



1 IN THE GRAND COURT OF THE CAYMAN ISLAND
2 CRIMINAL DIVISION

3 INDICTMENT No. 57/21 & 58/21

4
5
6 HER MAJESTY THE QUEEN

7
8
9 -v-

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11
12 ANTONIO MARSHALL

13
14 &

15
16 ERICKA LYNCH
17
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20 **Appearances:** Mr. Orrett Brown, Crown Counsel for the Prosecution
21 Mr. Keith Myers for Defendant #2
22 Mr. Richard Barton for Defendant #1
23

24 **Before:** Hon Mrs. Justice Marlene Carter (Actg.)
25

26 **Date of Hearings:** 13 and 30 September 2022
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30 HEADNOTE

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32 *Criminal Law – Sentence - Indecent Assault - Severe Psychological Harm*
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34

35 SENTENCE JUDGMENT

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38 1. Section 31 of the *Criminal Procedure Code (2014 Revision)* deals with the “*Anonymity of*
39 *complainants in rape etc. cases and states:*”

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41 “31.(1) *After a person is accused of a rape [etc.] offence, no matter likely to lead*
42 *members of the public to identify a woman as the woman against whom the*
43 *offence is alleged to have been committed shall be published in a written*
44 *publication available to the public or be broadcast, except as authorised by*
45 *a direction of the court.*”
46

47 2. I will therefore refer to the woman against whom the offence has been committed as “the
48 victim” to protect her identity.
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1 **The Facts**
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3 3. The defendants were found guilty after trial of the offence of indecent assault, contrary to
4 section 132 (1) of the Penal Code (2019 Revision).
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6 4. The following are the facts of the case taken largely from the Crown's written sentence
7 submissions with which Counsel for the each of the defendants has indicated to the Court that
8 the defendants take no issue.
9

10 5. The victim has known the defendant Ericka Lynch for over fifteen years. They were very close
11 friends. Ericka Lynch and the co-defendant Antonio Marshall are in a relationship together.
12

13 6. On 17 April 2021, the victim telephoned Ericka Lynch to discuss a personal matter. Lynch
14 invited her to Marshall's address. Having arrived at the address, the victim was introduced to
15 Marshall, a serving police officer, for the first time. The trio drank, ate, and watched television
16 together. The victim left the address around 11pm. As she was leaving, Lynch told her that
17 Marshall could perform oral sex on her. In response, she told Lynch that she did not want that.
18

19 7. On 18 August 2021, Lynch had planned a birthday celebration for Marshall at the Whitehouse
20 Restaurant. The victim was invited to attend. The celebration involved food, drinking and
21 dancing. At around 4:30pm the party moved on to the Power Supply Bar, just off West Bay
22 Road. The victim, Lynch and Marshall made their way to the Power Supply Bar in Marshall's
23 vehicle. He drove. The victim sat in the back of the vehicle.
24

25 8. On arrival at the Power Supply Bar, Marshall parked the vehicle and reclined the driver's seat
26 all the way back. As the victim tried to get out of the rear of the vehicle, Marshall pulled her
27 dress to hold her back and tried to put his head under her dress. She proceeded to open the door
28 and exit the vehicle. She told Lynch to tell her boyfriend to stop.
29

30 9. Whilst at the Power Supply Bar, everyone was drinking, dancing, and having a good time.
31 When the victim was ready to leave, because of the incident that happened when she was trying
32 to exit the vehicle upon arrival at the Power Supply Bar, she attempted to contact her boyfriend
33 to ask him to collect her from the location. She was unsuccessful in her attempts to contact him
34 and so left with Lynch and Marshall.
35

36 10. When they got back to the vehicle outside the Bar, Lynch got into the driver's seat and told her
37 Marshall to get into the back seat with the victim. As they approached the Camana Bay
38 roundabout, Marshall started to hold the victim down. She told him to stop but he pinned her

1 down. She shouted to Lynch to tell him to stop. Marshall then pushed his head under her dress,
2 pushed her underwear aside and started to perform oral sex on her by sucking on her vagina.

3

4 11. The victim kept trying to push him off and continuously told him to stop but he kept pushing
5 her down with force. She shouted out to Lynch several times and told her to tell Marshall to
6 stop. Lynch kept telling her that it was ok. The victim was crying out as Marshall continued to
7 suck her vagina. Marshall used both his hands to hold her waist and lower body whilst he used
8 his head to keep her legs open. The incident lasted 20 minutes in duration.

9

10 12. Having arrived at Marshall's home, Lynch got out of the driver's seat and opened the back door
11 of the vehicle. The victim was begging Lynch to tell Marshall to stop. However, Lynch pulled
12 her upper body down on the backseat and started to suck on her breast whilst repeating that she
13 was ok. Lynch went on to ask Marshall if the complainant's clit was hard, but she did not hear
14 his response.

15

16 13. The victim continued to beg both defendants to stop. She told Lynch that people would see. In
17 response Lynch said that no one was outside. Eventually the defendants stopped. They went
18 inside and the victim called her boyfriend to come to collect her. When the victim's boyfriend
19 attended he was told by Lynch that the victim was not in her right mind and had drunk too
20 much. He found her hunched over the dining room table. As they were leaving, he heard
21 Marshall say something to the victim. Her response was "*fuck you*".

22

23 14. She told her boyfriend and her mother what had happened that same evening. She also informed
24 her boss the following day as she was very upset at work.

25

26 15. On 19 April 2021, the victim messaged Lynch relating all that happened and telling her that she
27 had broken her trust. Lynch apologized and stated that she was drunk. In one message Lynch
28 said that she "*should have stopped it and I'm really sorry*". She went on to say she was '*truly
29 sorry and hurt what I allowed or engaged in*' and '*if you don't forgive me and choose not to
30 trust me again I understand and hope that you find it within ur heart to forgive me*'.

31

32 16. Other messages recovered from the defendants' phones, showed conversations the defendants
33 had with others. Marshall could be seen bragging. On the morning of the 18th April (prior to
34 the brunch at the Whitehouse, prior to the assault), Marshall sent a voice note to a friend in
35 which he said "*it rough boy, but my girl say to her 'why don't you just go in the room, take off
36 your pants and your draws, take off your pants and your panties, and, and he can come', she
37 say no I just wanna watch, I don't want to participate, he aint gonna fuck you but he sure gonna
38 eat the life outta ya pussy for..*" He can then be heard laughing on the voice note.

1 17. The following day, he sent a photograph of the victim and himself with the caption *'Watch my*
2 *bday gift'*. His friend responds with *'wait your girl give you her?'* to which he replied *'Yea that*
3 *my girl's fi'end They got me drunk yesterday at my swprise brunch. Ericka drove my car home*
4 *while I got in de back seat with her fi'end She said bae suck out her soul *emoji*. That time*
5 *the girl in the back moaning and groaning and saying Ericka this ur man Ericka tell her shut*
6 *and enjoy it *emojis'*.

7
8 18. Messages recovered from the defendants' phones include a message where Marshall, having
9 been informed of the complaint, instructs Lynch to *"delete this conversation out ur phone now"*.

10
11 19. The complainant made a formal report of the incident on 19 April 2021.
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13 20. The defendants were each interviewed under caution. Both defendants claimed that the victim
14 had consented to the sexual activity that took place. They maintained this during the trial. The
15 jury unanimously rejected their accounts.
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1 **The applicable sentencing guidelines**

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3 21. The applicable guidelines are the Cayman Islands Sexual Offences Sentencing Guidelines dated
4 8 April 2020 (the “Guidelines”).

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6 22. The maximum sentence for this offence after conviction on indictment is 10 years
7 imprisonment.

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10 **The Crown’s Position on Sentence**

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12 23. As per the Guidelines, the Crown submits that the offending of both these defendants fall within
13 the following category of harm.

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15 24. “**Between Category 1/2”: Category 1** – Citing severe psychological harm caused to the victim,
16 the Crown submits that based on the Victim Impact Report (VIR) there was evidence before
17 the court that the victim has suffered severe psychological harm as a result of the defendants’
18 offending. The Crown submits that such a finding can be made by a trial judge based on
19 evidence from the victim such as that contained in the VIR, as well as the court’s own
20 observations of the victim when she gave evidence.

21
22 25. **Category 2** – the Crown’s further submission, if a designation of category 1 does not find
23 favour with the court, was that category 2 may be appropriate, the factors of touching of naked
24 genitalia or naked breasts of the victim and some psychological harm being present.

25
26 26. As to culpability the Crown submits that the court should find that the offending falls within
27 Culpability A, the offenders acted each with the other to commit offence, and that there were
28 factors which could amount to planning in the commission of the offence. The Crown’s position
29 is that if the court accepts that it is a Category 1 harm Culpability A (1A) case the starting point
30 in line with the guidelines is 8 years custody with a sentencing Range of 7-10 years. If it is a
31 Category 2 Harm, Culpability A case the starting point is 6 years custody and a sentencing
32 Range of 5-9 years.

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34 27. The Crown further submits that there are no mitigating factors for the court’s consideration.
35 However, it was submitted that there is an Aggravating feature present, this being the attempt
36 to dispose or conceal evidence (the deletion of WhatsApp messages).

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1 **Submissions on Sentence - The Defendant Antonio Marshall**

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3 28. Counsel for the defendant Mr Marshall submitted that in its assessment of culpability and harm
4 that the court should find that this falls within the Category 2 harm, Culpability A on the basis
5 that the offence involved the touching of the victim’s vagina and that the defendant acted
6 together with Ms. Lynch, respectively.

7
8 29. Counsel submitted that there was an absence of any expert finding on the issue of psychological
9 harm and further argued that even if the court were to conclude that some psychological harm
10 occurred, it should contain the level of harm to Category 2.

11 **Aggravating Factors**

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14 30. Counsel for defendant Marshall acknowledged that the deletion of text messages formed a part
15 of the Crown’s case upon which the verdict was delivered. The defendant Marshall caused
16 Lynch to delete various messages from her phone.

17 **Mitigating Factors**

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20 31. Counsel identified the following as factors in mitigation.
- 21 i. The defendant has no previous convictions and has never been involved with the
 - 22 criminal justice system as an offender.
 - 23 ii. Remorse as reflected in the Social Inquiry Report (SIR).
 - 24 iii. Previous Good Character - counsel submitted that Mr. Marshall is a man of good
 - 25 character and has had no blemish on his character.

26
27 Although not specifically addressed in the Guidelines, the court was invited to consider the
28 following factors which counsel submitted, “*might together or individually, amount to personal*
29 *mitigating factors or otherwise serve to inform the court as to the appropriate penalty to be*
30 *imposed.*”

- 31
32 iv. Loss of Livelihood - It was noted that Mr. Marshall has lost is employment since
33 being charged with this offence and will experience difficulty in his efforts to gain
34 employment with a criminal conviction.
- 35 v. Since the conviction he has not been able to provide for his family and he has a
36 young son.



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Appropriate Sentence

32. Counsel for the defendant Marshall submitted that the appropriate level for the sentence before the court is level Category 2 harm, Culpability A. The court is invited to consider a starting point of 6 years custody with a sentencing range between 5-9 years.

Social Inquiry Report (“SIR”)

33. Very comprehensive SIRs were completed by the Department of Community Rehabilitation as requested in respect of each of the defendants. I am grateful to the Department for their continued assistance to the court.

SIR - Antonio Marshall

34. The SIR revealed that this defendant was raised in a humble setting in a family active within their Church Community. He described a happy home environment and school life. He joined the Royal Barbados Police Services in 2001 and spent seventeen (17) years with that organization. In 2017 he joined the RCIPS

35. The defendant has an 11-year-old son who resides in Barbados and with whom he shares a good relationship and maintains frequent contact.

36. The SIR revealed that the defendant’s colleagues think highly of him, described him as being hardworking and reliable and some of them were distraught for him personally upon hearing of this incident even while expressing sympathy for the victim.

[The defendant]... acknowledged that his conduct on the day of the incident was not in keeping with how he was raised. He offered an apology to the complainant and expressed remorse for what she underwent.”

.....

He said that the incident has taken a toll on him and described it as "career-ending." He said that initially he was upset. He said that he has no resentment toward [the victim] as, in looking back at the incident he played a part in the situation. He said if given an opportunity he would apologize to [the victim].”

37. The Probation Officer noted:

“It could be therefore argued that Mr. Marshall's conduct was situational and that he perceived that the opportunity presented itself. There was, however, a willingness on his part to engage in what could be viewed as an unbecoming behavior ...with the precursor being alcohol consumption.

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“... at the time he gave no thought, that the victim could have suffered emotional harm arising from his behavior. His current attitude towards the process leading to his conviction demonstrates that he has developed a capacity to appreciate the emotional and psychological experience of the victim thus indicating that he has accepted criminal, moral and social responsibility for his conduct. This is also an admission that he feels that his conduct was improper and did not meet societal expectations, especially those of his parents and peers.”

- 38. The defendant was assessed as per the LSC/MI Risk Assessment Chart which predicts a general risk to reoffend. The defendant’s risk of re-offending is classified as **"very low,"**
- 39. The probation officer noted that there was nothing that points to Mr. Marshall having a propensity to commit such an act as the present offence and that in the PO’s opinion *“it seems reasonable to conclude that the incident was more than likely situational and that his action while criminal also shows a lack of restraint which Mr. Marshall has acknowledged.”*
- 40. I have also considered the character references submitted on behalf of this defendant.



1 **Submissions on Sentence - The defendant Erica Lynch**
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3 41. Counsel on behalf of the defendant Ms. Lynch submitted that the offending in relation to this
4 defendant falls as category 2 harm. He urged the court to conclude that even if it found on the
5 evidence of the complainant and its own observations that some psychological harm occurred,
6 it should contain the level of harm to category 2.

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8 42. As to culpability, counsel for Lynch submitted that it was accepted that the culpability was at
9 level A on the basis that the offence involved the sucking of the Complainant's breast.

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11 **Aggravating Factors**
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14 43. Counsel for the defendant Ms. Lynch submitted that a finding of psychological harm to the
15 complainant could be an aggravating factor but there were no aggravating factors for the court's
16 consideration apart from same.

17 **Mitigating Factors**
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20 44. Counsel for the defendant Ms. Lynch noted that the defendant was now 34 years of age and had
21 up to this time never appeared before a court for any offence. She has no previous convictions
22 and is of previous good character.

23
24 45. Ms. Lynch had been in full-time employment with various organizations since she graduated
25 from college.

26
27 46. Ms. Lynch has 2 children residing with her, ages of 11 and 3, and she is their primary caregiver.

28 **Appropriate Sentence**
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31 47. Counsel invited the court to find that the appropriate sentence should be at level 2A, Category
32 2 harm Culpability A. The court was invited to consider a starting point of 6 years custody with
33 a sentencing range between 4-9 years.

34 **SIR– Erica Lynch**
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36
37 48. The SIR for the defendant Ms. Lynch relates that she was raised in a stable home environment
38 firmly grounded on Christian principles. She reported to the probation officer that hers was a
39 happy home. She graduated from high school and was quite involved with sports

40
41 49. She trained to be a nurse but eventually decided to pursue a career in banking. She holds an
42 Associate Degree in Banking for the University College of the Cayman Islands. She was
43 employed at Cayman National Bank for eleven (11) years. From 2016, she has been employed



1 with the Cayman Islands Government at Workplace Opportunity Residency Cayman (WORC)
2 as a Customer Service Financial Officer.

3
4 50. The defendant reported having an excellent relationship with her parents, siblings, and extended
5 family all of whom are very supportive.

6
7 51. The SIR details that acquaintances of Ms. Lynch remarked to the probation officer that, "*the*
8 *issues surrounding the offence are uncharacteristic of her*". She was described as "*honourable,*
9 *respectful and decent*".

10
11 52. The SIR shows that the defendant had expressed regret for her actions to the probation officer.
12 She appeared to the Probation Officer to be remorseful and verbalized that she was sorry.
13 However, the defendant also expressed that although she recognized that she should never have
14 got involved, that "*everybody is to be blamed as they all part take in the behavior*" that the
15 victim never objected by saying no.

16
17 53. In evaluating the defendant's attitude, the Probation Officer noted of the defendant: "*She*
18 *reiterated that the victim was a willing participant in the sexual encounter. Evidently, this is a*
19 *denial of full responsibility and minimization of her involvement. She however acknowledged*
20 *that she has crossed the periphery of her moral boundaries and has learnt an invaluable lesson*
21 *from the experience.*"

22
23 54. The defendant was assessed using the LS/CMI Risk/Need Assessment Tool and her overall risk
24 of re-offending was assessed as "*Very Low*". Apart from the SIR the court was also provided
25 with character references on behalf of this defendant. These form part of the court's
26 consideration on this sentencing exercise.

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1 **Court’s considerations**

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3 55. The main matter at issue between the Crown and the defendants is the category of harm that
4 this court should adopt considering the facts of this case. The Crown has submitted on the
5 authority of *R v Chall*, [2019] EWCA Crim 865; [2019] 2 Cr App R (S) 44,¹ that expert
6 evidence is not a necessary precondition to a court finding that a victim has suffered severe
7 psychological harm, a Category 1 harm factor.

8
9 56. In *R v Chall*, the issue before the EWCA was the approach a sentencing judge should take when
10 assessing, for the purposes of a relevant sentencing guideline, whether a victim of crime has
11 suffered severe psychological harm. The Court of Appeal noted as follows:

12
13 *“15. When a sentencing guideline directs a sentencer to assess whether the victim of*
14 *an offence has suffered severe psychological harm or to make any other*
15 *assessment of the degree of psychological harm, a judge is not thereby being*
16 *called upon to make a medical judgment. The judge is, rather, making a judicial*
17 *assessment of the factual impact of the offence upon the victim. Thus,*
18 *submissions to the effect that a judge who makes a finding of severe*
19 *psychological harm is wrongly making an expert assessment without having the*
20 *necessary expertise are misconceived. The judge is not seeking to make a*
21 *medical decision as to where the victim sits in the range of clinical assessments*
22 *of psychological harm, but rather is making a factual assessment as to whether*
23 *the victim has suffered psychological harm and, if so, whether it is severe.*

24
25 *16. The assessment of whether the level of psychological harm can properly be*
26 *regarded as severe may be a difficult one. The judge will, of course, approach*
27 *the assessment with appropriate care, in the knowledge that the level of sentence*
28 *will be significantly affected by it, and will not reach such an assessment unless*
29 *satisfied that it is correct. But it is an assessment which the judge alone must*
30 *make, even if there be expert evidence. It is the sort of assessment which judges*
31 *are accustomed to making.*

32

33 *17. The judicial assessment may in some cases be assisted by expert evidence from*
34 *a psychologist or psychiatrist. However, we reject the submission that it is*
35 *always essential for the sentencer to consider expert evidence before deciding*
36 *whether a victim has suffered severe psychological harm. On the contrary, the*
37 *judge may make such an assessment, and will usually be able to make such an*
38 *assessment, without needing to obtain expert evidence.”*

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41 57. The court also notes the following relevant dicta from the EWCA in *Chall*. During arguments
42 on sentence, one of the concerns expressed on behalf of the defendants in that case was that in
43 assessing the level of psychological harm, “*that a judge is left to make a subjective assessment*”.
44 The EWCA sought to provide the following guidance:

45

¹ See also: *R v Dalton* [2016] EWCA Crim 2060, *R v Egboujor* [2018] EWCA Crim 159 and *R v Boyle* [2018] EWCA Crim 2567

1 *"in making the assessment of whether the psychological harm in a particular case*
2 *can properly be described as severe, or serious (if a different guideline is being*
3 *considered), the judge will act on the basis of evidence and will be required in*
4 *the usual way to give reasons for his or her decision in the sentencing remarks.*
5 *If the evidence was not such as could provide a sufficient foundation for the*
6 *judge's assessment, the point can be raised on appeal."*
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9 58. The EWCA also counselled:

10 *"Save where there is an obvious inference to be drawn from the nature and*
11 *circumstances of the offence, a judge should not make assumptions as to the*
12 *effect of the offence on the victim. The judge must act on evidence. But a judge*
13 *will usually be able to make a proper assessment of the extent of psychological*
14 *harm on the basis of factual evidence as to the actual effect of the crime on the*
15 *victim. Such evidence may be given during the course of the trial, and the*
16 *demeanour of the victim when giving evidence may be an important factor in the*
17 *judge's assessment. The relevant evidence will, however, often come, and may*
18 *exclusively come, from the VPS. The court is not prevented from acting on it*
19 *merely because it comes from a VPS."*
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23 59. The equivalent report to the Victim Personal Statement referred to in *Chall* is in this jurisdiction
24 termed a Victim Impact Report. This court is satisfied that it can assess the level of
25 psychological harm on the basis of the evidence contained in the Victim Impact statement and
26 its own observations of the victim in this case.

27
28 60. There is a further matter relating to the assessment of serious psychological harm that was
29 considered in *Chall* and which was raised before this court by counsel Mr. Myers in his
30 submissions before the court. Mr. Myers submitted that the court must be careful in any
31 assessment of serious psychological harm not to double count. The court is mindful that the
32 guidelines determining culpability and harm assess starting points and sentencing ranges having
33 considered what may be inherent levels of harm, inherent to the nature of the offence.

34
35 61. In *Chall*, the EWCA referred to the case of *R v Forbes* [2016] EWCA Crim 1388 and to the
36 following passage in that case.

37 "26. *As is evident from many of the appeals, the effect on the victims can be*
38 *devastating. Where the judge has heard evidence from the victims, then he will*
39 *be well placed to make that assessment. [of psychological harm]. However, it*
40 *must be borne in mind, so that double counting is avoided, that the starting points*
41 *and sentencing ranges provide for the effect on the victim which is the inevitable*
42 *effect of this type of serious criminal behaviour. There has to be significantly*
43 *more before harm is taken into account as a distinct and further aggravating*
44 *factor and/or before a judge makes a finding of extremely severe psychological*
45 *or physical harm so as to justify placing the offence in the top category of harm."*
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47

1 62. The EWCA accepted *“that in assessing whether the psychological harm in a particular sexual*
2 *case is severe, a judge must keep in mind that the levels of sentence which the sexual offences*
3 *guideline sets out already take into account the psychological harm which is inherent in the*
4 *nature of the offence.”*

5
6 63. By way of illustration the Court provided the following example: *“an offence of rape will*
7 *inevitably cause at least some psychological harm. The sentence levels for category 3 harm*
8 *reflect that baseline level of harm. Within the category range, a sentencer may move upwards*
9 *from the starting point to reflect the fact that the psychological harm suffered in a particular*
10 *case, though falling short of "severe", is significantly greater than would generally be seen in*
11 *a case of rape.”*

12
13 64. These further observations are also part of this court’s consideration upon this sentencing
14 exercise.

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17 **The Victim Impact Report (“VIR”)**
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19 65. While the victim expressed that she did not have the words to say exactly how she felt her
20 Victim Impact Statement was of much assistance to the court. The victim related feeling
21 betrayed by the second defendant with whom she had shared a close friendship. She expressed
22 that to her

23
24 *“She wasn't just a friend; she was family and my closest friend, I trusted her with*
25 *my life.”*
26

27 66. The victim stated that it was because of the nature of this relationship that on the night of the
28 incident *“I learned to trust no one; [because] if my friend could have done that to me, who*
29 *wouldn't.”*

30
31 67. The victim related that she had become extremely fearful in her interactions with men because
32 of the actions of the first defendant. She stated that apart from feeling betrayed she felt
33 vulnerable and broken. The victim described that she had become obsessive about her safety,
34 she had lost a sense of security and that she has questioned her self-worth because of this
35 incident.

36
37 68. She stated that she does not like to go out into the public because it makes her anxious to do so.
38 She related that the various places where she interacted with the defendants on the day of the
39 incident are constant *“reminders of that night and what both accused did to me; no matter how*
40 *hard I try to move on, these are constant triggers.”* She also related that she does not *“sleep*
41 *well anymore, nightmares torment me constantly. Memories of this incident make me panic,*

1 *fear, and feel ashamed and humiliated. ...I am still traumatized. I am still healing, I am still*
2 *trying to make sense of this and to find my way.”*

3
4 69. A further witness statement was submitted by the Crown relating to the effects of the incident
5 on the complainant.² The author of this statement described the victim from the time that the
6 author first knew her in November 2021 up to the time of trial. She described her as “*a lively*
7 *young lady. She did her best to make others happy, she would show others that they were*
8 *appreciated, she was kind.*” The writer described that it was not until the date of the trial came
9 closer that the victim’s demeanour changed. She went on to describe how the victim had
10 changed since returning to work after the trial. She stated that the victim does not laugh or talk
11 that much anymore, that she was fearful of men, that she would not allow herself to be driven
12 by anyone, she must drive and that she has a lot of self-guilt.

13
14 70. Apart from the VIR, also relevant to this consideration of the level of psychological harm, is
15 the following. During the trial of this indictment this court ruled on an application to continue
16 proceedings despite the victim not being able to conclude her evidence. This application was
17 brought by the Crown when the victim [then complainant] did not return to court on the
18 adjourned date to complete her evidence. She was being cross-examined. The court was
19 furnished then with a medical report which detailed, so far as relevant, that at the end of the
20 previous day’s hearing the victim had been hospitalized and examined by a doctor. The
21 doctor’s conclusion upon examination of the complainant was:

22
23 *“She is currently not capable of providing any further testimony. ... It is possible*
24 *that if she is given the opportunity to recover in a stress-free environment that*
25 *she may be able to resume responding to questioning, however this cannot be*
26 *guaranteed.*

27

28 *It is my assessment that [Ms X] is not capable of proceeding further until she*
29 *has had adequate opportunity to recover. This possibly will also entail further*
30 *therapeutic intervention.”*

31
32
33 71. This court had the opportunity to observe the complainant when she gave her evidence at trial.
34 She became quite visibly distressed even at the initial stages of her testimony when the ABE
35 interview which was admitted at trial as her evidence in chief was being played for the jury.
36 Her distress increased when she was questioned about the specifics of her allegation during
37 cross-examination. This distress caused the court to take frequent breaks to ensure that her full
38 testimony was before the jury. From my own observations of the victim’s demeanor and the

² Redacted statement of KB, dated 29th June 2022

1 doctor's assessment as set out above this court was satisfied upon the Crown's application that
2 the victim was unable to continue further with her testimony.

3

4 72. I am mindful that I must be dispassionate in my assessment of this matter; that I must act on
5 evidence available to the court. I consider that there is sufficient evidence available to the court
6 to make a proper assessment of the extent of psychological harm. Having considered all of the
7 above, the CI Guidelines and the other factors which could merit a designation of category 1
8 harm for this offence, the principles and guidance provided by the EWCA in *R v Chall* and this
9 court's own assessment of the complainant and the VIR, I do not find that there is sufficient
10 evidence to merit a finding of severe psychological harm.

11

12 73. In its assessment of the categorization of harm, the Crown, in written submissions, submitted
13 that the court should find that Harm was "*Between Category 1/2*". I commend Crown Counsel
14 who had conduct of this prosecution and who provided the written submissions for her fairness
15 in this regard. I say that it is category 2 harm, culpability A. The starting point is 6 years
16 custody with a sentence range of 5-9 years. I adopt the approach highlighted in *Chall*. While
17 this court has not made a finding that the psychological harm suffered was severe, it does not
18 consider it to be trifling. It is still significantly greater than would generally be seen in a case
19 of indecent assault. I will therefore adopt a starting point of 6 1/2 years custody.

20

21

22 **Appropriate Sentence**

23

24 74. This court must strive to find the appropriate sentence in this case. Given the facts of this case
25 and the factors which this court and counsel for the prosecution and the defendants have
26 addressed, it is clear that the custody threshold has been passed. The life of the victim has been
27 affected in many and varied ways as expressed in the VIR. There is no doubt that the effect on
28 the victim of the defendants' offending has been traumatic.

29

30 75. Having presided over this trial, I believe that I am in a position to say that while the alcohol
31 consumption on the day of the incident may not have been such as to have legal consequences
32 it undoubtedly played a part in leading to the present situation where a young woman remains
33 traumatized and two persons of previous good character, respected by their family and peers
34 now find themselves convicted for their criminal behavior. But let it not be thought that the
35 alcohol consumption can excuse the callous and selfish actions of these defendants toward the
36 victim on the date of the incident. Actions have consequences and with criminal actions those
37 consequences can be severe.

38

39

1 76. *With respect to the defendant Mr. Marshall*, the starting point is 6 1/2 years custody, the
2 aggravating factor identified and accepted by this court is the attempt to dispose or conceal
3 evidence. There are several mitigating factors identified in respect of this defendant and these
4 are accepted as follows: the defendant has no previous convictions, the defendant has expressed
5 remorse for his actions and takes full responsibility for them, the defendant is a man of previous
6 good character.

7
8 77. It has been submitted that the court should consider Mr. Marshall's loss of family life. He has
9 a young son. However, this defendant is not that child's primary caregiver.

10
11 78. The mitigating factors outweigh the aggravating factors and as such the starting point will be
12 reduced. The sentence of this court is that the defendant Mr. Marshall will serve a sentence of
13 5 years custody. Any time that the defendant has spent in custody prior to today in respect of
14 this indictment is to be deducted from this sentence.

15
16 79. *As to the defendant Ms. Lynch*, again the starting point is 6 1/2 years custody. With respect to
17 Ms. Lynch the court notes that the direction to delete or attempt to dispose of evidence was at
18 the behest of Mr. Marshall at a time when this defendant was not even fully aware of the
19 circumstances of the complaint. I do not take this as an aggravating factor against her. There
20 are mitigating factors for the court's consideration in respect of this defendant. The defendant
21 has no previous convictions. The defendant is of previous good character.

22
23 80. The defendant's expressions of remorse in the SIR do not appear to this court to be well
24 founded. As noted in the SIR, although the defendant has recognized that she had crossed the
25 periphery of her own moral boundaries there was in her statements about the offence, evidence
26 of a denial of full responsibility and minimization of her involvement. I do not take this into
27 account as a mitigating factor.

28
29 81. There are factors that go to personal mitigation. The defendant is the primary caregiver to two
30 young children and an ill parent. This court recognises that it has long been a principle of
31 sentence that where a defendant has dependent children, that this is a relevant factor in
32 sentencing.³ In *HH v Deputy Prosecutor of the Italian Republic, Genoa*⁴, it was stated:

33
34 *"It has long been recognised that the plight of children, particularly very young*
35 *children, and the impact on them if the person best able to care for them (and in*
36 *particular if that person is the only person able to do so) is a major feature for*
37 *consideration in any sentencing decision."*
38

³ *R v Nadia Powery*, Indictment 90/2017 & 75/2018, 19th November 2019

⁴ [2012] UKSC 25

1 82. While a court must seek to balance the effect of the sentence on the family life of others,
2 especially dependent children, against the legitimate aims that the sentence to be imposed must
3 serve, the effect on family life of a custodial sentence, has considerably less impact the more
4 serious and grave the offences for which the defendant is to be sentenced.

5
6 83. Taking into account all of the foregoing, the mitigating factors in this case, I find that the
7 starting point of 6 ½ years should be reduced. The appropriate sentence in respect of Ms. Lynch
8 is 4 ½ years custody. Any time that this defendant has spent in custody prior to today in respect
9 of this indictment is to be deducted from this sentence.

10
11

12 **Sexual Harm Prevention Order (SHPO)**

13
14

15 84. The Crown has applied for the imposition of a Sexual Harm Prevention Order for a period of
16 not less than 5 years.

17

18 85. I consider that a SHPO is necessary in the circumstances of this case and that the conditions for
19 the imposition of this order are satisfied as per Section 45A of the Penal Code (2022 Revision).
20 The circumstances of this offence and the effect of the offending on the victim are the court's
21 primary considerations.

22

23 86. The SHPO is imposed for a period of 3 years in respect of each defendant from the date of
24 release upon the following condition: the defendant is prohibited from any contact with the
25 victim in this case either directly or indirectly.

26


27

28

29

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31



Hon. Mrs. Justice Marlene I. Carter
Judge of the Grand Court (Actg.)