

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C12 of 2023

BETWEEN:

THE KING

and

RU ¹

Accused

Appearances:

Ms. Cheryl-Lyn Vidal Senior Counsel, DPP and Mr Robert Lord, Crown Counsel
for the King

Mr Lynden Jones Counsel for the Accused

2024: October 30; 31

JUDGMENT

**RAPE OF A CHILD; ASSAULT OF A CHILD BY PENETRATION- JUDGE ALONE
TRIAL-DECISION**

¹ Names have been anonymized for the protection of the VC, a minor.

Introduction

[1] **NANTON, J.:** RU (hereinafter referred to as “the Accused”) was indicted for the following offences:

Count 1- Aggravated assault contrary to **Section 45 (f) of the Criminal Code**²

Count 2- Sexual Assault contrary to **Section 45 A of the Criminal Code**

Count 3- Rape contrary to **Section 46 of the Criminal Code**

Count 4 – Rape contrary to **Section 46 of the Criminal Code**

Count 5- Rape contrary to **Section 46 of the Criminal Code.**

[2] This trial by Judge Alone, therefore commenced on 30th October 2024 pursuant to **Section 65 A (2)(g) of the Indictable Procedure Act**³ . The Accused was arraigned and pleaded Not Guilty to all counts on the indictment.

[3] The Crown relied on the oral evidence of two live witnesses, agreed evidence, documentary evidence and photographs.

[4] At the close of the case for the Crown, 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 and that he could call witnesses if he so wished. The Accused opted to give an unsworn statement from the dock and called no witnesses.

[5] Closing addresses in writing were made by each side.

[6] The Court having considered the evidence in this case now gives its verdict and written reasons.

² Chapter 101 of the Substantive Laws of Belize Revised Edition 2020

³ Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

Elements of the Offences

[7] **Count 1:Aggravated Assault of an indecent nature contrary to Section 45 (f) of the Criminal Code:**

45) Every person who commits an unlawful assault of any of the following kinds, namely,

(f) indecent assault on any person, whether male or female shall be guilty of an aggravated assault and, on conviction thereof be liable to imprisonment for two years. Provided that in respect of an indecent assault upon a female or an aggravated assault upon any male child or any female, a person convicted under this section shall be liable to imprisonment for three years instead of two years.

67) (1) A person makes an assault and battery upon another person if, without the other person's consent, and with the intention of causing harm, pain, fear or annoyance to the other person, or of exciting him to anger, he forcibly touches the other person, or causes any person, animal or matter, to forcibly touch him.

(2) This definition is subject to the following provisions,

(a) Where the consent of the other person to be forcibly touched has been obtained by deceit, it suffices with respect to intention that the touch is intended to be such as to cause harm or pain, or is intended to be such as but for the consent obtained by the deceit would have been likely to cause fear or annoyance, or to excite anger. ...

(c) The slightest actual touch suffices for an assault and a battery if the intention is such as is required by this section.

[8] The Criminal Code did not then define the term "*indecent*"; however, the Court accepts the definition of indecent assault restated in **Beal v. Kelley**⁴ and often repeated and affirmed in subsequent cases, including, inter alia, **Reg. v. Leeson**⁵ which is "*an assault, accompanied with circumstances of indecency on the part of the prisoner ... towards the person alleged to have been assaulted.*"

[9] "*Indecency*" is something overtly sexual, offensive to customary standards of modesty and privacy. The test for indecency is objective **R v George**⁶ and it can be stated that an assault is indecent if right-minded persons would clearly think it was indecent **R v Court**⁷.

[10] On Count 1, the Crown must therefore prove to the satisfaction of this Court so that it is sure that:

- i. The Accused assaulted the VC, i.e. forcibly touched the VC without her consent, and with the intention of causing harm, pain, fear or annoyance to the other person, or of exciting him to anger.
- ii. That the circumstances of the assault are capable of being considered by right minded persons as indecent
- iii. The Accused intended to commit such an assault.⁸

[11] **Count 2: Sexual Assault**

i. **Section 45A of the Criminal Code**

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, anus, breast or any other part of that person's body; or*

⁴ [1951] 2 All E.R. 763, 764

⁵ (1968) 52 Cr.App.R. 185

⁶ [1956] Crim.L.R. 52

⁷ [1989] A.C. 28

⁸ R v Court

(b) that person being made to touch the person's vagina, penis, anus or breast or any other part of the person's body, commits an offence and is liable –

(ii) where that person was under sixteen years at the time the offence was committed, on summary conviction to a term of imprisonment for a term of seven years or on conviction on indictment to a term of imprisonment for twelve years.

(2) Whether a belief is reasonable is to be determined having regards to all the circumstances, including the steps the person has taken to ascertain whether the other person consents.

[12] The Court also refers to **Section 12(b) of the Criminal Code**, which removes the requirement of proving the absence of consent in the case of a person under sixteen years of age:

“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.”

[13] On Count 2, the Crown must therefore prove to the satisfaction of the Court so that it is sure that:

- i. The Accused intentionally touched the VC.
- ii. That touching was sexual in nature.
- iii. That touching was done without her consent (only necessary to be proven where the sexual assault occurred when the VC was sixteen years and above).

Counts 3, 4 and 5: Rape

[14] **Section 46** states:

Every person who commits rape or marital rape shall on conviction on indictment be imprisoned for a term which shall not be less than eight years but which may extend to imprisonment for life.

[15] **Section 71** defines rape as follows:

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

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

[16] **Section 73** is also instructive:

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.

[17] The Crown must therefore prove to the satisfaction of the Court so that it is sure that:

- i. The Accused inserted his penis into the vagina of the VC.
- ii. That penetration was done without the consent of the VC.

Specimen Counts

[18] For the first two counts, the Crown has chosen to proceed by way of specimen counts pursuant to **Section 4 of Indictable Procedure (Amendment) Act No 3 of 2022**. That section states:

(1A) Notwithstanding sub-rule (1), more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission or the victim of the offence.”

[19] Count 1 alleges that the Accused committed aggravated assaults of an indecent nature upon the VC on more than three occasions between 16th August 2010 and 19th February 2014.

[20] Count 2 alleges that the Accused engaged in a course of conduct by intentionally touching the VC in a sexual nature without her consent on more than three occasions between 18th day of February 2014 and 21st day of September, 2019.

[21] Where it is clear that it would not have been possible to charge each incident as a separate count without overloading the indictment the Crown may seek to establish the course of conduct by reference to the continuity of the offences relative to each separate count (1 and 2).

Multiple Counts

[22] The Court directs itself that there are multiple counts on the indictment, and the Court must not add all the counts together and convict or use the evidence of one count as evidence on the other. In the Court's deliberation it must consider the evidence in relation to each count separately and make a determination in relation to each separate count.⁹

Inadmissible Evidence

[23] Before embarking on an analysis of the evidence, the Court wishes to state that there was evidence that emerged from the VC's testimony relative to an incident that took place in the unpainted house. The VC stated that while her and her family lived at that house the Accused "*started to force her to suck his penis*". She recounts one specific occasion, which she referred to as "*the first time*".

[24] She said that she was in the room where they slept, and the Accused came into the room took his penis out and told her to suck it. She said that she did not know how to so he grabbed her hair and pulled her head towards him. He put his penis in her mouth and moved back and forth. The incident lasted a few minutes, and he then "jerked off" and ejaculated. She did not consent to this, and told him that she did not want to do that, but he just ignored her.

⁹ Salam (Coyseme) v R, Criminal Appeal No 5 of 2002

- [25] In its closing address, the Crown sought to rely on this evidence towards proof of Count 3 on the Indictment i.e. the offence of rape. Learned Defence Counsel also similarly referred to this evidence as being evidence probative of Count 3's allegation of rape.
- [26] However, the particulars of count 3 refers to one singular incident, which is alleged to have occurred on the 28th September, 2019 at Belize City. That date coincides with the evidence given by the VC of the incident at the hotel. Count 3 is not worded in the manner of a specimen count, but rather the particulars refer to one specific incident. The count would have been duplicitous had it sought to include these two very separately characterised incidents.
- [27] There is thus no count in the indictment alleging the incident of oral sex related by the VC as having occurred at the unpainted house in Hattieville. That incident; therefore, ought not to have been received in evidence as it is not probative of any count on the indictment. The Court; therefore, strikes out that bit of evidence as inadmissible and in seeking to render this verdict this portion of evidence has formed no part of the Court's deliberation as it is not evidence relative or probative to any of the counts.¹⁰

The Crown's Case

- [28] The Crown's case is that on more than three occasions between the 16th day of October 2010 and the 19th day of February 2014, the Accused committed assaults of an indecent nature upon the Virtual Complainant without her consent. That on more than three occasions between the 18th day of September, 2014 and the 21st September 2019, the Accused intentionally touched the Virtual Complainant without her consent, that touching being sexual in nature. The Crown further alleged that on three occasions: the 28th September 2019; an unknown date between 30th

¹⁰ FW v the Queen (Belize) Cr App No 18 of 2011

September and 31st October 2019, and on the 31st October, 2019, the Accused had sexual intercourse with the Virtual Complainant without her consent.

[29] The Crown relied on the oral evidence of the following live witnesses whom they called in the order shown below:

- 1) **WPC Janel Myers- Investigating Officer**
- 2) **VC –Virtual Complainant**

[30] The following items of documentary evidence were admitted:

- 1) **JM 1- Medico-Legal report**
- 2) **JM 2- Birth Certificate of the VC**

[31] The depositions of the following witnesses were read as agreed evidence pursuant to **Section 106 of the Evidence Act**¹¹:

- 1) Robert Henry – Crime Scene Technician with Photographs **RHA 1-4**
RHB 1-7
- 2) Austin Aranda- Arresting Officer

Special Measures

[32] The Crown made an application pursuant to **Section 22(1) of the Protection of Witnesses Act 2022** for special measures. The Crown contended that the Virtual Complainant was in a state of distress by having to give her testimony in the presence of the Accused and requested that she give her evidence with a screen between herself and the Accused, so that she would not have to view his face while testifying.

[33] The Defence did not object to the Crown's application.

¹¹ Chapter 95 Evidence Act of the Laws of Belize Revised Edition 2020

[34] The Court exercised its discretion to permit special measures to be employed in this case. The Court considered the nature of the VC's testimony, and the fact that the special measure requested would not have materially affected the Accused's right to confront his Accuser, as he would still be permitted, through his Counsel, to cross examine the witness. The use of the screen also would not affect the Court's ability as Fact Finder to assess the witness' demeanour as she gave evidence. In all the circumstances, the Court found that the adoption of the special measure would strike a fair balance between protecting the interest of the VC without prejudicing the right of the Accused to a fair trial.

[35] The Court; therefore, having considered the interests of justice and fairness to all parties, exercised its discretion to allow the VC to give her evidence with a screen between her and the Accused. The screen was set up in such a way that the Virtual Complainant and the Accused were at all times visible to the Court and to the attorneys; however, they were not visible to each other.

[36] The Court has not taken this against the Accused in any way at all, and it has not affected the Court's assessment of the evidence.

The Virtual Complainant

[37] The VC testified that when she had turned 8 years old on 15th August 2010 she lived in Hattieville with her mother, her two younger sisters and the Accused, who was her mother's boyfriend. They lived in a house located in the Accused's family yard. At that time the Accused started to touch her by grabbing her butt or touching her vagina underneath her clothing. He would do this when no one else was around. Her siblings would be sent to the shop, or in one of the other houses and her mother would be at work.

[38] She never consented to him touching her and she would ask him to stop or she would move, but he continued to touch her.

- [39] They lived in that house for about two years until they (her mother her siblings and the Accused) moved into an apartment in the Windmill area of Hattiesville. At that apartment, the Accused continued to touch her butt and her vagina without her consent by placing his hand under her clothing when no one was around.
- [40] She said that sometimes when she wouldn't allow the Accused to touch her, he would hit her on different parts of her body and sometimes in her face.
- [41] They lived in that apartment for about a year and then moved to a room behind the house of a man she knew as Jeff. At that time her mother had a son for the Accused and he accompanied them to that new home.
- [42] She said that the Accused continued to touch her on her butt and her vagina without her consent while they lived there. At that time she said that she had no privacy and that the Accused would peep at her through the holes in her bathroom while she was bathing and sometimes he would come into the bathroom and touch her and suck her breasts. He would do this when her mother and her siblings were not around.
- [43] She recalled one occasion, when the Accused was touching her she began shouting and making noise, so that Jeff could hear her but he (Jeff) never came. Later that day, she saw Jeff speaking with her mother and her mother called her outside and asked her in the presence of Jeff, whether the Accused was touching her and she replied, yes. Her mother asked her if the Accused was having sex with her and she told her, no because that had never happened. Her mother called the Accused outside and they were talking, but they never discussed it after that.
- [44] After that date, the VC said that she never told anyone about what was happening to her, because she was afraid of the Accused and felt that she would not be believed, because her mother had not believed her.

- [45] They later moved from behind Jeff's house to an unpainted house on Kamal Street in Hattieville. At that house, the Accused continued to touch her. He would suck her breast and rub on her vagina. She stated that she never consented to this. She said he would do this when no one was around, and she would be facing him when he did it.
- [46] On 28th September 2019, the VC, the Accused, and her siblings were staying at the Best Time Inn in Belize City as they came to the city for her uncle's funeral. She said that her sisters were not in the room with her at the time as they were at her grandfather's house at the time. She was alone in the room with the Accused and her two younger brothers, who were toddlers at the time and were asleep. She was on the bed texting on her phone when the Accused took her phone and saw that she had been texting a boy. He told her that he was going to tell her mom and she asked him not to. He said that she knew what she had to do for him not to tell her mother.
- [47] The Accused called her to the bathroom door; he bent her over, took down her clothes, and he tried to put his penis inside of her. She told him she did not want to do it, and that it was hurting her, but he put his hands on her mouth, because she was making noise. He held her down and put his penis inside her vagina. After a little while he stopped and then he pulled out his penis and continued to "jerk off" and then he ejaculated into a piece of clothing that was on the bed. She said that she went into the bathroom and her vagina was hurting her, and when she touched it she saw blood. The Virtual Complainant stated that up until that point she had never had sexual intercourse with anyone.
- [48] About two weeks after that incident at the Best Time Inn when they were back at home in Kamal Street, the Accused came into the room that they slept in and told her that he wanted to have sex with her. She told him that she did not want to, but he stomped her in her stomach, and still took off her clothes pulled down her pants

to her foot bent her over, and put his penis in her vagina. He did that for a while then pulled out his penis and ejaculated into a piece of clothing.

[49] On the 31st October 2019, she was in the room at Kamal Street when the Accused came into the room and told her that he wanted to have sex with her. She told him that she did not want to do it, but he insisted and pulled her off the bed. He sucked on her breast and rubbed his penis on her, and then into her vagina, and told her not to make any noise because his mother was outside in the living room sleeping. He put his penis inside her vagina for a couple minutes, and then pulled it out and ejaculated into a piece of cloth that was in the dirty clothes.

[50] She admitted that she had never told anyone what the Accused had done to her, because she was afraid of the Accused and didn't know how to tell anyone what the Accused was doing, and was afraid that no one would believe her, because her mother hadn't believed her.

[51] It was only after she told her aunt that police officers and a social worker took her to the police station and to the hospital, where a doctor checked her vagina. The officers also took her to the Best Time Inn and to the unpainted house at Kamal Street where she saw them taking photographs.

[52] Under cross examination the witness accepted that there were times that the Accused had a job, and that he would be working at the same time as her mother. She said that there were some times that her mother was at work and he was at home. She said that sometimes the Accused would get home before her mother would.

[53] She also accepted that she attended school during the 10 year period that she lived with the Accused.

[54] She agreed that she could not see 100 percent of the Accused's face when he peeped at her through the holes in the bathroom at Jeff's place; however, she knew it was him as she was very familiar with him, and sometimes he would enter the bathroom after, so that she knew it was him.

[55] She denied that the Accused and her mother would monitor her cell phone, but accepted that she would use her phone to text boys and girls. She denied ever being punished by the Accused for using her phone. She denied that the Accused would spank her as a form of punishment.

[56] The witness denied all allegations that she was fabricating her account.

Woman Police Constable #1634 Janel Myers

[57] On 18th June 2020, Officer Zuniga received a report and thereafter visited the home of the Accused.

[58] On 22nd June 2020, she met with the Virtual Complainant and her mother. On given date she witnessed Dr Navarrete perform a medical examination. At the end of that examination, Dr Navarrete handed over to her a medico legal report in the name of the Virtual Complainant. That report was tendered into evidence as **JM 1**.

[59] She also obtained a Birth Certificate from the Vital Statistics Unit in the name of the Virtual Complainant. That birth certificate was tendered into evidence as **JM 2**.

[60] Officer Myers later contacted CST Robert Henry and they proceeded to the two alleged scenes at Kamal Street, and at Best Time Inn where the CST took photographs which he submitted to her.

[61] She subsequently met with the Accused. She identified herself to him as a police officer and informed him of the report made against him, cautioned him, and gave him a copy of his rights. She swore to an information and warrant in the first instance and formally charged and cautioned him.

JM 1

[62] The medical report, which was completed by Dr Navarrete on the same date of the examination i.e. 22nd June 2020, was tendered into evidence pursuant to **Section 36 of the Evidence Act**. The findings of Dr Navarrete upon a genital examination, was that there was one complete single tear of the hymen of the VC at the 7:00 o'clock position with no scars or general injuries. His expert opinion was that the Virtual Complainant was carnally known.

JM 2

[63] The birth certificate of the VC, which was tendered into evidence states that the VC was born on 15th August, 2002.

Analysis

[64] The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court so that it is sure of the guilt of the Accused, and if there is any reasonable doubt the Court is duty bound to acquit him.

[65] The Court begins firstly with analyzing the evidence on the Crown's case, and **if** the evidence is strong enough to consider a conviction it would consider the case for the Crown, as is the required reasoning process noted by our apex court, the Caribbean Court of Justice (hereinafter "the CCJ"), in **Dioncicio Salazar v R**¹².

¹² [2019] CCJ 15 (AJ)

[66] The evidence which has been led by the Crown to make out the elements of the offence of aggravated assault (Count 1) is as follows:

- i. **The Accused assaulted the VC** – the evidence of the VC was that the Accused used to touch her by grabbing her butt or touching her vagina underneath her clothing. This touching began in 2010 when she was 8 years old and continued consistently until 2019 when she told her aunt. The VC stated that she did not consent to that forcible touching and that she would expressly tell the Accused not to do it and that sometimes he would hit her in her face or about her body.
- ii. **That the circumstances of the assault are capable of being considered by right minded persons as indecent** – the evidence of the VC was that the Accused would do this when no one else was around and the nature of that touching can only reasonably be considered to have been indecent.
- iii. **The Accused intended to commit such an assault-** It can only be reasonably inferred that the Accused had an indecent intention when he touched her in that manner this is supported by the evidence of the VC that the Accused told her not to tell anyone or that he would hurt her.

[67] The evidence which has been led by the Crown to make out the elements of the offence of sexual assault (Count 2) is as follows:

- i. **The Accused intentionally touched the VC's vagina** - the evidence of the VC was that the Accused used to touch her by grabbing her butt, or touching her vagina and her butt underneath her clothing. This touching began in 2010 when she was 8 years old and continued

consistently until 2019 when she told her aunt. Later when her breasts started to grow, the Accused would also touch her breast and suck it.

- ii. **That touching was sexual in nature** - the evidence of the nature of the touching can be only be reasonably inferred to have been sexual, this is also supported by the VC's evidence that the Accused told her not to tell anyone about what he was doing.
- iii. **That touching was done without her consent** – It should be noted that the VC would have turned 16 years old on the 15th August 2018 and as such the Crown would need to prove the absence of consent for any touching that occurred from that period onwards. The VC said that she did not at all consent to this touching and that she would expressly tell the Accused not to do it and that sometimes he would hit her in her face or about her body if she said no.

[68] The evidence which has been led by the Crown to make out the elements of the offences of rape (Counts 3, 4 and 5) is as follows:

- i. **The Accused inserted his penis into the vagina of the VC** - the evidence of the VC was that the Accused penetrated her vagina with his penis on three separate occasions: on the 28th September at Best Time Inn; two weeks subsequent on an undated occasion at the unpainted house at Hattievile; and on the 31st October, 2019 at the unpainted house at Hattievile. There is also the expert medical evidence that the VC was carnally known, that opinion was supported by Dr Navarrete's observation of a tear in the VC's hymen.
- ii. **That penetration was done without the consent of the VC** – the VC testified that on each occasion before the act of sexual penetration she told the Accused that she did not want to do it and that he forcibly put his penis into her vagina. On the first occasion he put his hands over her mouth to prevent her from screaming, on the second occasion he

kicked her in her belly and on the third occasion he told her that if she made any noise he would hurt her.

Absence of Consent

[69] It remains on the Crown to prove each element of the offence to the criminal standard. This is so; notwithstanding, that at trial the issue of consent was never a contested issue. The defence was always one of pure and complete denial. Notwithstanding, the absence of consent is an integral element of each offence save for Count 2, where the acts of sexual assault are alleged to have been committed when the VC was under the age of 16 years, and thus incapable of consenting as per **Section 12 (b) of the Criminal Code.**

[70] The Court found that the VC gave ample direct evidence of the absence of consent in each relation to each count of the indictment. As indicated above, the Court examined the issue of consent specific to each count and found that the VC testified (in relation to each count) that she would expressly tell the Accused that she did not want him to touch her, or that she did not want to have sex with him. The VC also testified that on some occasions (specified above), the Accused used physical force or threats of physical force either by muffling her screams (Count 3), hitting her (re Counts 1, 2 and 4), or threatening to hurt her (Counts 1-5).

[71] The Court additionally considers that it is not the law that the Prosecution has to show that the Complainant was either incapable of saying no or putting up some physical resistance, or did say no or put up some physical resistance.¹³ Consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent

¹³ R v Malone (1998) Crim LR 834,

involves a submission, but it by no means follows that a mere submission involves a consent.¹⁴

[72] The Court finds that the Crown has discharged the evidential burden of proof relative to the absence of consent. The direct evidence of the VC of her resistance, the force used, and threat of force coupled with the VC's immaturity, and the power dynamics between her and her then stepfather satisfies this Court that there is ample evidence to prove that there was no proper consent on each count on the indictment.

[73] The Court will discuss below whether the Court in its assessment of the VC's credibility, whether the Crown has discharged the legal burden of proof beyond reasonable doubt.

The Main Issue

[74] The Court is of the view that while it has considered the case for the Crown as a whole, the central issue for determination in analysing the Crown's case is the Court's finding as to the credibility and reliability of the VC's account.

[75] The Court will thus first consider, whether the Court accepts the testimony of the VC as honest and reliable, and if it does so accept then the Court will assess, whether the circumstances of the VCs identification of the Accused as the person who committed these acts on her on the alleged occasions is reliable. It is only if the Court is satisfied to the standard that the Court is sure that the VC is an honest and reliable witness that the Court will then consider the circumstances of the identification.

[76] The Court, in assessing credit and reliability, must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes;

¹⁴ FW v the Queen (Belize) Cr App 18 of 2011 citing with approval the dicta of Dunne LJ in R v Steven Olugboja [1981] EWCA Crim 2 (17 June 1981) at page 8

however, on the authority of the Belizean CCJ decision of **August and Anor. v R**¹⁵ that it need not comb the record for inconsistencies or contradictions. The Court directs itself that if there are inconsistencies and discrepancies; the Court must look to see if they are material and if they can be resolved on the evidence. The Court must consider whether inconsistencies or discrepancies arose for innocent reasons, for example, through faulty memory or lack of interest in what is transpiring, or if it is because the witness is lying and trying to deceive the Court. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible, it will reject either that witness's evidence entirely or that bit.

[77] The Court also directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of all believability. The Court in this regard relies upon the decision of the English Court of Appeal of **R v Fanning and Ors.**¹⁶ The Court notes 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 untruth and the reason for the lie, and may still convict if the Court is sure that the material parts of that evidence to be true. The Court in this regard relies upon the CCJ decision of **James Fields v The State**¹⁷ at paras 33-35:

"[33] The role of the jury is to evaluate the testimony of the witnesses and to determine what weight and reliability to assign to their statements. This role is crucial in the fact-finding process. In determining credibility, the jurors may have regard to the demeanour, consistency, bias or motive, prior inconsistent statements, corroborating evidence, and all the various factors a person will use in their daily life in order to assess and distinguish between truth and falsity. The fact that a witness has provided false information on one point under oath can impact the credibility of that witness and the weight given to their testimony. But once the case has been given over to the jury, it is the jury and the jury alone that has the responsibility to carefully consider the implications of the untruthfulness and evaluate how it affects

¹⁵ [2018] 3 LRC 552 at para. 60

¹⁶ [2016] 2 Cr. App. R. 19 at para. 27

¹⁷ [2023] CCJ 13 (AJ)

the overall credibility of the witness' testimony on the essential question(s) in issue.

...

[35] In all the circumstances, a proper direction to the jury in relation to intentional lies may proceed along the following lines:

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness. You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. If you find that any witness has intentionally testified falsely as to any material fact, you may disregard that witness' entire testimony. Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate. How you decide on this may depend on your view of how material to the issue is the lie. Where there are different or conflicting accounts in the evidence about a particular matter, you must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in your view their evidence is honest and accurate. When doing this you must apply the same fair standards to all witnesses, whether they were called for the prosecution or for the defence. It is entirely for you to decide what evidence you accept as reliable and what you reject as unreliable."

- [78] The Court is assisted in the legal parameters of its fact-finding function by a recent decision of the Jamaican Court of Appeal in **Vassell Douglas v R**¹⁸, per Fraser JA (Ag.) *"We have distilled from the foregoing authorities that in any trial, more so a bench trial, the judge is not required to identify all the inconsistencies or discrepancies that arise during the trial unless it is considered damaging to the Crown's case."*

Analysis: Whether the VC is an honest and credible witness

- [79] 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 sense¹⁹ while avoiding myths and stereotypes.

¹⁸ [2024] JMCA Crim 10.

¹⁹ R v Kruk 2024 SCC 7 (Supreme Court of Canada) at paras 151-156

Incidents Occurred During Childhood

[80] The Court notes firstly, that the VC was at the time of the trial an adult giving evidence relative to incidents, which began when she was just 8 years old and continued until she was 17 years old. It was not apparent that her ability to answer questions were affected by her present age as she understood Counsel's questions clearly and was able to testify in a cohesive and detailed manner. However, the Court did appreciate that the quality of her memory as to the past events may have been affected especially, since many of the allegations began when she was a very young child. The Court appreciates in this regard that a child does not have the same experiences of life, or to the same degree of understanding as that of an adult. A child's perception of the passage of time is likely to be very different to that of an adult. This was evident in the fact that the VC could not recall specific dates or times for some of the more vintage allegations, and that she narrated them in a more general manner as compared to the more recent allegations, which she recalled with striking clarity.

[81] The Court directed itself that 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, or may not be accurate. This was particularly important since the alleged conduct spanned almost a decade.

[82] Notwithstanding, the absence of details relative to specific dates and times, the Court found that the VC's evidence was otherwise detailed, especially with regard to the later events that occurred when she was older. Her evidence was coherent, logical, and straightforward.

Late Report

[83] The Court also reminds itself that the VC is testifying to alleged sexual assault/rape. The Court must be wary of making certain assumptions, which are again, matters

of common sense and human experience. Experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response. Some may complain immediately whilst others may feel shame and shock and not complain for some time; and a late complaint does not necessarily mean it is a false complaint, nor does an early complaint mean a true complaint.²⁰

[84] The incidents occurred over a period of almost 10 years and the VC did not report it. The Court is of course entitled to consider why these matters did not come to light sooner. The Defence suggest that it is because they are not true. They say that the allegations only came about months after the mother of the VC moved herself, the VC and her siblings out of the home they all shared. The suggestion is that the allegations are entirely fabricated. The argument can thus be made that had the allegations been true you would have expected a complaint to be made earlier.

[85] The VC explained her reasons for not telling anyone. She stated that she was afraid of the Accused, she explained in her evidence that the Accused had beat her and threatened her, and that she was very fearful of him. She also stated that she did not think that anyone would believe her as her own mother hadn't. She recalled one incident with her mother when they lived at Jeff's house. Her mother had confronted her about whether, the Accused had touched her and she admitted that he had, to her mother. She saw her mother speaking with the Accused; however, nothing ever came out of her admission, and it is clear that that incident *not unreasonably* fortified her conclusion that no one would believe her.

[86] It is not uncommon or unusual that a young child would feel some trepidation in making such a report against a family member, who according to the evidence of the witness was clearly a violent and domineering person, and who had in fact used violence on her during the commission of some of these acts and threatened her.

²⁰ Criminal Bench Book for Barbados, Belize and Guyana, February 2023 at p 631.

[87] It is also quite likely; however, that her having not reported it on that occasion emboldened the Perpetrator that he could try again, which according to the VC's evidence he did for several years.

Opportunity

[88] The Accused's defence, as deduced from cross examination was that the Virtual Complainant fabricated these incidents. In his unsworn statement, he advanced that he was employed throughout the almost 10 year period that the VC alleges that these incidents occurred. The inference he advances is that he did not have the opportunities to commit the offences in the manner and with the frequency described by the VC.

[89] The Court draws the inference from the evidence of the Virtual Complainant that the children were left in the care of the Accused while her mother was not at home. The Accused himself referred to an incident where the mother of the Victim had not returned home after work, and left all of the children in his care thus creating the opportunity for such acts to occur unnoticed. Therefore, whilst at first blush it may have seemed implausible for the Accused to have had that many opportunities to commit the offences in question, it is clear that there were many occasions where he was left alone with the VC either, because he came home earlier from work than her mother did, and that he would often send off the other children.

[90] Learned Defence Counsel also particularly references the incident at the hotel when the VC alleges that her little brothers, then toddlers, were asleep in the room when the Accused forcibly had sexual intercourse with her. Defence alleges that it was improbable that the VC did not scream so as to wake her siblings. The VC explained how this incident occurred quite clearly in her evidence, and the Court also referred to the layout of the room captured in the photographs admitted into evidence. There were two beds in that room. The toddlers were asleep and the Accused made the Victim lean on to the edge of the other bed close to the bathroom and put his hands

over her mouth while he forcibly penetrated her. The Accused is not a small man, it is not implausible that he would be able to stifle any sounds attempted by the VC by covering her mouth, nor that he would be able to physically overpower her into submission. The Court; therefore, rejects the Defence contention that the VC's account was implausible or unlikely.

Medical Evidence

[91] The Court 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 the VC. Rather the medical evidence goes to the issue of whether there was penetration of the vagina as alleged by the VC. 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.

[92] Dr Navarrete's observation of a tear to the VC's hymen is consistent with the VC's allegation of penetration; however, it cannot confirm who penetrated. The Court is therefore satisfied that the medical report is consistent with the VC's allegation that someone penetrated her vagina.

[93] The Court recognises that whether the VC was actually penetrated does not address the issue of identification.

Consistency

[94] The Court has carefully considered the VC's evidence to resolve the critical question of whether her evidence is credible and reliable, and the Court has analysed her

evidence to determine whether there are any inconsistencies, admitted or otherwise. The Court finds that at this stage the VC's overall account is not at all implausible, indeed, on the contrary it is internally consistent and convincing. The Court notes that if it is sure that the material parts of the VC's testimony are true and even without support it can convict the Accused.²¹

[95] The Court found that the Complainant's account was cogent and consistent. There were no material inconsistencies which affected the credibility of the VC. There was no attempt by her to gild the lily or pad her evidence when confronted with apparent weaknesses in her evidence, such as for example, her ability to see the entire face of the Perpetrator through the holes in the bathroom. The Complainant readily accepted that her visibility was limited at that point and that she knew for certain that it was the Accused when he came into the shower with her.

Distress

[96] The Court has assessed the VC's evidence in the same dispassionate manner that it would approach all of the evidence, and it is only after having come to the conclusion, that the Court feels sure that she is an honest and reliable witness, that the Court now decides what weight, if any, it will attach to the displays of emotion.

[97] The Court; therefore, considered with caution the evidential value of the Complainant's distress, particularly in this case where her distress was a prominent aspect of the VC's testimony. In this case, the VC's evidence had to be paused on several occasions to allow her to compose herself. At times the VC seemed physically uncomfortable, even attempting to rise while giving evidence.

[98] The presence or absence of emotion or distress when giving evidence is not always a good indication of whether, a person is telling the truth or not. The Court is careful not to give any undue weight to the demeanour of the VC so much, so that it

²¹ Supreme Court of Jamaica, Criminal Bench Book p. 120

displaces a proper analysis of her actual evidence. The Court has therefore, approached its consideration of the Complainant's demeanour with necessary and appropriate caution, and reminds itself that the Court must decide this case on the evidence given on oath and tested under cross examination.

[99] With that caution in mind, the Court has first considered, as Fact Finder, whether the VC's distress was genuine or feigned. The Court found her distress to be palpable and an honest and even appropriate reaction to the facts to which she was testifying. She was not distressed for every part of her testimony, but only at particular moments when the events to which she was testifying were particularly sensitive and to a person in her position shameful and embarrassing. The Court considered the VC's reaction to be especially appropriate and valid. The VC was visibly upset on the occasions when she had to relate what the Accused did to her or made her do and she was particularly and visibly angry at times when she described the absence of privacy in her home; the loss of her virginity and that she was never allowed to leave the house unlike her siblings, who were often sent out by the Accused to facilitate the acts of abuse. These events stained the VC's childhood and it struck the Court that the VC's emotional response, if believed, was expected and warranted.

[100] Having accepted that her distress while giving evidence was honest and truthful and not designed to mislead, the Court appreciates that that evidence does not necessarily mean that the Accused is guilty. It is but one factor that the Court has considered in its assessment of the totality of the VC's evidence.

[101] The Court recognises that a fabricated account may be consistent; however, the Court does not find that to be the case in this matter for the reasons which this Court has outlined above. Having considered the totality of the VC's evidence the Court finds that it is sure that the VC's account is truthful.

Circumstances of the Identification

- [102] The Court will now consider the identification evidence below.
- [103] On each of the occasions, the subject of these allegations, the VC gave detailed and cogent evidence as to lighting, distance, opportunities for observation and length of time. The Learned DPP meticulously led evidence from the VC on the Turnbull guidelines.
- [104] The VC testified that each of the incidents occurred during daytime and that light sources would either be from the windows and door, or from artificial lighting in the house.
- [105] She said that the Accused faced her on every occasion with the exception of the incident at Best Time Inn Hotel where he was to the back of her during penetration. On that occasion, he had been in the room with her for some time before and when the boys had fallen asleep he had called her over, and then told her to bend over. She would have spoken with him prior to and during the act of intercourse as she turned her head to speak with him.
- [106] The Accused, she said, was in touching distance of her and that nothing blocked her view of him on each occasion.
- [107] The Accused was someone with whom she lived in cross proximity having lived with him for a significant period of time, almost 9 years at the time of the last incident.
- [108] The Court notes that even honest witnesses can be mistaken, and even when identifying persons known to them. However, in this case the Court accepts that the VC's opportunities for observation on each occasion were exceptionally strong and sufficient to dispel the possibility of mistake.

Defence Case

- [109] The Court reminds itself that the Accused bears no burden in this matter to call witnesses or to prove anything on his defence. The Court wishes to emphasise that throughout his trial, the Accused was never under any onus to prove his defence as such there was no obligation on him to call any evidence on his own behalf.
- [110] The Court has further directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court so that it is sure of the guilt of the Accused and if there is any reasonable doubt, the Court is duty bound to acquit him. It is only if the Court rejects the Defendant's case that it returns to the Crown's case and considers the totality of the evidence and determines whether to convict.
- [111] The Court has considered the case for the Defence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing his credit and reliability, it must examine inconsistencies, discrepancies, and any implausibility in his evidence in the same manner as it has considered the evidence of every other witness in this case.

Analysis: Unsworn Statement

- [112] 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 to so do; 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.
- [113] In his unsworn statement from the dock, the Accused stated that throughout the 11 year period that the VC lived with him he was working full time. He stated that from

2008 when the VC and her family moved in with him, he was working as a bus conductor from Hattieville to Belize City. Every morning he would leave Hattieville around 6:30 a.m. and would not return to Hattieville until around 7:30 p.m. He worked as a bus conductor until around 2012. He then worked with a company in Hattieville doing geo-physical work for about a year and a half and would leave home at 5:30 a.m. and return at around 5:30 p.m. After quitting that job he worked with a fast food business and the owner would pick him up at around 5:00 a.m. He worked there for around 6 months. In 2015, he started working as a Porter at the San Pedro Express. He would leave with the VC's mother on mornings at around 5:45 a.m. and they would return home together at around 6:30 p.m.

[114] Although never expressly stated, the Court deduces from his account that the Accused was suggesting that he could not have been alone with the VC for the periods that she alleged that he committed these acts. The Court; however, notes from his own account that there would have been gaps in his employment as he transitioned from one job to the other. The Court also notes that the times of his departure and arrival up until the job at San Pedro Express meant that he returned home some time before the VC's mother. The Court also notes that while working with the San Pedro Express, he had 3 days off over the span of 14 days which meant that he would not be at work all day for at least three days per week.

[115] The time required to commit these types of incidents particularly the indecent touching is not extensive. It was therefore not impossible nor unlikely, even if the Court were to accept the Accused's statement, that in the 11 year period that the VC lived with him that he would have had frequent opportunities where he was alone with the Virtual Complaint without her mother being present.

[116] The Accused also stated that when the VC and her siblings moved out from his home in 2019; she cried and hugged him and they remained in contact and even visited his home on three occasions after to spend time with him and their brothers. The last of those occasions was on 28th May 2020 when they spent the entire

weekend. The Court deduces from this statement that the Defence was suggesting that, had he committed these acts why would the VC cry when she was leaving and why would she continue to visit him. The VC had already accepted in her evidence in chief that she did cry when she was being moved, but that was because she was thinking about her brothers whom she was leaving behind. The Court finds the VC's response to be quite reasonable and expected of a child of her age being separated from the only life she knew. Secondly, the issue of visiting the family; the Court notes that this specific allegation was never put to the VC in cross examination so the Court never had an opportunity to hear the witness' response to that contention to assess its veracity. Notwithstanding, the VC did state that when she left the Accused's home in 2019 she never returned.

[117] The Court can accord whatever weight it deems appropriate to the Accused's unsworn statement, which was untested under cross examination. The Court noted that although the Accused gave details as to his absence from the home for work, he never actually denied having committed these offences. The Court reminds itself; however, that he is not under any obligation to assert his innocence or to say anything at all for that matter as it is the Crown that must prove its case against him. The Court did not find that the Accused's statement from the dock detracted or cast any doubt on the strength of the Crown's case.

Delay Direction

[118] The Court appreciates that the delay placed the Defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case especially, with regard to the earlier allegations when the defence was essentially a simple denial i.e. the Defendant was saying that he had not acted as alleged. The longer the delay, the more difficult meeting the allegation often becomes, because of fading memories, and evidence is no longer available in this case such as evidence of an alibi for example. Indeed, it may be unclear what has been lost.

[119] In considering the central question of whether the Prosecution has proved the Defendant's guilt, the Court has borne in mind the prejudice that the significant delay can occasion.

[120] In this case, the Accused, in his unsworn statement was able to recall details of his employment throughout the period of the allegations. He was not able to give specific dates, but his account sufficiently articulated his position that he did not have the opportunities to commit these offences although, short of advancing an alibi.

[121] The Court notes that no notice of alibi was filed, nor did the Defendant or his Counsel specifically rely on same. Had a complaint been made at the time the sexual assaults were said to have happened, the Accused might have been able to show he was elsewhere, or to call a witness who would have assisted his case. He may not have even appreciated what evidence has been lost after such a period of time. As there are no specific dates for when some of the events are said to have happened, as there might have been if a prompt complaint had been made. The Accused cannot say he was elsewhere or say that there was someone else in his company or call a witness to confirm that. The Court has therefore taken the delay into account in the Defendant's favour in its assessment of whether or not the Prosecution has made me sure of guilt

Totality of the Evidence

[122] In this case, having placed no weight to the Defence's case; I must return to the Crown's case. The Court now looks at the totality of the evidence to reach a final decision.

[123] The Court finds that the weight it attaches to the strong recognition evidence made in overall good conditions by the VC, whom the Court considered to be honest and reliable further results in the rejection of the Defence. In this regard the Court

relies on the decision of our Court of Appeal in **Apolonio Kiow v R**²². The Court rejects the Defence case on the strength of the evidence on the Crown's case, which it is permitted to do on the authority of a decision of the Privy Council in the Dominican case of **Bally Sheng Balson v The State**²³.

[124] The Court has examined the VC's evidence bearing in mind the burden and standard of proof of the Crown to prove its case beyond a reasonable doubt. The Court is satisfied so that it is sure, for the reasons given above, that the VC's evidence on the material issues is truthful and credible and was made in reliable circumstances. The Court has rejected the case for the Accused, for the reasons given above. The Court is satisfied so that is sure and accepts that the Crown has discharged its burden in relation to each element of each of the five counts on the indictment.

Disposition

[125] The Court finds the Accused Guilty of the following Counts on the Indictment:

- i. Count 1- Aggravated Assault contrary to Section 45 (f) of the Criminal Code.
- ii. Count 2- Sexual Assault contrary to Section 45 A of the Criminal Code.
- iii. Count 3- Rape contrary to Section 46 of the Criminal Code.
- iv. Count 4- Rape contrary to Section 46 of the Criminal Code.
- v. Count 5- Rape contrary to Section 46 of the Criminal Code.

[126] The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**²⁴.

[127] The Court orders the following reports:

- i. Psychiatric Evaluation Report

²² Crim. App. 10/20

²³ [2005] 4 LRC 147 at para 38

²⁴ [2020] CCJ 7 (AJ) GY at para 32

- ii. Social Inquiry Report
- iii. Victim Impact statement
- iv. Criminal Antecedent History

Candace Nanton

High Court Judge

Senior Courts Belize

Dated: 25th November 2024