

IN THE HIGH COURT OF BELIZE, A.D. 2023

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C75/2020

THE KING

v.

GIOVANNI BURN

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

APPEARANCES: Ms. Romey Wade for the Crown

Mr. Darrell Bradley for the Accused

DATES OF HEARING: 21st, 22nd and 23rd June 2023; 6th July 2023

DATE OF DELIVERY: 6th July 2023

JUDGE ALONE TRIAL

DECISION

1. Giovanni Burn (hereinafter “the Accused”) was indicted for the offences of attempt to rape, sexual assault and rape contrary to section 18 read along with section 46, section 45A(1) and section 46, respectively, of the ***Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020***, (“hereinafter the Code”) arising out of allegations of sexual assault occurring on 1st February 2019 made by SM. The trial began with the arraignment of the Accused on 21st June 2023 before this Court by judge alone pursuant to section 65A(2)(g) of the ***Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020*** as amended by the ***Indictable Procedure (Amendment) Act 2022***. The Accused pleaded not guilty to all counts and indicated no objection to the indictment.

2. The Court, in exercise of its inherent common law discretion¹ and following the guidance of our Court of Appeal in *Whitfield Flowers v R, Cr. App. 9/02*², decided to hear the matter in camera in the interests of justice. There was no objection by the parties.

THE EVIDENCE

The Crown's case

3. The Crown's case, in a nutshell, is that SM was sexually assaulted in a washroom at her home on the night of 1st February 2019.
4. The Crown called the evidence of six witnesses. The evidence of three of those witnesses was formally admitted by the parties pursuant to section 106 of the *Evidence Act, Cap. 95 of the Substantive Laws of Belize (Revised Edition) 2020*. The agreed evidence was that of Jason Reneau who processed and photographed the scene of the alleged sexual assault; Matthew Young, who detained the Accused on 3rd February 2019; and Rosalie Sutherland³, the investigator who charged the Accused and indicated that after being told of the report against him and being cautioned he remained silent.
5. SM was the Crown's second live witness, but her evidence is referred to first for ease of exposition. She testified in evidence in chief that on 1st February 2019 around 10:37 p.m. she was at her home with her two children. SM had asked someone to purchase some fried chicken for her and he agreed. He took the money and when he came back, he texted her and told her that he was outside her home. SM went outside and when she got to her gate, she saw the Accused coming towards her from the direction of a nearby park. SM immediately became fearful and began to run in the direction of the man who brought the fried chicken. SM was fearful because she never expected to see the Accused as she had blocked his number and had broken off contact with him. The Accused had, prior to this night, made unwanted sexual advances towards her and she did not want to communicate with him. SM testified that the Accused had asked to see her naked body on a video chat so that he could masturbate while watching. This evidence of these prior interactions between

¹ See *R v Governor of Lewes Prison ex p Doyle [1917] 2 KB 254*

² Para. 3

³ Only the 1st statement of the witness, dated 15th March 2019 was agreed and read into evidence. On page 15 at line 2 it was agreed by both parties that the word "2nd" should be replaced by the word "3rd". On page 15 at line 7 from the word "that" to line 12 ending with the words "kill her" was redacted and replaced with the words "certain things and as a result". On page 16 line 16 from the word "I" to line 29 that ends with the word "report" would be redacted.

SM and the Accused was received by the Court as background evidence, without which SM's evidence of fearfulness and her reaction to the Accused on the night of the incident would be unintelligible, on the authority of a decision of our Court of Appeal in *FW v R, Cr. App. 18/11*⁴.

6. SM testified in chief that she knew the Accused from the neighbourhood for about 15 years before 1st February 2019 from going to the store and purchasing goods. She said that he lived a block away from her house and she had to pass where he lives to go to the shop. She would see him most days when she went into the shop, for about 3-4 days a week. She last saw him a week before the night of the incident.
7. SM further testified in chief that the Accused came towards her. SM received her fried chicken and stood directly behind the person who brought it. The Accused stood 3 feet away from SM and he exclaimed in an angry tone that he already saw her and that she had no reason to hide. SM took her fried chicken, and the Accused left the scene. SM went back to her house. When she saw the Accused the lighting condition was good, light came from the lamppost on the street. There was nothing obstructing SM from seeing the face of the Accused. That interaction lasted about 5 minutes. SM testified that she could remember exactly what he had on. The Accused wore a black hat, a cream with black polo shirt, black three-quarter pants, white socks, and brown tennis shoes.
8. SM further testified in chief that she remembered that her bicycle was outside, and she went out to bring it inside. While bending over to unlock her bike the Accused placed his hands on her neck. He grabbed her behind her neck and told her to shut up. She knew that it was the Accused because she recognized his voice due to their previous telephone calls and she had a short time before heard him speak when he told her not to hide. Afterwards she fell to the floor and her body faced up with her back to the ground. SM saw the Accused standing right above her. She testified that she was in shock and confused. The Accused began to drag her in the direction of her washroom. SM was still facing upwards with her back to the ground. She told him to please do not put his hands on her. The Accused continued to drag her. The Accused went into the washroom where he stood on one of the cement blocks facing the washing machine and SM got up still confused about what was happening.
9. SM further testified in chief that the Accused took his hands and put it under her dress and tore her blue and pink underwear. SM said that she was scared,

⁴ Para. 29

did not know what to do and felt defenseless. The Accused then turned her around and told her that tonight was the night that he would “f*** me in my bottom”. The Accused was on top of her, and SM could smell alcohol on him. She felt his teeth bite on the left side of her neck. SM “tightened up” herself to avoid penetration. The Accused was forcing his penis into her buttocks while he stood right behind her. She continued to “tighten up”.

10. SM further testified in chief that the Accused took his finger and shoved it with all his force in her anus in an “in and out” motion as well as “up and down” with all his might. She said that she was in a lot of pain. The Accused then took that same finger and shoved it in her vagina and made an “up and down” motion. Afterwards the Accused told SM that if he caught her talking to his son or the person who brought the fried chicken, he will get his gun and shoot her.
11. SM further testified in chief that the Accused mentioned that he would treat her “like a whore”. He forced SM’s head, grabbing her by her hair with such force that her wig came off, to his erect penis and told her to suck it. SM complied and sucked his penis. She testified that she did not consent to anything the Accused was doing. The Accused took his right hand, and he slapped her on her jaw and she “blacked out.” After re-orienting herself SM thought to herself, she may not live to see her son again. SM told the Accused that she would tell her mother and the latter replied he did not care. SM said that afterwards she picked up her dress and wig and ran inside her house. She said that she lay down in her bed and felt violated and ashamed.
12. SM indicated in her evidence in chief that 30 minutes elapsed from the time she was in the laundry room to the time she left. She said that the lighting was good and there was light from the streetlight, a light in her yard and the neighbour’s yard. SM said that there was nothing obstructing her from seeing the face of the Accused and his entire body. She indicated that he was on top of her, in front of her and in her face. SM said she never screamed for help because the only people in the yard were her and her two sons. She said she felt “very very afraid” that if she screamed or fought back the Accused would have killed her. SM testified that she only made a report on the 3rd of February 2019 because she felt weak, was in pain and felt like her mind had shut down. She said that when she finally found the strength, she saw the Accused walking in the street with a fishing rod and became afraid. SM testified that she could have called her mother on the phone but wanted to speak to her at home.

13. SM was cross-examined. She said that she had previously given the Accused her number, after he had asked her for it. SM testified that she previously had friendly and social conversations with the Accused. She accepted that there were a lot of people in the area she lived, and that she had neighbours. SM denied that the Accused assisted her family financially. SM denied that they were courting. SM denied the suggestion that she never saw the Accused at 10:37 p.m. on 1st February 2019. SM accepted that the Accused was dragging her outside in her yard. SM accepted after being shown her statement that the door to the washroom was open at the time of the incident, and that the passage was 3 feet wide. SM denied the suggestion that the incident never happened. SM accepted that she said in her statement that the Accused bit her clitoris very hard. She also accepted that the evidence about seeing the Accused with a fishing rod after the incident was not recorded in her statement.
14. SM in re-examination testified that the washroom door would not stay closed without being padlocked.
15. The Crown's first live witness was Dr. Tracey Nicholas. The Court deemed her an expert, without objection by the Accused, based on her qualifications and experience. Dr. Nicholas testified in chief that she had medically examined SM on 3rd February 2019. Her findings were that there were abrasions to the shoulder blade area. She also found abrasions with denuded areas, meaning there was a loss of skin to the back and the mid to lower area of the back. Dr. Nicholas testified that there were no lacerations or bruising noted in the genital examination. She also found the sphincter tone was normal and no bruising or lacerations were seen. Dr. Nicholas testified that there was a contusion of the neck, bruising that would be commonly called a hickey. She opined that these injuries appeared new as there was no scabbing over which takes a couple of days. However, she opined that it was not within hours as there was no active bleeding. She could not, however, say when these injuries were inflicted.
16. Dr. Nicholas further opined that it was not unusual to not find bruising or injuries to the genital area or anus for victims of sexual assault. She testified that the fact that one does not see genital trauma did not equate to whether there was coercion or force, or if the person consented or not. She indicated that:

“there are few things that can affect or influence the evaluation (1) the timing of the evaluation, the longer the time from the incident to the evaluation the less likely you are to see the trauma; (2) the sexual experience of the person meaning someone who is a virgin versus

someone who is sexually active, the age, in the sense of a prepubescent person versus an adult, the sex, males for anal sex the trauma for a male would be much more than a female and that is just based on anatomy; (3) whether the evaluation was done with magnification, which was not done, stains which was not done and whether you are doing it with the naked eye (4) resistance whether the person was fighting or struggling.”

17. Dr. Nicholas was not cross-examined.

18. The Crown’s final witness was AM, the mother of SM. She testified that on 2nd February 2019 around 6 p.m. she saw SM and the latter was crying and appeared frightened.

19. The Crown thereafter closed its case, and Mr. Bradley for the Accused made a no-case submission. He submitted on the second limb of *Galbraith* that the case was so weak because of implausibility, discrepancies, and inconsistencies that no reasonable tribunal of fact could convict. The basis of the submission were contentions that (i) there were material discrepancies between SM’s evidence and Dr. Nicholas; (ii) SM’s failure to attempt to escape or raise an alarm where there were avenues for both and (iii) there is a lack of corroboration.

20. The Court derived considerable assistance from a decision of our Court of Appeal in in ***Director of Public Prosecutions v Marlon Blease, Crim. Application for leave to appeal No. 10/02***⁵. In the Court’s view, in this case, much like *Bleaze*, all of the issues raised by the Defence were matters for the Court’s fact finding function: (i) the purported discrepancies with regard to the injuries **could** be resolved by a reasonable tribunal of fact with regard to the fact that the VC was not examined right away, namely 2 days after the alleged assault, and Dr. Nicholas gave evidence as to how trauma may not be seen in an examination after a sexual assault; (ii) the failure of SM to escape/raise an alarm were questions of the reliability of SM which was clearly an issue for the tribunal of fact and (iii) corroboration is not a legal requirement and as noted in *Bleaze* the evidence of the Crown must be taken at its highest. The Court overruled the no-case submission.

21. The Accused, after being advised of his three options, chose to give an unsworn statement from the dock and called one witness, Ms. Shanice Rivero.

22. The unsworn statement was as follows:

⁵ Paras. 8-12

“My name is Giovanni Carlos Burn. I am 49 years old. I live at the corner of College and Bachelor Street located in Belize City, in the Belize District. I am a father of 5 kids. I am a driver for the Ministry of Health in the Mental Health Department. I have been driving for them for over 10 years. I am the provider for my dad Charles Marlon Burn. I live with my dad I provide food and medication for him. I have known [SM] for a while. We were in a relationship. I would never harm her, rape her and I don’t condone any sexual assault against any female.”

23. Shanice Rivero testified in examination in chief that she was a special constable police officer. She said that she knew SM and the Accused well as they grew up together. Ms. Rivero testified that she was friends with the niece of the Accused, Amber. She said that in November-December 2018 she saw the Accused and SM together on a culvert by her father’s house kissing and holding hands. Ms. Rivero testified that they would pass her father’s house walking in the direction of her house. She said that out of a week she would see them together 4-5 days out of the week and that this was over about 2-3 weeks.
24. In cross-examination Ms. Rivero said that she was not friends with the Accused but was a friend of the family. She also said that she saw the Accused and SM the night of 1st February 2019. In re-examination Ms. Rivero testified that she saw them together at 10-11 p.m. on that night hugging, kissing, and having a conversation.
25. Both parties gave closing addresses which were carefully considered by the Court. The case for the Accused was that SM fabricated these assaults and that her evidence is contradicted by the medical testimony. The Crown submitted that the evidence of SM was clear and cogent and proved guilt beyond reasonable doubt.

THE LAW

26. The *Code* defines the offences of rape and sexual assault, for the purposes of the instant case, as follows:

*“71.-(1) Rape is the **penetration** of a person’s **mouth, vagina or anus**, with **a penis**, **without that person’s consent**.*
(2) It is hereby declared that if at a trial for rape the jury has to consider whether a man believed that a person was consenting to the penetration by his penis, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction any other relevant matters, in considering whether he so believed.

...

45A.-(1) Every person who intentionally touches another person, that touching being sexual in nature, without that person's consent or a reasonable belief that that person consents, and where the touching involved-

(a) that person's vagina, penis, anus, breast or any other part of that person's body; ...commits an offence

...

53A.-(1) If in proceedings for a sexual offence to which consent applies, it is proved that-

(a) the accused person committed the act;

(b) any of the circumstances specified in sub-section (2) existed; and

(c) the accused person knew that those circumstances existed, the complainant is to be taken not to have consented to the alleged offence unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) For the purposes of sub-section (1) (b) the circumstances are that-

(a) a person was at the time of the alleged offence or immediately before it begun, using violence against him or another person or causing the complainant to fear that immediate violence would be used against that other person;

...

(c) the complainant was unlawfully detained at the time of the alleged offence;

...

(3) If in proceedings for a sexual offence to which consent applies, it is proven that the accused person committed the act and that any of the circumstances specified in sub-section (2) existed, it is to be conclusively presumed-

(a) that the complainant did not consent to the alleged offence; and

(b) that the accused person did not believe that the complainant consented to the relevant act." (emphasis added)

27. The Court is assisted in establishing the elements of the offence of attempt to rape by a decision of our Court of Appeal in *Peter Augustine v R*, *Crim. App. 8/01*, which assisted in providing the appropriate directions for finding an attempt proved, per Carey JA:

"13...The jury, would we think, have been better assisted to discharge their duty... if they were told something along the following lines: - An attempt to commit a crime is itself a crime. Before the accused can be convicted of this offence, it must be proved;

(a) that he had the intention to commit the full offence and that in order to carry out that intention, he
(b) did an act or acts which is/are step(s) towards the commission of the specific crime, which
(c) is/are directly or immediately and not merely remotely connected with the commission of it, and
(d) the doing of which, cannot be reasonably regarded as having any other purpose than the commission of the specific crime.
All the above must co-exist. Intention alone is not sufficient - it is no offence merely to intend to commit a crime. Doing of the acts alone without intention is not sufficient. Act(s) done must be something more than mere preparation for the commission of the offence. (emphasis added)

28. The Court interprets the above as follows, in the context of the evidence in this case:

- i. To establish attempt to rape the Crown must prove beyond reasonable doubt that the Accused took steps towards the commission of the offence of rape of SM, which could have only been done to achieve the crime of rape, and which were not remote, with the specific intention to commit rape.
- ii. To establish sexual assault the Crown must prove beyond reasonable doubt that the Accused touched SM intentionally on any part of her body, that touching being sexual in nature, without SM's consent or a reasonable belief that SM was consenting.
- iii. To establish rape the Crown must prove beyond reasonable doubt that the Accused used his penis to penetrate the mouth or vagina of SM without her consent, and he knew she did not consent.
- iv. To assist the Crown in proving the absence of consent there are certain presumptions that may be triggered by virtue of section 53A(3) of the Code if the Court finds certain facts proved.

ANALYSIS

Count 1: Attempt to rape

29. The Court will consider each count in the indictment separately. The Court has warned itself that it should not be prejudiced by the mere allegation of sexual offences. Though demeanour is a legitimate consideration in the assessment of evidence, the Court has warned itself that the fact that SM broke down in tears at several points of her evidence in chief does not necessarily mean that her evidence is truthful, and the Court notes that tears can be manufactured.

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

31. The evidence which has been led by the Crown to make out the elements of the offence of attempt to rape are as follows:

- (i) **The evidence that the Accused took steps that were more than preparatory, and not remote, to the commission of the offence of rape:** This is established by evidence of SM in examination in chief that the Accused tore her under wear and attempted to force his penis into her buttocks and it was only because she “tightened” herself up that he was unable to penetrate her anus with his penis.
- (ii) **The evidence that the Accused specifically intended to rape SM by those actions:** This is established by, among other things, the contemporaneous declaration by the Accused that tonight was the night he would “f--” her in her “bottom”.
- (iii) **The evidence of the absence of consent, and belief in consent:** This is established by the evidence from SM that shortly before the Accused attempted to place his penis in her anus that he had used violence towards her, namely grabbing her by her neck and dragging her. SM also testified that the Accused unlawfully detained her by physically restraining her in the washroom. These are actions covered by section 53A(2)(a) and (c) of the *Code* which could give rise to the conclusive presumption at section 53A(3) that SM did not consent to sexual intercourse and that the Accused did not believe that SM was consenting.

32. The Court begins firstly with analyzing the evidence on the Crown’s case and **if** the evidence seems strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by our apex court, the Caribbean Court of Justice, in **Dionicio Salazar v R, [2019] CCJ 15 (AJ)**⁶.

- (i) *Is SM an honest and reliable witness?*

33. The Court examines two issues in analyzing the Crown’s case. The first is the honesty and reliability of SM. The second is whether in the circumstances SM could properly identify the Accused, having regard to it being put to her in

⁶ Para. 35

cross-examination that she did not see the Accused on the night of the incident. This is the required sequence of reasoning the Court understands from the Jamaican Privy Council decision of ***Beckford and Anor. v R, (1993) 42 WIR 291***.

34. The Court notes that in assessing credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that particular bit.
35. The Court finds that SM is an honest and reliable witness. The Court comes to this conclusion because it views her evidence as clear, cogent, largely consistent and there are key aspects of her evidence which are independently supported. The Court is not here speaking of corroboration, which not only lends credence to the account of SM but also implicates the Accused⁸, but support in the sense of making the evidence of SM's account of sexual assault more probable.
36. SM spoke in her evidence about being dragged across her yard by the Accused on her back. Dr. Nicholas's evidence is that two days after the alleged assault, she observed abrasions to SM's shoulder blade and back with missing skin in the area of her back. Dr. Nicholas was not challenged at all or cross-examined by the Accused, and the Court finds her an honest and reliable witness. The Court finds, as a matter of human experience, that these observations by Dr. Nicholas are consistent with SM's testimony of being dragged on her back. It is highly implausible to the Court, again as a matter of human experience, that these sorts of injuries, especially to the back, could be manufactured or self-inflicted.
37. SM spoke of receiving a bite on her neck from the Accused. Dr. Nicholas found a contusion on SM's neck. This is also evidence that the Court finds, as a matter of human experience, is consistent with SM's account.

⁷ P. 298

⁸ ***R v Baskerville [1916] 2 KB 658 at 667***

38. Mr. Bradley for the Accused made heavy weather of the fact that SM testified that the Accused acted with force and that she had said in her statement, though not at trial, that she was bitten on her clitoris, and that her account is implausible because there were not more injuries found to the genital region. On the evidence of Dr. Nicholas, and applying normal human experience, there are several very plausible reasons to account for that that have nothing to do with SM fabricating the evidence. The Court notes the following:

- i. This examination was two days after and injuries may have healed, and Dr. Nicholas's uncontroverted evidence was that the longer the time from the incident to the evaluation the less likely that trauma would be seen.
- ii. SM was a mother of two and Dr. Nicholas's evidence was that the more sexual experience one has the less likely that genital trauma would be seen, and that anal trauma in females is less likely to be seen than in males as a matter of biology.
- iii. The examination of SM was done by the naked eye due to systemic constraints, and that is less reliable than a scientifically enabled inspection.
- iv. SM said she did not resist or struggle with the Accused, owing to her sheer terror, and that also minimized the capacity for genital trauma on Dr. Nicholas's evidence. The Court notes that SM did not testify to any genital bleeding or tearing, which would make a stronger case for there being genital trauma. She merely indicated that the Accused bit her clitoris "very hard" but did not say it bled or was torn.
- v. SM's evidence of the Accused having acted forcefully, in the Court's view, is part scientific fact, as was demonstrated by the back and neck injuries, as well as the perception of a victim of trauma who, from human experience, may feel every touch from an uninvited party with an amplified sense of hurt. SM spoke repeatedly about her sense of feeling violated by the Accused, so much that she could not function the day after.

39. The Court finds that the absence of genital trauma in the circumstances of this case does not undermine the creditworthiness or reliability of SM.

40. Mr. Bradley for the Accused submitted that the account of SM is implausible because she should have screamed. The Court's finds that the evidence of SM on this point was cogent and consistent. She feared for the safety of her two children in the house from a man who had brutalized her, threatened to shoot her and with alcohol on his breath SM must have thought that, where the Accused was concerned, anything was possible. The Court can understand why

she did not scream in those circumstances. There is also the implicit assertion by the Accused that it is unlikely that he would not have done these acts in such a public setting. However, as a matter of human experience, the Court is not unaware that persons may sometimes drink alcohol to build up Dutch courage to do what they are too afraid to do without it, and in those circumstances with alcohol as a lubricant persons may throw care to the wind.

41. The Court notes that this is not a finding that the Accused was intoxicated⁹, because there is nothing on SM's evidence which is indicative that he was drunk, much less that he was so inebriated that he could not form intent. His contemporaneous declarations about today being the day and that he was going to treat her like a whore speak to a person who very much knew what he was doing and wanted to achieve.

42. There was also the submission that the account of SM is implausible because she did not escape through the open door of the washroom. The Court finds that an explanation for the failure to escape is to be found in SM's own words describing her reaction to the assault in progress:

*“After that I was in shock. I felt more afraid. I was defenceless. **My whole mind just shut down.** I neva know whe fi mi do.” (emphasis added)*

43. The Court notes that it is a well-known matter of human experience that persons react differently to trauma and there is no classic response¹⁰. There may be some who may be able to resist forcefully and there may be some who shut down and become confused. The Court finds that the absence of an escape attempt, in the context of SM's evidence is understandable and does not make her evidence implausible, indeed it is consistent with her choice to not resist to protect her life and the life of her children as she had testified.

44. The Court finds as noted above that SM's evidence was largely consistent. There were three material inconsistencies which arose in SM's testimony, which in the Court's view can be resolved.

45. The first inconsistency was about whether the door was opened or closed in the washroom. SM had said initially that light was coming through a crack in the door, which may have been suggestive of the door being closed with a slight opening. SM then in cross examination denied that the door was opened at first but when confronted with her statement ultimately accepted that the door was

⁹ See Orlando Smith Jr. and Anor. v R. Crim. App. 4/19 (BZ) at para. 25-30

¹⁰ R v D [2008] EWCA Crim 2557, R v Miller [2010] EWCA Crim 1578

open. The Court did find her explanation confusing but in the context of recounting a violent assault, which the witness said included a slap to the face which temporarily stunned her, the Court accepts, on a consideration of all of the evidence, that the witness's focus may not have been on the state of the door to the washroom, and this inconsistency was caused by trauma, not because SM was lying or sought to mislead.

46. The second inconsistency was by omission in failing to mention that her clitoris was bitten during the assault in testimony when she had said so in her statement. The Court notes that the anguish and extreme pressure of the event described so vividly by SM may cause an inconsistent recounting of the event. The Court resolves this inconsistency by omission as being the result of the trauma of the event, not because SM was lying or sought to mislead.
47. The third inconsistency was also by omission regarding her failure to mention in her statement but testifying at trial that the Accused was passing her house with a fishing rod the day after the assault. The Court notes that the witness testified in detail that after the assault she was virtually in a catatonic state, and she had to summon energy to even feed her children. The lasting trauma of the assault, in the Court's view, could easily explain the failure to remember then, nearer to the time of that trauma, than later at trial when in relating the event a new detail may spring to mind.
48. The Court finds that even cumulatively these inconsistencies do not shake its view that SM was honest and reliable.
49. The Court also accepts SM's explanation for her late reporting of the assault. SM has explained in detail the overwhelming sense of shame and violation she felt after the assault. The Court finds as a matter of human experience, again there is no classic response to trauma and SM's response was to retreat and draw strength from her mother, when she saw her in person.
50. Mr. Bradley asked the Court to consider that there was no corroboration of SM's account. He did not, however, ask the Court to give itself a corroboration warning nor did he advance an evidential basis upon which the Court should view the evidence as unreliable in the sense that it required a warning. The Court finds that there is no evidential basis, for example, that SM is an admitted liar as opposed to being mistaken or inconsistent and the Court notes that inconsistencies arise in every case, or any special feature in the evidence that would require the Court to seek corroboration much less issue itself any

warning. The Court relies on the authority of a decision of our Court of Appeal in *NLN v R, Crim. App. 3/12*¹¹.

51. Mr. Bradley has submitted that the evidence is weak because there was “no forensic evidence” in this case. This was a submission which alluded to the agreed evidence of Ms. Sutherland that anal and oral swabs were taken from SM but the results were not tendered in evidence. In the Court’s view this is something that impacts the consideration of the quality of the investigation, and the Court finds that it would have been better and more transparent for the Crown to have put in evidence the results of testing, if any was done. However, the strength of the evidence of SM overcomes this investigative or prosecutorial failing¹².

52. The Court has considered the demeanour of the witness, and evidence of her distress seen by her mother days after the event. The Court has given this evidence very little weight because it has the potential to mislead, especially when the witness knows that she is being observed. The Court has similarly treated the evidence of the torn underwear. It is consistent with SM’s account but is evidence that is easy to manufacture.

(ii) *Evidence that SM could correctly identify her attacker*

53. The Court having found that SM was an honest and reliable witness, the next step of analysis requires the Court to examine closely the circumstances in which the identification by SM was made and consider its specific weaknesses¹³.

54. The Court first reminds itself of the need for caution in accepting identification evidence, owing to miscarriages of justice that have their root in mistaken identification by seemingly sure witnesses. The Court notes that an honest witness may be mistaken, in that SM may have conscientiously convinced herself that her attacker was the Accused without intending to make a mistaken identification but is in fact in error. The Court also notes that mistaken witnesses may nonetheless be convincing. The Court also reminds itself that errors can be made even in the recognition of close friends or relatives.

¹¹ Paras. 24-32; see also *Supreme Court of Judicature of Jamaica Criminal Bench Book* at ps. 118-119

¹² *Bally Sheng Balson v The State [2005] 4 LRC 147 (PC)* at para. 38

¹³ *Jermaine Pascascio v R, Crim. App. 12/06 (BZ)* at paras. 6-10

55. The circumstances of the identification, and the Court's view thereon, are as follows:

- i. **Recognition:** SM testified that she knew the Accused for 15 years from the neighbourhood where she lived and saw him on average 3-4 times a week as he lived near a shop she would frequent. She also testified that she had spoken with the Accused on the telephone several times. This evidence was not challenged and indeed the Accused in his unsworn statement from the dock accepted he knew SM and went further to say that they were in a relationship. The Court finds that SM knew the Accused and that this is a true case of recognition.
- ii. **Lighting:** The Court looks at photograph JR 1 and observes a bright electric light shining near the washroom and SM testified that it was on. SM also testified that there was also lighting from the neighbour and a nearby streetlight. This evidence also was not challenged. The Court finds that this was sufficient lighting in which SM could make a correct identification.
- iii. **The period of observation, obstruction, and distance:** SM testified that she interacted with the Accused for 35 minutes, adding up the sighting with the fried chicken man and the alleged assault. She testified that there was nothing obstructing her and that she saw his face. Indeed, with all the activity that allegedly occurred in the washroom the Court easily finds that the estimate of 30 minutes is not an exaggeration. The Court notes in photograph JR 3 that the washroom area is quite small and the parties would not have been far apart. The Court also finds owing to the evidence of SM that the Accused was on top of her, and by the nature of the sexual activities that these were circumstances in which SM could have made a proper visual identification.

56. The Court found the only weakness in the identification would be the considerable alarm that SM would have been in during the incident. This however does not, in the Court's view, outweigh the strengths of the identification evidence. The Court finds that the identification evidence is that of good quality recognition.

57. The Court is of the view that there is evidence on the Crown's case which may be strong enough to consider a conviction, so it goes now to consider the case for the Accused.

iii. The Defence's case

58. The Court again reminds itself that the Accused has nothing to prove. The Court notes that if it accepts the case for the Accused or is in doubt because of it, the Court's duty is to acquit the Accused.
59. The Court considers the unsworn statement from the dock which was a bare denial of the Crown's case as well as evidence offered that he was in a relationship with SM. The Court rejects the evidence of the Accused because of the strength of the evidence of SM, supported by the evidence of Dr. Nicholas¹⁴.
60. Neither the Accused, nor his counsel, raised the issue of the former's good character and it not being distinctly raised the Court did not consider the issue. In this regard the Court relied on the Barbadian CCJ decision of ***Hall v R (2020) 95 WIR 201***¹⁵ and the English Court of Appeal decision of ***R v Hunter and Ors. [2016] 2 All ER 1021***¹⁶.
61. The Court then considers the evidence of Ms. Rivero. The Court also rejects her evidence owing to the strength of the evidence of SM along with a material inconsistency and discrepancy.
62. Ms. Rivero had testified in evidence in chief that she had seen SM and the Accused being intimate for a period of two months in November and December 2018. This was two months before the incident. It appeared that the thrust of her evidence was to give details of the relationship between SM and the Accused. In cross-examination for the first time, she indicated that she had seen SM and the Accused being consensually intimate on the night of the incident in February 2019 at a nearby park during the time period when SM testified that the rape took place. This was highly material evidence which the Court would have expected to form part of the witness's evidence in chief. This was a material inconsistency by omission which was not explained.
63. Though it was put generally that the Accused and SM were courting, a different specific defence was advanced regarding the night of the sexual assault. Ms. Rivero's evidence sits uneasily with the case for the Accused as put in cross-examination to SM:

“Q. You spoke about the 1st of February 2019 [sic] about 10:37 p.m., I want to suggest to you that at or about that time 10:37 p.m. on the 1st of February 2019, you never saw Giovanni Burns [sic]?”
A. Yes, he was there.” (emphasis added)

¹⁴ See *Balson* (supra)

¹⁵ Para. 52

¹⁶ Para. 69

64. The case put to SM, as the Court understands it, was that the Accused was not with her that night at the time of the rape. The evidence of Ms. Rivero, regarding 1st February 2019, in cross-examination and re-examination, respectively, was:

“Q. And you weren’t with Giovanni Burns [sic]?”

A. No, ma’am. **I only saw him that night with [SM].**

...

Q. You said you saw them that night. At what time did you see them that night?

A. **Around 10:00 p.m., 11:00 p.m.** that same time I went to Dolphin Park with my gentleman.

Q. When you saw them, how did they appear to you?

A. **They were hugging up, kissing, having a conversation.**”
(emphasis added)

65. This scenario was not put to SM and the Court draws the inference in the absence of any explanation, and none was provided in the evidence or otherwise, that the case for the Accused shifted materially in the evidence of Ms. Rivero. To draw this inference the Court relies on the decision of the Privy Council in the Trinidadian case of **Warren Jackson v The State (1998) 53 WIR 431** where the appellant had complained about the trial judge’s comments being unfair when he told the jury that they were entitled to draw negative inferences from the failure to put certain material matters by him to the prosecution witnesses. The Board rejected those contentions, per Lord Nolan:

*“Mr Birnbaum submitted that these comments were unfair. Their lordships do not accept this criticism. **The matters upon which Mr Pantor omitted to cross-examine the prosecution witnesses were important, and the omissions had quite properly been raised by Mr Mohammed in the presence of the jury.** In the absence of any explanation from Mr. Pantor the judge had to deal with them as best he could¹⁷.”* (emphasis added)

66. The Court rejects the entire evidence of Ms. Rivero and the case for the Accused.

iv. Decision

¹⁷ P. 442

67. The Court now looks at the totality of the evidence to reach a final decision¹⁸. The Court finds, for the reasons given above, that SM is an honest and reliable witness. The Court finds, again for the reasons given above, that in the circumstances at the time of the assault SM could have, and did, correctly identify the Accused as her attacker on 1st February 2019. The Court has rejected the case for the Accused, for the reasons given above. The Court accepts SM's evidence that:

- i. the Accused used violence by dragging and restraining SM before and during the time he attempted to put his penis into her anus.
- ii. this violence and pushing by the Accused of his penis into SM's buttocks were more than preparatory steps, which had as its sole aim the penetration of her anus with his penis without her consent and knowing that she was not consenting.
- iii. that the specific intention of the Accused was to penetrate SM's anus with his penis without her consent, knowing she was not consenting.

68. The Court consequently is satisfied so that it is sure of the guilt of the Accused on the first count of the indictment and finds him guilty as charged in the indictment of an attempt to rape SM.

Count 2: Sexual assault

69. The evidence which has been led by the Crown to make out the elements of the offence of sexual assault are as follows:

- (i) **The evidence that the Accused touched SM in a sexual manner:** This is established by evidence of SM in examination in chief that the Accused took his finger¹⁹ and put it in her anus and her vagina. In the Court's view that is a touching that is inherently sexual and is also sexual by virtue of the purpose of the Accused²⁰.
- (ii) **The evidence that the sexual touching of the Accused was intentional:** This is established by, among other things, the contemporaneous declaration by the Accused that tonight was the night he would "f***" her in her "bottom", and after he was unable to penetrate

¹⁸Salazar (supra)

¹⁹ See the Code 53A(4)... "touching" includes touching with any part of the body or with anything else, or through anything else;"

²⁰ Ibid. "sexual in nature" in relation to penetration, touching or any other activity is sexual if a reasonable person would consider that whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual or because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it or both, it is sexual;

her anus with his penis, he chose to use his finger to place it in her anus and vagina.

- (iii) **The evidence of the absence of consent, and belief in consent:** This is established by the evidence from SM that shortly before the Accused placed his finger in her anus and vagina that he had used violence towards her, namely grabbing her by her neck and dragging her. SM also testified that the Accused unlawfully detained her by physically restraining her in the washroom. These are actions covered by section 53A(2)(a) and (c) of the *Code* which could give rise to the conclusive presumption at section 53A(3) that SM did not consent to sexual touching and that the Accused did not believe that SM was consenting.

70. Having regard to the Court's findings of fact as to the honesty and reliability of SM, and her identification evidence on the first count; and the rejection of the case for the Accused, the Court accepts the evidence of SM that the Accused intentionally touched her vagina and anus with his finger and that that touching was sexual in nature. The Court accepts the evidence that SM was unlawfully detained while she was touched, and violence was used to her namely dragging and holding before the touching occurred. Pursuant to section 53A(3) of the *Code* the Court conclusively presumes that SM did not consent to the touching and the Accused knew that SM was not consenting.

71. The Court in those circumstances is satisfied so that it is sure that the Accused sexually assaulted SM as charged in the second count of the indictment and finds him guilty.

Count 3: Rape

72. The evidence which has been led by the Crown to make out the elements of the offence of rape are as follows:

- (i) **The evidence that the Accused penetrated the mouth of SM with his penis:** This is established by evidence of SM in examination in chief that the Accused instructed her to suck his erect penis which she did.
- (ii) **The evidence of the absence of consent, and belief in consent:** This is established, among other things, by the evidence from SM that shortly before the Accused placed his penis in the mouth of SM that he had used violence towards her, namely grabbing her by her head with such force that her wig came off and the previous dragging across the yard. SM also testified that the Accused unlawfully detained her by

physically restraining her in the washroom. These are actions covered by section 53A(2)(a) and (c) of the *Code* which could give rise to the conclusive presumption at section 53A(3) that SM did not consent to sexual touching and that the Accused did not believe that SM was consenting.

73. Having regard to the Court's findings of fact as to the honesty and reliability of SM, and her identification evidence on the first count; and the rejection of the case for the Accused, the Court accepts the evidence of SM that the Accused placed his penis in the mouth of SM. The Court accepts the evidence that SM was unlawfully detained, and violence was used to her namely the initial dragging and holding while her mouth was placed on the penis of the Accused. Pursuant to section 53A(3) of the *Code* the Court conclusively presumes that SM did not consent to the touching and the Accused knew that SM was not consenting.

74. The Court in those circumstances is satisfied so that it is sure that the Accused raped SM as charged in the third count of the indictment and finds him guilty.

DISPOSITION

75. The Accused is found guilty on all counts and the matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP [2020] CCJ 7 (AJ) GY²¹**.

DATED 6th JULY 2023

NIGEL C. PILGRIM
JUDGE OF THE HIGH COURT
CENTRAL DISTRICT
SENIOR COURTS OF BELIZE

²¹²¹ Para. 32