IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 0055/2022

BETWEEN:

THE KING

and

WF[1]

Defendant

Appearances:

Mr. Riis Cattouse, Senior Crown Counsel for the King

Defendant- Self-represented

2024: February 19; 20

March 08

May 15

INCEST, SEXUAL ASSAULT- SENTENCING

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

Introduction

[1] **NANTON, J.:** WF (hereinafter referred to as "the Convict") was indicted for two counts of incest, contrary to **Section 62 of the Criminal Code**[2], and two counts of sexual assault contrary to **Section 45A of the Criminal Code** arising out of incidents which took place during the period 31st March 2019 and 1st October 2020.

[2] The Convict was indicted on the 14th April 2022 and the trial by judge alone began on 19th February 2024 with his arraignment pursuant to **Section 65 A (2) (g) of the Indictable Procedure Act.**[3]

[3] On 8th of March 2024 the Court, having considered all the evidence, found the Convict guilty of all 4 counts of the indictment and the matter was adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP** [4].

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

i. Social Enquiry Report
ii. Psychiatric Report
iii. Criminal Antecedent Record
iv. Kolbe Prison Report
v. Victim Impact Statement

The Law

[5] **Counts 1 and 2 : Incest**

[2] Chapter 101 Criminal Code of the Laws of Belize Revised Edition 2020
[3] Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020
[4] [2020] CCJ 7 (AJ) GY at para 32

62.-(1) Any person who carnally knows another person who is to that person's knowledge, that person's grandchild, child, sibling, niece, nephew or parent, commits an offence and shall on conviction thereof be liable to imprisonment for not less than twelve years but may extend to imprisonment for life.

[6] Counts 3 and 4: Sexual Assault

45A.-*(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; or

(b) that person being made to touch the person's vagina, penis, anus or breast or any other part of the 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.

[7] **Sections 62** above must be read in conjunction with **Section 160 (1) of the Indictable Procedure Act**[5] (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.

[8] 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"*.

[5]Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020

[9] The decision of our Court of Appeal in **R v Zita Shol**[6] 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 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.*

[6] Criminal Application No. 2 of 2018

[10] The Court reasons that it is clearly entitled to follow the **Aubeeluck**[7] 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 by in **Bowen v Ferguson**.[8]

[11] 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**.

[12] 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.

[13] 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.*

[14] The Court has taken into account the prevalence, gravity and seriousness of this offence, the irreparable inflicted on the VC, the need to punish the Offender who is a repeat Offender, as well as the need to protect the society from serious harm by the Offender. 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

[7] [2011] 1 LRC 627
[8] Cr App 6/2015, decision dated 24 March 2017

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 all 4 counts on the Indictment.

[15] 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**[9] 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 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."*

[16] The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP**[10] 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*

[9] (2018) 93 WIR 132
[10] [2022] CCJ 4 (AJ) GY

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)."

The Facts

[17] On two separate occasions in the month of April 2019 the Convict had sexual intercourse with the Virtual Complainant (hereinafter the VC), whom he knew to be his niece. On one occasion in September 2020 and on another occasion on the 12th October 2020 the Convict intentionally touched the vagina of the VC, that touching being sexual in nature.

[18] The VC was born on 1st October 2007. Sometime in April 2019, when she was 11 years old, she and her brother were sleeping on the floor when she opened her eyes and saw a shadow of someone walking out the door. She looked through the window and saw that it was her mother's brother, her uncle, the Convict. He told her to meet him at his bedroom. When she got to his room, which is located at the back of her grandfather's house, he told her to lay down. She did as he said and then he told her to take off her pants, which she did. She said that they were both laying down when he pulled her panty to the side and inserted his penis into her vagina. He didn't say anything to her, and she didn't say anything to him. After it was done, she returned home and got ready for school.

[19] She said that about two weeks later she and her brother were sleeping on a mattress on the floor in the hall of her house when she felt someone touch her cheek. When

she opened her eyes, her uncle was standing in front of her and then told her that he wanted to see her. He left and she then followed him like before. He told her to lay down on the bed, he took off his pants and told her to take off her pants. She lay by the side of his bed and he came on top of her and inserted his penis into her vagina. After about 5 minutes she struggled herself out from under his body, and she told him that she was going home. He told her that she should stay so that he could do it a little bit longer, since she didn't have school until 8:00 o clock, but she told him that she didn't care and that she was leaving anyway. She said she went home and got dressed for school.

[20] On an unspecified date in September 2020, when she was 12 years old, the VC said that she was going to see her aunt at her house. She saw the Convict seated in the chair and asked him if her aunt J was at home. He told her, yes. So, she went inside to check, but didn't see her aunt. She told the Convict that he was a liar and while she was returning outside he grabbed her by her hand and pulled her onto his lap and started touching her vagina. He was holding her down, but she struggled herself and knocked him at his chin with her elbow and went home.

[21] On 12th October 2020, then 13 years old, the VC was in her room when she heard the Convict's voice outside her window. She got up, turned on the light and opened the window. She asked him what he wanted and that was when he pushed his hand through the window and started touching her vagina. She said he had her in his grip, but she managed to release his grip with her other hand. He left, so she closed the window.

[22] She said that after the first occasion in 2019 the Convict started giving her money and chocolate.

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**[11], 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 Sentencing Guideline of The Eastern Caribbean Supreme Court Sexual Offences"**[12](the "ECSG"). Counts 1 and 2 are covered under the guideline for,

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[11] [2020] CCJ 7 (AJ) GY.

[12] Re-Issue, 8th November 2021.

"Incest"[13] and Counts 3 and 4: sexual assault under the guideline for **"Indecency"**[14]

[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 (none in this case) and deductions for any time spent in pre-trial custody.

Incest: The Starting Point

[27] The Court considers the harm caused by this offending as high, because in its view there was psychological harm caused to the VC who was a mere 11 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 members and also affected her ability to concentrate at school and her grades suffered because of it.

[28] 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, a level of grooming, repetition of the offence and a significant disparity of age.

[29] 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 ranges of 35% - 65% of the maximum penalty.

[13] ECSG p 32
[14] ECSG p 26

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

Aggravating Factors

- Repeated incidents
- Use of gifts of money/chocolate to silence Victim
- Significant age difference
- Parties lived together in the same family land

Mitigating Factors

- No violence or threats of violence

[31] The CCJ, in the Guyanese case of **AB v DPP**[15] 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 this offence 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.

[32] After considering the above principles and the facts of this case, in particular the abuse of trust and the grooming in this case would choose a starting point of 50% of the maximum penalty of life imprisonment. The Court therefore sets the starting point at a determinate sentence of **15 years** imprisonment.

[15] [2023] CCJ 8 (AJ) GY.

Sexual Assault: The Starting Point

[33] The Court considers the harm caused by this offending as high, because in its view 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 members and also affected her ability to concentrate at school and her grades suffered because of it.

[34] The Court assessed the seriousness i.e. culpability of the Offender to be medium due to the following factors: there was significant abuse of trust, grooming, repetition of the offence and a significant disparity of age.

[35] The ECSG states that offences falling within category 2 of harm i.e. high and with a medium level of seriousness should attract a starting point between the ranges of 15% - 45% of the maximum penalty, which for this offence is 12 years.

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

Aggravating Factors

- Repeated incidents
- Use of gifts of money/chocolate presumably to silence victim
- Significant age difference
- Parties lived together in the same family land- abuse of close familial relationship

Mitigating Factors

- No violence or threats of violence

[37] The Court determines that a starting point at 30% of the maximum sentence of 12 years as an appropriate starting point. The Court therefore, sets the starting point for both incidents of sexual assault at **4 years** imprisonment.

Factors Affecting the Offender

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

Aggravating factors

- Previous convictions for sexual offences
- Offence committed while on parole
- Violation of Prison Rules: possession of an unauthorised article

Mitigating factors

- None

[39] To the starting points outlined above the Court makes an upward adjustment for the fact that the Convict is a repeat offender, who has not learnt from his past mistakes. The Convict has established a continuous pattern of sexual offences against women with 2 convictions for rape and attempted rape. The society of Belize needs to be protected from sexual predators and it is apparent that this Convict falls into such a category. While the Court will not go so far as to state that he is beyond rehabilitation, his patterns of offending certainly suggest that he has not yet rehabilitated despite, having served a significant portion of his adult life behind bars, and seems hell bent on continuing to offend against the laws of Belize that have been put in place to protect against the particularly vulnerable in our society. These present offences were committed whilst he was on parole for convicted sexual offences. For that reason the Court finds it appropriate to make a 30% upward adjustment to the starting points outlined above.

[40] For the two counts of incest that figure represents an upward adjustment of **4.5 years** and for the two counts of sexual assault that results in an upward adjustment of **1 year** (rounded down).

[41] The Court must also have regard to the totality principle outlined by the CCJ in ***Pompey*** as the Prisoner is being sentenced for four offences against the VC, 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;"*

[42] 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.

[43] The Court notes that in **Romeo da Costa Hall v The Queen**[16] the CCJ highlighted the importance of awarding full credit for the time spent in pre-trial custody.

[44] However, the Court is also mindful of the provisions of **Section 161 of the Indictable Procedure Act**:

> *"The court sentences any person to undergo a term of imprisonment for a crime, and the person is already undergoing, or has been at the same sitting of the court sentenced to undergo imprisonment for another crime, the court may direct that the imprisonment shall commence at the expiration of the imprisonment which the person is then undergoing, or has been so previously sentences to undergo, as aforesaid."*

[16] [2011] CCJ 6 (AJ)

[45] The Court is also guided by the interpretation of that section by our Court of Appeal in **Winston Dennison v R**[17]**,** that it requires an order by this Court as to how this sentence is going to run in relation to the one the Prisoner was already serving. In this regard the Court relies on the decision of the CCJ in **Bridgelall v Hariprashad**[18] where they opined, per Saunders JCCJ, as he then was: *"consecutive sentences may be given where the offences arise out of unrelated facts or incidents."*

[46] The Convict had been arrested and incarcerated relative to these offences since October 20th 2020; however, a significant portion of that time was spent serving a remaining term of imprisonment on an unrelated offence. That term of imprisonment ended on April 1st 2023. That period will not be counted. Therefore in relation to this offence only the Convict has spent one year one month and 2 days in pre-trial custody for these offences for which will be awarded full credit.

Disposition

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

i. On Count 1 of the indictment for incest the sentence is 19 years 6 months imprisonment.
ii. On Count 2 of the indictment for incest the sentence is 19 years 6 months imprisonment.
iii. On Count 3 of the indictment for sexual assault the sentence is 5 years imprisonment.
iv. On Count 4 of the indictment for sexual assault the sentence is 5 years imprisonment.
v. The sentences are to run concurrently with effect from April 2nd 2023.

[48] The Court also makes the following orders:

[17] Cr App 1 of 2013
[18] (2017) 90 WIR 300

i. The Court orders, pursuant to **Section 65(1) (a) of the Criminal Code**, that the Prisoner undergo mandatory 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 not change his residence without prior notification 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 15th May, 2024