IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N3/2022

BETWEEN

THE KING

and

NOEL PENA

Accused

Before:

The Honourable Mr. Justice Raphael Morgan

Appearances:

Ms. L. Cuello, Dovini Chell and Mrs. Shanidi Urbina for the Crown

Mr. Ronell Gonzalez for the Accused

2024: May 13th, 16th, 17th
June 11th, 12th, 26th
July 26th
Sept 16th
Oct 10th, Oct 25th

VERDICT – REASONS FOR DECISION - SEXUAL ASSAULT – UNLAWFUL SEXUAL INTERCOURSE CONTRARY TO SECTION 47(1)

[1] MORGAN, J.: Noel Pena ("the Accused") was indicted on two counts of Sexual Assault and four counts of Unlawful Sexual Intercourse contrary to **section 45A (1)** and **section 47(1)** of the **Criminal Code**[1] ("the Code") respectively.

[2] On the 1st and 6th counts of the indictment the Accused is alleged to have touched the leg of the virtual complainant Q[2] in a sexual manner and on the 2nd to 5th counts of the indictment the Accused is alleged to have had sexual intercourse with Q, a person under the age of fourteen years of age, to wit, eleven years of age.

[3] The trial began with the arraignment of the Accused on the 13th May, 2024 before this Court pursuant to section **65A (2) (a)** of the **Indictable Procedure Act**[3] (**the IPA**).

[4] During case management, the Court gave orders for the filing of the Notice of Alibi by the Defence pursuant to **section 125** of **the IPA**. By the morning of the trial no alibi notice had been filed nor had there been particulars provided to the Crown. These particulars were provided in person to the Crown on the morning of trial. The Court invited oral submissions from the parties as to whether or not leave should be granted for the Accused to rely on the defence of Alibi at trial. The Court on this issue found particularly helpful the case of **Richards v The State**[4], a decision of the Court of Appeal of Trinidad and Tobago. In **Richards** the Court considered the approach of a trial judge where an alibi notice and particulars had been provided late, even after the start of the trial, in contravention of section 16 of the Preliminary Inquiry Act of Trinidad and Tobago which is in *pari materia* to our section 125. John JA (as he then was) indicated:

> "31 Before leaving this matter **we wish to reiterate for the benefit of trial judges that the object of s. 16 of "The Act" is not to prevent unmeritorious defences by curtailing the time in which the accused may concoct such. The object is to prevent the defence from surprising the prosecution by suddenly producing at the trial alibi witnesses whose bona fides the prosecution will not have had opportunity to check. Therefore, if the notice is given out of time, even by several weeks, the judge ought to allow the alibi evidence nonetheless, as long as the prosecution has had enough time to make its investigations**.

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020
[2] Anonymized because of the VC being a minor at the time of the offence
[3] Cap 96 of the Substantive Laws of Belize Revised Edition 2020
[4] Cr. App. No 15 of 2007

> **Rather than refuse the evidence, the judge should adjourn the trial in order to make enough time. We think it would be more prudent that where an application is being made to lead evidence of alibi at the trial such application should be made in the absence of the jury**.
>
> 32 The mischief which the Act sought to remedy was succinctly stated in R v Jacks [1991] Crim L R 611, 612 a case decided under s11 of the Criminal Justice Act, 1967 (UK) where the court of Appeal stated:
>
> "**The mischief at which section 11 was aimed was not in doubt. Before it was enacted, it was possible for the defence to call alibi witnesses at a stage when the Crown had no opportunity to check the truth or reliability of the evidence. Plainly such a possibility was thought to be contrary to the interests of justice. The remedy was that the defence should be required to notify the Crown well before the trial of the effect of the alibi and the person by whom it could be proved, so that there was good time to explore the truth of the evidence upon which the jury were to be asked to rely**." [emphasis mine]

[5] The Court in the circumstances exercised its discretion to grant leave for the Accused to raise the defence of alibi at trial and adjourned the trial to allow the Crown to conduct its investigation into the particulars given on the morning of the trial. **The Court however wishes to emphasize that it is not in every case where a notice of alibi or the particulars are provided at a late stage that leave will be granted to raise the defence. There may well be cases where the provision of the notice and its particulars are so late that it is not in the interests of justice to grant leave**.

[6] Upon the resumption of the trial, the Crown relied on the evidence of six viva-voce witnesses including the Virtual Complainant, agreed evidence pursuant to **section 106** of **the Evidence Act**[5] and photographs taken of the crime scene.

[7] At the close of the Crown's case, the Court advised the Accused of the three options available to him i.e. to remain silent, to give a statement from the dock or to give sworn evidence. The Accused was also informed that whichever option he chose to exercise, he was entitled to call witnesses. The Accused opted to give a statement from the dock and called one witness in support of his alibi.

[8] The Court invited the parties to submit their closing addresses in writing and reserved its judgement.

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[5] Cap 95 of the Substantive Laws of Belize Revised Edition 2020

[9] The Court having considered the evidence, now gives its verdict and reasons.

The Elements of the Offences

Sexual Assault

[10]Section 45A (1) of the Code provides as follows:

> ***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, penis, breast or any part of that person's body….commits an offence***

[11]With respect to consent of a person under the age of sixteen in the context of the offence of Sexual Assault, the Code provides as follows in **section 12**:

> *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….*

[12]The Code also provides generally in **section 12** 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.

[13]As to what constitutes 'sexual in nature' the Code provides in **section 53** as follows:

> *53A(5) For the purposes of this Part–…*
>
> ***"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;***
>
> *…*
>
> ***"touching" includes touching with any part of the body*** *or with anything else, or through anything else; " (emphasis added)*

[14]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?"*

[15]How that question is answered is determined by reference 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."*

[16]The Crown therefore has to prove the following in respect of the charge of Sexual Assault:

a) The Accused touched Q's leg.
b) That touching was intentional.
c) That touching was sexual in nature.
d) The Accused knew or could have with reasonable diligence, found out that Q was under 16 or he knew that she was not consenting or had no reasonable belief in her consent[6].

Unlawful Sexual Intercourse contrary to section 47 (1) (USI contrary to section 47(1))

[17]The statutory framework for the charge of **USI contrary to section 47(1)** is also contained within the Code. **Section 47(1)** provides:

> **47.**-(1) **Every person who, with or without consent, has sexual intercourse with a person who is under the age of fourteen years commits the offence of unlawful sexual intercourse** and is liable on conviction on indictment to imprisonment for a term that is not less than twelve years but may extend to imprisonment for life. [emphasis mine]

[18]Section 73 is also instructive:

[6] The Court in this reqard is guided by the decision of the Court of Appeal in **Leiva v R Criminal Appeal no 16 of 2009** para 38

> ***Whenever, upon the trial for any crime punishable under this Code, it is necessary to prove carnal knowledge, the carnal knowledge shall be deemed complete upon proof of any or the least degree of penetration only***. [emphasis mine]

[19] The Crown must therefore prove the following with respect to the charges of USI contrary to section 47(1):

i. The Accused had sexual intercourse with Q, the slightest bit of penetration being all that is necessary to complete the act of penetration for the purpose of the offence.
ii. That at the time of the penetration Q was under the age of fourteen years.

[20] Consent or lack thereof is not an element that needs to be proven for a charge of Unlawful Sexual Intercourse contrary to section 47 (1) as the age of consent in Belize is sixteen(16) and the offence itself is not drafted to make consent a constituent element of the offence.

The Evidence

The Crown's Case

[21] The Court heard evidence from the following witnesses for the Crown viva voce:

a) Q – the Virtual Complainant (the VC)
b) M[7] – the mother of the VC
c) Woman Sergeant (WSgt) Sharaine Jacobs – the Investigating Officer
d) Scenes of Crime Technician Arian Reneau
e) WPC Concepcion Marroquin
f) Adriel Castaneda – Acting Senior Fisheries Office

[22] There was also agreed evidence of Dr. Lesly Mendez, PC Alvin Castillo and Thomas August Jr. (Justice of the Peace).

[23] The case for the Crown is that M was the common law wife of the Accused and she lived with him along with her three daughters of whom Q is the oldest. Q was born on the 11th July 2008. They lived with the Accused in Trial Farm Village, Orange Walk on land that belonged to the Accused's family. The property

[7] Also anonymized to protect her daughter who is a minor

had two houses, one of which belonged to the mother of the Accused and the other was where the Accused lived with M and her children. The house in which they lived was a small, one room, wooden structure in which there were two bedrooms created by the use of curtains. There was one bed in each corner of the house. On one bed the Accused slept with M and on the other bed Q slept with her two sisters. Between the two rooms there was a sofa and a table. The house was lit by a light bulb in the centre of the house. There were three windows in the house, two were made of glass and there was one wooden window. There was a bathroom attached to the home on the right side of the building which didn't have a roof but was covered with cloth sacks. There was also a bathroom/toilet about 150 yards from the house.

[24] In the month of **June 2020** Q was helping the Accused to repair a van, the Accused began touching the outside of her right thigh with his toes for a few seconds in an up and down motion that made her feel uncomfortable. The Accused was laying down while he did this. After he touched her right thigh with his toes he threatened Q by telling her that if she told her mother, he would send her mother to prison.

[25] **Further in the month of June 2020** the Accused had sexual intercourse with Q after she went outside to warm food at his request. The Accused approached Q while she was warming the food, placed his hand under her blouse, started touching her breast, took down her undergarments, took down his pants and then proceeded to insert his penis in her vagina while in a standing position. The Accused was in a standing position right in front of her while he fondled her breasts and vagina and also when he had sex with her. The Accused's penis was in Q's vagina for maybe a few minutes or a few seconds. After the Accused had sex with Q, he again threatened her and told her not to tell her mother or else he will put her mother in prison.

[26] In the month of **July 2020,** the Accused again had sexual intercourse with Q. On this occasion the Accused came into the room where she and her sisters slept. Her mother and sisters were asleep at the time. The Accused came onto the bed that she shared with her sisters which was a not so small bed. He started touching her breast and took down her undergarments. He started to touch her vagina with his finger. He pulled down his pants and climbed on the bed. He inserted his penis in her vagina and started moving his penis. He was taking it out and putting it back in. He did this for about one minute. After that he went down from the bed, pulled up his pants and left the room. After the Accused left the room, Q pulled up her clothes and stayed in the room. She didn't tell anyone what happened as she was afraid of her mother going to prison.

[27] In the month of **August 2020** Q was outside washing the dishes in the bathroom while her sisters were inside the house. Her mother was not at home. The Accused came into the bathroom and put his hand inside and under her blouse and started touching her breast. Q was able to see him because it was daytime and the bathroom didn't have a roof. After that he put his hand under her skirt. He took down her undergarments and took down his pants. He started touching her vagina, pulled her towards him and inserted his penis in her vagina in and out for a few seconds. They were both standing when they had intercourse. After he took it out and put on his clothes. He left the bathroom and Q continued to wash the dishes. She didn't tell anyone because she didn't want her mother to go to prison.

[28] On a night in the month of **September 2020** the Accused had sexual intercourse with Q again on her bed while her mother and sisters were sleeping. On that night Q had finished doing her schoolwork and went to her bed. The Accused came into the room and put his hand under her blouse. He started touching her breast and her underwear. He then started touching her vagina with his finger. After that he took his pants down to the knees and went on top of the bed. He opened her legs, put his penis in her vagina and started moving, taking out his penis and putting it back in her vagina. He did so for a few minutes. He then got off the bed, put back on his pants and left the room. Q was able to see the Accused because he was next to her and the light of the house was on. Q put on her clothes and just stayed in her room. She did not tell anyone because she was afraid her mother would go to prison.

[29] On the 1st of **October 2020** Q was studying with her sisters and the Accused was helping them. They were laying on the floor and the Accused told her to get closer to him. Q didn't go closer to him. The Accused responded by laying down more and pointing his foot to where she was. After that he started touching her leg with his toes in an up and down motion for some seconds. Q was able to see him because the light of the house was on and they were in the middle of the house under the light. The following day M asked Q what had happened and she told her mother nothing had happened. She told her that because she didn't want her mother to go to prison. M told Q that she had seen it and she asked if the Accused had touched Q on other occasions and Q told her no. Q told her that it was the first time he had touched her.

[30] M had seen the incident after becoming suspicious when she noticed the Accused's behaviour towards Q while helping her daughters with their homework. She saw that the Accused was paying more attention to Q. When her youngest daughter finished studying M took her to bed but continued to observe the Accused through an opening she made with the curtains. She noticed the Accused drawing closer to her

daughter and touching her with his toes. According to M the touching was more of caressing and lasted for about two minutes or one minute. She saw him taking his feet and lifting Q's skirt to which Q responded by bringing down her skirt and pushing it back. She saw Q move away and after that the Accused didn't try to touch her again. The day after the incident in addition to confronting Q, M also confronted the Accused who denied the incident and she slapped him when he said that.

[31] Later that month they moved from the home where they lived in the Accused's family yard and went to another area to live. When they moved the Accused admitted to M that he had touched Q's leg and it would not happen again. The Accused indicated that he was not sure if it happened because he smoked or because he drank too much.

[32] On the 6th of December 2020 M sent Q to bathe and noticed the Accused entered the bathroom at the same time. She called Q back and the Accused came out shortly after. When she noticed the Accused came out, she sent Q back in and at the same time the Accused went into the bathroom again. M asked the Accused what was going on and he replied that he had diarrhoea. She then called Q back inside and the Accused came out of the bathroom again shortly thereafter. She then sent Q back to the bathroom a third time and this time the Accused stayed outside. That incident made M suspicious and the next day she took Q to the police station to see if she could ascertain what was going on.

[33] On the 21st December, 2020 Josue Cowo of the Department of Human Services called the Orange Walk Police Station requesting assistance for the witnessing of a medical for Q. Woman Sergeant Jacobs assisted and Q was taken to be medically examined. Q was examined by Dr. Lesly Mendez who found that Q's hymen was seen with multiple complete rolled hymenal tears. After the medical examination WSgt. Jacobs detailed WPC Concepcion Marroquin to record statements from Q and M which were recorded on the 22nd December, 2020.

[34] On the 23rd December 2020 the Accused was arrested at his home in Trial Farm village by W. Sgt Jacobs and a party of officers. He was cautioned upon his arrest and remained silent. He was also interviewed later that day where he denied the allegations of sexual assault and Unlawful Sexual Intercourse that were put to him. The Accused was later charged on the 24th December 2020 for the offences of Sexual Assault and USI contrary to section 47(1).

[35] On February 2nd 2021 WSgt Jacobs, Q, M and Arian Jones Crime Scene Technician visited the scene to take photographs. At the time of the taking of the photos the house where the Accused lived with M and

her daughters had been partially demolished. Q pointed out certain things to WSgt. Jacobs and Arian Jones and seven photographs were taken of various portions of the partially demolished structure.

Case for the Defence

[36] The Accused gave a dock statement at trial and called one witness, his brother Jesus Pena, in support of his defence of alibi. In his dock statement the Accused denied the charges against him and indicated that he was not at home when these incidents were alleged to have taken place. He indicated that he was fishing with his brother at the time and when he was not fishing he would stay at his brother's home. He almost never came home to M because there was always problems between them and fights.

[37] Jesus Pena testified that he is a fisherman. In June of 2020 he took his crew out to catch lobsters. His brother the Accused was a member of that crew. During the 1st month they usually worked 5-6 days for the week then he would come in for two days for provisions such as food, ice and gasoline and then head back out again. After the 1st month he took 3 or 4 days when he came back for provisions before heading back out. During that lobster season, the Accused worked with him from the 10th June 2020 to the 22nd or 23rd December 2020. Jesus Pena indicated that he would take about 3-4 trips out to catch lobsters for the month during the season. After about every 3 trips the Accused would return to Orange Walk and Jesus Pena didn't know what he did when he went to Orange Walk. At the end of September he returned to Orange Walk and returned before the start of October for the conch season. After that the Accused next left on the 23rd December 2020.

Analysis

[38] The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove, The Court also reminds itself that the obligation is on the Crown to prove beyond a reasonable doubt the guilt of the Accused i.e. the Crown must lead evidence so that the Court is sure of the guilt of the Accused. If there is any reasonable doubt the Court is duty bound to acquit him.

[39] The Accused in this case opted to give a statement from the dock. The Court is duty bound to consider it and to give it such weight as it thinks fit when deliberating on the evidence. The Court reminds itself that this is the Accused's right, however the fact that he has not been cross examined may make his dock statement less cogent than sworn evidence. However, it is material which may be considered and may show the evidence in a different light.

[40] The Court is reminded of the approach suggested by our apex Court, the Caribbean Court of Justice (CCJ) in **Dionicio Salazar v R**[8]. The Court will therefore consider the prosecution's evidence first. If the evidence for the Crown seems strong enough to carry a conviction, the Court then will consider the case for the Defence to see whether any reasonable doubt arises. If reasonable doubt arises or the Court accepts the case for the Accused, the Court must acquit the Accused. If the Court rejects the case for the Accused, the Court must still then return to the case for the Crown and consider the totality of the evidence before coming to a final decision.

[41] In considering the evidence, the Court must also assess the credibility and reliability of the witnesses. Credibility refers to a witness's honesty or sincerity. Reliability on the other hand is about the accuracy of the witness's testimony where the Court must scrutinize the witness' ability to observe, recall and recount events[9]. In order to properly assess credibility and reliability the Court must examine inconsistencies, discrepancies and any implausibility that arises on the evidence. The Court need not comb the record for inconsistencies or contradictions[10].

[42] If there are inconsistencies and discrepancies, the Court must consider whether they are material and if they can be resolved on the evidence. The Court reminds itself that it must consider whether the 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. If there are any unresolved material inconsistencies or discrepancies this would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The cumulative effect of these inconsistencies or discrepancies on a witness's credit and reliability is also important for the Court's consideration. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that bit.

[43] The Court directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of believability. This is not to say that the telling of lies on oath is a trifling thing. The Court further reminds itself that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the lie and the reason for the lie. The Court may still convict if it is sure that the material parts of the evidence are true. The Court in that

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[8] [2019] CCJ 15 (AJ)
[9] R v Kruk 2024 SCC 7 (Supreme Court of Canada) at para 146
[10] August et al v R [2018] 3 LRC 552 at para 60

regard relies on the decision of the CCJ in **James Fields v The State**[11] in relation to evaluating testimony involving intentional lies.

[44] In addition to examining the general credibility and reliability of witnesses, this is a case which encompasses recognition evidence by Q and by her mother M. Even though this is a case of recognition and the defence at trial is alibi and fabrication which places credibility at the forefront of the issues to be resolved, the Court does not find that this case falls into the category of exceptional cases where the Court should not direct itself in accordance with the guidance in **R v Turnbull**[12]. The importance of a Turnbull direction even in cases of recognition was recognized by the Privy Council in **Pop v R**[13], a case arising out of Belize, where the Privy Council approved the following statement of the law from the Board in **Shand v R**[14]:

> '**The importance in identification cases of giving the *Turnbull* warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases**. It is, however, accepted that **no precise form of words need be used as long as the essential elements of the warning are pointed out** to the jury. **The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *Turnbull*.**' [Emphasis added].

[45] The Court must therefore consider carefully the circumstances of the recognition of the Accused as the person who assaulted and had sexual intercourse with Q on the occasions identified. The Court must look carefully at the circumstances of the recognition in deciding whether this witness is an honest witness and whether the recognition evidence can be relied on bearing in mind that a mistaken witness can be a convincing one. The Court further reminds itself even in cases of recognition of close friends and relative mistakes can be made.

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[11] [2023] CCJ 13 (AJ) BB at paras 33-38
[12] (1977) QB 224
[13] (2003) 63 WIR 18
[14] [1996] 1 ALL ER 511

[46] The Court in assessing the evidence must also analyse the evidence dispassionately, clinically, fairly, within the boundaries of the law and with the aid of its human experiences and common sense[15] while avoiding myths and stereotypes.

[47] The Crown also relies on expert medical evidence to prove their case on the charges of Unlawful Sexual Intercourse. The Court accordingly reminds itself that it is not bound to accept the opinion of the expert witness and is free to accept or reject the evidence of the expert in coming to any conclusions on the evidence. The Court also reminds itself of the fact that the medical evidence cannot answer the ultimate question in this case which is whether the Accused had unlawful sexual intercourse with Q. Rather the medical evidence goes to the issue of whether there was penetration of the vagina as alleged by Q. The Court also reminds itself that in deciding what weight, if any, to attach to the expert's evidence, the Court may take into account their qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

Is Q the person named on the indictment as the Virtual Complainant?

[48] An issue was raised by the Defence in closing submissions but which was not raised on the Defence case nor put in cross examination to any of the witnesses for the Crown. Q in her evidence identified herself when giving evidence by using her mother's maiden name as her last name. The Defence contends that she is not the same person listed in the indictment and as a result the Crown has failed to prove a crucial element of the charge against the Accused.

[49] The Court accepts that Q gave a different surname when giving evidence than the last name stated on the indictment however the Court still rejects this belated submission by the Defence as the Crown has established to the satisfaction of the Court that Q is the person identified on the indictment. While when Q testified she did give a different surname, the Court notes that the surname given is the surname of her mother M and the surname on the indictment was included by Q in the full name that she gave when asked to state her name at the beginning of her examination in chief. Further, M testified during her evidence in chief that her daughter's name was the name on the indictment. This was not challenged by the Defence during cross examination. While there is an inconsistency between Q and M as to what her exact name is, it is not material. The evidence clearly establishes Q as the person who is named as the virtual complainant on the indictment.

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[15] Kruk at paras 151-156

[50] The Court does have the power to amend an indictment at any time including right before the verdict. However, the Court does not think it necessary that the Court exercises its power to amend in this case as for the reasons stated above the Court finds that the submission by the Defence is without merit.

[51] Having rejected this submission the Court will now proceed to assess the evidence to see whether the Crown has established its case against the Accused beyond a reasonable doubt in accordance with the guidance in **Salazar**. In assessing the evidence, the Court will consider the case for the Crown on each count separately and then, if necessary consider the case for the Defence before coming to its findings.

General observations with respect to the evidence of virtual complainant Q

[52] Q in testifying appeared to the Court to be quiet, reserved and hesitant at times. She was forthright in some of her answers and reticent in others. She took her time to answer questions and was able to indicate when she didn't remember certain events or when she needed time to compose herself. There was nothing in her demeanour which made the Court feel disquiet about her veracity. At times Q was very emotional in giving her testimony exhibiting signs of crying and the Court is careful to emphasize that this exhibition of emotion does not automatically make the Court think that she is any more or less credible or reliable. The Court will assess her evidence in the same dispassionate manner that it would approach all of the evidence and it is only after the Court feels sure that Q is honest and reliable that the Court will decide what weight, if any, it will attach to the displays of emotion.

[53] The Court notes that Q was 15 when she testified and that she was even younger at the time of the incident. In assessing her evidence the Court notes that she was testifying about events that allegedly occur when she was an eleven and twelve year old child. The Court reminds itself that the age of Q at the time of testifying does not automatically mean that her word is any more or less reliable than that of an adult. The Court must assess Q's evidence in the same dispassionate and clinical way that it would assess any other evidence in the case.

[54] The Court as a tribunal of fact, in assessing the evidence, must bear in mind the following which are matters of common sense and human experience[16]:

a) 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

[16] **The Crown Court Compendium, Part I, Jury and Trial Management and Summing Up**, (Eng.) June 2022, para 10-28.

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.

b) 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.

c) 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.

d) 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.

e) 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.

f) All these things 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.

[55] The nature of the complaint that is being made by Q is also relevant as she is testifying to multiple alleged sexual offences. In that regard, the Court must guard against making certain assumptions, which are again, matters of common sense and human experience:

a) Experience shows that people react differently to the trauma of a serious sexual assault or attack of a sexual nature, that there is no one classic response.

b) some may complain immediately whilst others may feel shame and shock and not complain for some time; and

c) A late complaint does not necessarily mean it is a false complaint, nor does an early complaint mean a true complaint. A judge is entitled to have regard to the shame and embarrassment which may arise from sexual assault[17] particularly by a close family member or relative.

[56] In respect of the complaint made by Q to M in October 2020 the Court notes that **s96** of **the Evidence Act** provides for the reception into evidence of a complaint made soon after the commission of a sexual offence. This evidence is introduced to support the consistency of the alleged victim but not in proof of the offence. However per **R v Osborne**[18] in order for a complaint to be admissible it must have been made voluntarily and not as a result of leading or intimidatory questioning. The confirmation given by Q to M of the assault came after M gave Q "two lashings" because she initially denied the accusation. While this confirmation was made the next day after the assault, the Court is of the opinion that because of the circumstances under which the complaint was made it does not constitute recent complaint for the purposes of **section 96** of **the Evidence Act**. The Court therefore will not use this evidence to support the consistency of Q in its deliberation.

[57] The Court also recognizes that there are proven lies in Q's testimony where she lies to her mother initially and tells her that the Accused didn't touch her and then lies again when she is hit by her mother and says yes he touched her but it was the first time. Q accepted that she had lied to her mother but explained however that she lied because she was afraid that her mother would go to prison. This inconsistency is material as it directly impacts on the credibility of Q as she has been shown to be untruthful on at least one occasion on the topic of the Accused touching her inappropriately and it may seem illogical/implausible that she would not divulge everything to her mother upon her inquiry.

[58] The Court has reviewed the evidence and does not consider that the inconsistency robs Q of credibility entirely. It may seem illogical to an adult that Q would not seize upon the opportunity to tell her mother what happened between herself and the Accused previously. However, the Court reminds itself that at the time of the incident Q was 12 years old, still a child and thus may not have formed the same rational response that an adult has. The Court also considered the explanation given by Q as to why she lied and the Court does not find it incredible or unreasonable that a 12 year old after being threatened would act in such a manner if she assumed that by lying she would be protecting her parent.

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[17] **Criminal Bench Book for Barbados, Belize and Guyana** February 2023 at p 631

[18] 1 KB 551

[59] However the Court considers that while the lies do not rob Q of credibility entirely, they do concern the central issues that the Court has to consider which are whether the Accused sexual assaulted or had unlawful sexual intercourse with Q. The telling of these lies were not on trivial matters but whether the Accused had in fact touched her and whether it had happened before. There is also the omission to tell M that the Accused had intercourse with her on four occasions prior to October 2020. In those circumstances, the Court thinks it prudent to direct itself to exercise caution before acting on the evidence of Q and to look carefully at it before accepting it. Further the Court may, although this is not absolutely required, also look to see if there are other corroborative items of evidence which lend support to the witness' account.

Undisputed facts

[60] It is clear from the evidence that the following are undisputed facts in this case:

a) Q was born on the 11th July 2008 and at the time of the alleged incidents she was eleven years of age initially and then turned twelve in the month of July 2020.
b) The Accused and M were in a common law relationship for approximately two years which encompassed the period June – December 2020.
c) During the course of that common law relationship they lived together with M's three children of whom Q was the eldest. They lived in a house that was on land that belonged to the family of the Accused.
d) That house was a one room structure with two bedrooms that were divided by curtains. There were two beds, one in each corner of the house in the respective bedrooms. There was one light in the center of the home and between the two bedrooms there was also a couch. The bathroom of the house was situated on the outside of the home and the toilet was some distance away but in the same yard.
e) The Accused was arrested on the 23rd December 2020 and charged on the 24th December 2020.
f) The Accused Noel Pena was a fisherman would go out to sea to fish and work with his brother on his boat during lobster and conch season.
g) Q was examined by Dr. Lesly Mendez and presented with several multiple complete rolled hymenal tears.
h) The Accused was arrested and charged on the 24th December 2020 for the offences of Sexual Assault and USI contrary to section 47(1).

Count 1: Sexual Assault

[61] On this count the Crown's case of sexual assault against the Accused is based solely on the evidence of Q. The Court must therefore assess the reliability and honesty of Q in determining whether the evidence led by the Crown on the 1st count of sexual assault is strong enough to carry a conviction.

[62] The Court will now look specifically at the elements of the offence to see whether the evidence put forward by the Crown on this count is strong enough to carry a conviction:

a) The Accused touched Q

Q's testimony is that the Accused touched her on her right thigh with his toes while she was seated in the van and helping him fix it. The Accused was initially stooping close to her as he fixed the vehicle but then reclined and touched her leg with his foot for a few seconds in an up and down motion. He was three to four feet away from her when this happened. He didn't say anything to her while touching her. Q further testified that she was able to see the Accused as it was in the morning and she was able to see him clearly from the light in the van. After he touched her he then threatened her and told her not to say anything to her mother or he would put her mother in prison.

The Court has carefully considered the recognition evidence of Q examining the following:

a) **Length of the observation**: Q and the Accused were the only persons in the van for some time as she assisted him by handing him tools.
b) **Distance**: Q was three to four feet away from the Accused before he stretched out his feet and touched her thigh.
c) **The lighting conditions**: There was light coming into the van as it was during the day and the van was outside in the yard.
d) **Any impediments that obstructed Q's observation**: the van was gutted and without seats at the time so there was nothing to obstruct Q's view. The Accused and Q were also as indicated before the only persons in the van.
e) **Knowledge of the Accused prior to the incident**: the Accused was known to Q as she lived with him for almost two years prior to this incident.

The Court has considered as a specific weakness of the recognition evidence the following:

a) There was a significant lapse of time between the incident and when Q eventually reported it around the 24th December 2020. Q testified however that the reason she didn't say anything immediately after the Accused touched her thigh is because he said to her that if she told her mother he would have her sent to prison.

The Court reminds itself that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However, while the report was made late that was explained by Q and accordingly the Court considers that Q's opportunities for observation of the Accused on this occasion are sufficiently strong to dispel in the mind of the court the possibility of mistake.

b) The touching was intentional

Looked at in isolation the touching of Q's leg with his toes in an up and down motion for a few seconds in the van in close proximity while fixing the van may seem innocuous and unintentional as contended by the Defence. However the threat that came from the Accused shortly thereafter adds further context to the Accused's action and provides strong evidence of his intention. The threat provides clear evidence that the act was intentional as its only purpose would have been to silence Q and hide the Accused's intentional act.

c) The touching was sexual in nature

The Code prescribes that in deciding whether a touch is sexual in nature for the purposes of sexual assault, the Court ought *inter alia* to have regard to the nature of the touching, the circumstances of the commission of the touching and the purpose behind it. The touch was not accompanied by vulgar words or obscene sounds or gestures so the court must look further at the incident in its totality to ascertain whether the touching was sexual. The touch involved an action akin to a caress on Q's thigh, it was done while Q was alone with the Accused and was accompanied by a threat from the Accused to force the silence of Q which all point toward the touch being sexual in nature.

d) The Accused knew or could have with reasonable diligence, found out that Q was under 16 or that he knew she was not consenting or had no reasonable belief in her consent

The Accused lived with Q, her mother and her siblings for approximately two years prior to June 2020. The Accused therefore saw Q when she was a nine year old child attending primary school up to the time of the incident. Further, the making of the threat is clear evidence that the Accused knew that Q did not consent to the touch on her leg as it was made in an attempt to silence her.

[63] The Court on its analysis of the evidence on this count finds that Q is an honest witness. The Court has carefully scrutinised her evidence approaching it with caution and found that in addition to being an honest witness she is also a reliable witness. The Court does not consider that the late making of the complaint diminishes the credibility or reliability of Q on this count as Q has provided a plausible explanation for the late reporting as the threat from the Accused was still operating on her mind. The Court has considered whether she could be honest but mistaken and finds that the circumstances of her recognition of the Accused are sufficient to dispel in the Court's mind on the Crown's case, the possibility of mistaken recognition.

[64] The Court has carefully looked at each element of the offence in light of its findings with respect to Q's veracity and reliability and is of the opinion that the evidence of the Crown on Count 1 (sexual assault) is strong enough to carry a conviction. Accordingly the Court will now proceed to consider the case for the Defence on this Count to see if any reasonable doubt arises.

Counts 2, 3, 4 and 5 – USI contrary to section 47(1)

[65] For the offence of **USI contrary to section 47(1)** the Crown has to prove two things as itemized above i.e. penetration of the vagina of Q by the Accused of the slightest degree and that Q was under the age of fourteen at the time of the offence. The parties agreed that Q's date of birth was the 11th July 2008. This makes Q eleven years of age at the time of the first two or three incidents and twelve thereafter for the remainder of the incidents. The Court accepts the age of Q at the time of the alleged incidents.

[66] Therefore what is left for determination on these counts is whether the Accused had sexual intercourse with Q as alleged.

[67] On this issue the Crown relies on the account of Q and the agreed medical evidence from Dr. Lesly Mendez. The agreed evidence of Dr. Mendez shows that there was a damaged hymen with multiple rolled hymenal tears which supports Q's allegations that there was penetration. The Court is careful to remind itself that Dr. Mendez's evidence cannot decide the ultimate question which is whether it was the Accused who penetrated Q. That answer can only come from Q's evidence as there were no other

witnesses to the alleged acts. The Court will therefore examine Q's evidence in determining whether the evidence led by the Crown on each count of Unlawful Sexual Intercourse is strong enough to carry a conviction.

Count 2

[68] On this count Q testified that the Accused inserted his penis in her vagina when she went outside to wash her hands in the month of June 2020. Q had gone outside to wash her hands because the Accused had told her to warm the food that was there before it spoilt. The Accused came close to her and she started to feel afraid as he had touched her before. The Accused then put his hand underneath her blouse and fondled her breasts. He then took down her clothes and started touching her vagina. Thereafter he penetrated her. The penetration lasted for "maybe a few minutes or maybe a few seconds" she was not sure. After the Accused finished having sex with her, he again threatened her that if she said anything he would put her mother in prison. The Accused had sex with her while they were standing and facing each other. The incident occurred at night but she was able to see him because of the light from the house that came through the window that was right next to them.

[69] The legal burden in a criminal trial is on the Crown to satisfy the Court the Accused is guilty of all of the elements of the offence beyond reasonable doubt. This means that the Crown must lead sufficient evidence on each element to satisfy the Court so that it is sure that the offence has been proved against the Accused beyond reasonable doubt.

[70] In light of the Crown's burden there is a specific implausibility that concerned the Court in its deliberation on this count. In describing how the incident occurred Q indicated that the Accused had sex with her facing her while they were both standing. The Court notes that at this time Q was a young girl of tender age and was described by M as being a skinny small girl. The Accused at that time was already an adult male who was described by Q at the time of the incidents as thin and tall. There was obviously a height difference between the two. The description given by Q makes it difficult to understand how the act of sexual intercourse could have occurred between the two of them in a standing position.

[71] The Court considered whether this implausibility was a result of a fabrication by Q but the Court having assessed her evidence in totality found Q to be an honest witness and the implausibility to likely be a result of a child's inability to express the way in which they have experienced a traumatic incident. The Court in that regard must make such allowances.

[72] Notwithstanding that allowance being made, an evidential gap is an evidential gap. Even after making allowances for the age of Q at the time of the giving of the evidence and the time of the incident, the evidence is such that the Court would be engaging in speculation in establishing in its mind how the act occurred. The Crown unfortunately did not explore this aspect of the evidence any further and this implausibility is left unexplained and unanswered.

[73] This implausibility directly impacts the reliability of Q on the issue of penetration and the Court's deliberation on whether the evidence of the Crown on this count is strong enough to carry a conviction for USI. The gap in the evidence is such that the Court on this Count finds after approaching the evidence with caution that Q while honest is an unreliable witness on the issue of the penetration of her vagina. The Court is unable to rely on the description of the incident given in court and accordingly as Q's evidence is the only evidence upon which this charge is founded, finds that the evidence of Unlawful Sexual Intercourse is insufficient to carry a conviction.

[74] However, the Court's analysis on this count does not stop there. The Court is mindful of **s136** of the **Indictable Procedure Act** which reads as follows:

> "Every count of an indictment shall be deemed divisible, and if the commission of the crime charged, as is described in the enactment creating the crime, or as charged in the count, includes the commission of any other crime, the accused person may be convicted of any crime so included which is proved, although the whole crime charged is not proved, or he may be convicted of an attempt to commit any crime so included."

S136 therefore empowers the Court to convict an Accused person of an available lesser included/alternative offence even though the substantive charge on the indictment has not been proven. This is so whether counsel for either side has asked for the lesser included/alternative offence to be considered. The duty is on the Court to recognize the situations where in the interests of justice a lesser included/alternative offence ought to be left for consideration and to either direct the jury or itself as to whether such an offence has been made out.

[75] The rationale for the power given to the Court under **s136** was aptly explained by Lord Bingham in **R v Coutts**[19] a decision of the House of Lords:

> "**In any criminal prosecution for a serious offence there is an important public interest in the outcome (see R v Fairbanks [1986] 1 WLR 1202 at 1206). The public interest is that, following a fairly conducted**

[19] [2006] UKHL 39 para 12

> **trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged.** The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge. (see Von Starck v R [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275; Hunter v R [2003] UKPC 69 at [27], [2004] 2 LRC 719 at [27])."

[76] What is meant by the phrase lesser included/alternative offence was helpfully examined in the **R v Simpson**[20], a case arising out of the Supreme Court of Ontario where the Ontario Court of Appeal was called upon to interpret section 589 of their Criminal Code, a section in *pari materia* with **s136** of the **Indictable Procedure Act**. The question before the Court was whether a count charging attempted murder includes the offences of causing bodily harm, or any other "lesser" offences, where the count does not particularize the means used to commit the offence. In examining the question the Court of Appeal gave the following guidance:

> "20 The decisions interpreting the meaning of "an included offence" under the present s. 589(1) (a) and its predecessors reflect 'two complementary notions or principles. **Firstly, an "included offence" is part of the main offence. The offence charged as described either in the enactment creating the offence, or as charged in the count, must contain the essential elements of the offence said to be included**: see Fergusson v. The Queen, [1962] S.C.R. 229; R. v. Ovcaric, (1973), 11 C.C.C. (2d) 565 at p. 568; Juneau v. The Queen (1972), 16 C.R.N.S. 268 at p. 270; R. v. Kay, [1958] O.W.N. 478; R. v. Carey (1973), 10 C.C. C. (2d) 330 at p. 333.
>
> 21 **In Fergusson v. The Queen, supra, Taschereau J. (as he then was), delivering the judgment of the Supreme Court of Canada, said at p. 233:**
>
> **The count must therefore include but not necessarily mention the commission of another offence, but the latter must be a lesser offence than the offence charged. The expression 'lesser offence' is a 'part of an offence' which is charged, and it must necessarily include some elements of the 'major offence',**

[20] [1981] OJ no. 23

but be lacking in some of the essentials, without which the major offence would be incomplete. Rex v. Louie Yee [51 C.C.C. 405]

22 **The second operative principle governing the meaning of an "included offence" is that the offence charged, as described either in the enactment creating the offence or as charged in the count, must be sufficient to inform the accused of the included offences which he must meet**. It will be observed that subsection (3) (insofar as it empowers the jury on a charge of murder to convict of infanticide), and subsections (4) and (5) of s. 589 empower the jury or the court, as the case may be, in the circumstances mentioned, to convict the accused of certain offences which are not "included offences" within s. 589(1) (a). Where an offence is declared by the statute to be an included offence, the accused is, of course, put on notice that he must meet it. **[Emphasis mine]**.

[77]The Court also approved the following statement of principle on the operation of s589 at paragraph 26:

26 In R. v. Harmer and Miller (1977), 33 C.C.C. (2d) 17, Evans J.A. (as he then was), after referring to s. 589(1), said at p. 19:

The section clearly contemplates situations in which, although the whole offence charged is not proved, the accused may be convicted of some other offence created by the Criminal Code which is established by the evidence. Those other offences fall into three categories:

(a) Offences included in the enactment creating the offence charged e.g., indecent assault in a charge of rape;

(b) Offences included by statute e.g., those offences specified in s-ss. (4) and (5) of s. 589 and attempts, s. 587;

(c) Offences which become included by the addition of apt words of description to the principal charge.

It is the last category which gives rise to difficulties. An accused is entitled to know from the indictment the offence or offences with which he is faced in order that he may not be prejudiced in his defence.

In cases falling within the first two categories the accused is put on notice with respect to the charges which he faces, since an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence as described in the enactment creating it, as well as those offences of which the accused may be convicted by virtue of express statutory provisions.

For an offence to be an included offence within the third category the charge must be so worded that the accused is afforded reasonable notice of the offence or offences alleged to be included in the principal offence charged. Moreover, the offence must be one which is properly included in the count.

[78] In the opinion of the Court, following the guidance in **Simpson**, Sexual Assault is a lesser included/alternative offence to the crime of USI contrary to section 47(1). This is because the offence of Sexual Assault which is a touching of a sexual nature without consent or where consent can be invalidated by the age of the victim is necessarily committed in the course of the commission of the principal offence of USI contrary to the Code. The act of sexual intercourse by its very nature involves a touching of the victim in a sexual manner. Under the Code any consent given by a victim of Sexual Assault under the age of 16 is invalidated by operation of law unless the Accused could not with reasonable diligence have ascertained that invalidity. Similarly, while there is no requirement to prove consent or lack thereof under USI any consent that arises on the evidence is also invalidated by the age of the victim as the age of consent in Belize is 16. In the mind of the Court, upon indictment, an Accused charged with USI contrary to the Code would be well aware that a lesser included offence is that of Sexual Assault and is placed on notice by the charge itself.

[79] The Accused in this matter and his Counsel would therefore have been placed on notice of the lesser offence by the very nature of the offence charged. Although this matter was not raised by Counsel for either side at trial or in their closing submissions, the Court considers that having regard to the evidence, in the interests of justice, the lesser included/alternative offence of Sexual Assault falls to be considered.

[80] In analysing the evidence on this count the Court has considered carefully the following aspects of the recognition evidence of Q:

a) **Length of the observation**: Q had the Accused under observation while he was outside in the hammock and then when he came in fondled her breasts, took down her clothes and touched her vagina while facing her.

b) **Distance**: The Accused was face to face with her when he fondled her breasts and touched her vagina. While Q did not say how long the Accused touched her for, the Court notes that Q indicates that she had the Accused under observation for some time while he was fondling her breast. She also had him under observation when he took down her clothes and started touching her vagina.

c) **Lighting conditions**: The identification was made at night and the light that allowed her to see the Accused came through the glass window

d) **Any impediments that obstructed Q's observation**: Nothing obstructed the ability of Q to see the Accused as he was face to face with her

e) **Knowledge of the Accused**: the Accused was known to Q as she had lived with him for almost two years prior to this incident.

[81] The Court has considered as a specific weakness of the recognition evidence the following:

a) The incident happened at night (no specific time was given) and the only source of light that Q highlighted was the light that came from the single bulb in the center of the home. The light was not shining directly where the Accused and Q were standing as they were outside but rather the light extended peripherally through the glass windows in the house.
b) There was a significant lapse of time between the incident and when Q eventually reported it around the 6th December 2020. Q testified however that the reason she didn't say anything immediately after the Accused had touched her is because the threat that the Accused had made about sending her mother to prison if she told was operating on her mind.

[82] The Court has again approached the evidence of Q with caution and in the mind of the Court there is evidence strong enough to carry a conviction which shows that the Accused intentionally touched the breasts and vagina of Q on a day in August 2020. While there may be insufficient evidence to prove the element of penetration to ground a charge of USI the Court has carefully considered the recognition evidence of Q and found that Q is both an honest and reliable witness when she says that she recognized the Accused as he fondled her breasts and her vagina. The circumstances of the recognition are sufficient in the Court's mind to dispel the possibility of mistake, even with the less than ideal lighting, particularly with the Accused being face to face with Q as he touched her breast and her vagina. The very nature of the Act required that the Accused be in sufficiently close proximity which would have aided Q in recognizing him.

[83] Upon further careful analysis the Court finds there is evidence strong enough to carry a conviction to show that that the Accused knew that Q was under the age of 16 and that he also knew that she was not consenting to the touching of her breasts and vagina. The issuance of the threat yet again to Q when he was finished, if the Court accepts it, is cogent and possibly compelling evidence indicating that the Accused knew Q was not consenting as its only purpose could have been to ensure her silence.

[84] Accordingly, while the Court does not think that the Crown has met its burden on the charge of USI contrary to section 47(1) on this count, the Court will consider the case for the Defence on this count to see whether any reasonable doubt arises on the offence of Sexual Assault.

Count 3

[85] On count 3 Q testified that the Accused came into her room while her mother and sisters were sleeping. He put his hand underneath her blouse and started touching her breasts. He then took down her underwear and his pants and climbed on the bed where he put his penis in her vagina. He then had sexual intercourse with her for about a minute and then left. She was able to see him during the incident as the light that was in the center of the house was on still.

[86] The Court has carefully considered the following in respect of the recognition evidence of Q:

a) **The length of the observation**: Q had the Accused under observation for some time while he fondled her breasts and undressed. While the specific time wasn't stated, it was clearly more than a fleeting glance.
b) **The distance from which the observation was made**: the Accused was standing next to the bed when fondling her breasts and then laying on top of her and face to face with her when he penetrated her vagina for a minute or so before leaving.
c) **The lighting conditions**: the bedroom was lit by the single bulb in the center of the home
d) **Obstructions to Q's observation of the Accused**: There was nothing impeding the view of Q as she looked at the Accused
e) **Knowledge of the Accused prior to the incident**: The Accused was known to Q as she had lived with him for almost two years prior to this incident.

[87] On this count it is a specific weakness of the recognition evidence to be that the incident happened at night and the only source of light that Q highlighted was the light that came from the single bulb in the center of the home. This light would have been further obscured by the curtains that were meant to add privacy to the bedrooms. It would be fair to say that the lighting conditions were average.

[88] The significant lapse of time between this incident and when Q eventually reported it around the 6th December 2020 is also another weakness that permeates throughout the entirety of the allegations against the Accused and applies here. The Court notes Q's explanation that the reason she didn't say anything immediately after the incident because the threat that the Accused had made about sending her mother to prison if she told was still operative on her mind.

[89] An implausibility was raised by the Defence in closing submissions with respect to the ability of the Accused to have intercourse with Q while her sisters were in the bed. Upon careful examination however

the Court does not find that act implausible. In Q's account, the Accused initially comes into the room and spends some time playing with her breasts and undressing her and then has sexual intercourse with her for a minute or so. The Accused appears to have been careful not to say anything to Q nor did Q herself raise an alarm to alert her sisters or her mother. The fact that they were not aroused by the activity may lean more towards the depth of their sleep rather than any inability of the Accused to do what he did. The Court also notes that M testified that her daughters were all small and skinny and could all fit on and sleep in the bed.

[90] In her evidence on this count the Court after careful deliberation finds that Q is an honest witness. The Court does not find that the lies told to her mother later in October nor the late reporting of the incident strip Q of believability.

[91] In the Court's mind on this count Q is also a reliable witness. The Court has carefully considered Q's evidence on this Count reminding itself that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However the Court considers that while there are weaknesses highlighted in the recognition evidence, Q's opportunities for observation of the Accused on this occasion are sufficiently strong to dispel in the mind of the court the possibility of mistake. The Court has also looked at the implausibility raised by the Defence and rejected it for the reasons mentioned above.

[92] The evidence of Dr. Lesly Mendez as indicated above is indicative that there was penetration of Q's vagina and lends support in that regard to Q's evidence on this count.

[93] The Court is therefore of the opinion that the evidence of the Crown on Count 3 (USI) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

Count 4

[94] On this count Q testified that in the month of August 2020 the Accused again had sexual intercourse with her outside their home. This incident occurred during the day and when her sisters were inside and her mother had gone to Town to run an errand. The incident took place in the bathroom where she had gone to wash the dishes. Q indicated that the Accused came into the bathroom and put his hand under her blouse and started touching her breast. He then put his hand under her skirt. He took down her

undergarments and took down his pants. He started touching her vagina, pulled her towards him and inserted his penis in her vagina for a few seconds.

[95] The Court notes that there are aspects of the recognition evidence on this count that are strong such as that it occurred during the day in a bathroom that was uncovered except for cloth sacks that were used as a makeshift roof. Thus there was ample lighting in the Court's mind for Q to observe the Accused if she could. Q also knew the Accused for almost two years prior to the incident. Further the nature of the incident is such that the Accused would have been in close proximity to Q thereby reducing the possibility of a mistake in the recognition.

[96] However, the Court notes that while Q testifies that the Accused was the one who inserted his penis into her vagina for a few seconds, the Court is still obligated to scrutinize this recognition evidence. The evidence does not assist the Court on a crucial issue i.e. how Q was able to see that the assailant on the day in question was the Accused. The evidence does not disclose whether Q was facing her assailant when she felt someone touch her or at all during the incident or whether her back was turned. While a Court is generally able to draw inferences from the evidence which assist in allowing it to draw particular conclusions, a Court must be careful not to speculate. This Court cannot assume that Q was facing the assailant during the incident in the bathroom because it is equally likely from the evidence that she was not facing the assailant. If she was not facing the assailant then her ability to identify the assailant as the Accused would be significantly disadvantaged as opposed to if she was facing them directly unless there was an indication on the evidence, of Q being able to identify the assailant by any other means such as his voice, his smell or any distinguishing features. There was no such indication.

[97] The Court considers that the failure of the Crown to lead evidence on how Q was able to see that the assailant was the Accused on the day in August 2020 impacts the reliability of Q and the Court's deliberation on whether the evidence of the Crown on this count is strong enough to carry a conviction. The gap in the evidence is such is that the Court on this Count finds that Q while honest is an unreliable witness.

[98] A further evidential gap also arises on this count where Q indicates that the sexual intercourse occurred while she and the Accused were standing. The Court has already addressed the height difference between the Q and the Accused and the fact that such evidence without more makes it difficult for the Court to understand, without speculating, how the sexual act itself occurred. The Court similarly as with its reasoning on Count 2 does not think that this evidential gap is as a result of fabrication by Q but rather

likely be a result of a child's inability to fully express the way in which they have experienced a traumatic incident.

[99] This gap when coupled with the evidential gap in the recognition evidence means that the Court is unable to rely on the description of the incident given in court and accordingly, as Q's evidence is the only evidence upon which this charge is founded, finds that the evidence on Count 4 is insufficient to carry a conviction.

[100] While the offence of Sexual Assault is also available under this count of USI contrary to section 47(1), the issue with identification also affects the lesser included/alternative offence of Sexual Assault. The Court is still left with the same unanswered questions as to how Q was able to see the Accused on the day in August. Accordingly, the Court finds that the evidence on Count 4 is insufficient to carry a conviction.

Count 5 (USI)

[101] On this count Q testified that on a night in September 2020 after she had finished doing her school work and went to bed the Accused had sexual intercourse with her again. Her mother and sisters were already asleep as she went to bed after them. He came into her room, put his hand under her blouse. He started touching her breast and her underwear. He then started touching her vagina with his finger. He then took his pants down to his knees and climbed on the bed. He opened her legs and had sexual intercourse with her for a few minutes. He then left the room after dressing himself.

[102] The Court has carefully considered the following aspects of the recognition evidence of Q:

a) **The length of the observation**: Q had the Accused under observation while he was touching her breasts and vagina, undressing her, then undressing himself and then placing his penis in her vagina for a few minutes.

b) **The distance from which the observation was made**: Q didn't give an exact distance but the Court can infer from her evidence that he was extremely close to her in order to be able to fondle her initially and then penetrate her vagina with his penis.

c) **The lighting conditions**: The bedroom was lit by the single light bulb in the center of the one bedroom home.

d) **Any impediments to the observations made by Q**: There was nothing obstructing Q's view of the Accused.

e) **Knowledge of the Accused prior to the incident**: the Accused was known to Q as she had lived with him for almost two years prior to this incident.

[103] The Court has considered as a specific weakness of the recognition evidence to be that the incident happened at night and the only source of light that Q highlighted was the light that came from the single bulb in the center of the home.

[104] The Court has also considered as a specific weakness that there was a significant lapse of time between the incident and when Q eventually reported it around the 6th December 2020. Q testified however that the reason she didn't say anything immediately after the Accused had sexual intercourse with her is because the threat that the Accused had made about sending her mother to prison if she told was still operative on her mind.

[105] The implausibility of the Accused being able to have sexual intercourse with Q on the bed while her sisters slept was also raised in respect of this count by the Defence. The Court notes that the sexual intercourse in this regard is reported by Q as being a few minutes. The Court does not think this is an exact estimate of the time as Q was not timing the incident but rather instead an indication of how long it felt to her as a child. The Court in its reasoning on Count 3 has already rejected this implausibility and that reasoning equally applies to the contention on Count 5.

[106] The Court finds that Q is an honest witness and reliable witness in her evidence on this count. While the lighting may not have been ideal, Q had some time to observe the person who was touching her, pulling down her clothes and then inserting his penis into her vagina. The Court accepts that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However the Court considers that while there are weaknesses in the recognition evidence, Q's opportunities for observation of the Accused on this occasion are sufficiently strong to dispel in the mind of the court the possibility of mistake.

[107] The evidence of Dr. Lesly Mendez that upon examination the hymen was absent and there were several hymenal tears, to the Court, is indicative that there was penetration of Q's vagina.

[108] The Court is therefore of the opinion that the evidence of the Crown on Count 5 (USI) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

Count 6 Sexual Assault

[109] The Crown's evidence on the 6th Count which is also for Sexual Assault comes primarily from the evidence of Q and M. In its analysis the Court will therefore assess the credibility and reliability of both witnesses in respect of their evidence on this count.

[110] The Court in analysing their evidence will filter it through the lens of the elements of the offence to see whether the evidence put forward by the Crown on this count is strong enough to carry a conviction:

a) The Accused touched Q

The evidence from both Q and M is that the Accused touched Q on the night in question while helping her and her sisters with her homework. The touching according to Q was in an up and down motion and according to M was in the nature of a caress. The Court notes however that there are material inconsistencies between both witnesses as Q never mentions that the Accused attempted to lift her skirt and put his foot under her skirt while M says this is how the incident occurred. Both witnesses also differ on the length of time that the touching occurred. Q said it happened for a few seconds and she moved away while M said that it continued for one to two minutes. They are however consistent on the fact that the Accused touched the thigh of Q on that night.

The Court has looked carefully at the recognition evidence of Q particularly the following elements:

a) **Length of the observation**: Q was together with the Accused doing homework for some time prior to the incident,
b) **Distance**: the Accused was a short distance from Q when he asked her to move closer. The Court can infer from the photographs and the evidence of Q and M as to the size of the home, that the space between the two bedrooms where the Accused and the girls were doing homework was small. Further, the Accused's leg was extended towards Q when touching her.
c) **Lighting**: there was lighting directly overhead from the light from the bulb in the center of the home
d) **Impediments to Q's observations**: there was nothing obstructing Q when she saw and felt the Accused touch her.
e) **Knowledge of the Accused prior to this incident**: The Court also notes that Accused was known to Q as she had lived with him for almost two years prior to this incident.

After scrutinizing the circumstances of the recognition, the Court considers that the circumstances of the recognition of Q are sufficient to dispel in the mind of the Court, the possibility of mistake.

The Court on this issue accepts the evidence of Q and does not rely on the evidence of M as to the circumstances of the assault particularly where the Accused touched and for how long. The Court acknowledges that different witnesses can have different versions of an incident depending on their vantage point of the incident however the Court is unable to reconcile the two versions given by Q and M. The Court is of the opinion that M's evidence seems to be an embellishment of what, if anything, she actually observed. In those circumstances, the Court will place no reliance on her evidence as to the nature and length of the touching.

f) The touching was intentional

It is clear from Q's evidence that the touching was intentional as the Accused told her to draw nearer and when she didn't draw nearer, the Accused then lay down more with his feet deliberately pointing to where Q sat and touched her leg with his feet.

g) The touching was sexual in nature

From Q's evidence it is also clear that the touching was sexual in nature. The Court accepts that the touch was not accompanied by any words or obscene gestures which would readily indicate its purpose but the nature of the act itself which was an up and down motion akin to a caress of Q's leg as well as the timing of it when coupled with the fact that the Accused was clearly trying to hide his actions by asking Q to draw closer so that no one would notice, indicates that the touching was sexual in nature.

h) The Accused knew or could have with reasonable diligence, found out that Q was under 16 or that he knew she was not consenting or had no reasonable belief in her consent

The Accused lived with Q, her mother and her siblings for approximately two years prior to June 2020. The Accused therefore saw Q when she was a nine year old child attending primary school up to the time of the incident. Further, the fact that the VC refused to draw nearer to him so that he would not be able to touch her and that the Accused took it upon himself to draw nearer to her so that he could touch, indicates that he was aware that she was not consenting.

The alleged confession of the Accused to M

[111] The Crown also offered in support of Count 6 an alleged confession made to M by the Accused sometime after the incident when they had moved from the premises where they lived with his family. M testified that when they had moved the Accused had accepted that he touched her daughter and that it may have been because he smoked too much and that it would not happen again. Again here, the Court places no reliance on this alleged confession made to M for several reasons. Firstly, the Court finds it strange that after denying it initially, even after being slapped, the Accused would spontaneously just admit to his actions. Secondly M strikes the Court as a conscientious mother who cares for her children but yet after the Accused allegedly admits to touching her daughter in such a manner, she does nothing with that information and sits on it. The Court therefore does not believe M when she says the Accused confessed to her and accordingly places no weight on that evidence in its deliberation.

[112] The Court therefore having decided to place no reliance on the evidence of M as it pertains to this count is left solely with the evidence of Q which it again approaches with caution. The Court on its analysis of the evidence on this count finds that Q's credibility is not diminished even with the admitted lies told to her mother M. The Court reminds itself that the telling of a lie or multiple lies does not necessarily strip a witness of believability and that is so in this case. The Court after carefully scrutinizing Q's evidence finds that in addition to being an honest witness she is also a reliable witness. The Court has considered whether she could be honest but mistaken in her recognition of the Accused and finds that the circumstances of her recognition of the Accused are sufficient to dispel in the Court's mind on the Crown's case, the possibility of mistaken recognition.

[113] The Court is therefore of the opinion that the evidence of the Crown on Count 6 (Sexual Assault) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

The Case for the Defence

[114] The Accused opted to give a statement from the dock and not to call witnesses. The Court reminds itself that this is the Accused's right however the fact that he has not been cross examined may make his dock statement less cogent than sworn evidence. However it is material which may be considered and may show the evidence in a different light.

[115] The Defence relied upon by the Accused is that of alibi particularly that he was in Bella Vista village or on his brother's boat at sea at the time of the offences. The Court reminds itself that the Accused has

no duty to prove that he was elsewhere at the time of the offence, the burden remains on the Crown to establish beyond a reasonable doubt that the Accused committed the acts charged on the indictment. Part of this burden includes the need to prove that the Accused was not elsewhere but was at the scene committing the crimes alleged. Even if the Court rejects the alibi or finds the alibi to be false, this by itself does not prove that the Accused was in Trial Farm Village Orange Walk committing the offences.

[116] The Court also reminds itself that false alibis may be put forward for many reasons by an Accused person, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the Court is satisfied that the sole reason for the fabrication is to deceive the Court and there is no other explanation for its being put forward can fabrication provide any support for identification evidence.

[117] Even if the Court rejects the alibi evidence of the Accused, the Court must still go back to the Crown's case to see whether they have led sufficient evidence so that the Court is sure that the Accused committed the acts alleged.

[118] The Court rejects the dock statement of the Accused for the following reasons:

a) Even if the Court accepts that the Accused was working with his brother Jose Pena during the months June – December 2020 the Accused himself in his dock statement is inconsistent as to whether he go back to his home during that time. Initially the Accused indicated that when he went home he would not encounter M at home which places him as leaving his brother Jose Pena from to time and going back to the house where the incidents occurred. Later on in his dock statement however, the Accused then says that when he did leave from work with his brother, he stayed by another brother but not in Orange Walk as every time he came home there were a lot of fights with M.

b) The Court also finds it illogical that if his relationship with M was as tumultuous as he claimed, instead of ending the relationship and asking her to leave his family property he instead allows her to stay until the end of the year. In fact it seems that the relationship was only terminated after the Accused was arrested and charged.

[119] The fact that the Court has rejected the dock statement of the Accused however does not automatically mean that the Court rejects his defence of alibi. The Court must still go onto consider the

alibi evidence of Jose Pena to see whether the Court accepts the evidence of alibi or is unsure so that any reasonable doubt arises.

[120] The Court after carefully considering the evidence of Jose Pena was unable to rely on it for the following reasons:

a) Jose Pena was inconsistent as to the whereabouts of his brother throughout the entire period. He initially claimed that his brother Noel Pena was with him from 10th June 2020 to 22nd or 23rd December 2020 thus placing the Accused in Bella Vista Village in the South of Belize and therefore not present in Orange Walk when the alleged offences were committed. Under cross examination however, Jose Pena admitted that Noel Pena would come home every three trips to Orange Walk and when he left his side he could not say what he did or where he was. These trips coincided with the times that Jose would berth his ship for a few days to restock and refuel before heading out.

b) Further while there is no obligation on a witness to come forward to provide information to the authorities, when asked why he never gave information to the Police Jose Pena said that he told the police officers where he lived in Bella Vista but not in Orange Walk. The Court found this aspect of the witness' evidence illogical and unbelievable as he knew that his brother was charged by Police Officers in an entirely different division but chose to speak to officers who had nothing to do with this investigation. This evidence to the mind of the Court was an attempt to bolster his testimony and lacked any credibility.

[121] Further even if the Court accepted the evidence of Jose Pena, his own evidence places the Accused in Orange Walk at the end of every three trips out to sea at which point Jose could not account for his brother's whereabouts. Thus on his own evidence there is the possibility that the Accused could have been in Orange Walk at the time of the commission of the offences.

[122] The Court therefore rejects the defence of Alibi put forward by the Accused and returns to the Crown's case to consider the totality of the evidence before making its findings.

The Court's findings

Count 4

[123] The Court finds the Accused not guilty of Count 4 of the Indictment as the Court is not satisfied so that is sure that the Accused committed the act of USI contrary to section 47(1) as alleged.

Count 1

[124] Having now considered the totality of the evidence. The Court is satisfied so that it is sure:

a) The Accused touched the thigh of Q in the month of June 2020. The Court accepts Q's evidence in this regard.
b) The touching was intentional: The Court accepts as true Q's evidence that the Accused intentionally stretched out his feet and rubbed her thigh in an up and down motion.
c) The touching was sexual in nature: The Court accepts Q's evidence and finds after looking at the nature of the touch, the circumstances of the touch and the intention of the Accused when doing so that the touch was sexual in nature.
d) The Accused knew the Q was not consenting or had no reasonable belief in her consent: The Court finds that the Accused knew that Q was under the age of 16. The Court further finds that the issuance of the threat by the Accused shows the Accused knew Q was not consenting shows that he knew Q was not consenting when he assaulted her and therefore the threat was issued to keep her quiet and compliant.

[125] The Court therefore finds the Accused guilty of Count 1 of the indictment.

Count 2

[126] Having considered the totality of the evidence, the Court is satisfied so that it is sure:

a) The Accused touched the breasts and vagina of Q in the month of June 2020. The Court accepts Q's evidence in this regard.
b) The touching was intentional: The Court accepts as true Q's evidence that the Accused intentionally reached under her blouse and fondled her breasts. He then took down her clothes and touched her vagina.
c) The touching was sexual in nature: The Court accepts Q's evidence and finds after looking at the nature of the touch, the circumstances of the touch and the intention of the Accused when doing so that the touch was sexual in nature.

d) The Accused knew the Q was not consenting or had no reasonable belief in her consent: The Court finds that the Accused knew that Q was under the age of 16. The Court further finds that the issuance of the threat by the Accused shows the Accused knew Q was not consenting shows that he knew Q was not consenting when he assaulted her and therefore the threat was issued to keep her quiet and compliant.

[127] The Court therefore finds the Accused guilty of the lesser included/alternative offence of Sexual Assault.

Count 3

[128] Having considered the totality of the evidence, the Court is satisfied so that it is sure:

a) The Accused had sexual intercourse with Q: the Court accepts Q's evidence that the Accused came into her and sexual intercourse with her for a minute
b) Q was under the age of 14: the Court accepts the agreed evidence of Q's date of birth

[129] The Court therefore finds the Accused guilty of Count 3 of the indictment

Count 5

[130] Having considered the totality of the evidence, the Court is satisfied so that it is sure:

a) The Accused had sexual intercourse with Q: the Court accepts Q's evidence that the Accused came into her room and had sexual intercourse with her for a few minutes.
b) Q was under the age of 14: the Court accepts the agreed evidence of Q's date of birth

[131] The Court therefore finds the Accused guilty of Count 5 on the indictment

Count 6

[132] Having now considered the totality of the evidence. The Court is satisfied so that it is sure:

a) The Accused touched the thigh of Q in the month of October 2020. The Court accepts Q's evidence in this regard.

b) The touching was intentional: The Court accepts as true Q's evidence that the Accused asked her to come closer and when she refused he intentionally stretched out his feet and rubbed her thigh in an up and down motion.

c) The touching was sexual in nature: The Court accepts Q's evidence and finds after looking at the nature of the touch, the circumstances of the touch and the intention of the Accused when doing so that the touch was sexual in nature.

d) The Accused knew the Q was not consenting or had no reasonable belief in her consent: The Court finds that the Accused knew that Q was under the age of 16. The Court further finds that the Accused knew that Q was not consenting as she refused to come closer when initially asked indicating a reluctance to have him touch her.

Disposition

[133] The Court finds Noel Pena guilty of Sexual Assault and 2 counts of Unlawful Sexual Intercourse contrary to section 47(1) as charged in the indictment. The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**[21].

Raphael Morgan

High Court Judge

Dated 25th October 2024

[21] [2020] CCJ 7 (AJ) GY at para 32.