. Thus, though the offences committed by the convicted man are most egregious I do not find the prescribed mandatory minimum sentences for the commission of the offences herein to be proportionate. Accordingly, I find a sentence of 6 years imprisonment appropriate for the commission of the offence contrary to section 47B of the **Criminal Code**.

[41] I now turn to consider the sentence for the commission of the offence of rape of a child contrary to section 47A aforesaid which prescribes that a mandatory minimum

⁵ Belize Constitution CAP4 Edition 7 November 2022 section 7

sentence of 15 years imprisonment shall be imposed. Moreover, section 160(2) restricts the court's ability to impose a lesser sentence herein.

[42] Conteh JA in the decision of ***Davis and Armbrister v Commissioner of Police***⁶ 2013 1 LRC 213 opined thus:

'Sentencing is essentially a judicial function and in the exercise of this function, courts must ensure that in any particular case the sentence should fit the crime and must be in keeping with the principle of proportionality'.

[43] The facts disclose that whilst there is no evidence of excessive physical violence committed on the virtual complainant over and above that which was used in the commission of the offence of rape. There was however a severe psychological impact on the Virtual complainant as a result of being raped. I find having considered all of the circumstances herein that a penalty of 15 years imprisonment would be excessive and disproportionate. Accordingly, I find a lesser sentence of ...8 years imprisonment to be appropriate.

[44] I have also considered the issue of delay as submitted by defence counsel. It is trite that inordinate delay is usually met with a reduction of the severity of the sentence imposed by the court. The offences were committed between the 15 January and 1 February 2020. On the 23 February 2020 the convicted man was granted bail which subsisted until his conviction. I do not find the delay of 4 years whilst the convicted man was on bail to be excessive to the extent that it merits a further reduction in the sentences imposed.

⁶*Davis and Armbrister v Commissioner of Police* [2013] 1 LRC 213 page 13

[45] Accordingly, the convicted man is sentenced to a period of imprisonment of 8 years for the offence of rape of a child and 6 years imprisonment for the offence of assault of the said child by intentionally penetrating the vagina of the said child with his finger, that penetration being sexual in nature. He shall be enrolled in appropriate rehabilitation programs to treat his predilection for pedophilia prior to his release from prison.

[46] The sentences shall run concurrently.

Hon. Mr. F M Cumberbatch

Justice of the High Courts