IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCR2021/001
GY Criminal Appeal No 42 of 2015

BETWEEN

CALVIN RAMCHARRAN	**APPELLANT**
AND	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

Before the Honourable: **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 with Ms Savannah Barnwell and Mr Ronald J Daniels for the Appellant

Mrs Shalimar Ali-Hack, SC, Director of Public Prosecutions with Mrs Diana Kaulesar-O'Brien, Mrs Teshana Lake and Ms Natasha Backer for the Respondent

Criminal law – Appeal - Sentence - Appellant convicted of rape and causing actual bodily harm – Sentences of 23 years and 3 years imprisonment to run concurrently – Whether sentences manifestly excessive - Sexual Offences Act Cap 8:03, s 3(3) - Criminal Law (Offences) Act Cap 8:01, s 49.

Criminal law - Rape - Sentencing Principles - Failure to apply guidance in Pompey v DPP.

SUMMARY

Calvin Ramcharran ('Ramcharran') was tried before a jury and convicted of rape and assault causing actual bodily harm. On the day of the verdict, 16 November 2015, he was sentenced to 23 years imprisonment for the offence of rape and 3 years imprisonment for the offence of assault occasioning actual bodily harm, with the sentences to run concurrently. On 11 January 2021 the Court of Appeal affirmed the decision of the trial judge. Ramcharran appealed to this Court. The appeal was against sentence alone, this Court having refused permission to appeal against conviction.

Before this Court Ramcharran contended *inter alia* that the sentences were manifestly excessive, that the judge failed to consider or to adequately consider the antecedents of the appellant or any social report or any victim impact statement and that she failed to outline or apply any principles and considerations upon which the sentences were determined. He argued that the Court of Appeal erred in law when they found that although the trial judge did not identify the process by which the penalties were arrived at the sentences did not warrant any review or were appropriate.

The Court, in a majority judgment authored by Barrow JCCJ found that the sentence for rape was manifestly excessive. The Court considered that the trial judge failed to hold a separate sentencing hearing, to take a victim impact statement, to obtain mental health or psychological assessments, to obtain a social report and to give reasons for and indicate the process used to arrive at the sentence. While the trial judge did hear a plea in mitigation and did not impose the maximum sentence of life imprisonment, because the judge gave no reasons the appellate courts could only infer what the trial judge considered in arriving at the sentences imposed.

The Court found that the Court of Appeal in reviewing the trial judge's sentence erred in failing to follow the comprehensive guidance for trial judges in respect of sentencing in rape cases in its earlier decision in *Pompey v DPP ('Pompey').* The Court was satisfied that because the Court of Appeal failed to be guided by the precedent of *Pompey*, as it was

bound to do, it failed to apply the proper sentencing principles and objectives to the determination of the issue raised by the appeal: whether the sentences were manifestly excessive or wrong in principle. More fully stated, it failed to consider if a different sentence should have been passed.

The Court found that pursuant to the *Caribbean Court of Justice Act* it had jurisdiction to review the sentences imposed. The Court considered the range of starting sentences for rape, as well as the aggravating and mitigating factors and imposed a sentence of 12 years imprisonment. In respect of the sentence for assault causing actual bodily harm the Court found that because the sentence of imprisonment for 3 years for assault is to be served concurrently there is no double punishment for this offence, and it may be left to stand for its demonstrative and deterrent effect.

In a separate judgment, Rajnauth-Lee and Jamadar JJCCJ agreed that the sentence for rape imposed and affirmed by the Court of Appeal was excessive and needed to be reviewed. The sentence was suspect, because no rational or evidence-based approach was taken to sentencing. Neither the trial judge nor the Court of Appeal followed the methodology recommended by the majority judgments of this Court in *Pompey*, with the result that the sentence imposed was presumptively excessive and disproportionate. The evidential deficits and procedural shortcomings, taken together with the failure to follow the sentencing approach explained by the majority in *Pompey*, resulted in a sentencing hearing that was flawed and has arguably not met the threshold standards to constitute a fair hearing that could produce a fit, proportionate, and just sentence. The deficits were arguably so fundamental, that evidentially it was difficult for an appellate court to engage in a thorough resentencing review and arrive at an appropriate new sentence. To overcome these evidential deficiencies, this matter could have been remitted for a sentencing rehearing by the trial judge guided by this Courts jurisprudence, including as set out in their opinion and in the majority opinions in *Pompey*. However, given the passage of time from both the date of the crime and the holding of the sentencing hearing, and in the interest of fairness including to the victim, timeliness, and for pragmatic reasons, a sentencing re-evaluation and reconsideration ought not to be remitted for rehearing and should be undertaken by

this Court. Rajnauth-Lee and Jamadar JJCCJ disagreed with the sentence imposed by the majority and would have imposed a sentence of 16 years imprisonment for rape.

All judges of this Court agreed that the sentence for rape imposed by the trial court and upheld by the Court of Appeal was excessive and needed to be reviewed. They agreed that the sentences for the two offences should run concurrently and agreed with the lower courts on the sentence for the assault charge. The majority also all agreed with the general approaches to a sentencing hearing outlined in the joint opinion of Rajnauth-Lee and Jamadar JJCCJ. The appeal was therefore allowed, and the Appellant sentenced to 12 years imprisonment for rape. The sentence for assault causing actual bodily harm was affirmed. The sentences are to run concurrently.

Cases referred to:

Alleyne v R [2019] CCJ 6 (AJ) (BB), (2019) 95 WIR 126; *Balach v DPP* [2019] NSWSC 377; *Baxter v R* (2007) 173 A Crim R 284; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Bend v R* (Barbados CA, 27 March 2002); *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377; *Gittens v R* [2010] CCJ 1 (AJ) (BB), (2010) 75 WIR 126; *Hall v R* [2011] CCJ 6 (AJ) (BB), (2011) 77 WIR 66; *Joseph v R* (Saint Lucia CA, 31 October 2001); *Lashley v Singh* [2014] CCJ 11 (AJ) (GY), [2014] 5 LRC 649; *Manzanero v R* [2020] CCJ 17 (AJ) BZ, [2021] 1 LRC 543; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Persaud v R* [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132; *Pinder v R* [2016] CCJ 13 (BB), (2016) 89 WIR 181; *Pompey v DPP* [2020] CCJ 7 (AJ) GY; *R v Billam* [1986] 1 WLR 349; *R v Ewart* (2000) 120 A Crim R 18; *R v Friesen* [2020] SCC 9; *R v Millberry* [2003] 1 WLR 546; *R v Mustafa* 2021 ONSC 3088; *R v Rambarran* [2016] CCJ 2 (AJ) (BB), (2016) 88 WIR 111; *Ramcharran v The State* (Guyana CA, 12 January 2021); *Reid v Reid* [2008] CCJ 8 (BB), (2008) 73 WIR 56; *Roylance v DPP* [2018] NSWSC 933; *Solem v Helm* 463 US 277 (1983); *Todd v Price* [2021] CCJ 2 (AJ) GY; *Williams v Walters* (Guyana CA, 18 July 1985).

Legislation referred to:

Barbados - Penal System Reform Act, Cap 139; **Guyana -** Caribbean Court of Justice Act, Cap 3:07, Constitution of the Co-operative Republic of Guyana, Cap 1:01, Court of Appeal Act, Cap 3:01, Criminal Law (Offences) Act, Cap 8:01, Sexual Offences Act, Cap 8:03; **Jamaica -** Sexual Offences Act 2009.

Treaties and International Materials referred to:

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

Other Sources referred to:

Bhabha H K, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 Discipleship: A Special Issue on Psychoanalysis 125; Bhabha H K, 'Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Delhi, May 1817' (1985) 12(1) Critical Inquiry ("Race," Writing, and Difference) 144; Crichton S, 'Justice Delayed is Justice Denied: Jamaica's Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment' (2016) 44 Syracuse J Int'l L & Com 1; Daicoff S, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2005) 6(1) Pepp Disp Resol L J; Drakes N and others, 'Prevalence and Risk Factors for Intergenerational Sex: A Cross-Sectional Cluster Survey of Barbadian Females Aged 15–19' (2013) 13(53) BMC Women's Health; Eastern Caribbean Supreme Court, *A Compendium Sentencing Guideline of The Eastern Caribbean Supreme Court, Sexual Offences, Re-Issue 12 April 2021*; Elahie E, *Reflections of an Interested Observer; Ethnographic Musings of the Court User's Experience in T&T* (Judicial Education Institute of Trinidad and Tobago 2017); Erez E, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 Crim L Bull 483; Fanon F, *Black Skin, White Masks* (Gaillimard 1952); Fanon F, *The Wretched of the Earth* (1961); Goldberg S, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute 2005); Goldberg S, *Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice* (National Judicial Institute 2011); Jamadar P and Brathwaite K, *Exploring the Role of the CPR Judge* (Judicial Education Institute of Trinidad and Tobago 2017); Jamadar P and Elahie E, *Proceeding Fairly, Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Republic of Trinidad and Tobago* (Judicial Education Institute of Trinidad and Tobago 2018); Jones A and Trotman Jemmott E, 'Child Sexual Abuse in the Eastern Caribbean: Issues for Barbados (University of Huddersfield 2009); Judicial Education Institute, *Republic of Trinidad and Tobago Sentencing Handbook 2016;* Kempadoo K, 'Caribbean Sexuality: Mapping the Field' (2009) 3 Caribbean Review of Gender Studies 1; Kerrigan D and others, 'Securing Equality for All in the Administration of Justice: The Evidence and Recommendations' CJD Paper 1, 2017 (Caribbean Judicial Dialogue: Equality for All in the Administration of Justice, Trinidad and Tobago, 2017); Kerrigan D, 'Therapeutic Jurisprudence in Trinidad and Tobago: Legitimacy, Inclusion, and the Neo-colonialism of Procedural Justice' in Nehring Daniel (ed), *The Routledge International Handbook of Global Therapeutic Cultures* (Routledge 2020); Kokaram V, 'The Foundations of a Peace Jurisprudence Movement: Lessons Learned from Caribbean Mediation' (World Mediation

Summit, Madrid 2017); Lazarus-Black M, 'The Rites of Domination: Practice, Process and Structure in Lower Courts' (1997) 24 American Ethnologist 628; Lazarus-Black M, 'Everyday Harm: Domestic Violence, Court Rites, and Cultures of Reconciliation' (University of Illinois 2007); Lazarus-Black M, 'Vanishing Complainants: The Place of Violence in Family, Gender, Work, and Law' (2008) 36 Caribbean Studies 25; Makiwane P N, 'Victim-Impact Statements at the Sentencing Stage: Giving Crime Victims a Voice' (2010) 31 Obiter 606; McCloskey B, 'Reflections on Judicial Responsibility' (Commonwealth Law Conference, Nassau, 2021); Marley B, 'Redemption Song', track 10 on *Uprising*, Island Records, 1980; *Model Guidelines for Sexual Offence Cases in the Caribbean Region* (Judicial Reform and Institutional Strengthening (JURIST) Project 2017); Naipaul V S, *The Mimic Men* (1967); Perlin M, '"Have you Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence' (2017) 27 NZULR 1135; *Procedural Fairness A Manual: A Guide to the Implementation of Procedural Fairness* (Judicial Education Institute of Trinidad and Tobago 2018); Rudman L A and Fetterolf J C, 'Gender and Sexual Economics: Do Women View Sex as a Female Commodity?' (2014) 25 Psychological Science 1438; Sentencing Academy, 'Sentencing Explained, Appeals Against Sentence' 13 February 2021; Supreme Court of Jamaica, *Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts* (2017); *Town M A, '*Court As Convener and Provider of Therapeutic Justice' (1998) 67 Rev Jur UPR 671; Tyler T, 'Procedural Fairness and Compliance with the Law' (1977) 133 Swiss Journal of Economics and Statistics 219; Tyler T, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283; Tyler T, *Why People Obey the Law* (Yale University Press 2006); UNCHR (Sub-Commission) 46th Session 'Draft Body of Principles on the Right to a Fair Trial and a Remedy' Annex II in 'The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening, Final Report' (3 June 1994) UN Doc E/CN.4/Sub.2/1994/24; Weller P J, 'Mainstreaming TJ in Australia: Challenges and Opportunities' (2018) 3 Int'l J Therapeutic Juris 81.

JUDGMENT
of
The Honourable Justices Anderson, Barrow and Burgess

and

JUDGMENT
of
The Honourable Justices Rajnauth-Lee and Jamadar

Delivered by
The Honourable Mr Justice Barrow

on the 18th day of February 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

Introduction

[1] This appeal against a sentence of 23 years imprisonment for rape raises again basic issues of sentencing principles and approach and the need for sentencing courts to apply and further develop guidelines which have been established.

The Facts

[2] The appeal was against sentence alone, this Court having refused permission to appeal against conviction. The appellant was tried before a jury and convicted of rape and assault causing actual bodily harm. He was sentenced respectively to 23 years and 3 years imprisonment for the offences, with the sentences to run concurrently. The Court of Appeal affirmed the decision of the trial judge.

[3] Because an appellate court is required to exercise its sentencing discretion, it is necessary to set out fully the traumatic occurrence. T, the virtual complainant, went to a football match on the night of 21 July 2012. T was 20 years old. Due to its cancellation, she and three friends went to an open-air party and 'Fish Fry Lime' at Calabash Alley, Soesdyke. While there, T went alone into an unfinished concrete structure nearby to urinate. On her way in she saw someone stooping in the place, she said good night and went to urinate. While she was urinating, the person got up and went outside.

[4] On her way out she saw the appellant, also 20 years of age, standing outside the structure. She knew the appellant for seven years prior from attending school with him. The appellant held onto her hands, pulled her back into the structure and asked if she was 'doing business'. She said no and tried to release his grip on her hands. He let go of her hands and as she was trying to walk around him, he pushed her. She tried to pass him again and a fight ensued. The appellant struck her with a bottle

on her head. He snatched her top and tried to pull her through a door space to the back of the building, she resisted by bracing herself on the door frame. He removed his hands from her top and snatched her hair behind her head. He then hit her for a second time with a bottle and dragged her by her hair outside. He got her over a wall and then dragged her by her hair to a bushy area behind the structure. There, the appellant violently removed her clothing and he tried more than once to put his penis into her vagina. T was screaming, begging to be left alone, but he repeatedly hit her in her face, demanding that she 'shut up'. He kissed her on the neck and told her that he liked her. He ripped off her top and started kissing her chest and breast. She tried to scream but he choked her, telling her to shut up and threatening to kill her if she did not stop screaming. He kept slapping and cuffing her face. He tried to pull her pants off and she begged him to stop. He offered to pay her $65,000 but she refused and asked him to leave her alone**.** He pulled her pants and underwear down. He kept squeezing her throat. He asked her to suck his penis and tried to push it into her mouth, but she turned her face. He grabbed her hair and tried to turn her head around to put his penis in her mouth; she bit him on the penis. He pulled back, asked her what she did that for and he slapped her face. He then tried to put his penis in her vagina again and she started to scream. He told her that if she did not shut up he would throw her in the trench that was at the side of them. The appellant then sexually penetrated her without her consent on two occasions. The first time for 10 minutes and the second time for 15-18 minutes. When he was finished, he got up and left.

[5] T suffered injuries because of the attack namely bruising to the left eye, which was left black and blue, bite marks to the right side of her neck measuring 5 cm by 4 cm, scratches to the right forearm, scratches to the interior abdomen and bloody secretion in the vaginal vault.

Sentencing in the Courts below

[6] After the jury convicted the appellant on 16 November 2015, the trial judge heard a plea in mitigation on his behalf and proceeded immediately to sentence him. The Court of Appeal heard the appellant's appeal on 18 and 30 June 2020 and on 12 January 2021 affirmed the conviction and sentence.

[7] The facts relevant to the sentencing exercise at first instance and before the Court of Appeal are brief. As indicated, the trial judge failed to hold a separate sentencing hearing, to take a victim impact statement, to obtain mental health or psychological assessments, to obtain a social report and to indicate the process used to arrive at the sentence. While the trial judge did hear a plea in mitigation and did not impose the maximum sentence of life imprisonment, because the judge gave no reasons an appellate court can only infer what the trial judge considered in arriving at the sentences imposed.

[8] The Court of Appeal acknowledged the deficiencies of the sentencing exercise but went only as far as observing that 'the trial judge has not shown the process used to arrive at the sentence, given the modern sentence guidance'.[1] The Court of Appeal indicated that there was 'not much that the judge could have done in terms of a smaller sentence', considering the maximum sentence and the aggravating and mitigating factors but failed to identify what these factors were.[2]

[9] The contention on appeal is that the sentences were manifestly excessive, and this is summarised in the grounds of appeal. In brief, the appellant contended that the judge failed to consider or to adequately consider the antecedents of the appellant or any social report or any victim impact statement and that she failed to outline or apply any principles and considerations upon which the sentences were determined. Following from this, the appellant argued the Court of Appeal erred in law when

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[1] *Ramcharran v The State* (Guyana CA,12 January 2021) at [59].
[2] ibid at [62]-[63].

they found that although the trial judge did not identify the process by which the penalties were arrived at the sentences did not warrant any review or were appropriate. The appellant also urged that the Court of Appeal erred in law when they failed to identify or indicate any basis or consideration upon which they arrived at the conclusion that the sentences imposed by the trial judge were appropriate or, implicitly, that the trial judge must have applied the correct principles. Overall, the appellant argued that the sentences imposed by the trial judge and affirmed by the Court of Appeal were inconsistent with sentencing patterns disclosed for similar offences.

The Guidance Pompey Provided

[10] This Court recently provided comprehensive guidance for trial judges in respect of sentencing in rape cases in *Pompey v DPP*[3] and while that decision came long after the trial judge had done her sentencing, it was available before the appeal was heard. The Court of Appeal acknowledged the decision in *Pompey* but placed no reliance on that guidance. That failure to be guided by *Pompey* was critical because if the Court of Appeal had so guided itself, it is likely it would have arrived at a different decision.

[11] Four opinions from a seven-member bench were delivered in *Pompey*, with the majority opinion being delivered by Saunders PCCJ and Rajnauth-Lee and Jamadar JJCCJ each delivering a concurring opinion and Wit and Anderson JJCCJ delivering a joint dissenting opinion. The upshot of the decision was that a sentence of 15 years imprisonment for rape of a minor must be considered a standard sentence in a case with no aggravating or mitigating features and that the sentence would be lower for rape of an adult.

[12] Saunders PCCJ noted and all opinions were concerned to reaffirm that an appellate court will not alter a sentence merely because the members of the court might have

[3] [2020] CCJ 7 (AJ) GY.

passed a different sentence.[4] 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.[5] In this regard, a court will consider the range of sentences imposed by common law Caribbean courts for like offences.[6] The Court will also consider sociological realities.[7]

[13] Saunders PCCJ stated that the practice of passing sentence immediately after a verdict comes in should generally be avoided, 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.[8] As the opinions commonly observed, 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.[9]

[14] Rajnauth-Lee JCCJ drew attention to the alarming prevalence of sexual crimes in Guyana and elsewhere[10] and noted that in direct response some governments throughout the Caribbean have acted on the need to address this worrying trend. This has taken the form of specialized police units comprised of officers trained in the investigation of sexual offences.[11] International organizations have also been at the forefront of addressing gender-based violence[12] and in 2015, *the Judicial Reform and Institutional Strengthening Project ('JURIST'),* developed model

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[4] ibid at [29].
[5] ibid at [2].
[6] ibid at [25].
[7] ibid at [26].
[8] ibid at [32].
[9] ibid at [34].
[10] ibid at [41].
[11] ibid at [37].
[12] ibid at [38].

guidelines for managing sexual offence cases.[13] The *Model Guidelines for Sexual Offence Cases in the Caribbean Region 2017* ('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. Rajnauth-Lee JCCJ noted that Guyana's Sexual Offences Act established a National Task Force for the Prevention of Sexual Violence and gave the statutory duty to develop and implement a national plan for the prevention of sexual violence.[14] The judge endorsed the recommendation that the trial judges of Guyana would benefit greatly from sentencing guidelines crafted, agreed upon and published by the Judiciary of Guyana.[15]

[15] In affirming the deference an appellate court must give to sentencing judges, Jamadar JCCJ observed that sentencing is quintessentially contextual, geographic, cultural, empirical, and pragmatic. Caribbean courts should therefore be wary about importing sentencing outcomes from other jurisdictions whose socio-legal and penal systems and cultures are quite distinct and differently developed and organised from those in the Caribbean.[16]

[16] Jamadar JCCJ noted that in 2014 this Court explained the multiple ideological aims of sentencing. These objectives may be summarised as being: (i) the public interest, in not only punishing, but also in preventing crime ('as first and foremost' and as overarching), (ii) the retributive or denunciatory (punitive), (iii) the deterrent, in relation to both potential offenders and the particular offender being sentenced, (iv) the preventative, aimed at the particular offender, and (v) the rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law-abiding member of society.[17] In 2019, these governing principles were also

[13] ibid at [39].
[14] ibid at [42].
[15] bid at [43].
[16] ibid at [51].
[17] *Lashley v Singh* [2014] CCJ 11 (AJ) (GY), [2014] 5 LRC 649 at [31], [32].

acknowledged by this Court in *Alleyne v R*.[18] Appellate courts have at least four 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.[19]

[17] This Court's awareness of the specific realities in Guyana was demonstrated in the opinion of Jamadar JCCJ who carried out a comprehensive and detailed examination of the information provided on sexual offences for the three counties in Guyana: Demerara, Berbice and Essequibo. [20] He declared that the picture that emerged was so appalling that this Court was duty bound to respond in a decisive and robust way.

[18] Jamadar JCCJ considered 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.[21] In his view, to find the appropriate starting point in the sentencing exercise one needed to look to the body of relevant precedents, and to any guideline cases (usually from the territorial court of appeal).[22] To move beyond starting point mitigating and aggravating factors are considered. Mitigating factors include a guilty plea, evidence of cooperation, expression of remorse, apology, offer or action in mitigation (that may point to a lesser degree of culpability), or offer of compensation[23].Jamadar JCCJ also spent some time analysing the value of criminal

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[18] *Alleyne v R* [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126 at [44], [45], [58], [90].
[19] ibid at [56]; *R v Friesen* [2020] SCC 9 at [34], [35].
[20] Pompey (n 3) at [58]-[62].
[21] ibid at [64].
[22] ibid at [73].
[23] ibid at [83].

courts facilitating the making of victim impact statements[24]. Such statements, he noted, can provide both useful and relevant information in the sentencing process.

[19] The joint dissent of Wit and Anderson JJCCJ first considered that the appellate jurisdiction to review sentences is legislated in very wide terms. Section 13(3) of the Court of Appeal Act, Cap 3:01 provides that, where this Court 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.'[25]

[20] Wit and Anderson JJCCJ commented on the importance of giving reasons for the imposition of the sentences.[26] 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 which to mount such a defence. This is especially so where there is 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 accused.

[21] Wit and Anderson JJCCJ applied the principles established by this Court in *Persaud v R.*[27] In determining sentencing 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.[28]

[22] In determining a starting point, the Justices adverted to *Solem v Helm*[29] decided by the US Supreme Court. It was considered in that case 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,

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[24] ibid at [112].
[25] ibid at [128].
[26] ibid at [131].
[27] [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132.
[28] *Pompey* (n 3) at [137].
[29] 463 US 277 (1983) cited in *Pompey* (n 3) at [153].

(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.[30] Wit and Anderson JJCCJ noted in *R v Billam*[31] the English Court of Appeal gave guidelines on the length of sentences that are appropriate for rape and associated offences. It was recommended there, *inter alia*, 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.

[23] Wit and Anderson JJCCJ citing *R v Millberry* found that aggravating factors include:

> (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.[32]

To these they added (x) previous convictions for similar offences, (xi) age, and (xii) positions of trust.[33]

[24] The Justices considered that, in the absence of judicial guidelines issued by the Court of Appeal of Guyana, the guidelines set out in *Billam* provided a useful point of departure for consideration of the appropriate sentence in this case although of

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[30] *Pompey* (n 3) at [153].
[31] [1986] 1 WLR 349 cited in *Pompey* (n 3) at [155].
[32] *R v Millberry* [2003] 1 WLR 546 quoted in *Pompey* (n 3) at [160].
[33] *Pompey* (n 3) at [161].

course, any guidelines on sentencing that emanate from outside the jurisdiction from which the appeal comes, and more so, from outside the region, must obviously be subjected to rigorous scrutiny for relevance. Their Honours were of the view however that there were good reasons to pay attention to the *Billam* guidelines as they were 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, Bahamas, Hong Kong, and Singapore. Most relevantly, the *Billam* Guidelines influenced the adoption of the starting point for sentencing in sexual offences in the St Lucian case of *Joseph v R* where a range of 3 to 8 years was adopted with the Court of Appeal suggesting 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.

[25] Wit and Anderson JJCCJ considered the conditions in the prisons to be relevant in sentencing as these conditions have an impact on the severity of the penalty.[34] The dissenting judges concluded by stating that 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. This development appears to be coinciding with lower sentences imposed for even the most heinous offences, including murder and rape. 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. The judges supported the majority's call for sentencing guidelines as these would go a long way towards creating some consistency in the sentencing practices of the courts. They added the caveat, though, that 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

[34] *Pompey* (n 3) at [165].

publication of sentencing guidelines will not lead to the petrification of past sentencing policies.[35]

Re-exercise of Sentencing Discretion

[26] One of the fundamental principles the judgment in *Pompey* reiterated[36] was that a sentencing court needs to identify for itself and state for general information the starting point or range of punishment for an offence of the type before it. Using the starting sentence or range approach, it was decided in Pompey that a sentence of 15 years imprisonment for the rape of the minor was appropriate, with a higher sentence of 17 years imprisonment for a repeat offence. The dissenting opinion considered that a starting point of 5 to 8 years may have been appropriate, and this is significant because it strengthens the force of the 15 years sentence in *Pompey*, as being at the higher rather than lower end of the range. This stands in flat out contradiction of the DPP's suggestion in oral argument of a starting point, in this case, of 23 years. The extensive summary, in this opinion, of the multiple opinions from the full bench of this Court in *Pompey* was done deliberately to show that the sentences decided in that case were arrived at after an ample and indeed exhaustive consideration of relevant data and factors. It must also be observed that all opinions in *Pompey* recognized that the most reliable way to arrive at starting sentences and ranges was for the judiciary of Guyana to see to and be assisted in conducting the necessary exercise for creating sentencing guidelines.[37]

[27] It is curious that the Court of Appeal acknowledged that *Pompey* decided that a sentencing court should begin its decision-making on the sentence to impose by identifying a starting point, but took no step in that direction. It may be that the court failed to appreciate a significant dimension of its appellate function in a sentencing appeal. In this regard, the Court requested and received supplemental written submissions, post-hearing, from the appellant (the DPP declining to provide

[35] ibid at [169].
[36] ibid at [32], [64]. See also *Persaud v R* (n 27) at [46], [47].
[37] See *Pompey* (n 3) at [28], [35], [43], [108], [111], [169].

same) expatiating on the jurisdiction of an appellate court in sentencing. The Court of Appeal Act, Cap 3:01 sets out that jurisdiction as follows, at s 13(3):

> (3) On an appeal against conviction or sentence the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

[28] Counsel for the appellant relied on dicta from the Australian case of *Baxter v R*[38] to submit that it is the duty of the appellate court to consider whether a different sentence should have been passed. Counsel submitted the appellate court cannot proceed on the basis that the sentencing judge was presumptively correct when the appellate court is being called upon to exercise their discretion. Instead, as it was stated in *Baxter*, the statute requires that the court

> … re-exercises the sentencing discretion taking into account all relevant statutory requirements and sentencing principles with a view to formulating the positive opinion for which the subsection provides.[39]

[29] Applying that principle to this case, the duty of the Court of Appeal to re-exercise the sentencing discretion meant it was their duty to consider all relevant matters, foremost among which, in this case, was the very approach and principle from the decision in *Pompey* to which they referred. That principle was that a court should begin its sentencing with identifying a starting sentence for the offence. Instead, impermissibly, the Court of Appeal rested its determination on the appropriateness of the sentence on the observation that 'One must not lose sight of the fact that in this jurisdiction sexual offences carry periods of imprisonment that are not altogether short, especially where violence is employed.' That observation was

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[38] (2007) 173 A Crim R 284.
[39] ibid at [19].

made after the court's determination that while there were some things the trial judge failed to do, these were not such as to render 'manifestly excessive' the sentence imposed by the trial judge in her exercise of discretion.

[30] This route to arriving at their decision represents the substantive failure of the Court of Appeal, namely, to re-exercise the sentencing discretion, which s 13 of the Act obliged it to do. For certain, such a re-exercise would have required the court to be guided by *Pompey* and identify a starting sentence, which it necessarily would have arrived at after considering that *Pompey* decided on a sentence, for the first offence, of 15 years imprisonment for rape of a minor.

Jurisdiction to Interfere

[31] In oral argument, the question as to the scope of the jurisdiction of this Court to review the sentence imposed by the sentencing court was raised with counsel. Section 11(6) of the Caribbean Court of Justice Act, Cap 3:07 provides that in relation to any appeal to it this Court shall have all the jurisdiction and powers of the Court of Appeal in relation to that case. The primary grounds of this appeal, as stated, were that the sentences of 23 years and 3 years were 'manifestly excessive'. The expression 'manifestly excessive', in appeals against sentences is a familiar one in common law courts that expresses the proposition that the sentence imposed exceeded the proper range of sentences after taking into account all the factors relevant to the offence and the offender.[40] The ground easily fits into the ambit of s 13(3) of the Court of Appeal Act, Cap 3:01 discussed by Wit and Anderson JJCCJ in *Pompey*, at [128], as being in broad terms in providing that the Court of Appeal "… if they think that a different sentence should have been passed …" may quash the sentence passed at the trial and substitute another sentence warranted in law.

[40] Sentencing Academy, 'Sentencing Explained, Appeals Against Sentence' 13 February 2021 <https://sentencingacademy.org.uk/wp-content/uploads/2021/02/Appeals-Explainer.pdf> accessed 17 January 2022.

[32] Counsel for the appellant submitted that there are several grounds upon which an appellant may urge that a different sentence should have been passed and these include that the sentence passed was manifestly excessive; wrong in principle; the result of procedural error; based on improperly considered material; and others. While there are these and other bases for urging error, such as an outright failure to follow legal principles and precedent, it needs to be emphasized that the core exercise the appellate court must conduct is to consider if a different sentence should have been passed. The exercise is not that the appellate court should consider if a particular error has occurred that may need to be corrected and then go on to consider passing a different sentence. Rather, the exercise is that the appellate court must consider the sentence passed and re-exercise the sentencing discretion to decide if a different sentence should have been passed.

[33] This appeal provides a good example of how that difference may operate in practice. When the appeal came to be heard and to be decided *Pompey* was fully available to assist the Court of Appeal in performing its statutory obligation of considering 'if a different sentence should have been passed'. The essential basis of this appeal is that the Court of Appeal failed to consider, guided by the decision of *Pompey*, if a different sentence should have been passed; it failed to consider whether there were sufficient grounds for them to interfere with the sentence. The court looked at the errors of the trial judge and decided she had done her best in the circumstances. That approach was thought to be supported by the words of Massiah C. in *Williams v Walters*[41] that '… the court will not interfere with a sentence unless it is manifestly excessive or wrong in principle.'

[34] With respect, the court gave no proper consideration to the requirements contained in the Chancellor's statement of the law because they did not consider or apply the by-then established developments in sentencing practice and principle. That advertence would have shown them that by reference both to the precedent of the recent sentence for rape and the applicable sentencing principles, as to which see

[41] (Guyana CA, 18 July 1985).

[16] above, the sentence was both manifestly excessive and wrong in principle. Had the court so adverted it would have recognized it was its duty, as an appellate court, to quash the sentence because they could not think otherwise than that a different sentence should have been passed.

Retribution

[35] *Lock him up and throw away the key* was a familiar expression of an earlier generation and the sentiment it contains continues to express popular reaction to crimes especially of such abhorrence as rape. It must be appreciated that it is a reaction that, while undoubtedly indicative of the societal disposition, has never been a principle of sentencing because it has no judicial authenticity. No doubt, the maximum sentence of life imprisonment that the legislation provides may seem to the uninformed to amount to nearly the same thing, but now it must be accepted that a sentence of life imprisonment will be rare and imposed only in the worst of the worse cases.

[36] This must necessarily be so because, as *Pompey* confirmed, modern sentencing practice requires the court to begin its exercise by identifying a starting sentence or range of sentence that has been established as standard for the offence, where the circumstances of its commission are not particularly bad. The decision on the sentence to impose must be a result of the process of fully considering the primary aims and principles of sentencing which, as discussed by Jamadar JCCJ[42] drawing upon this Court's decisions in *Lashley v Singh*[43] and *Alleyne v R*[44], are the prevention of crime (first and foremost), retribution, general and subjective deterrence, preventing the particular offender from committing crime and rehabilitation – retribution alone may not determine the sentence.

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[42] *Pompey* (n 3) at [52].
[43] *Lashley* (n 17) at [31], [32].
[44] *Alleyne* (n 18) at [44], [45], [58], [90].

[37] The Court of Appeal's approach that *in Guyana we impose sentences that are not altogether short* expresses a reality that reflects the demands within the society for retributive justice. But the full seven-member bench of this Court gave the matter full consideration in *Pompey* and determined that insufficient weight may have been given in previous sentencing exercises to sentencing objectives other than retribution. It follows that the Court of Appeal was legally bound to guide itself by the determination in *Pompey*. The ancient aphorism with which Wit and Anderson JJCCJ concluded their opinion in *Pompey*[45] is apposite at this juncture: 'A talent for following the ways of yesterday is not sufficient to improve the world of today.'

[38] We are, therefore, satisfied that because the Court of Appeal failed to be guided by the precedent of *Pompey*, as it was bound to do, it failed to apply the proper sentencing principles and objectives to the determination of the issue raised by the appeal: whether the sentences were manifestly excessive or wrong in principle. More fully stated, it failed to consider if a different sentence should have been passed.

Re-exercising the Sentencing Discretion

[39] The re-exercise of the sentencing discretion that this Court must perform begins with identifying a starting sentence, which was a seminal principle that Pompey further endorsed,[46] following the Court's earlier determination in *Persaud*.[47] The sentence of 15 years imprisonment for the rape of a minor in *Pompey* makes it proportionate to decide on a starting range of sentence of 8 to 10 years for the rape of an adult. As discussed in *Persaud*[48], a sentencing court must proceed by considering the aggravating and mitigating factors; first those pertinent to the commission of the offence and then those pertinent to the offender[49].

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[45] *Pompey* (n 3) at [170].
[46] ibid at [32], [64]-[66], [71], [72], [114], [136], [137], [141], [153].
[47] *Persaud* (n 27) at 46.
[48] ibid.
[49] ibid.

[40] As regards factors pertinent to the commission of the offence, the violence used in this case aggravated the rape and the significance of that violence as a distinct component of the criminal conduct to be punished is expressed in the prosecution's decision to separately charge assault occasioning actual bodily harm. The multiple acts of violence were inflicted to overcome the victim's determined resistance to the violation and that strength of character, that right to resist, must be vindicated by the Court treating the repeated violence used to overcome it as a significant aggravating feature of the offence. The violence operates to increase the Court's sense of the overall criminality and the sentence that is appropriate in this case. However, as *Pompey* was concerned to establish, care must be taken to ensure there is no double punishment when sentences are being imposed for multiple offences and the commission of one offence aggravates the other. That is not a concern in this case because the two sentences are not consecutive, and care will be taken to ensure that the sentence for the violence is not simply added on to the starting sentence. Rather, as *Pompey* showed, the sentencing court must proceed with an appreciation of the overall criminality of the conduct of the offender and impose a sentence that is appropriate to that criminality.

[41] Another aggravating factor is the offender's repeated attempt at fellatio, to which a court must respond as significantly and not incidentally increasing the feeling of violation the victim must have suffered.

[42] In relation to the commission of the offence there were no mitigating factors. As noted in *Pompey*, the offender is not to be punished nor is his sentence to be increased for his maintaining a not guilty plea; but by adopting that course, he loses the mitigating effect that would be produced by a guilty plea. Even after he was found guilty, the appellant offered no expression of remorse and he denied himself the mitigation earned by genuine remorse.

[43] As regards aggravating and mitigating factors pertaining to the offender, it is distinctly troubling that there was no psychological evaluation because there were

aspects of the offender's behaviour that seemed odd. These included his repeated offer to pay both before and after the violent rape; his telling the victim he liked her; his seeming upset that the victim forcefully rejected his efforts at fellatio including his asking why she did that. Of course, he gets no ease for his oddity, but it is something to consider as possibly indicative of the offender's amenability to rehabilitation, in the Court's balancing of sentencing objectives.

[44] Because there was no separate sentencing hearing, as *Pompey* indicates should be the normal course, the Court knows very little about the offender. At best, it can be said there were present some standard mitigating factors such as his age – he was 20 years old when he committed the offence; and he had no police record. There were no personal aggravating factors.

[45] In the end, having considered the various matters already discussed and having considered the weight of the aggravating versus the mitigating factors, and also bearing in mind that the sentencing court must form a view of the overall criminality of the offending in each case, it seems appropriate to begin with a starting sentence of 8 years and increase the sentence by 4 years and to impose a sentence of 12 years for rape. The assault for which the appellant was sentenced to 3 years imprisonment was committed in the course of the rape and the sentence for rape was increased mostly because of the assault. But because the sentence of imprisonment for 3 years for assault is to be served concurrently there is no double punishment for this offence; the sentence for assault was not simply added on to the starting sentence for rape; and it may be left to stand for its demonstrative and deterrent effect.

<u>The Result</u>

[46] The fact that it is a majority of the Court that has decided that the sentence 'warranted in law' is imprisonment for 12 years reflects the often-stated proposition that sentencing is quintessentially an exercise of discretion and not a mathematical process. Perhaps the absence of unanimity as to the appropriate term of years is not

to be regretted, as would usually be the case when there is not accord because, in sentencing, the divergence may be seen as a reaffirmation of the scope for discretion and reassurance that the judicial concern is to get it right and not simply to produce a desirable result. The acceptability of divergence may be even more so when it is considered that the difference in the term of imprisonment as between the respective opinions is three years: this indicates that the Court is clear and unanimous as to the range of sentences that is warranted in this case. The settled principle in exercising and reviewing the sentencing discretion is to arrive at a sentence that falls within a range, as distinct from deciding on a particular number of years.[50]

[47] The approach to sentencing and the principles that courts must apply have been expounded with much care and in great detail in the opinion of Rajnauth-Lee and Jamadar JJCCJ and they are fully endorsed in this opinion. A particular benefit of this exposition, as part of its general contribution to the jurisprudence, is to be anticipated with the public dissemination of information that the Government of Guyana has started on the process of seeing to the production of sentencing guidelines. As appears above,[51] this Court has repeatedly extolled the value of such a resource, and it may be appropriate for the Court, as it now does, to celebrate the development and pay the tribute that is due. It is to be hoped that those who become involved in the production of the sentencing guidelines will be assisted by the exposition.

JUDGMENT OF THE HONOURABLE MME JUSTICE RAJNAUTH-LEE AND MR JUSTICE JAMADAR, JJCCJ

'Emancipate yourselves from mental slavery. None but ourselves can free our minds.'

[50] See above at [12], [18], [24], [26], [31]. Indeed, the objective of Sentencing Guidelines is to produce a range of sentences for offences.
[51] At [13], [14], [15], [24].

- Bob Marley, Redemption Song[52].

'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.'

- President Adrian Saunders, *Pompey v DPP*[53].

Introduction

[48] Rape is a most serious crime. It impacts first the victim-survivors, and then, their families and friends, their communities, the entire society, and finally the State at large. It is an act of inter and intrapersonal violence, disrespect, and degradation, that considers a human person an object and commodity to be used for the callous satisfaction of deformed personal inadequacies and pathological maladaptation. A rapist is understandably an anathema to society, yet may be more in need, than simply of punishment. Rapists also need rehabilitation. Both victims-survivors and rapists are human persons and persons have no entirely separate existence – all 'inter-exist'. Both form parts of intersecting communities.

[49] Sentencing a rapist is therefore a matter of great societal importance, for all concerned and affected, not to be undertaken in a casual or arbitrary fashion. A sentencing hearing in a rape case is a matter that demands and deserves fair, responsible, and pro-active judicial management and judicious decision making. This is both a constitutional imperative and a societal need.

[50] This opinion addresses these matters frontally. It builds on this Court's sentencing jurisprudence as developed and explained in *Pompey* v *DPP*.[54] It focuses on the value and virtue of a separate sentencing hearing in cases such as this one. And on

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[52] Bob Marley, 'Redemption Song', track 10 on *Uprising*, Island Records, 1980.
[53] *Pompey* (n 3) at [1].
[53] ibid.

the need to decolonialise historical approaches to sentencing by incorporating, *inter alia*, approaches that satisfy Procedural Justice and Therapeutic Justice standards and objectives with other more traditional approaches. Approaches that will, taken together, advance the delivery of criminal justice in Guyana as an integrated system that achieves all the objectives of sentencing and as well aids the creation of a peaceful society.

[51] One aim of sentencing is to punish an offender for the crime they have committed. There are other aims such as preventing crime happening in the future so that more people don't become victims of the same offender or of the same kinds of offence. In fulfilling these aims a distinction must be borne in mind. The distinction between the condemned behaviour and the person convicted. Sentencing also tries to reform and rehabilitate offenders, by changing an offender's attitudes and behaviours. And sentencing can include compensatory as well as restorative elements[55]. Thus, sentencing seeks to play its part in reducing crime and protecting the public, in rehabilitation, and as well to compensate, heal and to restore at both individual and societal levels.

The Victim-Survivor's Ordeal

[52] In rape cases the victim-survivor is at the centre of the proceedings. Hearing her voice in this case is important. The following is a summary of her evidence of what occurred. The jury believed her. Her testimony forms an important part of the factual matrix that informs the sentencing process. The impact of the crime on her physically, mentally, and psychologically goes directly to intent to cause and actual harm caused by the crime.

[53] TA went to a football match on the night of 21 July 2012. She was 20 years old. The match was cancelled, and she and three friends went to an open-air party and 'Fish Fry Lime' at Calabash Alley, Soesdyke. While there, she went alone into an

[55] *Bend v R* (Barbados CA, 27 March 2002) at [17].

unfinished concrete structure nearby to urinate. On her way out she saw the appellant, also 20 years of age, standing outside the structure. She had known the appellant for about seven years prior, from attending school with him.

[54] The appellant held onto her hands, pulled her back into the structure and asked if she was 'doing business'. She said no and tried to release his grip on her hands. He let go of her hands and as she was trying to walk around him, he pushed her. She tried to pass him again and a fight ensued. The appellant struck her with a bottle on her head. He snatched her top and tried to pull her through a door space to the back of the building, she braced herself on the door frame. He removed his hands from her top and snatched her hair behind her head. He then hit her for a second time with a bottle and dragged her by her hair outside. He got her over a wall, and she was then dragged by her hair to a bushy area behind the structure. There, the appellant violently removed her clothing and he tried more than once to put his penis into her vagina.

[55] She was screaming, begging to be left alone, but he repeatedly hit her in her face, demanding that she 'shut up'. He kissed her on the neck and told her that he liked her. He ripped off her top and started kissing her chest and breast. She tried to scream but he choked her, telling her to shut up and threatening to kill her if she did not stop screaming. He kept slapping and cuffing her face. He tried to pull her pants off and she begged him to stop. He offered to pay her $65,000 but she refused and asked him to leave her alone**.** He pulled her pants and underwear down. He kept squeezing her throat. He asked her to suck his penis and tried to push it into her mouth, but she turned her face. He grabbed her hair and tried to turn her head around to put his penis in her mouth; she bit him on the penis. He pulled back, asked her what she did that for and he slapped her face. He then tried to put his penis in her vagina again and she started to scream. He told her that if she did not shut up, he would throw her in the trench that was at the side of them. The appellant then sexually penetrated her without her consent on two occasions. The first time for 10

minutes and the second time for 15 minutes. The entire horrific ordeal lasted about 25 minutes. When he was finished, the appellant got up and left.

[56] TA suffered multiple physical injuries because of this ordeal. No doubt she also suffered mental, emotional, and psychological trauma, the extent of which remains unknown. The appellant has never accepted responsibility for what happened, nor offered any form of contrition or apology. There is no evidence of any remorse.

Further Facts and Circumstances

[57] The rape occurred in 2012. The appellant was tried before a jury and convicted of rape and assault causing actual bodily harm. This was a vicious and prolonged case of rape. In 2015 the appellant was sentenced to 23 years imprisonment in respect of the offence of rape and 3 years imprisonment for the offence of assault occasioning actual bodily harm, with the sentences to run concurrently. In Guyana, the maximum sentence for rape is life imprisonment.[56] For assault causing actual bodily harm, it is five years imprisonment.[57] On 11 January 2021 the Court of Appeal affirmed the decision of the trial judge. Before this Court the appellant contends, among other things, that the sentences are manifestly excessive.

[58] Of note for the purposes of this opinion, is the trial judge's failure to conduct a sentencing hearing, or to indicate what sentencing approaches were considered, or to inquire about and avail herself of a range of relevant information, including a victim impact statement. The record indicates that on 16 November 2015, the appellant was convicted by the jury for rape and assault causing actual bodily harm. After a plea in mitigation the appellant was immediately sentenced. It is contended by the appellant and largely undisputed, that the trial judge failed to consider or to adequately consider the antecedents of the appellant, or any social welfare reports, or any victim impact statement. Indeed, the respondent accepts that the record does

[56] Sexual Offences Act, Cap 8:03, s 3(3).
[57] Criminal Law (Offences) Act, Cap 8:01, s 49.

not explicitly disclose the matters considered by the trial judge when sentence was passed, but nevertheless contends that no such disclosure was necessary nor was there any necessity for stating reasons.

Summary and Disposition

[59] The approach to sentencing in this case was deficient, as the trial judge a) failed to hold a separate sentencing hearing or to approach sentencing as an autonomous process, b) failed to inquire about or obtain a social welfare report, c) failed to inquire about, request, or obtain mental health or psychological assessments, d) failed to inquire about, request, or receive a victim impact statement, e) failed to request, or order any other relevant evidence, information, reports, or assessments, and compounding the problem, f) failed to indicate the process used to arrive at, or the reasons for the sentence imposed, or whether any sentencing precedents, guidelines, handbooks or other sources were considered.

[60] Four well accepted roles of an appellate court in relation to sentencing are: (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. This opinion focuses its analysis on (i), (iii), and (iv).

[61] However, in relation to (ii), the sentence imposed and affirmed by the Court of Appeal is suspect, because no rational or evidence-based approach was taken. And as demonstrated later in this opinion, neither the trial judge nor the Court of Appeal followed the methodology recommended by the majority judgments of this Court in *Pompey*[58], with the result that the sentence imposed was presumptively excessive and disproportionate.

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[58] *Pompey* (n 3).

[62] In our opinion this appeal must be allowed. The evidential deficits and procedural shortcomings, taken together with the failure to follow the sentencing approach explained by the majority in *Pompey*, have resulted in a sentencing hearing in this case that was and is flawed and has arguably not met the threshold standards to constitute a fair hearing that could produce a fit, proportionate, and just sentence. These deficits are arguably so fundamental, that evidentially it is difficult for an appellate court to engage a thorough resentencing review and arrive at an appropriate new sentence. To overcome these evidential deficiencies, this matter can be remitted for a sentencing rehearing guided by this Court's jurisprudence, including as set out in this opinion and in the majority opinions in *Pompey*.

[63] However, and as explained below, given the passage of time from both the date of the crime and the holding of the sentencing hearing, and in the interest of fairness, timeliness, and for other pragmatic reasons, this sentencing re-evaluation and reconsideration ought not to be remitted for rehearing. It must now be undertaken.

[64] We note that before this Court we have all agreed that the sentence for rape imposed by the trial court and upheld by the Court of Appeal is excessive and needs to be reviewed. Thus, we all agree that the appeal is to be allowed. However, we differ on the what the new sentence should be for the rape charge. We also all agree that the sentences for the two offences should run concurrently, and we agree with the lower courts on the sentence for the assault charge. And most importantly we also all agree with the general approaches to a sentencing hearing outlined in this joint opinion.

[65] In these circumstances, we would impose as a just and proportionate sentence in this case a concurrent term of 16 years imprisonment, taking into account both convictions, and the totality principle.

Analysis

Pompey and the Way Forward

[66] This Court in *Pompey*[59], by a clear and decisive majority of a 7-member panel, set out the approach to sentencing that is apposite in Guyana. Lower courts are obliged to follow it. This appeal also involves the issue of sentencing. It is therefore useful at inception to rehearse and develop some aspects of the principles in *Pompey* that govern this Court's approach to sentencing. Following this, these principles will be synthesised around some specific core principles, including the ideas of procedurally fair and therapeutic approaches to sentencing. These will then be applied in the context of the facts and circumstances of this case.

[67] *Pompey* involved three instances of sexual activity with and rape of a minor by an adult in a position of trust. The entire panel agreed that the trial judge's imposition of a cumulative sentence of 37 years imprisonment was excessive. The majority found that a concurrent sentence of 17 years was fair, just, and proportionate in the circumstances of the case. The minority thought 9 years was appropriate.

[68] The majority opinion in *Pompey* enunciates and elucidates several salient and overarching principles and approaches that are relevant to the circumstances of this case. This Court is expected to follow them in its analysis and review. These are:

(a) 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.[60]

(b) A 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

[59] ibid.
[60] ibid at [2].

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.[61]

(c) [T]he 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.[62]

(d) The utility and value in facilitating victim impact statements in appropriate cases is encouraged, and the approach explained by Jamadar JCCJ for trial judges to determine a proper starting point when embarking upon the sentencing exercise is endorsed.[63]

(e) 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.[64]

(f) 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.

[69] In *Pompey*, Jamadar JCCJ also shared his reflections on the general ideological underpinnings of sentencing and the sentencing process.[65] Some of those principles are also worth repeating here:

(a) This court will not wantonly interfere with the exercise of a trial judge's discretion in the choices of sentences imposed. This court will not substitute its own opinions as to what constitutes appropriate and fit sentences unless there are legitimate bases for

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[61] ibid at [16].
[62] ibid at [32].
[63] Specifically endorsing Jamadar JCCJ's explanations in his concurring opinion. *Pompey (n 3)* at [32] (Jamadar JCCJ) at [64]-[68], [71]-[72], [114] on starting points and ranges, [112]-[125] on the use and value of victim impact statements.
[64] *Pompey* (n 3) at [34], [39], [40], [43]. Specifically endorsing Rajnauth-Lee JCCJ acknowledging the urgent need for the Judiciary of Guyana to publish sentencing guidelines, which would undoubtedly play a key role in building public trust and confidence in the Judiciary of Guyana and in promoting the rule of law.
[65] ibid at [51]-[57].

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.[66]

(b) This Court has 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.[67]

(c) Public interest, public trust and confidence, and preservation of the rule of law are integral to both the sentencing process and to sentencing outcomes. As a general principle 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.[68]

(d) 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. [69]

(e) 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.[70]

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[66] ibid at [51].
[67] ibid at [52].
[68] ibid at [53].
[69] ibid at [54].
[70] ibid at [55].

(f) 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.[71]

Advancing the Sentencing Jurisprudence in Caribbean Contexts

[70] Having extracted the relevant and salient principles from *Pompey*, we notice a significant and overarching consideration emerging: the idea of holding a separate sentencing hearing.[72] This is a practice recommended highly by the Court in *Pompey* and especially so in cases where a lengthy prison term may be imposed – as in this matter. Taken as a principle, this is less about form and more about substance; substantively engaging a fit and proper judicial sentencing process. The danger in not following this practice is that an unfair sentence may be imposed, one that is neither just nor proportionate. In this case this practice was not followed, either in form or substance. The consequences are teased out in what is discussed below.

[71] In cases such as this one, a separate sentencing hearing is integral. Why? Because the objectives of sentencing are different from those of a trial. The objective of a trial is to determine guilt or innocence. However, sentencing is concerned about very different matters, including the five ideological aims of sentencing referenced above.

[72] A contemporary approach to sentencing is to both frame and treat it as a discrete and separate event from the determination of innocence or guilt. Both are interrelated, yet they each serve entirely different purposes and objectives as explained by the majority in *Pompey*. Central to these distinctions are the areas of foci: the trial looks primarily to the past to determine innocence or guilt, while the sentencing process and outcomes though grounded in past events look towards the

[71] ibid at [56].
[72] Supported unreservedly by the minority opinions. *Pompey* (n 3) at [169].

future. Sentencing therefore demands different mind-sets, approaches and deserves a discrete process and hearing apart from the process to determine issues of innocence or guilt. This is so even when sentencing is dealt with as a part of a single hearing.

[73] In *Pompey* the Court noted that: 'Sentencing is one of the most challenging aspects of a judge's functions.'[73] This has been too often overlooked and the primary focus, attention and energies have often been placed on the trial and determination of guilt or innocence. At times sentencing has become something of a footnote to a criminal hearing, so much so that cogent explanations or reasons are not always forthcoming, as in this case. A sure indication of devalued salience.

A Separate Hearing: Seven Considerations

[74] In *Pompey*, the majority gave the following guidance to trial judges[74] :

> 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.

And, the minority opinions opined supportively: 'Lastly, we also support the call for dedicated sentencing hearings …'.[75]

[75] A separate or dedicated sentencing hearing (as discussed in this opinion) facilitates, among other things, (i) focus, (ii) judicial accountability, (iii) providing reasons, (iv) procedural fairness, (v) informed judicial making, (vi) respecting core constitutional values, and (vii) therapeutic justice. These are addressed below:

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[73] ibid at [1].
[74] ibid at [32].
[75] ibid at [169].

i. Focus: Intentional Attention

[76] Sentencing deserves and demands placing specific focus, attention, effort and care on the process and outcomes of sentencing, immediate and long term, and as well for the parties and the wider society. Intentional attention to sentencing is vital.

ii. Judicial Accountability: Independence and Responsibility

[77] Judges are accountable to all parties including victims-survivors, convicted persons, their families/communities, the wider society, and the State. Sentencing therefore requires a proper and adequate process, with sufficient reasons. These requirements are also a matter of judicial ethics and of judicial responsibility, and form part of a democratic open justice system. An accountable, adequate process and proper reasons are elements of a fair hearing, due process, and the protection of the law – and integral to the rule of law.[76] Judicial independence demands judicial responsibility.

iii. Reasons: Clarity, Cogency, Transparency

[78] Judges must give clear, cogent, and easily understandable explanations and reasons for their sentencing decisions. The necessity for clear and cogent explanations and reasons, is a minimum standard that must be met in a sentencing hearing.[77] Whether oral or in writing, short or long, this is a non-negotiable judicial standard.[78]

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[76] *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [334]-[337], [339]-[341].

[77] *Pompey* (n 3) at [33], [131]; *Pinder v R* [2016] CCJ 13 (BB), (2016) 89 WIR 181 at [22]; *Gittens v R* [2010] CCJ 1 (AJ) (BB) at [7]; *Hall v R* [2011] CCJ 6 (AJ) (BB), (2011) 77 WIR 66 at [26]. See also Sha-Shana Crichton, 'Justice Delayed is Justice Denied: Jamaica's Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment' (2016) 44 Syracuse J Int'l L & Com 26-31.

[78] *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381. *R v Mustafa* 2021 ONSC 3088 at [7]-[8] (Davies J) 'Applying these principles in the sentencing context, a sentencing judge has a duty to give reasons that explain why the sentence imposed is proportionate and consistent with the relevant sentencing objectives having regard to the mitigating and aggravating factors. Again, sentencing judges are not held to a standard of perfection. The reasons must be read together with the evidence adduced at the sentencing hearing and the submissions of counsel. If the reasons demonstrate that the sentencing judge understood and dealt with the live issues on sentencing, the reasons will be sufficient and the decision will be entitled to deference. However, if the reasons do not address the issues raised by the parties or explain the sentence imposed, the sentencing decision will not be entitled to deference on appeal …'. See also *Balach v DPP* [2019] NSWSC 377 at [12] (Campbell J); *Roylance v DPP* [2018] NSWSC 933 at [12]-[14] (Bellew J); *R v Ewart* (2000) 120 A Crim R 18 at [19] (Fitzgerald JA). See also *Crichton* (n 77) 31, C.

[79] It is also a judicial and ethical responsibility. In the Commentary on the Bangalore Principles of Judicial Conduct, under the ethical value of Independence, and in relation to the 'minimum requirements for a fair trial'[79], it states that: '(g) The involved parties should be provided with adequate notice of, and the reasons for, the decision.'

iv. Procedural Fairness: Having Regard for All

[80] Judges must ensure procedural fairness in all aspects of the sentencing process. Procedural fairness, or procedural justice, is a necessity. In Caribbean judicial spheres facilitating the nine elements of procedural justice is apposite in a sentencing hearing. That is, facilitating: (i) voice, (ii) understanding, (iii) respectful treatment, (iv) neutrality, (v) trust, (vi) accountability, (vii) access to information, (viii) inclusivity, and (ix) access to necessary amenities.[80]

[81] In Caribbean judicial spheres these elements can help mitigate against the still present and inherited colonial anti-therapeutic ethos that all too often prevails in the criminal justice systems.[81] The research is clear that when court processes are imbued with procedural fairness throughout, there is an increase in overall public trust and confidence in the administration of justice, and increased compliance with

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[79] United Nations Office on Drugs and Crime, *Commentary on The Bangalore Principles of Judicial Conduct* 2007 para 46, 53. See also UNCHR (Sub-Commission) 46th Session 'Draft Body of Principles on the Right to a Fair Trial and a Remedy' Annex II in 'The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening, Final Report' (3 June 1994) UN Doc E/CN.4/Sub.2/1994/24.

[80] Justice Peter Jamadar and Elron Elahie, *Proceeding Fairly, Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Republic of Trinidad and Tobago* (Judicial Education Institute of Trinidad and Tobago 2018) <www.ttlawcourts.org/jeibooks> accessed 4 February 2022; *Procedural Fairness A Manual: A Guide to the Implementation of Procedural Fairness* (Judicial Education Institute of Trinidad and Tobago 2018) < www.ttlawcourts.org/jeibooks> accessed 4 February 2022; Justice Peter Jamadar and Kamla Jo Brathwaite, *Exploring the Role of the CPR Judge* (Judicial Education Institute of Trinidad and Tobago 2017) 33 – 47 <www.ttlawcourts.org/jeibooks> accessed 4 February 2022; Elron Elahie, *Reflections of an Interested Observer; Ethnographic Musings of the Court User's Experience in T&T* (Judicial Education Institute of Trinidad and Tobago 2017)<www.ttlawcourts.org/jeibooks> accessed 4 February 2022.

[81] Mindie Lazarus-Black, 'The Rites of Domination: Practice, Process and Structure in Lower Courts (1997) 24 American Ethnologist 628; Mindie Lazarus-Black, 'Everyday Harm: Domestic Violence, Court Rites, and Cultures of Reconciliation' (University of Illinois 2007); Mindie Lazarus-Black, 'Vanishing Complainants: The Place of Violence in Family, Gender, Work, and Law' (2008) 36 Caribbean Studies 25; Dylan Kerrigan and others, 'Securing Equality for All in the Administration of Justice: The Evidence and Recommendations' CJP Paper 1, 2017 (Caribbean Judicial Dialogue: Equality for All in the Administration of Justice, Trinidad and Tobago 2017) < https://www.dylankerrigan.com/uploads/2/4/3/4/24349665/cjd_paper_1_-_kerrigan.pdf> accessed 4 February 2022; Dylan Kerrigan, 'Therapeutic Jurisprudence in Trinidad and Tobago: Legitimacy, Inclusion, and the Neo-colonialism of Procedural Justice' in Nehring Daniel (ed), *The Routledge International Handbook of Global Therapeutic Cultures* (Routledge 2020) 446.

court orders and directives. As well, the research indicates that there is reduced recidivism.[82]

[82] Though crimes are traditionally viewed as being 'against the State', this approach may be too narrow and still rooted in colonial approaches to law and order. A fairer and more therapeutic approach to sentencing, viewed developmentally (both in relation to the individual and society) and rooted in constitutional values, demands that procedural fairness standards be met. More will be said about this aspect later. For the moment, this approach also includes the request for, consideration, and use of victim impact statements, which may be an imperative in certain cases, as explained by the majority in *Pompey*.

[83] Victim impact statements are one vehicle to give voice and respect to and to include victims-survivors in the sentencing process, bearing in mind all the caveats that were explained in *Pompey*. As such they are part of the framework of procedural justice in the sentencing process. However, and critically so, victim impact statements have the jurisprudential benefit of providing sentencing judges with evidence of harm intended and caused to, suffered by, a victim-survivor, and so can help judges impose fair and just sentences proportionate with harm.[83]

[84] Of special note in Guyana is s 61(1) of the Sexual Offences Act, which provides that the Court shall provide an opportunity to a complainant in a sexual offence case, if the complainant desires it, to present the complainant's views and concerns at appropriate stages of criminal proceedings, in a manner not prejudicial to the rights of the accused. Section 61(2) includes '**before passing of sentence'** as an

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[82] Tom Tyler, 'Procedural Fairness and Compliance with the Law' (1977) 133 Swiss Journal of Economics and Statistics 219; Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283; Tom Tyler, *Why People Obey the Law* (Yale University Press 2006).

[83] A Victim Impact Statement (VIS) may be defined as a written, oral, or visual presentation of a statement in which the victim describes the impact (past, present, continuing) of the crime on their life, including physical, social, mental, psychological and financial harm and trauma. A VIS is not a victim statement of opinion (VSO), in which victims provide their opinion about an appropriate sentence. The VIS has been justified and used traditionally in courts as an aid to help judges impose fair and just sentences proportionate with harm (intent and extent of harm). Even though crimes are 'committed against the State', it is the actual victims-survivors who suffer loss, damage, and injury. But note, VIS's can also have a therapeutic value in affording victim-survivors an opportunity for voice and expression at the stage of sentencing. See also, Edna Erez,'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 Crim L Bull 483. See *Pompey* (n 3) at [112]-[125].

appropriate stage of criminal proceedings for such an opportunity. This provision strongly supports the desirability and even the necessity in appropriate cases for the inclusion of a victim impact statement at a sentencing hearing.

v. Informed Decision Making: An Integral Imperative

[85] The making of informed assessments and decisions. Key to a fair and just outcome, that meets the juridic purposes and objectives of a sentencing process, is the availability and use of relevant evidence (fit for purpose).[84] As explained in all three of the majority opinions in *Pompey*, sentencing guidelines and comparable jurisdictional precedents are sub-sets of that evidence, though neither is decisively determinative.

[86] The range of relevant information to enable informed decision making is contextual, and may include some 'standard' categories of information (eg psychiatrists and psychologists assessments, social workers and police reports, health and educational profiles, employment and family contexts, and where admissible criminal records – pre-sentencing assessments and reports ('PSARs'), as well as contextually driven information (idiosyncratic to victims-survivors and convicted persons, relevant communities and other circumstances), including victim impact statements[85]. The circumstances of each case will determine what such evidence and information may be relevant and necessary.

[87] Sentencing remains an exercise of judicial discretion and all relevant information and considerations are encompassed. As will be developed further, sentencing is to be seen in the context of the present and future, even as it is grounded in past events. Indeed, when one considers the public interest, deterrent, preventative, and rehabilitative objectives of sentencing, this future oriented focus becomes self-

[84] Article 144(1) of the Constitution of the Co-operative Republic of Guyana, Cap 1:01.
[85] *Pompey* (n 3) at [32], 'We endorse Justice Jamadar's views on the utility and value in facilitating victim impact statements at such hearings in appropriate cases …'

evident. Sentencing is thus quintessentially a therapeutic opportunity.[86] Which is not to say that the past is irrelevant. Its relevance is clearly indicated in the public interest and retributive or denunciatory (punitive) objectives of sentencing.

[88] In addition, sentencing is no longer to be viewed in a silo, as an adjudication limited to the interests of the State and the convicted person. Such a view is hopelessly myopic and divorced from lived realities. Arguably the persons most directly affected by a crime are its victims-survivors. Then their families, friends, and communities. And as well the larger society of persons who live in various degrees of relationships with each other. Thus, while the traditional and inherited approach has been to place the convicted person at the centre of the sentencing process, and they are object of sentencing, they alone are not affected by the process and outcomes. A therapeutic approach to sentencing that is fully aligned with all five sentencing objectives requires a more encompassing approach to a sentencing hearing. An approach that includes all relevant evidence to enable the making of informed assessments and decisions, and that at the same time unlocks the law's capacity to be a source of healing and relevance for all persons, institutions, and communities that are affected by it. Indeed, for the entire society.

[89] Without repeating what this Court endorsed about the value and use of victim impact statements,[87] the following is noteworthy. Article 6(b) of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), provides that the 'views and concerns of victims' should be presented and considered at appropriate stages of the proceedings where their personal interests are affected, 'without prejudice to the accused and consistent with the relevant national criminal justice system.' [88] While not specifically addressing victim impact

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[86] Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute 2005) 32; Susan Goldberg, *Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice* National Judicial Institute 2011) 72.

[87] *Pompey* (n 3) at [32], [112]-[125].

[88] UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34, 6. 'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;' See also, PN Makiwane, 'Victim-Impact Statements at the Sentencing Stage: Giving Crime Victims a Voice' (2010) 31 Obiter 606: 'Irrespective of the method through which it is presented, the impact statement could assist the presiding officer to arrive at a balanced decision because it enables him to understand the full impact the crime had on the victim – it presents a

statements, this international declaration is clearly accommodative of their use. Judges are expected to conduct their work in ways that align with international values and principles, once doing so does not conflict with any competing laws or legal principles within the jurisdiction.[89] This is especially so in Guyana as it is a constitutional imperative, certainly applicable in the context of fundamental rights.[90]

[90] Starved of relevant evidence, a sentencing hearing can become a vehicle for unjust decision making and can undermine the purposes and objectives of the exercise. Thus, undermining public trust and confidence in both the administration of justice in its broadest senses and in the democratic underpinnings of societies.[91]

vi. Core Constitutional Values: Human Rights

[91] Human Rights considerations. In *Pompey* the Court explained the importance of human rights values in the context of sentencing (in that case in relation to children/minors). Pursuant to Articles 40 and 144(1) of the Guyana Constitution: (a) every person charged with a criminal offence 'shall be afforded a fair hearing' by an 'independent and impartial court' and within a reasonable time, and (b) it is the duty of the court 'to ascertain the truth in every case'.[92] These two imperatives, to guarantee a fair hearing and to discover and be informed by truth in criminal proceedings, have direct implications on the process of sentencing.

(a) A Fair Hearing

[92] First, a sentencing hearing must be fair. Which begs the question: fair to whom? A contemporary response is, to all concerned and affected by the proceedings.

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full picture of the circumstances surrounding the occurrence of crime. It provides courts with information that may be used in determining the appropriate sentence, provided it is reliable and relevant.'

[89] *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332 at [54]-[55]; *Manzanero v R* [2020] CCJ 17 (AJ) BZ, [2021] 1 LRC 543 at [45]; *Todd v Price* [2021] CCJ 2 (AJ) GY at [129].

[90] Article 39(2) of the Constitution of Guyana (n 84).

[91] *Pompey* (n 3) at [85].

[92] Articles 40 and 144(1) of the Constitution of Guyana (n 84).

Another aspect is: what constitutes a fair sentencing hearing? Again, a contemporary response is, one that includes (i) placing specific focus, attention, effort and care on the process and outcomes of sentencing, (ii) procedural fairness in all aspects of the sentencing process, (iii) the making of informed assessments and decisions, and (iv) judicial accountability, including the giving of cogent explanations and reasons at all stages of the process. Judicial independence is one side of a coin, the other side of which is judicial responsibility and accountability.[93] Which means that judges have a responsibility under the Constitution to fulfil the requirements of a fair hearing. Failure to do so can amount to a breach of the fundamental rights provisions; but as important, failure to do so can undermine the constitutional imperative to discover truth.

(b) The Imperative to Truth

[93] Second, a sentencing hearing must uncover truth.[94] What then does the imperative to truth demand of a sentencing hearing when wedded to the imperative to guarantee a fair hearing? At a minimum, the four areas explained in the paragraphs above.[95]

[94] To elaborate. In the context of a sentencing hearing, the imperative to truth places a positive obligation on a judge to inquire about, discover, collect, analyse, and apply all relevant information to the main task at hand – sentencing a convicted person. It is only through such a process that a fair and just sentence can be arrived at that attends to all the five objectives of sentencing. A process that is holistic in nature and aspiration, acting in the best interests of all affected persons and institutions. Thus, at a sentencing hearing the role of the judge is constitutionally driven to be necessarily pro-active. The trial of innocence or guilt completed, a judge is unshackled to broaden the scope of inquiry to facilitate a fit and proper

[93] Lord Justice McCloskey, 'Reflections on Judicial Responsibility'(Commonwealth Law Conference, Nassau 2021).
[94] *Pompey* (n 3) at [122].
[95] These four areas are: (i) placing specific focus, attention, effort and care on the process and outcomes of sentencing, (ii) procedural fairness in all aspects of the sentencing process, (iii) the making of informed assessments and decisions, and (iv) judicial accountability.

sentencing process, and arrive at just and proportionate outcomes. Hence the value (in principle and practically) of a separate sentencing hearing.

vii. Therapeutic Justice[96]: An Already Present Future, Creating Cultures of Care

[95] A therapeutic approach to sentencing. Essentially, therapeutic justice approaches are intended to interrogate the law, legal procedures and processes and assess how they actually impact people's lives, and then to determine whether they can be reshaped to enhance their therapeutic potential consistent with other values served by the law, including due process, protection of the law, and other core constitutional values and principles.

[96] In this context therapeutic justice and the therapeutic potential of a law are informed by and aimed at enhancing an ethic of care and regard for all persons and the greater good of the society.[97] Its jurisprudential basis lies in the core international and constitutional value of the inherent dignity of all persons. [98] As such, all persons are to be treated equally and with appropriate regard and respect for their inherent personhood and rights throughout the entire court proceedings and in relation to all

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[96] 'TJ has been described as a portable legal theory, a philosophy or field of inquiry that recognizes law as 'therapeutic agent' (Wexler, 1999, 2005, 2011). TJ sees the law as 'a social force that can produce therapeutic or anti-therapeutic consequences' (Winick & Wexler, 2003, p.7). It is an approach to law that attempts to 'reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected' (Winick & Wexler, 2003, p.479; Yamada, 2017). TJ is remedial, focused on 'law in action' and on the wellbeing of participants in the legal process (King, et al., 2014, p.24). TJ encompasses innovative practices, techniques, and strategies, drawing on the insights of social science and other disciplines to understand the full impact of the law (Wexler, 2014). Armed with these insights, TJ prompts legal actors to 'reach out to explore models of practice that are more relationally engaged, less adversarial, more psychologically beneficial and more capable of producing non-exploitative outcomes' (Wexler, 2014, p.6). Wexler restates the tripartite model of TJ practice as a method involving a focus on 'legal rules, legal procedures and the roles and behaviours of legal actors' (Wexler, 2011, p.33)' in Penelope June Weller, 'Mainstreaming TJ in Australia: Challenges and Opportunities' (2018) 3 Int'l J Therapeutic Juris 81.

[97] 'Therapeutic jurisprudence, in my view, is a philosophy of law which attempts to provide a process and a result which is helpful to all who take part in the court process including litigants, families, community and professionals. Differently put, it is justice that attempts to heal and not hurt. … The result should blend the goals of (1) accountability (to the victim, community and society), (2) competency (through services to those before the court), and (3) public safety. Therapeutic justice also requires an atmosphere of patience, dignity and courtesy. Ideally, each communities' individual judicial and legal culture should promote civility, timeliness, understandable procedures and language, participation of victims and the community in court hearings and modelling of effective conflict resolution by the professionals and staff involved.' in Michael A Town, 'Court As Convener and Provider of Therapeutic Justice' (1998) 67 Rev Jur UPR 671, 672–73.

[98] Article 1, Universal Declaration of Human Rights, 1948, at Preamble, Constitution of Guyana. See also, Michael L Perlin, '"Have you Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence' (2017) 27 NZULR 1135.

aspects of a matter. Hence regard, respect, and dignity, and as well as procedural fairness, are integral.[99]

[97] A therapeutic approach to sentencing would seek to meet all the objectives of sentencing in ways that promote the care and wellbeing of all persons and institutions that are affected, and to do so at every stage in proceedings. It therefore favours a broader more inclusive perspective in relation to how sentencing proceedings are conducted and who is involved. It also favours a multi-disciplinary approach that is open to drawing on all resources and sources of information that are relevant and useful to the sentencing processes and outcomes. It therefore encourages informed decision making and values appropriate use of PSARs.[100] It would also favour more inquisitorial (investigatory) and less adversarial approaches to the sentencing process, which are pro-actively judge led when required.

[98] In sum, therapeutic approaches try to maximize the personal and societal wellbeing of individuals and communities, and so focuses on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. It is what is referred to in the academic literature as a 'Rights Plus' approach to adjudication, that also consciously focuses on the law's potential to have a positive impact on people's lives and on society. In the context of sentencing, human wellbeing and interpersonal relationships also matter.[101]

Re-imagining the Sentencing Hearing

[99] In re-imagining the sentencing hearing there are conceivably seven core considerations: (i) the need to decolonize and democratize sentence hearings, suited

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[99] Perlin (n 97).

[100] In Barbados, for example, s 37 of the Penal System Reform Act, Cap 139 requires judges to obtain and consider a pre-sentence report before imposing or determining the length of a custodial sentence, save for offences triable on indictment only where, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report. See also *R v Rambarran* [2016] CCJ 2 (AJ) (BB), (2016) 88 WIR 111 at [16].

[101] Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2005) 6(1) Pepp Disp Resol LJ.

for Caribbean contexts, (ii) the need to make sentence hearings rational, and therefore research and evidence based, (iii) the need to make sentence hearings interdisciplinary, and therefore informed by relevant competencies, (iv) the need to make sentence hearings relevant, and so informed by all evidence and information that is necessary and available, (v) the need to make sentence hearings participatory, inclusive of the persons who are at the centre of the event and who have been most affected by it, (vi) the need to have constantly updated co-created and interdisciplinary local sentencing guidelines,[102] and (vii) the need to conduct sentencing hearings and make sentencing decisions that are therapeutically enabling, which includes alignment with procedural justice standards.

[100] The contemporary approach to sentencing is away from an overemphasis on punishment and vengeance – retribution, and to focus more on rehabilitation, restoration, protection, and peace.[103] This approach confirms the necessity for a separate, relevant, research based, and competently informed sentencing hearing.

[101] The approaches explained in this opinion aspire to decolonize and democratize the sentencing process, maintain the central role of the Judiciary (separation of powers), and draw on the competencies of those who are qualified in relevant areas related to the task of sentencing. They also value the voices of those most impacted and so achieve inclusivity. It is important to remind ourselves that judges are not trained in criminology, penology, sociology, psychology, psychiatry etc. To assume to be independent experts or independently competent in these fields is arrogant, and undermines an enlightened, informed, research and evidence based sentencing process. What is advocated is a collaborative approach rooted in judicial humility.

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[102] *Pompey* (n 3) at [34], [43] 'Included in the Model Guidelines, therefore, were Guidelines for Sentencing which sought to provide guidance to trial judges to assist in the determination of the appropriate sentence in sexual offence cases.'

[103] Justice Vasheist Kokaram, 'The Foundations of a Peace Jurisprudence Movement: Lessons Learned from Caribbean Mediation' (World Mediation Summit, Madrid 2017); On Friday 4 February 2022, Minister of State in the Ministry of National Security, Jamaica, speaking at the 13th Annual Restorative Justice Conference, underscored the value of restorative justice as important in providing a pathway for transformation to more secure, just, and peaceful societies – 'a catalyst for peace and community strengthening' in Jamaica; an approach 'which allows us to "Liv Gud"' <https://www.jamaicaobserver.com/latestnews/Restorative_justice_leading_to_more_just_and_peaceful_society_says_Mayne_> accessed 7 February 2022.

[102] Thus, the principle of rehabilitation, decolonialized and democratized to suit Caribbean contexts, in which community is central and integral, can be re-imagined jurisprudentially to be 'rehabilitation' that includes offenders, victim-survivors, other affected parties, and the community. Such approaches also satisfy the public interest objectives of sentencing.

[103] The decolonising of law and legal systems is an ongoing project for post-colonial independent Nation-states such as Guyana. It is the constitutional task and responsibility of both the legislature and the Judiciary to engage this decolonizing process. Parliament as both a constitutive source and constituted power has by Article 7 of the Constitution Act[104] made it clear that the courts have this duty and power. Article 8 of the Constitution[105] confirms that this is so. In the context of post-colonial societies, sentencing is one area where the colonial mindset needs to be uprooted and replaced with more relevant and regionally intelligent approaches.

[104] What can be realistically imagined, and pragmatically implemented, can be conveyed using the imagery of multiple intersecting mandorlas. This process, approached in an open and receptive way, can be a place and space of interconnection and exchange; a shared and overlapping zone, rich in relevance and imbued with invaluable information and insights, of integrated co-creation; all of which, taken together can enrich the decision-making process and outcomes of a sentencing hearing; while never threatening the ultimate authority and jurisdiction of a sentencing judge to determine, decide, and impose a fair, fit and just sentence.

[105] There is no necessity for legislative interventions to implement this approach, though that could be helpful and even welcomed. The constitutional imperatives in criminal trials, which necessarily include the sentencing process, of facilitating a fair and just process, of discovering truth, and of achieving fair and just outcomes,

[104] Constitution of Guyana (n 84), art 7.
[105] ibid art 8.

are a sufficient source of legal authority for judges and courts to adopt and implement these approaches.

Sentencing Guidelines: Researched and Developed in Guyana, by Guyana, for Guyana

[106] All seven judges in *Pompey* explained the value and need for sentencing guidelines to be developed in, by, and for Guyana.[106] That call is reiterated here.

[107] Saunders PCCJ, speaking for the majority in *Pompey*, explained[107]:

> …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.
>
> …
>
> 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.

[108] Indeed, in *Pompe*y,[108] Rajnauth-Lee JCCJ pointed out in relation to the Model Guidelines, that:

> …Included in the Model Guidelines … were Guidelines for Sentencing 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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[106] *Pompey* (n 3) at [34], [35], [43], [111], [169].
[107] ibid at [34], [35] respectively.
[108] ibid at [43].

[109] We repeat these recommendations in this appeal, and hope that urgent action will be taken.[109] There are resources already available, and use can be made of them to assist in preparing and drafting sentencing guidelines in Guyana. This case reiterates the urgency of the matter.

[110] Sentencing guidelines help judges take a consistent approach to sentencing. Guidelines provide guidance on factors the court should consider that may affect a sentence. Generally, they set out different levels of sentence based on the harm caused to the victim and how blameworthy or culpable an offender is. Because offences happen in many ways and with many different consequences, it is necessary for the courts to impose a range of sentences that appropriately reflect the seriousness and circumstances of each individual offence. Ideally there should be general overarching principles, guidelines for specific (certainly the more prevalent and serious) offences, guidelines for sentencing minors and young persons, as well as guidance in relation to marginality, intersectionality, and gender sensitive adjudication.

[111] We remain confirmed in the view that the application of extra-territorial or extra-regional sources in relation to sentencing is inapt and a betrayal of constitutional sovereignty and Caribbean judicial independence. The task of creating a Caribbean jurisprudence, and the mandate of this Court, is exactly to build from the inside out, and not to continue what Naipaul termed a culture of 'mimicry'.[110]

[112] In this region there are resources that can be turned to, that may be relevant and relied upon. As explained in *Pompey*, Trinidad and Tobago and Jamaica have

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[109] We note with commendation that on Saturday, 15 January 2022 the Minister of Legal Affairs and Attorney General indicated: '*The Justice System in Guyana is expected to drastically improve with the introduction of sentencing guidelines which are expected to come on stream by mid-2022*' < *https://caribbean.loopnews.com/content/guyana-working-sentencing-guidelines-justice-system#:~:text=The%20Justice%20System%20in%20Guyana,on%20stream%20by%20mid%2D2022*.> accessed 7 February 2022.

[110] V S Naipaul's novel *The Mimic Men* (1967), explains Naipaul's verdict on the mimic-dependency of post-colonial societies. See also, Homi K Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 Discipleship: A Special Issue on Psychoanalysis 125 and 'Signs Taken For Wonders: Questions of Ambivalence and Authority Under a Tree Outside Delhi, May 1817' (1985) 12(1) Critical Inquiry ("Race," Writing, and Difference) 144; Frantz Fanon *Black Skin, White Masks* (Gallimard *1952)*. Mimicry in colonial and postcolonial literature is evident when members of a colonized society imitate the language, dress, politics, or cultural attitude of their colonizers. Under colonialism and in post-colonial societies, mimicry is seen as insecure and opportunistic patterns of behaviour: one copies those with power, because one hopes to have access to that same power oneself, and as well lacks the self-confidence to be truly free, independent, and self-actualized.

published sentencing handbooks and guidelines.[111] The Eastern Caribbean Supreme Court has also published sentencing guidelines.[112] And as Rajnauth-Lee JCCJ has pointed out in *Pompey*[113], there is also available the Model Guidelines which includes sentencing guidelines. This is a sexual offence case. And so, we ask, rhetorically, why look and choose to be guided by elsewhere? Is 'outside' still considered superior to what we within this region can reflect on and create for ourselves? Of what value is local and regional experience and insight?

Practical Implications: What This All May Look Like in Practice

[113] At the end of the trial phase of a matter and when there is a finding of guilt, the next stage is sentencing. Embarking on this sentencing phase, certainly in cases such as this one,[114] judges need to approach it as a separate process in principle and have firmly in their minds the objectives to be considered. Judges should pause to take stock of what may be required. An audit of relevant and required evidence and information can be made, in collaboration with the prosecutors, defence attorneys (the convicted person if unrepresented), and taking into consideration a victim-survivor's role and needs.

[114] In a very practical way, the sentencing hearing may need to be case managed. Developing, having, and using a checklist can be a useful tool. Each case should have a unique checklist, contextualized to the circumstances of the case. Based on what is needed to conduct a fully informed sentencing hearing fairly and to discover relevant truth, directions may need to be given to produce relevant evidence, information, and witnesses (or witness statements or depositions), as well as victim impact statements where appropriate. Hearing dates can be fixed with agreed

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[111] *Pompey* (n 3) at [109], [110].
[112] Eastern Caribbean Supreme Court, *A Compendium Sentencing Guideline of The Eastern Caribbean Supreme Court, Sexual Offences, Re-Issue 12 April 2021*.
[113] *Pompey* (n 3) at [40]-[43].
[114] And others, say, where the sentences that may be imposed can be of long duration, including where the commission and impacts of the crime have been and could continue to be serious, for all parties affected including victims-survivors.

guidelines as to the production of evidence and information, procedures to be adopted, and the timelines for all slated events (prehearing and at the hearing).

[115] At the sentencing hearing judges should ensure that all necessary evidence, information, and witnesses (or witness statements or depositions) are available as agreed and scheduled. The hearing should then proceed as planned. Pleas in mitigation may be heard, as well as the examination of witnesses permitted.

[116] At the conclusion of the sentencing hearing cogent reasons must be given explaining the reasons for what has been decided as a fit and just sentence. These may be given orally or in writing.

[117] Throughout the process the standards of procedural fairness must be met.[115] And, wherever possible therapeutic approaches, directions, and orders should be adopted and made.

[118] This explanation is intended as a model, demonstrative and not prescriptive. To reiterate, the idea of a separate sentencing hearing is not about form but about substance. In the end what is required is that the ingredients that constitute a proper sentencing hearing be met, whether it is separate in fact or not. And this is dependent on all the circumstances of each individual case.

The Circumstances of this Case: What Went Wrong

[119] In this case what was the evidence before the trial judge at the sentencing hearing? The verbatim transcript of proceedings before the trial judge reveals the following. On 16 November 2015 the jury retired to the jury room at 11.37am. At 14.45pm the jury returned and announced the verdict: on the charge of rape 11/1 guilty, on the charge of assault causing actual bodily harm 11/1 guilty. Immediately following this a plea in mitigation was made. The transcript note records its brevity:

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[115] *Procedural Fairness A Manual* (n 80).

Plea

Client 23, he is still a young member of society and can still contribute to society – should be given an opportunity.

No antecedents – be lenient towards accused.

Accused says he is innocent of the offence and wishes those who did this are forgiven.

[120] The record then notes:

Prosecution – nothing known.

And immediately thereafter the record indicates that the judge passed sentence. No reasons or explanations were given.

[121] In this case, what other evidence and information could also have been reasonably relevant and helpful but was not inquired about, considered, or sought? As explained above, there are five main objectives of sentencing.[116] At a sentencing hearing evidence and information ought to be sought that is relevant to and can assist in making informed assessments and decisions in relation to each and all of these objectives.

[122] Rape is a most serious crime, both for society and for victims-survivors. It traumatizes communities, tears at the fabric of society, and creates cultures of fear. In Guyana we know that the rape of young persons is prevalent.[117] In this case the

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[116] See [69] above. The principles of sentencing require that the following sentencing objectives be considered and applied in a proportionate and just manner: (i) the public interest objective, in not only punishing, but also in preventing crime ('as first and foremost' and as overarching), (ii) the retributive or denunciatory (punitive) objective, (iii) the deterrent objective, in relation to both potential offenders and the particular offender being sentenced, (iv) the preventative objective, aimed at the particular offender, and (v) the rehabilitative objective, aimed at rehabilitation of the particular offender with a view to re-integration as a law-abiding member of society.

[117] See *Pompey* (n 3) at [41] 'sexual offences in Guyana have accounted for more than one half of all indictable cases set down for trial'at [58], [62].

victim-survivor was a young woman, and she was raped by someone she knew. Bearing in mind the discussion in this opinion and in *Pompey*, and to meet especially the objectives of prevention, rehabilitation, as well as overriding public interest concerns, including the intended and actual harm (past, present, continuing) caused to the victim-survivor, the following evidence and information should at a minimum have been inquired about, sought, and if available and forthcoming, considered: (i) PSARs such as psychological, social welfare, educational and health reports, and (ii) a victim impact statement.[118] As well, though more discretionary, (iii) peer or community opinions/evidence. And if this was not done at the High Court, it should have been considered by the Court of Appeal.

[123] Without such evidence and information, how does one decide what is a truly fit, proper, and proportionate sentence, that both deals with the past event of the crime and trauma to the victim-survivor and community, and as well the present and continuing (future) impacts and implications for the convicted person, the victim-survivor, community, and the wider society?

[124] To compound matters, no assistance was sought from counsel representing the State and/or the appellant as to what relevant precedents were apposite and could guide the court in its decision making. And none were offered in support or justification of the sentences imposed. Indeed, no sentencing process as explained by the majority in Pompey, or at all, was engaged.

[125] As explained in *Pompey*, a rational process for sentencing includes following the methodology for establishing sentencing starting points.[119]And a critical part of this exercise, which contextualizes it, also includes 'evidence of prevalence and seriousness (and trends in these elements) in a particular jurisdiction or in a sub-region of that territory'.[120] None of which evidence or information was inquired about or sought.

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[118] ibid at [114], [115], [116].
[119] Ibid at [32], [71]-[72].
[120] ibid at [68], [72], [81].

[126] These are all egregious errors in the sentencing process, that undermine due process and the protection of the law in relation to the appellant, but also render the sentences imposed incapable of being understood, trusted, or procedurally fair or just. Furthermore, the general administration of justice suffers when sentencing is not given the focus, care, and attention that is demanded by the Constitution and the law and for the good of society.

[127] Evaluating the evidential gaps that occurred at the sentencing hearing and were not addressed remedially by the Court of Appeal, it can be persuasively argued that they are so significant that it cannot be said that what took place was a fully informed, procedurally fair process, or that it was a judicially responsible sentencing hearing, which demonstrated the requisite degree of judicial accountability.

Right to a Fair Hearing Conundrum

[128] What does an appellate court do, if the sentencing process has not reached the constitutional standard of a fair hearing that can legitimately produce an evidentially just outcome and as a consequence an unjust sentence has been imposed? There seemingly are at least two obvious possibilities a) send the matter back to the trial court for such a hearing to take place, that is for a re-hearing, or b) conduct such a hearing itself. How an appellate court responds is undoubtedly a matter of some delicate balancing of competing values. Ultimately, the prevailing value should be to do justice. The right to a fair hearing is also to such a hearing within a reasonable time. Dispositional timeliness is a constitutional value of salience.

[129] What then should this Court do, if it is convinced the relevant and necessary evidence and information for conducting a fair sentencing hearing was not sought

in the lower courts and has not been placed before this court? What does justice demand?

The Court of Appeal Act

[130] The Court of Appeal Act, Cap 3:01 is instructive. It is to be interpreted and applied in the context of the Act itself according to the conventional canons of construction, and as well in alignment with the Constitution, in this case particularly the Article 144(1) imperatives for a fair hearing and to seek truth. Part III of the Act is entitled Criminal Appeals[121] and is of relevance both to proceedings before the Court of Appeal and this Court.[122] Section 11 defines 'sentence' as including '… the power of the Court of Appeal to pass a sentence (which) includes a power to any such order as the convicting court might have made.' Section 13(3) specifically addresses appeals against sentence and provides that the Court of Appeal may '…if they think that a different sentence should have been passed …': a) '… quash the sentence passed at trial …', and b) '… pass such other sentence as may be warranted in law by the verdict … in substitution therefore as they think ought to have been passed …'.

[131] The duty and power of the Court of Appeal to 'pass such other sentence as may be warranted in law … in substitution' is language that is repeated in substance in s 14 (1), (2), and (3), which deals with appeals in special cases. This intra-textual aid reinforces the following interpretation of s 13.

[132] In s 13, the trigger is a miscarriage of the exercise of sentencing discretion by the trial court. Once this is found to have occurred a Court of Appeal (and this Court) is called upon to re-exercise the sentencing discretion as is 'warranted in law' and to substitute an appropriate sentence justified by the verdict. This creates a positive

[121] Cap 3:01: Part III comprises ss 11 to 34.

[122] Section 11(6) of the Caribbean Court of Justice Act, Cap 3:07; the CCJ shall have all the powers of the Court of Appeal, Guyana.

obligation to consider all relevant statutory and common law sentencing provisions and principles. A Court of Appeal (and this Court) is thus required to (i) form its own view of whether the sentence imposed was appropriate, and if not, to (ii) exercise its independent discretion to re-sentence the convicted person.

[133] In criminal appeals, s 16 of the Act gives to the Court of Appeal (and this Court) the powers conferred by s 8 of the Act (Part II, Civil Appeals), which it says may be exercised 'if they (the Court of Appeal) think it necessary or expedient in the interests of justice'. Section 8 of the Act empowers the Court of Appeal to order the (i) production and receipt of documentary and other evidence, (ii) attendance and examination of witnesses, (iii) reference of any questions to a special commissioner appointed by the court, and (iv) appointment of experts as advisory assessors.

[134] Taken together, Part III, which deals with criminal appeals, creates the statutory underpinning for an appellate court to exercise any or all of the s 8 powers, if in the interests of justice, it is necessary or expedient to do so in the exercise of its re-sentencing discretion. An interpretation which is in alignment with the constitutional imperatives for a fair trial and to discover relevant truth. Which begs the question: If the Court of Appeal forms the view that the sentencing hearing before the trial judge was flawed and produced an inappropriate sentence because of evidential deficits (because of a lack of relevant evidence, information, reports, assessments, or statements), what is it to do? The re-sentencing duty of the court is to pass a sentence in substitution which is appropriate and warranted in law by the verdict. In this appeal, sentences for rape and assault occasioning actual bodily harm.

[135] This failure of the Court of Appeal to effectively conduct a sentencing re-hearing, can also constitute a ground of appeal. To wit, the failure to exercise its discretionary constitutional and statutory powers and to hold a proper sentencing hearing before substituting a fit and proper sentence. In this case the Court of

Appeal affirmed the sentences of the trial judge, and so such a ground may not have been readily apparent. However, this analysis confirms the question whether such a re-hearing ought to be considered whenever a deficit of relevant and necessary evidence is evident. As is now clear to be so in this case. The Court of Appeal could therefore also have remitted this matter for a sentencing rehearing.[123]

Implications for this case

[136] Section 13 requires a two-step approach: (i) an assessment of the sentence imposed, and if found to be deficient, (ii) either a re-sentencing or order for re-hearing.

(i) Assessment of the sentence imposed

[137] In this case and in relation to step one, it is possible, using the methodology established by the Guidelines for Sentencing contained in the Model Guidelines[124] and the approaches explained in Pompey, to determine as a base line whether the sentences imposed (by the trial judge) and affirmed (by the Court of Appeal) ought to be reviewed and reconsidered. This firstly requires the Court at stage 1 to (a) determine the category of the offence and the high and low ranges in that category[125] and to determine what is the starting point for sentencing for the offence[126], applying the approaches to starting points in sentencing advocated by the majority in *Pompey*.[127] Then secondly at stage 2 it requires the Court to consider (b) aggravating factors and mitigating circumstances and (c) other considerations

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[123] See the conjoint effect of ss 3, 8, and 16 of the Court of Appeal Act, Cap 3:01 read in the context of Articles 8 and 144 of the Constitution (n 84), and s 7 of the Constitution of Guyana Act, Cap 1:01.

[124] *Model Guidelines for Sexual Offence Cases in the Caribbean Region* (Judicial Reform and Institutional Strengthening (JURIST) Project 2017) at 5.0.

[125] ibid at 5.2.1(a).

[126] ibid at 5.2.1(b).

[127] *Pompey* (n 3) at [64]-[72], [114]; *Persaud* (n 27) at [46], [47]. 'The starting point approach to sentencing admits to a four-stage methodology. 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.' *Pompey* (n 3) at [114].

applicable to this case to determine whether the totality of the sentence imposed was excessive.

(a) Determining the Category and a Starting Point in this Case[128]*: Stage 1 Evaluations*

[138] While past precedents are important in the sentencing process and decision making, they are not determinative. Indeed, they are always only guides in determining the category of the offence and 'starting points'. By definition precedents are examples of what past judges have done in similar circumstances, and analysed carefully can indicate useful sentencing trends.[129] Once categories and starting points are determined, and bearing in mind their evaluative value in terms of the offending and offence generally, attention must then be focused on 'mitigating and aggravating factors in relation to the offender, guilty plea discounts, and credit for pre-trial custody, together with any other relevant considerations, (which) can be factored-in to arrive at a final sentence that is fair, just and proportionate.'[130]

[139] Before this Court, category and starting point precedents were submitted from Guyana. In relation to a single count of rape by a man on an adult woman, seven precedents were submitted by the respondent. These were not disputed by the appellant. Indeed, at the end of the oral hearings before this Court, the appellant was invited to submit any other relevant precedents. None were submitted.

[140] In three precedents there were pleas of guilty, and these attracted sentences of 11, 20 and 20 years imprisonment respectively (the third involved a 20 year old female, in the first two the victim-survivors were middle aged females). Of the next four precedents, three involved the rape of females (aged 20, 26, and 25) and the fourth the rape of a male. In the first three cases, terms of imprisonment of 16, 20, and 30

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[128] *Pompey* (n 3) at [32], 'We endorse Justice Jamadar's … suggested approach for trial judges to determine a proper starting point while embarking upon the sentencing exercise.'
[129] ibid at [74] 'Using these cases as the basic data set, certain trends emerge that can allow for both range and starting point assessments.' [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.'
[130] ibid at [72].

years respectively were imposed. A range of 16 to 30 years imprisonment for the rape of a young woman in relatively similar circumstances is apparent, with the sentences clustering in and around 20 years imprisonment. This is the precedential evidence and wisdom arising out of the courts of Guyana.[131]

[141] In comparative circumstances from Trinidad and Tobago, where the maximum sentence for rape is also life imprisonment, a range can be discerned between 10 to 30 years, considering 30 comparators from 1996 to 2008.[132] However in terms of recency, and considering the period 2001 to 2008,[133] seven out of fifteen matters attracted sentences of and more than 20 years imprisonment. Of the remaining eight instances in this more recent period, no sentence was under 15 years imprisonment. This Trinidad and Tobago comparative evidence was and is readily available, online, and free.

[142] Similarly, in Jamaica there are published sentencing guidelines that are easily accessible.[134] In Jamaica the maximum sentence for Rape is also life imprisonment. The statutory minimum is 15 years.[135] The normal range of sentences guideline is between 15-25 years.[136] And the guideline starting point is 15 years.[137]

Preliminary Inferences

[143] At the first stage conducting a category and starting point analysis[138] and based on precedents only, in Guyana a range of 15 to 17 years imprisonment is a rational and evidence-based beginning for determining a starting point. Such a conclusion

[131] ibid at [2] '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.' [69], [70], [79] '… 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 … then an appropriate starting point in this case should be not less than …'. [81] '… a starting point cannot reasonably and contextually be described as 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.'
[132] Judicial Education Institute, *Republic of Trinidad and Tobago Sentencing Handbook 2016* at 315, 343, 386, 387, 388, 390, 391, 395, 396, 400, 404, 405, 408, 411, 412.
[133] There are no comparable reported cases in the Sentencing Handbook beyond 2008.
[134] Supreme Court of Jamaica, *Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts* (2017).
[135] Sexual Offences Act 2009, s 6(1)(a) and (b) (JM).
[136] *Sentencing Guidelines* (n 134) A-7.
[137] ibid.
[138] *Pompey* (n 3) at [114], '… having regard only to the aggravating and mitigating factors relative to the objective gravity, seriousness and characteristics of the particular offence.'

accords with comparative precedents from Trinidad and Tobago, which may most closely resemble Guyana in the Caribbean region, even as they are close geographic neighbours. It also is in alignment with the sentencing guidelines from Jamaica, a regional territory that is geographically further north. It takes into consideration the unquestionable evidence of prevalence of rape in Guyana[139]. The clear limitations for an appellate court in this case are the absence of the information that would have been gleaned from a dedicated sentencing hearing and, as well, any local sentencing guidelines, and in that context forced reliance on an *ad hoc* collation of available precedential resources.

A Single Starting Point

[144] However, in so far as a single starting point number is desirable, this Court's decision in *Pompey* can assist. In that case, which involved multiple rapes of a minor female, the majority decision re-sentenced the convicted person and imposed a sentence of 17 years imprisonment. The starting point was 15 years for the first count of rape.[140] While recognising that *Pompey* dealt with a different comparable (the rape of minors), taking into consideration that under the Model Guidelines judges are asked to consider the age of the victim as an influencing factor[141], a pragmatic (though arguably conservative) starting point in this matter could reasonably be either 12 or 13 years' imprisonment.

[145] In *Pompey*, the majority were of the view that 15 years imprisonment for the first rape 'was a stiff sentence', but were prepared to accept it as within the range of reasonableness and proportionality.[142] They settled on 17 years as an overall fit and proper sentence.[143] The minority, relying largely on extra-territorial and *ad hoc* regional sources, opined that an appropriate starting point for the multiple rapes on

[139] Model Guidelines (n 124) 5.2.4 'While the court may also consider previous sentences passed for the offence, when dealing with sexual offences the court must in addition consider the prevalence of the offence in the particular community at the time, so that a previous decision which may have been based on a different degree of prevalence may not be persuasive…'
[140] *Pompey* (n 3) at [79].
[141] *Model Guidelines* (n 124) 5.2.2. e. 'The age of the complainant.'
[142] *Pompey* (n 3) at [24].
[143] ibid at [30].

a minor in *Pompey* should be 6 years imprisonment.[144] And settled on 9 years as an overall fit and proper sentence.[145]In justification they opined, remarkably:

> … 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).

[146] In *Pompey* and based on a careful application of the methodology advocated by the majority, and in the absence of local sentencing guidelines, I thought that an apt starting point ought to have been 17 years.[146]

[147] In this case, bearing in mind the comments of the majority in *Pompey* on the sentence imposed for the first instance of rape, and recognising that in this case there were accompanying acts of violence, humiliation and degradation that are yet to be reckoned with at stage 2 of the analysis (below),[147] and also recognising that this first stage analysis is focused on 'the objective gravity, seriousness and characteristics of the particular offence',[148] and considering the relevant precedents, we are of the view that a justifiable starting point in this case is 13 years.

[148] This more scientific approach is, I suggest, responsible, rational, and transparent – even if not perfect. It is grounded evidentially in collective Guyanese jurisprudence, experience, and wisdom, though not compliantly so. It helps judicial officers avoid the hubris of judicial arrogance, the bias of subjectivity, and the possibility of precedential cherry picking at this stage. Arbitrariness is the antithesis of a fair

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[144] ibid at [157], [158] '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 … is indicated.'
[145] ibid at [162].
[146] ibid at [82].
[147] *Model Guidelines* (n 124) 5.2.5. Aggravating Factors.
[148] *Pompey* (n 3) at [114].

hearing. Whatever may be our own personal predilections and preferences, sentencing is both a judicial and societal responsibility.

[149] Grounded in this preliminary analysis, an appellate court could reasonably conclude that the 23-year sentence for rape imposed may have been excessive. In this case the totality principle must also be borne in mind, as the appellant was also found guilty of assault causing actual bodily harm. These occurrences were aggravating of the rape itself. Nevertheless, as explained by the majority in *Pompey*, if '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.'[149]

(b) Aggravating Factors and Mitigating Circumstances: Stage 2 Evaluations

[150] The next stage is to take into consideration the aggravating and mitigating factors in this case relative to the particular offender, as well as other relevant considerations. [150]

Aggravating factors

[151] The applicable aggravating factors are (i) the degree of invasion of victim's sexual integrity and (ii) the degree of violence and force used by the appellant.[151] The event was one of misogynist violence, disrespect, and disregard for and against the preciousness and value of human life, integrity, and personhood. The victim-survivors' clothes were ripped, and she suffered multiple injuries. The appellant used a bottle to threaten, assault, and carry out the attack. There was humiliation inflicted, through forced oral sex, kissing, touching outside of clothes, touching inside of clothes, and two instances of sexual intercourse.

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[149] ibid at [17].
[150] ibid at [114].
[151] *Model Guidelines* (n 124) 5.2.5.

[152] In addition, there is (iii) public abhorrence for the offence,[152] and (iv) no evidence of remorse or taking of responsibility on the part of the appellant.[153] No discount in sentence is therefore applicable in this latter regard.[154]

Mitigating circumstances

[153] Mitigating circumstances in favour of the appellant are (i) he was a young person at the time of the commission of the crime (20 years), and (ii) there was no evidence of any prior criminal behaviour or record. [155]

(c) Other Considerations

[154] In this case there is no evidence by which any assessment can be made of the appellant's capacity for re-offending, or rehabilitation[156]. There is also no evidence as to the mental or psychological health of the appellant.[157] Suppositions about these will always be arbitrary and are to be avoided, certainly by responsible judicial officers. With appropriate evidence, this may be otherwise. The prior observations about supposition, bias and arbitrariness are apposite.

[155] There is also no evidence as to relational antecedents in society. And likewise, as to the appellant's educational level or health conditions. And no evidence of the impact on the victim-survivor. All of which could have been sought, made available, and considered.

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[152] ibid 5.2.5.
[153] ibid The Appellant did not plead guilty and in the plea in mitigation maintained his innocence.
[154] *Pompey* (n 3) stage three, at [114].
[155] *Model Guidelines* (n 124) 5.2.6.
[156] ibid 5.2.5.
[157] ibid 5.2.5.

[156] In our opinion, applying the proportionality principle and balancing aggravating, mitigating, and other considerations, an uplift of either 2 or 3 years imprisonment is appropriate in this case, if even somewhat conservative. In part this is because even though there are several severe aggravating factors, the factual matrices in some of the precedents provided included similar instances of aggravation.

[157] We note with some concern the majorities' observation at [43] of this judgment that 'there were aspects of the offender's behaviour that seemed odd' and that these oddities are 'something to consider as possibly indicative of the offender's amenability to rehabilitation …'. In so far as three of these oddities were noted as being the 'repeated offer to pay both before and after the violent rape' and 'telling the victim he liked her' and being 'seemingly upset …' over her rejections, we do not consider any to be odd or presumptively indicative of any amenability to rehabilitation.

[158] There is compelling research that transactional sex and sexual abuse (sex for money, services, material goods, security) is a feature of Caribbean societies where money is used to legitimize sex. Also, the expressions of 'liking' the victim-survivor or being 'hurt' by her rejections are consistent with some Caribbean male notions of sexuality, where females are viewed as available to males for sex, all parts of the patriarchal commodification of both females and sex. Thus, a male offender may not even consider that his demands are something that a female should herself be offended by or reject. We therefore see this divergence of judicial views as indicative of the need for inter-disciplinary research, education, and collaboration in both the sentencing process and its outcomes. We judges must all be careful not to assume knowledge or understanding of matters outside of their areas of expertise and competence.[158]

[158] Nicole Drakes and others, 'Prevalence and risk factors for intergenerational Sex: a cross-sectional cluster survey of Barbadian females aged 15–19' (2013) 13(53) BMC Women's Health < https://bmcwomenshealth.biomedcentral.com/track/pdf/10.1186/1472-6874-13-53.pdf> accessed 4 February 2022; Adele Jones and Ena Trotman Jemmott 'Child Sexual Abuse in the Eastern Caribbean: Issues for Barbados'. The report of a study carried out across the Eastern Caribbean during the period October 2008 to June 2009 (University of Huddersfield 2009)< http://eprints.hud.ac.uk/id/eprint/9617/> accessed 4 February 2022; Kamala Kempadoo, 'Caribbean Sexuality: Mapping the Field' (2009) 3 Caribbean Review of Gender Studies 1; Laurie A Rudman and Janell C Fetterolf, 'Gender and Sexual Economics: Do Women View Sex as a Female Commodity?' (2014) 25 Psychological Science 1438.

(ii) Re-sentencing or Re-hearing: Making Choices

[159] Decision making is often not a straightforward enterprise. This appeal is one of those knotty ones, where different judicial values compete for precedence.

[160] Article 144(1) of the Constitution,[159] in explaining the principle of a fair hearing, includes two core values, fairness and timeliness, to an objective standard of reasonableness. This opinion highlights deficits in the sentencing process. However, all deficits are not equal. For example, in as much as victim impact statements are being highly recommended in cases such as this one,[160] not having one is not fatal to a fair hearing. In similar fashion and to different degrees, is the request for and consideration of PSAR's. In this case none of these were sought and have not been obtained or considered. Should these have been sought and considered (if accessible and available)? Absolutely. However, these are all significant but not necessarily fatal deficits. Cumulatively, their collective deficit has more of an undermining impact on the integrity of a sentencing hearing. Their lack makes the sentencing process and outcomes so much less fit and just. However, in their absence an appellate court may still be able to render an evaluation and re-evaluation of a sentence.

[161] Timeliness is also to be considered. This is not only a constitutional principle *per se* in Guyana, as it is also an international principle[161] and common law standard.[162] And as well an ethical imperative. [163] This crime occurred in 2012. The victim-survivor testified in 2015, and the sentencing took place in 2015. The appeal before the Court of Appeal was heard in 2020. Is it fair to the victim-survivor, 10 years later, to compel her, her family, friends, and communities to relive this incident? And in so doing to have the victim-survivor suffer potential re-traumatization and

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[159] Constitution of Guyana (n 84).
[160] *Pompey* (n 3) at [112]-[125].
[161] The American Convention on Human Rights, Art 8(1). The African Charter on Human and Peoples' Rights, Art 7. The European Convention on Human Rights, Art 6(1).
[162] *Reid v Reid* [2008] CCJ 8 (BB), (2008) 73 WIR 56 at [22]; Crichton (n 77) 29.
[163] *Commentary on The Bangalore Principles of Judicial Conduct* (n 79) [46].

re-victimization? Likely not. And what is the likelihood that at this time any useful PSAR's can be obtained? Probably unlikely. Indeed, the value of these PSAR's is precisely to have them pre-sentencing. And similarly in relation to any other relevant and useful information or testimony, including victim impact statements.

[162] Practically, pragmatically, and proportionately, it appears that at this point in the appellate process the balance weights in favour of this Court undertaking the re-sentencing process on the evidence and information that is available, as much as it is less than adequate or optimal. In a sense this Court is left with 'Hobson's choice'; re-sentencing on the available evidence is the only fair, proportionate, and just decision at this moment in time. And there is arguably enough conventional data to do so. We say conventional, because sentencing in the Caribbean is all too often conducted evidentially as it was in this case.

[163] Finally, this Court's development and enunciation of the appropriate approaches to and methodologies for conducting a proper sentencing hearing is relatively new in the region. Its impact and application will hopefully be concretized prospectively. To be overly insistent on these approaches in reviewing pre-Pompey sentencing hearings may be somewhat harsh. In the future however, these standards are expected to be met, in trial courts, courts of appeal, and encouraged and urged by litigants, prosecution and defence attorneys, and judges.

[164] In all of these circumstances, we would impose as a just and proportionate sentence in this case a concurrent term of 16 years imprisonment, taking into account both convictions and applying the totality principle as explained in Pompey.[164]

[165] This assessment takes into account the analysis above, as well as the sentencing guidelines set out in the - Model Guidelines. In this latter regard I note the following introductory statements of principle[165] which align with this Court's

[164] *Pompey* (n 3) at [14]-[22], [96]-[97].
[165] *Model Guidelines* (n 124) 38, 39.

recommended approaches,[166] and as well with procedural and therapeutic justice approaches to sentencing:

> The purpose of sentencing in sexual offence cases, as in other criminal offences, is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing sanctions that denounce unlawful conduct, deter offenders, assist in rehabilitation, promote a sense of responsibility and provide reparations to the complainant.
>
> To achieve this, the court strives to ensure that the sentence is proportionate to the gravity of the offence while accounting for any mitigating factors.
>
> The court may look at the factors below as examples for determining sentences to determine the starting point where the legislation does not give mandatory sentences. After establishing the starting point, aggravating and mitigating factors may be considered to determine what the final sentence will be.

[166] The Model Guidelines then go on to state the guidelines in relation to (i) the steps typically to be followed by a court in determining the appropriate sentence, and (ii) the facts and circumstances of each case which can guide the length and type of each sentence.[167] We commend for consideration, use, and application this generic model for sentencing guidelines, until such time as Guyana develops its own.

[167] As the majority opined in *Pompey*: 'Public trust and confidence in courts are significantly impacted by sentencing decisions.'[168] Sentencing is a trust that the State vests in the Judiciary, and it deserves the focus and care that this opinion seeks to describe and explain.

<u>Conclusion</u>

[168] Therapeutic, procedurally fair, and post-colonial approaches to criminal justice from a human rights perspective need to be embraced in the Caribbean. Courts must

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[166] See the majority opinions in *Pompey (*n 3).
[167] (n 124) 5.2 Determining the Sentence 39.
[168] *Pompey* (n 3) at [18].

not only focus on the individual (accused and victim) but also on the system and structures that underpin and inform criminal justice. This demands a post-colonial critique of both. It may not be possible to completely dismantle the existing systems, but with sufficient awareness, it is possible to re-shape and re-form existing systems and structures, through relevant, appropriate, strategic, and skilful (innovative) approaches. These 'new' approaches need to be imagined and implemented from within the region. In this regard the Caribbean Court of Justice has an important role to play.

[169] Two fundamental orientations in the western colonial mindset that impact the traditional approaches to conducting sentencing hearings are: (i) an emphasis on the individual convicted person, and (ii) the imposition of hierarchical, patriarchal, and patronizing systems and structures of governance. The consequence is all too often a failure to embrace the centrality and significance of collaboration, inclusivity, and community. Community, inclusivity, and collaboration are conversely, integral for Caribbean post-colonial societies, given our histories, made up as we are, and existing mostly in relatively small island states.

[170] This lived reality (anthropological, sociological, cultural, regional) of community, exists as a felt-sense and longing wherever Caribbean peoples inhabit these spaces we claim as our sovereign States. To be a Caribbean person is to know the truths and to understand these distinctions. Caribbean sentencing hearings can be adapted to meet these values, needs, and realities.

[171] Mapping a way forward, the intersections between top-down hierarchy and inclusive collaboration inform a re-imagining of the sentencing hearing. Conceptually it requires interrogating the structural and relational overlaps between pyramids and circles, to enable an inter-disciplinary, democratized, decision-making process. Maybe it can be imagined as a sentencing hearing in which the traditional judge led decision-making process (hierarchical and pyramidical) is combined or intersects with multiple overlapping circles (interdisciplinary vectors

of information and insight), that serve to inform the decision-making process without supplanting or usurping either the process of decision making or the established objectives of sentencing. However, undertaken with a clear intention of minimizing anti-therapeutic effects and maximizing therapeutic and procedurally fair effects in the sentencing process and outcomes. In this way one achieves truly fair and just outcomes for all parties, including victims-survivors, and the society at large. In this collaborative endeavour, one achieves deeper insights and upholds the core constitutional and international value of the dignity of all persons.

[172] In closing, we endorse the comments of the majority so eloquently expressed by Barrow JCCJ at [46] of this judgment. Indeed, this Court's inability to arrive at a unanimous decision as to the appropriate sentence to be imposed, is not to be considered regrettable. We are of the view that the Court's divergence of opinion is an indication, moreso a confirmation, of the challenges posed to any court in arriving at a fair, just and proportionate sentence. Moreover, it conveys an important message to the Judiciary of Guyana of the tremendous task that lies ahead as they embark on the development of their sentencing guidelines. This undertaking will undoubtedly involve a forensic examination of myriad judgments, both in Guyana and elsewhere, and meaningful consultations with key stakeholders in Guyana. The range of sentences discussed by this Court will no doubt inform this undertaking, but, without in any way, unduly limiting the discretion to be exercised by the Judiciary of Guyana in the development of their guidelines.

Postscript

[173] 'Come, then**,** comrades; it would be as well to decide at once to change our ways. We must shake off the heavy darkness in which we were plunged, and leave it behind. The new day which is already at hand must find us firm, prudent and resolute.

We must leave our dreams and abandon our old beliefs and friendships of the time before life began. Let us waste no time in sterile litanies and nauseating mimicry.’

Frantz Fanon, *The Wretched of the Earth*[169].

Orders of the Court

[174] The Court makes the following Orders-

(a) The appeal is allowed, and the decision of the Court of Appeal dated 12 January 2021 is set aside.

(b) The Appellant is sentenced to 12 years imprisonment for rape.

(c) The sentence of 3 years imprisonment for assault causing bodily harm is affirmed.

(d) The sentences are to run concurrently.

/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

[169] *Les damnés de la terre* (François Maspéro ed 1961 Macgibbon and Kee 1965).