IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C00100/2023A

BETWEEN

THE KING

and

EZEQUIEL AYALA

Defendant

Before: The Honourable Justice Nigel Pilgrim

Appearances:

Ms. Romey Wade, Crown Counsel, for the Crown.

Mr. Leeroy Banner for the Defendant.

2024: May 14th, 16th, and 17th.
June 28th.

JUDGMENT

ASSAULT OF A CHILD UNDER SIXTEEN BY PENETRATION- SEXUAL ASSAULT- RAPE OF A CHILD- JUDGE ALONE TRIAL-DECISION

[1] PILGRIM, J.: Ezequiel Ayala ("the defendant") was charged in a five count indictment, filed on 5th April 2024, for the offences of assault of a child under sixteen by penetration, sexual assault and rape of a child contrary to section 47B, section 45A(1) and 47A of the **Criminal Code**[1], ("the Code"), respectively. The trial by judge alone began with the arraignment of the defendant on 14th May 2024 before this Court pursuant to section 65A(2)(g) of the **Indictable Procedure Act**[2] ("the IPA"). Counts 1 and 2 allege that the defendant intentionally penetrated the vagina of S[3], then fourteen years old, with his finger, and that he otherwise touched her vagina without her consent, to wit by licking it, both touchings being sexual in nature, on 24th April 2021. The same allegations are made in counts 3 and 4, this time occurring on 13th February 2021, when S was then 13. In count 5 it is alleged that he raped S on 31st December 2020, when she was 13 years old.

The Framework of the Charges

[2] It would be helpful to firstly examine the elements of the crimes of penetrative assault of a child under sixteen, sexual assault and rape of a child for which the defendant stands indicted.

[3] The definition of assault of a child under sixteen by penetration in the Code, where relevant, is:

> *"47B. Every person who **intentionally penetrates the…vagina**…of another person who is **under the age of sixteen years** with a part of his body other than his penis or anything else and that penetration is **sexual in nature**, commits the offence of assault on that person…*
> *…*
> *53A(5) For the purposes of this Part–… "penetration" includes the continuing act from entry to withdrawal…into the…vagina…*
> *…*

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020.
[2] Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020, as amended by the **Indictable Procedure (Amendment) Act, 2022.**
[3] The virtual complainant's name and that of her relatives have been anonymized to prevent her identification pursuant to the Court's inherent powers.

"sexual in nature" in relation to penetration, touching or any other activity is sexual if a reasonable person would consider that whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual or because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it or both, it is sexual;" (emphasis added)

[4] The Crown must establish for this offence: (i) the defendant by even the least degree penetrated S's vagina by a body part other than his penis; (ii) that penetration was intentional; (iii) that penetration was sexual in nature; and (iv) S was under the age of sixteen.

[5] The definition of sexual assault in the Code, where relevant, is:

*"45A.-(1) Every person who **intentionally** **touches** another person, that touching being **sexual in nature**, **without that person's consent** or **a reasonable belief that that person consents**, and where the touching involved–*

*(a) that **person's vagina** … commits an offence…*

…

12. In construing any provision of this Code by which it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or by which it is required for a matter of justification or exemption that an act should be done with a person's consent, the following rules should be observed, namely–

…

*(b) In the case of a sexual assault upon a person, **a consent shall be void if the person giving it is under sixteen years of age** without prejudice to any other grounds set out in this section.*

…

***Provided that no person shall be prejudiced by the invalidity of any consent if he did not know and could not by the exercise of reasonable diligence have known of such invalidity**.*

..

53A(5) For the purposes of this Part–…

…

"touching" includes touching with any part of the body or with anything else, or through anything else; " (emphasis added)

[6] The facts that the Crown must establish in this case on the charge of sexual assault, in light of the provisions of section 12(b) of the Code, are: (i) that the defendant touched S's vagina; (ii) that touching was intentional; (iii) that touching was sexual in nature; and (iv) the defendant knew, or could have with reasonable diligence found out, that S was under 16 or S did not consent and he knew she was not consenting or had no reasonable belief in her consent. The first portion of the fourth element is adopted from the requirement in the last paragraph of section 12 that though the consent of a child under 16 to sexual assault is void, "no person shall be prejudiced by the invalidity of any consent if he did not know and could not by the exercise of reasonable diligence have known of such invalidity." The Court in this regard is guided by the decision of the Court of Appeal supporting this analysis in **Lewis Leiva v R**[4].

[7] The elements of the offence of rape of a child under the Code, where relevant, are as follows:

*"47A. Every person who **rapes** another person and that person **is under the age of sixteen years** commits an offence…*

…

*71.-(1) Rape is the **penetration of a person's…vagina**…**with a penis**, **without that person's consent**.*

(2) It is hereby declared that if at a trial for rape the jury has to consider whether a man believed that a person was consenting to the penetration by his penis, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction any other relevant matters, in considering whether he so believed."

[8] In relation to the requirement of the absence of belief by the defendant that S was consenting as set out in section 71(2) of the Code, the Court of Appeal in **Oscar Escalante et al v R**[5] opined about that section, then section 68(2):

[4] Criminal Appeal No. 16 of 2009 at para 38.
[5] Criminal Appeals Nos. 1 and 2 of 1991 at p 7.

"We wish also to observe that in our view section 68(2) of the Criminal Code applies whenever an accused person is charged with rape, irrespective of the age of the person alleged to have been raped."

[9] The Crown has to establish for this offence, as is relevant to this case: (i) the defendant by even the least degree penetrated S's vagina; (ii) that penetration was with the defendant's penis; (iii) that penetration was without S's consent and the defendant knew she was not consenting; and (iv) S was under the age of sixteen.

[10] In terms of proof of intention section 6 of the Code is instructive:

"6(1) The standard test of intention is–
Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?"

[11] How that question is answered is determined by adverting to section 9(b) of the Code which provides that the Court must, "decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

[12] The Court of Appeal in **FW v R**[6] considered the issue of proof of the element of the absence of consent, per Sosa P:

"[26] As regards the relevant law, the majority accepts the submission…that ***there is a valid legal distinction between mere submission to sexual intercourse and consent thereto****. Support for that submission is found in Olugboja, where Dunne LJ, speaking for the England and Wales Court of Appeal (Criminal Division) on the topic of proper directions to a jury, said, at page 8:*
*'****They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent***

6 Criminal Appeal No. 18 of 2011.

and submission; every consent involves a submission, but it by no means follows that a mere submission involves a consent.'

Consistent with that view is the statement in the judgment in Malone, where Roch LJ speaking for the same Court, gave examples of possible factual situations in cases involving rape charges and went on to say, at para 7:

'[These examples] suffice to demonstrate ***that it is not the law that the prosecution in order to obtain a conviction for rape have to show that the complainant was either incapable of saying no or putting up some physical resistance or did say no or put up some physical resistance****.'*

…

… the above-cited statements in these authorities…accurately [represent] the current state of the law in Belize…" (emphasis added)

The evidence

[13] The Court heard viva voce evidence from S; S's mother, E; and the defendant. The Court also heard agreed evidence from Eileen Graham, Daniel Daniels, Raven Galvez, Edward Ciau and Marina Dawson. The medical evidence of Dr. Mauricio Navarrete was received, without objection, via his medicolegal report admitted pursuant to section 36(3) of the **Evidence Act**[7].

[14] The Court did not hold a voir dire in relation to A's evidence as though she was 13 years old at the time of some of the alleged offences, she was 17 years old at the time of her testimony and is no longer of tender years. In that regard the Court relied on the decision of the Court of Appeal in **Coyseme Salam v R**[8]. There was also nothing that raised any concern in the Court's mind that S did not understand the nature of the oath nor that she was incompetent to give evidence.

[15] S testified on oath. Her evidence in chief was that on December 31st, 2020, she was invited to her family's dinner. Her mother, E, dropped her off at her uncle's house at around, or after, 7 p.m. in Belama Phase 4, Belize City. When they got there S told E that she was not feeling well and wanted to go back home.

[7] Chapter 95 of the Substantive Laws of Belize, Revised Edition 2020.
[8] Criminal Appeal No. 5 of 2002 at paras 32-36.

S's cousins convinced her to stay because it was supposed to be her last year in Belize. S told them that she still was not feeling well, and her cousin, F, offered to take her to her house to freshen up. F's house, which she shared with the defendant who was her boyfriend, was about 3 minutes from her uncle's. She agreed to go and went in the defendant's car which was driven by the defendant. S knew the defendant for about 6 years before that date.

[16] S went there to sleep while they got ready. While they were getting ready S went into F's room. She would normally sleep there during the weekends when she would sometimes stay at F's house. S heard a car leave and then fell asleep. S was awoken by someone pulling on the straps of her dress. When she opened her eyes she saw the defendant, who was then between her legs. Her body froze. She closed her eyes and started to tremble.

[17] S was able to see the defendant as the top window beside the bed was open and the lamp pole outside was on. There was also a clock that had a green LED light. S testified that the distance between her and the defendant was about 1 foot. Nothing was obstructing S from seeing him. She was able to see his face and his whole body.

[18] The defendant lifted up S's dress and pulled down her tights and underwear. S then heard what appeared to be a zipper go down and she felt the defendant's penis being pushed into her vagina. He pushed his penis in and out twice for about 30 seconds. At this time, it was still the same lighting, and the distance was 1 foot. Nothing was obstructing her and she saw his face and his whole body. S pushed the defendant off with her feet and he took his penis out.

[19] The defendant then put his fingers into S's vagina. His fingers were in and out for about 30 seconds. S then tried to get up but the defendant pulled her back down. At the time she was afraid and hurt because of his fingernails. The defendant then started to lick S's vagina for about 5 seconds. He then got up and left and then S fixed herself and went to the bathroom.

[20] S did not consent to the defendant putting his penis in her vagina. She testified that "my body language was clear I was uncomfortable." She indicated that she did not have sex prior to this night with anyone. S stated that the incident lasted 5 minutes and she was closing and opening her eyes throughout.

[21] S testified that on February 13th, 2021, F and the defendant took her out at about 1 p.m. to buy ice cream. They then went back to F's house in Belama Phase 4 and the defendant gave S permission to use his computer to play and then he left. S got on to play Roblox with her friend Aubrey and she saw F in the kitchen cooking and taking out vegetables. S was in F's room sitting in a black office chair. After about 30 minutes she heard the vehicle pull up to the yard. S didn't think much of it because she assumed it was F was in the kitchen. S then saw the defendant coming her way and he spun the chair around facing him.

[22] The defendant pushed her to the bed and closed the door. The windows were open, so it was clear enough for her to see him. When he closed the door, he came towards S and he pulled up her skirt and pulled her tights and underwear down. The defendant then inserted his two fingers in her vagina about 4 times. He looked at her and she looked away because she was afraid and embarrassed. S tried to get back up, but the defendant pushed her back down and started to lick her vagina. He gripped onto her legs. He licked her vagina for about 30 seconds. S struggled, pushed him off and went to the bathroom. She fixed herself and went out to the verandah. When the defendant put his fingers inside of her the windows were open and it was daytime. She was about 1 foot away from him. Nothing was obstructing her from seeing him. She saw his face and his whole body. About 30 seconds had passed when his fingers were in her vagina. It was the same lighting when he licked her vagina, the windows were open, and it was daytime. It was the same distance of about 1 foot, and nothing was obstructing her from seeing him. She was able to see his face and his whole body.

[23] S then saw F coming back into the yard. She did not tell F what happened because she did not think F was going to believe her.

[24] S testified that she told F's mother, A, about what happened to her on the December 31st, 2020, and February 13th, 2021, sometime around April 2021. She indicated that she felt that maybe F's mother would have believed her because she trusted her and gave her words of comfort. She did not tell her mother, E, because they did not have a close relationship. She also said that she "still wanted to process everything."

[25] S testified that on April 24th, 2021, she was at home watching television while her mother was sleeping in her room. While watching television she heard two slight knocks. She opened the door because she thought it was someone who would bring groceries for her mother named Jose. When she opened the door, she saw the defendant standing there wearing his uniform shirt, his ¾ khaki-coloured pants and in his brown boots. He was standing about 2 feet away from her and she smelled alcohol under his breath. She found that he was watching her "weirdly", so she went to the bathroom. She hoped he would leave. After about 2 minutes S then got out of the bathroom and saw the defendant sitting on the sofa. She washed the dishes to avoid him and after she was done, she walked back to the sofa. S saw him with her phone. She took her phone away and sat on the opposite side of the sofa. The defendant asked where her mother was, and she replied that E was sleeping in her room.

[26] The defendant then pulled S from her shoulders towards him. As she leaned back, he pulled down her shorts and he knelt. He then inserted his fingers into her vagina. S felt pain because of his fingernails. She then pushed him off. She got up and fixed herself and went to the bathroom and cried silently for about 2 minutes. She was able to observe what transpired because the top windows were open, and it was daylight. Her distance from the defendant was about 2 feet. Nothing was obstructing her view. She saw his whole face and his entire body. S testified that the entire incident lasted about 30 seconds.

[27] S then came out of the bathroom and went to sit on the opposite side of the sofa. S stated that there was nowhere else she could have gone because she felt if she went back to her room, it could have escalated if he followed her.

[28] He then again pulled her towards him, pulled her shorts and pants to above her knee and he started to lick her vagina. S struggled and pushed him off. The defendant got up and he said he was going to leave and would be right back. When he was licking her vagina, the windows were open he was about 2 feet away. Nothing was obstructing her from seeing him. She saw his face and entire body. The incident lasted about 30 seconds.

[29] S testified that at that moment she was scared and embarrassed. She did not think that she had anyone to talk to. She was scared because she did not think there was going to be an end to that cycle. She started to cry and went out to the verandah and sat out there for some fresh air. S cried for about 5

minutes until her mother woke up and she came outside. E spoke with S and E called someone. E then took S to S's room and comforted S while she was crying. She later heard a knock on the door.

[30] S later did a medical examination with a doctor. She testified that she did not have sex with anyone from Dec 31st until that medical examination. She further stated that she did not consent to what the defendant did to her on all of those days. She did not flirt with him at any moment.

[31]She identified different areas in photographs tendered in evidence and identified the defendant in video footage walking towards her house and towards his car.

[32]S was cross-examined. She accepted that on April 24th she was the one who let the defendant into the house and that she could have refused to open the door. She, however, repeated that she did not know it was him. She accepted that when she felt uncomfortable with the defendant, she could have knocked on her mother's door. She testified that she did not have her cellphone with her in the bathroom so she could not call E. She accepted that after she came out of the bathroom she could have gone into her mother's room. She accepted that all this was taking place, on April 24th, when her mother was in her bedroom sleeping.

[33]She accepted that she told Kenisha Cole, a social worker, that the defendant took off her clothes, while in evidence in court she said that he pulled down her clothes to above her knees. She also testified that she did not alert her mother to the defendant's presence at the home when he first came because E was sleeping, and she did not want to wake her, and she had already taken the evasive action of going in the bathroom. S denied the suggestion that she was being untruthful, and that the defendant had no sexual interaction with her.

[34]S accepted that E went on vacation and for two weeks, at E's suggestion which she later said was a direction, she stayed at the defendant's house in February 2021. She said the defendant did not threaten her at any time. She accepted that A and other family members lived in the area. She said she did not go to A's house because E told her to go to the defendant's home, and at that time she neither told A nor E what had happened to her. She said that E and A were "the only two family members that I had."

[35] S accepted that on 31st December she left the defendant's house and went to A's house and that she did not mention that in her statement to the police. She denied the suggestion that she was not at the defendant's house that day. She testified that she got back to A's house in the defendant's car. She testified that she told the police in her statement that on that day she checked her underwear for blood and there was no blood. She said that she had also stated that that was the first time she had intercourse. She said that she had felt pain but had not indicated that in her evidence in chief. When challenged on the absence of spotting or blood after intercourse and faced with the suggestion that those were absent because there was no sexual contact she replied, "I did not state that he took my virginity because there was not any blood but he did put his penis inside of me not all the way in but he tried." She said that saying he pushed in his penis and that he pushed it in part way were the same thing to her. She rejected the suggestion that the defendant had no sexual contact with her that day.

[36] In terms of the incident on 13th February 2021 she rejected the suggestion that F was at home at all times on that date. She said that she did not recall telling the social worker that the defendant took off all her clothes. She rejected the suggestion that the defendant had no sexual interaction with her on that day.

[37] S was re-examined. She testified that she said the defendant did not take her virginity because he did not push his penis all the way inside of her. She said that she could not recall telling the social worker that he took her clothes all the way off because he had not done so.

[38] Dr. Navarette stated in his report that he examined S on 26th April 2021, two days after the last alleged incident. She had indicated that she had been menstruating since she was 12 years old. She showed no bruises, scratching or swelling generally. There was tearing and scars on her hymen. Dr. Navarette opined that S was carnally known. His evidence was unchallenged.

[39] E testified in chief that she is S's mother, and that S was born on 15th February 2007. She said that on 24th April 2021 she went to lay down after lunch at 2 p.m. After some hours she heard S shout outside. She went to the verandah and saw S crying. She asked S why she was crying. E went to find water for her to calm down, but she continued crying. E called her father and then spoke to the police. The defendant, whom E had known before, came and knocked on the door but E did not open the door. The

police reached and the defendant left. E carried S to the police station, and they were then escorted to the hospital.

[40] E testified that on December 31st, 2020, she dropped S off at 7 p.m. at the family dinner in Belama. E left at 7:30 p.m. She testified that she left S there. She said that she saw the defendant in camera footage coming and leaving her home on April 24th 2021. She also indicated that she had a good relationship with the defendant before the alleged incident and that he was trusted within the family.

[41] In cross-examination E testified that there was a door and not a curtain on her bedroom and that on 24th April the door was closed. She indicated that she did not hear a struggle in the hall. She accepted that sometime after she had dropped off S at the Belama dinner she called A and had a conversation with her. She accepted that she picked S up at A's house the morning after the dinner. She also indicated that she does not recall S telling her that she was feeling unwell the night of the dinner. She said that in the years she has known the defendant she knew him to be a decent man and that he would always visit her house.

[42] The agreed evidence of Eileen Graham, a police officer, was that on 24th April 2021 around 6:45 p.m. that she received a report and went to E's home. She met with E and S and they had a conversation. She spoke with Kesha Cole who arranged for a medical examination of S. Ms. Graham contacted Daniel Daniels, a crime scene technician, to photograph and process the scene of the alleged sexual assault. She later met the defendant at the Precinct Four Police Station and confirmed his age as 35 years old. She later cautioned him and told him of his legal rights and privileges.

[43] The agreed evidence of Daniel Daniels was that he went to the defendant's home on 24th April 2021 with Marina Dawson, a police constable and photographed certain areas in it. He also on that date took photographs of certain areas of S's home.

[44] The agreed evidence of Edward Ciau, a police officer, was that on 4th May 2021 he retrieved video footage from E's DVR, which was in good working condition. He burnt that footage onto a DVD and they were tendered in evidence in the trial. Both E and S identified the defendant in that footage from 24th April 2021.

[45] The agreed evidence of Raven Galvez, then a police cadet, was that on 25th April 2021 he met the defendant at the Precinct Two police station. He cautioned the defendant and advised him of his legal rights and privileges which the latter exercised by making a call to F. The defendant was asked to do an interview which he declined. On 26th April Mr. Galvez recorded statements from S, conveyed her to the social worker interview and a medical examination. He later charged the defendant.

[46] The agreed evidence of Marina Dawson, a police officer, was that on 24th April 2021 she responded to a report and met with S and E. She directed Daniels to photograph certain areas of the defendant's home. She later met the defendant, told him of the report against him and detained him. She cautioned him, told him of his constitutional rights and he remained silent. The defendant was interviewed under caution and exercised his right to remain silent.

[47] At the close of the Crown's case the defendant was given his three options and chose to give sworn evidence and called no witnesses.

[48] The defendant testified in chief that he has no previous convictions and is employed as a manager at a business. He stated that on December 31st, 2020, he was at the family gathering at A's house. He remained for the entire gathering and returned home at about 2-3 in the morning with F. He testified that he did not rape S. He said that on 13th February 2021 he did not lick S's vagina nor insert his finger into her vagina. He said that on that day in the afternoon he would usually be at two locations, work or at home. He "presumed" he was at work. He also testified that he was not alone with S on that day and F was there in the kitchen, cooking. He later said he was at home on 13th February 2021. He testified that on 24th April 2021 he did not insert his finger in, nor did he kiss, her vagina. He indicated that he was at S's house that day to visit them as he usually visits them. He testified that he went back that evening because S told him she wanted to go visit her relatives in Belama.

[49] The defendant was cross-examined. He accepted that he would often visit S's home and S would visit his home. He denied the suggestion that he used his position of trust with S's family to sexually assault her. He accepted that he had a computer at his home but that S never used his as she had her own. He accepted that he took S for ice cream and that to him, "we were like a normal family."

[50] The parties made closing submissions in writing which were carefully considered by the Court.

Analysis

General considerations

[51] The Court has directed itself that the defendant is presumed innocent with regard to all counts in the indictment and has absolutely nothing to prove. The Court has directed itself in relation to those counts that the obligation is on the Crown to satisfy it so that it is sure of the guilt of the defendant, and if there is any reasonable doubt the Court is duty bound to acquit him.

[52] The Court begins firstly by analysing the evidence on the Crown's case and if the evidence seems strong enough to consider a conviction it would consider the case for the defendant as is the required reasoning process noted by the apex court, the Caribbean Court of Justice ("CCJ") in **Dionicio Salazar v R**[9]. The Court, if it accepts the case for the defendant, or has a doubt about whether it is true, must acquit the defendant. It is only if the Court rejects the defendant's case that it returns to the Crown's case and considers the totality of the evidence and determines whether to convict.

[53] In assessing the evidence, the Court must make findings on its credibility and reliability. Credibility refers to a witness's honesty or sincerity. Reliability, meanwhile, is about the accuracy of the witness's testimony, referring to the witness's ability to observe, recall, and recount events[10]. In assessing credit and reliability, the Court must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes however, on the authority of the Belizean CCJ decision of **August et al. v R**[11] that it need not comb the record for inconsistencies or contradictions. The Court directs itself that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. The Court must consider whether inconsistencies or discrepancies arose for innocent reasons, for example through faulty memory or lack of interest in what is transpiring, or if it is because the witness is lying and trying to deceive the Court. Unresolved

[9] [2019] CCJ 15 (AJ) at para 35.
[10] **R v Kruk** 2024 SCC 7 (Supreme Court of Canada) at para 146.
[11] [2018] 3 LRC 552 at para 60.

inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that bit. The Court must also consider the character, demeanour, capabilities of witnesses along with whether there is any supporting evidence[12].

[54] The Court also directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, automatically strips the witness of all believability. However, the telling of lies on oath is not a trifling thing. If the Court finds that any witness has intentionally testified falsely as to any material fact, it may disregard that witness's entire testimony or, may disregard so much of it as it finds was untruthful, and accept so much of it as it finds to have been truthful and accurate. How the Court decides on this may depend on its view of how material to the issue the lie is, and the reason, if any, for it. This is the Court's understanding of the CCJ decision of **James Fields v The State[13]** in relation to evaluating testimony involving intentional lies.

[55] The Court has considered all the evidence. However, the Court will note that it is not obliged to state its findings on every bit of evidence, nor every argument raised but will address the essential issues in this case[14]. It will analyse the evidence clinically, fairly, within the boundaries of the law and with the aid of its human experience and common sense[15] while avoiding myths and stereotypes.

[56] The Court will consider each count separately.

Count 1: Assault of a child under 16 by penetration (24th April 2021)

[57] In the Court's view, the Crown's case of assault of a child under 16 by penetration in the first count against the defendant, indeed on all counts in the indictment, is based on the credibility and reliability of the evidence of S. The Court notes that the evidence of S is uncorroborated. The case stands or falls on her evidence.

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[12] *Kruk* at para 146.
[13] [2024] 2 LRC 176 at paras 33-38.
[14] *Salazar* at paras 27-29; **Andy Forbes et al v R, Criminal Appeals 20, 21 and 24 of 2018** (BZ) at para 40; and **Nevis Betancourt v R** [2024] CCJ 6 (AJ) BZ at paras 22 and 38.
[15] *Kruk* at paras 151-156.

[58] The Court will firstly consider S's honesty.

A. Is S an honest witness?

[59] As noted before S was 17 years old when she testified, and still a child. She was testifying about events which occurred when she was a young child aged 13 and 14. The Court directs itself that the fact that a witness is young does not mean that her word is any more or less reliable than that of an adult and that it should assess S's evidence in the same fair way as it assesses any other evidence in the case.

[60] The Court will bear the following in mind, which are matters of common sense and human experience[16]:

i. A child does not have the same experience of life or the same degree of maturity, logic, perception or understanding as an adult. So, when a child is asked questions, she may find the questions difficult to understand, may not fully understand what it is she is being asked to describe and may not have the words accurately or precisely to describe things.

ii. A child may be tempted to agree with questions asked by an adult, whom the child may well see as being in authority, particularly in a setting such as this. Also, if a child feels that what she is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that she may get into trouble.

iii. A child may not fully understand the significance of some things that have happened, which may be sexual, at the time they happened, and this may be reflected in the way she remembers or describes them in later life.

iv. A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time, when trying to describe events, even after a fairly short period, and a child's memory of when and in what order events occurred may not be accurate.

v. A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how she felt at the time or why she did not take a particular course of action.

[16] **The Crown Court Compendium, Part I, Jury and Trial Management and Summing Up**, (Eng.) June 2023, ps 10-28 and 10-29.

vi. All these things may go to a child's level of understanding rather than to her credibility and so the Court should be cautious about judging a child by the same standards as an adult. None of these things mean that this witness is or is not reliable: that is a matter for the Court's judgment on all of the evidence.

[61] S is also testifying to an alleged sexual assault committed against her as a child. The Court must also be wary of making certain assumptions, which are again, matters of common sense and human experience, and notes, generally speaking, that a child may:

i. be confused about what has happened or about whether or not to speak out.
ii. blame herself for what has happened or be afraid that she will be blamed for it and punished.
iii. be afraid of the consequences of speaking about it.
iv. feel that she may not be believed.
v. may be embarrassed because she did not appreciate at the time that what was happening was wrong, or because she enjoyed some of the aspects of the attention they were getting.
vi. simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out.
vii. may feel conflicted: loving the abuser but hating the abuse[17].

[62] The Court found S's manner and demeanour to be intelligent, articulate and direct. She also seemed to be somewhat melancholy.

[63] The Court found S to be an honest witness.

[64] The account given by S in relation to the first count, in the Court's view, is not inherently implausible. The Court thinks that it is logical that S would open the door thinking that it was Jose, and not the defendant. The fact that S did not raise an alarm to her mother when she realized that it was the defendant, or even immediately after the digital penetration, having regard to her allegations of previous assaults, is consistent with her evidence that she was not close to her mother and that she was still processing those assaults. As a matter of human experience, the Court notes that S was at the time a 14-year-old child

[17] Ibid *Crown Court Compendium* at p 10-29.

and the defendant was the 35-year-old boyfriend of an older cousin. In the family dynamic it is not illogical that S may not want to alert her mother who she is distant from and "cause problems" for someone like the defendant who appeared to be well-respected in her family unit. The Court recalls the evidence of S that her mother and A, in her mind, were the only two family members, to use her words, "she had". She was distant from the first and the defendant was effectively the son in law of the latter. It would take some doing for a child in S's position to face down someone in that position of power in relation to her. S indicated in her testimony that she felt like she had no-one to talk to. Thus, in the Court's mind, it is entirely consistent that S would only make the decision to disclose to E, after the third incident, out of sheer desperation, to use her words, "because I did not think there was going to be an end to that cycle." This is especially so as according to her evidence the defendant said after he licked her vagina on April 24th 2021 that he was coming back.

[65] The Court observes that, as a matter of human experience, a child, particularly in the family context, need not be threatened to keep the secret of an abuser. The Court in this regard recalls S's evidence about being embarrassed, her feelings of isolation, and that she would not be believed. In that regard it is not implausible that S did not disclose the assaults even though she was not threatened by the defendant.

[66] The Court also considers the issue of plausibility from the defendant's perspective. According to S, he had sexually assaulted her since several months before and she had remained silent. There was no reason why that silence would not continue on this occasion. He was aware of his good standing in S's family. The fact that the defendant had alcohol on his breath, on S's evidence, could explain his bravery in terms of assaulting S at her home while her mother was there. This, however, is not a finding that the defendant was intoxicated in the legal sense that he could not form intent, as there is no evidence of that. The defendant, on S's evidence, would have also strategically enquired from S and established that E was sleeping and that he may have said to himself that he could probably do a quick "lee thing". E's evidence was also that her bedroom door was closed at the time and the Court accepts E's evidence.

[67] The defendant has raised, as an implausibility, that for two weeks while E was on vacation S stayed at the defendant's home. The Court finds no necessary implausibility in this in light of her evidence. S indicated that she was directed, or suggested, to stay there by her mother. Again, S and E are not close,

and S was, according to her, processing the assaults. In that regard, raising an objection to staying with her cousin, F, and the defendant may have caused E to ask questions that S was not ready at that time to confront.

[68] The delay in reporting the December and February incidents has been contended by the defendant as an indication that those events did not happen as it is improbable that someone suffering those sexual violations would delay reporting. The Court does not find that scenario implausible and finds that her explanations of processing the trauma and feelings of embarrassment are reasonable. As a matter of human experience there is no classic response to trauma.

[69] The Court says all of this to say at this stage that it finds S's overall account not inherently implausible, indeed, on the contrary it is internally consistent and cogent.

[70] The Court will state, having regard to the Crown's submissions[18], that it has not placed on the scale in term of the plausibility evaluation the fact that no motive has been unearthed as to why S would lie on the defendant. The Court is of the view that this is an impermissible train of reasoning, as improperly boosting S's credibility, on the authority of a decision of the Trinidadian Court of Appeal in **Reed Richards v The State**[19], which adopted an Australian case of **R v Palmer**[20], per Weekes JA, as she then was:

> *"19. The Court further explained that asking the question "Why would he or she lie?" would cause the jury to speculate. They quoted Sperling, J. in the Court of Criminal Appeal of New South Wales in R v. E [1996] 39 N.S.W.L.R. 450 at 464:*
>
> ***"[W]e are dealing here with a case where there is no direct evidence of an actual motive to lie, nor evidence from which a specific motive to lie could reasonably be inferred. To ask, "Why would he or she lie?' in such a case is to invite the jury to speculate as to what might be possible motives for lying and to assess their likelihood. That is not to try the case on the evidence, but to speculate concerning unproven facts. The absence of evidence of a motive for lying and of a plausible***

[18] Para 43.
[19] Criminal Appeal No. 12 of 2008.
[20] (1998) 193 CLR 1.

explanation for lying is not proof that there was no motive for lying. Yet to pose the question at all is to give legitimacy to that method of reasoning and to that conclusion.

…

21. ***The Court further held that by inviting the jury to consider the Crown Prosecutor's submission that the complainant had no motive to lie, the trial judge was instructing the jury to start with a presumption that a crown witness is telling the truth. This is inconsistent with the concepts underlying a criminal trial, embodied in the standard directions concerning onus of proof and the jury's obligation to consider what evidence to accept and what to reject***.

…

*24****. In the…case, where there is no evidence of a motive to lie, to allow the question to be put to the jury "Why would the witness lie?" would run the risk that the jury may think it open to them to infer that because the witness had no apparent motive for lying that fact of itself showed the witness was telling the truth. The second case, where there is a real issue in the case whether the witness had an actual motive to lie is one where that issue is a relevant factor in judging a witness's credit and the question may be asked****." (emphasis added)*

[71]The Court will now consider the material inconsistencies in S's evidence, overall.

[72]These are as follows:

i. Take of all her clothes/pulled down her clothes to above her knees: The Court finds that this inconsistency between what S told the social worker, and her testimony is immaterial, and readily explainable as a mistake in narrative as opposed to any dishonesty on her part. In a traumatic event as described by S, if true, it is likely that focus would be on the details of the penetration as opposed to the state of her undress. The Court in its view does not believe this is an inconsistency generated by untruthfulness.

ii. Whether the defendant took S's virginity: Neither the Crown nor the defendant explored this issue in oral examination of Dr. Navarrete. The Court does not have any expert evidence on this issue. However, the defendant makes heavy weather of the fact that after the alleged rape in December 2020 there was no evidence of blood in S's underwear although it was the first time S had

intercourse. This contention however proceeds on the potentially faulty anatomical assumption that a female virgin must have her hymen intact. This ignores the notorious fact of which the Court takes judicial notice that a hymen can be ruptured for reasons unrelated to sexual activity. Indeed, the United Nations Office on Drugs and Crime ("UNODC"), **Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls**[21] has noted:

> *"Judges may find the following guidance useful:*
>
> *…*
>
> *• … A medical report that may show that penetration occurred but does not prove or disprove rape.*
>
> *…*
>
> *• Follow the United Nations Inter-agency statement regarding prohibiting the practice of introducing evidence of virginity testing, as research show this has no scientific merit or clinical indication – **the appearance of a hymen is not a reliable indication of intercourse and there is no known examination that can prove a history of vaginal intercourse**."*
> *(emphasis added)*

The Court reminds itself of the legal principles in relation to judicial notice. In **Commonwealth Shipping Representative v P and O Branch Service**[22], a decision of the House of Lords, Lord Atkins opined that:

> *"My Lords, to require that a judge should affect a cloistered aloofness from facts that every other man in Court is fully aware of, and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile.*
>
> *…*
>
> *Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."*

[21] Vienna 2019 at p 93.
[22] [1923] AC 191 at ps 211-212.

The editors of **Phipson on Evidence**[23] have observed that, "The court will take judicial notice of facts which are notorious". Two such examples of medical matters, analogous to this case, in which judicial notice was taken, without the requirement of evidence, were the fact that venereal disease may lie dormant for a long time[24], and that a person's genetic makeup could be related to the incidence and course of a medical disorder[25]. The Court is of the view that the UNODC Handbook records really what every reasonable Belizean would know that the absence of blood during a female's first sexual intercourse does not necessarily mean she was not a virgin.

Again, this area was not explored forensically in examination of the doctor or otherwise to create an inconsistency in S's evidence, or any discrepancy with the medical evidence, in the Court's mind. There may also be an explanation provided by the fact that the defendant did not fully penetrate S.

There was also, in the Court's mind, no inconsistency in S's evidence in relation to saying that she was a virgin and saying that the defendant did not take her virginity. She explained in the manner above by way of the partial penetration. The Court appreciates that this evidence only emerged in cross-examination but notes that S was not probed on this in evidence in chief and S was still a child when testifying and may not be aware of the detail she should give while giving evidence. The Court also resolved her failure to mention that there was pain with the penile penetration in December in examination in chief but only mentioning it when being cross-examined on that basis as well.

[73] The material discrepancies between S's evidence and other evidence in the case are as follows:

i. Complaint about feeling unwell at the Belama party: S testified that she told her mother, E, that she was unwell and wanted to go home. While E testified that she could not recall that. The Court does not find this to be a material discrepancy in any event. It can be easily explained by differences in focus to detail between S and E. There was nothing special about the family gathering to E so she may not have been paying attention to fine details when she is giving her statement in April about whether last December S said she was unwell and wanted to go home.

[23] 20th Edition at para 3-17.
[24] **Glenister v Glenister** [1945] P 30 at p 36.
[25] **F (A minor), Re** [1993] Fam. 375.

That evening would have been significant to S, because of the alleged sexual assault and she is better likely to have remembered the event.

ii. Picking up S at A's home while the alleged rape happened at the home of the defendant: E testified that she picked up S the day after the Belama party at A's home while S said that she left the night before and went to the defendant's home and was raped. However, S testified, albeit in cross examination for the first time, that she went back to A's house that morning after noting again that the houses were not far apart. The Court does not consider this a significant issue and the failure to mention it in examination in chief can be resolved by the fact that she was not probed on the issue, nor would she have thought that realistically an important matter to mention unprompted by further examination.

[74] The Court has not considered as a discrepancy the evidence of E that she called A on the night of the Belama party around 9 p.m. and A told her that S was there, and she was fine. This issue arose in the cross-examination of E. In the Court's view this evidence, though favourable to the defence, is hearsay as A has not testified in this trial. The Court is being asked by this evidence to rely on what A told E in the conversation about S's whereabouts and state for the truth of it because that is the only way it can be used to create the discrepancy with S's evidence that she left the party. Again, A is not a witness and was not listed as a witness on the back of the indictment. The Court relies on the Bermudan decision of the Privy Council in **Billy Max Sparks v R**[26] where evidence which favoured the appellant, who was white, from the mother of a child victim who had not testified, that she was assaulted by a "coloured boy". The Board held that even if it seemed unfair to the defence the evidence was hearsay and could not be admitted, per Lord Morris of Borth-Y-Gest:

> *"It was said that "it was manifestly unjust for the jury to be left throughout the whole trial with the impression that the child could not give any clue to the identity of her assailant." The cause of justice is, however, best served by adherence to rules which have long been recognised and settled. If the girl had made a remark to her mother (not in the presence of the appellant) to the effect that it was the appellant who had assaulted her and if the girl was not to be a witness at the trial, evidence as to what she had said would be the merest hearsay. In such circumstances it would be the defence who would wish to challenge a*

[26] [1964] AC 964 at ps 978-979.

contention, if advanced, that it would be "manifestly unjust" for the jury not to know that the girl had given a clue to the identity of her assailant. If it is said that hearsay evidence should freely be admitted and that there should be concentration in any particular case upon deciding as to its value or weight it is sufficient to say that our law has not been evolved upon such lines but is firmly based upon the view that it is wiser and better that hearsay should be excluded save in certain well defined and rather exceptional circumstances.

…

Even if any basis for its admission could be found the evidence of the making of the remark would not be any evidence of the truth of the remark."

[75] The Court places little weight on the evidence of S's distressed condition after the alleged incidents on 24th April particularly as she would have known that she was being observed by E. The Court wishes to clarify that this is not a finding by the Court that the distress was feigned, but having regard to the inherent problems associated with that specie of evidence[27] the Court chooses not to place it on the evaluative scale.

[76] The Court having found that S is an honest witness it now considers her reliability.

B. Is S's evidence reliable?

[77] The Court would firstly observe that even looked at cumulatively it does not view the inconsistencies or discrepancies identified above as making S's evidence unreliable.

[78] The issue the Court would consider in terms of the reliability of S's evidence is the correctness of her identification of the defendant as the person who digitally penetrated her on 24th April 2024.

[79] Indeed, the defendant accepted in his sworn evidence in chief that he was at S's home that day and he never challenged his identification on the video footage by E nor S.

[27] **Lambey et al v R** Criminal Appeals Nos.13 and 15 of 2004 (CA BZ).

[80] The Court nevertheless reminds itself that mistaken identification is a source of miscarriages of justice and that an honest witness may be mistaken. Indeed, several honest witnesses may be mistaken. There may be errors made in the identification of close friends or even relatives.

[81] The Court will examine the opportunity S had to register and record the features of the person she says is the defendant:

i. Period of observation: The evidence of S is that this incident lasted about 30 seconds This in the Court's view seems an underestimation as it must have taken more time for the person to pull her by her shoulders, pull down her shorts, kneel down and insert his fingers. The Court notes the guidance of the Court of Appeal in **Chadrick Debride v R**[28] when considering time estimates by witnesses, per Sosa P:

> *"[71] The fifth of the alleged weaknesses was that everything was said to have taken place in a matter of 15 – 20 seconds or a minute. The Court does not accept the suggestion that a time estimate in this range automatically gives rise to a weakness in the evidence of identification. Furthermore, the Court considers it helpful to recall its own words in The Queen v Donicio Salazar Jr, Criminal Appeal No 1 of 2009, in which judgment was delivered on 28 October 2011, which words were as follows (see para [24]):*
>
> *'What may seem like thirty seconds to one person may well seem like as few as ten seconds to another and as much as a minute to yet another.'*
>
> *Mr Méndez, like the witness Douglas in Grieves, cited above, 'was being asked for a time estimate several years after the event', to quote from the judgment of the Board, at para 41. And as their Lordships went on to add, in that same paragraph:*
>
> *'Time estimates by someone who is not looking at a watch are notoriously difficult.'"*

In any event S would have been in contact with the person she identifies as the defendant from before on the opening of the door and after including the licking of the vagina. In those circumstances the Court finds that there would be sufficient time to register the features of the person she identifies as the defendant.

ii. Distance: Her evidence was that the defendant was 2 feet away from her. Indeed, this distance must have been even closer by the irresistible inference that flows from him being close enough to put his fingers in her vagina.

[28] Criminal Appeal No 13 of 2007.

iii. Lighting: The consistent evidence of S is that the sighting was in daylight and the windows were opened.

iv. Obstruction: The consistent evidence of S is that there was nothing obstructing her view of the face or body of the person she identified as the defendant.

v. Recognition: S testified that she knew the defendant for about 6 years before December 2020. It was conceded by the defendant that he knows S and he knows her well referring to her, indirectly, as "family". The defendant also accepted that he frequently visited S's home.

[82] There are no weaknesses in her identification.

[83] The Court finds that S had a proper opportunity to identify the person she says is the defendant who digitally penetrated her.

[84] The Court consequently finds that S is both an honest and reliable witness. The Court thinks that there may be evidence sufficient to convict the defendant so it will then consider the case for the defendant.

C. The Defence Case

[85] The Court again reminds itself that the defendant has nothing at all to prove and did not need to say anything. In that regard the Court rejects out of hand the Crown's argument that a portion of the defendant's evidence was untrue, namely that he never left the Belama party, because "not one person at that party has come forward to testify to this[29]." This argument implies an obligation on the defendant to call evidence to prove his innocence and is an invitation to impermissibly shift the burden of proof. The Court reminds itself that if it accepts the defendant's evidence, or has doubts as to whether it is true, then it must acquit him, and it is only if it rejects the case for defendant then it returns to the Crown's case and considers whether on all the evidence the defendant is guilty.

[29] Para 46.

[86] The Court has considered two things in the general consideration of the defendant's evidence. Firstly, the defendant is a man of good character having no previous convictions. Good character is not a defence to the charges in the indictment, but it is relevant in two ways. First, the defendant has given evidence. His good character is a positive feature which the Court takes into account in his favour when considering whether it accepts his testimony. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as the Crown alleges in this case. However, what importance the Court attaches to the defendant's good character and the extent to which it assists on the facts of this particular case is for the Court to decide after a consideration of all of the evidence.

[87] The second general consideration is the issue of the delay in the reporting of some of the incidents, such as that in December and February, and its effect on the defendant's ability to defend those charges. The Court notes that the passage of time may have put the defendant at a serious disadvantage. The defendant may not be able to remember with crystal clarity details now that could have helped him.

[88] The defence of the defendant on this count, and indeed all counts, is fabrication. He accepts that he went to S's home on 24th April 2021 but testified that he never sexually interacted with her.

[89] In terms of the defendant's general credibility the Court considered the inconsistency of where he was on the afternoon of 13th February 2021 when he first said in evidence in chief that he presumed he was at work and then within a matter of minutes in chief he said that he was home with F, and provides the further detail that not only was F there, but she was in the kitchen and cooking. Also that he was never alone with S that afternoon. These helpful vivid details raise serious concerns about the defendant's credibility having regard to the sequence of events. The defendant is first told of these reports on 24th April 2021. The 13th February 2021 from his perspective, until the report is told to him, is a regular day of no particular significance. The Court, as a matter of human experience, would accept as probable that the defendant may be able to say generally his location, unless there was something significant about that day and the defendant did not testify that there was, but to be able to provide the detail that F was cooking in the kitchen, and that he was not alone with S more than two months prior strikes this Court as wholly unbelievable. The Court does find that the addition of F into the event was designed to support the theory that S's evidence was implausible, and that this inconsistency did not arise for any innocent

reason. The Court observes however that people may tell lies to bolster a genuine defence and does not jump to the conclusion that because he has told an untruth that the defendant is guilty.

[90] The Court did not find the defendant to be an honest witness.

[91] The Court also found in combination with that factor, that the strength of S's evidence, its overall consistency and cogency, would lead it to reject the defendant's case[30].

D. Findings

[92] The Court returns to the Crown's case and has looked at the totality of the evidence. The Court is satisfied so that it is sure:

i. The defendant by even the least degree penetrated S's vagina: The Court accepts as true and reliable the evidence of S that the defendant placed his fingers in her vagina.

ii. That penetration was intentional: The Court finds that the defendant wanted to produce the result of penetrating her vagina after considering all of the evidence. The Court accepts the evidence of S that the defendant grabbed her, pulled down her clothes and digitally penetrated her after confirming that her mother was asleep. On this evidence it is clear that the defendant wanted to sexually molest S that day by putting his fingers in her vagina.

iii. That penetration was sexual in nature: The Court finds that there was no legitimate purpose for the defendant in those circumstances as described by S, which the Court accepts, to place his fingers in her vagina and that that penetration was by its nature sexual.

iv. A was under the age of sixteen: The Court accepts the unchallenged evidence of E that S was 14 years old at the time of this offence.

[93] The Court consequently finds the defendant guilty of assault of a child under 16 by sexual penetration of S on 24th April 2021.

Count 2: Sexual assault (24th April 2021)

[30] **Bally Sheng Balson v The State** (2005) 65 WIR 128 (PC Dom.) at para 38 and **Hamilton et al v R** [2013] 4 LRC 188 (PC Jam.) at para 66.

[94] The Court does not find that S's account in relation to the second count implausible. The Court accepts S's explanation that she went back and sat on the sofa, after the digital penetration, because she had nowhere else to go and that she, in her mind, was effectively helpless and at the defendant's mercy. The Court, as a matter of human experience, appreciates that a child may not have the fortitude to calculate what is the best evasive action to take, and the Court notes that going in the bathroom and washing wares did not seem to work. The Court accepts as true that in S's mind she really felt she had nowhere to go.

[95] In addition to this finding and having regard to the findings on the previous count the Court finds that S is an honest witness in its consideration of this count. The Court also finds the evidence reliable as the lighting, distance, period of observation and non-obstruction are virtually identical, and the events happened shortly after the digital penetration. The Court finds that S had a proper opportunity to observe the person she identified as the defendant who assaulted her. The Court rejects the defendant's evidence for the same reason it did on the previous count.

A. Findings

[96] The Court has looked at the totality of the evidence. The Court is satisfied so that it is sure:

i. The defendant touched S's vagina: The Court accepts as true the evidence of S in this regard that the defendant licked her vagina.

ii. That touching was intentional: The Court finds that the defendant wanted to produce the result of touching her vagina after considering all of the evidence. The Court accepts the evidence of S that the defendant grabbed her, pulled down her clothes and began licking her vagina after confirming that her mother was asleep. On this evidence it is clear that the defendant wanted to sexually molest S that day by licking her vagina, particularly after just digitally penetrating her.

iii. That touching was sexual in nature: The Court finds that there was no legitimate purpose for the defendant in those circumstances as described by S, which the Court accepts, to lick S's vagina and that that touching was by its nature sexual.

iv. S did not consent to the touching and the defendant knew S was not consenting or had no reasonable belief in her consent: The Court accepts S's evidence that she did not consent to

any sexual touching and that she physically struggled with him and pushed him off during the act. The defendant restrained S by grabbing her, without any discussion, before pulling down her clothes and would have felt S pushing him and struggling. It is clear to the Court that the defendant did not reasonably believe that S was consenting to that touching. The Court did not rely on the section 12 of the Code presumption against consent by age as there is no clear evidence that the defendant would have known A was under 16 pursuant to the last paragraph of that section.

[97] The Court finds the defendant guilty of sexual assault on 24th April 2021.

Count 3: Assault of a child under 16 by sexual penetration (13th February 2021)

[98] The Court does not find that S's account on Count 3 of the indictment to be implausible. Her evidence is essentially that the defendant sexually assaulted her at his home while F went out as S saw F coming back in the yard after the assaults. The fact that S did not disclose to F, in the Court's view, is not a function of dishonesty or that the assault did not happen but accepts her explanation that she thought F would not believe such an allegation against her live-in boyfriend. The Court finds the evidence cogent and consistent.

[99] In addition to this finding and having regard to the findings in Count 1 the Court finds that S is an honest witness in its consideration of this count.

[100] The Court turns now to consider the reliability of S's evidence on Count 3. The Court reminds itself of the issues regarding visual identification as noted above. The Court will examine the opportunity S had to register and record the features of the person she says is the defendant:

i. Period of observation: She testified that she would have gone for ice cream with the defendant and drove back to the house. She also testified that that the incident of him digitally penetrating her lasted 30 seconds. The Court finds that this may have been an underestimation in the scenario where the defendant penetrated S 4 times with his two fingers. In any event the Court finds that there was a sufficient period of time for S to register the features of the person she identified as the defendant.

ii. Distance: S testified that the defendant was 1 foot away from her at the material time, but again the Court thinks this is an overestimation because the inference is that the defendant would have been close to S to put his fingers in her vagina.

iii. Lighting: S testified that it was daytime, and the windows were open.

iv. Obstruction: S testified that there was nothing obstructing her from seeing the defendant and she saw his entire body including his face.

[101] There are no weaknesses in S's identification. It should also be noted that in his evidence the defendant, albeit belatedly, accepted that he was at home that day. The Court finds that there was a proper opportunity for S to have correctly identify the defendant.

[102] The Court rejects the defendant's evidence for the reasons outlined in Count 1.

A. Findings

[103] The Court returns to the Crown's case and has looked at the totality of the evidence. The Court is satisfied so that it is sure:

i. The defendant by even the least degree penetrated S's vagina: The Court accepts as true and reliable the evidence of S that the defendant placed his fingers in her vagina.

ii. That penetration was intentional: The Court finds that the defendant wanted to produce the result of penetrating her vagina after considering all of the evidence. The Court accepts the evidence of S that he wordlessly pulled her chair, pushed her down on the bed, pulled down her clothes and digitally penetrated her while seemingly F was away. On this evidence it is clear that the defendant wanted to sexually molest S that day by putting his fingers in her vagina.

iii. That penetration was sexual in nature: The Court finds that there was no legitimate purpose for the defendant in those circumstances as described by S, which the Court accepts, to place his fingers in her vagina and that that penetration was by its nature sexual.

iv. A was under the age of sixteen: The Court accepts the unchallenged evidence of E that S was 13 years old at the time of this offence.

[104] The Court consequently finds the defendant guilty of assault of a child under 16 by sexual penetration of S on 13th February 2021.

Count 4: Sexual assault (13th February 2021)

[105] The Court having regard to its findings in Count 1 and Count 3 finds S to be an honest witness regarding this count. The Court also finds her evidence reliable as the identification factors during the licking of S's vagina were almost identical as in Count 3.

[106] The Court rejects the defendant's evidence for the reasons outlined in Count 1.

A. Findings

[107] The Court has looked at the totality of the evidence. The Court is satisfied so that it is sure:

i. The defendant touched S's vagina: The Court accepts as true the evidence of S in this regard that the defendant licked her vagina.

ii. That touching was intentional: The Court finds that the defendant wanted to produce the result of touching her vagina after considering all of the evidence. The Court accepts the evidence of S that the defendant grabbed her, pulled down her clothes twice by this point, gripped her legs and began licking her vagina while F was seemingly out. On this evidence it is clear that the defendant wanted to sexually molest S that day by licking her vagina, particularly after just digitally penetrating her.

iii. That touching was sexual in nature: The Court finds that there was no legitimate purpose for the defendant in those circumstances as described by S, which the Court accepts, to lick S's vagina and that that touching was by its nature sexual.

iv. S did not consent to the touching and the defendant knew S was not consenting or had no reasonable belief in her consent: The Court accepts S's evidence that she did not consent to any sexual touching and that she physically struggled with him and pushed him off during the act. The defendant restrained S by grabbing and gripping her, without any discussion, before pulling down her clothes and would have felt S pushing him and struggling. It is clear to the Court that the defendant did not reasonably believe that S was consenting to that touching.

[108] The Court finds the defendant guilty of sexual assault on 13th February 2021.

Count 5: Rape of a child (31st December 2020)

[109] The Court finds that S's account of the offence on this count plausible. The defendant would have attacked her while she was asleep. The Court having regard to its findings in the previous counts finds S to be an honest witness with regard to this count.

[110] The Court turns now to consider the reliability of S's evidence on Count 5. The Court reminds itself of the issues regarding visual identification as noted above. The Court will examine the opportunity S had to register and record the features of the person she says is the defendant:

i. Period of observation: She testified that the incident lasted about 5 minutes. In any event the Court finds that there was a sufficient period of time for S to register the features of the person she identified as the defendant.

ii. Distance: S testified that the defendant was 1 foot away from her at the material time, but again the Court thinks this is an overestimation because the inference is that the defendant would have been close to S to put his penis in her vagina.

iii. Lighting: S testified that there was light from a nearby lamp pole and a clock with an LED light. There is, however, no evidence of much internal light in the room apart from the clock.

iv. Obstruction: S testified that there was nothing obstructing her from seeing the defendant and she saw his entire body including his face.

[111] The weaknesses in the identification of the defendant are the lighting as alluded to above; the fact that S was shocked from sleep; and the fact that she was opening and closing her eyes intermittently. However, the assault took place in the home of the defendant, supporting the conclusion it was him, and even considering the weaknesses cumulatively, the Court finds that there was a sufficient opportunity for S to identify the person she says is the defendant.

[112] The Court rejects the defendant's evidence for the reasons outlined in Count 1.

A. Findings

[113] The Court has looked at the totality of the evidence. The Court is satisfied so that it is sure:

i. The defendant by even the least degree penetrated S's vagina: The Court accepts as true the evidence of S in this regard that the defendant penetrated her vagina.

ii. That penetration was with the defendant's penis: The Court finds that the defendant penetrated S with her penis on all of the evidence including S hearing the defendant's zipper going down, her feeling his penis inside of her and when she pushed him off his penis came out.

iii. That penetration was without S's consent and the defendant knew she was not consenting: The Court finds that S did not consent as it accepts her testimony that she did not consent, along with evidence that she was asleep when the encounter began. The Court finds that the defendant did not reasonably believe that she was consenting as she was asleep when he began the encounter and wordlessly climbed on top of her pulled down her clothes and penetrated her. There was no way, in the Court's mind, the defendant could have reasonably believed in that scenario that S was consenting to intercourse.

iv. S was under the age of sixteen: The Court accepts the unchallenged evidence of E that S was 13 years old at the time of this offence.

[114] The Court finds the defendant guilty of rape of a child on December 31st, 2020.

DISPOSITION

[115] The Court finds Ezequiel Ayala guilty of all counts in the indictment. The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**[31].

Nigel Pilgrim
High Court Judge
Dated 28th June 2024

[31] [2020] CCJ 7 (AJ) GY at para 32.