

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)
SAINT LUCIA**



**CLAIM NO. SLUCRD2013/1462
SLUCRD2016/0745, 0746, 0747**

R

v

KIRBY LIMA

Appearances:

Mr. Fidel Michel for the Defendant
Ms. Kelly Thomson for the Crown

16th June 2022

Factual Background:

1. **THOMPSON JR. P:** On August 5th, 2011, Kirby Lima had sexual intercourse¹ with CJ. At the time, CJ was a 12 year old girl.
2. On September 16th, 2011 and forty one days after he had had sexual intercourse with CJ, Kirby Lima raped AA. AA was a 23 year old woman.
3. On February 1st, 2013, Kirby Lima raped SJ. SJ was a 28 year old woman.
4. Finally, on July 12th, 2013, Kirby Lima raped KC. KC was a 17 year old young woman.
5. In each of these sexual encounters, Kirby Lima unlawfully entered the homes of his unsuspecting victims at night. He waited until they were alone and then promptly blindfolded his victims and with or without the aid of weapon he had vaginal and/or oral and/or anal intercourse with his victims². His victims were not

¹ For reasons that will be discussed later in this judgment, Kirby was not charged with rape or unlawful sexual intercourse but with unlawful sexual connection

² Oral and vaginal sex with CJ, Oral and vaginal sex at gunpoint with AA, Vaginal and anal intercourse at knifepoint with SJ and oral and vaginal sex with KC

known to him nor he to them so they were not able to visually identify him. DNA samples from his victims were tested against Mr. Lima's DNA and those DNA tests confirmed that Kirby Lima's DNA was found on the 4 rape kits taken from his victims.

6. On 22nd October 2021 Kirby Lima pleaded guilty to the counts of rape and unlawful sexual connection that were read to him on the 4 indictments that had been filed against him. The Crown offered no evidence on the counts of burglary and other offences that were also laid against him in respect of each his victims.
7. Kirby Lima sought a sentence indication from this Court on 16th July 2021. A sentence indication is a procedure by which a Defendant can seek an indication from the High Court on the maximum sentence it would be minded to impose if he (the Defendant) were minded to plead guilty.
8. It is important to note that a sentence indication is not an indication of the final sentence but a ceiling based on the Court's estimate of the likely sentence that could reasonably be imposed on the Defendant if he were to plead guilty at that stage. A sentence indication is sought and pronounced in private so that if the Defendant were to reject the indication, the fact that he had sought an indication is not held against him.
9. This Court indicated that a sentence indication of 38 years imprisonment was warranted. At the time of the indication, this court would have only had before it the matters of CJ, SJ and AA. Subsequent to indicating a maximum sentence of 38 years imprisonment this Court was advised that the matter with KC was before another judicial officer and that Kirby Lima would wish for a global indication in relation to all of his matters, including the matter with KC.
10. On 13th October 2021 this Court indicated that it would not impose a sentence of more than 38 years imprisonment on Kirby Lima for these 4 offences. On 22nd October 2021 Kirby Lima pleaded guilty to the offences summarized in paragraph 1 and 2 of this judgment.
11. The maximum penalty on conviction for rape is life imprisonment³. The maximum penalty on conviction for unlawful sexual connection is 14 years imprisonment.
12. It is common ground that the Guideline for the ECSC Sentencing Guideline for Sexual Offences⁴ ("the Guideline") and in particular the guidelines that address the offences of rape in the cases of: AA in case number SLUCRD2016/0747, SJ in case number SLUCRD2016/0746 and KC in case number SLUCRD2013/1462 and aggravated unlawful sexual intercourse in the case of CJ are applicable.

³ Life imprisonment on the Guideline is represented by a 30 year sentence

⁴ In force and updated as of November 8th, 2021

13. Everyone agrees that in the case of AA in case number SLUCRD2016/0747 and SJ in case number SLUCRD2016/0746, Kirby Lima used a weapon to subdue his victims and perpetrate his offending. The victim impact statement and/or witness statements confirms that the impact of Mr. Lima's offending was significant. All the same, this Court is careful to resist the temptation of lumping together Mr. Lima's reprehensible conduct in respect of each victim in assessing whether his offending in respect of each victim was Category 1 – Exceptional.
14. The first step in any sentencing exercise is to categorize the nature of the Defendant's offending. This is a nuanced task that is particularly difficult when there are multiple counts of offending. A sentencing court must be careful to consider and categorize each individual act of offending before going on to determine how those sentences are to run, that is to say, consecutively or consecutively with a careful eye on the totality of Mr. Lima's offending.
15. This Court is of the view that Mr. Lima's offending falls into Seriousness – Level A – High on the Guideline since Mr. Lima's offending involved some or all of the following elements
- (i) Prolonged detention/sustained incident
 - (ii) Forced/uninvited entry into victim's home
 - (iii) Disparity of age (this applies in the case of CJ who was aged 12 while Kirby Lima was aged 25 at the time he had sexual intercourse with her)
16. The dividing line between extreme (Category 1) and serious/significant (Category 2) on the Guideline is not immediately clear. This is not to say that Mr. Lima's conduct is not egregious but this Court is always required to consider the hypothetical 'worst of the worst' offender in categorizing Mr. Lima's offending.
17. In this Court's view, his offending though reprehensible is not neatly characterized as so extreme so as to warrant a Category 1 – Exceptional finding. In the same vein, Mr. Lima's offending does not neatly fall within Category 2 – High. To do so would work a grave injustice on the victims and the impact of his offending on them. For this reason, this Court chooses for itself a starting point⁵ of 60% of 30 years with a range of 55% to 80% of 30 years. The starting point is thus 18 years imprisonment with a range of 16 ½ to 24 years imprisonment.
18. The Guideline provides that the list of aggravating and mitigating factors are non-exhaustive. This is unsurprising since to do otherwise would deprive a sentencing court of the necessary flexibility that sentencing requires. This Court notes that the ECSC Guideline does not include the timing of the offence as an aggravating factor.

⁵ The Category 1 starting point is 75% of 30 years [22 ½ years]. The Category 2 starting point is 50 % of 30 years [15 years]

19. The UK Guideline from which the ECSC Guideline is derived makes it clear that the timing of the offence is an aggravating factor. Should this Court presume that the omission of timing from the ECSC Guideline as an aggravating factor meant that its learned authors meant to exclude it? In the case of each victim, they were at home, at night, in their homes when Mr. Lima unlawfully entered their respective homes and violated them. This Court would be remiss in its duty to do justice if it were to ignore this significant feature of Mr. Lima's offending and thus finds that Mr. Lima's offending is aggravated by this feature of his offending.
20. Mr. Lima's offending is not mitigated by any of the Guideline, whether UK or ECSC, mitigating factors of the offence. There are no aggravating factors of Mr. Lima and his offending is mitigated by his previous good character and genuine remorse.
21. Previous good character as a mitigating factor has to be considered alongside the reasoning of Sir Denis Byron CJ at paragraphs 29-30 in the case of Desmond Baptiste.

"As to the fact that the offender was committing crime for the first time, it seems to us that the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. **It must be stressed though that the more serious the offence, the less relevant will be this circumstance.** In *Turner v The Queen*, a case of armed robbery, Lord Lane, CJ stated that 'the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the Court is dealing with cases of this gravity'. Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of an insubstantial nature.

On the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. **As with first time offenders, the more serious the offence, the less relevant will be these circumstances.**"

22. In this Court's view, Mr. Lima is to receive credit for the fact that he has no previous convictions but the extent and amount of that credit is a matter for this Court in the exercise of its undoubted discretion as circumscribed by the reasoning of Byron CJ set out above.

- 23.** The pre-sentence report and evidence of the social worker demonstrated that Mr. Lima has demonstrated considerable remorse and insight into his offending. When the allocutus was put to him, Mr. Lima stated that he was truly remorseful and had seen the error of his ways. He regretted the harm that he had caused to his victims and the fact that they would have to live with the consequences of his actions for a long time. He indicated that if given the opportunity he would do everything in his power to use his experiences to teach and deter other young men from acting as he did.
- 24.** Mr. Lima's counsel drew to the Court's attention the fact that Mr. Lima had had a difficult upbringing and that since he had been at the Bordelais Correctional Facility he had of his own volition successfully taken and passed CXC Math, English A and Social Studies and had also voluntarily assisted other prisoners. In his view, Mr. Lima was an excellent candidate for rehabilitation.

Discount for Guilty Plea:

- 25.** Considerable discussion was spent on the extent of the discount which Mr. Lima should receive for his guilty plea. The Crown initially contended that Mr. Lima could only hope to receive a 10% discount for his guilty plea. In their view, his plea came after a trial date was set in the matter of AA. Counsel for Mr. Lima contended that client should receive the maximum 1/3 discount for his guilty plea. Counsel reminded the court that his firm were not Mr. Lima's original counsel. Mr. Lima's previous lawyers were no longer able to represent him and once Mr. Michel met with Mr. Lima and took his instructions in 2021 he promptly indicated that his client wished to shorten the proceedings.
- 26.** As a matter of law, the 10% or less discount is reserved for the plea that comes at jury selection or even after the trial has started. The full 1/3 discount is reserved for the Defendant who at the first reasonable opportunity indicates his guilt. Mr. Lima would have been in custody since August 2013. He would have had legal advice and would have had legal advice up and even after the DNA reports had been received. Even with the fact of the significant delays in progressing the matter, none of which were Mr. Lima's fault, he would have known that he had perpetrated these offences. It was therefore always open to him to indicate that fact. He cannot therefore have the benefit of the full 1/3 discount.
- 27.** On the other hand, this court must take into account the significant delays that plague the administration of justice in St Lucia. Mr. Lima would not have had many opportunities to indicate his position. His previous attorney's ability to represent him has been limited for several years and in those circumstances this Court doubts whether Mr. Lima had ever received from his previous attorney the sort of advice that he received from Mr. Michel once the DNA material was served on him. In this Court's view a discount of 20% for Mr. Lima's guilty plea is

eminently fair and reasonable and takes into account these competing considerations.

Totality – Concurrent & Consecutive Sentence:

28. This Court's assessment of the totality of Mr. Lima's offending and whether his sentence should be expressed to run concurrently or consecutively are intertwined. The issue of totality requires the Court to take a bird's eye view of Mr. Lima's entire offending both in respect of each victim and as a particular type of offence. This is consistent with Practice Direction 7A⁶ issued by the ECSC which sets out certain general sentencing principles.

29. Paragraphs 3.1 to 3.3 of the Practice Direction are instructive and are helpfully set out below and confirm the approach that this Court has taken in this matter.

"The principle of totality requires a court, when sentencing for more than one offence, to pass a sentence that reflects the total criminality but which is just and proportionate so that the sentence does not exceed what is necessary to reflect the overall offending behaviour. This principle applies regardless of whether the offences form a single episode of criminality or two or more separate acts of criminality."

3.2 *A sentencing court must, however, take care when applying the totality principle. Public confidence in the administration of justice requires the Court to explain clearly why it has taken a particular approach to multiple sentences."*

3.3 *The court's first task is to consider the appropriate sentence for each individual offence applying the relevant guideline. Secondly, it must decide whether the sentences should be made to run concurrently or consecutively. Finally, the court will then assess the overall sentence for justness and proportionality, adjusting the sentence accordingly."*

30. Paragraph 5 of the Practice Direction is also instructive. It is trite law that as a general rule multiple offences committed in the course of the same transaction or arising out of the same incident or facts should run concurrently with each other. By contrast, if a serving prisoner or person on bail commits an offence subsequent to their initial offence then as a general rule the sentence for the 2nd offence will run consecutively to the initial offence.

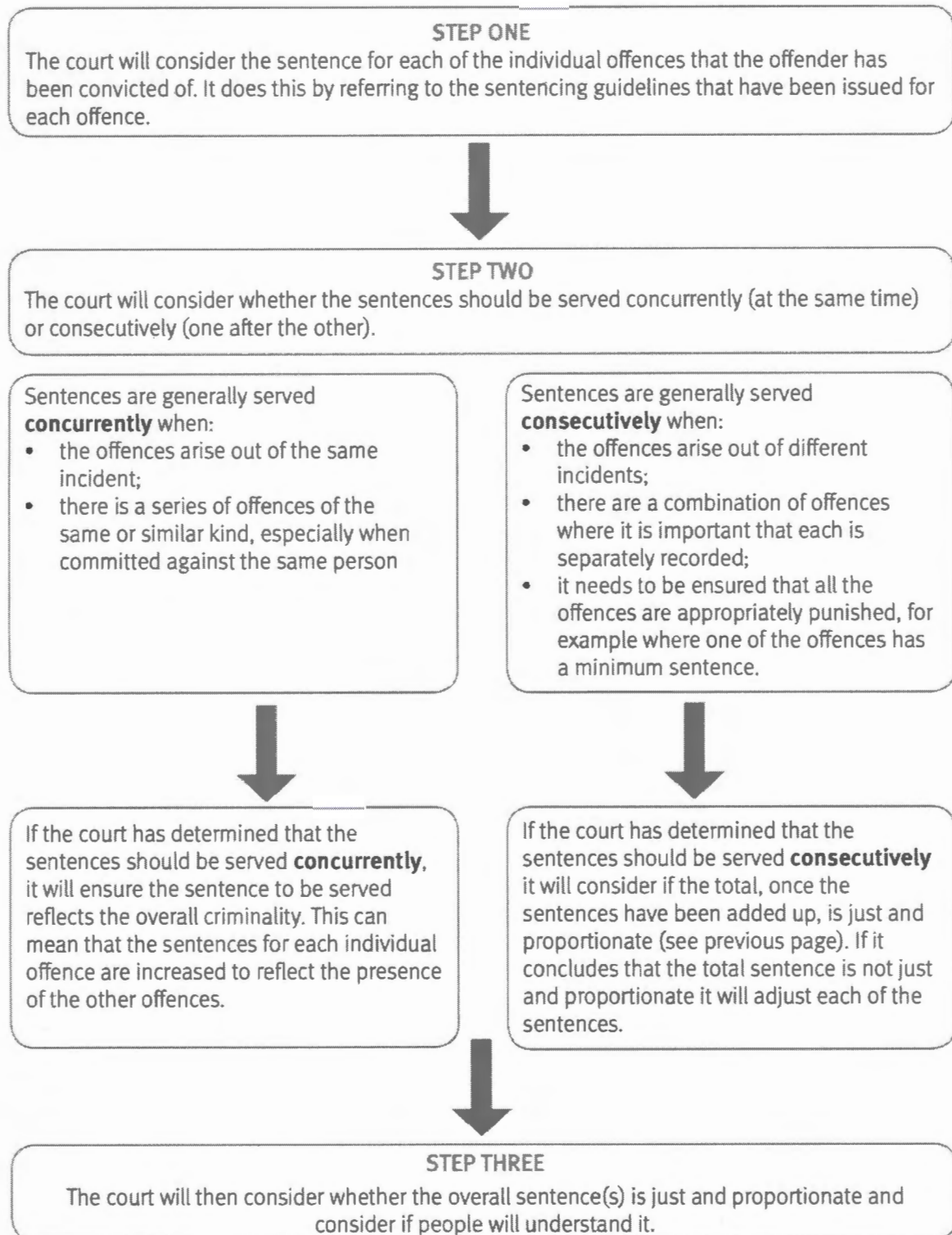
31. Paragraph 5.4 provides that *"Even in cases where consecutive sentences may be ordered, when sentencing for a series of similar offences the court should usually pass a substantial sentence for the most serious offence, with shorter*

⁶ The fact that this practice direction is expressed to apply to Anguilla does not pose a difficulty since the principles contained therein are consistent with well-established practice and/or case law in the ECSC and UK.

concurrent sentences for the less serious ones". Finally, a sentencing court must have regard to the totality principle when passing consecutive sentences.

- 32.** The UK Guide on Sentencing for Multiple Offences which is set out below for ease of reference summarizes how this approach is effected in practice.

What steps does the court take?



The judge or magistrate will explain in court the approach they have taken.

- 33.** Mr. Michel contends that this Court should adopt the approach outlined in paragraph 5.4 above and pass a substantial sentence for one offence with shorter concurrent sentences. In support of his argument Mr. Michel invited this Court to adopt the approach of Mr. Justice Morley QC in the matter of R v DeVante Henry.
- 34.** In the Da’Vante Henry matter, Justice Morley imposed concurrent sentences of 18 and 15 years imprisonment on an offender who had raped 2 different septuagenarians in May and July of 2016. Justice Morley considered the issues of consecutive and concurrent sentences and was of the view that to impose a 30 year sentence (that being the result of consecutive 15 year sentences) in respect of each victim would be excessive when considering the totality of Mr. Henry’s offending.
- 35.** This Court is of the view that the Henry matter is distinguishable from the instant matter for a number of reasons. One, there are 4 and not 2 victims. Secondly, all of Mr. Henry’s offending was perpetrated in a 2 month span. Mr. Lima’s 4 separate acts of offending spanned almost 2 years. Thirdly, this Court notes in passing that the 18 year sentence imposed on Mr. Henry is consistent with the likely range of sentencing for this offence so that this Court’s 18 year starting point appears eminently reasonable.
- 36.** Paragraph 5.4 of the Practice Direction provides that the court should usually pass a substantial sentence for the most serious offence with shorter concurrent terms for the less serious ones. What should happen when the Defendant’s offending is extremely serious in each case such that no offence is relatively more or less serious than the other? The Defendant is already facing a substantial sentence of imprisonment. Would a sentence of say 24 years on say count 2 concurrently with lesser terms on the remaining counts meet the justice of the case and properly take into account the totality of Mr. Lima’s offending?
- 37.** The answer to this question must be no. Such a sentence (24+ years or more) would be outside the upper limit of the range of sentences for a single count of the rape offences. All the same, this Court acknowledges the wisdom in Justice Morley’s approach in the Henry matter and has no difficulty in finding that Mr. Lima’s offending in respect of CJ and AA (the August and September 2011 incidents) should run concurrently with each other. By parity of the same logic, Mr. Lima’s offending in respect of KJ and SJ coming several months apart in 2013 should be expressed to run concurrently with each other. What should happen in respect of Mr. Lima’s 2011 and 2013 offending?
- 38.** This Court is of the view that the sentences imposed for Mr. Lima’s 2013 offending should be expressed to run consecutively with the sentence imposed for his 2011 offending. The rationale for consecutive sentences is neatly

encapsulated by reasoning of Madam Justice Vicki Ann Ellis at paragraphs 62-64 of *R v Derek Knight* in the following terms:

"[62] These general principles have repeatedly been approved by our courts. While there is clear authority for the contention that questions of concurrence or accumulation is a discretionary matter for the sentencing judge, the Court accepts that such discretion must be viewed within a context which applies the principle of totality. It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence.

[63] Although it is not a binding precedent, the Court is guided by the case of *Cahyadi v R24* in which the New South Wales Court found that in applying the principle of totality, the question to be posed is -- whether the sentence for one offence can comprehend and reflect the criminality of the other offence. At paragraph 27 of the judgment, Howie J observed that if the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent; otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences. If not, then the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality.

[64] Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. The nature of the offence and the particulars of the offender are relevant. Also, factors relating to the victim or victims should be considered. The nature of a crime is a critical factor. The Court accepts that as a matter of general principle that where two offences committed during the course of a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two"

39. Applying Justice Ellis's analysis of *Cahyadi* it is clear that Mr. Lima's offending should be at least partially cumulative otherwise there is a real risk that the total sentence will fail to reflect the total criminality of Mr. Lima's 4 offences. In particular, an application of Justice Ellis' reasoning at paragraph 64 confirms that some accumulation is warranted in order to fully address Mr. Lima's criminality. To do as contended for by Mr. Michel would be to fail to properly reflect Mr. Lima's significant criminality in perpetrating this offence on 4 separate occasions on 4 separate victims.

40. Moreover, in this Court's view, there are a combination of offences, grouped into distinct chronological periods for which separate and distinct sentences ought to be imposed. A further adjustment is required to take into account the totality of Mr. Lima's offending. On any analysis, Mr. Lima was a serial rapist. Any one of his rape offences would ordinarily attract a sentence of considerable length.
41. The hypothetical person on the Gros Islet Bus Stand could be forgiven for thinking that the matter is simply a matter of arriving at a sentence in respect of each victim and then totaling those sentences. That analysis would lead to a sentencing range far beyond what would be reasonable, not just for this offence but for offenders generally.

Unlawful Sexual Connection:

42. At sentencing this Court inquired of the Crown why Mr. Lima was charged with unlawful sexual connection. The Court's inquiry was after the Defendant had already pleaded guilty but this Court found it strange that the charge in respect of the youngest victim was not rape. In respect of CJ in case number SLUCRD2016/0745, Mr. Lima's first victim, the facts were that she was aged twelve (12) and had just come out of the shower when Mr. Lima entered her home. He was not known to her and after blindfolding her, he initially put his penis in her mouth then forced her legs open and inserted his penis into her vagina and had sexual intercourse with her.
43. Crown counsel indicated that the Director of Public Prosecution (DPP) was of the view that since CJ was a twelve (12) year old girl, as a matter of law; she could not consent to sexual intercourse. If however a rape charge was laid against her assailant at trial he may argue that she had consented and that since consent is a defence to rape, a rape charge would have been inappropriate.
44. Unlawful sexual connection means the introduction, to any extent, into the vagina or the anus of the person of any part of the body of any other person without the consent of that person. For reasons that will become apparent, this Court cannot discern the rationale for a charge of unlawful sexual connection. That offence appears to overlap with other sexual offences (indecent assault, rape, unlawful sexual intercourse) and there does not appear to be any useful legislative aim that the offence appears to address. A fourteen (14) maximum penalty on conviction for this offence is also at odds with the penalties imposed for rape (life imprisonment) or even sexual intercourse with a person between 12 and 16 (15 years imprisonment).
45. This Court does not offer any comment on the Director of Public Prosecution's rationale for charging for unlawful sexual connection as to do so would be outside of its remit. All the same, Section 99(1) of the Criminal Code provides that at a trial for rape a person may be convicted of any offence which is established

by the evidence. Section 991⁷ means that in theory Mr. Lima could have been charged with rape.

46. Had he pleaded not guilty (and it is difficult to see how he could have done so both in view of his ultimate plea and the DNA evidence) and proceeded to trial it would have been open for a jury to find that either rape or any other sexual offence, including unlawful sexual connection was made out by the evidence. It begs the question of why charge for unlawful sexual connection when Section 991 exists.
47. What is clear is that CJ could not consent to sexual intercourse even if she wanted to and secondly the scope for a reasonable jury finding that CJ was consenting is extremely narrow in view of the facts. In future it may behoove a prudent prosecutor to focus on whether the charge meets the justice of the case as opposed to speculating on possible defence positions.
48. In this Court's respectful view, the decision to charge Mr. Lima with unlawful sexual connection must have a knock on effect on the sentence in view of the wide difference in penalty between rape and unlawful sexual connection. Even after taking into account the fact that the CJ in case number SLUCRD2016/0745 and AA in case number SLUCRD2016/0747 sentences were expressed to run concurrently the starting point for CJ's case would have meant that an uplift was warranted on totality grounds.
49. The foregoing discussion is a moot point in Mr. Lima's case. All the same, crown counsel was compelled to agree that the court's position as articulated above held considerable force. Whether this will result in a change of approach by the Crown to sexual matters (prevalent as they are) remains to be seen.
50. The Defendant is thus sentenced to serve the following terms of imprisonment.
51. In respect of the count of unlawful sexual connection with CJ in case number SLUCRD2016/0745, ten (10) years imprisonment.
52. In respect of the count of rape on AA in case number SLUCRD2016/0747, eighteen (18) years imprisonment.
53. In respect of the count of rape on SJ in case number SLUCRD2016/0746, eighteen (18) years imprisonment.

⁷ Upon the trial on indictment of a person charged with rape, or with the offence of having sexual intercourse or sexual connection with a male or female under the age of 12 years, he or she may be convicted of any offence which is established by the evidence, and of which the unlawful sexual intercourse or sexual connection with a male or female, whether of a particular age or description or not, is an element.

54. In respect of the count of rape with KC in case number SLUCRD2013/1462, eighteen (18) years imprisonment.
55. The ten (10) year term of imprisonment with imprisonment is expressed to run concurrently with the eighteen (18) year term of imprisonment in respect of his offending with AA in case number SLUCRD2016/0747.
56. The eighteen (18) year terms of imprisonment in respect of his offending with SJ in case number SLUCRD2016/0746 and case number SLUCRD2013/1462 are expressed to run concurrently with each other.
57. Finally, the eighteen (18) year terms of imprisonment in respect of AA in case number SLUCRD2016/0747 and SJ in case number SLUCRD2016/0746 are expressed to run consecutively from August 13th, 2013 thus leading to a global 36 year sentence of imprisonment calculated from August 13th, 2013.
58. This Court wishes to put on record the considerable assistance provided by Mr. Michel, who at the Court's invitation provided his services to Mr. Lima on a pro bono basis. This assistance is noteworthy since Mr. Michel had never previously appeared in the court's criminal jurisdiction. It is hoped that this experience may encourage other practitioners to offer their services to the many criminal defendants at the Bordelais Correctional Facility who desperately require their services.

JUSTICE PATRICK THOMPSON JR.

HIGH COURT JUDGE

BY THE COURT



Dp. REGISTRAR