IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCR2019/001
GY Criminal Appeal No. 29 of 2015

BETWEEN

LINTON POMPEY **APPELLANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Before The Honourables **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr C A Nigel Hughes and Mr Ronald Daniels for the Appellant

Mrs Shalimar Ali-Hack, DPP, Ms Teshana Lake and Ms Natasha Backer for the Respondent

MAJORITY JUDGMENT
of
The Honourable Mr Justice Saunders, President
and the Honourable Justices, Barrow, Rajnauth-Lee, Burgess and Jamadar
Delivered by The Honourable Mr Justice Saunders

and
RESPECTIVE JUDGMENTS CONCURRING IN THE MAJORITY JUDGMENT
of
The Honourable Mme Justice Rajnauth-Lee
and
The Honourable Mr Justice Jamadar
and
JOINT DISSENTING JUDGMENT
of
The Honourable Justices Wit and Anderson

Delivered on the 14th day of May 2020

MAJORITY JUDGMENT DELIVERED BY THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[1] Sentencing is one of the most challenging aspects of a judge's functions. It is a tremendous responsibility vested in a judge that no one else in society may lawfully undertake. This awesome duty is often discharged in the face of impassioned expectations of victims and convicted persons alike, their respective families and friends and, of course, the public and the Press. A dis-service is done to trial judges when there are no guidelines to aid the exercise of their vast sentencing discretion.

[2] Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court *must* step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law.

[3] A full Bench of this Court sat and determined Linton Pompey's case. He had appealed against sentences imposed on him for three sexual offences. Some of us, if we had sentenced Pompey in the first instance, would have given him a more severe sentence than the 17 years the trial judge imposed for his second rape of a minor. Some of us would have given him a far more lenient sentence, even for the repeated rape of the child. We unanimously agree, however, that the trial judge's imposition of a cumulative sentence of 37 years in jail was excessive. While Justices Wit and Anderson would have reduced Pompey's sentence to 9 years, all the other members of the Bench are agreed that Pompey should serve the 17-year sentence concurrently with the sentences prescribed for his other two offences.

Factual Background

[4] On May 29, 2013, Pompey was charged under the provisions of the **Sexual Offences Act**[1]. Two of his three offences were for rape of a child under 16 years of

[1] Cap. 8:03

age.[2] The third was for sexual activity with a child under 16 years of age[3]. The offences occurred on three separate occasions over a course of approximately eight months. The child is the niece of Pompey's common law spouse. She was 14 years old at the time of each offence. Pompey knew her since she was in Primary School.

[5] The first offence occurred in May 2011. The child was at her Granny's, picking cherries with her cousins. Pompey called her. He engaged her in conversation, lifted her jersey and fondled her breasts.

[6] A month later, the girl again went by her Grandmother. She was there with her cousin playing cricket. Pompey was also there. He called her over, separating her from her cousin. He made her lie in a chair and he had sexual intercourse with her. She tried to stop him, but it was to no avail. His response to her attempts to shove him off was that he was 'breaking just now'. After his sickening act, Pompey threatened the little girl in case she dared tell. The child told no one.

[7] The third offence occurred in January 2012. The girl was again at her Grandmother's. She was speaking with Pompey's daughter when Pompey ordered her to meet him in the kitchen. He told her that he wanted to have sex with her and, again, he proceeded to rape her. He did so this time on a counter in the kitchen. On this occasion, unknown to Pompey, there was an eyewitness. The child's brother-in-law was upstairs and heard the commotion downstairs. He saw what was taking place through a hole in the upstairs flooring. The girl also noticed him. Pompey later beckoned the child into another room where he attempted to bribe her with a thousand-dollar bill. She told him she didn't want his money. She went home and again said nothing. Until the brother-in-law later spoke to her on the phone. She was afraid and ashamed. But she summoned up the courage to tell her mother what had occurred. The family was in consternation. They convened a meeting at Granny's. The child told them what she had been through. The brother-in-law told them what he had seen. The girl was later taken to the hospital. She gave a statement to the police.

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[2] Section 10(3)
[3] Section 11(3)

The Proceedings in the Courts Below

[8] Pompey was arrested and charged with the three offences. He pleaded Not Guilty to each of them. His trial began on 10 September 2015. All three offences were heard together. The child and the brother-in-law were among several witnesses called by the Prosecution. The accused elected to give a statement from the dock professing innocence. Pompey also called as a witness his daughter, with whom the violated girl regularly played. This proved to be a vain effort to cast the young survivor as a liar. Pompey's daughter was 11 years old when the third incident occurred.

[9] On 21 September 2015, the jury found Pompey guilty on all three counts. The judge sentenced him immediately after the verdict came in. By way of mitigation, his counsel indicated that he was 50 years old, a father of 12 children, had 'never showed disrespect' to his family for the 11 years he lived there and had never come to the attention of the police prior to these incidents. Counsel asked the Trial Judge to exercise leniency.

[10] The Trial Judge passed sentences of 5 years for the charge of sexual activity, that is the breast fondling charge, and 15 years and 17 years respectively for the first and second rape charges. The judge ordered that the three sentences should run *consecutively*. The consequence of this was that Pompey was effectively given a 37-year sentence.

[11] On 30 September 2015, Pompey appealed to the Court of Appeal. He appealed both his conviction and the severity of his sentences. As to the overall sentence, Pompey's counsel complained that no reasons were given for the imposition of consecutive sentences. The Court of Appeal dismissed the appeal, against both the conviction and the sentence. The court justified the judge's decision to have the sentences run consecutively on the basis that there were three separate incidents over a period of 8-9 months. The court also noted that rape offences, and particularly rape of child family members, were prevalent and must be treated with condignly. It was important, the court warned, to send a strong message that such offences would not be tolerated. Further, Pompey's conduct, it was noted,

amounted to on-going sexual interference with a child in relation to whom he was in a position of trust.

[12] This Court granted Pompey permission to appeal, but only against his sentences. Two main questions arise for determination. Firstly, whether the individual sentences, or any of them, are excessive. Secondly, whether the sentences were properly made to run consecutively. These issues are in fact inextricably interwoven. If in this judgment we appear to treat with them separately it is purely for the sake of convenience. But we recognise that a judge sentencing a convicted person does not have that luxury.

[13] In addressing the two questions, this Opinion proposes to do four things. First, we look at the issue of concurrent and consecutive sentences in the context of *the totality principle*. We conclude that this principle was breached in this case. Secondly, we describe briefly the sentencing approaches that were available to the trial judge and we assess how the judge addressed those approaches. Thirdly, we consider how the breach of the totality principle may be remedied by this Court. Finally, we provide some general guidance and recommendations.

The Totality Principle and Concurrent and Consecutive Sentences

[14] This Court briefly addressed the question of consecutive versus concurrent sentences in *Bridgelall v Hariprashad.*[4] That was a case where the police discovered cocaine both in the home and in the yard of the accused. Separate charges were laid summarily in respect of each discovery. The sentencing limit of the Magistrate for each charge was five years imprisonment. The Magistrate sentenced Bridgelall to the maximum on each charge. The Magistrate further ordered that the sentences be served consecutively. In effect, the Magistrate ended up imposing a ten-year sentence on Bridgelall.

[15] There were two problems with what the Magistrate did. Firstly, *barring special circumstances*, courts should normally impose concurrent sentences where a person

[4] [2017] CCJ 8 (AJ) (Guy)

is convicted of multiple offences which arise out of the same set of facts or the same incident. If the Magistrate had given regard to this norm the Magistrate should have ordered Bridgelall's sentences to be served *concurrently*. The second problem with the Magistrate's sentence in *Bridgelall* was that by imposing, in effect, a ten-year sentence on Bridgelall, the Magistrate was exceeding her statutory sentencing limit of five years.

[16] The "special circumstances" mentioned in the previous paragraph is, in part, a veiled reference to what is known as "the totality principle"[5]. The principle may be thought of in much the same fashion as one may express the principle of proportionality.[6] The sentence imposed upon a convicted person should ultimately be neither too harsh nor too lenient. It must be proportionate. The totality principle requires that when a judge sentences an offender for more than a single offence, the judge must give a sentence that reflects all the offending behaviour that is before the court. But this is subject to the notion that, ultimately, the total or overall sentence must be just and proportionate. This remains the case whether the individual sentences are structured to be served concurrently or consecutively.

[17] If, therefore, a judge is minded to order that two or more sentences should be served consecutively, before pronouncing the order, the judge must factor the totality principle by considering the effect of the total sentence. The judge must ensure that this total is proportionate and not excessive. As was stated by DA Thomas,[7] as cited in *Mill v The Queen*[8]:

> … when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.

This Court unanimously considers that in deciding to sentence Pompey, effectively, to 37 years behind bars, the judge was in breach of the totality principle.

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[5] See: DA Thomas, *Principles of Sentencing*, 2nd Edn, Heinemann (1979) at pp 56-57
[6] See R v MMK (2006) 164 A Crim R 481 at [11]
[7] Thomas, *Principles of Sentencing (n 5)*
[8] (1988) 166 CLR 59 at 63

[18] As a matter of interest, ordinarily, it would indeed have been open to the judge to order Pompey's sentences to be served consecutively. Consecutive sentences will normally be appropriate where offences arise out of unrelated facts or incidents, or when offences are of the same or similar kind and are committed against the same person at different dates. So, for example, in cases of domestic violence or repeated sexual offences committed against the same individual at varying times, consecutive sentences may well be appropriate. Public trust and confidence in courts are significantly impacted by sentencing decisions. It would be quite wrong for courts to foster the impression that a convicted person should receive an unjust discount for multiple offending against the same person.[9] For this reason, in principle, the judge was not wrong to take the view that Pompey deserved to have his sentences run consecutively. But if the judge chose to act on that view care needed to be taken to ensure that due regard was paid to the totality principle.

[19] In this case, unfortunately, there is nothing to suggest that, in proceeding to make the three sentences run consecutively, the judge paid any such regard to the principle. While this Court acknowledges fully the utterly disgusting nature of Pompey's crimes, we unanimously consider that jail time of 37 years is excessive. That amount of prison time would equally have been excessive if it had been applied to the second rape by itself, in circumstances where all the sentences were intended to be served concurrently.

The Sentencing Approaches that were Available

[20] Pompey's case was one of those where the judge had before her different approaches to the structuring of the sentence. The offences were all tried together. By the time Pompey was being sentenced, the judge would have been aware of the full extent of his criminality. Two broad approaches were legitimately open to the judge. Under the first approach, the judge could have moderated the individual sentences (so as to avoid breaching the totality principle) and then have the moderated sentences run consecutively.

[9] See R v Knight (2005) 155 A Crim R 252 at [112]

[21] Alternatively, the judge could have adopted an approach to each sentence that would have enabled her to have Pompey serve the sentences concurrently. If, for instance, the judge truly considered that Pompey's overall criminality warranted, for the most serious of the offences (i.e. the second rape), a sentence in excess of 17 years, nothing prevented the judge, in principle, from imposing that higher sentence on Pompey for that offence and then having all the sentences run concurrently. Provided of course that any such sentence needed indeed to be proportionate to Pompey's overall criminality.

[22] The judge ended up giving an excessive sentence because it does not appear that she settled on one or the other of these two approaches. Instead, it would seem that, inadvertently, she combined their application. She took a calculated decision that the fondling charge warranted a grave sentence of five years imprisonment, the first rape merited a severe 15 year sentence and the second rape called for an increase of two years over the first. The judge then decided that this was a fit case for the sentences to run consecutively and she left the arithmetic to take care of itself.

Remedying the Breach of the Totality Principle

[23] There are different ways in which we can approach the breach of the totality principle. Perhaps the most appropriate method in this case is to set aside the order that the sentences should run consecutively, have them served concurrently instead and then leave intact such of the exercise of the judge's discretion as most of us consider ought not to be overturned by a court of review.

[24] Fifteen years for the first rape was a stiff sentence. This was followed by the two year increase for the second rape. For those who are so repulsed by Pompey's behaviour that it is considered that the 17-year sentence is on the lenient side, it is to be borne in mind that appellate courts should only interfere if the sentence is *unreasonably* low.

[25] For those who consider 17 years to be unreasonably harsh, it must be recalled, as has been carefully pointed out below by Justice Jamadar, that sentence falls well

within the range courts in the common law Caribbean will impose for like offences. The young survivor was repeatedly raped on premises and in an environment where she should have expected to be safest from sexual predators. The trial court received no psychological evidence in this matter. But it hardly requires a psychologist to appreciate that this must have been extremely traumatic for the child. The rapist was, in effect, her uncle, a middle-aged man more than three times her age. He seemed determined to have his way with the child again and again. He might have kept on doing so except that on the third occasion (the second rape) someone else saw him. One observes that, not only did he compel the survivor to re-live the trauma by giving evidence in court about it, but he also had his own daughter, the survivor's cousin with whom she regularly played, give evidence to suggest that the second rape had not occurred. If the trial judge had imposed more lenient individual sentences of say, 3, 5 and 9 years respectively, and then ordered that those sentences should be served *consecutively*, as the judge would have been perfectly entitled to do, Pompey would still have ended up having to serve 17 years.

[26] There are also stark sociological realities to consider. Sexual offences against minors are a tremendous cause for concern, sadly not only in Guyana. But the position in Guyana is grim. The Director of Public Prosecutions presented us with some shocking statistics. We have appended these statistics as an Appendix to this judgment. Justice Jamadar, in his Opinion, has gratefully elaborated on and analysed the information disclosed in these statistics. It is sufficient here to point out that, over the last three years, sexual offences have accounted for more than one half of all indictable cases set down for trial. Worse, sexual offences *against children* comprised almost 80% of those cases. In 2019, there were 648 indictable sexual offence cases (i.e. 56.6% of the indictable criminal list) set down for trial in Demerara. Of those, 488 or 75% were allegedly committed against children.

[27] The figures presented to us show that the offence of having sex with under-aged children is becoming more prevalent. The statistics indicate an increase from 2015, the year in which Pompey was convicted and sentenced. Then, there were 448 indictable sexual offence cases fixed for trial in Demerara, or 50.2% of the indictments so listed. Of this number, 306 (68.3%) were sexual offences against

minors. This broad picture is an important part of the background against which a sentencing judge in Guyana is called upon to impose an appropriate sentence for the repeated rape of a child by a 50-year-old relative.

[28] The passing of a sentence is always the unique expression of the sentencing court in the context of the facts and circumstances of the specific case and the prevailing culture of the location in which the court is operating at the particular time. Trial judges should be afforded flexibility and discretion in keeping with reasonable sentencing guidelines drawn up by first tier appellate courts or by the Head of Judiciary and the judicial branch.

[29] The principles which must guide an appellate court in reviewing a sentence are well known. An appellate court will not alter a sentence merely because the members of the court might have passed a different sentence.[10] As Chancellor Massiah stated in *Williams v Walter*:[11]

> … the court will not interfere with a sentence unless it is manifestly excessive or wrong in principle. Nor is it useful or relevant for members of the appellate court to reflect on the penalty they would themselves have imposed if they were trying the matter. The reason for this is obvious. Questions as to the appropriateness of a sentence are essentially questions of judgment and discretion which involve a latitude of individual choice.

[30] In the absence of any sentencing guidelines, although some of us in the majority might have given Pompey a greater sentence if they had initially sentenced him for the second rape, the majority do not consider that a sentence of 17 years imprisonment is either so lenient or so harsh that it warrants being set aside by an appellate court.

[31] In the circumstances, by a majority, the Court disposes of the appeal by affirming the individual sentences passed by the trial judge but ordering instead that those sentences be served concurrently.

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[10] See *Ramphul v Thomas* (1955) LRBG 234
[11] Williams v Walters Cr App No 24 of 1985, unreported, July 18, 1985

Guidance to Trial Judges

[32] The Court suggests that the practice of passing sentence immediately after verdict should generally be eschewed, especially in cases where there is a likelihood that a lengthy prison term may be imposed. In such cases, the judge should hold a separate sentencing hearing at which mitigating and aggravating factors, including mental health or psychological assessments, can better be advanced and considered. We endorse Justice Jamadar's views on the utility and value in facilitating victim impact statements at such hearings in appropriate cases as well as his suggested approach for trial judges to determine a proper starting point while embarking upon the sentencing exercise.

[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;

(d) If upon having the sentences run consecutively, the total prison time to be served is not just and proportionate (as in Pompey's case where it yielded an excessive 37 years sentence), go back to the drawing board and consider structuring the sentence in a different fashion bearing uppermost in mind the totality principle. This re-structuring exercise might be achieved by lowering the individual sentences and retaining their consecutive character

or by altering the individual sentences (in particular the most serious one) and having the sentences run concurrently;

(e) Finally, carefully explain the rationale for the sentence and its structure in a way that will be best understood by the parties and the public.

[34] There is another area in which judges require guidance. We referenced it in the first paragraph of this judgment. Guyana's trial judges would be better served if they were guided by appropriate guidelines that suggest various sentencing ranges for the most prevalent crimes. Several States throughout the Caribbean Community have established such guidelines.[12] It is a good practice. In his judgment, Justice Jamadar has helpfully referenced the Jamaica and Trinidad and Tobago publications.

[35] An apex Court may weigh in on principles that would underlie the exercise of judicial discretion or a judge's application of reasonable sentencing guidelines to particular facts. But populating, or fleshing out, those principles with reference to the months and years in prison a convicted person should serve, is an exercise best undertaken by the judicial branch of the particular State in which the crime is committed and the sentence is to be served. The local Court of Appeal may do so, or the Head of the Judiciary may establish a committee to assist her in developing and publishing appropriate sentencing guidelines.

CONCURRING JUDGMENT IN THE MAJORITY JUDGMENT OF THE HONOURBALE MME JUSTICE RAJNAUTH-LEE, JCCJ:

Sexual Violence in the Caribbean

[36] I have read the judgment of Saunders PCCJ and I am in complete agreement with it. I write this short concurring judgment at a time of unprecedented crisis. On 30 January 2020, the World Health Organization declared a Public Health Emergency of International Concern, and on 11 February 2020, announced the name for the

[12] See: for example, *Sentencing Handbook* (Judicial Education Institute of Trinidad and Tobago, 2016); *Sentencing Guidelines* For Use By Judges of The Supreme Court of Jamaica and The Parish Court Judges [2018]; *Eastern Caribbean Supreme Court (Sentencing Guidelines)* Rules 2019 for Anguilla, Dominica, Montserrat, St. Kitts, Saint Lucia and The Virgin Islands

new coronavirus disease, COVID-19.[13] As a result of this Pandemic, there have been "lockdowns" of varying degrees worldwide. Governments throughout the Caribbean region have declared states of emergency and have established curfews. I work, and write, from home during this extraordinary time, described by the Honourable Mia Mottley, Prime Minister of Barbados, as 'the most destabilizing event' for the Caribbean region since World War II[14].

[37] One of the devastating effects of the many "stay at home orders" and the consequential loss of jobs amidst the closing down of economies across the world, has been the alarming spike in reported cases of domestic violence experienced worldwide.[15] Indeed, the increase in gender-based violence, including sexual violence, has been a disturbing trend not only at this time, but over several years. As a result, governments throughout the Caribbean have taken on board the need to address this worrying trend. Some jurisdictions in the Caribbean have specialized police units comprised of officers trained in the investigation of sexual offences and the interviewing of victims of sexual offences. Jamaica made a very early start in this regard in establishing the Centre for the Investigation of Sexual Offences and Child Abuse ("CISOCA"), a branch of the Jamaica Constabulary Force. Established in 1989, the objectives of CISOCA are: to create an atmosphere which will encourage victims to report incidents of sexual offences and child abuse; to ensure efficient and effective investigation into allegations of abuse; to enhance the rehabilitation of victims through counselling and therapy and to conduct public education programmes on sexual offences and child abuse. In addition, Child Protection Units operating within Caribbean Police Services have been established in some jurisdictions. For example, in Trinidad and Tobago, the Child Protection Unit (an investigative unit) was established in May 2015 and operates within the Police Service with officers specially trained in the investigation of crimes against

[13] World Health Organization website
[14] See the Interview of the Honourable Mia Mottley, Prime Minister of Barbados, by Christiane Amanpour, Chief International Anchor for CNN
[15] "Global Lockdown Resulting in 'Horrifying Surge' in Domestic Violence" – United Nations Secretary-General, Antonio Gutteres at a virtual news briefing at the United Nations headquarters in New York, cited a sharp rise in domestic violence amid global coronavirus lockdowns, called on governments around the world to make addressing the issue a key part of their response to the pandemic. Reported on 6 April 2020 by Scott Neuman. https://www.npr.org/sections/coronavirus

children. Statistics from the Child Protection Unit[16] for the period May 2015 to July 2016, revealed that there were 2595 reports made to the Child Protection Unit. The majority of those reports were of child sexual abuse.

[38] International organizations have been at the forefront of addressing gender-based violence and child sexual abuse. Among the international conventions which have sought to focus on gender-based violence is the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, which was adopted by the General Assembly of the Organization of American States in 1994. Better known as the *Convention of Belém do Pará*, the Convention asserts that violence against women violates fundamental human rights and freedoms based on the unequal power relations between women and men. Of note as well is the *Convention on the Rights of the Child*[17] which at Article 19(1) requires States Parties to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.

The Judicial Reform and Institutional Strengthening Project

[39] In 2015, the Judicial Reform and Institutional Strengthening Project ("JURIST"), a five year regional Caribbean judicial reform initiative funded under an arrangement with the Government of Canada, and spearheaded by the Caribbean Court of Justice, commenced work on a key component of the Project, the development of model guidelines for managing sexual offence cases (including cases involving children) with the aim of improving the capacity of the courts to deliver gender-responsive and customer-focused court services. A baseline study was commissioned through UN Women, on the legislation, protocols and courts systems relating to sexual offence cases. The study was conducted in five (5) Caribbean countries and identified several major gaps in the justice chain for sexual

[16] http://ftp.cnc3.co.tt/press-release/sex-minors-high-among-2595-reports-made-child-protection-unit-may-15-july-16

[17] Which, since its adoption over thirty (30) years ago on 25 November 1989 and subsequent entry into force on 2 September 1990, has since become the most ratified human rights treaty in history with 196 parties https://www.unicef.org/child-rights-convention

offences. These gaps included poor investigative and evidence gathering, inordinate delays in the hearing of cases, the undervaluing of sexual offences cases in relation to the public interest so that limited resources were instead reserved for other "serious crimes" such as murder, and insufficient interconnectedness between the courts and other key agencies.[18]

Model Guidelines for Sexual Offence Cases in the Caribbean Region

[40] In 2017, after consultations with more than 200 stakeholders throughout the region, JURIST published *Model Guidelines for Sexual Offence Cases in the Caribbean Region*. In the Foreword to the *Model Guidelines* dated 8 August 2017, Sir Dennis Byron, then President of the Caribbean Court of Justice, commented that the Model Guidelines sought to take a comprehensive, collaborative approach towards addressing the investigation, prosecution and adjudication of sexual assault cases.[19] The *Model Guidelines* adopt a rights-based approach and explore best, good and promising practices for improving investigatory processes, ensuring adequate safeguards for the protection and care of complainants and vulnerable witnesses, while securing at all times a fair hearing for defendants in sexual offence cases. Special emphasis is placed on important issues, such as sexual offences against children, persons with disabilities and indigenous persons, the identification of vulnerable witnesses, and the use of special measures in order to facilitate the giving of the best evidence from vulnerable witnesses.

Alarming Statistics from Guyana

[41] The statistics on the prevalence of sexual offences in Guyana, provided to the Court by the Director of Public Prosecutions, were examined in the judgment of Saunders PCCJ, and even more extensively in the judgment of Jamadar JCCJ. These statistics revealed that sexual offences and indeed sexual offences against children are prevalent and occupy much of the work of the criminal courts in Guyana. As Saunders PCCJ noted, over the last three years, sexual offences in Guyana have accounted for more than one half of all indictable cases set down for trial and sexual

[18] *Model Guidelines for Sexual Offence Cases in the Caribbean Region* at page 9
[19] Ibid. p. 7

offences against children comprised almost 80% of those cases. The statistics for 2019 revealed that there were 648 indictable sexual offence cases (more than one half of all indictable cases), set down for trial in Demerara. Of that number, 488 or 75% were sexual offence cases against children.

Sexual Offences Courts in Guyana

[42] Such was the prevalence of sexual offences generally, and sexual offences against children specifically, that in November 2017, the Judiciary of Guyana established a specialized court to hear sexual offences case. The first of its kind in the English-speaking Caribbean, a Sexual Offences Court was established in the Supreme Court in Georgetown. Two such Courts have been since been established, in Berbice and in Essequibo, in the year 2019. In this regard, the Parliament of Guyana in enacting the Sexual Offences Act[20] in 2010 was ahead of the curve. By the Act, a National Task Force for the Prevention of Sexual Violence was established and given the statutory duty to develop and implement a national plan for the prevention of sexual violence. The Task Force was also mandated to report on proposals for a special court environment to try cases relating to sexual offences.

Sentencing Guidelines

[43] I endorse the recommendation of Saunders PCCJ that the trial judges of Guyana would benefit greatly from sentencing guidelines crafted, agreed upon and published by the Judiciary of Guyana. The *Model Guidelines* recognized that several jurisdictions in the English-speaking Caribbean had not published sentencing guidelines. Included in the Model Guidelines, therefore, were Guidelines for Sentencing[21] which sought to provide guidance to trial judges to assist in the determination of the appropriate sentence in sexual offence cases. This appeal underscores the urgent need for the Judiciary of Guyana to publish sentencing guidelines. The publication of sentencing guidelines would undoubtedly play a key role in building public trust and confidence in the Judiciary of Guyana and in promoting the rule of law.

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[20] Cap. 8:03; see sections 44 and 87
[21] See page 38, 5.0

Conclusion

[44] For all the reasons stated in the judgment of Saunders PCCJ, I agree that the imposition of the cumulative sentence of 37 years by the trial judge and upheld by the Court of Appeal is excessive and cannot be allowed to stand. I also agree that the appellant should serve the sentences imposed on him by the trial judge concurrently and not consecutively. I wish to express my deep appreciation to Counsel on both sides; Mr Hughes for his clear and able arguments, and to Mrs Ali-Hack SC, the Director of Public Prosecutions, for her passion for the law and dedication to the people of Guyana.

CONCURRING JUDGMENT IN THE MAJORITY JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

> WE, THE GUYANESE PEOPLE,
>
> Acknowledge the aspirations of our young people who, in their own words, have declared that the future of Guyana belongs to its young people, who aspire to live in a safe society which respects their dignity, protects their rights, recognises their potential, listens to their voices, provides a healthy environment…and affirm that their declaration will be binding on our institutions and be a part of the context of our basic law.[22]

Introduction

[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.[23]

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[22] Constitution of the Co-operative Republic of Guyana Act Cap. 1:01, Preamble
[23] Sexual Offences Act Cap 8:03, s 10(3).

[46] The Universal Declaration of Human Rights asserts as its first principle, that all humans are born free and equal in dignity and rights.[24] 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, including Guyana's. 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 fulness of the protection of the law, due process and equality.

[47] This case brings into sharp relief the disproportionate prevalence of sexual offences against children, minors, and vulnerable young persons in Guyana. It asks hard questions of that society, its cultures of enabling, its law enforcement and justice systems, and its relevant government agencies. In particular, it asks of this Court questions that are relevant to the principles of sentencing in relation to sexual offences against minors generally, and specifically, in relation to the young girl who was repeatedly assaulted and raped by an adult in an obvious position of trust in relation to her and in the sanctity of a family home.

[48] I have read the judgment of Saunders PCCJ and I agree that the trial judge committed the following composite error of principle (all aspects of which could constitute an error of law): either completely disregarding the totality principle, or egregiously misapplying it in the circumstances of this case, and ordering the sentences imposed for each of the three offences for which the accused was convicted to run consecutively so as to amount to a cumulative sentence of 37 years imprisonment, which in all the circumstances was disproportionate and unjust. These errors of principle have a direct impact on the fitness of the sentence imposed. This Court is therefore obliged to either: (i) review the sentences imposed by the trial judge and to perform its own sentencing analysis in order to determine

[24] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

what should be an appropriate sentence in this case, or (ii) remit the matter for re-sentencing in light of this Court's observations. I agree that the first option is pragmatically what is required in this case. It is now almost five years since the offender was sentenced, and this lapse in time renders the second option virtually pointless. It is one of the scourges of delay.

[49] I agree generally with the analysis and conclusions of the majority on the issues identified above. I therefore do not intend to address them unnecessarily in this judgment. They are dealt with comprehensively as the first, second, and third issues in the judgment of Saunders PCCJ. As well, I adopt the summary of the relevant facts as set out by Saunders PCCJ as accurate and sufficient for the disposition of this appeal. However, because I am of the view that the errors of principle compel this court to perform an independent sentencing analysis, and to do so while paying appropriate deference to the advantages that trial judges in Guyana enjoy over appellate courts in relation to sentencing (especially an apex court such as this one, which though regional is also extra-territorial), I wish to make a few comments that I consider apposite. These comments do not in any way intend to derogate from my support of the judgment of Saunders PCCJ and are offered as supplementary to it. Indeed, they may be read as falling under the fourth issue in that judgment which deals with general guidance and recommendations.

[50] What I propose to do is to examine three areas in relation to these kinds of offences against minors, as follows. First, the approach of appellate courts in an appeal on sentence in the special circumstances of this case, where this Court has been apprised of the disproportionate number of sexual offences against minors in Guyana, and in light of the prevailing trends in sentencing in that jurisdiction at both the trial and appellate levels. Second, to consider the human rights implications that arise in the context of sexual offences against minors. Third, to consider the value and importance of victim impact statements in cases such as these.

General Approaches to Sentencing

[51] The law is settled that this court will not wantonly interfere with the exercise of a trial judge's discretion in the choices of sentences imposed. Certainly, this court will not substitute its own opinions as to what constitutes appropriate and fit sentences unless there are legitimate bases for doing this. These bases are either errors in principle that have a significant impact on the sentences, or sentences that are in and of themselves manifestly excessive or otherwise demonstrably unfit.[25] Finally, sentencing is also quintessentially contextual, geographic, cultural, empirical, and pragmatic. Due deference is therefore paid to trial judges in the execution of their sentencing powers. Supranational approaches are problematic and likely misplaced. These tenets all exist for good reasons.

[52] 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.[26] In 2019, these governing principles were also acknowledged by this Court in *Alleyne v The Queen*.[27] The Court suggesting in the latter case that whereas rehabilitation was a very important aim of sentencing, retribution, punishment, and deterrence were no less so; and as well, explaining that denunciation as an element of retribution and deterrence (and thus of sentencing), plays the very important role of promoting public trust and confidence in the criminal justice system and therefore in the preservation of the rule of law.

[53] This thread that weaves public interest, public trust and confidence, and preservation of the rule of law is, I suggest, integral to both the sentencing process and to sentencing outcomes. I will develop this more in relation specifically to both

[25] *Lashley v Singh* [2014] CCJ 11 (AJ), [30]; *Alleyne v The Queen* [2019] CCJ 06 (AJ) [87]
[26] Lashley (n 4) [31], [32]
[27] Alleyne (n 4) [44], [45], [58], [90]

the role of the appellate courts with respect to sentencing for sexual offences against minors and the value and usefulness of victim impact statements in these kinds of cases. As a general principle however, these three interwoven elements point towards the need to be sensitive to contextual sentencing, and to 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.

[54] The rehabilitative objective of sentencing demonstrates the difficulty in de-contextualizing sentencing. If the objective is rehabilitation leading to re-integration as a law-abiding citizen, then there is a duty on judicial officers to take account of whether there are adequate and suitable facilities, personnel, and assessment mechanisms to effectively achieve and confirm rehabilitation as fitness for re-integration as a law-abiding person. These may vary from territory to territory within the region. As well, there must be some actual information about the likelihood of rehabilitation (ideally, at the time of sentencing), such as social workers' reports, psychological or psychiatric reports and the like. This has already been implicitly acknowledged by this Court:

> Rehabilitation is inextricably linked to the prospect of release but cannot be definitively evaluated or pronounced upon at sentencing. Much will depend upon the correctional systems in place for rehabilitation and the response to them by the prisoner….[28]

[55] As this Court has also explained, 'science can illuminate the law'.[29] Thus, the objective of rehabilitation ought properly to be considered in light of credible and relevant information; it must be evidence based. The social, psychological, and medical sciences have an important role to play. Sentencing judges may therefore have a duty to request and inform themselves about all relevant information that can assist with factoring-in the rehabilitative objective of sentencing. Indeed, science can also shed light on what may or may not be effective in relation to the other sentencing objectives. The overall point being, that because sentencing is

[28] Alleyne (n 4), [58]
[29] *Hall v The Queen* [2020] CCJ 1 (AJ) [162]

inherently contextual and therefore 'quintessentially … an exercise of judicial discretion', both sentencing judges and appellate courts need to be mindful of territorial realities and the need for relevant and useful information.[30] Failure to do so may result in sentencing according to the proverbial 'length of the Chancellor's foot.'[31]

[56] Appellate courts are thus considered to have at least four well accepted roles in relation to sentencing: (i) to ensure that the principles of sentencing are properly applied, (ii) to ensure that sentences are not demonstrably unfit or unjust, (iii) to provide clarity and guidance to lower courts, and (iv) to help develop the law, including in directions that appropriately respond to evolving notions of justice and changing realities.[32]

[57] These insights inform the approaches to the process and procedures of sentencing, as well as the final outcomes. They are relevant to all the comments that I wish to make and will be developed accordingly in the discussions in those areas. A Caribbean jurisprudence of sentencing must be forged and formed in and out of Caribbean realities.

Sentencing in the Special Circumstances of this Case

(a) Evidence of Prevalence and Seriousness

[58] This court requested and received information which showed the yearly breakdown of the number of criminal cases and their relationship to sexual offences for the three counties in Guyana: Demerara, Berbice and Essequibo. That information was compiled to disaggregate the total number of cases for each Assizes for all offences, and the corresponding number of sexual offences cases, as well as the number of sexual offences cases concerning minors. This information has not been disputed and forms part of the record in this appeal.

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[30] Alleyne (n 4), [58], [87], [94]
[31] John Selden's 15th century quip: 'equity varies with the length of the Chancellor's foot'
[32] *R v Friesen* [2020] SCC 9, [34], [35]

[59] What that information revealed was extremely disturbing. In Demerara, for the years 2014 to 2019, on average, out of the total number of criminal cases filed, 54.29 percent constituted sexual offences cases, and of those 72.12 percent constituted sexual offences cases involving minors. Also, the percentage of sexual offences cases involving minors as a percentage of all sexual offences cases, has been increasing over time from 2014 to 2019. For the years 2014 to 2016, the number of cases involving minors as a percentage of all sexual offences cases was 67.72. However, for the years 2017 to 2019, the corresponding percentage was 76.53. That change represents an average three-year increase of 8.81 percent (2017 to 2019) over the earlier three-year period (2014 to 2016). This is an extremely disturbing trend.

[60] In Berbice the trends are significantly worse than in Demerara. The percentage of sexual offences cases against minors, as a percentage of all sexual offences cases for 2014 to 2019, is as follows: 84.87, 89.3, 94.43, 89.1, 89.03, and 97.27. The six-year average (2014 to 2019) of sexual offences cases against minors as a percentage of all sexual offences cases in Berbice, is 90.17. And the corresponding three-year average for 2017 to 2019, is 91.8 percent! Indeed, for 2019 the percentages for progressive Assizes sittings were as follows: February 97.4 percent, June 94.4 percent, and October 100 percent. This is indicative of a crisis.

[61] In Essequibo the trends fall between those in Demerara and in Berbice, though closer to those in Demerara. In Essequibo, for the years 2014 to 2019, on average, out of the total number of criminal cases filed, 55.86 percent constituted sexual offences cases, and of those 73.86 percent constituted sexual offences cases involving minors. For the three-year period 2017 to 2019, the number of cases involving minors as a percentage of all sexual offences cases was 77.8, an increase of 10.88 percent over the corresponding 2014 to 2016 three-year period (average of 69.92 percent).[33]

[33] Appendix A - Criminal Cases by Assizes in Guyana 2014 – 2019

[62] This is an issue of such enormity that this court is duty bound to respond decisively and robustly. In the discussion on human rights implications, I will develop this in greater detail. What is noteworthy, is that these statistics are only for cases filed and pending in the Guyana criminal justice system. We have no evidence of general reporting statistics, or of under-reporting trends for Guyana for alleged sexual offenses against all children, minors and vulnerable young persons. However, if Guyana follows international norms in this regard for developing societies, such as those in the Caribbean, then, on the basis of presumed under-reporting, the problem likely assumes a magnitude that is endemic, pathological, and potentially destructive of the fabric of Guyanese society.

(b) **Relevance**

[63] The jurisprudential question that arises, is whether this information is relevant to the sentencing of the appellant in this appeal. On first principles, yes. The public interest, deterrence, and denunciation (as promoting public trust and confidence) ideologies of sentencing, all deem this information relevant to the individual sentencing of a person convicted of sexual offences against a minor. This is confirmed, when one considers the factors that a sentencing judge must apply in determining what is an appropriate sentence in each individual case, as discussed below.

(c) **Starting Points and Ranges**

[64] This Court, in *Persaud v The Queen*[34] indicated its support for the 'starting point' approach to sentencing as one appropriate method. Another method is the 'ranges of sentence' approach. Both approaches are always only guidelines, which are not binding, and which must defer to judicial discretion (to evaluate and individualise sentencing that is fair, just, and proportionate), case specific circumstances, and new developments, insights, and understandings. Both approaches depend on the existence of common categories of offences that share enough similar features to permit usefulness by way of comparison. To be truly useful, there ought to be

[34] [2018] CCJ 10 (AJ), [46], [47].)

sufficient comparators from which to extrapolate as a principle, either a starting point or a range of sentences (one similar case will not likely suffice).

[65] In Persaud's case this court explained the starting point approach as follows:

> Fixing a 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…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.[35]

[66] What is left partially unexplained, is exactly what evidence or information is to be relied on to determine a starting point. One consideration must be the statutory penalty, in this instance, for the rape of a minor, it is life imprisonment. But this is the maximum penalty. On what basis is a term of years chosen as a starting point 'bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence …'?[36] What becomes apparent, is that starting points that rely on comparative offending and inherent mitigating and aggravating factors relevant to an offence, run the risk of being purely hypothetical unless grounded in some concrete and empirical data and evidence. I will return to this momentarily.

[67] When it comes to the ranges of sentence approach, the method is to identify from the appropriate comparative case cluster, minimum and maximum sentences that were imposed in past cases, and to use these to establish a (broad) range of sentences for the particular offence, which will serve as a guide for future decisions. Sentencing in every new case that fits the category to which the range applies, utilizes the range as a guide and individualises the sentence based on case-specific factors. Here the data and evidence used to determine a range consists of past comparable decisions. Decisions which appear, relative to most cases within the range, as anomalies and outliers are to be noted.

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[35] Persaud (n 13), [46] (citing with approval the seminal decision of the Trinidad and Tobago Court of Appeal, in *Aguillera v The State* 89 WIR 451, [22], [23], [24]).
[36] ibid

[68] Returning to the starting point approach, it seems that it too must rely on past decisions as relevant and necessary data and evidence, of both comparative types of offending and of general mitigating and aggravating factors relevant to the species of offence and to the mode or method of the actual commission of the particular offence. In addition, and in relation particularly to the latter consideration, it would appear that evidence of prevalence and seriousness (and trends in these elements) in a particular jurisdiction or in a sub-region of that territory, would be relevant considerations.

(d) **Recognition and Value of Sentencing Judges**

[69] Further, the common law tradition recognises and values the capacity of sentencing judges to have a better sense of what is an appropriate sentence in any given case. Hence the deferential approach of appellate courts and the limited bases of review. The Supreme Court of Canada has remarked on this most recently in, *R v Friesen*, 'This deference… promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position.'[37] Further:

> A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases… Precedents embody the collective experience and wisdom of the judiciary.[38]

[70] This deferential approach to trial judges' sentences, expands to appellate courts' decisions on sentencing in relation to apex courts in an additional and nuanced manner. The accepted wisdom is that:

> The appropriate length and the setting of sentencing ranges or starting points are best left to provincial appellate courts. These courts 'are in the best position to know the particular circumstances in their jurisdictions'. Indeed, a degree of regional variation for sentences is legitimate.[39]

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[37] Friesen (n 11) [28]; *R v M* 1996 1 SCR 500, 565-566.
[38] ibid, [33]
[39] ibid, [106]

These observations are just as valid in the Caribbean region. Sentencing is an inherently contextual exercise, and the greatest judicial experience, insight and wisdom lies with the local judicial officers who are called upon regularly to deal with particular species of offences in their jurisdictions.

(e) **Methodology**

[71] Thus, in order to determine an appropriate starting point for a particular case, one must look to the body of relevant precedents, and to any guideline cases (usually from the territorial court of appeal). In looking at precedents, one looks to both species and factual matrices, to identify a precedent or precedents that most closely resemble, and approximate to, the case to be decided. This precedent or sub-cluster of precedents becomes the evidential basis for selecting the appropriate starting point. Here a certain overlap with the data collection that informs the range of sentence approach is evident. Attention has been duly paid to comparative offending, with an eye on corresponding mitigating and aggravating factors relevant to the offence. Depending on the facts of the comparators, the starting point can be adjusted upwards or downwards in response to the facts of the case to be decided.

[72] In addition to considering comparable precedents in establishing a relevant starting point, other considerations are also contextually relevant. For example, prevalence and seriousness, and trends in relation to these in the local or sub-regional jurisdiction. Guyana is a good example of why this contextual and deferential approach to sentencing is necessary in the Caribbean region. As the statistics above show, the prevalence of sexual offences against minors in Guyana varies from one sub-region to the next, which in turn impacts on the seriousness with which these kinds of offences are to be viewed and treated. These factors are therefore properly accounted for in the determination of the starting point. Then, mitigating and aggravating factors in relation to the offender, guilty plea discounts, and credit for pre-trial custody, together with any other relevant considerations, can be factored-in to arrive at a final sentence that is fair, just and proportionate. One that also achieves the desirable objective of contextual consistency.

(f) **Precedents**

[73] This court also requested decisions from the Guyana courts on sentencing decisions that closely resembled the facts in the instant matter. Key common features were rape or sexual activity involving minors, relationships of trust between offender and victim, similarity in age of victims, and conviction by a jury after a trial. None of these case summaries, submitted by the DPP, were disputed.

(i) *The State v Sherwin Sharples* (2015). Rape of a child under sixteen years. The victim was 13 years. The offender was her aunt's husband, who lived next door. The rape was forced. It occurred once. The victim's brother walked into the house and confronted the offender. A jury found the offender guilty. Sentenced to 8 years imprisonment.

(ii) *The State v Sean Trotman* (2015). Two counts of sexual activity with a child under sixteen years. The victim as 12 years. The offender was her father. The rape was forced and occurred twice. A jury found the offender guilty on both counts. Sentenced to 20 years imprisonment on the first count, and 25 years imprisonment on the second count. Sentences to run consecutively (45 years in total). Conviction and sentence affirmed on appeal.

(iii) *The State v Harold Naurayan* (2015). Sexual activity with a child under sixteen years. The victim was 6 years. The offender was her stepfather. The rape was forced. It occurred once. A jury found the offender guilty. Sentenced to 19 years imprisonment.

(iv) *The State v Montgomery Vaughn* (2016). Two counts of sexual activity with a child under sixteen years. The victim was 9 years. The offender was her grandfather. No rape. The criminal activity occurred twice. A jury found the offender guilty. Sentenced to 6 years imprisonment on each count. Sentences to run concurrently.

(v) *The State v Michael Abrams* (2017). Two counts of rape of a child under sixteen years. The victim as 8 years. The offender was her grandmother's common-law husband. The rape was forced and occurred twice. A jury found the offender guilty on both counts. Sentenced to life imprisonment on each count, with a possibility of parole after serving 35 years imprisonment.

(vi) *The State v Josiah Baptiste* (2017). Carnal Knowledge of a girl under sixteen years. The victim was 6 years. The offender was her stepfather. She was raped once. A jury found the offender guilty. Sentenced to 18 years imprisonment.

(vii) *The State v Leroy Fredericks* (2017). Rape of a child under sixteen years. The victim was 6 years. The offender was her adult next-door neighbour.

She was raped once. A jury found the offender guilty. Sentenced to 25 years imprisonment.

(viii) *The State v David George* (2017). Two counts of Rape of a child under sixteen years. The victim was 6 years. The offender was the pastor of the church that she attended and a cousin of one of her parents. The rape was forced and occurred twice. A jury found the offender guilty on both counts. Sentenced to 25 years imprisonment on each count. Sentences to run concurrently.

(ix) *The State v Andrew Hannibald* (2018). Rape of a child under sixteen years. The victim was 15 years. The offender was the pastor of the church that she attended. The rape was forced and occurred on several occasions. It occurred in the living quarters of the church. A jury found the offender guilty. Sentenced to 40 years imprisonment, with a possibility of parole after serving 30 years imprisonment.

(x) *The State v Rohan Daniels* (2018). Four counts of sexual activity with a child. The victim was 10 years. The offender was her foster father. The rape was forced and occurred on several occasions. A jury found the offender guilty on two counts. Sentenced to life imprisonment on each count, to run concurrently, with a possibility of parole after serving 40 years imprisonment.

(xi) *The State v Rohan Daniels* (2018). Sexual Activity with a child. The victim was 9 years. The offender was her foster father. The rape was forced and occurred on one occasion. A jury found the offender guilty. Sentenced to life imprisonment, with a possibility of parole after serving 30 years imprisonment.

(xii) *The State v Milton Kewley* (2018). Rape of a child under sixteen years. The victim was 13 years. The offender was his former stepfather. The rape was forced and occurred on one occasion. A jury found the offender guilty. Sentenced to life imprisonment, with a possibility of parole after serving 45 years imprisonment.

(xiii) *The State v Rudolph Madray* (2018). Rape of a child under sixteen years. The victim was 8 years. The offender was her neighbour, aged 55. The rape was forced and occurred on one occasion. A jury found the offender guilty. Sentenced to 35 years imprisonment, with a possibility of parole after serving 25 years imprisonment.

(xiv) *The State v Abdool Jamil* (2018). Two counts of Rape of a child under sixteen years. The victim was 10 years. The offender was her grandfather. The rape was forced and occurred on two occasions. A jury found the offender guilty on both counts. Sentenced to life imprisonment, with a possibility of parole after serving 45 years imprisonment.

(xv) *The State v Gregory Ramkissoon* (2019). Two counts of rape of a child under sixteen years. The victim was 4 years. The offender was her 56 year old neighbour. The rape was forced and occurred on two occasions. The offender pleaded guilty to both counts. Sentenced to 20 years imprisonment, with a possibility of parole after serving 15 years imprisonment.

(xvi) *The State v Gingesh Khan* (2019). Three counts of indecent assault and one count of carnal knowledge of a girl under sixteen years. The victim was 9 years. The offender was her adult neighbour. The rape was forced and occurred on two occasions. A jury found the offender guilty on all four counts. Sentenced to 29 years imprisonment.

(g) **Deciding on Ranges and Starting Points**

[74] Using these cases as the basic data set, certain trends emerge that can allow for both range and starting point assessments. Since in the instant matter there was conviction for one count of sexual activity, and two counts of rape, comparable facts are highly relevant. First, sentencing range. On the lower end is an 8 year term of imprisonment for an offender who raped a 13 year old girl once (*Sherwin Sharples,* 2015). On the upper end are two life sentences with no possibility of parole before 45 years, for rape on a 13 year old boy and on a 10 year old girl (*Milton Kewley, Abdool Jamil,* 2018). In the case of the rape on the boy, it occurred once; with the girl, it occurred twice. (There is one case of two counts of sexual activity with a 9 year old girl, with no rape, for which two 6 year terms of imprisonment were imposed, to run concurrently. This case is not an appropriate comparator.) In all cases, custodial sentences were imposed. It is therefore reasonable to conclude, based on the decided cases, that the courts in Guyana do not consider non-custodial sentences appropriate.

[75] With respect to an appropriate starting point, taken from these cases, the first step would be to try and determine a relevant sub-cluster that most approximates to the instant matter. Disaggregating the cases further, the following emerges. There are eight cases involving minors 8 years and under, of which, in one the victim was age 4. Of these, the lowest sentence imposed was 18 years imprisonment, the highest fixed term sentence imposed was 35 years, one life sentence was imposed with a proviso that parole was not available for 35 years; and the average of the six fixed

term sentences was 23.66 years. The remaining seven cases (excluding the one in which there was no rape), involved minors 9 to 15 years. The lowest sentence imposed was 8 years imprisonment (a single instance of rape on a 13 year old girl - Sherwin Sharples, 2015), the next lowest was 29 years (two counts of rape and two counts of indecent assault), the highest fixed term sentence imposed was 45 years, four life sentences were imposed with provisos that parole was not available for 30, 40, 45 and 45 years; and the average of the five fixed term sentences was 31.1 years (and if the 8 year sentence imposed in Sherwin Sharples, is excluded, as contextually anomalous, the average for these cases is 37.25 years).

[76] With respect to decisions of the court of appeal of Guyana, the decision in *Sean Trotman* (2015) was the only prior similar decision cited to this court. The offender was charged with two counts of sexual activity with a child under sixteen years. The victim as 12 years. The offender was her father. The rape was forced and occurred twice. A jury found the offender guilty on both counts. He was sentenced to 20 years imprisonment on the first count, and 25 years imprisonment on the second count. The sentences were ordered to run consecutively. Both the conviction and sentence were affirmed on appeal.

[77] The instant appeal is also a decision of the Guyana court of appeal. The offender was charged with one count of sexual activity and with two counts of rape with a child under sixteen years. The victim as 14 years. The offender was the common law spouse of the victim's aunt. The rapes were forced and occurred twice. The incidents occurred on three separate occasions. A jury found the offender guilty on all three counts. He was sentenced to 5 years imprisonment on the charge of sexual activity, 15 years imprisonment on the first count of rape, and 17 years imprisonment on the second count of rape. The sentences were ordered to run consecutively. Both the conviction and sentences were affirmed on appeal.

[78] What is most striking in this entire analysis, is the general consistency in the imposition of high sentences for sexual offences against minors over the age of 8 (and under 16). No doubt, the sentences are extremely severe, and one wonders whether this is reflective of the prevalence, seriousness and trends interrogated

above (and presumably known, if only intuitively, to judges in the 'trenches'). However, and despite the overall average custodial sentence being 37.25 years (upheld in effect by the court of appeal through its affirmation of consecutive sentences in the two cases cited), it is also apparent that for individual and repeated acts of rape the court of appeal decisions reveal that a fit sentence ranges between 15 to 25 years. Indeed, interrogated more, where there were two counts of rape, the court of appeal affirmed 15 and 20 years as fitting for the first incident, and then 17 and 25 years for the second (both times, it appears, in 2015).

[79] In my opinion therefore, if this Court is to be faithful to the starting point approach which it has approved and applied, and is to pay due deference to the local courts and to the court of appeal in particular, then an appropriate starting point in this case should be not less than 15 years for the first count of rape and not less than 17 years for the second. Indeed, taking account of the decision of the court of appeal in *Sean Trotman*, a fair starting point should be slightly higher for both. This, I would think, should be especially so because of the clear and uncontroverted evidence of prevalence and the trends in relation to sexual offences against minors in Guyana at this time[40]. These considerations should only rationally push the starting point upwards.

[80] In 2013, the Court of Appeal of Trinidad and Tobago observed:

> … an important objective in the sentencing exercise is that of general deterrence. In the case of highly prevalent offences, this objective can only be reasonably maintained if an appellate court, fully seized of relevant local conditions, conducts a periodic review, as cases come before it, of whether an existing sentencing bandwidth has…become somewhat dated and is thus no longer entirely appropriate. We think that the time is soon approaching for a review … of a number of offences including rape as their incidence and gravity appear to be increasing exponentially.[41]

[81] The evidence presented to this Court demonstrates that, in Guyana, the 'incidence and gravity' of sexual offences against minors is approaching a crisis. In my opinion therefore, a starting point cannot reasonably and contextually be described as

[40] *R v Ntim* [2019] EWCA Crim 311, [17]; *R v Ezeh* [2017] EWCA Crim 1766, [15], [16]; *R v Bondzie* [2016] EWCA Crim 552, [10], [11], [19].
[41] *John v The State* Cr. App. No. 39 of 2007, [65]

excessive, let alone 'manifestly excessive', if it is grounded in a broad data base of local precedent, and is consistent with the current approaches of the court of appeal to individual offence sentences.[42]

[82] However, as this court has also explained, fixing a starting point is not a mathematical calculation. Thus, whereas I would have preferred a starting point for the first count of rape in this case to have been 17 years imprisonment, and for the second to have been 20 years, I am willing to accept the majority's decision not to disturb the trial judge's sentence of 17 years for the second rape.

(h) **Moving Beyond Starting Points**

[83] In this case, there are no additional aggravating factors attributable to the offender, beyond necessary and minor features of intentionality, planning, coercion, and threats about disclosure. There was also no guilty plea, no evidence of cooperation, no expression of remorse, no apology, no offer or action in mitigation (that may point to a lesser degree of culpability), or of compensation in this case. Therefore, no mitigating circumstances with regard to these considerations arise in relation to the offender. It was however a first offence and there is no evidence of any prior criminal record; but that bestows no credit in the circumstances of this case, where there were increasing degrees of sexual impropriety over a period of months, culminating in two instances of forced rape, as between a minor and an adult in a position of power and trust, and no doubt accompanied by an intentional abuse of that power and careful planning. Indeed, during the second incident the offender was caught in the act, confronted, and subsequently prosecuted. But for this, his pattern of behaviour suggests that he would likely have continued his reprehensible course of conduct. No sentencing discount is therefore appropriate for this consideration. It carries no weight, as it is outweighed by all the aggravating and cumulative factors that were present and operative.

[84] In so far as the ideological principles of sentencing are concerned, there is substantial evidence to support informed decision making on the ideologies of

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[42] *R v Lacasse* [2015] SCC 64. [94] to [105]

retribution, deterrence, prevention, and denunciation. However, there is no, or at best only speculatively little, evidence to make any informed sentencing decisions about rehabilitation in this case. This lack of evidence with respect to information regarding opportunity and possibility for rehabilitation, is a shortcoming that needs to be addressed as a matter of urgency.

[85] The idea that time spent incarcerated, simpliciter, is presumptive of rehabilitation, is no longer viable in relation to sexual offences against minors. Psychiatry and psychology have advanced to a stage where it is possible to make reliable empirical and measurable evaluations about rehabilitative prospects for sex offenders. Furthermore, categorization as low-risk, medium-risk, and high-risk and use of tried, tested and often supervised treatment interventions, such as cognitive behavioural therapy, can help offenders exercise control over and change their pathologies and behaviours, and so facilitate law abiding re-integration into society.[43] The idea that "once a sex offender, always a sex offender", is no longer accepted. Rehabilitation leading to re-integration is now well documented.

[86] The practice of the law needs to take into account the available science and treatments. Justice must keep up with evolving developments, and be informed by these, if it is to remain useful and fulfil aspirations such as fairness, proportionality and restorative justice, and if it is to serve the public interest and engender public trust and confidence. Judges have a duty to lead in this regard.

[87] I will come back to the objectives of public interest, public trust and confidence, and preservation of the rule of law, when I consider the human rights aspects of this matter. At that point I will also deal with the application of the totality and proportionality principles, and explain why I am willing, in the final analysis, to abide the decision of the majority.

[43] Anthony N. Doob and Rosemary Gartner, 'Some Recent Research on Sex Offenders and Society's Responses to Them' available at https://criminology.utoronto.ca/wp-content/uploads/2013/09/CrimHighlights_SexOffending11.pdf (03 December 2013)

Human Rights Implications of Sexual Offences Against Minors

(a) General Principles

[88] In Guyana there are constitutional values, many of which are shared throughout the Caribbean, which impact on the matter at hand. These include the rights to life, to liberty, to not be subjected to degrading treatment, and to equality and protection of the law – especially if one is in a vulnerable or disadvantaged position.[44] Developmentally and in relation specifically to children, there is a protected right to education.[45] Indeed, a liberal reading of section 149J(1) of the Constitution, can interpret 'environment' as not being limited to the natural environment per se, and so reveal a more general underpinning constitutional value of a right to not be harmed in relation to one's "health and well-being". An interpretation which would be consistent with the values of life and liberty (as freedom). All of these core constitutional values arise out of the singular recognition that all humans, including children, have inherent dignity and worth. Expressed otherwise, there is an *a priori* right to be, to be human, a right to personhood, to personal autonomy and development, and so to freely enjoy the fullness of what that means and to be protected from all that undermines and endangers what that promises.[46]

[89] In relation to children, the Constitution places a special value on their protection and development. In its Preamble, there is a specific clause dedicated to their recognition and worth, present and future:

> WE, THE GUYANESE PEOPLE,
>
> Acknowledge the aspirations of our young people who, in their own words, have declared that the future of Guyana belongs to its young people, who aspire to live in a safe society which respects their dignity, protects their rights, recognises their potential, listens to their voices, provides a healthy environment … and affirm that their declaration will be binding on our institutions and be a part of the context of our basic law.[47]

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[44] Constitution of Guyana (n 1) ss 138, 139, 141 (1), 149D
[45] ibid, s 149H
[46] ibid, s 149D; Hall (n 8), [174]; *Mohammed v Warner* (TT CA, 22 May 2019) Civil Appeal No. 252 of 2014, [4]
[47] Constitution of Guyana (n 1)

[90] The indecent assault and multiple rape of a minor, in this case of a fourteen year old girl, by a person whom she trusted and who exercised power over her, in the sanctity of a family home, directly assaults these guaranteed and protected constitutional rights. Every single one of the six preambular aspirations contained in the clause cited above, has also been assaulted by the offender in this case. Though these acts were not carried out by the state or by an organ of the state, nevertheless the loss of what the state has proclaimed as integral and assured is real. This is not about legal liability; it is about an acknowledgement of core societal values that are considered both sacrosanct per se and important developmentally. Consequently, it is also about the recognition of the true nature of the harm inflicted. Therefore, in this case it is about how the state should, through its judicial arm, respond.

[91] In my opinion, understanding the nature of rape against a minor from a human rights perspective, helps a sentencing court apply the objectives of sentencing in a more balanced, fair and proportionate manner, to both process and outcome, and in relation to both victim and offender. (I will also develop this idea further in the discussion on victim impact statements).

[92] For example, sexual offences cause profound harm to minors. Harm that is physical, mental, emotional, psychological, and relational. Harm that can endure for an entire lifetime. Rape of a minor assaults personal autonomy, bodily integrity, sexual integrity, and dignity. It is a violation of personhood. It interferes with the developmental right of a child to grow and mature into adulthood free from the effects of sexual exploitation and objectification. It is a violation of trust. It is exploitative of the most vulnerable and powerless. It humiliates, shames, de-humanises. It erodes self-worth and self-esteem. It stultifies development in all spheres and, relative to other children, compromises them to their detriment and disadvantage. It fractures relationships with adults, peers, and society, as well with families. Future social and intimate relationships are compromised. It can condemn victims to cycles of sexual violence, to self-harm, and to self-deprecation.[48] Thus,

[48] Friesen (n 11), [46]-[69], [74]-[90]

the consequential effects of the rape of a minor, translate into adverse effects inequality; that is an inequality of outcome that adversely or disproportionately affects the victim/survivor. In all these ways, the rape of a minor compromises the fundamental guarantees of equality, protection, freedom, and personhood that the Guyanese Constitution avows.

[93] Judges have the responsibility to determine, on a case by case basis, what punishment is fair, proportionate, and just, relative to the gravity of the particular offence and the degree of culpability of the individual offender. Account must also be taken in this reckoning of the contemporary and evolving understandings and insights into the wrongfulness and harmfulness of sexual offences against children, as these factors impact both the gravity of the offence and the degree of responsibility of the offender.[49]

[94] What has to be kept at the forefront is that the "welfare principle" in family law is in fact grounded in constitutional and well established international values.[50] That is to say, the protection of children from harm is a core societal and legal value; as is the interest and investment in their healthy growth. Moreover, this protection and interest are vital individually and developmentally to the free and democratic society that Guyana aspires to be.[51] Sentences for sexual offences against minors 'must recognise and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence'.[52] In addition, there must also be contextual recognition of the reality in Guyana, that (from the cases cited) the rape of minors disproportionately affects girls and so disadvantages and victimises them unequally.

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[49] ibid, [50]
[50] Custody, Contact, Guardianship and Maintenance Act 2011, Act No 5 of 2011, s 3(1); 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' Convention on the Rights of the Child (adopted 25 November 1989, entered into force 2 September 1990) 189 UNTC 1577 (CRC) art 3
[51] Friesen (n 11), [42]
[52] ibid, [74]

(b) **Gender Sensitive Sentencing**

[95] Seen through a gender sensitive lens, this disproportionality is a matter of great concern. It may be indicative of deep structural and systemic patterns of gender discrimination, and of asymmetrical distributions of power, status, and privilege along gender lines, in Guyanese society. It may also be indicative of deep-seated and unconscious cultures of bias and misogyny. Sentencing judges must also bear these in mind and have a duty to interrogate these issues as they strive for fairness, proportionality and consistency. Again, the social sciences can enlighten the law in this regard, and both judiciaries and judicial officers have a duty and responsibility to educate and inform themselves about these matters.[53]

(c) **The Totality Principle and Proportionality**

[96] The principle of totality is intended to ensure that justice is achieved by the imposition of sentences that are fit in relation to both the offence and the offender's overall culpability. It has particular relevance when consecutive sentences are being considered, as was the case in this matter. I agree with the explanations given in the opinion of Saunders PCCJ, that when an offender is being sentenced for more than one offence, the sentence(s) imposed must reflect all of the offending behaviour and in so doing must also be, in totality, just and proportionate. In the case of terms of imprisonment, the actual overall term imposed and to be served must therefore be carefully weighted to ensure that an appropriate overall sentence for all the offences under consideration is determined. Underpinning this approach is the goal of meeting the ideological objectives of sentencing. Proportionality is the tool used to achieve this fair and just outcome.

[97] The general principle is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but do not have to, receive concurrent sentences. It was therefore open to the trial judge to determine, that because these three offences occurred on separate occasions, though the offender and victim were

[53] ibid, [68]

the same and the nature of the offences were all sexual offences against a minor, it was appropriate to impose consecutive sentences. However, having so determined, this court has adjudged that the overall sentence imposed, of 37 years imprisonment, is manifestly excessive, unfit and disproportionate. Saunders PCCJ has explained the various sentencing options that were open to the trial judge. I have no need to revisit them. At the end of the day, the error of principle that the majority have agreed on, was the failure to apply properly or at all the totality principle, so as to arrive at a fair, just and proportionate, a fit, sentence. I agree.

[98] However, I would like to comment on why I consider a total of 37 years (consecutive) imprisonment in this case to be disproportionate. I consider this important when one looks at the range of sentences for similar offences that have been handed down in Guyana in recent years, including those confirmed by the court of appeal. In fact, a term of imprisonment of 37 years, for the multiple rape of a minor, is well within that range and just about on par with the average sentence (37.25, for minors 9 to 15 years) in Guyana. In this context, the principle of parity, that similar offenders who commit similar offences in similar circumstances ought to receive similar sentences, is not breached. Neither therefore is the objective of consistency. Indeed, both have been met by the local courts. This Court however considers this cumulative term of 37 years imprisonment to be disproportionate. In so doing, it is critiquing, not just the sentencing outcome in the instant appeal, but the average of the entire range that the local courts have deemed appropriate for these kinds of offences.

[99] In *R v Friesen*, the Supreme Court of Canada, as recently as April, 2020, stated, "All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[54] This court agrees that this is the foundation of sentencing. However, the Canadian Supreme Court also explained how, in its opinion, proportionality was to be practically achieved in sentencing:

[54] ibid, [30]

> In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deducted from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.[55]

[100] On what basis therefore can this Court critique the sentence imposed by the trial judge and upheld by the court of appeal, beyond saying that there was an error in principle in relation to the totality principle? The only way is to explain why, given this error of principle, 37 years imprisonment is demonstrably unfit. In this, the Court is fulfilling its role of developing the law and providing guidance for future decisions of a similar kind. In so doing, this court is also setting a new direction, deviating from the body of comparable sentences imposed in the past in order to impose what it considers a truly fit sentence.

(d) **Arriving at a Fit Sentence**

[101] I have already demonstrated how, on an analysis of the existing precedents, considering an appropriate cluster of cases, and paying particular attention to decisions of the court of appeal, for starting point purposes in a case such as this, 15 to 20 years imprisonment for the first rape and 17 to 25 years imprisonment for the second rape, reflect the "collective experience and wisdom" of the Guyanese Judiciary. This means, that an uplift from 15 to 17 (2 years), or from 20 to 25 (5 years), or uplifts to a factor of, between, or around 2 to 5 years for a second rape of a minor, reflect what the local courts have also collectively deemed a fit sentence for a second similar offence. Thus the justification for a cumulative sentence becomes tenuous, if the sentence for the second rape already includes an uplift to reflect both the gravity of the second offence and the culpability of the offender in relation to this second offence – taken as a second offence for the rape of the same minor and dealt with in the same proceedings and at the same trial and sentencing hearing. Indeed, the imposition of consecutive sentences becomes quite obviously

[55] ibid, [33]

unjustified and disproportionate, hence excessively unfit. Once this is accepted, then the process that follows is as was described above in the section on "moving beyond starting points".

[102] The question therefore becomes: should the starting points for the individual terms of imprisonment for the individual offences be increased or decreased in this case? It is here that the objectives of public interest, public trust and confidence, and preservation of the rule of law come into play, as well as the challenging objective of rehabilitation.

[103] It is in the public interest to protect minors from sexual predators such as the offender in this case. Public trust and confidence demand that an overall contextually fit sentence be imposed on this offender. A human rights perspective reveals the seriousness of this particular offence and the degree of culpability that the offender must be held responsible for. A gender sensitive perspective nuances the nature of the exploitation and objectification that likely also facilitates these multiple rapes, and the disproportionate harm that they will have caused to this victim. All of these factors suggest that there should be an increase from the starting point that is arrived at. The ideologies of retribution, deterrence, prevention, and denunciation support such an increase. What then of rehabilitation?

[104] Starved of any useful information or evidence, the objective of rehabilitation appears stillborn. Yet, somehow it must be accounted for. Maybe in the absence of evidence, resort could be had to the principle of mercy. But this cannot be jurisprudentially justified. The questions therefore remain: can this offender be rehabilitated so as to re-enter society as a law-abiding citizen? If not, then what does the public interest demand of a justice system that seeks to protect children, minors and young vulnerable girls from sexual predators such as this offender; and in so doing to preserve the rule of law? To be clear, the public interest would be best served if an offender could be rehabilitated and so be re-integrated into society as a better person. The best societies make this a clear priority and invest in the necessary resources to achieve this objective. Courts can only make a plea in this regard!

[105] I have found this to be a most difficult question to adjudicate. However, I am guided by the following. First, the science shows that generally a majority of sexual offenders can be rehabilitated.[56] Second, this offender has not had the benefit of a proper scientific assessment to ascertain whether he is a low, medium, or high risk offender, or what are his chances of rehabilitation; and this Court has not been informed of whether there are resources and personnel who are suitably qualified, trained and available to help him rehabilitate for the purpose of lawful re-entry into society. Third, the principle of fairness, and this offender is entitled to a fair trial,[57] includes a sentencing process that is also fair. Part of that fair process includes consideration of available and relevant information. In this context, information relevant to the chances of and opportunities for rehabilitation. This offender ought not therefore to be penalised for what may have been available to assist in making a fair sentencing assessment but was not sought or considered.

[106] Balancing all of these considerations, I am of the opinion that there should have been an uplift from the median starting points that the precedents for a second rape reveal (17.5 years), and by the lowest factor also so revealed (2 years). The result would be a term of imprisonment for the second rape of 19.5 years. This approach balances the justifications for an uplift against the benefit of rehabilitation. Sentencing cannot however be entirely mathematical or scientific, and a certain amount of flexibility is necessary because no two cases are ever identical in all respects. At best there may be similarities, common features, that allow for a measured comparison. Always, sentencing is a matter of judicial discretion, best suited to the first instance trial judges who have all the advantages that they enjoy in the fact finding and decision-making process.[58]

[107] The majority prefer to hold both the individual sentence for the second rape and the total overall sentence of imprisonment at 17 years. I am willing to abide by this decision, though my preference is for an overall total sentence of 20 years in the

[56] Some Recent Research (n 22)
[57] Constitution of Guyana (n 1), s 144(1)
[58] *Aguillera v The State* 89 WIR 451, [23]

circumstances of this case. I am however in total agreement that a cumulative sentence of 37 years is disproportionate and excessive.

[108] I have laboured over this analysis, because I consider it only fair that a transparent, accountable, and consistent approach be taken to the review of sentences. Local courts deserve no less. I have also done this to hopefully model an approach that can be followed by sentencing judges; as well, to demonstrate practically why the development of local sentencing guidelines, a readily accessible local repository of sentencing precedents, and even a local criminal bench book, is invaluable.[59]

[109] In relation to sentencing guidelines and sentencing handbooks, it is worth noting the following. In 2017 Jamaica produced Sentencing Guidelines. This aid to sentencing was the product of a cooperative effort by local judges and attorneys, led by Justice Dennis Morrison, President of the Court of Appeal. It is a most useful document, not least of which is the Table that appears as Appendix A, which is a Quick Reference sentencing guide. Interestingly, for rape of a minor, for which the maximum sentence is life imprisonment, the 'normal range' is stated as being between 15 to 20 years, and the 'usual starting point' as being 15 years. In cases where the offender is an adult in a position of authority, the guideline is for a minimum of 10 years to be served before eligibility for parole.[60]

[110] In 2016, Trinidad and Tobago published the 2nd edition of its Sentencing Handbook, which is a local repository of High Court and Court of Appeal sentencing precedents from 1990 to 2016. It too was the result of a wide-ranging collaborative effort, led by two judges of the Court of Appeal, Justices Mark Mohammed and Alice Yorke-Soo Hon. It is also a remarkable achievement. As in Guyana and Jamaica, the maximum penalty for rape in Trinidad and Tobago is life imprisonment. A perusal of the Court of Appeal sentencing decisions for rape of a

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[59] Judicial Education Institute of Trinidad and Tobago, 'Sentencing Handbook 2016' available at http://www.ttlawcourts.org/jeibooks/bookdetails.php?19 (2018); Judicial Education Institute of Trinidad and Tobago, 'Criminal Bench Book 2015' available at http://www.ttlawcourts.org/jeibooks/books/ttcriminalbenchbook.pdf (2015); F Algernon Smith and Karl Harrison, 'Supreme Court of Judicature Jamaica Criminal Bench Book' available at https://supremecourt.gov.jm/sites/default/files/pdf/Supreme-Court-of-Judicature-of-Jamaica-Criminal-Bench-Book.pdf (2017); Supreme Court of Jamaica, 'Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts' available at https://supremecourt.gov.jm/sites/default/files/Jamaica%20Sentencing%20Guidelines.pdf (2017).

[60] Jamaica Sentencing Guidelines (n 38), A-8

minor, reveals a range that coalesces consistently between 15 to 20 years imprisonment, with several decisions being higher.[61]

[111] Thus, in so far as one may wish to look to other jurisdictions for trends in sentencing, one should first look to relatively comparable jurisdictions, such as those in this region. Doing so supports the totality approach of the majority, as to what a fit sentence could be in this matter; though it should be said, that in both Jamaica and Trinidad and Tobago, based on the two resources cited above, a slightly higher sentence would have better approximated to the trends in those two jurisdictions. As I have already alluded to, a truly Caribbean jurisprudence must be born and grounded in the *sitz im leben* of Caribbean peoples and Caribbean spaces. It is therefore my hope that Guyana will also undertake the publication of sentencing guidelines and a sentencing handbook.

The Value and Importance of Victim Impact Statements

[112] A victim impact statement is:

> A statement by a victim of a crime detailing the impact of the incident on their personal, professional and family life. Such statements serve to provide judicial officers with a better sense for the human cost of someone's wrongdoing and to assist them in deciding on an appropriate sentence. They help in assessing the immediate and potential long-term effects of the offence on the victim and any psychological harm caused.[62]

A victim impact statement can also influence mitigating factors and shed light on the prospects of rehabilitation. There are other good reasons for their usefulness. These are aspects which will also be explored.

(a) General Principles and Starting Point Approaches to Sentencing

[113] The jurisprudence that has been developed by this court, both in relation to ideological sentencing objectives, as well in relation to sentencing methodologies,

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[61] Sentencing Handbook 2016 (n 38), 384-415

[62] *Lutchman v Gookool* Mag. App. No. S 025 of 2018, CATT, [21] (Mohammed JA). This judgement of the court of appeal of Trinidad and Tobago is a virtual tour de force of the commonwealth cases and approaches, including regional considerations, and as well of the academic literature on the use of victim impact statements by courts, [25]-[51].

support the use of victim impact statements at the sentencing stage of a criminal hearing.

[114] The starting point approach to sentencing admits to a four-stage methodology.[63] First, fix a starting point having regard only to the aggravating and mitigating factors relative to the objective gravity, seriousness and characteristics of the particular offence. Second, take into consideration the aggravating and mitigating factors relative to the particular offender and, based on these, adjustments may be made upwards or downwards to the selected starting point. Third, where relevant factor-in an appropriate discount for guilty pleas. Fourth, give credit for time spent in pre-trial custody.

[115] At stage one, the focus of aggravating factors is on the mode or method of commission of the particular offence, which allows for an assessment of its seriousness, which in turn, is gauged by 'the degree of harmfulness of the offence'.[64] This stage therefore also facilitates giving effect to the sentencing objectives of retribution, deterrence and prevention. A victim impact statement, that speaks to the harm suffered by the victim can quite obviously provide both useful and relevant information towards determining an appropriate starting point for individualised sentencing. Information that may never be elicited in relation to the commission of the offence. For example, a victim impact statement can assist in answering the question: What was the impact of this particular offence on this particular victim? It can thus give insight into the degree of harm caused by these offences to this victim. In the case of multiple rapes of a minor, it can, for example, help provide information about present and future physical, mental, emotional, and psychological harm. It can also provide information into all of the possible impacts of rape on a minor explored in the section on the human rights implications of sexual offences on minors, including gendered impacts. All of which may otherwise never be known when victims are treated as mere witnesses of their own crimes.

[63] Persaud (n 13), [46], [47]; Aguillera (n 37), [24]
[64] Friesen (n 11), [24]

[116] At stage two, where the focus of on the offender, a victim impact statement can provide information that goes towards mitigating factors. This stage can therefore also facilitate giving effect to the sentencing objective of rehabilitation, and as well as to the aspirations of restorative justice. For example, information may be revealed about steps taken by an offender, or on their behalf, to mitigate the harm caused by the commission of the offence.[65]

(b) Other Reasons Justifying the Use of Victim Impact Statements

[117] A criminal trial includes both the conviction/acquittal and sentencing stages (where this applies). In Guyana, and in several other Caribbean jurisdictions, the sentencing stage of the trial often takes the form of a separate event in the Assizes, following upon a conviction or guilty plea. Such a bifurcated approach facilitates the use and usefulness of victim impact statements at the sentencing stage.

[118] The idea of a fair trial in criminal proceedings is constitutionally recognised in Guyana (as throughout the region).[66] The jurisprudence on this subject has developed around recognition and upholding of the rights of accused persons, as it should. But what of victims? From a victim's perspective what constitutes a fair process, leading to a just outcome? Are there any constitutional values that can recognise a victim's role in the sentencing process?

[119] In the last clause of the Preamble to the Guyana Constitution, there is a declared resolution to 'include the commitments, concepts, and other principles proclaimed in this preamble'. Two of those preambular 'commitments, concepts, and … principles' are to: (i) 'Forge a system…that promotes concrete effort and broad-based participation in national decision making in order to develop…a harmonious community based on democratic values, social justice, fundamental human rights and the rule of law'; and, (ii) 'Create a republican community…'[67] These two preambular clauses describe, among other things, what one may term "democratic

[65] Lutchman (n 41), [63] and [64].
[66] Constitution of Guyana (n 1), section 144 (1)
[67] ibid, Preamble

participatory aspirations and objectives". These are also explicitly linked to human rights and the rule of law.

[120] In the context of a sentencing hearing, this constitutional participatory objective justifies the use of victim impact statements in determining what may be a fit and proportionate sentence. It does so by including the victim in the sentencing process, in ways that can provide information that may be both useful and relevant to determining an appropriate sentence. It gives a victim a voice, and in so doing gives recognition to the inherent dignity and value of a victim's personhood, and as well, to a victim's role (albeit limited) in determining what may be an appropriate sentence. Thus, a victim participates throughout a criminal matter, at the trial with respect to the determination of innocence or guilt, and then if required, at the sentencing stage in relation to what a judge may, in the independent exercise of their judicial discretion, determine to be a proper sentence.

[121] There is a public interest justification for the use of victim impact statements as well. One ideological objective of sentencing, considered the most important, is the public interest consideration. Crimes have a collective origin and impact; hence a victim is technically only a witness in the prosecution of a criminal offence – an offence against the state. However, crimes are in reality against both individuals, as well as against the state and society at large. This individual and human face to crime informs, in part, public trust and confidence in the criminal justice system. Victims of crime (and through them, their families and communities), who suffer the real and immediate trauma of criminal behaviour, and as well its lasting and lingering effects, develop increased trust and confidence in a criminal justice system that includes them in the most important stage of sentencing. Thus, the use and recognised usefulness of victim impact statements in sentencing serves the broader and deeper purpose, a public interest purpose, of influencing and increasing public trust and confidence.

[122] Finally, and at a more granular level, section 144 (2) of the Guyana Constitution, affirms that, 'It shall be the duty of a court to ascertain the truth in every case...'[68] This 'duty to truth', is applicable no less to the sentencing stage of a criminal trial, as it is to the determination of innocence or guilt. Victim impact statements are one way in which courts can ascertain the truths that are directly relevant to determining a fit and proper individualised sentence.

[123] All the above justifications advance a human rights sensitive compliance with the rule of law. This is not to say that victims are to be invited to suggest or determine what is a fit sentence. Only that their experiences as victims of the particular crime are relevant to the integrity of and provide useful information for both the process and outcomes of sentencing. It is for each local jurisdiction to work out how best to make use of victim impact statements, and many Commonwealth jurisdictions have already done so, as has the United States of America.

[124] Indeed, Caribbean jurisdictions are also exploring their use and usefulness and, as the Trinidad and Tobago decision in *Lutchman* case so persuasively opines:

> The courts in the Commonwealth jurisdictions … recognise the cathartic, communicatory and participative value of victim impact statements but share the view that it would be quite improper for a victim of a crime to dictate the level of sentence for his assailant …. Having said how a victim impact statement is not to be treated by sentencers, it is important not to lose sight of what it is legitimately capable of demonstrating. Victim impact statements may play an important role in helping the sentencer, when determining sentence .... This can only be conducive to the fairness, balance and integrity of the criminal justice system.[69]

[125] Ultimately, it remains a matter of judicial discretion (barring statutory intervention), whether to request and use victim impact statements at the sentencing stage of a matter. I do not intend to be prescriptive, only to raise the issue, and to leave it to

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[68] ibid, s 144(2)

[69] Lutchman (n 41), [52], [54]; 'Assessing Victim Participation during Sentencing at the International Criminal Court', J Int Criminal Justice, (2019) 17 (2): 431; 'Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis', Oxford Journal of Legal Studies/2015, Oxford J Legal Studies (2015) 35 (2): 355; 'Victims' rights are human rights: The importance of recognising victims as persons', TEMIDA, Jun 2012, str. 71-84; 'The evidential quality of victim personal statements and family impact statements', The International Journal of Evidence & Proof/2009, IJEP 13 4 (293).

the local jurisdictions and their judicial officers, to best determine when and how to best utilize this intervention.

JOINT DISSENTING JUDGMENT OF THE HONOURABLE JUSTICES WIT AND ANDERSON, JCCJ:

Introduction

[126] With regret, we are compelled to disagree, once again,[70] with the majority judgment as to the appropriateness of sentences for criminal offences imposed by the courts below. This time the disagreement relates to the sentence imposed for sexual offences. We shall set out our reasons for our disagreement relatively briefly, reserving detailed considerations for another occasion.

Appellate Power to Review Sentences

[127] As on the previous occasion, in *Lashley and Campayne v Singh*,[71] we are deeply conscious that, speaking generally, an appellate court, and certainly a final Court of Appeal, should be slow to interfere with a sentence imposed by a lower court. Accordingly, we accept that this Court ought not lightly to disturb such a sentence and should only do so if the sentence is manifestly excessive or inadequate or otherwise wrong in principle.[72]

[128] However, it is important to remember that the appellate jurisdiction to review sentences is legislated in very wide terms. Section 13 (3) of the Court of Appeal Act of Guyana provides that, where this Court[73] thinks 'that a different sentence should have been passed', this Court 'shall…quash the sentence passed…and pass such other sentence as warranted in law by the verdict'. Any reticence to interfere with sentence decisions of the courts below must, we emphasize, ultimately bow to the legislative mandate to ensure that just sentences are imposed on those convicted of criminal offences in our courts.

[70] [2014] CCJ 11 (AJ).
[71] Ibid.
[72] See Majority in Lashley at [30].
[73] Section 11(6) of the Caribbean Court of Justice Act, Cap. 3:07.

[129] In the present case, we do not think that this Court can properly accept, and we agree with our colleagues on this point, the total sentence imposed by the courts below of 37 years' incarceration for the three sexual offences of which the Appellant was convicted. That being so, that sentence must be quashed and substituted by another considered by this Court to be warranted by the convictions. In pronouncing the sentence or sentences in substitution it is certainly permissible and indeed expected that this Court will have proper regard to the views of the sentencing judges, but the legislation just referenced places the responsibility for deciding on the sentence in substitution squarely and exclusively within the purview of this Court. We consider that to accept the term of 17 years imprisonment imposed by the courts below for the most serious of the three offences, without application of the relevant principles of sentencing, results in a sentence that is much too severe in the circumstances of this case.

Reasons to Quash the Appealed Sentences

[130] We need not cause any significant tarrying over the quashing of the decision by the Trial Judge and the Court of Appeal to impose the term of 37 years on the Appellant for the three convictions. We note that that sentence is regarded unanimously by this Court as manifestly excessive and, therefore, unjust. We are content to highlight three matters, relevant to the imposition of the sentences, that cause us considerable disquiet.

[131] First, the Trial Judge gave absolutely no reasons for the imposition of the sentences (at least none apparent on the record), and the Court of Appeal dealt with the issue of sentencing in a single, generic, paragraph.[74] The giving of reasons for judicial decision-making is now generally regarded as an ingredient of judicial responsibility and essential to the discharge of the judicial function. It has been said that the process of reducing reasons to writing contributes to the avoidance of error.[75] Where the sentencing court does not disclose the reasons for its sentencing, it becomes difficult to defend the sentence as just. There is simply no material with

[74] See Para [8] below.
[75] *Blackwell v GEC Elliott Process Automation Ltd* [1976] IRLR 144.

which to mount such a defence. This is especially so in this case where there was no pre-sentencing report, no victim impact statement, and no record of the views of the family members most immediately affected by the conduct of the Appellant. In the absence of reasons, and in the absence of relevant reports and materials, the imposition of 37 years' incarceration gives the impression, rightly or wrongly, of a sentence having been plucked out of thin air.

[132] Second, and relatedly, there was no, or no adequate, consideration of whether the three terms of imprisonment for the three offences ought to have run consecutively, or concurrently. The Sexual Offences Act, under which the Appellant was charged and convicted, provided for a maximum sentence of life imprisonment for rape of a child under 16 years of age, and for a maximum sentence of ten years for conviction on indictment of sexual activity with a child under the 16 years of age. The Trial Judge sentenced the Appellant to 15 years imprisonment on the first count of rape; 17 years imprisonment on the second count of rape; and 5 years imprisonment on the count of sexual activity with a child under sixteen. The judge ordered that the sentences were to run consecutively, rendering the composite sentence 37 years imprisonment.

[133] Whilst the Trial Judge gave no reasons for making the sentences consecutive, the Court of Appeal said the following:

> As regards the sentencing, it is complained that no reasons were given for the imposition of consecutive sentences. It is noted that the incidents are three separate incidents spread over a period of eight to nine months. This is not a case where the offences charged flowed from one incident; in which case, it would be expected that the sentences would be ordered to run concurrently. It is clear that the conduct of the Appellant amounted to an… ongoing sexual interference with a child in relation to whom, as her uncle, he was in a position of some trust. As he said in his statement, he knew her from when she was little. She was clearly a regular visitor to the home to assist with the care of her grandmother. She should not have been violated in the way that she was. In the circumstances, we do not consider that the Trial Judge was incorrect in imposing consecutive sentences. The incidence of rape and particularly rape of child family members are prevalent and the Courts must treat with these cases condignly and send a strong message that such would not be tolerated. Therefore, the conviction and sentences are affirmed and the appeal is dismissed.

[134] It will be observed that these remarks do not at all refer to the effect of the global term of imprisonment; that is, the remarks do not consider whether the degree of criminality displayed merited a total term of 37 years. The prevalence of the incidents of rape, undoubtedly despicable as these are, and while a relevant factor, cannot be determinative of the appropriate sentence for a specific offender. An offender may not be sacrificed to the perceived greater good of a standard tariff or to the goal of general deterrence. The offender is entitled to the sentence which his or her crime, and individualized conduct and circumstances, mandate; no more, no less. The offender may have depersonalized his or her victim; a court of law cannot do the same to the offender.

[135] Thirdly, the courts below failed to reference and apply the relevant sentencing principles in announcing the sentence imposed. This was so even though the applicability of the penological principles of punishment, deterrence, and rehabilitation have been affirmed by this Court on several occasions: see e.g., *Alleyne v The Queen.*[76]

Application of Sentencing Principles

[136] The methodology for applying sentencing principles to arrive at an appropriate sentence was recently expounded by this Court in *Teerath Persaud v Queen.*[77] Speaking for the Court, Anderson JCCJ said:

> 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

[76] [2019] CCJ 06 (AJ).
[77] [2018] CCJ 10 (AJ).

> 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 *Romeo da Costa Hall v The Queen* full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed.[78]

[137] It follows from all the foregoing that in applying the principles of sentencing to the facts of the present case, this Court must (i) determine whether a custodial sentence is warranted; if it is, (ii) determine the starting point, for such sentence; and (iii) adjust the starting point in consideration of the relevant aggravating and mitigating factors. These matters are now considered, in turn.

(i) Is a Custodial Sentence Warranted in this Case?

[138] The first consideration in the application of proper sentencing principles is whether a custodial sentence is indicated. In *R v Roberts*[79] Lord Lane CJ gave the following guidance concerning custodial sentences in rape cases:

> Rape is always a serious offence. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence… A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasize public disapproval. Third to serve as a warning to others. Fourth, to punish the offender, and last, to protect women. The length of the sentence will depend on all the circumstances.

[139] Lord Lane CJ was concerned with the rape of an adult woman (the same, we would suggest, applies to the rape of a man), but we venture to say that even where the sexual offence is against a child under 16, there may be wholly exceptional circumstances where imprisonment is not warranted. A girl, who on the night of her twentieth birthday engages in consensual sexual intercourse with her boyfriend who is a few weeks shy of his 16 birthday, has committed an offence under the Sexual Offences Act but, were she to be charged and convicted, an appropriate sentence may well be, dependent upon all the circumstances, a reprimand and discharge. Other judicial examples have been given where a rehabilitative sentence

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[78] Ibid., at [46] (footnotes omitted).
[79] [1982] 1 All ER 609.

may be preferable to a sentence that is denunciatory where there was no violence or threats and there was a family to restore.[80]

[140] We are of the view that the present case cannot fall under the 'wholly exceptional circumstances' category just mentioned and merits a significant term of incarceration. The conduct of the Appellant in committing these offences was detestable and made worse by the fact that the child was aged 14 at the material time while he was a grown man of some 46 years. The Appellant breached the trust reposed in him as an informal family member and did so in a manner which involved a serious violation of the victim's sexual and personal integrity and, likely, her reputation. It is true that no violence or threat of violence to the child was used but, even in the absence of a victim impact statement, it can be reasonably assumed that emotional or psychological injury occurred and has been worsened by the public disclosure of the name of the victim with the attendant notoriety. As the JURIST Model Guidelines for Sexual Offences in the Caribbean make clear, the commission of these types of offences is usually attended by trauma to the survivor as well as complicated family and community dynamics.[81] The circumstances and the seriousness of the offences make a substantial term of incarceration inevitable and unavoidable.

(ii) What Should the Starting Point Be? – (a) Consecutive or Concurrent Sentences

[141] The second consideration concerns the starting point for the determining the duration of the sentence. The exercise of choosing a starting point is a tool to arrive at a just and appropriate sentence that reflects both the crime(s) and the individual circumstances of the offence(s) and the offender. The starting point also helps with ensuring consistency of sentencing and, therefore, the constitutional requirement of equality before the law. A preliminary issue, therefore, concerns how best to reflect the overall criminality in the sentence imposed.

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[80] McDonell at 39.
[81] JURIST Model Guidelines for Sexual Offences in the Caribbean at p. 16.

[142] In the present case, the approach adopted by the courts below was to determine individual sentences for each of three offences for which the Appellant was convicted and then to run these sentences consecutively. Reference was made to *Bridgelall v Hariprashad*,[82] a decision of this Court, to justify the imposition of consecutive sentences. In that case the appellant was charged and convicted of two counts of possession: one count related to cocaine found in a house, the other to cocaine found in the yard of the house. He was sentenced to two 5-year terms of imprisonment, to run consecutively. The consecutive sentences were warranted, in the view of the DPP, because of the societal ills caused by drugs, generally, and cocaine, particularly. This Court held that it was a mistake to run the sentences consecutively. Citing Court of Appeal authority from Jamaica[83] this Court held that, barring special circumstances, where a person is convicted of multiple offences which arise out of the same set of facts or the same incident, it will be appropriate to impose concurrent, and not consecutive, sentences. This Court also delivered the *obiter dictum* that consecutive sentences 'may be given when the offences arise out of unrelated facts or incidents' and 'may also be imposed where the offences are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

[143] The key requirement, therefore, is the imposition of a composite sentence that reflects the criminal conduct of the convict as a whole. To be just, the concurrent or consecutive sentences for the underlying offences must result in a global sentence that, having regard to the facts and circumstances of the case, is reflective of the overall criminality. The case is easiest where the convictions arise out of the same set of facts or incident, as in *Bridgelall*. But concurrent sentencing according to overall criminality may also be appropriate by reference to other factors, including (i) whether the convict displayed widespread promiscuous criminal tendencies; (ii) whether the offences were directed to one victim or several victims; (iii) whether the criminal conduct occurred over a short or long period of time; (iv) whether there is need to preserve or restore family relationships; and (v) whether

[82] [2017] CCJ 8 (AJ).
[83] *Kirk Mitchell v R* (Court of Appeal of Jamaica, 14 January 2011), [2011] JMCA Crim 1 at [34].

the sentencing options allow for the imposition of an appropriate sentence commensurate with the degree of criminality displayed. Several cases have suggested that concurrent sentences should be given where the same or similar type of offence was committed against the same victim over a short period of time.[84]

[144] In *R v McDonnell*,[85] notwithstanding that there were two separate sexual offences (one, a rape and other, a sexual assault) against two different victims separated by a period of seven years, the Supreme court of Canada held, albeit by majority, that concurrent sentences were appropriate. The majority adopted the words of the trial judge that:

> An additional lengthy consecutive custodial sentence to the custodial sentence imposed on the first charge would only seek to destroy the accused and his family and is not necessary to deter others from committing such an offence.

[145] We consider that the case before us is far more compelling for composite sentencing in accordance with the overall criminality without having to resort to consecutive sentencing than was the case in *McDonnell*. The criminal conduct here was directed at the same individual; that conduct occurred three times over eight months; the family should be restored and preserved, as far as is possible; and the sentencing range available is adequate to ensure an appropriate sentence.

[146] Having determined that the total sentence appealed against should be quashed, but that a period of incarceration is warranted, it is open to this Court to reconsider all aspects of the composite sentence, including the relationship between the three offences involved. Bearing in mind the totality principle, about which, further on, we accept that best practice requires that in sentencing for a series of similar offences, it is most appropriate to pass a substantial sentence for the most serious offence and shorter concurrent sentences for the less serious ones: *Regina v Walford Ferguson*.[86] It is understood, though, that that sentence absorbs the shorter ones and does, as it must, reflect the offender's criminality in its totality.

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[84] *R v Paddon* (3 March 1971) Current sentencing Practice A 5.2b; *R v Magill* [1989] Northern Ireland Law Reports 51.
[85] R v McDonnell [1997] 1 SCR 948.
[86] SCCA No 158/1995, J'can Court of Appeal per Langrin JA.

[147] We agree with the Trial Judge and the Court of Appeal that the second rape can be considered the most egregious of the three offences, because, among other things, it constituted the second and last such assault. The question therefore arises as to the appropriate starting point for the sentence for this offence (reflecting also, as it should, the weight of the three underlying offences together).

[148] Before embarking on that exercise, something more needs to be said about the sentencing for multiple offences. A recent Dutch research report[87] concerning this subject, comparing the legislation of several countries, The Netherlands, Germany, UK (England and Wales), Finland, France, Austria and Spain, reveals that, despite clear differences, the purpose and foundation of the respective legislation does not differ much from each other. In all these countries the aim is to prevent disproportional sentencing, although retribution and, to a lesser extent, deterrence, serve as a foundation for the legislative sentencing arrangements. In none of these countries does pure accumulation of sentences exist. In case of multiple offences, sentences will be incrementally and moderately (but not absolutely) increased.[88] Even in those countries where an absolute accumulation of sentences is legally possible, a softening of the result thereof is usually provided, either through the courts (England and Wales) or by law (Spain). The apposite mechanism developed in the English courts for this exercise is called the totality principle.

[149] Traditionally, the totality principle 'is seen as a limiting principle, a means of reducing a total sentence that would otherwise be regarded as excessive… Thus, on the accepted application of the principle, it only comes into play once the sentencer has imposed appropriate proportionate sentences for each of the individual offences and has determined whether those sentences should be cumulative or concurrent in accordance with accepted principles'.[89] This still seems to be the conventional, approach in the common law world: the "bottom-up approach" as it has been called. However, the principle could also be seen, as it often is, as requiring proportionality

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[87] *Meerdaadse samenloop in het strafrecht, Een onderzoek naar doel, grondslag, karakter, strekking en functie van de wettelijke regeling van meerdaadse samenloop (artikel 57-63 Sr)*, Leiden, 11 July 2013, with an English summary (pp 224-254), www.wodc.nl › 2260-volledige-tekst_tcm28-72729.

[88] Professor Asworth, referring to German research, states that "each extra offence must have a diminishing incremental effect on the overall sentence." (Andrew Ashworth, *Sentencing and Criminal Justice*, 5th edition, p 272).

[89] Marianne Wells, Sentencing for Multiple Offences in Western Australia, The University of Western Australia, Crime Research Centre, Research Report No. 6, June 1992.

between the total sentence and the total criminality, i.e., the overall conduct of the offender. This "top down" approach to sentencing, described by Marianne Wells as a more determinative approach, has been applied in Western Australia and seems to us, in principle and practice, to make the most sense. The primary step in the sentencing process must therefore be the determination of the overall sentence, it is only thereafter that a decision must be made as to what sentence each of the separate offences should attract.

[150] It is often said that when criminals are punished, they are ordered to pay the price for what they have done. After all, retribution means literally "pay-back". But it has to be realised that the total price that is paid will not be the sum of the prices for each of the crimes committed. If that would be so, although it is often seen that way, any reduction of the total sum of sentences, would be considered a (unjustified) discount. The better view, it seems to us, is to posit that offenders must pay the price for their criminal behaviour. And if that behaviour has been repeated, as shown by multiple similar offences committed by the same person, the multiplicity, must for the purpose of punishment, be considered as an aggravating factor. Professor Ashworth makes the point quite clearly: 'the longer an incident continues, the more serious it usually is; therefore, irrespective of the procedural issue of whether a continuing series of offences is thought to call for concurrent or consecutive sentences, it is surely right that such a series of offences should be regarded *ceteris paribus* as a more serious manifestation of criminality than a single such offence and as justifying a greater total sentence'.[90] (underlining added).

[151] What is required in this case, therefore, is to select an appropriate starting point for the last of the three offences (the second rape) and then to apply the aggravating and mitigating factors within the sentence range for this offence. As that range is sufficient to punish the criminality in question (the maximum sentence for rape of a child is life imprisonment) the lower sentences for the other two offences will run concurrently and thus be absorbed by the former.[91]

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[90] Ashworth, ibid, p 265.

[91] Somewhat comparable to the Russian matryoshka doll, containing a set of similar wooden dolls of decreasing size placed one inside another.

(iii) **What Should the Starting Point Be? – (b) the Period of Time**

[152] There are no judicial guidelines in Guyana on the starting point for sentencing in sexual offence cases, and the JURIST Model Guidelines provide broad advice on applicable principles but no concrete suggestions on starting points. It is virtually impossible to work backwards from the final sentence pronounced in decided cases to what the starting point would have been had the sentencing judge thought of a starting point. The DPP frankly admitted that sentencing patterns vary in Guyana but, virtually the only relevant precedent provided to the Court was the recent case of *Selwyn Lancaster*.[92] There the rape and sexual assault of a 6-year old child by a 45 year old man (in addition to vaginal penetration, he forced his penis into the girl's mouth) attracted sentences of 15 years and 7 years, respectively and were made to run concurrently but this was clearly a more egregious case than the case at bar.

[153] How then should a court determine the appropriate starting point for this particular sexual offence? In *Solem v Helm*[93] the US Supreme Court indicated that determinations of this nature required a proportionality analysis that should be guided by objective criteria such as (1) the gravity of the offence and the harshness or severity of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, that is whether more serious crimes are subject to the same penalty or to less serious penalties, and (3) the sentences imposed for commission of the same crime in other jurisdictions. The court was of the view that courts are competent to judge the gravity of the offence(s), at least on a relative scale. Comparisons can be made, the court stated, in light of the harm caused or threatened to the victim or to society, and the culpability of the offender.[94]

[154] The Appellant has touched on these criteria. He has made the point that of the 13 murder cases (concluded in the April sessions 2019 in Guyana), nine of the accused pleaded guilty to the lesser (but still very serious) offence of manslaughter: three of these accused were sentenced to 12 years, two to 14 years each and the others to 15

[92] As reported at https://www.kaieteurnewsonline.com/2019/10/30/men-to-serve-18-15-years-in-jail-for-raping-underage-girls/
[93] 463 U.S. 277 (1983).
[94] At p 292.

years, 10 years, 9 years and 16 years and 8 months. Although this may serve as a strong indication that the sentencing for sexual offences may be disproportionate, too little is known of these manslaughter cases to draw clear conclusions. There are, however, other criteria.

[155] Whilst not entirely determinative, the guidelines adopted in other Commonwealth countries may, as stated in *Solem v Helm*, have persuasive value. The English case of *R v. Roberts*,[95] mentioned earlier, was built upon in *R v Billam*[96] where the English Court of Appeal gave guidelines on the length of sentences that are appropriate for rape and associated offences. Based on the reported decisions available to the court at the time, it was recommended that:

> For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living , or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

[156] The guidelines in *R v Billam* were reconsidered in *R v Millberry*[97] against the background of recommendations by a Sentencing Advisory Panel, as well as legislative changes in the substantive law of sexual offences (e.g. with the development of marital rape and date rape). However, Lord Woolf CJ expressly retained the starting points and made clear that there had been no substantial departure from the general approach laid down in *R v Billam*.[98]

[157] We consider that the *Billam* guidelines provide, in the absence of judicial guidelines issued by the Court of Appeal of Guyana, a useful point of departure for consideration of the appropriate sentence. Of course, any guidelines on sentencing that emanate from outside the jurisdiction from which the appeal comes, and moreso, from outside the region, must obviously be subjected to rigorous scrutiny for relevance but there are good reasons to pay attention to the *Billam* guidelines.

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[95] [1982] 1 All ER 609.
[96] [1986] 1 WLR 349.
[97] [2002] EWCA Crim 2891.
[98] Ibid., at para 26.

First, these guidelines are based on consideration of numerous sentence decisions in the United Kingdom for sexual offences and several of those cases are similar to the offences in the present proceedings. Second, *Billam* has been followed and applied in several common law jurisdictions outside the UK, for example, in Bermuda,[99] Bahamas,[100] Hong Kong,[101] and Singapore.[102] The Canadian approach in *McDonnell* is somewhat comparable. Most critically, the *Billam* Guidelines clearly influenced the adoption of the starting point for sentencing in sexual offences in the St Lucian case of *Winston Joseph v Queen.*[103] In that case Sir Dennis Byron CJ (who would later become President of this Court) stated that: 'For rape committed on an adult without aggravating or mitigating features a figure of 8 years should be taken as the starting point in a contested case with a minimum of 3 years on a plea of guilty'; it should be remembered that *Billam* itself gave a range from 5 to 8 years. The other indications of starting point given by Sir Dennis also bore close resemblance to those stated in *Billam*.

[158] In the present case, the offence took place in the sanctity of a home where the young victim would have expected to be safe and protected. On the other hand, the appellant was a first-time offender, no violence was used beyond that which necessarily goes with the commission of the crime of rape. No weapon was used, and there were no threats of violence to the child. The victim was not a very young child, being 14 years of age; (the younger the victim, speaking generally, the higher should be the starting point). The conditions in the prisons is also a factor for consideration as these conditions have an impact on the severity of the penalty, a point to which we return shortly. In all the circumstances, we adopt the range of 5 – 8 years mentioned in *Billam* and we consider that a starting point of six years (given the likely prison conditions and the position of trust based on the informal relationship between the Appellant and the victim's aunt) is indicated.

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[99] *The Queen v Morris O'Brien* BM 2019 SC 27.
[100] *Anthony Penn aka Anthony Smith v R* BS 2019 CA 175.
[101] *HKSAR v Chan Wai Tung* [2014] HKEC 844.
[102] *Public Prosecutor v. Mohammed Liton Mohammed Syeed Mallik* [2008] 1 S.L.R.(R.) 601 at para. 82 (C.A.).
[103] Consolidated with *Benedict Charles v The Queen* and *Glenroy Sean Victor v The Queen*; Decision re-issued on 31 October 2001.

(iv) **What Adjustment for Mitigating and Aggravating Factors?**

[159] We do not consider that there are any mitigating factors of significance. The fact of that the appellant had no previous convictions, sometimes euphemistically referred to as evidence of good character, was already utilized in arriving at the starting point. And this is a convenient point to indicate that whilst lack of previous conviction is not really a strong mitigating factor, it should be clearly understood that a conviction for a subsequent sexual offence, would be a very serious aggravating factor.

[160] The case of *R v. Millberry* accepted nine commonly occurring aggravating factors in sexual offence cases. These aggravating factors do not include the age of the victim since that is already a factor which would have taken into account in determining the higher starting point. In this case 6 (as opposed to 5) years. The nine factors are:

> (i) the use of violence over and above the force necessary to commit the rape; (ii) use of a weapon to frighten or injure the victim; (iii) the offence was planned; (iv) an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in the transmission of a life-threatening or serious disease; (v) further degradation of the victim, e g by forced oral sex or urination on the victim (referred to in *Billam*, at p 351, as 'further sexual indignities or perversions'); (vi) the offender has broken into or otherwise gained access to the place where the victim is living (mentioned in *Billam* as a factor attracting the eight-year starting point); (vii) the presence of children when the offence is committed (c.f., *R v Collier* (1991) 13 Cr App R (S) 33); (viii) the covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence; (ix) a history of sexual assaults or violence by the offender against the victim.

[161] To these we would add the factors of previous convictions for similar offences (to which we have referred), age, and positions of trust. The older the perpetrator the more likely that age will be an aggravating factor. In the present case, the fact that the Appellant was, at the time of the offence, a 46-year old adult must be regarded as a significant aggravating factor. The Appellant was also in a position of trust in that he was the common law husband of the aunt of the victim. These last two elements have already been accounted for in the enhanced starting point, As set

out above, however, we also consider the fact that the appellant has been found guilty of three incidences of sexual assault by appellant against the same victim (of which the last incidence was the third one) to be an aggravating factor. In the circumstances, we consider that the global sentence should be enhanced by a further period of 3 years' incarceration.

Conclusion

[162] In the premises, we would have sentenced the Appellant to a term of 9 years for the second offence of rape, enhanced as stated immediately above to accord with the totality principle; 6 years for the first offence of rape, and 9 months for the offence of sexual activity. We would also have ordered that these two shorter sentences run concurrently with the sentence of 9 years and thus be absorbed in it.

[163] We accept that the global sentence of 9 years amounts to less than one-quarter of the 37 years imprisonment thought appropriate by the lower courts and to just a little over half of the 17 years sentence imposed by our colleagues. We are confirmed in our view by three considerations to which we make brief reference on this occasion.

[164] First the law appears to be at the beginning of a jurisprudential development which explores whether unduly long terms of imprisonment violate fundamental rights embodied in several human rights treaties.[104] This development appears to be coinciding with lower sentences imposed for even the most heinous offences, including murder and rape. Whatever comes of that development, the unthinking imposition of excessively long sentences is usually counterproductive (when eventually a broken and embittered convict is released into society) and should be avoided.

[165] Secondly, we do not know where Mr Pompey is being, or will be, accommodated for the remainder of his sentence. What we do know is that, certainly at the time of our last visit, the Georgetown prison was sadly overcrowded and, despite the efforts of those Prison Officers who are trying to make the best of it, was one of the most

[104] *Vinter v UK*, ECHR Judgment dated 9 July 2013.

dehumanizing places of incarceration we have seen in our region. The conditions in our prisons have already been the basis for variation in sentences by both domestic courts,[105] and international tribunals.[106] The safety of the society is ultimately enhanced by remembering that prisoners are sent to prison as punishment and not for punishment.

[166] Thirdly, several courts in the region have already demonstrated judicial leadership in performing their sentencing function. In *R v Rabsatt*[107] a 66-year old man pleaded guilty to 1 count of rape and 2 counts of indecent assault against a young girl who was between 14 and 15 at the time of the offences. Despite the fact that the rape resulted in the pregnancy of the girl, Hariprashad-Charles J., sitting in the British Virgin Islands High Court, imposed sentences of 8 years for rape and 9 months each for the two counts of indecent assault and ordered the sentences to run concurrently. In *Winston Joseph v Queen et al.*, Byron CJ reduced sentences for significant sexual offences from 8 years to 21/2 years;[108] 15 years to 5 years;[109] and 30 years to 5 years.[110] We consider that these, and several other cases, have established a directionality that the objectives of a just and balanced sentencing regime dictate must be followed.

Postscript

[167] By way of *post scriptum*, we observe that the majority has not substantially explained how the cumulation of two sentences, one of 15 years and another of 17 years, can be squared with a global sentence of 17 years. Nor is it clear from the majority's judgments, why the average sentencing range that the lower courts have deemed appropriate for one of two similar offences would be basically determinative for this Court's assessment of that range (without, apparently, consideration of whether that range was excessive) but not determinative for the totality of those sentences. Why is it only at the point of deciding the total sentence that this Court, to use the words of Justice Jamadar in his thoughtful judgment,

[105] *Pratt v Attorney General et Al; Morgan v Attorney General et Al* JM 1991 SC 25.
[106] *Boyce et al v Barbados* Inter-American Court of Human Rights Judgment of November 20, 2007. See, e.g., Paras 100-102.
[107] *The Queen v Calvin Rabsatt [Eastern Caribbean Supreme Court]* VG 2011 HC 22.
[108] *Winston Joseph v The Queen* (sexual intercourse with a girl, a neighbour, of 12 years old)
[109] *Benedict Charles v The Queen* (incest against 14-year-old daughter)
[110] *Glenroy Sean Victor v The Queen* (forced sexual intercourse with a domestic co-worker).

should fulfil its role to develop the law and provide guidance for future decisions of a similar kind? As we see it, when deciding the basic starting point, this Court should also be 'setting a new direction, deviating from the body of comparable sentences imposed in the past in order to impose what it considers a truly fit sentence'.[111]

[168] We are aware that in some other Caribbean jurisdictions (Jamaica, and Trinidad and Tobago, for example) very long sentences are being imposed for sexual offences against minors, sentences of a range similar to those in Guyana. But we also know that in neighbouring Suriname,[112] not less a Caribbean jurisdiction, offences as the ones before us would hardly attract a total sentence of more than 4 years, even though there, too, these crimes are seen as very serious. It would seem that in Guyana the sentencing policies with regard to these kinds of offences have been strongly influenced by the fact that these offences have become more and more prevalent, which seems to suggest that general deterrence plays an overriding role in those policies. But the facts, as set out by Justice Jamadar, must give us pause; despite the very severe sentencing by the courts in Guyana, these offences have become even more prevalent. Clearly, to assume that filling the Guyanese prisons with sexual offenders without more will free the country from this scourge would be a naïve simplification. In addition to incarceration, other complementary interventions appear to be needed to heal the society.

[169] Lastly, we also support the call for dedicated sentencing hearings and for sentencing guidelines. These would go a long way towards creating some consistency in the sentencing practices of the courts. There is at least one caveat, though; the process of creating sentencing guidelines should go beyond the registration of the sentences the courts would usually impose for certain offences. The sciences of criminology and penology should also be consulted. And above all, the process should ensure that the publication of sentencing guidelines will not lead to the petrification of past sentencing policies.

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[111] See [100] supra

[112] The normal range would be 3 to 5 years, but lower sentences are also regularly imposed. Only in very rare cases the sentence may be higher (Unpublished information from the High Court of Justice of Suriname).

[170] We end with the wise words of Chinese King Wu-ling. The King declared, in 307 BCE: ‘A talent for following the ways of yesterday is not sufficient to improve the world of today.’

Order of the Court

[171] The Court orders that:

(i) The appeal is allowed, in part, against the sentence passed by the Trial Judge;

(ii) The sentences of 5 years for the sexual assault conviction and 15 years and 17 years for the rape convictions are affirmed;

(iii) The sentences are ordered to run concurrently.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar

Appendix A

Criminal Cases by Assizes in Guyana 2014 – 2019

What is shown is the total number of cases for each Assizes for all offences, and the corresponding number of sexual offences cases, as well as the number of sexual offences cases concerning minors.

2019

	Assizes	**2019**				
		Criminal Cases	**Sexual Offence Cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	260	153	116	58.8	75.8
	April	259	154	115	59.5	74.7
	June	304	175	130	57.6	74.3
	October	322	166	127	51.6	76.5
Berbice	February	100	38	37	38.0	97.4
	May	95	36	34	37.9	94.4
	October	83	31	31	37.3	100.0
Essequibo	February	81	44	38	54.3	86.4
	May	74	40	32	54.1	80.0
	October	63	34	24	54.0	70.6
Total	Demerara	1145	648	488	56.6	75.3
	Berbice	278	105	102	37.8	97.1
	Essequibo	218	118	94	54.1	79.7
Total		**1641**	**871**	**684**	**53.1**	**78.5**

2018

	Assizes	2018				
		Criminal Cases	**Sexual Offence cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	229	142	104	62.0	73.2
	April	242	151	125	62.4	82.8
	June	223	149	114	66.8	76.5
	October	228	147	107	64.5	72.8
Berbice	February	96	41	34	42.7	82.9
	May	94	37	34	39.4	91.9
	October	98	39	36	39.8	92.3
Essequibo	February	62	36	27	58.1	75.0
	May	60	34	28	56.7	82.4
	October	78	47	41	60.3	87.2
Total	Demerara	922	589	450	63.9	76.4
	Berbice	288	117	104	40.6	88.9
	Essequibo	200	117	96	58.5	82.1
Total		**1410**	**823**	**650**	**58.4**	**79.0**

2017

	Assizes	2017				
		Criminal Cases	**Sexual Offence cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	140	76	60	54.3	78.9
	April	152	88	69	57.9	78.4
	June	167	98	76	58.7	77.6
	October	216	134	103	62.0	76.9
Berbice	February	92	41	38	44.6	92.7
	May	94	44	39	46.8	88.6
	October	114	58	50	50.9	86.2
Essequibo	February	35	20	15	57.1	75.0
	May	38	18	12	47.4	66.7
	October	59	35	27	59.3	77.1
Total	Demerara	675	396	308	58.7	77.8
	Berbice	300	143	127	47.7	88.8
	Essequibo	132	73	54	55.3	74.0
Total		**1107**	**612**	**489**	**55.3**	**79.9**

2016

	Assizes	2016				
		Criminal Cases	**Sexual Offence cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	184	90	61	48.9	67.8
	April	163	79	53	48.5	67.1
	June	116	60	38	51.7	63.3
	October	142	69	51	48.6	73.9
Berbice	February	65	22	21	33.8	95.5
	May	77	27	26	35.1	96.3
	October	89	39	36	43.8	92.3
Essequibo	February	28	16	10	57.1	62.5
	May	27	15	10	55.6	66.7
	October	39	23	16	59.0	69.6
Total	Demerara	605	298	203	49.3	68.1
	Berbice	231	88	83	38.1	94.3
	Essequibo	94	54	36	57.4	66.7
Total		**930**	**440**	**322**	**47.3**	**73.2**

2015

	Assizes	2015				
		Criminal Cases	**Sexual Offence cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	213	100	66	46.9	66.0
	April	230	115	81	50.0	70.4
	June	231	120	84	51.9	70.0
	October	218	113	75	51.8	66.4
Berbice	February	61	18	16	29.5	88.9
	May	51	14	12	27.5	85.7
	October	53	15	14	28.3	93.3
Essequibo	February	22	13	8	59.1	61.5
	May	20	12	9	60.0	75.0
	October	22	13	8	59.1	61.5
Total	Demerara	892	448	306	50.2	68.3
	Berbice	165	47	42	28.5	89.4
	Essequibo	64	38	25	59.4	65.8
Total		**1121**	**533**	**373**	**47.5**	**70.0**

2014

	Assizes	2014				
		Criminal Cases	**Sexual Offence cases**	**Cases with Minors**	**Sexual Offence Cases as % of Criminal Cases**	**Cases with Minors as % of Sexual Offence Cases**
Demerara	January	233	107	72	45.9	67.3
	April	230	113	77	49.1	68.1
	June	242	116	75	47.9	64.7
	October	227	101	69	44.5	68.3
Berbice	February	37	9	7	24.3	77.8
	May	43	13	11	30.2	84.6
	October	52	13	12	25.0	92.3
Essequibo	February	20	10	8	50.0	80.0
	May	15	6	5	40.0	83.3
	October	20	13	9	65.0	69.2
Total	Demerara	932	437	293	46.9	67.0
	Berbice	132	35	30	26.5	85.7
	Essequibo	55	29	22	52.7	75.9
Total		**1119**	**501**	**345**	**44.8**	**68.9**