

A Compendium Sentencing Guideline of the Eastern Caribbean Supreme Court

Sexual Offences

This compendium sentencing guideline will deal with sexual offences beginning with rape and unlawful sexual intercourse. In time, sections will be added to deal with indecent assault and other offences.

Applicability of Guideline

In sentencing for these offences, the Chief Justice has issued guidelines and the court must apply the relevant guidelines and sentence accordingly, unless to do so would not be in the interests of justice. It is only permissible to depart from the guidelines in exceptional circumstances, where such departure can be justified. Clear reasons for not applying the guideline must be given when passing sentence.

It is expected that every court will follow the steps below, with each relevant step being identified to the offender in public before the sentence is passed. Starting points and ranges apply to all adult offenders¹ whether they have pleaded guilty or been convicted after a trial. Credit for a guilty plea is taken into consideration only at Step 3.

Step 1

Consider the seriousness of the offence. Find the starting point by consulting the guideline and the grid below. Then adjust the figure within the range for the aggravating and mitigating factors of the offence.

Step 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

¹ For persons below the age of 18, see the **Practice Direction 8D on Sentencing Guidelines, no. 4 of 2019**.

This guideline should be read in conjunction with Practice Directions 8 A-D, numbers 1 to 4 of 2019.

Step 3

Adjust the figure on assessing discount for any plea of guilty, if applicable.

Step 4

Adjust the figure on assessing totality if sentencing for more than one offence.

Step 5

Give credit for time served on remand.

Step 6

Finally, consider ancillary orders, compensation, restraining orders, etc, if applicable.

Pass the Sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

RAPE - Section 1²

Within the ECSC, in the nine member states and territories there are different maximum sentences for the offence of rape.

STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A rape case requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are four stages within Step 1.

² As at 16 September 2019.

FIRST STAGE

The first stage is to assess the evidence in order to establish the category of the offence by reference to the harm caused by the offence.

Categories arising from harm caused are as follows:

Category 1 – Exceptional

Extreme psychological or physical harm supported by evidence, (this can come from the victim)

Extreme degradation/humiliation

Use of a firearm or weapon

Use of extreme force

The extreme impact caused by a combination of category 2 factors may elevate to category 1

Victim is a child under 10 years of age

Victim is 65 years and over

Category 2 – High

Serious psychological or physical harm supported by evidence, (this can come from victim)

Significant degradation/humiliation

Significant use of force

Victim is a child under 13 years of age

Pregnancy as a consequence of offence

STI as a consequence of offence

Category 3 - Significant

Category 1 and 2 factors not present

SECOND STAGE

The second stage is to assess the seriousness of the offence by reference to a non-exhaustive list of factors to establish the culpability of the offender.

Levels of seriousness may be indicated by one or more of the following:

Category 1 – Exceptional

- Abuse of position of trust
- Abduction
- Significant degree of planning, including grooming or enticement
- Group or gang attack
- Disparity of age
- Prolonged detention/sustained incident
- History of violence against the victim
- Use of violence or threats of violence to prevent reporting
- Recording of incident, and/or distribution, including uploading it to the internet
- Forced/uninvited entry into victim's home
- Use of drugs or alcohol on victim to facilitate the offence
- Offence motivated by, or demonstrated hostility to the victim based on their sexual orientation or transgender identity
- Commercial exploitation

Seriousness - Level B (Lower)

- None of the above present

THIRD STAGE

Having determined the category and level of seriousness find the starting point by consulting the grid below.

Maximum sentence is 'x'³.

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

	<u>SERIOUSNESS Level A</u>	<u>SERIOUSNESS Level B</u>
<u>Category 1</u>	Starting point 75% x Range 60% – 90%	Starting Point 65% x Range 50% - 80%
<u>Category 2</u>	Starting point 50% x Range 35% - 65%	Starting Point 40% x Range 25% - 55%
<u>Category 3</u>	Starting point 40% x Range 25% – 55%x	Starting Point 25% x Range 20% - 30%

³ Where the maximum sentence is life imprisonment, simply for the purposes of the calculation 'x' is to be treated as 30 years, (but please note that this does not have the effect of meaning a sentence where the maximum is life can never be more than 30 years).

FOURTH STAGE

Having determined the starting point, consider the following list of non-exhaustive aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

AGGRAVATING FACTORS of the offence

- Victim is particularly vulnerable due to personal circumstances which can include mental or physical disability
- Offence committed in the presence of others e.g. relatives, children or partner of the victim
- Ejaculation
- Use of drug or alcohol by the offender

MITIGATING FACTORS of the offence

- Some initial consensual sexual activity
- No violence used beyond that inherent in the offence

STEP 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

AGGRAVATING FACTORS of offender

Previous convictions for sexual offences

Relevant convictions for other offences

Offence committed whilst on bail

Knowledge of infection with STI

MITIGATING FACTORS of offender

Good character

Genuine remorse

Age and/or lack of maturity

Physical or mental disability or ill-health

STEP 3

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will usually reduce significantly the later the plea.

STEP 4

Adjust the figure on assessing totality if sentencing for more than one offence. If appropriate, dangerousness should also be considered.

STEP 5

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision.

STEP 6

Finally, consider ancillary orders, compensation, restraining orders, etc, if applicable.

⁴ See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.

Pass the sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

UNLAWFUL SEXUAL INTERCOURSE – Section 2⁵

Within the ECSC, in the nine member states and territories the offence of unlawful sexual intercourse (USI) can be described in different language and have different maximum sentences. These offences span a wide range of criminality. At the lowest end of the sentencing range, non-custodial sentences or diversion from the criminal justice process may be appropriate. This may be particularly the case in consensual relationships between young people.

There are usually two categories of USI, each with different sentencing powers, which in this guideline will be divided between 'USI' and 'aggravated USI'. USI is where the girl is a young person under 16, being usually 14 or 15 (13 in some States/Territories), often attracting a maximum sentence of ten years. Aggravated USI is where the girl is child under 13 (under 14 in some States/Territories), often attracting a maximum sentence of life imprisonment. A court will need to be sensitive to this difference, and in particular to how USI with a girl aged 13 can lead to very different sentences in the Member States and Territories depending on whether a person aged 13 is in the first or second category of USI.

⁵ As at 17 September 2019.

USI – section 2

USI WITH A PERSON UNDER 16, (being 15 or 14, or 13 in some States/Territories)

STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A case of unlawful sexual intercourse requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are four stages within Step1.

FIRST STAGE

The first stage is to assess the evidence in order to establish the category of the offence by reference to the harm caused by the offence.

Categories arising from harm caused are as follows:

Category 1 – Exceptional

- Extreme psychological or physical harm supported by evidence, (this can come from the victim)
- Extreme degradation/humiliation
- The extreme impact caused by a combination of category 2 factors may elevate to category 1

Category 2 – High

- Significant psychological or physical harm supported by evidence, (this can come from the victim)
- Significant degradation/humiliation
- Significant use of force
- Pregnancy as a consequence of the offence
- STI as a consequence of the offence

Category 3 – Significant

- Category 1 and 2 factors not present

SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender.

Levels of seriousness may be indicated by one or more of the following:

Seriousness - Level A (High)

- Abuse of position of trust, especially in a familial relationship
- Abduction
- Significant degree of planning, including grooming or enticement
- Group or gang attack
- Disparity of age
- Prolonged detention/sustained incident
- Violence or threats of violence
- Steps taken to prevent reporting
- History of violence against the victim
- Steps taken to prevent reporting
- Recording of incident, and/or distribution, including uploading it to the internet
- Use of a weapon to frighten or injure
- Forced/uninvited entry into victim's home
- Use of drugs or alcohol on victim to facilitate the offence

Seriousness - Level B (Lesser)

- None of the above present

THIRD STAGE

Having determined the category of harm and level of seriousness find the starting point by consulting the grid below.

Maximum sentence is 'x'⁶.

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

	<u>SERIOUSNESS Level A</u>	<u>SERIOUSNESS Level B</u>
<u>Category 1</u>	Starting point 65% x Range 50% – 80%	Starting point 45% x Range 30% - 60%
<u>Category 2</u>	Starting point 45% x Range 30% - 60%	Starting point 20% x Range 5% - 35%
<u>Category 3</u>	Starting point 20% x Range 5% – 35%	Starting point Likely non-custodial

⁶ Where the maximum sentence is life imprisonment, simply for the purposes of the calculation 'x' is to be treated as 30 years, (but please note that this does not have the effect of meaning a sentence where the maximum is life can never be more than 30 years).

FOURTH STAGE

Having determined the starting point, consider the following list of non-exhaustive aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

AGGRAVATING FACTORS of offence

Victim is particularly vulnerable due to personal circumstances which can include mental or physical disability

Offence in the presence of others, especially children

Ejaculation

MITIGATING FACTORS of offence

No violence

Parties involved in a consensual relationship with little disparity in age

STEP 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

AGGRAVATING FACTORS of offender

- Previous convictions for sexual offences
- Relevant convictions for other offences
- Offence committed whilst on bail

MITIGATING FACTORS of offender

- Good character
- Genuine remorse
- Evidence of genuine attempt to address offending behaviour
- Age and/or lack of maturity
- Physical or mental disability or ill-health

STEP 3

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will usually reduce significantly the later the plea.

STEP 4

Adjust the figure on assessing totality if sentencing for more than one offence. If appropriate, dangerousness should also be considered.

STEP 5

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision.

STEP 6

Finally, consider ancillary orders, compensation, restraining orders, etc., if applicable.

⁷ See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.

Pass the sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

AGGRAVATED USI – section 2B

USI WITH A PERSON UNDER 13, (or under 14 in some States/Territories)

STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A case of unlawful sexual intercourse requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are four stages within Step 1.

FIRST STAGE

The first stage is to assess the evidence in order to establish the category of the offence, by reference to the harm caused by the offence. This should include an assessment of the evidence.

Categories arising from harm caused are as follows:

Category 1 – Exceptional

- Extreme psychological or physical harm supported by evidence, (this can come from the victim)
- Extreme degradation/humiliation
- The extreme impact caused by a combination of category 2 factors may elevate to category 1
- Victim is a child under 10 years of age

Category 2 – High

- Serious psychological or physical harm supported by evidence, (this can come from the victim)
- Significant degradation/humiliation
- Significant use of force
- Pregnancy as a consequence of the offence
- STI as a consequence of the offence

Category 3 – Significant

- Category 1 and 2 factors not present

SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender.

Levels of seriousness may be indicated by one or more of the following:

Seriousness - Level A (High)

- Abuse of position of trust, especially in a familial relationship
- Abduction
- Significant degree of planning, including grooming or enticement
- Group or gang attack
- Disparity of age
- Prolonged detention/sustained incident
- Violence or threats of violence
- History of violence against the victim
- Steps taken to prevent reporting
- Recording of incident, and/or distribution, including uploading it to the internet
- Use of a weapon to frighten or injure
- Forced/uninvited entry into victim's home
- Use of drugs or alcohol on victim to facilitate the offence

Seriousness - Level B (Lesser)

- None of the above present

THIRD STAGE

Having determined the category of harm and level of seriousness find the starting point by consulting the grid below.

Maximum sentence is 'x'⁸.

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

	<u>SERIOUSNESS Level A</u>	<u>SERIOUSNESS Level B</u>
<u>Category 1</u>	Starting point 65% x Range 50% – 80%	Starting point 40% x Range 25% - 55%
<u>Category 2</u>	Starting point 40% x Range 25% - 55%	Starting point 20% x Range 5% - 35%
<u>Category 3</u>	Starting point 20% x 5% – 35%	Starting point 5% x Range non-custodial – 15%

⁸ Where the maximum sentence is life imprisonment, simply for the purposes of the calculation 'x' is to be treated as 30 years, (but please note that this does not have the effect of meaning a sentence where the maximum is life can never be more than 30 years).

FOURTH STAGE

Having determined the starting point, consider the following list of non-exhaustive aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

AGGRAVATING FACTORS of offence

Victim is particularly vulnerable due to personal circumstances which can include mental or physical disability
Offence in the presence of children
Ejaculation

MITIGATING FACTORS of offence

No violence
Parties involved in a consensual relationship with little disparity in age

STEP 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

AGGRAVATING FACTORS of offender

- Previous convictions for sexual offences
- Relevant convictions for other offences
- Offence committed whilst on bail

MITIGATING FACTORS of offender

- Good character
- Genuine remorse
- Evidence of genuine attempt to address offending behaviour
- Age and/or lack of maturity
- Physical or mental disability or ill-health

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Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will usually reduce significantly the later the plea.

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Finally, consider ancillary orders, compensation, restraining orders, etc., if applicable.

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Pass the sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.