

IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N10/2023

BETWEEN

THE KING

and

JOSE ZAVALA

Accused

Before:

The Honourable Mr. Justice Raphael Morgan

Appearances:

Mrs. Shanidi Urbina for the Crown

Mr. Leslie Hamilton for the Accused

2024: Sept 23rd, 25th
Oct 17th
Nov 5th, 14th, 20th, 26th
Dec 11th

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

[1] **MORGAN, J.:** Jose Zavala (“the Accused”) stands indicted on one count of Unlawful Sexual Intercourse contrary to **section 47(1)** of the **Criminal Code**¹ (“the Code”).

¹ 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 had sexual intercourse with C², a person under the age of fourteen years of age, to wit, thirteen years of age.
- [3] The trial began with the arraignment of the Accused on the 23rd of September 2024 before this Court pursuant to section **65A (2) (g)** of the **Indictable Procedure Act³ (the IPA)**.
- [4] At trial, the Crown relied on the evidence of two viva-voce witnesses including C, agreed evidence of eleven witnesses pursuant to **section 106 of the Evidence Act⁴** and photographs taken of the crime scene.
- [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 sworn testimony and called no witnesses.
- [6] The Court then heard closing addresses from the parties and reserved its judgement.
- [7] The Court having considered the evidence, now gives its verdict and reasons.

The Elements of the Offence

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

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

47.-(1) Every person who, with or without consent, has sexual intercourse with a person who is under the age of fourteen years commits the offence of unlawful sexual intercourse and is

² Anonymized due to the fact that she was a minor at the time of the alleged offence

³ Cap 96 of the Substantive Laws of Belize Revised Edition 2020

⁴ Cap 95 of the Substantive Laws of Belize Revised Edition 2020

liable on conviction on indictment to imprisonment for a term that is not less than twelve years but may extend to imprisonment for life. [emphasis mine]

[9] 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]

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

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

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

The Evidence

The Crown's Case

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

- a) C – the Virtual Complainant (VC)
- b) Lucrecia Mejia – Housekeeper

[13] There was also agreed evidence of the following witnesses:

- a) F⁵ – Mother of the VC
- b) Teodora Toledano – Principal of San Francisco RC School
- c) Oscar Vallederez – Scenes of Crime Technician (SCT) – photographs OV1-3 were tendered through him.
- d) Ruben Vargas (Justice of the Peace) – witnessed the Notes of Interview of the Accused

⁵ Anonymized as the VC was a minor at the time of the incident

- e) Dr. Erlindo Chi – medically examined C
- f) WPC Concepcion Marroquin – witnessed the medical examination of C by Dr. Chi.
- g) W. Sergeant Sharaine Jacobs
- h) PC Alvin Castillo – recorded the Notes of Interview – DVD recordings of the Notes of Interview were tendered through him as AC1 – 2.
- i) Myron Contreras (Justice of the Peace) – witnessed the refusal of the Accused to give a caution statement.
- j) Zair Villatoro – SCT – photographs ZV 1 – 3 were tendered through him.
- k) WPC Sandra Ical – police complainant – through whom the Birth Certificate of C and the Notes of interview of the Accused were tendered as SI1 and SI2 respectively.

[14] The case for the Crown is that in September 2018 C was attending San Francisco RC school in Standard Three. At that time the Accused came to San Francisco RC school to do his teaching internship. Sometimes he would go to her class to do supervision. At recess time C and the Accused would talk about school and about work. C would see him everyday for about three months at recess or when he came to her class to do supervision. The Accused introduced himself as Jose Zavala and during the times that they spoke, she would usually be about three feet away from him in clear lighting conditions.

[15] Almost three years later, in April 2021, C was in her bedroom when someone sent her a friend request on Facebook. C noticed that the person sending the request was the Accused Jose Zavala. They began to talk on Facebook messenger. During the conversations on Facebook Messenger the Accused asked her if she already had sexual intercourse. This question made her feel uncomfortable because at the time she did not know what sexual intercourse was. C told him no. The Accused then asked her if she wanted him to be her first. C told him that she didn't know if she wanted him to be her first. While testifying C could not recall what else they spoke about on Facebook Messenger.

[16] On the 2nd of July 2021 C was living at Pasture Street, Orange Walk Town. She was living with her mother F, her father, her two younger brothers, her grandmother and her grandfather. It was a two-storey house, red and white in colour. There were two gates, one at the front and one at the back. The one at the back is where the visitors would sometimes park. At around 10:30 pm that night C was in her room and preparing to go to bed when she saw a text from the Accused on Facebook Messenger. Her grandparents

were asleep in their room. He asked her what she was doing, and she replied that she was in her room. Then the Accused offered to come to her house and asked where her parents were. C indicated that that they were not at home and asked the Accused what would happen if his girlfriend found out that he came to check her. The Accused replied indicating that his girlfriend wouldn't find out and C then agreed to have him come over. The Accused asked for C's location on Facebook Messenger to use to get to the house. When he received the location, the Accused indicated that he was familiar with the area as his in laws lived in the same area. 15 minutes later C heard a car horn beeping, looked out of her window and saw that it was the Accused in his car as the car was parked at the back gate close to a lamp post. The lamp post was about 100 feet from her window. C then went downstairs, opened the gate, let the Accused in and took him to her room. The Accused was wearing a grey shirt, black long pants and black and white shoes. The Accused then indicated that he would tell his girlfriend that he got home and was going to take a bath and sleep. After he said that, he came closer to C and began to kiss her in her mouth. He then put her on the bed and climbed on top of her. Then he took off his clothes and C's clothes. On that night C had on a blue shirt, an orange short pants, a bra and a pink underwear. C initially stayed in her bra and underwear. The Accused then took off the rest of her clothes and began to kiss her on her neck and her breasts. When he was kissing her on her breasts, he left several hickeys or "vamps", like six of them. Three on her left breast and three on her right breast. He then made her hold his penis, but C let it go because to her it felt weird. After she let it go, he then put his penis in her vagina for about four or five seconds. The Accused then pulled out his penis and placed it back in after, it felt rough. After some time, the Accused told C that he wanted to cum, so he took out his penis and ejaculated on her right leg. Then he took his shirt and wiped her leg. The Accused then asked to use her bathroom so he could wash off. C took him to the bathroom and after he washed off, C took him back to her room. When they got back to the room, the Accused told her he wanted to try another position which is doggy style. He then demonstrated the position that the woman would be in for doggy style and C assumed that position on the bed. After that the Accused tried to put his penis in her vagina about three times but he couldn't get it in. The Accused then stopped trying and got dressed. C then escorted him downstairs and he went inside his car. After the Accused left, C went upstairs in the bathroom and cried as she felt bad. The Accused was in her room for about 30 minutes and the only thing that was on was her bed light. On the 7th of July 2021 the Accused sent a message to C asking her if she wanted to have sex again and she told him no.

[17] On the 8th of July 2021, C was downstairs with the housekeeper Lucrecia Mejia. C at the time was wearing a macaroni strap shirt and Lucrecia asked her if those were vamps on her breasts. C told her yes and the conversation ended. While testifying however Lucrecia Mejia indicated that C had been the one to initiate the conversation and point out the vamps on her breast.

[18] Under cross examination C accepted that there were inconsistencies between her evidence at trial and her statement to the police. C accepted in her statement to the police she never told them that the Accused initially put his penis inside of her vagina and it hurt for about four to five seconds. Nor did she say that after that, he penetrated her again and it was rough. She also accepted that she didn't say in her statement that she went up to the bathroom to cry after the Accused left. C further accepted that she had a crush on the Accused at that time and she didn't mention that to the police. C further accepted that she never mentioned to the police that the Accused told her on the night that he would tell his girlfriend that he would take a bath and go to sleep. She also accepted that she never told the police that the Accused made her hold his penis nor did she tell the police that the Accused demonstrated or showed her what doggy style was. C however maintained that she was telling the truth.

[19] Under cross examination C also denied that the Accused left after he learnt her age was 13 years of age as before everything happened that night, he had asked her age, and she told him. She also denied making up the story and specifically making up the story because she had a crush on the Accused.

[20] On the 16th of July 2021 F was at the family's hotel when her husband, C's father came to collect her. He told her certain things. When they went back home that night, they spoke to C, and she told them certain things. On the 19th of July 2021 C and F went to Mr. Josue Cowo, a social worker. Mr. Cowo made an appointment for C to be medically examined.

[21] On Wednesday 21st of July 2021 WPC Concepcion Marroquin reported for duty. Whilst on duty at around 1:00 pm, WPC Marroquin upon the request of Mr. Cowo visited the Northern Regional Hospital to witness a medical examination conducted on C by Dr. Erlindo Chi. WPC Marroquin filled out the consent form for the medical which was signed by F and issued a medico legal form in the name of C which she handed to Dr. Chi. Dr. Chi then conducted the gynaecological medical examination on C. C's hymen was not intact. The hymen was seen with a partial single tear with a rolled edge. After the medical examination,

C and F went to the Orange Walk Police Station with WPC Marroquin where she recorded statements from both.

[22] On Thursday 22nd of July 2021 at about 4:00 pm upon reporting for duty WPC Sandra Ical commenced investigating the report made by C after being briefed by WPC Marroquin of the report. On the 29th of July 2021 she requested the services of Oscar Valladerez, SCT, to process the scene. Upon arrival at C's home, C indicated to Mr. Valladerez where the incident had taken place, and it was photographed. Whilst at the home, F handed over a copy of C's birth certificate to WPC Ical.

[23] On the 23rd of September 2021 around 10:40 pm WPC Ical detained the Accused who identified himself as Jose Zavala and gave his age at the time of arrest as 22 years of age. The Accused indicated that he was a laborer and lived at Yo Creek Village. The Accused was informed of the reason for his detention, his constitutional rights and he was cautioned. He was then escorted to the Orange Walk Police Station. WPC Ical verified his identity through his Social Security Card. At around 10:42 pm WPC Ical read and issued the Accused with a copy of the Suspect's Right in Custody Acknowledgement Form, which the Accused signed. He was then placed under detention pending investigation for Unlawful Sexual Intercourse.

[24] On the 24th of September 2021 at 10:30 am WPC Ical contacted JP Ruben Vargas and requested his assistance to witness a Notes of Interview under caution. At about 10:33 am WPC Ical requested the assistance of PC Alvin Castillo in video recording the Notes of Interview. At around 1:50 pm JP Vargas arrived at the Orange Walk Police Station. WPC Ical then informed the Accused that she would be conducting a Notes of Interview under caution and escorted him to the room where JP Vargas and PC Castillo were. She introduced the accused to JP Vargas and informed him that JP Vargas' role was to ensure that his rights were not violated. She also introduced PC Castillo as the officer in charge of operating the video camera for the video recording of the interview. WPC Ical then asked the Accused if he had a lawyer to which he responded that at the time he did not have an Attorney, but they are working on it. WPC Ical then exited the room and allowed the Accused to speak in private with JP Vargas. JP Vargas explained to the Accused his role during the interview and asked him if he was willing to participate in an interview under caution and the Accused said yes. Five minutes later, she re-entered the room and began the interview. She informed the Accused of the reason for his detention for Unlawful Sexual Intercourse, his constitutional right to communicate without delay and in private with a legal

practitioner of his choice and have adequate opportunity to give instructions to a legal practitioner of his choice. WPC Ical also cautioned him in the following terms "You do not have to say anything unless you wish to do so but what you do say will be taken down in writing and may be used in evidence". She then proceeded to ask the Accused 60 questions which the Accused answered, and which were recorded. Initially during his interview, the Accused was asked whether he was in contact with C Rodriguez and he denied knowing any person by the name of C Rodriguez or having any relationship with C Rodriguez. However later in his interview upon being asked what he did after leaving his girlfriend's house on the 2nd of July 2021 the Accused indicated that he was at the home of C Romero after she invited him because her parents were not at home. He further stated that he remained there for about 15 minutes and that they had discussed having sex, but he left immediately after learning that she was 13 years of age as he got scared. At the end of the interview the Accused was invited to sign the Notes of Interview by WPC Ical which he did. The Notes of Interview were also signed by JP Vargas and WPC Ical. Later that day WPC Ical requested the assistance of W. Sergeant Jacobs to video record a caution statement from the Accused, but the Accused refused to give a caution statement after his Notes of Interview as he wanted his Attorney to be present before he made any further statements. The Accused was later charged for the offence of Unlawful Sexual Intercourse later that night at 7:00 pm.

[25] On the 23rd of December 2021 WPC Ical received the video recordings of the Notes of Interview and refusal to give a caution statement from PC Castillo.

[26] On the 25th of February 2022 WPC Ical asked SCT Zair Villatoro to take further pictures of the crime scene. These pictures were tendered and marked at trial as ZV 1-3. On that same day WPC Ical requested that F visit the station to give the computer technician access to the devices to retrieve the conversation that C had with the Accused on Facebook Messenger. F never visited the station to give the Computer Technician access to retrieve the Facebook messages citing that the matter was taking too long, and she wanted to spare her daughter any further embarrassment by not pursuing the matter further.

Case for the Defence

[27] The Accused testified in his own defence. He indicated that he is currently 25 years old and employed as a warehouse manager. On the 2nd of July 2021 he left work at 4:30 pm and went to his then girlfriend's

house in Orange Walk. He stayed there until 9:30 pm. While there, he was drinking some beers, but he left because there was a curfew at that time due to the pandemic. After he left his girlfriends' house and went to put gas, he noticed a message from C asking him how he was and what he was doing. He told her he was heading home and that he had been drinking. C asked him to come over to her house as her parents were not home. He told her that he did not know where she lived, and she sent her location. C told him not to park in front of the house but to park at the back gate. The Accused then went to her house and parked at the back gate. C was there waiting for him and opened the gate. C then took him inside the house and to her room. In her room, C sat on the bed and the Accused stayed standing and they were talking. They were talking about having sex. During that conversation, the Accused asked her age and C replied 13. When C indicated her age, the Accused got scared and told her that he couldn't be in the room, and he was going home. He opened the door, walked out and C let him out the back gate. He then got in his car and left. A few days later C messaged him on Facebook again, asking him if he was in Orange Walk and if he wanted to come over. He told her no and they did not speak again. He denied having sexual intercourse with C that night, denying specifically that he used her bathroom or did other things such as doggy style. The Accused admitted that he did his internship at San Francisco RC School and at that time taught a standard 2 class. At the school he introduced himself as Teacher Jose Zavala generally and he didn't introduce himself to any particular student. At break times, he would check papers or get ready for the next lesson. The procedure at the school was that students were not allowed in class while the teacher was getting ready for the next subject, he did not speak to students during break time if it wasn't under the supervision of another teacher.

[28] Under cross examination, the Accused indicated that he was at the school for three months and during that time he would have assisted in supervising the Standard 3 classes when a teacher was absent. He further indicated that he interacted a little with the students generally as they would call out to say hello and see how everything is going. He indicated that it was possible that he could have supervised C's class, but he could not remember specifically. He maintained that he would only interact with students under the supervision of other teachers as the school was divided into zones which were supervised by different teachers so wherever he went there was a teacher supervising.

[29] Further under cross examination, the Accused denied that he sent a friend request to C and indicated that she messaged him first and that they only spoke about two to three times before he met her in

person. He however indicated that at the time they met, they were not friends as he knew her but not personally. He indicated that while talking he had no interest in her however on that night, he wanted to have sexual intercourse with her. He indicated that he stayed for 10 minutes in her room and then he left. He made it home before the curfew. He indicated that it would take him like 15-20 minutes to get home as the road was bad to Yo Creek from there. He got home like 5 minutes before the curfew which at that time was 11 pm. He further testified that he arrived at C's house at 10:30 pm.

[30] It was formally admitted pursuant to **section 106 of the Evidence Act** that the Accused has no previous convictions.

Analysis

[31] 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.

[32] The Accused in this case opted to give sworn testimony and subjected himself to cross examination. The Court will subject the testimony of the Accused to the same scrutiny that it would any other witness ascribing what weight to it that the Court sees fit.

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

[34] 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

⁶ [2019] CCJ 15 (AJ)

recount events⁷. 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 contradictions⁸. The Court notes that most of the evidence in this matter has been agreed and several salient facts are not in dispute. The Court will still look at each aspect of agreed evidence to see whether the Court finds the evidence credible and reliable and then ascribe weight accordingly.

[35] If there are inconsistencies and discrepancies, the Court must consider whether they are material and if they can be resolved on the evidence. The Court reminds itself that it must consider whether the inconsistencies or discrepancies arose for innocent reasons, for example through faulty memory or lack of interest in what is transpiring or if it is because the witness is lying and trying to deceive the Court. If there are any unresolved material inconsistencies or discrepancies this would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The cumulative effect of these inconsistencies or discrepancies on a witness's credit and reliability is also important for the Court's consideration. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that bit.

[36] The Court directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of believability. This is not to say that the telling of lies on oath is a trifling thing. The Court further reminds itself that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the lie and the reason for the lie. The Court may still convict if it is sure that the material parts of the evidence are true. The Court in that regard relies on the decision of the CCJ in **James Fields v The State**⁹ in relation to evaluating testimony involving intentional lies.

[37] In addition to examining the general credibility and reliability of witnesses, this is a case which encompasses recognition evidence by C. However, the Court notes that in the context of this case, particularly how the issues emerged at trial there is no dispute that the Accused was in the bedroom of C on the night of the 2nd of July 2021. The defence run at trial is denial and the key issue is whether the Accused had sexual intercourse with C on the night in question. The defence of denial, in the context of

⁷ R v Kruk 2024 SCC 7 (Supreme Court of Canada) at para 146

⁸ August et al v R [2018] 3 LRC 552 at para 60

⁹ [2023] CCJ 13 (AJ) BB at paras 33-38

this case, places credibility at the forefront of the issues to be resolved and raises no question as to the reliability of C's recognition of the Accused, the Court therefore finds that this case falls into the category of exceptional cases where the Court need not direct itself in accordance with the guidance in **R v Turnbull**¹⁰.

[38] 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 sense¹¹ while avoiding myths and stereotypes.

[39] The Crown also relies on expert medical evidence to prove their case on the charge of USI contrary to section 47(1). 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 C. Rather the medical evidence goes to the issue of whether there was penetration of the vagina as alleged by C. 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.

[40] The Crown's case stands or falls on whether the Court believes C so that it is sure beyond a reasonable doubt that she had sexual intercourse with the Accused on the 2nd of July 2021, there are no other witnesses to the incident for the Crown. The Court is careful not to give any undue weight to the demeanour of C so much so that it displaces a proper analysis of her actual evidence. C when testifying at the age of 16 was clear in her responses, she accepted the inconsistencies from her statement to the police providing explanations when asked to do so. There were times when C paused to think before answering questions but overall, the Court found C to be forthright in her responses. The Court assessed her evidence in the same dispassionate way that it analysed each other portion of evidence before it reached its conclusion.

[41] C was still a child (below the age of 18) at the time of testifying. In assessing her evidence, the Court is careful to remember that she is testifying about events that allegedly occur when she was 13 years of

¹⁰ (1977) QB 224

¹¹ Kruk at paras 151-156

age. The Court in its analysis bears in mind that the age of C at the time of testifying does not automatically mean that her word is any more or less reliable than that of an adult.

[42]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 experience¹²:

- 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.
- 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.

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

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

- a) Experience shows that people react differently to the trauma of a serious sexual assault or attack of a sexual nature, that there is no one classic response.
- b) some may complain immediately whilst others may feel shame and shock and not complain for some time; and
- c) A late complaint does not necessarily mean a false complaint, nor does an early complaint mean a true complaint. A judge is entitled to have regard to the shame and embarrassment which may arise from sexual assault¹³ particularly by a close family member or relative.

Whether the Notes of Interview of the Accused is a mixed statement

[44]The Court notes that in his Notes of Interview, the Accused made the following admissions:

- a) He knew C
- b) He went to C's house on the night of the 2nd of July 2021 because she invited him over because her parents were not there
- c) There was a discussion between him and C about having sex

[45]The Court notes however that the Accused in his Notes of Interview denies that any sexual intercourse happened and insisted that he left after learning that C's age was 13. The Court therefore must decide whether the Accused's Note of Interview amounts to a mixed statement considering the admissions and denial contained therein.

[46]The question of what constitutes a mixed statement was considered by the English Court of Appeal in **R v Garrod**¹⁴. In **Garrod**, the Court considered the question of whether the Appellant's interview could be classified as mixed or as wholly exculpatory. The Court indicated on the issue:

"This has meant that Mr Bethel for the defence has found himself in the unusual position of submitting that the interview answers contain admissions or what he has called 'inculpatory' as well as exculpatory statements, pointing, in other words, to parts of the prosecution evidence which support the jury's finding of guilty. We

¹³ **Criminal Bench Book for Barbados, Belize and Guyana** February 2023 at p 631

¹⁴ [1997] Crim LR 445

cannot regard this as a satisfactory exercise, not least **because it is almost impossible to conceive of any series of answers – i.e. something more than a bare denial – which cannot be regarded as containing some admissions of relevant fact as well as a statement of innocence and denial of guilt (the so-called 'exculpatory' part of a mixed statement). The question is how to identify the kind of interview which contains enough in the nature of admissions to justify calling it a 'mixed' rather than an 'exculpatory' statement.**"

[47]The Court continued:

"Mr Bethel submits that the test to be applied should be that a statement is a 'mixed' statement if it contains any admission of a fact which is significant in relation to the prosecution case. Mr Milford QC, on behalf of the prosecution, prefers to rely upon a passage in the judgment in *Duncan* which reads as follows:

'Where a 'mixed' statement is under consideration by the jury in a case where the Defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence'

We would hold that where the statement contains an admission of fact which are (sic) significant to any issue in the case, meaning those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt, then the statement must be regarded as 'mixed' for the purposes of this rule. This is little, if any, different from paraphrasing the use of the word 'incriminating' in the passage in *Duncan* which we have already quoted. If the statement is of that nature, then the credibility direction is required and the whole statement can be regarded as evidence in the case." (Emphasis added)

[48]Garrod was followed in the decision of **R v Papworth and Another**¹⁵ where the Court indicated:

The admission in interview of an ingredient of the offence will often constitute a significant admission for the purposes of the *Garrod* test, but not necessarily. The fact that a Defendant on trial for murder accepted in interview that the victim was dead is not likely to be a significant admission. **Likewise, in the absence of an**

¹⁵ [2007] EWCA Crim 1031

admission of an ingredient of the offence, it will be more difficult to conclude that the admissions which were made convert the statement into a mixed statement.

[49] The difficulty of the Court's task in identifying whether a statement is mixed where there hasn't been an admission to an ingredient of the offence is illustrated by the decision of the Privy Council in **Junior Reid v R**¹⁶, where the Appellant gave a statement admitted to being at the scene where a murder took place. However, he denied taking any part in it and indicated that his presence was totally innocent. The Privy Council indicated:

"But this caution statement was essentially an exculpatory statement. True enough it contained admissions of the defendant's presence at the scene where the shooting took place and his knowledge of the area, but it set out in considerable detail the innocent part which the defendant said he had played." [Emphasis mine]

[50] Considering the authorities outlined above, the Court notes that the Accused's Notes of Interview does not contain an admission of any ingredient of the offence which makes the Court's task a little more difficult. The question remains however whether the admissions contained in the Notes of Interview are significant enough to add a degree of weight to the prosecution case on an issue relevant to guilt, so that the interview amounts to a mixed statement. In **Papworth** the Court indicated that absent an admission to an ingredient of the offence, the Court will find it **difficult** to deem a statement mixed. However, the Court stopped short of holding that absent an admission to an ingredient of the offence, a statement **could not** be deemed a mixed statement. This Court therefore understands that whether a statement is mixed or not depends on an analysis of the issues before the Court and the significance of the admissions in the context of how the Crown has led its case.

[51] In this trial the Crown's case was that the Accused went to C's house on the night in question and had sexual intercourse with her. In fact, the tenor of the Crown's case is that this was the purpose of the visit as C's parents were not home at the time. The Accused in his interview admits that he was in C's room on the night in question and there was a discussion between them about having sex on the night in question. He however denies that there was any sexual intercourse as he left after hearing C's age. The Court after carefully considering the issues at trial and the notes of interview, considers that these admissions can, if the Court believes them to be true, add weight to the issue of whether there was sexual

¹⁶ [1990] 1 AC 363

intercourse on the night in question. The potentially inculpatory parts of the Accused's interview place him in the room of the VC and his interview also indicates that his presence in the room there was not for an innocent purpose which is different to the position in **Junior Reid**. The purpose of the Accused being in C's room was to have sex with C as per their alleged conversation. In those circumstances, those admissions potentially can, if accepted, add weight to the Crown's case that the Accused went to C's home with the intention of having sex and in fact did so. The Court notes the Accused's denial of sexual intercourse in his interview (which is the exculpatory part of the interview) but is of the opinion that when the interview is considered as a whole, in the context of the issues at trial, it ought to be treated as a mixed statement.

The application of section 90 of the Evidence Act

[52] Having concluded that the Accused's interview amounts to a mixed statement, the Court must now consider the application of **section 90 of the Evidence Act** and the question of whether the statement was freely and voluntarily made i.e. it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.

[53] The fact that the statement went in without contest from the Defence does not absolve the Court of this responsibility. The Court must still satisfy itself on the evidence that the statement was freely and voluntarily made. The Crown, particularly, must have lead evidence either viva voce or through agreed evidence sufficient to satisfy the test contained in section 90. The Court in this regard is guided by the decision of the Belizean Court of Appeal in **Lisandro Matu v R**¹⁷.

[54] In the instant matter the Court finds that the Crown has led sufficient evidence to satisfy this Court that the Accused's Notes of Interview were freely and voluntarily made. The Court notes that the Accused was cautioned upon arrest and advised of his constitutional right to retain and instruct Counsel. The Accused was again cautioned prior to the Notes of Interview and again reminded of his constitutional rights. The Accused also conferred with JP Vargas and told him that he was willing to give the interview to WPC Ical. The Accused also signed the interview notes as true and correct. This evidence was not challenged at trial and in fact was led as agreed evidence. In those circumstances, the Court is satisfied that the Notes of Interview were freely and voluntarily made and accordingly will proceed to consider it as part of the body of evidence at trial.

¹⁷ Criminal Appeal no. 2 of 2011

Mixed statement direction

[55] As the Court has concluded that the interview of the Accused is mixed and was freely and voluntarily made, the Court reminds itself that the whole statement, both the incriminating parts and the excuses or explanations, must be considered in deciding where the truth lies. Further, the Court reminds itself that the incriminating parts are more likely to be true (otherwise why say them?) whereas the excuses do not have the same weight.

'Lucas' direction

[56] The Crown has submitted that there are proven lies in the interview notes of the Accused which they rely on as probative of the guilt of the Accused. They submit that the lies told by the Accused in his interview are as follows:

- a) When the Accused denies knowing C by the last name of Rodriguez – The VC testified that her last name was Rodriguez, and the Accused admitted in his evidence at trial that he knew the VC. In his notes of interview however he denied knowing any C Rodriguez. The Crown contends that considering the Accused's testimony at trial that he knows C, his statement to the police that he didn't know any C Rodriguez is a proven lie told to the police during the interview.
- b) When the Accused denies going to the home of C on the night in question when WPC Ical referred to C by the last name Rodriguez – the Accused denied being at the home of any C Rodriguez on the 2nd of July 2021 but admitted at trial that he was at C's house that night. The inference contended by the Crown being that when he said he wasn't at C Rodriguez's house that night in his interview he was lying to the police.

[57] The Crown therefore submit that the Court should direct itself in accordance with the case of **R v Lucas**¹⁸ which provides that the Court can use lies told by the Accused in support of an inference of guilt against the Accused if the following criteria are met:

- a) There is a proven lie told by the Accused – the statement must have been proven to be a lie by admission or by evidence from an independent witness.
- b) The lie must be deliberate and:

¹⁸ [1981] QB 720

c) The reason for the lie must be a realisation of guilt and a fear of the truth.

[58] Counsel for the Accused on the other hand argued that there was no proven lie which would give rise to the need for a Lucas direction. The defence argued that there was no lie proven by the Crown as the Accused at the time of the giving of the interview did not know C by the last name Rodriguez. The defence further argued that this could be gleaned from the interview itself as the Accused repeatedly said he didn't know anyone with the last name Rodriguez but volunteered, without being asked, that on the night of the 2nd of July 2021 he was at the home of C Romero which is the last name he knew the VC to have.

[59] The Court notes that when the Accused testified, he didn't indicate in his evidence that he only knew C by the last name of Romero at the time of the interview, this explanation came by way of submission from Counsel during his closing address. The defence arguing that the Court could infer that the Accused only knew C by the last name of Romero from the way that he responded during the interview itself without such testimony coming from him.

[60] Inferences to be safely relied on by the Court must have an evidential basis from the evidence led at trial. Without such an evidential basis the Court may be engaging in impermissible speculation in coming to such conclusions. This evidential basis can come from the viva voce evidence of witnesses or from the evidence agreed by the parties at trial. Counsel at trial ought properly to lead evidence upon which they want to invite the Court to make certain key inferences, or they run the risk that the evidential basis to draw key inferences upon which they intend to rely may be absent. In this case the explanation offered by Counsel for the Accused with respect to his responses during his interview ought properly to have come from the Accused himself while giving testimony. However, in the circumstances of this case, the Court considers that, even without such an explanation coming from the Accused, there is a basis for the inference suggested by Counsel when one looks at the interview in its entirety. The Court notes that it is the Accused who volunteered that he was at C's house, calling her by the name Romero and it was not that the police suggested the alternative surname to him.

[61] In the circumstances, to the mind of the Court, there are two equally weighted inferences that can be drawn:

a) The Accused was deliberately lying when he said that he didn't know any person by the name of C Rodriguez, nor was he at the home of C Rodriguez on the night of the 2nd of July 2021.

- b) The Accused did not know C by the last name of Rodriguez but rather by the last name Romero and was not deliberately lying when he indicated in his interview that he didn't know C. Rodriguez.

[62]The Court reminds itself that where there are two equally weighted inferences, it must draw the inference in favour of the Accused and does so in this case. The Court on this issue draws the inference that the Accused did not know C by the last name of Rodriguez but rather by the last name of Romero when he was interviewed by the police. Accordingly, the Court does not find that there was a deliberate proven lie told by the Accused and will not direct itself in accordance with the case of **R v Lucas**.

Undisputed Facts

[63]On the Crown's case certain undisputed facts emerge:

- a) The Accused did a teaching internship at the San Francisco RC school for three months during a period where C was attending the same school and in Standard 3.
- b) Sometime in 2021 the Accused and C began conversing on Facebook Messenger.
- c) On the night of the 2nd of July 2021 at around 10:30 pm the Accused went to the home of C, C let him in the back gate and took him upstairs to her room.
- d) Sometime later the Accused left and went home.
- e) C was taken to be medically examined on the 21st of July 2021 and gave a statement to the police on the same day.
- f) The scene was photographed by OV on the 29th of July 2021.
- g) The Accused was arrested on the 23rd of September 2021 and interviewed on the 24th of September 2021.
- h) The Accused was then charged on the 24th of September 2021.
- i) The scene was then photographed again by Zair Villatoro on the 25th of February 2022.

The incident

[64]For the offence of USI contrary to section 47(1) the Crown must prove two things as indicated above i.e. penetration of the vagina of C by the Accused of the slightest degree and that C was under the age of fourteen at the time of the offence. C's birth certificate indicating that her date of birth is the 18th of June

2008, was tendered as part of the agreed evidence of WPC lcal. This makes C, thirteen years of age at the time of the incident. The Court accepts the age of C at the time of the alleged incident.

[65]What remains for determination therefore on the sole count of the indictment is whether the Accused had sexual intercourse with C as alleged. On this issue, the Crown relies on the evidence of C, the medical evidence from Dr. Erlindo Chi and the inculpatory portions of the Notes of Interview given under caution by the Accused to the police.

Medical Evidence

[66]The medical evidence of Dr. Chi is that C's hymen was not intact, and she presented upon examination with a hymen that had a partial single tear with rolled edge. The Court notes that the absence of the hymen can be indicative of penetration and may be supportive of C's account that there was penetration of her vagina. The Court is careful to remind itself that Dr. Chi's evidence cannot decide the ultimate question which is whether it was the Accused who penetrated C. That answer can only come from C's evidence as there were no other witnesses to the alleged acts. The Court will therefore examine C's evidence in determining whether the evidence led by the Crown on the sole count of Unlawful Sexual Intercourse is strong enough to carry a conviction.

C's evidence

[67]C testified that the Accused messaged her on the 2nd of July 2021 offering to come to her home and enquiring where her parents were. C sent him her location after questioning the Accused about whether his girlfriend would find out. The Accused arrived about 15 minutes later and C brought him upstairs to her room. When in her room, the Accused initiated the physical interaction between the two, beginning to kiss C and then taking off their respective clothes. He then penetrated C twice. On the first occasion it lasted for about 4-5 seconds and the second time was longer ending with the Accused ejaculating on C's leg and then wiping it off with his shirt.

[68]The Court notes that the main challenge to C's evidence is to her credibility. There is no dispute that the Accused was in her room at around 10:30 pm on the night of the 2nd of July 2021 as the Accused places himself there both in his evidence and in his interview. The Court therefore does not need to examine the reliability of C's recognition of the Accused on the night.

[69]The Court after carefully looking at the evidence considers C to be a honest witness. The Court found C's evidence to be cogent and consistent with other evidence in the case. The Court has looked at the inconsistencies that emerged in her evidence under cross examination and found that that they do not diminish the credibility of the witness in the mind of the Court. The Court bears in mind that C was 13 at the time of giving her statement to the police and had just been medically examined by Dr. Chi and then taken to the police station by her mother to give a statement. The Court does not find it incredible or implausible that she would fail to mention some details to the police as a child may have difficulty explaining the totality of an incident to adults or understanding the significance of events in order to mention them. The Court also considers the shame that a young girl would have experienced having to tell adults about her first sexual experience knowing that it occurred at an age when she should not be having sexual intercourse. The Court therefore does not find the fact that C only mentioned the two instances of penetration and the attempted doggy style at trial to be evidence of fabrication by the VC.

[70]The Accused through Counsel sought to suggest as a motive for C's fabrication of the allegations against the Accused that she had a crush on the Accused and was upset that the Accused did not have sexual intercourse with her on the night in question. The Court reminds itself that the Accused is under no obligation to prove a motive by the witness to lie and the burden remains on the Crown to satisfy the Court so that is sure that the witness is honest and reliable. However, where a motive is suggested to the witness by Counsel or raised by an Accused through evidence, the Court is obligated to examine it and see whether it affects the testimony of the witness in any way.

[71]The Court finds this suggested motive implausible as C's behaviour on the evidence and at trial is not consistent with someone who bears a grudge against the Accused. The Court notes that C does testify that she cried after the Accused left but she indicates that the reason she cried was because she felt bad about having sex not that she was angry the Accused left. Further, on Ms. Mejia's evidence, C appears to be proud of the fact that she had "vamps" on her breasts. Also, the Court notes that neither when she gave her account to the police nor in court at trial did she try to paint herself as an unwilling participant who was forced by the Accused. C accepts that she played a role in having the Accused come to her house and that she was a willing participant in the events of the night in question. The Court therefore paid no weight to this suggestion by Counsel when evaluating C's credibility.

[72]The Court also found as plausible, C's account that she knew the Accused by his name because he introduced himself to her class by that name when he was supervising them. The Court also doesn't

consider it out of the ordinary that a primary school student would speak to the new teacher at break time in order to get to know him especially a teacher who is closer in age to their own age.

[73]The Court is careful not to place any undue weight on the demeanour of the witness but the Court notes that there was nothing in the demeanour of the witness which made the Court feel disquiet about her testimony.

The mixed statement of the Accused

[74]The Court has carefully considered the interview of the Accused and found that there are incriminating portions of the interview which lend support to the Crown's case that the Accused went to C's house to have sex on the night in question and did have sexual intercourse on the night in question. The Court notes that in his interview the Accused admitted to going to the house of C on the night in question and having a discussion with her about having sexual intercourse. The Court is careful to emphasize that it will consider both the inculpatory and exculpatory portions of the interview (where the Accused denies having sexual intercourse with C) if the Court rejects the Defence case and comes to consider whether the Court is sure that the Accused committed the crime as alleged.

Whether the evidence on the sole count of the indictment is strong enough to carry a conviction

[75]The Court, on its foregoing analysis, is of the opinion that the evidence of the Crown on the sole count of the indictment is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

The Case for the Defence

[76]The Accused upon being put to his election took the stand and gave evidence subjecting himself to cross examination. He called no witnesses. The defence advanced at trial through cross examination of the Crown's witnesses and the evidence of the Accused is denial and fabrication. The Defence alleges that C is fabricating the allegations against the Accused. While the Accused admits that he was in C's bedroom on the night in question, he denies kissing or having sexual intercourse with her. He further suggests that it was C who invited him over that night and not him who messaged C first. He denied introducing himself to C while he was doing his internship. He denied sending her a friend request on Facebook and says that it was C who added him. He also denies messaging C later and asking if they

could have sex again indicating that it was C who messaged him and asked him to come back and he turned her down because of her age.

Good Character Direction

[77]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.

[78]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.

[79]As the Accused has testified, he is entitled to both limbs of the Good Character direction. The Court in giving him this benefit will appraise his evidence considering that his good character makes him more likely to be believed when he says he did not have sexual intercourse with C both at trial and in his notes of interview. The Court will also give him the benefit of the propensity direction by looking at the evidence through the lens that his good character makes it less likely that he acted as alleged by the Crown.

Analysis of the Defence case

[80]The Court carefully analysed the Defence's case bearing in mind that the Accused has no burden of proof in these proceedings. Even if the Court rejects his defence of denial and fabrication the Court must still go back to the case for the Crown to see if I am satisfied beyond a reasonable doubt.

[81]The Court disbelieves the Accused when he says that he did not have sex with C on the night in question. The Court accepts that he was in C's bedroom on the night in question but does not accept that he was so appalled by C's age that he left immediately and went home. The Court notes that even after learning C's age and fearing the potential consequences of interacting with C, on his own case, he continues to have her as a friend on Facebook and communicate with her thereafter.

[82]The Accused in his evidence indicated that he got home at about five minutes before the curfew that night which was 11 pm at that time. The Court takes judicial notice however of **Statutory Instrument no. 66 of 2021** which provided that the curfew in place on the night in question, due to the Covid 19 pandemic, was midnight. The Court also found it implausible that the Accused was able to get to C's home at 10:30 pm, be taken to her bedroom surreptitiously to avoid her grandparents finding out, spend ten minutes in her bedroom, leave, then take 15-20 minutes to get to Yo Creek village and still arrive home at 10:55 as alleged by the Accused.

[83]The Court rejects the suggestion by the Accused that he didn't want to know C and had no interest in her whatsoever. The Court finds that inherently implausible as if the Accused didn't want to know C and had no interest in C beyond chatting on messenger, he would not have gone to her house at 10:30 at night, knowing that there was a curfew coming soon and knowing that her parents were not at home. The Accused under cross examination even admits that despite his earlier assertion that he had no interest in C, he wanted to have sexual intercourse with her on that night.

[84]The Court has evaluated the evidence of the Accused considering that his Good Character makes him more likely to be believed when he says he didn't have sexual intercourse with C. The Court has considered that the Accused has maintained that he did not have sexual intercourse with C upon being first taxed and at trial. The Accused has remained consistent on this issue. The Court has also considered the allegations of C considering that his Good Character makes it less likely that he acted as alleged by her. However, considering the strength of the evidence of the Crown, the Court accords little weight to the Good Character of the Accused.

[85]Considering the strength of the evidence from the Crown, particularly the evidence of C, the Court rejects the case for the Accused. The Court is fortified in this approach by the advice of the Privy Council in **Bally Sheng Balson v The Queen**. The Court will now return to the case for the Crown to see whether the Court is sure that the Accused had sexual intercourse with C on the night of the 2nd of July 2021.

The Court's findings

[86]Having looked at the totality of the evidence, the Court is satisfied so that it is sure of the following:

- a) **The Accused had sexual intercourse with C** – The Court accepts the evidence of C that the Accused visited her home on the 2nd of July 2021, she took him to her room, and he penetrated her twice with his penis. The first instance of penetration being for 4-5 seconds and the second

being for longer until he ejaculated on her leg. The Court also accepts that C told the Accused her age during Facebook Messenger conversations prior to meeting the accused on the 2nd of July 2021.

The Court accepts the evidence of Dr. Erlindo Chi that C's hymen was absent and finds that this is supportive of C's account that there was penetration.

The Court also holds that C's account finds support in the incriminating portions of the interview of the Accused. The Court accepts those parts of the Accused's interview where he says that he went to C's room, and they discussed having sex. The Court rejects the exculpatory portions of the interview of the Accused.

- b) **C was under the age of fourteen at the time of the incident** – The Court accepts the agreed evidence led by the parties that C's date of Birth is the 18th of June 2008. The Court therefore finds that C was 13 years of age at the time that the Accused had sexual intercourse with her on the 2nd of July 2021.

Disposition

[87] The Court finds Jose Zavala guilty of Unlawful Sexual Intercourse contrary to section 47(1) as charged in the indictment. The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**¹⁹.

Raphael Morgan
High Court Judge
Dated 14th November 2024

¹⁹ [2020] CCJ 7 (AJ) GY at para 32.