

count alleges that the Accused between 15 January 2020 and 1 February 2020, in Belmopan City in the central district of The Supreme Court intentionally penetrated the vagina of the virtual complainant a person under the age of 16 to wit ten years of age and that penetration being sexual in nature.

- [2] The Accused entered not guilty pleas in a judge alone trial was held pursuant to the provisions of section 65 A of the **Indictable Procedures Act** as Amended.

The Facts:

- [3] I will for ease of reference summarize evidence adduce at the trial by the witnesses of the Crown and the unsworn statement submitted by the Accused. However, in arriving at my verdict I will do so considering all evidence available at this trial.
- [4] **Leoneley Martinez testified** that the virtual complainant is her daughter, and her date of birth is 10 December 2009. In January 2020, the virtual complainant attended United Evergreen Primary School and was in standard four at the time. This witness stated that on the 24 March 2020, at about 10:30 a.m., she went to the Western Regional Hospital with the virtual complainant and a police officer. There she was present when a medical examination was conducted on the virtual complainant by Dr. Edna Mendez Peraza, in her presence.
- [5] This witness was not cross-examined.
- [6] **Genesis Banks**, testified that in January 2020 she attended the United Evergreen Primary School. She recalls an incident between 15 January and 1 February 2020. She said she was spending the weekend with her mother who resides at 13 St. Joseph Street, San Martin Area, Belmopan, and she asked her mother for permission to go to her friend's home, Shanelly and Syrie, to play. Her

mother said yes, and she went over to play with her friends. They were engaged in a game of hide and seek when the Accused came over shortly afterwards and joined them. When it was her turn to come out, she came out of a bathroom and said ready or not here I come, the Accused bedroom was near the bathroom, and he was standing near the bedroom door, so she asked him why he did not hide. He said, he did not have time to hide and pulled her by her shirt and pushed her on her wooden bedframe. He took off her shirt and kissed her on her neck and pulled down her short pants. He pulled down her short pants and after that he pulled down his cargo pants and pulled down her panty and pushed his penis inside her vagina. When he was finished, he put her clothes back on. She said it was Shanelly's turn to find them, and she got mad and stopped playing the game. The Accused said he would get ready to go to work and watch a movie with them. Cyrie is the niece of the Accused. The Accused sat with them and then the Accused said he was cold, and he got up and got a blanket and covered himself and her right leg. She went on to state that when the Accused put his hand on her right leg, he started to rub her knees, and she knocked his hands off several times. Shanelly asked her if she wanted coffee, and she said she did not drink coffee. However, before she got up from the couch the Accused put his finger in her vagina. A little later she heard her mother calling she went home, ate, and went to sleep.

- [7] The virtual complainant continued that she got to know the Accused through his two nieces, Shanelly and Syrie, and that she knew him for about a year at that time and has seen him for about twenty times. She also stated that when the Accused placed his penis in her vagina there was a small yellow nightlight on in

the bathroom light which was a yellow, fluorescent bulb was also on. She said she saw his face when he was standing by the bedroom door. The virtual complainant said that when the Accused was on top of her it was for about a minute. And she was able to see his face when he was on top of her. When they were sitting on the couch the TV was on and there was light coming from the bedroom door some three to four feet away. The witness said that she told someone from school what had happened to her and on the 24 March, she went to the Belmopan Police Station to give a statement. She also showed the police where the incident happened. She also said she was examined by a female doctor when at the hospital.

[8] **Under cross-examination**, the witness said that she and Syrie was about the same age and Shannelly was about one or two years older than them. She said they were neighbours and friend. That day was not the only day that they played hide and seek. And that they played other games as well. She denied that one of the games involved inserting each other fingers into each other's vagina. She said that sometimes they go to the grocery store but on that day, she did not want to go to the grocery store, and she never asked for money to buy snacks. She went on to state that on that day she never had a conversation with the Accused about money.

[9] She said the Accused did take off her pants and pushed his penis inside her vagina. She was not sure what time she went to Syrie's apartment, but it can be after 6:30 p.m. She said it was the Accused who got the blanket to place on them. And he was sitting on the couch with her and Shanelly, and she was in the middle with Shanelly to her left and the Accused on her right. The blanket did not cover

her and Shanelly up from their shoulders to their feet. She said the blanket covered her right leg and was not covering her top. She continued that there was light coming from the bathroom door and she was able to see the Accused face. Sahe said she would not put herself through mental trauma for five dollars.

[10] There was no re-examination of the witness.

[11] **Dr. Edna Mendez testified**, she told the court of her experience and qualifications in the field of paediatrics and was deemed an expert in the field of paediatrics medicine. The witness recalls being at the Western Regional Hospital on the 24 March 2020, at around 10:30 a.m., when she carried out a medical legal examination on the virtual complainant who was brought by a police officer, a social worker and her mother. The findings of the vaginal examination disclosed that there was vaginal opening with white secretions, the hymen was not intact and there was a complete tear at two o'clock. The area between the vaginal opening where the labia meet is not intact. She said we normally describe the tear like a clock twelve o'clock being on the upper part and six o'clock being on the lower part. In this case it would be the vagina. In this case if you picture a clock the injury would be at nine o'clock and the other injury at two o'clock. So, those are the two tears she had on the hymen of her vagina. When asked what could have caused the tear she observed on the hymen of her vagina, the witness stated that normally the hymen of a ten-year-old girl should be intact. The hymen is a membrane surrounding the vagina it was not intact and there was a tear that could only be due to an injury to the hymen. The witness went on to state that normally an injury to the hymen can be caused by various factors but when there is a tear the hymen is very fragile, and it can be torn by several thing and when

there is a tear and there was a complete tear at two o'clock that can be explained by some sort of penetration. Also, the area where the labia menorah, or the lips of the vagina meet was not intact, right where it ends at six o'clock was not intact and that could have been due to friction. She was asked what the likely cause of friction would be. She said if there was friction it would have been caused by penetration and there would have been erosion, and that area would not be intact. She was asked were the injuries you observed recent. She said it looked recent, but it was difficult to say how recent since they were not bleeding but they were not scarred in this case.

[12] **Under cross-examination**, the witness said she could not say with certainty when the tears took place. She also mentioned that any injury could cause the hymen not to be intact. But for it to have a complete tear at two o'clock and a partial tear at nine o'clock there had to be some sort of penetration there. She could not be sure if it was penile penetration. The witness said she could not see a finger causing a complete tear. A finger would probably make the hymen lose its intactness but not a complete tear.

[13] There was no re-examination.

[14] **Khadijah Thimbriel testified**, that in the 2020, she was a crime scene technician. She recalls on the 25 March 2020, at about 12:15 p.m., she was on call duty in the Belmopan Police Station and WPC Hyde requested her assistance to visit the St. Joseph Street, San Martin Area, Belmopan to photograph a house and a room. She visited the scene where she found a young girl, her guardian and a social worker was present and took photographs as requested. Those photographs are admitted into evidence.

[15] This witness was not cross-examined.

[16] **WPC Hyde testified**, she stated that on the 23 March 2020, she received information of a sexual case. Based on the information she received she along with PC Gonzalez visited an address at St. Joseph Street, San Martin Area, where she met the virtual complainant and her mother. She received information from the principal from United Evergreen Primary School and she recorded a statement from the virtual complainant in the presence of her mother. On Tuesday 24 she along with the virtual complainant and her mother visited the Western Regional Hospital. At around 10:30 a.m., she handed over a pair of medicolegal form for sexual offences and a consent form which was signed by the mother. The witness continued and testified that on Wednesday 25 March 2020, at around 9:00 a.m., the Accused was located and informed of the report made against him. He was detained at the Belmopan Police Station. On that same day, herself along with WPC Thimbriel, the virtual complainant, and a social worker visited an address in San martin area where photographs were taken. On Thursday 26 March 2020, she formally arrested and charged the Accused for Unlawful Sexual Intercourse he was cautioned and informed of his constitutional rights and remained silent.

[17] **Under cross-examination** she stated that she cannot recall if a parent or guardian was present when she arrested and charged the Accused. She could not recall if a Justice of the Peace was present.

[18] There was no re-examination.

[19] That was the case for the Crown.

[20] At the close of the Crowns case, the Accused was given his three choices, that is, i. that he could choose to remain at the dock and give an unsworn statement, or ii.

he could choose to come to the dock and give sworn testimony. He chose to make an unsworn statement. This is what he said,

'the day in question I was at home on a call with my girlfriend at the time. My little cousins were at home and started to play with Genesis. After a while they asked me to play with them which I did. We played for a while and afterwards I was asked for five dollars to go to the store and get snacks. When they asked for the money, I told them I did not have any. Shanelly said let us go watch a movie at her mom's house which is across the road from where I live. We entered the room and sat down. Syrie was scrolling down, and I sat down so we could watch. Shanelly said she was feeling cold and went for a blanket. When she came back with the blanket, she covered us up from the belly button down. After watching the movie for a while everyone started heading home. I went home. Shanelly and Syrie stayed in the apartment cleaning. When we were leaving Genesis told me that since I did not want to give her five dollars, she will tell her mother I molested her. During the entire time I did not pull Genesis into my room and put my penis in her vagina. Neither did I put my finger in her vagina whilst being in the apartment. I can only assume that it is because of the money I am here now'.

[21] The Accused, called no witnesses and that was the case for the Defence.

Submissions:

[22] Mr. Hamilton for the Accused, in his closing submissions reminded the court that the burden of proof relies at all times with the Crown and that his client has nothing to prove. Defence Counsel addressed the court on the evidence of the

doctor and the virtual complainant. He contends that the virtual complainant admitted that there was a grocery store nearby and she admits that she and her friends had visited it in the past. He further contends, that the virtual complainant admitted that she and her friend were sitting on the couch and were covered with a blanket. He submits that when he suggested to her that she could not have seen what occurred beneath the blanket her answer became evasive and answered that the blanket was not cover her legs. Counsel further submitted, that the virtual complainant could not see who if anyone inserted their finger inside her vagina and again her answer was evasive. Mr. Hamilton again submitted that the evidence of the bedroom where the virtual complainant alleges that the Accused placed his penis in her vagina was not sufficient for her to properly identify who if anyone inserted their penis into her vagina.

[23] Defence Counsel, address the court on the evidence of Dr. Mendez. He submits that the doctor stated in her evidence that the tear of the hymen could be caused by several factors, and it would be difficult to say how recent the injuries were. He further contends, that the doctor could not be certain that the injuries to the virtual complainant's hymen was as a result of penile penetration. He urged the court to reject the evidence of the virtual complainant and accept the unsworn testimony of the Accused and return a verdict of not guilty.

[24] Crown Counsel, Ms. Mohamed urged the court to accept the evidence of the virtual complainant about what occurred on the night in question. She submits that her credibility remained unshaken under cross-examination and that her answers under cross-examination remained unshaken. Ms. Mohamed, further contend that the evidence of the virtual complainant's identification of the Accused

as the person who placed his penis inside her vagina was not challenged in cross-examination. She knew the Accused prior to that day and that the Accused placed himself in that location on that day and in close proximity to the virtual complainant on the occasion when the rape occurred and when the sexual assault occurred.

The Law

[25] The Accused is indicted for the rape of a child contrary to section 47(a) of the **Criminal Code** CAP 101 of the Laws of Belize. That section provides as follows:

*“(a) Every person who rapes another and that person is under the age of 16 years old commits an offence and is liable on conviction and indictment for 12 years and may extend to life where that other person was over 14 but under the age of 16 at the time the offence is committed; or,
(b). imprisonment of not less than 15 years but may extend to life where that other person was under the age of 14 years at the time the offence was committed”.*

[26] The Accused is also indicted for assault of a child through penetration contrary to the provisions of section 47 (b) of the **Criminal Code**. That section provides as follows.

“Every person who intentionally penetrates the mouth, vagina, or anus of another person who is under the age of 16 years with a part of his body other than his penis or anything else and that penetration is sexual in nature commits the offence of assault and is liable on conviction on indictment to imprisonment for not less than 12 years but may extend to imprisonment for life”.

[27] The offence of rape of a person is committed, in this case, when a man has sexual intercourse with a female without her consent. To prove the act of sexual intercourse was committed the Crown must prove that the act of penetration of the female vagina had occurred. It is not necessarily for there to be ejaculation, but that act shall be deemed to have occurred on proof of penetration only. The law further provides that, sexual intercourse shall be deemed complete upon the least degree of penetration only. The offence of assault of a child occurs when a person inserts any part of their body into the mouth, vagina, or anus of a person under age 16. And that penetration must be sexual in nature. Thus, the Crown must prove beyond reasonable doubt that the Accused penetrate the vagina of the virtual complainant with his finger and when he did so it was for sexual purposes.

[28] In this case, it is common ground that at the time of the act of sexual intercourse the virtual complainant was ten years old. The law provides that a person of that age cannot give consent to an act of sexual intercourse with another person. Hence, the Crown is not obliged to prove the act of consent as part of their case. However, the Crown must prove that there was penetration of the virtual complainant vagina by the penis of the Accused as alleged. In this regard, the Crown relied on evidence of the virtual complainant and doctor Mendez. The virtual complainant testified that the Accused removed her clothing and put her to lie on the bed where he put his penis in her vagina and had sexual intercourse with her. When he was through, she put her clothes on and went out of the room. Doctor Mendez was deemed an expert by the court in the field of paediatric medicine. She testified, that she examined the virtual complainant on the 24 March 2020, and the findings of the vaginal examination disclose that there was

vaginal opening with white secretions. The hymen was not intact and there was a complete tear at two o'clock. The area below the vagina opening where the labia menorah meets is also not intact. She went on to state that normally an injury of the hymen can be cause by several factors. But when there is a tear, the hymen is very fragile, and it can be torn by several things but when there is a tear, and it is a complete tear at two o'clock that can be explained by some sort of penetration. Also, the area where the labia menorah meets is not intact. The labia menorah and the lips of the vagina meet is not intact where they end like at six o'clock. That area was also not intact and could have been due to friction. She opined that the injuries aforesaid looked recent, but she could not say how recent. Under cross-examination, the doctor said that any injury can cause the hymen not to be intact but for it to have a complete tear at two o'clock and a partial tear at nine o'clock there had to be some sort of penetration. She could not be sure if it was 100 percent penile penetration. She said she could not see a finger causing such a complete tear. She said the finger would probably cause the hymen to lose its intactness but not a complete tear.

[29] The Crown also relies on the evidence of the virtual complainant who testified that while sitting on the couch next to the Accused he commenced placing his hands on her knee under the blanket and on several occasions, she knocked his hands off before and before she got up, he placed his fingers in her vagina.

Analysis of the Crown's Evidence

[30] The defence is one of complete denial of the allegations made by the virtual complainant against the Accused. Section 92 (3) of the **Evidence Act** CAP 95 provides thus.

“Where at a trial a person is prosecuted for rape, attempted rape, carnal knowledge, or any other sexual offence and the only evidence of the prosecution is that of the person whom the offence is committed or attempted or the alleged accomplice of the Accused give evidence for the prosecution the judge shall where he consider it appropriate to do so warn the jury of special need of caution before acting on the evidence of such persona and should also explain the reason for the need of such caution”.

[31] As stated, aforesaid, the virtual complainant was ten years old at the time of the alleged commission of the offence. Adult experience makes me aware that at times children are known to prevaricate, fabricate stories, and fantasize events that did not occur. Thus, in the circumstances the court will exercise due care and caution in its consideration of the evidence of the virtual complainant adduced by the Crown before arriving at a verdict. The defence is one of a complete denial, the defence alleges that the virtual complainant concocted the allegations against the Accused because he refused to give her five dollars to buy snacks on the day in question. The defence further contends in their closing submissions that evidence of identification is inadequate to find the allegations of the Accused for the offence of rape.

Identification

[32] The Crown's case is that the virtual complainant and the Accused knew each other prior to the day of the alleged incidence as she was a friend of the Accused nieces, and they played together on a regular basis. She said she knew him for about a year and has seen him for about twenty occasions prior to the allegation of the commission of these offences. Indeed, in his unsworn statement the

Accused said that the virtual complainant was at his home playing. They asked him to play with them which he did for a while. He also stated that he accompanied them to watch a movie after they finished playing.

[33] I find in the circumstances, the Accused placed himself on the scene of in the company of the virtual complainant at the time of the commission of the alleged offences. The virtual complainant alleges that while she was speaking to the Accused by the bathroom and in that area was lit by the fluorescent light from the bathroom. She further alleges that while speaking to the Accused he took her into his bedroom which was lit by a small yellow light and the light from the bedroom. I find in the circumstances, the evidence of the identification of the Accused by the virtual complainant that he was at the home where the alleged incidence occurs to be quite strong.

[34] In considering the virtual complainant evidence I take into consider the evidence of the doctor who opined in her evidence aforesaid having conducted a medical examination of the virtual complainant who said, 'her findings of tears of the hymen of the virtual complainant and her opinion that this was caused by penetration and friction associated with that they are very powerful evidence that there was penetration of the virtual complainants vagina sometime prior to the 24 March 2020, when she carried out her examination. I further find from the evidence of the virtual complainant, that there was vaginal penetration was neither a prevarication nor fabrication.

[35] In respect of the second count of the indictment with the penetration of the virtual complainant's vagina with sexual intent, here again the Accused place himself on the scene by admitting that he was sitting on a couch together with the virtual

complainant and his nieces, but that they were covered with a blanket from the upper part of their body. The defence also contends, that the allegations against the Accused were also fabricated because of his refusal to give the virtual complainant money to buy snacks that day. The defence adverte that the virtual complainant threatened to tell her mother that the Accused sexually molested her.

[36] The evidence reveals that the virtual complainant left her friends and went to her mother's home that night and went to bed. The virtual complainant went on to state that she told one of her school friends about what happened to her and as a result her mother was called to the school and a report was made to the police. This occurred on or around the 23 March 2020.

Verdict

[37] I have carefully and cautiously considered the evidence of the virtual complainant as regards the day when the alleged incidence occurred. I have observed her demeanour while giving evidence especially her answers to the questions put to her whilst in cross-examination. I have found her testimony to be forthright and straightforward as she testifies to the events that took place. Moreover, there were no contradictions, no inconsistencies, or discrepancies in her evidence. I find the evidence of Dr. Mendez to be very powerful in support of the testimony of the virtual complainant. Her evidence clearly reveals that the virtual complainant's vagina was indeed penetrated at some time prior to the date of her examination. I do not accept for the reasons aforesaid for the contention of the defence that the virtual complainant threatened to accuse him of sexually molesting her because of his refusal to give her five dollars to buy snacks. Indeed, the evidence discloses that she did not speak to her mother of the incident herein but told a friend

sometime on or around the 24 March 2020, at which time her mother was called to the school and a report made to the Belmopan Police Station. Thus, in the final analysis I find that the evidence of the virtual complainant that the Accused had sexual intercourse with her and also inserted his finger into her vagina satisfies me to the extent that I feel sure of the guilt of the Accused on both counts of the indictment.

[38] Accordingly, the Accused is found guilty on both counts of the indictment.

Hon. Mr. F M Cumberbatch

Justice of the High Courts