IN THE SUPREME COURT OF BELIZE, A.D 2022

(CRIMINAL JURISDICTION)

CENTRAL DIVISION

INDICTMENT C38/2022

THE KING

v

CHARLES MARTINEZ

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(RAPE OF A CHILD)

Appearances:
Mr. Robert Lord, Crown Counsel for the Crown
Mr. Norman Rodriguez and Mr. Hubert Elrington S.C. for the Accused

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Hearing Date: 2023: July 3rd; 7th.

Delivery Date: 2023 November 15.

CRIMINAL LAW – RAPE OF A CHILD CONTRARY TO SECTION 47 (A) OF THE CRIMINAL CODE, CHAPTER 101 OF THE SUBSTANTIVE LAWS OF BELIZE (REVISED EDITION) 2020, AS AMENDED BY THE CRIMINAL CODE (AMENDMENT) (NO.2) ACT, ACT NO. 12 OF 2014.

Indictment read to the Accused

Accused plead Not Guilty

SANDCROFT, J.:

Applications

[1]. The accused stands charged as follows:

Count 1

Statement of Crime

Rape of a child, contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014.

Particulars of Offence

Charles Martinez, on three occasions between the 10th day of September 2019 and the 10th day of November 2019, at Belize City, in the Belize District, in the Central District of the Supreme Court, raped JG, a person under the age of sixteen years, to wit, nine years of age.

[2]. An application was made under **Part 10 of the Criminal Procedure Act** for the following statements to be admitted into evidence as agreed by both the Prosecution and the Defence:

(1) **Statement 1 of Jason Reneau, CST, dated 9th of November 2019** read into evidence as agreed by both the Crown and the Defence.

(2) **Statement 2 of Jason Reneau, CST, dated 9th of November 2019** read into evidence as agreed by both the Crown and the Defence.

(3) **Statement 1 of Lavan Garnett, dated 26th of November 2019** read into evidence as agreed by both the Crown and the Defence.

(4) **Statement 2 of Lavan Garnett, dated 20th of February 2020** read into evidence as agreed by both the Crown and the Defence.

Background

[3]. The Defendant, Charles Martinez, on three occasions between the 10th day of September 2019 and the 10th day of November 2019, at Belize City, in the Belize District, in the Central District of the Supreme Court, raped JG, a person under the age of sixteen years, and who was nine (9) years of age at the time of the alleged incident.

[4]. At approximately 8:00 p.m. on November 9, 2019, the complainant was sitting at home alone watching television when she felt someone pull her hair. Upon turning around, she encountered the accused, Charles Martinez, who took her to the back of Shamiel Bowen's house, where he threatened her to keep quiet while he sexually assaulted her and forced her to engage in oral sex.

[5]. After being discovered in the bathroom by Jevon Bowen (JB), the accused fled the scene. The complainant was transported to the police station and gave a statement alleging Charles Martinez had sexually molested her.

[6]. The accused was later arrested and charged with one count of Rape of a Child, contrary to **section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014**.

THE CASE FOR THE PROSECUTION

[7]. It was around 8:00 p.m. on November 9, 2019, when the complainant was alone watching television at home when she felt someone pull her hair. When she turned around, she observed the accused, Charles Martinez, whom she had been acquainted with for approximately two (2) years. He pulled her by the hair and threatened to kill her if she made any noise/alerted anyone.

[8]. His sexual misconduct took place in the bathroom of Shamiel's house for approximately five (5) minutes when he forced her to suck his penis (performing fellatio on him) in the bathroom. The accused fled the scene on his motorcycle after being discovered by an eyewitness who saw him in the bathroom with his penis in the complainant's mouth. It was reported to the police that the complainant had been sexually molested by Charles Martinez, so she was taken to the police station to give a statement.

[9]. The police accosted him at his residence and arrested him for rape of a child, which is contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014. In addition, the complainant claimed that Charles Martinez had also forced her to suck his penis in the same bathroom two other times.

Examination in Chief of Mr. Jason Reneau CST:

[10]. My name is Jason Reneau, I have been a Crime Scenes Technician for 19 years. I recall preparing a report of an alleged incident at # 15 Tigris Street, Belize City, on 9th of October 2019. I took photographs along with this report; if I saw these photographs again, I would be able to recognize them; by the amount of photographs; a total of 4 photographs, by the depiction of the photographs, by the labelling on the photographs, the date which is the 9th of November 2019 and also my signature.

[11]. Witness shown photographs which he identifies by the depiction of the photographs, by the labelling on the photographs, the date which is 9th November 2019 and also my signature.

[12]. Photographs tendered and marked as **exhibits "JR1-4"**. No objections by the Defence.

Examination-in-Chief of JG:

[13]. JKG a student, testified that she remembered November 9, 2019, she lived at 15 Tigris Street, Belize City, she lived with her ma and her brothers and sisters. Around 8:00 p.m., her ma gone buy fly fish and she was in her house watching tv with her brothers and sisters and her sister dem come outside and only she one did deh inside an her cousin Abiyana was inside the house in the hall an she left fi gaan bathe, a only she one did inside deh watch tv and she feel someone pull her hair an when she tun roun she see Charles Martinez and he took her to the back of her cousin's house Shamiel Bowen and he took her to the bathroom an he tell her shet up or else he a guh kill her. An him did a wear a red shirt, a brown khaki pants and a blue boxers and he pull down mi pants an he force his penis inna mi mout and for five minutes then my cousin light was flash into the bathroom then Jevon Bowen, he come and pull the bathroom curtain and he saw Charles Martinez and her, Charles Martinez started to run, then her cousin ask mi weh did I a duh inna dis bathroom with Charles Martinez, then Jevon Bowen carry me at the front, then she was crying, then Jevon Bowen talk to her, then her cousin Abiyana who was in the bathroom at the front and she heard when JG was crying, she came out and asked her what happened then JG told her what happened to her, then the police truck come, then they took me to the station, then she told the police officer and told them she want to put a charge on Charles Martinez, then she told them she want to write a statement.

[14]. Yes she knew Charles Martinez before that day before that day she saw har right inna di yard. JG would see Charles Martinez every day before that day, because he guh everybody house and laugh and play wid dem. JG would see Charles Martinez inna night and inna day. JG see his whole body. Sometimes him siddung right side a wi. Nothing would block her view from seeing Charles Martinez, JG would have known Charles Martinez for over two years. JG would see Charles Martinez for hours sometimes 2 hours inna di yard. Charles Martinez lived at 15 Tigris Street at the time. Well, him pull me inna her hair and she did a try fight he fi leggo her hair and she did stomp up inna di house, but he said nuh mek no noise or else he is going to kill her. There was light coming from her cousin's house: Shamiel house. Charles Martinez was close close when he forced his penis in her mouth. Nothing was blocking her view when he and JG were in the bathroom. JG saw his whole body and his penis when we were in the bathroom. Charles Martinez and JG were in the bathroom for 5 minutes. If JG saw Charles Martinez again, she would be able to recognize him.

[15]. Prosecution Witness points to the accused Charles Martinez sitting in the dock in a red shirt and cut up pants.

[16]. Prosecution Witness shown **exhibit "JR-1"**; JG sees Charles Martinez house in the front, witness points to the house of Charles Martinez.

[17]. Prosecution Witness shown **exhibit "JR-3"**; JG sees the bathroom at the back of her cousin's house, you can see light flashing, the bathroom where she and Charles Martinez was in. Charles Martinez molest her; pull down his pants and forced me to suck his penis, witness points to the bathroom where incident occurred.

[18]. Witness shown **exhibit "JR-2"**; witness did not recognize the picture.

[19]. Witness shown **exhibit "JR-4"**; the picture is by the studio back to my cousin's house. Charles Martinez forced me to suck his penis two more times, right back at the same bathroom.

Examination-in-Chief of Jevon Bowen:

[20]. Jevon Brentley Bowen, testified, he live at 15 Tigris Street. Yes, he recalled November 9, 2019, my address was 15 Tigris Street, right here in Belize, PW-JB was living with his sister Abiyana. At about 6:00 p.m. on November 9, 2019, he was at the front of the yard, then they did tell me if he knew where "Bunku", Charles Martinez deh. JB saw Charles Martinez who was at his brother's house backdoor, JB had never seen him there before. JB said he saw Charles Martinez at the back of the yard, JB went at the back of the yard, when he went back a di yard, he could see him clearly inna di bathroom, wen the Complainant was crying, he had the complainant's head like way down, the witness shows to the Court with his head bow down, JG suck his penis. This was happening right back a di yard at Shamir's house. JB went back to the front of the yard to tell somebody who would believe him because he knew they wouldn't believe him. So, when he was looking for somebody, never found nobody, so then he gone back a back deh fi see if dem still deh, then JB bumped into him by Mir backdoor, he never did a pay him any mind, then his sister Abiyana came. JB just came out from there when Abiyana was questioning JG.

[21]. JB have seen Charles Martinez before; he was going out with Shanice Bowen his cousin, and this was 5 years before. JB saw him in Mahogany Heights, JB saw him at 15

Tiger Street over the 5-year period; he would see him nearly every-day, the lighting condition would be bright bright, it was clear. JB would be 2 feet away, because he was in his face. JB would see his face over this 5-year period, and nothing was blocking him from seeing him. JB would see him for like a half an hour and 2 seconds.

[22]. It was clear when he saw Charles Martinez with my cousin JG sucking his penis on the 9th of November 2019. JB was about 2 feet away when he saw JG sucking Charles Martinez's penis. Nothing was blocking his view when he saw JG sucking Charles Martinez's penis. JB saw Jasnique sucking Charles Martinez's penis, nuh long long, he just peeped and gone. JB see the whole a he when he saw JB sucking Charles Martinez's penis. He can remember that he had a brown khaki pants and a red shirt. If he were to see Charles Martinez he would be able to point him out.

[23]. Witness points to Charles Martinez sitting in the dock in a button-down shirt and a black and red pants.

Defence Case

[24]. When the incident occurred on Nov 9, 2019, the defendant denies being anywhere near the scene of the crime. They contend that when the incident was said to have occurred, he was watching television at his parents' house at around 8 o'clock to 8:30. This is confirmed in the statement given by his father, Charles Martinez Sr. A car was purchased by the defendant for his father on that same day.

[25]. He test-ran the vehicle until about 12:00 noon when he received a call from his common-law wife to bring her food. He brought the food to her residence at 15 Tigris Street.

In the vehicle he bought for his father, accompanied by two male passengers, he arrived there wearing a black shirt with a Bob Marley face and black and white jeans pants.

[26]. In the afternoon, he got into an altercation with a resident of the yard where his common-law wife lived. This occurred between 3:00 p.m. and 4:00 p.m. That same day, he was scheduled to perform a musical performance at a club at 4:30 p.m.; however, his common-law wife dissuaded him from performing as his earlier altercation was musically related. At about 6:00 p.m., he left his common-law wife's house on Tigris Street.

[27]. In the vehicle he brought for his father, he drove to his parents' home on Curl Thompson Street. At about 8:00 p.m. to 8:30 p.m. while he was there watching TV, he heard a banging on his mother's fence. Upon investigation, it was discovered that the police had come to arrest him because the complainant and her mother claimed that he sexually molested her in the bathroom at the rear of their home.

[28]. The defendant feels that he is being falsely accused of a crime that he did not commit. Because he was at his parents' house watching television at the time of the incident, he was nowhere near the scene of the crime.

Examination-in-Chief of Charles Martinez:

[29]. Charles Andre Martinez Jr., a Belizean citizen. 9800 Curl Thompson Street, May 30, 1990, I am 33 years old. I wish to say that I am a Belizean citizen, construction worker/Belizean artist. On the day of the incident of which I am being accused, I wasn't there at that time, I was at Jane Usher 9800 wearing a black in colour shirt with a Bob Marley face on it and a black and white in colour jeans. At the time that I am being accused I was home watching tv where my mother and father live, I was buying a vehicle for my father to surprise

him, which I did went to check on, they give me a test run on the vehicle; the vehicle is for $2,500.00 and I only got $2,00.00, so I put a downpayment on the vehicle and test run it to my sister's house Kayanna Belgrave, I stayed there about 12 o'clock in the afternoon, I got a phone call from my common law wife that she wanted something to eat in the afternoon, so she said that anything that you want to take for me, so I buy a barbecue for her and a big red Fanta at the first roundabout by the hand, I went on 15 Tigris Street to carry my common law wife's barbecue and soft drink, to carry the food for her, I see a group of people in the yard playing cards, playing loud music and drinking too. Some guys that I didn't know, some people that I didn't see before. Went in the yard in the front house, to carry my wife food, then I heard some laughing, "yuh got vehicle now." At that time, I didn't pay them any mind, I carried my girlfriend food and she said "babes weh yuh get dah vehicle deh from", I told her it was for my father, I am going to surprise him. Then Lavan Garnett wanted to borrow a $20.00 from me, so my woman called me inside and said she never did know you? I told her yes. My common law got vex and she didn't want me to lend her and so I didn't lend her, they cursing in the yard, when I come out back they started to say how you feel like yuh a money man, then her cousin whose name is Baggaheat, gimme a Guinness because a mi family birthday today, he also said weh yuh a buy fi di yard fi mek wi drink, I told him that I only got money for a vehicle weh I did a pay down for, then he said yuh nuh guh buy di thing then, then he started an argument with me. When I got into the argument it was 3 o'clock going to 4, I got cautious because there is a gang related spot, and it was only me one. Bwoy Bunku yuh nuh know wi da from Malanti and we rob and kill people and he cousin Lavan Garnett was not going to pay me back, so I get offended. I never see at the time of the incident, Lavan that she come back and pay me, so I said unno nah pay me back my money then, then Baggaheat said, we guh rob you right now, I nuh care bout my common law wife

who is his cousin too, I nuh care bout nobody. This was about 4:30, I had to go perform at a club weh dem a guh look fi have one party. So, my common law call me and said she nuh want I go there and perform with them. At that time, I listened to my wife, and I said babes, I am going to take this vehicle and show my pa, which I did. I never see her child; I never utter a word to her, and I never commit that crime that they said I did. And then I went in the vehicle this is about 5:30 going to 6 o'clock which is 9800 Curl Thompson Street, while at my home around 8 o'clock 8:30, I heard a banging on my mother's fence then I see the police, I said good night officer, the police officer said, weh Bunku deh, they said that they just called for a rape that yuh duh, I told the officer that I am not a criminal, accompanied by my mother and father at the time, I tell the police who could say something like that about me, which at the time I did not know was my own common law wife's cousin, she said that I am going to charge you for pushing your penis in my daughter's mouth, I said what, who could say something like that, I don't have that thinking deh. While I was accompanied by the police, I go carry you mek dem lock yuh down right now, I said to the police, how you go lock me up for something that I did not do and what didn't happen. I tell the officer that I go the yard several time to see my common law wife and my child, so how they going to bring up an allegation like that, I am a respectable person, I never had a criminal record before, I tell them is spoil yuh wah spoil my reputation and frame my character, which I was mad and frustrated too. When I went in the vehicle, they carried me to Precinct 1 Police Station, I asked the police if I could speak to them to find out what happened and what was the problem, but they did not speak to me. My common law wife called my mother and father and told them what happened after that. I said to the officer, why yuh nuh bring the people dem so I could talk to dem and see is who. The officer said yuh deh pon lock down right now, I seh I deh pon lock down fi something I don't know about, the officer told me that you

are going to stay in the station until Monday, that was the first time I went to police station your Honour and it was very frustrating, at that time I started to cry in the cell and ask God why dem people had to do that because I never hurt no one, never did have criminal record, it was a new experience to me, a very bad experience; sleeping on the concrete floor, it hurt me the most lord when they got me far from my child and family. I tell the officer, how I would do something like that and I have my kids, I don't want to see my children grow up without their father, I know how it feel. I lay behind the bars and think about my common law wife and children. I never thought that something like that would happen to me. It is like dividing my whole future. When I lay there in the cell, all things run through my mind, why do they have to do me like that, when you are wrongfully accused, it hurts a lot. I was building my house and told my wife that I would take her away from there because I don't like how they live. Every-time you live around family, it is a problem, worst when you live in poverty. Yes there is a lot of house in that yard and a lot of people are there. Thanks to my father I got my house and land and moved my family to another location, now they are happy, I move them your Honour, when you live in poverty, I want better for my family. My common law wife is educated, so that is why they were jealous of her too, they did not want her for me and me for her. They wanted me for one of their next family member, but I did not have any love for that next person. My common law wife sticks by my side, and when people see you are happy, they try to tear you apart, I always try to be the best father for my child, for my daughter Miracle and my son CJ, they mean the world to me. That is why I always try to work hard for my children and show them the right way, cause I know how it feels to have nothing to eat, I don't want to go and rob and be incarcerated. I try to do the best for my children, my father Charles Sr. has always advised me. I want to tell the Court today that I am not a criminal and that these false allegations that they bring against me I forgive them,

but they are making my family and wife suffer in the society. And for the record your Honour, God always open the way cause He is the way the truth and the life. I am still hurting inside.

Examination-in-Chief of Keileigh Jenkins:

[30]. I am the common law wife of the Defendant. I know about the allegations. I am currently living at Jane Usher, 9800 Curl Thompson Street. I remember the 9th of November 2019 when the police came and knocked at the fence. At that time, I was living at same yard that the allegation occurred, that was at #15 Tigris Street, it was at night, they were having a party, the yard was crowded, I live at the front of the yard, the yard contains 6 houses not far apart from each other, at that time, meanwhile everyone was rehearsing, we also have a studio. Charles Martinez was not there until after 9, he went out in the day to purchase a vehicle. Upon arriving at the time in the night, the yard is crowded, everyone is rehearsing, people were in the yard, in front of the yard, in the studio, so upon arriving he went inside change his clothes, I asked him if he is still going to attend the party, he answered me yes. After that he went outside, he had an altercation with one of the persons outside, my cousin who was having the party, one of his friends. So, meanwhile the altercation was going on, the altercation was about music that was to be played on the radio, I then came outside and told him better he goes home because he has no one there, the person he was in the altercation with, he had his brothers there, he had people to defend him and those people were also gang bangers, so after that about to 2 to 3 minutes, he took his bike and went somewhere. I called his mom and dad and told them about the altercation he was having with the person. About half an hour after, the mom of the complainant came from somewhere and came to inform us what the child asked him to tell her. His parent reached her while the mother of the complainant was at 15 Tigris Street, and they had told her what had transpired.

And after that his sister called and said the police was at his address on Curl Thompson Street where he was at.

Examination-in-Chief of Charles Martinez Sr.:

[31]. My name is Charles Martinez, I live at 9800 Jane Usher Boulevard, I live there with my wife and 12 kids, I do construction work, the Defendant is my oldest son, and he works with me. On the 9th of November 2019 at around 7 or 8, Charles Martinez was at home with me when the police came, they asked for Charles Martinez Jr., when they came I saw them, they apprehended him between 7:30/8. Before the police came he was there between an hour to ½ hr. I knew he was at home at that time because I saw him watching television, he was downstairs, I was upstairs. I know because I check upon him, I have 12 children and I don't want them to stray.

Discussions & Findings

Burden of Proof

[32]. The burden of proof is always on the shoulders of the prosecution requiring them to prove all the ingredients beyond reasonable doubt. **(See: Woolmingtion v DPP (1935)** Ac 463**, Andreya Obonyo & Others v. R** (1962) EA, 550.)

Standard of Proof

[33]. The standard of proof is beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability of the accused is innocent. As in the **case of Miller v Minister of Pensions** [1947]2ALLER 372.

[34]. The prosecution case against the accused person should be so strong as to leave only a remote possibility in his favour. (See: Section 101 of the evidence Act, **Woolmington v DPP** (1935) Ac 462**; Miller v Minister of Pensions**).

[35]. The accused has been charged with rape contrary to section 46 of the Criminal Code of Belize and punishable under section 47(1). The relevant provisions of which read as follows:

> **Rape of a child, contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2011, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014.**

[36]. In respect of unlawful sexual intercourse offenses, the Court must be satisfied that the accused person had sexual intercourse with the complainant. In this case, the alleged sexual assault is the penetration of a body orifice, the vagina of the Complainant, Miss MR with the penis of the defendant. The two elements that the court must be satisfied with are that the accused intentionally penetrated a body orifice of the complainant with his penis and that the complainant did not consent to this at the time of the penetration by the defendant.

[37]. A person accused of a crime is presumed to be innocent. This means that I must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless I am satisfied beyond a reasonable doubt that he is guilty.

[38]. Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If I find that the prosecutor has not proven every element beyond a reasonable doubt, then I must find the defendant not guilty.

[39]. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

[40]. Part of my job in deciding what the facts of this case are is to decide which witnesses I believe and how important I think their testimony is. I do not have to accept or reject everything a witness says. I am free to believe all, none, or part of any person's testimony.

[41]. In deciding which testimony, I believe; I should rely on my own common sense and everyday experience. However, in deciding whether I believe a person's testimony, I must set aside any bias or prejudice I may have based on the witness's race, national origin or ethnicity, gender, gender identity or sexual orientation, or religion, age, or socio-economic status.

[42]. There is no fixed set of rules for judging whether I believe a witness, but it may help me to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Does the witness seem to have a good memory?

(c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?

(g) In general, does the witness have any special reason to tell the truth or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when I think about all the other evidence in the case?

[43]. Sometimes the testimony of different witnesses will not agree, and I must decide which testimony I accept. I should think about whether the disagreement involves something important or not, and whether I think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be wrong about what

they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.

[44]. However, I may conclude that a witness deliberately lied about something that is important to how I decide the case. If so, I may choose not to accept anything that witness said. On the other hand, if I think the witness lied about some things but told the truth about others, I may simply accept the part I think is true and ignore the rest.

[45]. When it is time to decide the case, I am only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I consider as evidence.

[46]. The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. I should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is.

[47]. I may have asked some of the witnesses questions myself. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored.

[48]. In this case, the defendant, Charles Martinez, is represented by Counsel. This fact should not affect my decision in any way. The defendant has the right to represent himself, and he has chosen to not exercise that right.

[49]. I should use my own common sense and general knowledge in weighing and judging the evidence, but I should not use any personal knowledge I may have about a place, person, or event. To repeat once more, I must decide this case based only on the evidence admitted during this trial.

[50]. In **Zialor v R** [2017] SCCA 42, this Court cited with approval **Vilakazi v The State** (636/2015) [2015] ZASCA 103 (10 June 2016) –

> **"In Woji v Sanlam Insurance Co. Ltd 1981 (1) SA 1020 9A) Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned Judge said: "The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in R v Manda [1951] (3) SA 158 (A)]). At the same time the danger of believing a child where evidence stands alone must not be underrated."**

[51]. Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if I look outside and see rain falling, that is direct evidence that it is raining.

[52]. Facts can also be proved by indirect, or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if I see a person come in from outside wearing a raincoat covered with small drops of water that would be circumstantial evidence that it is raining.

[53]. I may consider circumstantial evidence. Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove the elements of a crime. In other words, I should consider all the evidence that I believe.

[54]. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

[55]. The defendant is charged with only one crime. This criminal act is that the defendant, Charles Martinez, is said to have had raped the Complainant, PW2 who did not consent to the penetration of her mouth at the time of the commission of the offence.

[56]. The prosecutor says that this crime took place on her veranda somewhere in Belize City. The prosecutor also says that the crime took place between September 10, 2019 and November 10 2019. The prosecutor does not have to prove that the crime was committed on those exact dates, but only that it was committed reasonably near to those dates.

[57]. I should not decide this case based on which side presented more witnesses. Instead, I should think about each witness and each piece of evidence and whether I believe them.

Then I must decide whether the testimony and evidence I believe proves beyond a reasonable doubt that the defendant is guilty.

[58]. One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.

[59]. In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, and whether the area was well-lighted.

[60]. Also, I must think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.

[61]. I should examine the witness's identification testimony carefully. I may consider whether other evidence supports the identification, because then it may be more reliable. However, I may use the identification testimony alone to convict the defendant, as long as I believe the testimony and I find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

[62]. The law on Rape was well stated by the court of Appeal for East Africa in the case of **Kibazo versus Uganda** (1965), E.A 507 that in a charge of Rape the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. The court should address its mind to the question of reasonable doubt on the issue of consent. The fact that non-consent must be proved to the satisfaction of the court

and where the court is not satisfied beyond reasonable doubt in the issue of non-consent there cannot be a convict.

The essential elements requiring proof beyond reasonable doubt in the offence of Rape are:

1. That there was unlawful Sexual Intercourse with the complainant.
2. That the complainant did not consent to that Sexual intercourse.
3. That it was the accused who had the unlawful Sexual Intercourse with the complainant.

[63]. Rape of a child is contrary to section 47 (A) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020, as amended by the Criminal Code (Amendment) (No.2) Act, Act No. 12 of 2014.

[64]. His Lordship, Chief Justice Lord Campbell (as he then was) in the case of **FLETCHER** (1959) 8 Cox cc 131 had this to say on definition of rape;

> "….The definition of rape may now be considered Res Judicata…It is carnal knowledge of a woman against her will or without her consent."

[65]. Also, in that case of **DPP v Morgan & 3 others** (1976) AC 182, Lord Hailsham **(as** he then was) said;

> "**Rape consists in having unlawful sexual intercourse with a woman without her consent and by force… it does not mean there has to be a fight or blows have to be inflicted. It means there has to be some violence used against the women to overbear her will or that there has to be a threat of violence as a result of which she will over borne."**

Whether there was Unlawful Sexual Intercourse with the complainant?

[66]. The law with regard to proof of Sexual Intercourse has long been settled. In the case of **Bassita Hussein v Uganda**, Criminal Appeal No. 35 0f 1995, the Supreme Court of Uganda held as follows:

> **"The act of Sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove Sexual Intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."**

[66]. Regarding the first ingredient, carnal knowledge or rape means penetration of the vagina or the mouth, however slight, of the victim by a sexual organ where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

[67]. PW2 testified that:

> **"Around 8:00 p.m., my ma gone buy fly fish and I was in my house watching tv with my brothers and sisters and my sister dem come outside and only me one did deh inside an my cousin Abiyana was inside the house in the hall an she left fi gaan bathe, a only me one did inside deh watch tv and I feel someone pull my hair an when I tun roun I see Charles Martinez and he took me to the back of my cousin's house Shamiel Bowen and he took me to the bathroom an he tell me shet up or else he a guh kill me. An him did a wear a red shirt, a brown khaki pants and a blue boxers and he pull down mi pants an he force his penis inna mi mout and for five minutes then my cousin light**

was flash into the bathroom then Jevon Bowen, he come and pull the bathroom curtain and he saw Charles Martinez and myself"

[68]. PW2 further testified that:

"There was light coming from my cousin's house: Shamiel house. Charles Martinez was close close when he forced his penis in my mouth. Nothing was blocking my view when he and I were in the bathroom. I saw his whole body and his penis when we were in the bathroom. Charles Martinez and I were in the bathroom for 5 minutes."

[69]. PW2 also testified when shown exhibit "JR-3" that:

"I see the bathroom at the back of my cousin's house, you can see light flashing, the bathroom where me and Charles Martinez was in. Charles Martinez molest me; pull down his pants and forced me to suck his penis, witness points to the bathroom where incident occurred."

[70]. PW3 testified that:

"At about 6:00 p.m. on November 9, 2019 I was at the front of the yard, then they did tell me if I knew where "Bunku", Charles Martinez deh. I saw when Charles Martinez who was at my brother's house backdoor, I never see har there before. I said I saw Charles Martinez at the back of the yard, I went at the back of the yard, wen I gone back a di yard, I could see him clearly inna di bathroom, wen Jasnique was crying, he had Jasnique's head like way down, the witness shows to the Court with his head bow down, Jasnique suck his penis. This was happening right back a di yard at Shamir's house."

[71]. PW3 further testified that:

"It was clear when I saw Charles Martinez with my cousin J sucking his penis on the 9th of November 2019. I was about 2 feet away when I saw J sucking Charles Martinez's penis. Nothing was blocking my view when I saw J

> **sucking Charles Martinez's penis. I saw J sucking Charles Martinez's penis, nuh long long, I just peep and gone. I see the whole a he, when I saw Jasnique sucking Charles Martinez's penis. I can remember that he had a brown khaki pants and a red shirt. If I were to see Charles Martinez I would be able to point him out. Witness points to Charles Martinez sitting in the dock in a button down shirt and a black and red pants."**

[72]. In the case of **Katumba James versus Uganda Criminal Appeal 58 of 1997 (Court of Appeal),** the victim had been medically examined but the medical doctor did not testify on issues of penetration. The court of Appeal held, inter alia that;

> **"There can be no doubt that there was penetration, notwithstanding that no medical evidence was led on the point. The complainant was an old woman of 40 years. She had 9 children… she must have known what she was talking about."**

[73]. In **D**[1] the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. There may be cases where guidance on myths and stereotypes may be appropriate to benefit a defendant.[2]

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[1] [2008] EWCA Crim 2557. See also *Breeze* [2009] EWCA Crim 255

[2] [2019] EWCA Crim 665 where D was charged with making false rape complaints, although in the circumstances of the case the court did not assess that the failure to give such guidance undermined the safety of the conviction.

[74]. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in **Miller**:[3]

> **"In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, R v. MM [2007] EWCA Crim 1558, R v. D [2008] EWCA Crim 2557 and R v. Breeze [2009] EWCA Crim 255)."**

[75]. In **Miller**, the Court of Appeal endorsed the following passage from the 2010 Bench Book "Directing the Jury":

> **"The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice."**

[76]. In **GJB**[4] the CA approved the direction of the trial judge in **Miller** on the delay issue. "We entirely accept that in a suitable case, and this was one, the judge is entitled to and should comment on the reluctance or difficulty of the victim of sexual abuse to speak about it for long afterwards. In this connection, we refer to the judgments of this Court in **D (JA)**[5]

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[3] [2010] EWCA Crim 1578
[4] *GJB* [2011] EWCA Crim 867; *F* [2011] EWCA Crim 1844
[5] [2008] EWCA Crim 2557

and in **Miller**.[6] However, it is important that the comment should not assume the guilt of the defendant, and that the defendant's case should be made clear. The direction in **Miller** was described as a model in this respect. The summing up in that case included the following passage:

> **"You are entitled to consider why these matters did not come to light sooner. The defence say that it is because they are not true. They say that the allegations are entirely fabricated, untrue and they say that had the allegations been true you would have expected a complaint to be made earlier and certainly once either defendant … was out of the way … of the complainant. The defence say that she could have complained to her mother or her grandmother before she left the country or to her mother on the plane, or to the headmaster of the school … or to the social worker who came on one occasion to speak to her (although again bear in mind there is no evidence that the complainant was ever given any contact details or instructions as to how to make such a complaint), or that she could have complained sooner to a family or extended family member once she was safe in Jamaica.**
>
> **On the other hand the prosecution say that it is not as simple as that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship."**

[6] [2010] EWCA Crim 1578

[77]. This topic of demeanour has been addressed in cases such as **Keast**,[7] **Miah**[8] and **Zala**.[9] For evidence about the demeanour of a witness at other times to be admissible there needs to be a "concrete basis for its relevance" and that "in the overwhelming majority of cases, such evidence should not be adduced" not least because to admit it could lead "to a number of collateral witnesses being called to explain the reaction of the victim (or alleged victim)", **Miah** para [16]. In so far as evidence may feature in a particular case great care will need to be exercised when crafting the terms in which the jury are to be directed about that and in the circumstances no example direction has been provided. The admission of such evidence should be a rare event and the circumstances sufficiently variable that a 'standard' direction is unlikely to be of help.

[78]. It would be understandable if I came to this trial with assumptions about the crime of rape. But as a judge, I have taken a legal oath or affirmation to try D based only on the evidence I hear in court. This means that I should not let any false assumptions or misleading stereotypes about rape affect my decision in this case. I will explain what I know about rape/sexual offences from experience that has been gained in the criminal justice system.

[79]. I know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related.

[80]. I also know that there is no typical response to rape.

[7] [1998] Crim LR 748
[8] [2014] EWCA Crim 938
[9] [2014] EWCA Crim 2181

[81]. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation.

[82]. I must make sure that I do not let any false assumptions or stereotypes about rape affect my verdict. I must make my decision in this case based only on the evidence I hear from the witnesses and the law.

[83]. When I consider the emotional state of PW2 I need to bear in mind two things. First, there is no "normal" reaction to a [rape or sexual assault]. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. Second, it is possible for someone to put on an act if they choose to.

[84]. If I am sure that PW2's behaviour at the time was genuine then it may help me decide whether the prosecution has proved its case. On the other hand, if I am not sure that W's behaviour at the time was genuine, then it would not provide support for the prosecution case.

[85]. The warning I am giving myself is that I should consider this issue with care. I should avoid making an assessment based on any preconceived idea I may have about how I think someone should behave in this situation.

[86]. I should not assume that the way PW2 gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape/sexual assault in a variety of ways. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. The presence or absence of emotion or distress when giving evidence is not a good indication of whether the person is telling the truth or not.

[87]. In law there is a difference between consent and submission. A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but it is still consent. But when a person gives in to something against his/her free will, that is not consent but submission. They may submit due to threats, out of fear or by persistent psychological coercion. In those situations, they do not have free choice and this does not amount to consent freely given.

[88]. If a person decides not to struggle or gives up struggling, that is not the same thing as consent. A person can in some circumstances simply let the sexual activity take place because they feel they cannot act to stop it or because that is the only way they see the incident ending. Such actions or inactions are not an agreement by choice.

[89]. It is for me to decide what the situation was in this case by considering all of the evidence. Remember the prosecution must prove PW2 did not consent to having sexual intercourse with the Defendant and that the Defendant did not reasonably believe that W consented. What the prosecution do not have to prove is:

- that the Defendant used or threatened to use any force or that PW2 put up a struggle or was injured

- that PW2 communicated her lack of consent to the Defendant.

When deciding whether the Defendant reasonably believed PW2 was consenting, I should consider how PW2 behaved before or during intercourse.

[90]. I heard from the Defendant and also from the Defendant's partner that they have a mutually fulfilling life together. The Defendant claims he had no need to have sexual intercourse with a stranger and had much to lose by doing so.

[91]. The Defendant testified that:

> **"I tell the police who could say something like that about me, which at the time I did not know was my own common law cousin, she said that I am going to charge you for pushing your penis in my daughter mouth, I said what, who could say something like that, I don't have that thinking deh. While I was accompanied by the police, I go carry you mek dem lock yuh down right now, I said to the police, how you go lock me up for something that I did not do and what didn't happen. I tell the officer that I go the yard several time to see my common law and my child, so how they going to bring up an allegation like that, I am a respectable person, I never had a criminal record before, I tell them is spoil yuh wah spoil my reputation and frame my character, which I was mad and frustrated too."**

[92]. The Defendant further testified that:

> **"I said officer, why yuh nuh bring the people dem so I could talk to dem and see is who. The officer said yuh deh pon lock down right now, I seh I deh pon lock down fi something I don't know about, the officer told me that you are going to stay in the station until Monday, that was the first time I went to police station your Honour and it was very frustrating, at that time I started to cry in the cell and ask God why dem people had to do that because I never hurt no one, never did have criminal record, it was a new experience to me, a very bad experience; sleeping on the concrete floor, it hurt me the most lord when they got me far from my child and family. I tell the officer, how I would do something like that and I have my kids, I don't want to see my children grow up without their father, I know how it feel. I lay behind the bars and think about my common law wife and children. I never thought that something like that would happen to me. It is like dividing my whole future. When I lay there in the cell, all things run through my mind, why they have to do me like that, when you are wrongfully accused, it hurts a lot. I was building my house and told my wife that I would take her away from there**

because I don't like how they live. Every-time you live around family, it is a problem, worst when you live in poverty."

[93]. The Defendant also testified that:

> **Yes there is a lot of house in that yard and a lot of people are there. Thanks to my father I get my house and land and move my family to another location, now they are happy, I move them your Honour, when you live in poverty, I want better for my family. My common law is educated, so that is why they jealous her too, they did not want her for me and me for her. They want me for one of their next family, but I did not have any love for that next person. My common law wife sticks by my side, and when people see you are happy, they try to tear you apart, I always try to be the best father for my child, for my daughter Miracle and my son CJ, they mean the world to me. That is why I always try to work hard for my children and show them the right way, cause I know how it feels to have nothing to eat, I don't want to go and rob and be incarcerated. I try to do the best for my children, my father Charles Sr. has always advised me. I want to tell the Court today that I am not a criminal and that these false allegations that they bring against me I forgive them but they are making my family and wife suffer in the society. And for the record your Honour, God always open the way cause He is the way the truth and the life. I still hurting inside.**

[94]. I will consider this evidence when I decide whether it was the Defendant who raped PW2. But I must not assume that a person who is in a relationship, and/or has a fulfilling relational life, will not want to engage in sexual activity with someone else. In explaining this I am not suggesting what I should make of the evidence of the Defendant or of his partner. I am simply alerting myself to the danger of making an assumption which may not be valid.

Whether it was the accused that had the unlawful sexual Intercourse with the complainant?

[95]. Lastly, the prosecution had to prove that it is the accused who committed the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the offence.

The court must be satisfied that the circumstances were favoured for identification considering;

- What was the lighting?
- The distance between the witness and the assailant.
- Familiarity with the assailant by the witness.

[96]. PW2 testified that:

> **"Yes I knew Charles Martinez before that day, before that day I saw har right inna di yard. I would see Charles Martinez everyday before that day, because he guh everybody house and laugh and play wid dem. I would see Charles Martinez inna night and inna day. I see his whole body. Sometimes him siddung right side a wi. Nothing would block my view from seeing Charles Martinez, I would have known Charles Martinez for over two years. I would see Charles Martinez for hours sometimes 2 hours inna di yard. Charles Martinez lived at 15 Tigris Street at the time. Well him pull me inna my hair and me did a try fight he fi leggo my hair and I did stomp up inna di house but he said nuh mek no noise or else he is going to kill me. There was light coming from my cousin's house: Shamiel house. Charles Martinez was close close when he forced his penis in my mouth. Nothing was blocking my view when he and I were in the bathroom. I saw his whole body and his penis when we were in the bathroom. Charles Martinez and I were in the bathroom for 5 minutes. If I saw Charles Martinez again, I would be able to recognize**

him. Witness points to the accused Charles Martinez sitting in the dock in a red shirt and cut up pants."

[97]. PW3 also testified that:

> **"So when I was looking for somebody, never found nobody, so then I gone back a back deh fi see if dem still deh, then I bump into he by Mir backdoor, I never did a pay him any mind, then my sister Abiyana came. I just come out from there when Abiyana was questioning Jasnique.**
>
> **I have seen Charles Martinez before, he was going out with Shanice Bowen my cousin and this was 5 years before. I see him in Mahogany Heights, I saw him at 15 Tiger Street over the 5 year period; I would see him nearly every-day, the lighting condition would be bright bright, it was clear. He would be 2 feet away, because he was in my face. I would see his face over this 5 year period and nothing would be blocking me from seeing him. I would see him for like a half an hour and 2 seconds.**
>
> **It was clear when I saw Charles Martinez with my cousin Jasnique sucking his penis on the 9th of November 2019. I was about 2 feet away when I saw J sucking Charles Martinez's penis. Nothing was blocking my view when I saw J sucking Charles Martinez's penis. I saw Jasnique sucking Charles Martinez's penis, nuh long long, I just peep and gone. I see the whole a he, when I saw J sucking Charles Martinez's penis. I can remember that he had a brown khaki pants and a red shirt. If I were to see Charles Martinez I would be able to point him out. Witness points to Charles Martinez sitting in the dock in a button down shirt and a black and red pants."**

[98]. In order to secure a conviction in this case, the Crown is obliged to prove beyond reasonable doubt the commission of the offence by the accused person on the specific count.

[99]. I carefully perused the evidence on record. I meticulously considered arguments advanced by both counsel in support of their respective cases. First of all, on the question of credibility of the child-witnesses although the complainant and her cousin PW3-JB. were of tender age and youth respectively, in my assessment, they were competent, mature, reliable, intelligent and truthful witnesses. The competence or incompetence of children is determined not on a class basis, but with reference to the maturity and understanding of the individual child. The test, in broad terms, is whether the child has sufficient understanding of the duty to tell the truth and is sufficiently capable of giving comprehensible evidence to justify the reception of his or her evidence, given the danger of fabrication, exaggeration or capriciousness. I also note that the question is not simply one of age, though age is, of course, an important factor and I accordingly, warn myself of the danger. Both of them gave clinching, intelligible and unbreakable evidence regarding the alleged act of sexual assault committed by the defendant upon the child on the day in question. I believe both of them to be credible in every aspect of their testimony. The evidence given by them is consistent, cogent, corroborative and reliable in all material facts, which are necessary to constitute and establish that not only the offence has been committed but also to prove beyond reasonable doubt that it was the defendant, who committed it. The defendant was not a stranger to them. I find the independent evidence of the eye witness S. is strong and sufficient on its own for any reasonable tribunal to convict the defendant of sexual assault in this matter. I see no reason to disbelieve her. In fact, even corroboration is not required, when there is the evidence of an independent eye-witness. See, the case of **R v. Rose-Case** No: 13- 1972 SLR wherein, the accused was charged with the rape of a 7 year-old girl and in the alternative, with indecent assault upon her. At the end of the case the Court found the

accused guilty of indecent assault on female relying upon the truth of the uncorroborated evidence of an independent eye-witness, which was not contradicted by any other evidence.

[100]. The correct approach to the application of this so called cautionary rule was set out by Diemont JA in **S v Sauls and Others**.[10] The process of reasoning which is appropriate to the application of the cautionary rule in any particular case will depend on the nature of the evidence which the court has before it. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge is bound to weigh the evidence, consider its merits and demerits, and, having done so, will decide whether, despite shortcomings or defects or contradictions in the testimony, the truth has nevertheless been told. A final evaluation can rarely be made without considering whether such evidence is consistent with the probabilities.[11] Where the evidence of the single witness is corroborated in any way which tends to suggest that the story was not concocted, the caution enjoyed may be overcome and acceptance facilitated. A court will usually find it profitable to compare the nature and quality of the complainant's evidence with that of the accused.[12]

[101]. It is my view that on a preliminary inquiry before taking the evidence of a child witness, it is difficult by asking a few questions, for a trier of fact, to come to a determination whether the child is capable of giving intelligible evidence. It is only by observing the manner in which the child answers the questions put to him/her during his entire testimony that a trier of fact can determine whether the child is capable of giving intelligible evidence. In **Jacobs v Layborn** (1843)) 11 M & W 685 it was said that the incompetency of a witness may become

[10] 1981 (3) SA 172 (A) at 180E-G
[11] See **S v Texeira** 1980 (3) SA 755 (A) 761
[12] See **Maake v DPP** [2011] 1 All SA 460 (SCA) at [6-8]

apparent only after he has commenced to give evidence. 'Intelligible' in my view in the context of section 11A of the Evidence Act, simply means the child is able to understand the questions put to him/her and give answers which can be understood by the listener and nothing more. Credibility of a witness is a determination to be made by the trier of fact based on the evidence, a witness gives and should not be confused with intelligibility. Many an adult witness who takes the oath to speak the truth does not always speak the truth. In **Blackstone's Criminal Practice 2010 at F4.18** under the heading child witnesses it is stated: "that questions of credibility and reliability are not relevant to competence but go to the weight of the evidence…" In **MacPherson; Powell** (2006) 1 Cr App R 468 it was said that a court cannot properly conclude that a child is incapable of satisfying the test of competency on the basis of the child's age alone. In **Blackstone's Criminal Practice** 2010 at F4.18 under the heading child witnesses it is stated: "There has been a change of attitude by Parliament, reflecting in its turn a change of attitude by the public in general to the acceptability of the evidence of young children and an increasing belief that their testimony, when all precautions have been taken, may be just as reliable as that of their elders." At **paragraph 8-59 of Archbold 2012** it is stated: "A child's chronological age will, however, help to inform the decision as to competence, but the age of a witness is not determinative of his ability to give truthful and accurate evidence, and if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age: **R v B** (2011) Crim L. R. 233, CA (observing that none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults.)"

[102]. To ensure that the evidence of a child witness can be relied upon as provided for in law, the South African Court stated in **Woji v Santam Insurance Co Ltd**,[13] that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

> **'Trustworthiness . . . depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. . . . His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers."' (Emphasis added.)**

[103]. It is in any event trite that the evidence of young children should be treated with the utmost caution owing to the dangers inherent in such evidence.[14] Children are, by their very nature, imaginative. They are prone to suggestibility. These are but two of the elements against which the trier of fact should guard. The primary concern of this court as the trier of fact is to ascertain whether the evidence of a young witness is trustworthy. The concept of trustworthiness was examined by the court in **Woji v Santam Insurance Co Ltd (supra)**. The court found that it comprises the following four components:

a. **The capacity for observation;**

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[13] **Woji v Santam Insurance Co Ltd** 1981 (1) SA 1020 (A) at 1028B-D. Note the caution courts are advised to take note of when they consider the reliability of a child witness in rape cases: Woji by M Bekink 'Defeating the anomaly of the cautionary rule and children's testimony – S v Haupt 2018 (1) SACR 12 (GP).

[14] See **R v Manda** 1951 (3) SA 158 (A) at 162.

b. The power of recollection, which depends on whether the child has sufficient years of discretion to remember what occurs around her;

c. Narrative ability, which raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers;

d. Sincerity, or a consciousness of the duty to speak the truth.

[104]. However, the Courts have, since **Woji**, cautioned against what is now commonly known as the double cautionary rule.[15] It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.

[105]. On the other hand, I do not attach any credibility to the testimony of the defendant and his witnesses on the issue of "alibi" as none of them appeared to be reliable in the least.

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[15] See **Vilakazi v S** [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) and cases cited therein.

Moreover, I find the evidence given by the defence witness is not consistent, cogent and reliable on material particulars. For instance, DW2, the common law wife., one of the household of the defendant testified on the crucial fact that the defendant did come to the yard where she resided at the time, whereas the other two alibi witnesses testified to the same incident. Obviously, the defendant failed to establish the defence of alibi in this matter although, I note in criminal law cases, it is a fundamental rule that the prosecution bear the overall burden of proving the guilt of the defendant including his identity. In a rather broad sense, the defence of alibi may consist of a denial that the crime charged was committed by anyone; it may consist of a denial that the accused was the person who committed the crime; there may be an allegation that the accused was nowhere near the scene of the crime or it may consist of an allegation that, though the accused had an opportunity to commit the crime, he was wrongly identified as its perpetrator. Therefore, evidence required to rebut an alibi is frequently said to be "proof of Identity". In the instant case, I find the prosecution has proved beyond reasonable doubt the presence of the defendant at the time and place of the alleged crime. There could not have been any mistaken identity by the complainant or by her and her cousin PW3-JB.

[106]. It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the Crown) to prove his defence.

If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty.[16]

[107]. The only responsibility an accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the alibi defence, after investigations, prove to be solid.

[108]. The alibi defence has received the attention of several courts, in particular that of the Constitutional Court in **Thebus v S**,[17] where it is stated:

> **'. . . [A] failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in R v Mashelele. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:**
>
> > **"But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection."[18] (Emphasis added.)**

[16] **Tshiki v S** [2020] ZASCA 92 (SCA) with cases cited therein.

[17] **Thebus and Another v S** [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

[18] Ibid para 63.

[109]. Without this evidence, the question that must be determined is whether the evidence of a child witness (in this case, approximately 9-year-old girl child) was satisfactory in all material respects. At the same time, whether or not the defendant's version was reasonably probably true.

[110]. Applying the **Woji** principles to this case, I find that the evidence of the complainant is trustworthy and, thus, (supported by *aliunde* evidence of the cousin JB) satisfactory beyond reasonable doubt. Despite her young age, the complainant's evidence was consistent and clear. She was able to respond to statements put to her and questions posed by the defence with certainty and clarity; intelligently and without difficulty. The cross-examination of the complainant was rigorous and to some extent unnecessary. Where she did not understand the question, the question was repeated and she responded appropriately. During cross-examination, the complainant stood firm and composed herself and remained adamant that the defendant was the one who put his penis in her mouth.

[111]. In this case I approach the evidence of the complainant with necessary caution deserving to be applied to a child victim of rape as it was warned in **R v Manda** 1951 (3) SA 158 (A) at 162E – 163E; and recently in **S v Dyira** 2010 (1) SACR 78 (ECG) at 84, para [6] where the following was said:

> **"The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or**

> **entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (S v Viveiros [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt Law of Evidence 4-7)."**

[112]. Coming to the appellant's version. It is trite that the proper approach to evidence is to look at the evidence holistically to determine whether the guilt of the accused has been proven beyond reasonable doubt.[19] This approach was reaffirmed by the South African Court in **Tshiki v S**[20] as follows:

> **'In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'**[21]

[113]. There are improbabilities in the defendant's version in general and, in particular, his alibi. The defence witness that was called to testify in this regard was not very impressive. Besides stating that between the 10th day of September and the 10th day of November 2019, the defendant was at work, there was no substantiation. When he was cross-examined on

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[19] **S v Van der Meyden** 1999 (1) SACR 447 (W) at 448.
[20] **Tshiki v S** [2020] ZASCA 92 (SCA).
[21] Ibid para 23.

the simple issue of what day it was on which the defendant was at home, he could hardly remember whether the defendant was at home or the time he was at home.

[114]. The South African Court warned in **Thebus (supra)** that a court cannot attach much weight to an alibi that is raised later; in this case, four years later. This is because such an alibi is prone to fabrication, as evidenced in this case.

Good Character

[115]. Evidence that the accused is of good character may be relevant to the credibility of evidence given in court and statements made out of court (**R v Vollmer & Ors** [1996] 1 VR 95; **R v Vye** [1993] 1 WLR 471; **Melbourne v R** (1999) 198 CLR 1).

[116]. In the case of **Leslie Moodie v R** [2015] JMCA Crim 16, Morrison JA (as he then was) made the following observation at paragraph [127] of the judgment:

> **"[127] The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in R v Vye, R v Wise, R v Stephenson [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant 'does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required' (per Lord Taylor CJ, at page 245)."**

[117]. An analogous effect was stated in the dictum of Brooks JA (as he then was) in the later case of **Tino Jackson v R** [2016] JMCA Crim 13. At paragraph [24] of that judgment, it was stated that:

> **"…It is correct to say that there are two possible limbs to a good character direction. The first is the propensity limb and the second is the credibility**

> **limb. The propensity limb speaks to the likelihood, or more accurately, unlikelihood, of the person accused having committed such an offence. The credibility limb speaks to the likelihood of his being truthful in his assertions of innocence to the court. If an accused raises the issue of his good character in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect."**

[118]. In the case of **Michael Reid v R** in which Morrison JA (as he then was), setting out general principles relating to good character, gave the following guidance at paragraph 44 of the judgment:

> **"(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged…"**

[119]. However, the court may limit the use to be made of good character evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party, or might be misleading or confusing (Evidence Act 2008 s136). However, this will be rare (see, e.g., **R v Lawrence** [1984] 3 NSWLR 674; **R v Murphy** (1985) 4 NSWLR 42; **R v Hamilton** (1993) 68 A Crim R 298).

Conclusion

[120]. It therefore remains the Court's duty to evaluate the evidence as a whole which must be done on the same basis as it would, regarding the evidence given by other (adult) witnesses. The proper judicial approach is therefore to consider each case on its merits and the question a Court must ask itself is whether the evidence of the young/child witness is

trustworthy. From a number of decisions, it is clear that single evidence need not be perfect, but must be clear and satisfactory in every material respect (**S v Arthman**)[22]. At the end the Court must be satisfied beyond reasonable doubt that the truth has been told, despite the witness being an unsatisfactory witness in some respects.

[121]. Indeed, the proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the Crown's case, the nature of the defence's case, the probabilities emerging from the case as whole, the credibility of all the witnesses in the case including the defence witness, and then to ask oneself at the end of all these, whether the guilt of the accused has been established beyond reasonable doubt.

[122]. It must however be noted that during the cross examination of the complainant and PW3, such version of motive and malice were never put to them in order for them to either confirm or deny such allegations. The rule to put the defence case to Crown witnesses has long been a practice in our Courts and is followed to ensure that trials are conducted fairly; that witnesses have the opportunity to answer challenges to their evidence and that parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised. **S v Boesak**[23] where it was held that a Criminal Trial is not a game of catch-as-catch-can.

[123]. The accused in his testimony had demonstrated to the Court that he is not telling the truth about what had transpired, because he went on as far as denying the presence of JB at the house where he was confronted.

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[22] **S v Arthman** 1968 3 SA339 (A).
[23] **S v Boesak** 2001 (1) SA 912 (CC) 2001 (SACR1; 2001(1) BCLR 36).

[124]. On the other hand, the complainant as a child witness has been found to be an impressive witness. Her evidence comprised of detailed and consistent narration of facts. She maintained stability throughout her testimony, she never showed reluctance [indistinct]. The complainant even though she was a child witness she is found to be tangible and reliable. There could be no reason to believe that she had been coached or she was imagining facts.

[125]. The complainant did not contradict herself in the witness box; her evidence was not shown to be improbable in that she was with the appellant at the time relevant to the commission of rape when the appellant had the opportunity to rape her; and she reported the sexual assault upon her at the earliest opportunity dispelling any possible notion that she was bent towards implicating the appellant in the commission of rape falsely; or that she was acting on suggestibility by elders.

[126]. On the issue of medical evidence, I find there is no rule of law or of practice, which requires that in all cases of sexual assaults, there ought to be a medical evidence to corroborate or to prove the offence. In any event, the medical evidence as to the tear in the hymen of the complainant shows that she had been sexually abused. This fact, obviously does not lead to any inference of innocence in favour of the defendant in this matter.

[127]. In the circumstances, I convict the accused of the offence as charged in the indictment.

Dated the 16th day of November, 2023

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RICARDO O'N. SANDCROFT

Justice of the High Court