

IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N1/2023

BETWEEN

THE KING

and

NERY GARCIA

Accused

**Before:**

The Honourable Mr. Justice Raphael Morgan

**Appearances:**

Ms. L. Cuello for the Crown

Mr. Leslie Hamilton for the Accused

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2024: June 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup>, 26<sup>th</sup>  
July 2<sup>nd</sup>, 30<sup>th</sup>  
Sept 24<sup>th</sup>  
Oct 8<sup>th</sup>, 17<sup>th</sup>  
Nov 14<sup>th</sup>  
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**VERDICT – REASONS FOR DECISION – RAPE OF A CHILD**

[1] **MORGAN, J.:** Nery Garcia (“the Accused”) was indicted on one count of Rape of a Child contrary to section 47A of the **Criminal Code**<sup>1</sup> (“the Code”).

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<sup>1</sup> Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020

- [2] On the sole count of the indictment the Accused is alleged to have on more than three occasions raped A<sup>2</sup>, a person under the age of 16 years, between the 31<sup>st</sup> day of March 2020 and the 1<sup>st</sup> day of April 2021, in Progreso Village, in the Corozal District.
- [3] The trial began with the arraignment of the Accused on the 19<sup>th</sup> June, 2024 before this Court pursuant to section **65A (2) (g)** of the **Indictable Procedure Act**<sup>3</sup> (the IPA).
- [4] At trial the Crown relied on the evidence of five viva-voce witnesses including the evidence of A, the virtual complainant, agreed evidence pursuant to **section 106 of the Evidence Act**<sup>4</sup> and photographs taken of the crime scene and documentary evidence in the form of a birth certificate.
- [5] 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 three witnesses in support of his alibi.
- [6] The Court then heard addresses from Counsel and reserved its judgement.
- [7] The Court having considered the evidence and the arguments from Counsel, now gives its verdict and reasons.

### **Elements of the Offence**

- [8] The statutory framework for the charge of Rape of a Child contained within the Code. **Section 47A** states:

**Every person who rapes another person and that person is under the age of sixteen years commits an offence** and is liable on conviction on indictment to–

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<sup>2</sup> Anonymized as she was a minor at the time of the offence

<sup>3</sup> Cap 96 of the Substantive Laws of Belize Revised Edition 2020

<sup>4</sup> Cap 95 of the Substantive Laws of Belize Revised Edition 2020

(a) imprisonment for not less than fifteen years, but may extend to life, where that other person was under the age of fourteen years at the time the offence was committed [emphasis mine]

[9] **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.**

[10] **Section 12** provides in so far as it is applicable:

(c) **A consent shall be void if it be obtained by means of deceit or of duress.....**

(g) **A consent shall be deemed to have been obtained by means of deceit or of duress or of the undue exercise of authority, or to have been given by reason of a mistake of fact, if it would have been refused but for such deceit, exercise of authority or mistake, as the case may be.**

[11] **Section 15** defines duress as follows:

**“Duress” means any force, harm, constraint or threat, used with intent to cause a person against his will to do or to abstain from doing any act.**

[12] **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.** [emphasis mine]

[13] **Section 71(2)** also provides as follows:

(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.

[14] This section is applicable whenever an Accused person is charged with rape. In that regard the Court is guided by the decision of the Court of Appeal in **Oscar Escalante and Carlos Reyes v R**<sup>5</sup>. While the section speaks to a jury, with the passage of **section 65 A** of the IPA, it is equally applicable to a judge sitting alone exercising their function as a tribunal of fact.

[15] The Crown must therefore prove the following with respect to the charges of Rape of a Child:

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<sup>5</sup> Criminal Appeals nos. 1 and 2 of 1991

- i. The accused carnally knew A, i.e. inserted his penis into her vagina.
- ii. That penetration was done without the consent of A, or any consent given was obtained by duress or without any reasonable grounds for belief that A was consenting.
- iii. That at the time of the penetration A was under the age of sixteen years.

## **The Evidence**

### **The Crown's Case**

**[16]**The Court heard evidence from the following witnesses for the Crown viva-voce:

- a) A the virtual complainant
- b) B the father of the VC
- c) C the mother of the VC
- d) Dr. Jose Samos
- e) WPC Azalia Gomes – the Police Complainant

**[17]**The parties agreed to the evidence of the following witnesses:

- a) Scenes of Crime Technician Leidiana Cantun
- b) PC 1302 Teofilo Marroquin
- c) Renan Villanueva Justice of the Peace
- d) Cruz Majil Justice of the Peace
- e) Woman Corporal Belky Gilharry

**[18]**The case for the Crown is that A was born on the 30<sup>th</sup> May, 2008. In April 2020 A and her family moved to a house about 200 feet from the Adventist School in Progreso Village having previously lived with R's grandmother. A's family consisted of her mother C, her father B and two younger siblings a sister and a brother. On the right-hand side of the house that they moved into was the Adventist school which was about 200 feet away. There was another house to the side and to the back of the house was the house of the Accused. The distance from the Accused's house to A's home was about 100 feet. There was a concrete wall between the house where A lived and the Adventist school. There was however an opening in the wall that was about two feet in width which allowed persons to pass through without having to walk around. There was a wire fence separating her house from the Accused's house. From April 2020, A

would see the Accused every day, sometimes she would see him for half day, sometimes all day because he used to go help her father build the house.

**[19]** On a day in April 2020 around 5 pm A was playing with her siblings when she felt thirsty. She told her siblings that she was going to drink water at the Accused's house because the water that her mother had given her was finished. She went over to the house of the Accused, said Good Afternoon and the Accused came out. She asked if she could have some water, and he said yes. The Accused told her to go inside as the water was in the kitchen. He took a glass from the shelf, handed it her and she drank the water thereafter setting the glass on the table. She began to leave the house, but the Accused was standing by the door. She told him thanks and the Accused said that he wanted to talk to her. She then asked him for what. The Accused then asked if he could give her a hug and she answered no. He started holding her hands and she got mad and told him to let her go. The Accused then told her that if she shouts or says anything to her mother, he said that he was going to take her little sister and touch her vagina. The Accused then held her hand and took her to the room. He laid her down on the bed, facing up and lifted her dress. He then brought down her tights and her panties. He then undressed taking down his pants and boxers. He stood in front of her and then came on the bed, taking his penis and placing it in her vagina. When the Accused did this he was in front of A, and she was able to see him through the light that was coming in from the window. He then started moving up and down causing her pain for about 15-20 minutes. He then stopped, came off the bed and put back on his pants and boxers. A felt like she was wet, checked and saw that she was bleeding. She put on her panties and tights and then went out of the room. The Accused was sitting on the sofa when she came out of the room and told her that if she said anything he was going to take her little sister because he was always at her house. A went out and played with her siblings as if nothing had happened. She didn't tell anyone about that incident as she was afraid that the Accused would take her sister.

**[20]** During the months of April to November 2020 A would go to see the Accused and have sexual intercourse every two days because the Accused threatened her that if she didn't come to see him, he would take her little sister. She would go to see him at his house. She would go to see him during the day and no one else would be around at the time that she would go.

[21] On a day in January 2021 at around 4 pm C sent A to buy flour at the shop. While A was making her way to the shop, she heard someone call her. She turned to look and saw that it was the Accused on a black and yellow motorbike. He told her that he wanted to see her at 8 pm that night in the bathroom of the Adventist School. A told him that she could not go because she needed to help her mother. The Accused told her "I don't care, find a way how to come, because you know what will happen, I will take your little sister". A returned home. Her mother cooked and then went to sleep. Around 8pm, A checked the time as her father had not gotten home yet. She made sure her mother was sleeping and then she left the house. She went over to the Adventist school using the opening in the fence and walked towards the bathroom. She saw a light flashing from a phone, and it was the Accused. The Accused told her to come into the bathroom and the Accused took off the flashlight from his phone. Prior to the Accused taking off the flashlight she was able to see him for about five to ten seconds. He lifted her dress, brought down her tights and her panties. He was seated by the sewerage. He put her on top of him. He took his penis and put it inside her vagina. He started moving up and down causing her pain for about twenty minutes. She told him to stop but he didn't. After twenty minutes passed, he told her to stand up. He lit the flashlight on his phone and put on his boxers and pants. A felt that she was wet, and she put on her panties and tights. The Accused told her he was leaving and threatened her that if she said anything to anyone, he would take her little sister. She didn't tell anyone about this incident because of the threat made by the Accused.

[22] On a day in the last week of March 2021 A went to the shop again. She once more heard someone calling her name. She turned to look, and it was the Accused. He told her that he wanted to see her at 5 o'clock in the morning in the bathroom of the school. A told him that she didn't know if she could go. The Accused told her to find a way to come because her little sister would go to the shop all the time, hinting that he could take her. A agreed to meet him and went to the shop. After returning from the shop, A felt uncomfortable all day. C enquired from her what was wrong, and she told her nothing. A spent the day, according to her, praying that the day would not end so that she would not have to go see the Accused. C got up at 4 am the next morning and made food and then went back to sleep. B took the bus and left for work. A checked the time and realized it was 5 am. She then made her way to the Adventist School through the open section of the fence. A went to the bathroom and met the Accused there. A was able to see the Accused because there was an opening to the top of the roof of the bathroom from which light could come in. The Accused took down his pants and his boxers. He lifted her skirt and took down her

tights and panties. He put A on top of him with her legs open. He then took his penis and put it inside her vagina. He started moving up and down causing her a lot of pain. A told him to stop but he refused. It lasted for about 15 to 20 minutes. After twenty minutes he told her to stand up. A stood up and got dressed and the Accused put on his clothes. Then they both left the bathroom. A told no one about this incident because of the repeated threats of the Accused.

**[23]** On the 15<sup>th</sup> April 2021 at around 8 pm, B arrived and told A and C that he wanted to talk with them both. He first spoke to C and then indicated that he wanted to speak to A. A testified that B asked her if it was her that used to go on the other side to the bathroom. A said no initially. He asked her again and she said yes. B then asked who she would go to the bathroom with and A responded that she would go with the Accused. Then A told B that she was having sexual intercourse with the Accused. B asked why it was happening and A responded that the Accused had threatened to take her little sister. B then spoke with C and told her to take A to the police station the following day. C took A to the police station on the following day where A gave a statement. In cross examination it was suggested to A that she named the Accused as the person she was in a sexual relationship only after being pressured by B. This was denied by both A and B.

**[24]** B however testified that he came home with the intention of what was happening between herself and the Accused as he got information that they used to speak at the edge of the corner shop. A told him nothing happened initially and then he told her that he had information regarding the two of them. That is when she said yes, she was having sex with the Accused, but it only happened once. B then asked her to please tell him the truth and to confirm it was just once. Then A said no, it had been happening since they started repairing the house in 2020. He then told her don't worry; he will see what he can do. They then went back into the house as they were outside when they were speaking. When he got into the house, after the children went to sleep, he told C about what A had said and indicated that A had told him that the Accused had threatened to use her little sister and kill C, A and him if A said anything.

**[25]** On the 26<sup>th</sup> April, 2021 A was accompanied by C and WPC Azalia Gomes to the Corozal Community Hospital where she was medically examined by Dr. Jose Samos. The medical examination was conducted in the presence of P. Dr Samos' found that there was an offensive vaginal discharge. He took a swab which was sent for analysis. There was also an absence of hymen tissue to the posterior

fourchette. The fourchette is the strap of skin located at the base of the entrance to the vagina. There were also healed hymenal transections to the 3 o'clock, 5 o'clock, 7 o'clock and 9 o'clock positions. These healed hymenal transections were healed defects of a previous injury and extended all the way to the vaginal opening. There was also a notch at the 6 o'clock position. A notch is V shaped scar tissue that does not go all the way to the base of the vaginal opening. There were no signs of acute or recent injuries. Dr. Samos concluded that his findings were indicative of a chronic penetrating vaginal trauma. Chronic meaning any injury that was two months or older. An acute injury is within the first two weeks. These injuries could have been caused by any penetrating object including a penis or an artificial or foreign object.

**[26]** On the 8<sup>th</sup> May 2021, PC Teofilo Marroquin informed WPC Azalia Gomes that the Accused was in custody. PC Marroquin indicated that he was at the Accused's residence in Progreso Village. The Accused at that time was living at a farm that was located about half mile outside the village of Progreso. WPC Gomes upon arriving informed the Accused of the report made against him, cautioned him and informed him of his constitutional rights. She also gave him the opportunity to speak to his common law wife who was also there. She escorted the Accused to the Corozal Police Station. Upon arrival at the police station, she again informed him of his constitutional rights and read to him the suspect rights in custody acknowledgement form which he signed. The Accused was given a copy of the suspect rights in custody form. WPC Gomes then requested the assistance of Renan Villanueva Justice of the Peace to witness the Notes of Interview of the Accused that was to be conducted later. The Accused was interviewed by WPC Gomez during which interview he admitted being neighbours with A's family but moved away and denied having anything to do with the charge. On the same day a caution statement was also recorded from the Accused by Woman Corporal Gilharry, on the instructions of WPC Gomes, with the assistance of Cruz Majil Justice of the Peace where the Accused again denied having anything to do with the charge and indicated that since December 2019, he had moved from living next to A's family and had not seen A since that time. Under cross examination WPC Gomes indicated that the residence of the Accused where he was arrested was about 15 minutes' drive away from Progreso Village and in her estimation, it was about 1.5 or 2 miles away.

**[27]** On the 12<sup>th</sup> May 2021 SCT Leidiana Cantun took pictures of the crime scene at Progreso Village. Ms. Cantun took several pictures, and they were admitted into evidence and tendered and marked **LC 1-7**.



[28] On the 19<sup>th</sup> June 2021 WPC Gomes obtained the birth certificate of A which showed that her date of birth was the 30<sup>th</sup> May, 2008. This birth certificate was admitted into evidence and tendered and marked **AG1**.

### **Case for the Defence**

[29] The Accused gave a dock statement at trial and called three witnesses. In his dock statement the Accused denied the charges against him. He indicated that he and his family lived in Progresso village until 2019, before moving completely from Progresso they lived in the house beside A's family. They moved from that house in the 2<sup>nd</sup> week of August 2019 to another residence beside the Jones family. There he was employed as a construction helper and his wife as a babysitter from August 2019 to December 2019. In December 2019, he got an offer to take care of a farm from Mr. Florencio Rodriguez. That farm is located seven to nine miles from Progresso. He worked there with his wife for about 4 to 7 months. Then due to Covid Mr. Rodriguez could not pay him the salary they had agreed, and he received an offer from Mr. Alvaro Vanegas to work at his farm. He denied ever having a relationship with A. He denied living close by to her and calling her to meet at the school. He further indicated that he never owned a yellow and black motorbike as his was red.

[30] The Accused called his common law wife Dalia Sedacy who indicated that during the time specified by A, they were living at Mr. Rodriguez's farm from December 2019. The Accused worked there for 4-6 months and then they moved to Mr. Vanega's farm in the month of June-July 2020. She testified that she was always with the Accused as they needed to work the farm together. Under cross examination Ms. Sedacy denied living next to A's family insisting that she and the Accused and their family had moved out from where they were living in the house that was next to where A eventually lived. She also denied that A was friends with her daughters insisting that while they lived in the village her daughter didn't have friends. She also denied that P used to help her take care of her last child.

[31] The Accused also called Florencio Rodriguez on his behalf. Mr. Rodriguez testified that he knew the Accused for about 15 years. He employed the Accused at his farm located about 8 miles from Progresso Village from December 2019. He employed him to look after the cows that he had and to upkeep the premises as he had a house and everything there. The Accused was the caretaker. The Accused left his

employment in July 2020. After the Accused left his farm, the Accused went to work with Alvaro Vanega. The Accused did have a means of transportation which was a red and black Meilun motorcycle. In his experience from his farm to Progreso Village would take about 20 – 25 minutes as the road conditions coming out were very difficult. Under cross examination Mr. Rodriguez admitted that the Accused was his friend, he came to assist him in his court proceedings, and he didn't want him to go to prison. He admitted that the Accused while living on his farm was allowed to leave and he couldn't say how often he would leave the farm. However, he said that he would be at the farm about two times per week.

[32] Alvaro Vanega also testified on behalf of the Accused. He testified that he employed the accused to work on his farm for a period which was from June 2020 to July 2021. He employed the Accused to do fence work, chopping and sometimes planting of seed grass. His farm is located approximately three miles from Progreso Village close to the junction going to Little Belize. Sometimes he would be there at the farm but for most of the time he was working at Belize Embassy in Guatemala as a security sergeant of the Embassy. Under cross examination he testified that the Accused would be allowed to leave the farm but when he saw him going out, he would usually be with his wife. He also said that the Accused would go out on his motorbike but when he was not there, he could not say with certainty that the Accused would be at the farm all the time.

### **Analysis**

[33] 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.

[34] 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.

[35]The Court is reminded of the approach suggested by our apex Court, the Caribbean Court of Justice (CCJ) in **Dioncicio Salazar v R**<sup>6</sup>. 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.

[36]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<sup>7</sup>. 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<sup>8</sup>.

[37]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 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.

[38]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, considering 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 regard

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<sup>6</sup> [2019] CCJ 15 (AJ)

<sup>7</sup> R v Kruk 2024 SCC 7 (Supreme Court of Canada) at para 146

<sup>8</sup> August et al v R [2018] 3 LRC 552 at para 60

relies on the decision of the CCJ in **James Fields v The State**<sup>9</sup> in relation to evaluating testimony involving intentional lies.

[39] In addition to examining the general credibility and reliability of witnesses, this is a case which is based on recognition evidence from A. 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**<sup>10</sup> and will direct itself accordingly.

[40] The Court must therefore consider carefully the circumstances of the recognition of the Accused as the person who raped A 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.

[41] 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<sup>11</sup> while avoiding myths and stereotypes.

[42] 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 sexual intercourse with A without consent. Rather the medical evidence goes to the issue of whether there was penetration of the vagina as alleged by A. The Court also reminds itself that in deciding what weight, if any, to attach to the expert's evidence, the Court may consider their qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

[43] The Crown's case is dependent on the weight to be attached to the evidence of A. There are no other witnesses to the incidents alleged by A. A while testifying was forthright with her answers, indicating when she needed a break and clearly answering the questions put to her by Counsel for the Crown and

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<sup>9</sup> [2023] CCJ 13 (AJ) BB at paras 33-38

<sup>10</sup> (1977) QB 224

<sup>11</sup> Kruk at paras 151-156

for the Defence. The Court is careful to note that demeanour should not be given undue weight and displace the importance of the actual evidence but there was nothing in her demeanour which made the Court feel disquiet about her veracity.

[44] A testified at the age of 16 which is close to the age of majority but still a child in the eyes of the law and the Court. In assessing her evidence, the Court notes that she was testifying about events that allegedly occur when she was a twelve-year-old child. The Court reminds itself that the age of A 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 A's evidence in the same dispassionate and clinical way that it would assess any other evidence in the case.

[45] 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<sup>12</sup>:

- 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 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.

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<sup>12</sup> The Crown Court Compendium, Part I, Jury and Trial Management and Summing Up, (Eng.) June 2022, para 10-28.

- 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.

**[46]** The nature of the complaint that is being made by A 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) Late complaints do not necessarily mean false complaints, nor does an early complaint mean a true complaint. The judge is entitled to have regard to the shame and embarrassment which may arise from sexual assault<sup>13</sup> particularly by a close family member or relative.

### **Hearsay information received by B which led him to confront A**

**[47]** The Court notes that in his evidence, B spoke of hearsay information that he received from another person about A and the Accused. The Court places no reliance on this information in its assessment of the credibility of the allegations made by A. It remains hearsay evidence admitted because it was said and because it gave context to the actions of B on the night of 15<sup>th</sup> April 2021.

### **The complaint made to B by A on the 15<sup>th</sup> April 2021**

**[48]** The Court notes also the material inconsistencies with respect to the circumstances of the complaint made by A to B on the night of 15<sup>th</sup> April 2021. On the evidence of A, B does not mention the Accused's name when he approaches her initially. In fact, according to A she initially denies that she goes over to the Adventist School but then recants. It is only after she recants that she mentions the Accused by saying that she goes to the Adventist School with him and indicating that they were having sexual intercourse.

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<sup>13</sup> Criminal Bench Book for Barbados, Belize and Guyana February 2023 at p 631

[49] On B's evidence however he confronts A with the fact that he had information regarding A and the Accused. A initially denied anything was going on between herself and the Accused. B then told her again that he had information regarding herself and the Accused. It is at that point that A says yes, they had sex but said that it only happened once. A then continues questioning her asking her to confirm that it was only once, it is at that point that A then says it had been going on since April 2021 because the Accused threatened her. The threat related to him by A, which she said came from the Accused, was that the Accused would take her little sister and kill A, B and C if A said anything to anyone.

[50] The Court in this regard accepts the evidence of B in respect of the complaint made to him by A and rejects the account of A on this issue. The Court considered that B was an honest witness, who came across as a concerned father who wanted to know what was happening with his daughter. During his testimony, it was clear that the incident was a significant one for him and emblazoned into his memory. His evidence was also partially consistent with A's account that her father came home seemingly with a purpose to talk to her and her mother.

[51] The Court is careful to point out that its implicit rejection of the evidence of A in respect of the recent complaint is not fatal to the overall credibility of A as the Court does not believe that the discrepancy is an attempt by A to deliberately mislead the Court. The Court reminds itself that this conversation with her father occurred in April 2021 and the matter is now being tried in June 2024. Allowances must be made for victims and witnesses to not remember to exactitudes the events which form the basis of their evidence.

[52] Having accepted the evidence of B on this issue, it therefore emerges that A lied to her father twice when he confronted her with the fact that he had information about her and the Accused. The lies touch and concern whether she had sexual intercourse with the Accused at all and secondly the number of times that it occurs. This inconsistency is material as it directly impacts on the credibility of A as she had been shown to be untruthful on at least one occasion on the key issues that form the basis of this indictment. The Court notes that this inconsistency between A and B remained unexplained on the evidence. These lies do not rob A of credibility entirely as A, being a child, may still have been apprehensive initially to tell her father about the issue because of the threat of the Accused and other more complicated feelings arising from the assaults.

[53] However, the Court considers that while the lies do not rob A of credibility entirely, they do concern the central issues that the Court must consider which are whether the Accused had sexual intercourse with

Q without her consent. The telling of these lies was not on trivial matters but whether the Accused had in fact had sex with her and the number of times. In those circumstances, the Court thinks it prudent to direct itself to exercise caution before acting on the evidence of A 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.

[54] The Court will also not treat the complaint made by A to R as evidence of recent complaint. **Section 96 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**<sup>14</sup>, for a complaint to be admissible it must have been made voluntarily and not because of leading or intimidatory questioning. In this case on B's version of events, while the questioning was not intimidatory, it was certainly leading. B confronted A with the fact that he had information regarding her and the Accused, thereby suggesting the name of the Accused to A. Then when A denied it, he told her again that he had information regarding herself, and A and it is that point that the Accused's name comes into the picture from A. The Court therefore finds that while the complaint was made voluntarily, it was because of leading questions from B and thus does not satisfy the test for admissibility. The relevance of the complaint made by A to R is strictly as a previous inconsistent statement which impacted on the credibility of A and the question of whether the Court should approach her evidence with caution.

### **Undisputed facts**

[55] On the Crown's case, certain undisputed facts arise:

- a) A was born on the 30<sup>th</sup> May 2008, making her eleven and twelve years of age during the time of the alleged incidents.
- b) The Accused is the cousin in law of B and is known to A and her family.
- c) The virtual complainant A and her family at some point moved to the house next to where the Accused and his family had stayed.
- d) A was examined by Dr. Jose Samos and found to have injuries indicative of a chronic penetrative vaginal trauma. Chronic meaning that the injuries were at least two months old.

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<sup>14</sup> 1 KB 551



- e) The Accused was arrested on the 8<sup>th</sup> May 2021 and taken to the Corozal Police Station where he was interviewed and subsequently gave a caution statement. In both the caution statement and the Notes of Interview the Accused denied the allegations made by A.

### **The specimen count**

[56] The Crown in this case has chosen to proceed by way of a specimen count alleging that the Accused engaged in a course of conduct consisting of repeatedly having sexual intercourse with A without her consent or with consent that was given under duress. The reason for this emerges from the evidence of A who indicates that between April and November 2020 she would have sexual intercourse with the Accused every two days. It was not possible to charge each incident as a separate count without overloading the indictment. To prove the course of conduct and the sole count on the indictment the Crown seeks to rely on three separate incidents. The Court will carefully examine all three incidents to see whether the Crown has led evidence strong enough to ground a conviction on the sole count of the indictment.

### **Incident #1**

[57] A testified that the first incident occurred in April 2020. The Accused is alleged to have blocked her from leaving his home and asked to give her a hug. Upon A refusing the hug, the Accused started holding her hands and she said let him go. He then threatened A and took her to his room and had sexual intercourse with her for about 15 – 20 minutes. When she was leaving the Accused threatened her again.

[58] The Court will look carefully at the evidence to see whether the Crown has led evidence on each element of the offence that is strong enough to carry a conviction:

#### **a) The Accused carnally knew A i.e. inserted his penis into her vagina**

The Crown on this element must lead evidence of two things. The first being that there was penetration and the second being that the penetration was done by the Accused. On the issue of there being penetration, A's evidence is that there was penetration of her vagina and that it lasted for 15-20 minutes. When it was finished, she felt wet, and she saw bleeding. The evidence of Dr. Samos is supportive of A's account that there was penetration as he found her to suffer from injuries indicative of chronic penetrating vaginal trauma which were injuries that were more than two months old.

On the issue of whether the penetration was done by the Accused, the Court has carefully scrutinized A's evidence examining the following areas:

- i. **Length of the observation:** While A does not give an exact estimation of the time that she had the Accused under observation it is clear that it was more than 15-20 minutes beginning with her interaction with him while getting the water, the sexual intercourse which lasted for about 15-20 minutes according to A and then their interaction when A was leaving the home and the Accused threatened her again. There was therefore ample opportunity for A to observe the Accused.
- ii. **Distance:** On A's evidence, the Accused was near her while she was in his house and even closer when he held her hand and took her to the bedroom. The very nature of the act of sexual intercourse implies that there was close contact with A during at least 15-20 minutes of their interaction and the Accused was facing her while he was having sex with her.
- iii. **The lighting conditions:** There is no evidence of what the lighting conditions were in the kitchen where A was getting the water. However, according to A there was a window in the bedroom with the curtain open and through there light was coming in.
- iv. **Any impediments that obstructed A's observation:** There is nothing according to A's evidence that obstructed her view of the Accused. No photographs were taken of the bedroom so the Court cannot form its own objective view as to whether anything there was capable of obstructing her view at the time of the incident.
- v. **Knowledge of the Accused prior to the incident:** A knew the Accused from living next door to him and from the Accused interacting with her family daily as the Accused assisted her father as they built their home. She would see him regularly.

The Court considers as a specific weakness of this identification evidence that there was a significant lapse of time between this incident and the complaint made to B and the report made to the police. The Court notes however that this can be explained by the fact that A was still operating in fear caused by the threats issued by the Accused.

**b) The penetration was done without the consent of A or without any reasonable grounds for belief that A was consenting**

A gave evidence that she repeatedly told the Accused that she was not consenting to any of her actions. A initially refused the hug and then when he grabbed her arm she told him to let her go.

While there is no evidence that A told him she was not consenting while the Accused was having sexual intercourse with her, it cannot be forgotten that according to A the Accused threatened her to keep her quiet prior to taking her to the bedroom. Therefore, even if there was tacit consent after the threat, that threat was obtained due to the threat and could not be valid, if the Court accepts A's evidence. The circumstances also suggest that there was no reasonable belief held by the Accused of A consenting to the sexual intercourse.

**c) That at the time of the penetration A was under the age of sixteen years**

The Crown has also led evidence from both A, her parents and the WPC Gomez that A at the time of the first incident was 11 years old and her date of birth was the 30<sup>th</sup> May 2008.

**[59]** The Court in its analysis, after approaching A's evidence with caution finds that she is an honest witness. The Court after carefully looking at her recognition evidence found that in addition to being an honest witness she is also a reliable witness on this count. The late complaint while a weakness in her recognition evidence does not diminish her credibility or reliability with respect to the 1<sup>st</sup> incident. The Court has considered the explanation provided by A for her late complaint and does not think it unreasonable or implausible that a child having been threatened with harm to a loved one would be compliant and not raise a complaint unless directly confronted. The Court has considered the issue of whether A is honest but mistaken when she says she recognized the Accused and finds that the circumstances of the recognition are sufficient to dispel in the Court's mind on the Crown's case, the possibility of mistaken recognition.

**[60]** Having considered each element carefully after scrutinizing the evidence of A, the Court is of the opinion that the Court has led evidence strong enough to carry a conviction on this incident to satisfy the elements of the crime of Rape of a Child.

**Incident #2**

**[61]** A testified on this incident that sometime in January 2021 she saw the Accused while she was on her way to the shop and the Accused threatened her again to make her meet him at 8 pm at night in the

Adventist School. At 8 pm when she made her way to the Adventist School bathroom where the Accused told her to come inside, she was able to see his face for about five to ten seconds because of the flash from his phone. When she got into the bathroom, the Accused took off the flash on the phone, undressed himself and A and placed her on top of him while he sat. He then had sexual intercourse with her. After about 20 minutes, he told her get up and then he got dressed and left. Before he left, he threatened her again to keep her quiet.

[62] The Court will look carefully at the evidence to see whether the Crown has led evidence on each element of the offence that is strong enough to carry a conviction:

**a) The Accused carnally knew A i.e. inserted his penis into her vagina**

A's evidence is that on the night in January 2021, the Accused took his penis and placed it in her vagina and started moving up and down. The penetration lasted for about 20 minutes. When it was finished, she felt wet. The evidence of Dr. Samos is supportive of A's account that there was penetration as he found her to suffer from injuries indicative of chronic penetrating vaginal trauma which were injuries that were more than two months old.

On the issue of whether the penetration was done by the Accused, the Court has carefully scrutinized A's evidence examining the following areas:

- i. **Length of the observation:** A indicates that she was able to see the Accused for about five to ten seconds before he took the flash off on his phone. Looked at in isolation this may seem like an insufficient time to make a proper observation, but it cannot be forgotten that the Accused called out to A when she made her way to the bathroom, so A was able to recognize him from his voice and thereafter A was able to see him when he threatened her as he left.
- ii. **Distance:** On A's evidence, the Accused was near her while she was in the bathroom, and she was seated on top of him when he penetrated her.
- iii. **The lighting conditions:** A accepted implicitly that the bathroom was dark and she could only have seen the Accused with the assistance of the flash from his phone.
- iv. **Any impediments that obstructed A's observation:** There is nothing according to A's evidence that obstructed her view of the Accused. Having perused the photographs of the

scene taken by the CST there was nothing that the Court could objectively see that would obstruct A's vision on the night in question.

- v. **Knowledge of the Accused prior to the incident:** A knew the Accused from living next door to him and from the Accused interacting with her family daily as the Accused assisted her father as they built their home. She would see him regularly.

The Court considers as a specific weakness of this identification evidence that there was a significant lapse of time between this incident and the complaint made to B and the report made to the police. The Court notes however that this can be explained by the fact that A was still operating in fear caused by the threats issued by the Accused.

The Court considers that the recognition evidence of A finds support in the incident earlier during the day when she was going to the shop and the Accused calls out to her and tells her to meet him at the exact spot where the incident happens. Further, A was able to recognize the voice of the Accused when he called out to her from the bathroom and then she was with him for 20 minutes thereafter in the dark but in close proximity. On A's account, there is little room if any for mistake in her recognition on the night in question.

**b) The penetration was done without the consent of A or without any reasonable grounds for belief that A was consenting**

A gave evidence that she went to the bathroom to meet with the Accused to have sexual intercourse. This tacit consent to meet with the Accused was obtained by the Accused threatening her that if she didn't come to the bathroom, he would take her sister. Also, during the intercourse A told the Accused to stop but he didn't. There is therefore sufficient evidence to show that any consent obtained from A to come to the bathroom and have sexual intercourse was obtained by duress and in any event during the act A indicated that she was not consenting. For completeness, the circumstances also suggest that there was no reasonable belief held by the Accused of A consenting to the sexual intercourse.

**c) That at the time of the penetration A was under the age of sixteen years**

The Crown has also led evidence from both A, her parents and the WPC Gomez that A at the time of the first incident was 11 years old and her date of birth was the 30<sup>th</sup> May 2008.

[63] The Court in its analysis, after approaching A's evidence with caution finds that she is an honest witness. The Court after carefully looking at her recognition evidence found that in addition to being an honest witness she is also a reliable witness on this count. The late complaint while a weakness in her recognition evidence also does not diminish her credibility or reliability with respect to the 2<sup>nd</sup> incident. The Court has considered the explanation provided by A for her late complaint and does not think it unreasonable or implausible that a child having been threatened with harm to a loved one would be compliant and not raise a complaint unless directly confronted. The Court has considered the issue of whether A is honest but mistaken when she says she recognized the Accused particularly with the limited opportunity for seeing him at night in the bathroom and finds that the circumstances of the recognition particularly when one considers the supporting material are sufficient to dispel in the Court's mind on the Crown's case, the possibility of mistaken recognition.

[64] Having considered each element carefully after scrutinizing the evidence of A, the Court is of the opinion that the Court has led evidence strong enough to carry a conviction on this incident to satisfy the elements of the crime of Rape of a Child.

### **Incident #3**

[65] On this incident A testifies that on a day to the end of March 2021 she was headed to the shop when the Accused calls out to her again and threatens her so that she would meet him the next day at the Adventist School bathroom at 5 am. A met the Accused the next morning at 5 am after making sure that her mother was asleep, and her father had left for work. When she got to the bathroom she saw the Accused. She was able to see the Accused as there was light coming through the space between the wall and the ceiling in the bathroom. The Accused undressed himself and undressed her. He then placed her on top of him, placed his penis in her vagina and had sex with her for about 15-20 minutes. A told him to stop but he refused. After about twenty minutes the Accused stopped, got dressed and left. When he left, he threatened A again not to say anything. A then got dressed and went home.

[66] The Court will look carefully at the evidence to see whether the Crown has led evidence on each element of the offence that is strong enough to carry a conviction:

**a) The Accused carnally knew A i.e. inserted his penis into her vagina**

A's evidence is that on the morning of the day in March 2021, the Accused sat her down on top of him, took his penis placed in her vagina and started moving up and down for about 15-20 minutes. The evidence of Dr. Samos is supportive of A's account that there was penetration as he found her to suffer from injuries indicative of chronic penetrating vaginal trauma which were injuries that were more than two months old.

On the issue of whether the penetration was done by the Accused, the Court has carefully scrutinized A's evidence examining the following areas:

- i. **Length of the observation:** A doesn't give an exact estimate of how long she had the Accused under observation, but she has him under observation from the time she sees him in the bathroom to when the Accused leaves. The act of intercourse alone according to A lasted about 15-20 minutes. While the Court doesn't take that as an exact estimation but rather as how long it felt to A, it is clear that A had him under observation for some time.
- ii. **Distance:** On A's evidence, the Accused was near her while she was in the bathroom, and she was seated on top of him when he penetrated her.
- iii. **The lighting conditions:** A testified that she was able to see the Accused from the opening between the wall of the bathroom and the roof where the light came in.
- iv. **Any impediments that obstructed A's observation:** There is nothing according to A's evidence that obstructed her view of the Accused. Having perused the photographs of the scene taken by the CST there was nothing that the Court could objectively see that would obstruct A's vision on the night in question.
- v. **Knowledge of the Accused prior to the incident:** A knew the Accused from living next door to him and from the Accused interacting with her family daily as the Accused assisted her father as they built their home. She would see him regularly.

The Court considers as a specific weakness of this identification evidence that there was a significant lapse of time between this incident and the complaint made to B and the report made to the police. The Court notes however that this can be explained by the fact that A was still operating in fear caused by the threats issued by the Accused.

The Court considers that the recognition evidence of A finds support in the incident the previous day when she was going to the shop and the Accused calls out to her and tells her to meet him at the exact spot where the incident happens.

**b) The penetration was done without the consent of A or without any reasonable grounds for belief that A was consenting**

A gave evidence that she went to the bathroom to meet with the Accused to have sexual intercourse. This tacit consent to meet with the Accused was obtained by the Accused threatening her that if she didn't come to the bathroom, he would take her sister. Also, during the intercourse A told the Accused to stop but he didn't. There is therefore sufficient evidence to show that any consent obtained from A to come to the bathroom and have sexual intercourse was obtained by duress and in any event during the act A indicated that she was not consenting. For completeness, the circumstances also suggest that there was no reasonable belief held by the Accused of A consenting to the sexual intercourse.

**c) That at the time of the penetration A was under the age of sixteen years**

The Crown has also led evidence from both A, her parents and the WPC Gomez that A at the time of the first incident was 12 years old and her date of birth was the 30<sup>th</sup> May 2008.

[67] The Court in its analysis, after approaching A's evidence with caution finds that she is an honest witness. The Court after carefully looking at her recognition evidence found that in addition to being an honest witness she is also a reliable witness on this count. The late complaint while a weakness in her recognition evidence does not diminish her credibility or reliability with respect to the 3<sup>rd</sup> incident just as it did not diminish her credibility with the other two incidents. The Court has considered the explanation provided by A for her late complaint and does not think it unreasonable or implausible that a child having been threatened with harm to a loved one would be compliant and not raise a complaint unless directly confronted. The Court has considered the issue of whether A is honest but mistaken when she says she recognized the Accused and finds that the circumstances of the recognition are sufficient to dispel in the Court's mind on the Crown's case, the possibility of mistaken recognition.

[68] Having considered each element carefully after scrutinizing the evidence of A, the Court is of the opinion that the Court has led evidence strong enough to carry a conviction on this incident to satisfy the elements of the crime of Rape of a Child.

[69] The Court has carefully looked at each element of the offence, for each incident alleged. Considering its findings with respect to A's veracity and reliability the Court is of the opinion that the evidence of the



Crown on the sole count of Rape of a Child 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.

### **The Case for the Defence**

[70]The Accused opted to give a statement from the dock. 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.

[71]The Court again reminds itself of the guidance by Wit JCCJ in **Salazar** speaking to the polymorphic decision- making process of a judge sitting alone. Wit J indicated:

[35] As a rule, the judge will consider the prosecution's evidence first. If that evidence seems strong enough to carry a conviction, the judge will consider the evidence of the defence. The judge will then look at the totality of the evidence to reach a final decision. It is there where the intercommunication and overlapping take place. It is after this polymorphic process that the judge needs to arrange his or her judgment in a logical order which will not always be able to reflect the complicating thinking process as such.

### **Alibi direction**

[72]The Accused in his dock statement raised the defence of alibi and called witnesses in support of his alibi defence. The particulars of the alibi relied upon by the Defence being that he was not living in Progresso Village at the time of the incidents alleged and throughout the entire course of conduct alleged by the Crown.

[73]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 Progresso Village committing the offences.

[74]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.

[75] 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.

### **Good Character Direction**

[76] The Accused has led evidence that he has no previous convictions, and this means that the Accused is entitled to the benefit of a Good Character Direction.

[77] Good Character of the Accused can be relevant in two ways: it can go to determinations of credibility and propensity, both of which could be useful in determining guilt or innocence. Good Character influences credibility by increasing the likelihood that the Accused will be believed, and it influences propensity by making it less likely that the Accused acted as alleged. The standard Good Character direction therefore bears two limbs, one relevant to credibility and the other to propensity. A Good Character is not a defence and the particular weight to be given to the character of the Accused is a matter for the tribunal of fact to determine when considering the evidence. The content of the direction however must be tailored to the particular facts at bar.

[78] In the matter at bar, the Accused has elected to give a dock statement which is his right. The election by the Accused however means, pursuant to the judgement of the CCJ in August v R<sup>15</sup>, the Accused is entitled only to the propensity limb of the Good Character direction. The Court therefore reminds itself that the fact that the accused has no previous convictions may make it less likely that he has acted as alleged in raping the VC.

### **Analysis of the Defence case**

[79] The Court having looked carefully at the evidence for the Defence finds that there are aspects of it that raise reasonable doubt.

[80] Firstly, the case for the State is that at least during the period April 2020 to November 2020 the Accused living next to A in Progresso Village. However, when the Court considers the evidence of Alvaro Vanega,

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<sup>15</sup> Ibid

he indicates that he employed the Accused as a live in caretaker from July 2020 – July 2021. Mr. Vanega further states that his farm where he employed the Accused was 3 miles outside of Progreso Village. This is consistent with the evidence of PC Marroquin and WPC Gomes that the Accused was arrested at a farm outside of Progreso Village and that the distance between the farm and Progreso was about two to three miles. The Court therefore finds as a fact that the Accused was arrested at a farm outside of Progreso Village and that farm was owned by Alvaro Vanega. Mr. Vanega came across as credible and reliable when giving his evidence and he stated in his evidence that he employed the Accused to live at his farm prior to November 2020. This placed considerable doubt in the mind of the Court as to whether the Accused was in fact living next to A for the period July 2020 – July 2021 when A alleges that she had sexual intercourse with him every two days **at his home**.

[81] Secondly, the evidence of Florencio Rodriguez also casts doubt on whether the Accused was living in Progreso Village prior to July 2020. The Court found the evidence of Florencio Rodriguez to be cogent and compelling. Mr. Rodriguez testified that he employed the Accused from December 2019 to July 2020 as a live in caretaker. While he was not able to say that the Accused was there at the farm all the time. He was able to say that his farm was about eight miles outside of Progreso Village. Mr. Rodriguez accepted that the Accused was a friend and that he came here to assist him. This concession by the witness by itself does not diminish the cogency of his evidence as each witness called by a party in litigation bears a partisan allegiance except expert witnesses who are there to assist the court. The Court looked at the evidence of Mr. Rodriguez in light of that concession and still found him to be honest and reliable. Mr. Rodriguez also confirmed that the Accused drove a red motorbike and not a yellow and black motorbike as alleged by the Crown.

[82] The evidence of Dalia Sedacy was also consistent with the evidence of Florencio Rodriguez and Alvaro Vanega. The Court notes that there are some aspects of the evidence of Ms. Sedacy that were illogical and lacked credibility. Firstly Ms. Sedacy indicated that she was with her husband all the time including when he left the farm. To the mind of the Court this sounded illogical as no one could be with someone 100% of the time. This statement was also incongruent with the agreed evidence of PC Marroquin who testified that when he went to the home of the Accused on the farm outside Progreso Village, Ms. Sedacy was home, but the Accused was not at home having left the farm to go fishing. The Court considers that this statement was meant to bolster the cogency of the alibi evidence from Ms. Sedacy. On another issue, the Court found Ms. Sedacy less than credible is her assertion that while she was

living in Progresso her children didn't have any friends. This was an attempt to disassociate her family from any association with A's family through the children. The Court did not believe her on this issue either. However, these two aspects of her evidence which were clearly added to bolster the alibi evidence did not diminish the overall credibility of Ms. Sedacy. To the Court she remained cogent and consistent on the core of the alibi evidence that the Accused was not living in Progresso Village from December 2019. The Court found her on that aspect of the evidence to be a witness capable of belief and this when integrated with the evidence of the other two defence witnesses raised considerable doubt in the mind of the court as to whether the Accused was in Progresso village living next to A at the time that she alleges he lived there and raped her.

[83]The Court is careful to indicate at this point that even without the evidence of Ms. Sedacy, the evidence of Alvaro Vanega and Florencio Rodriguez were sufficient to raise reasonable doubt in the mind of the Court.

[84]The evidence of the three witnesses is also largely consistent with the dock statement of the Accused. The Court must afford the Accused the benefit of the propensity limb of the Good Character direction appraising his defence and the allegations made by the State since his good character may make it less likely that he acted as alleged by the Crown.

[85]Having considered the evidence for the Defence, the Court is left unsure as to whether the Accused was in Progresso Village at the times alleged by the VC and accordingly whether the Accused engaged in the course of conduct alleged on the evidence and the specimen count on the indictment.

### **Disposition**

[86]After careful deliberation of the Defence's case which was premised on alibi the Court finds itself in reasonable doubt. The burden of proof in this case rests on the Crown to prove to the Court that the Accused raped A as alleged. The Crown must do so to the extent that the Court feels sure that the Accused raped A, a child as alleged. Having regard to the evidence, the Court is not satisfied so that it is sure of the guilt of the Accused on the charge of the indictment. The Court therefore finds him not guilty and discharges him.

**Raphael Morgan**  
**High Court Judge**  
**Dated 14<sup>th</sup> November 2024**