

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 0055/2022

BETWEEN:

THE KING

and

WF¹

Defendant

Appearances:

Mr. Riis Cattouse, Senior Crown Counsel for the King

Defendant- Self-represented

2024: February 19, 20

March 08

JUDGMENT

INCEST, SEXUAL ASSAULT- JUDGE ALONE TRIAL-DECISION

Introduction

[1] **NANTON, J:** WF (hereinafter referred to as “the Accused”) was indicted for two counts of incest, contrary to Section 62 of the Criminal Code², and two counts of sexual

¹ Names have been anonymized for the protection of the VC, a minor.

² Chapter 101 Criminal Code of the Laws of Belize Revised Edition 2020

assault contrary to **Section 45A of the Criminal Code** hereinafter “the Code” arising out of incidents which took place during the period April 2019 and October 2020.

[2] The Accused was indicted on the 14th April 2022 and the trial by judge alone began on 19th February 2024 with his arraignment pursuant to **Section 65 A (2) (g) of the Indictable Procedure Act.**³

[3] During the case management of this matter the Accused indicated that he wished to obtain an attorney and time was granted for him to do so. On each occasion that the matter was called this Court enquired into the Accused’s legal representation and he was facilitated with adjournments for the purpose of retaining an attorney.

[4] On 23rd October 2023 the Court made a further enquiry into the status of his legal representation and the Accused indicated that he would be representing himself. On that occasion the matter was set for trial to begin on the 19th February, 2024. When the matter was called on said date the Accused made a request for an adjournment indicating that he wanted more time to obtain an attorney. The Court refused the Accused’s application for adjournment based on its assessment that sufficient time i.e. 4 months had been granted to the Accused to obtain legal representation. As a result, the trial of the Accused commenced. The Court took care to explain the procedures of each relevant stage of the proceedings to the Accused and assisted him in his legal defence as required.

[5] The Crown relied on the oral evidence of nine witnesses.

[6] The Accused opted to give sworn evidence on his own behalf.

[7] No closing addresses were made by either party.

³ Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

Elements of the Offences

[8] Counts 1 and 2 : Incest

62.-(1) Any person who carnally knows another person who is to that person's knowledge, that person's grandchild, child, sibling, niece, nephew or parent, commits an offence and shall on conviction thereof be liable to imprisonment for not less than twelve years but may extend to imprisonment for life.

(2) For the purposes of this section, it is immaterial whether the other person consents to the penetration of the mouth, anus or vagina.

(3) Where in proceedings for an offence under this section it is proven that the Defendant was related to the other person, it is to be taken that the Defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(6) The relation between persons is within this section if either person is the other's parent, stepparent, grandparent, brother, sister, half-brother, half-sister, aunt, uncle or if either person is or was the foster parent of the other.

(8) For the purpose of this section—

“aunt” means the sister or the half-sister of a person's parent and “uncle” has a corresponding meaning;

[9] To prove the offence of incest the Court understands that the Crown must prove to the satisfaction of the Court so that it is sure that:

- i. The Accused carnally knew the VC.
- ii. The Accused was related to the VC -in this case that he was the uncle of the VC.
- iii. That the Accused knew or could reasonably have been expected to know that he was related to the VC in that way.

[10] Counts 3 and 4: Sexual Assault

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; or

(b) that person being made to touch the person's vagina, penis, anus or breast or any other part of the person's body, commits an offence and is liable –

(i) where that person is sixteen years or over at the time the offence was committed, on summary conviction to a term of imprisonment of five years or on conviction on indictment to a term of imprisonment for ten years; or

(ii) where that person was under sixteen years at the time the offence was committed, on summary conviction to a term of imprisonment for a term of seven years or on conviction on indictment to a term of imprisonment for twelve years.

[11] The Court also refers to **Section 12(b) of the Criminal Code** which removes the requirement of proving the absence of consent in the case of a person under sixteen years of age:

“In the case of a sexual assault upon a person, a consent shall be void if the person giving it is under sixteen years of age without prejudice to any other grounds set out in this section.”

[12] The Crown must therefore prove to the satisfaction of the Court so that it is sure that:

- i. The Accused intentionally touched the VC's vagina.

- ii. That touching was sexual in nature

The Crown's case

[13] The Crown's case is that on two separate occasions in the month of April 2019 the Accused had sexual intercourse with the Virtual Complainant (hereinafter the VC) whom he knew to be his niece. The Crown also alleged that on one occasion in September 2020 and on another occasion on the 12th October 2020 the Accused intentionally touched the vagina of the VC, that touching being sexual in nature.

[14] The Crown relied on the oral evidence of the following witnesses whom they called in the order shown below:

- 1) #1314 PC Daymond Rhaburn
- 2) Dr. Luis Chulin
- 3) #1517 Corporal Santiago Perez
- 4) Crime Scene Technician Robert Henry Jr
- 5) Justice of the Peace Jane Sutherland
- 6) NG
- 7) AF
- 8) #2104 PC Shannon Pook
- 9) The VC

[15] The following items of documentary/real evidence were admitted:

- 1) **SP 1**- video recording of notes of interview WF.
- 2) **SPA 1**- written notes of interview WF.
- 3) **RH 1-7 (A-E)** - Photographs of the scene.

The VC

[16] The VC, who was 16 years old at the time of her testimony, gave sworn evidence after the Court satisfied itself of her competency to so do. The Court was satisfied that the witness understood the nature of the oath and the duty to tell the truth and the consequences of telling a lie.

[17] The VC testified that she was born on 1st October 2007 and lives in Double Head Cabbage with her mother, father and brother. She recalls sometime in April 2019 that she and her brother were sleeping on the floor when she opened her eyes and saw a shadow of someone walking out the door. She looked through the window and saw that it was her uncle, the Accused. He told her to meet him at his bedroom.

[18] She went through the back door because the front door and the side door were locked. When she got to his room, which is located at the back of her grandfather's house, about 40 yards away, he told her to lay down. She did as he said and then he told her to take off her pants which she did. She said that they were both laying down when he pulled her panty to the side and inserted his penis into her vagina. He didn't say anything to her and she didn't say anything to him. At the time she said that the lighting was clear and nothing blocked her view of him, she could see his whole body and had him in her view for about 5 minutes. After it was done she returned home and got ready for school.

[19] She said that about two weeks later she and her brother were sleeping on a mattress on the floor in the hall of her house when she felt someone touch her cheek. When she opened her eye her uncle was standing in front of her and then told her that he wanted to see her. He left and she then followed him like before. She said they went through the back door of her grandfather's house because the front door and the side door were locked. He told her to lay down on the bed, he took off his pants and told her to take off her pants. She lay by the side of his bed and he came on top of her and inserted his penis into her vagina. After about 5 minutes she struggled herself under his body and she told him that she was going home. He told her that she should stay so that he could do it a little bit longer since she didn't have school until 8:00 o'clock but she told him that she didn't care and that she was leaving anyway. She said she went home and got dressed for school. At that time she said the lighting was clear and that she had him in her view for about 6 minutes and nothing blocked her view of him.

[20] On an unspecified date in September 2020 the VC said that she was going to see her aunt at her house. She saw the Accused seated in the chair and asked him if her aunt

J was at home. He told her yes so she went inside to check but didn't see her aunt. She told the Accused that he was a liar and while she was returning outside he grabbed her by her hand and pulled her onto his lap and started touching her vagina. He was holding her down but she struggled herself and knocked him at his chin with her elbow and went home. She had him in her view for about 3 minutes and nothing blocked her view of him.

[21] On 12th October 2019 the VC was in her room when she heard the Accused's voice outside her window. She got up, turned on the light and opened the window. She asked the Accused what he wanted and that was when he pushed his hand through the window and started touching her vagina. She said he had her in his grip but she managed to release his grip with her other hand. He left so she closed the window.

[22] She said that after the first occasion in 2019 the Accused started giving her money and chocolate.

[23] In cross examination the witness denied the suggestion that she only came to his room on her father's instructions to borrow the barbering machine. She accepted that although it was her first time she had said that the sexual intercourse with the Accused did not hurt.

[24] She said that at the time the window reached to the height of her waist.

[25] She denied the Accused's suggestion that her father was in her room on the night that she said the Accused touched her vagina by the window. She said that she could not remember if the Accused had told her that she was too nasty.

[26] She accepted that she had said that she had heard a gunshot outside her room but that she could not see outside her room.

[27] She denied the suggestion that the money and chocolate the Accused gave her was to give his granddaughter.

[28] She denied the suggestion that Keman was present when the Accused was sitting in the chair at J's house.

[29] She denied the suggestion that she was making these incidents up.

[30] She agreed with the Accused's suggestion that she did not accuse him until he (the Accused) had said something about her and her father. She said that the reason she did not say anything was because she was afraid.

NG

[31] In 2019 this witness said that she was not working. At that time her mother in law AF was working in Belize City. This witness started noticing the VC going over to the Accused's room which is located behind the bar in the same yard about 20 yards away from where she lived. She said that she would notice the VC going there as soon as her mother went on the 6:00 a.m. bus. She did not say anything the first or second time she noticed this but on the third occasion she told AF as soon as she came off the bus. She also noticed that the Accused would accompany the VC on her way to school, at cricket games and at church. She said that the Accused and the VC were always close and they were always playing and laughing with each other. She could recall the VC started to get disrespectful at him and he would get upset and be overprotective with her.

[32] In cross examination the witness denied the suggestion that she could not see the front door to the Accused's room from where she lived because of the position of the homes. She accepted that there were trees and a tool house in front of his home. She accepted that everyone goes to the cricket game and that she also sometimes walked with him and the VC on the way to school.

AF

[33] AF gave birth to the VC in Belize City on 1st October 2007. In 2019 she lived at Double Head Cabbage with her husband and two children. She said that the Accused is her biological brother and the uncle of her daughter the VC.

[34] She said that on the 14th October 2020 she spoke to her stepmother and thereafter to her daughter. After talking to the VC she spoke to the police who took her to the police station in Bermuda Landing.

[35] The witness denied that the Accused had told her about what he saw between the VC and her father and that she told him to shut his mouth. She denied that she was protecting her husband because she gets abused by him.

Dr. Luis Chulin

[36] Dr. Luis Chulin was deemed an expert in paediatric medicine. This witness testified that he examined the VC on 15th October, 2020 in the presence of her parent and accompanying officers. He observed that there was a smell and abundant vaginal discharge when the child was undressed but he noted that there was no immediate trauma which he clarified meant that there was no bleeding or scars.

[37] He noted the absence of a hymen which led to his conclusion that the child was carnally known.

[38] It is to be noted that the opinion of the doctor that the child was raped was disregarded by the Court as that is a legal term and there was insufficient evidence proffered by the doctor for any such conclusion to have been made by the witness. The Court thus paid no regard to this inadmissible evidence.

[39] In cross examination the doctor explained that recent trauma meant evidence of bleeding scars. He stated that if sexual intercourse was not forceful there may be no scars or bleeding upon examination.

[40] He said that he knew that a Human Services representative was present but that he was not aware whether that person refused to give a statement.

Robert Henry

[41] Robert Henry took photographs of different locations at Double Head Cabbage pointed out by the VC. Those photographs were admitted into evidence and marked **RH 1-18 A-E**.

[42] In cross examination the witness said that he was given access to the Accused's room by the investigator Shannon Pook. When asked about the lighting in the room he stated that he used the flash on the camera to capture the images.

Daymond Rhaburn

[43] On 14th October 2020 officer Rhaburn received a call from AF. He proceeded to Double Head Cabbage where upon arrival he spoke with AF. He received a report which he handed over to investigator Shannon Pook.

[44] In cross examination he said that he did not receive a call from AF's son and that he did not pick up the Accused. He accepted that he met the Accused tied up and that he told the person who had tied him up that he could not take the law into his own hands. He agreed that he made a mistake and that he took the Accused to Bermuda Landing Police Station.

Santiago Perez

[45] On 15th October 2020 at 3:30 pm the witness arrived at Burrell Boom Police Station. Whilst at the station PC Roland handed over the Accused whom he observed to be in good health conditions. He then informed him of the reason of his detention and cautioned him. He escorted the Accused to the Ladyville Police Station where he issued an acknowledgment form and informed him of his constitutional rights.

[46] On 16th October 2020 he recorded a video interview with the Accused. The interview was recorded in the Domestic Violence Unit Office of the Ladyville Police Station in the presence of Justice of the Peace Jane Sutherland and the investigating officer Shannon Pook WPC 2104.

[47] At the conclusion of the recording he extracted the video and thereafter burned it onto a blank compact disc. The witness identified that CD which was admitted into evidence as **SP1**.

[48] In cross examination it was suggested to the witness that the Accused was never arrested when he was at the Burrell Boom Police station. The witness said that he never mentioned that the Accused was in a cell block but just that Officer Roland handed over the Accused to him.

[49] The witness denied the suggestion that he was not present when the interview was being taken.

Justice of the Peace Jane Sutherland

[50] On 16th October 2020 Justice of the Peace Jane Sutherland visited the Ladyville Police Station where she met Officer Shannon Pook who introduced her to the Accused. She was allowed 5 minutes to speak alone with the Accused and during that time she asked the Accused whether he was threatened, if he was beaten and the Accused said that he was not and that he wanted to give a statement of his own free will. When Officer Pook returned, she read him his rights and asked the Accused once again if he was willing to give a statement and he said, yes. Officer Pook explained that she was going to ask him questions and record his responses. The witness identified **SPA 1** as the statement that was recorded from the Accused in her presence.

[51] She was not cross examined.

Shannon Pook

[52] On 14th October 2020 at around 4:15 p.m. WPC Shannon Pook was working at the Burrell Boom Police Station when she received a phone call from PC Rhaburn. She left for Bermuda Landing Police Station where upon her arrival she was met by PC Rhaburn, AF and the VC. She called Human Services.

[53] On 15th October she met social worker Kenisha Cole, the VC and her mom at the Human Services Office and thereafter they proceeded to the Coral Grove Medical Centre where Dr. Chulin conducted an examination on the VC in the presence of this witness, social worker Kenisha Cole and AF.

[54] This witness recorded a statement from the VC at the Ladyville Police Station.

[55] This witness and other officers visited the scene at Double Head Cabbage where the VC showed where the incidents took place.

[56] On 16th October 2020 she identified herself to the Accused and informed him of the report made by the VC and cautioned him. She asked him if he wanted to give a caution statement or a notes of interview after which he agreed to give the notes of interview. She introduced Justice of the Peace Jane Sutherland to the Accused who spoke with him privately. Thereafter, she recorded an interview from the Accused which was read over to the Accused who signed same along with the Justice of the Peace. The interview notes were admitted into evidence and marked **SPA 1**.

[57] In cross examination this witness denied the suggestion that the Accused was never detained on the 15th October. The witness said that she did not recall getting a call from the Accused nor speaking to him for 20 minutes. She denied sending officers to assist him in packing up his stuff but stated that she only know of him being detained and

placed in the cell block. She said that she had no knowledge of how the Accused was transported but she knew that he was placed in a cell block.

[58] She denied being asked by the Accused to go to a doctor because his teeth had been knocked out. She testified that she did not see any injuries on the Accused when she met him. She denied being asked by the Accused to go to the doctor to prove that he could not be with a woman.

[59] She denied that he was charged on the Monday night.

[60] She denied that he gave her any report at all or seven times as suggested by the Accused.

[61] She stated that she gained access to his room from the Accused who gave her a key but that she could not recall the state of the room.

Exhibits

SP1 – video recording of interview of WF

[62] Officer Santiago Perez testified that he video recorded the interview conducted by WPC Pook with the Accused. The video was played during the course of the trial. Regrettably, the quality of the CD on which the video was recorded was poor and the last 10 minutes could not be played. The Court therefore was unable to view the video in its entirety. However, the Court has referred to the interview notes summarised below for the written record of what transpired during the course of the interview. The Court observes that CDs can at times be a troublesome means of storing data as they are susceptible to damage through the passage of time and ordinary wear and tear. It may be appropriate for consideration to be given for more updated methods of storing digital evidence.

[63] It is noted that while the written interview and the audio-video recorded interview contain for the most part identical information there are some utterances made by the Accused

in the video recording that were not accurately or completely transcribed on the written record. It is also necessary at this stage that the Court underscores the importance of police officers making a verbatim, complete and accurate record of the statements made by an Accused during the course of an investigation. Paraphrasing an Accused's statements is not sufficient, it is imperative that the exact wording by Accused persons should be accurately reflected when collating evidence in a criminal trial. Reference is made to **Paragraph 5.8 on the Guidelines for Interviews** *"The police officer must ensure that the exact words spoken by the person are taken down and that they are not edited or paraphrased."*

SPA 1 – interview notes of WF

[64] The account given by the Accused in **SPA 1** is that in April 2019 he hunted and was not usually at home. He said that he was the uncle of the VC and that they lived in the same area but that he lived in a room behind his father's bar. He said that his room is about 50 yards behind the VC's house. He would see her mainly on weekends because during the week he is usually busy. The VC's mother (his sister) cooks for him and he will see the VC sometimes when he goes to eat. Sometimes she would be asleep and sometimes she would be running around the yard. He said that he did not recall seeing her in April 2019.

[65] He recalls seeing her in September 2020 when he would go to drink tea. He also recalls seeing the VC at his sister J's house as she is always there; however, he said that he has never seen her at his sister J's house when it was just the two of them as she would usually be with her cousin Bretlee or Kemar.

[66] He said that on Monday (the week in October before his arrest) he was chasing animals outside of the yard when he saw the VC got up to open the door for her father. As her father got into the room he could see her father sucking up her breast. -It should be noted that in the video interview unlike the written interview the Accused also added that although the father cut off the lights he was able to see through the glare coming in from

another window. He heard them make sounds and then the father opened the door and left closing the door behind him.

[67] He said that he saw the VC and her father through the window and that the VC took off her dress and she had on a red bra. He stayed there for about 20 minutes. He said the light was on and then they cut it off.

[68] He said that he saw his sister that same night and that he told her that she needed to see a nurse about the VC and she told him to shut his mouth. He also told his sister the following day and she got mad and told him that would never happen.

[69] He said that at no time did he and the VC have sexual relations.

[70] He said that he gave the VC money and that he give all his nieces money.

[71] The Court notes that in this interview the Accused essentially denied the accusations that he had sexual intercourse with his niece and that he touched her vagina. He did however admit that he was the uncle of the VC, which as shown above to be an essential ingredient to the offences of incest. The Court refers to the test outlined in the seminal case of **R v Garrod**⁴ of whether a statement is “mixed”. The Court of Appeal in that case explained that a statement could not be treated as a mixed statement unless the admissions or inculpatory parts were significant in relation to the prosecution’s case as it was conducted at trial. In this case the Accused’s admission that he is the uncle of the VC is relevant to one of the two ingredients of the offence of incest and as such the interview falls to be treated as a mixed statement. In **R v Papworth and Doyle**⁵ it was stated that “where the statement contains an admission of fact which is important to any issue in the case, meaning those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt, then the statement must be regarded as “mixed” for the purposes of this rule.

⁴ [1977] Crim L R 445

⁵ [2007] All ER (D) 167

[72] The Court in treating the statement as mixed considered the whole of the statement both the exculpatory and the incriminating parts in considering where the truth lies bearing in mind that the excuses may not have the same weight. The Court also refers to the fact that the Accused gave sworn oral evidence which for the most part was consistent with and in some respects expressly referred to his earlier statement to the police.

Analysis

[73] 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 the Court 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 him.

[74] The Court begins firstly with analysing the evidence on the Crown's case and if the evidence is 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 (hereinafter "the CCJ"), in Dioncicio Salazar v R⁶.

[75] The Court, in assessing credit and reliability, must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes however, on the authority of the Belizean CCJ decision of August and Anor. v R⁷ that it need not comb the record for inconsistencies or contradictions. The Court directs itself 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. The Court must consider whether inconsistencies or discrepancies arose for innocent reasons, for example through faulty memory or lack of interest in what is transpiring, or if it is because the witness is lying and trying to deceive the Court. Unresolved inconsistencies or discrepancies would lead

⁶ [2019] CCJ 15 (AJ)

⁷ [2018] 3 LRC 552 at para. 60

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 bit.

[76] The Court also directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of all believability. The Court in this regard relies upon the decision of the English Court of Appeal of **R v Fanning and Ors.**⁸ The Court notes that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the untruth and the reason for the lie, and may still convict if the Court is sure that the material parts of that evidence to be true. The Court in this regard relies upon the CCJ decision of **James Fields v The State.**⁹

[77] The Court is assisted in the legal parameters of its fact-finding function by a recent decision of the Jamaican Court of Appeal in **Vassell Douglas v R**¹⁰, per Fraser JA (Ag.)

⁸ [2016] 2 Cr. App. R. 19 at para. 27

⁹ [2023] CCJ 13 (AJ) BB at paras 33-35. “[33] *The role of the jury is to evaluate the testimony of the witnesses and to determine what weight and reliability to assign to their statements. This role is crucial in the fact-finding process. In determining credibility, the jurors may have regard to the demeanour, consistency, bias or motive, prior inconsistent statements, corroborating evidence, and all the various factors a person will use in their daily life in order to assess and distinguish between truth and falsity. The fact that a witness has provided false information on one point under oath can impact the credibility of that witness and the weight given to their testimony. But once the case has been given over to the jury, it is the jury and the jury alone that has the responsibility to carefully consider the implications of the untruthfulness and evaluate how it affects the overall credibility of the witness' testimony on the essential question(s) in issue.*

...

[35] *In all the circumstances, a proper direction to the jury in relation to intentional lies may proceed along the following lines:*

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness. You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. If you find that any witness has intentionally testified falsely as to any material fact, you may disregard that witness' entire testimony. Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate. How you decide on this may depend on your view of how material to the issue is the lie. Where there are different or conflicting accounts in the evidence about a particular matter, you must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in your view their evidence is honest and accurate. When doing this you must apply the same fair standards to all witnesses, whether they were called for the prosecution or for the defence. It is entirely for you to decide what evidence you accept as reliable and what you reject as unreliable.”

¹⁰ [2024] JMCA Crim 10.

“We have distilled from the foregoing authorities that in any trial, more so a bench trial, the judge is not required to identify all the inconsistencies or discrepancies that arise during the trial unless it is considered damaging to the Crown’s case.”

[78] The evidence which has been led by the Crown to make out the elements of the offences of incest is as follows:

- a. **The Accused carnally knew the VC** – the evidence of the VC was that the Accused penetrated her vagina with his penis on two occasions in April 2019.
- b. **The Accused was related to the VC** -in this case that he was the uncle of the VC- the uncontroverted evidence from the VC, AF and the Accused in his video recorded interview was that the Accused was the biological brother of the mother of the VC and the uncle of the VC. The Accused also stated that he was the uncle of the VC in his interview with the police.
- c. **That the Accused knew or could reasonably have been expected to know that he was related to the VC in that way-** the evidence comes from the video recorded interview of the Accused that he was the uncle of the VC.

[79] The evidence which has been led to make out the offences of sexual assault:

- a. **The Accused intentionally touched the VC’s vagina** – the VC’s evidence is that the Accused touched her vagina on two occasions in September and October 2020.
- b. **That touching was sexual in nature-** the evidence of the VC is that in September 2020 the Accused pulled her onto his lap and touched her vagina, and on October 12th 2020 the Accused grabbed her by putting his hand through her bedroom window and touched her vagina.
- c. **That the VC was at the below sixteen years of age at the time of the offences and incapable of consenting** – the evidence of AF was that she gave birth to the VC on 1st October, 2007.

[80] The Court is of the view that while it has considered the case for the Crown as a whole, the central issue for determination in analysing the Crown's case is the Court's finding as to the credibility and reliability of the VC's account and whether the Court accepts the testimony of the VC. In making this determination the Court must consider whether the VC is an honest and credible witness.

Circumstances of the identification

[81] On each occasion – the two allegations of sexual intercourse and the two incidents of sexual touching of her vagina- the VC gave evidence that the lighting was good, that the Accused, her uncle whom she knew for two years prior, was in touching distance of her and that nothing blocked her view of him and that she could see his face clearly and the incidents lasted minutes. With the exception of the incident of 12th October, 2020 all other incidents occurred during the daylight. On the night of the 12th October, 2020 the witness said that she turned on the light. She said that nothing blocked her view then although the Court notes that the window must have blocked her full view to some degree. Notwithstanding the VC said she also had a conversation with him when he called her to the window.

[82] The Court notes that even honest witnesses can be mistaken and even when identifying persons known to them. However, in this case the Court accepts that the VC's opportunities for observation on each occasion were sufficiently strong to dispel the possibility of mistake. The Court is of the view that the Crown's case turns more directly on the Court's assessment of the witness' credibility.

Timing of the Report

[83] The Court considered the timing of the VC's report. The evidence coming from the VC in her evidence in chief was that she reported the incident when her mother confronted her with the allegation. In cross examination she accepted the suggestion put by the

Accused that she did not report the matter until the Accused himself had Accused her of having inappropriate relations with her father. The following exchange is noted:

Question: Why you wait until I say something to accuse me why you didn't say anything long time to tell your mom?

Answer: Cause I was afraid.

Question: You wait until I report it so you can say something?

Answer: Yes, I agree.

[84] The VC was forthright in her response. She did not seek to deny the Accused's suggestion. She explained that she did not report it earlier because she was afraid. The Court considers this to be a reasonable explanation considering the VC's age at the time the offences occurred and the position of trust with which the Accused held in her family.

[85] The Court also considers that according to the VC the Accused gave her chocolate and money. The VC specifically testified that two days after the first alleged incident of sexual intercourse the Accused approached her with money and chocolate which she received. As a matter of human experience the Court notes that often persons in positions of trust and authority may use gifts in exchange for the silence of their victims. The Court draws the inference that the Accused by his gifts of money and chocolate attempted to receive good favour from the VC.

[86] The Court rejects outright the Accused's evidence on oath that he only gave her money once and that that was to give to his granddaughter. In coming to this view the Court considered that the Accused said something completely different in his interview with the police. During that interview the Accused was specifically asked if he ever gave the VC money and he responded that he gave her money all the time and that he gives money to all of his nieces. These two pieces of evidence are glaringly inconsistent. This inconsistency is unexplained. The Court considers that the issue of whether the Accused gave money to the VC to be significant to the issue of whether the Accused was trying

to find favour with the VC and can potentially explain why she would have remained silent for so long.

[87] The Accused himself recognised the significance of him giving money to the VC and acknowledged the fact that his sister would not approve. The Court observes the following excerpt from the cross examination of the Accused:

Mr Cattouse: You gave her chocolate?

Accused: I gave everybody I am a free handed guy.

Mr Cattouse: You gave her money?

Accused: Yes, I gave her \$5.00 to give my granddaughter. Just one time I gave her I hardly at home. If I gave her money the mother will cuss, I know my sister.

Mr Cattouse: You gave her chocolate and money so that you would gain her favour?

Accused: I disagree.

[88] The view that the Accused sought to win favour with the VC is also consistent with the evidence of NG who testified as to what she observed of the relationship between the Accused and the VC. The Court assessed NG to be a reliable and truthful witness. The manner in which she gave her testimony was consistent and her responses to questions posed by the Accused did not suggest that she was attempting to mislead or concoct evidence. Her evidence of this witness was accepted by this Court, because it was consistent and plausible. She described where she lived in relation to the Accused's room both of which are located in what can be described as a family yard. She stated that she saw the VC entering the Accused's room on three occasions after her mother caught the 6:00 a.m. bus (which the witness clearly thought to be unusual as evidenced by her reporting same to the VC's mother). Although the Accused challenged this portion of the witness' evidence by contesting her ability to see his front door, the witness accepted that there is a tree and tool shed in front of his room but maintained that she could still see the door clearly. It is also noted that in his oral evidence that the Accused

accepted himself that the VC came to his room on at least two occasions. It is therefore believable that the witness witnessed what she said she did.

[89] NG also observed that the Accused would accompany the VC on her way to school, at cricket games and at church. She said that the Accused and the VC were always close and they were always playing and laughing with each other. She could recall the VC started to get disrespectful at him and he would get upset and be overprotective with her. It is clear that the witness found both the VC and the Accused's behaviour to be unusual and noteworthy. The Court notes that the Accused himself questioned NG directly on this point by suggesting that he was not the only person who went to church or school or cricket with the VC. He clearly did not deny that he would be seen with the VC on these occasions but seemingly suggested that it was normal behaviour and that NG herself accompanied them on some occasions. The witness accepted as true that at times she would accompany them. The Court accepts the testimony of this witness as credible. The Court is of the opinion that the witness was honest and transparent in giving her testimony and draws the inference from her testimony that the Accused and the VC became notably close in the two years that he would have known her.

[90] The Court further notes in considering the timing of the VC's report that experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; some may complain immediately whilst others may feel shame and shock and not complain for some time; the VC herself said she was afraid. A late complaint does not necessarily mean it is a false complaint. The Court finds the VC's explanation for the timing of her report as credible and truthful.

Medical evidence

[91] Dr. Chulin's medical opinion was that the VC was carnally known on the basis that there was no presence of a hymen. The Accused pointedly asked the doctor about the meaning of the term "*absence of trauma*" found on his report and the doctor explained that that means there was no bleeding or scars. The doctor explained that if sexual

intercourse is forceful there may be bleeding or scars within 24-48 hours; however, if it is not forceful there may be no scars. The Court also notes that the doctor would have examined the VC over a year after the last allegation of sexual intercourse and within days of the last occasion of the touching of her vagina.

[92] While the medical evidence supports the VC's contention that she had sexual intercourse it cannot confirm with whom the VC had sexual intercourse.

Absence of Pain

[93] In cross examination the Accused asked the VC about her statement to the police that it was her first time and that it did not hurt. The Court; however, specifically refers to the fact that the evidence of the VC of the first act of sexual intercourse did not suggest any force or violence used by the Accused in the act of penetration. The VC said that the Accused told her to lie down and pull her panty to the side. She complied with his request. She did not describe a forceful encounter so it is not unusual that she may not have experienced pain.

[94] The Court found the VC to be a credible and truthful witness. Her manner and demeanour struck the Court as honest and forthright and her evidence was consistent and plausible. The Court is also impressed that there was no attempt by her to gild the lily and she confined her evidence to what she could clearly remember and accepted even suggestions by the Accused even where it would not have cast her in the most positive light (such as the timing of the report considered above).

[95] The Court, having found evidence that may result in a conviction, following the guidance in **Salazar**, then considers the case for the Accused as set out in his sworn evidence. The Court, if it accepts the case for the Defendant, or has a reasonable doubt about whether it is true, must acquit the Defendant. It is only if the Court rejects the Defendant's case that it returns to the Crown's case and considers the totality of the evidence and determines whether to convict.

[96] The Court observes that the Accused has nothing to prove as the burden remains on the Crown to prove the guilt of the Accused beyond a reasonable doubt throughout this trial.

Defence Case

[97] At the close of the Crown's case the Court told the Accused of the three options available to him i.e. to remain silent; to give a statement from the dock; to give evidence under oath. The Court explained to the Accused the differences between each option and his right to remain silent. The Accused opted to give sworn evidence on his own behalf. He called no witnesses.

[98] The Accused stated that he was a farmer who lived in Double Head Cabbage. He stated that one night he went outside to pass urine and saw animals in the yard. While attempting to budge them out he ended up behind his sister's house. He heard a latch open and was inquisitive so he went closer to the window-and saw his brother in law B having affairs with his niece. When B was finished the Accused said he heard him say *"if anyone get caught blame it on your uncle"*. He said that his niece the VC had on a checkered dress and half her body was out. He told her that she is very nasty and that he will tell her mother. That very night he said that he told his sister AF and she told him to shut his mouth. He said that the next night he told his sister the same thing and she got vex with him so he went to his stepmother whom he told what he had seen.

[99] He said he also reported the matter to his parole officer and to Officer Shannon Pook. He spoke to Officer Pook for about 20 minutes and told her that he was afraid for his life. She told him that she would send a mobile for him. He said that his nephews beat him up and knock out two of his jaw teeth and tied him up. Officer Rhaburn came to collect him on a red cycle and told his nephews that they could not take the law into their own hands. Officer Rhaburn took him to the Bermuda Landing Police Station where he spent the night on the verandah. He said that the next day Officer Leroy Roland took him back to Double Head Cabbage to retrieve some clothes and then to the Ladyville

Police Station. He said that he was charged four days later. He said that he had told Officer Pook that he wanted to go to the doctor seven times as he wanted to show that he was not fit enough to be with a woman due to medication he had been taking since 2008. He also complained to her about the beating he received from his nephews but he said that she never took him on. He said after they charged him then took him to Belize Court and then to prison.

[100] The Accused said that in April 2019 he had a boat and he took some soldiers to camp in the river for about 8 days and when he returned he got sick and had to lie down for about two weeks. He could recall Pete and Ted were two people who accompanied him but they were not available to attend Court.

[101] In cross examination the Accused said that when he returned home in 2018 after 18 years of being in prison, his sister told him that the VC was his niece.

[102] When asked about the date he said that it was between the 5th to 8th September 2020 around 11:00 o'clock at night when he looked inside the louvers of his niece's bedroom. He was able to do so because the louvers were not shut tight. The Accused was shown photograph **RH 4** and challenged by Crown Counsel on whether he could see through that window when it was shut closed. The Accused insisted that the window was closed but that the third plank was bent and that there was a space between the louver and the frame at the bottom. He also said one could peep through the side of the window. He denied the suggestion by Counsel that you could not see anything inside the room if the window was shut. When asked about the lighting the Accused said that you could see inside the room from the outside if the light was on. When confronted about his earlier evidence that B had turned off the light the Accused said that there is a street light that passes through a glass window at the front of the house that illuminated the room. While the light was off he said that he listened with his ears and heard sounds.

- [103] He said he saw his brother in law sucking the breast of his niece and then he get on top of her and in 5 minutes he heard noises. He then heard B say *"if yuh get catch say is your uncle."* He said that the VC and her father were intimate for about 5-7 minutes.
- [104] He said that the VC plugged back in the light and he saw that she had on a brassiere and that is when he told her that he was going to tell her mother.
- [105] He said that he went back for his firearm and fired a shot about 5-10 minutes after he had seen them which he did to alert his sister so that he could report the matter to her.
- [106] He denied the suggestion that the incident happened after 11:00 p.m. at night but insisted it happened after 2:00 a.m. stating that he had his watch and his phone on him and he knew the time.
- [107] When asked whether he reported what he saw to the police he said that he did so at the time of the interview. He denied that he waited a month or until after he was accused to make a report. He said that he had made the report first.
- [108] He said that his three nephews used a pint bottle in his back and punched him in his jaw and that he could not eat for a while after the incident. He accepted that he gave a video interview shortly after but indicated that his face was not swollen and he insisted that he could not talk well.
- [109] He denied that he had sexual intercourse with his niece, that he touched her vagina. He denied that he was being untruthful under oath.
- [110] He said that he gave his niece \$5.00 on one occasion and that money was for her to give his granddaughter as they had attended the same school. He disagreed with the suggestion that he gave her money on any other occasion. He said that he gave everyone chocolate as he is a free handed guy.

[111] He said that there were two occasions that the VC came to his room and both times were when her father sent her to borrow his barbering machine.

[112] He said that on the occasion when he was at his sister's house watching tv his nephew was there and he did not touch the VC's vagina.

[113] In cross examination the Accused denied counsel's suggestion that he was lying when he said he was taking soldiers up the river in April 2019.

Analysis

[114] 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 the Court 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 him.

[115] The Court reminds itself as outlined above on how to deal with discrepancies and inconsistencies with regard to the evidence of the Accused.

[116] The Court rejects the evidence for the Defence as untrue on the basis of the glaring inconsistencies examined below and also on the basis of the strength of the evidence on the Crown's case, on the authority of a decision of the Privy Council in the Dominican case of **Bally Sheng Balson v The State**¹¹.

Character

[117] The Court did not consider the issue of good character as the Accused has previous convictions.

[118] Despite repeated warnings by this Court that he ought not to, the Accused mentioned (twice) in his evidence that he had been incarcerated. The Court considers

¹¹ [2005] 4 LRC 147 at para 38

that the Accused was unrepresented and may not have contemplated the effect of this admission. The Court also observes that evidence of his previous incarceration was inadmissible as being wholly irrelevant to the offences with which he is indicted. The Court in these circumstances places no reliance on that evidence and finds that admission to be neither probative of guilt nor as a matter that the Court has used in assessing his credibility.¹²

Alibi

[119] In relation to the two counts of incest that are alleged to have been committed in April 2019 the Accused stated that he was boating and camping with some soldiers for about 8 days and then he got sick for about two weeks and was in bed. The Accused therefore advanced an alibi in respect of the first two counts which are alleged to have occurred in April 2019.

[120] The Court reminds itself that even though the Accused has advanced an alibi in respect of the first two counts the burden of proving the case against the Accused remains with the Prosecution throughout this trial. The Crown must satisfy the Court so that it feels sure that the Accused was not where he says he was and that he was at the time committing the offences in question. If the Court accepts the Accused's alibi as true or finds that it is possibly true then that would be the end of the two counts of incest. The Crown would not have displaced its burden. However, for the reasons advanced below I reject the Accused's alibi.

[121] When challenged by Crown Counsel on his ability to recall where he was almost four years later the Accused stated that he can remember certain things. When probed about how he was able to recall where he was several years after the incident the Court

¹² Section 51 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ), deals with evidence of character in criminal cases and provides as follows:

51. – (1) In criminal causes or matters, the fact that the defendant or the Accused person, as the case may be, has a good character may be proved, but the fact that he has a bad character is inadmissible in evidence, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

rejects the Accused's explanation firstly on the strength of the Prosecution's evidence and secondly on the implausibility of the Accused recalling exactly where he was on two unspecified dates in April, a year before he was even arrested for these offences. This would be less unusual if for instance something noteworthy to the Accused had occurred at that time or if the Accused had made a record; however, neither of those contentions were advanced. The Accused simply stated that some things he remembered and some things he did not.

[122] The Court's view on this point is emphasised by the fact that even in his recorded interview with the police which occurred closer in time to this incident (in October 2020), the Accused was unclear about where he had been the year before and vaguely stated that around April 2019 he was hunting and not usually at home and could not recall seeing the VC during that time. The Accused's recollection at the time of trial that he was sick for two weeks and in a camp with persons whom he only knew by their first names, is not believable. The Court finds the Accused's alibi to be unbelievable.

[123] Notwithstanding the Court's rejection of his alibi the Court reminds itself that such a rejection does not prove that the Accused is guilty of the two counts of incest. The Court acknowledges that false alibis may be put forward for many reasons: an Accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi out of fear that his own evidence will not be enough. Further the Accused can make genuine mistakes about dates and occasions like any other witness can.

[124] The Court finds that although it has rejected the Accused's alibi about where he was at the material time that does not prove that he was committing the offences of incest (to which the alibi relates). It is quite possible that in this case the Accused fabricated an alibi to bolster what he thought was a weak case or that he was genuinely mistaken. The Court also notes that the fact that the dates of each count were not specified makes it quite difficult for the Accused to successfully advance an alibi. The passage of time in the reporting of these two incidents would have placed the Defendant at a material disadvantage in advancing an alibi for events that occurred over a year before his arrest.

The Court therefore bears this in mind in its rejection of the Accused's alibi and consequently places no reliance on same in relation to it being probative of guilt.

Inconsistencies

[125] A material inconsistency which arose on the Accused's evidence is whether the Accused gave money to the VC. In his evidence on oath the Accused stated that he only gave the VC money once to give to his granddaughter; however, in his interview with the police he said that he would give all of his nieces money. The Accused's sworn evidence on this point is also contrasted with the VC's evidence that he started to give her money after the first incident of sexual intercourse. The Court finds this inconsistency/discrepancy material. This inconsistency is unexplained. The Court finds as a fact that the Accused was not being truthful and attempting to mislead the Court when he says that he only gave the VC money on one occasion.

[126] A material discrepancy between the Accused's evidence and the Crown's case was whether the Accused would have been able to see through the window to the VC's room to witness what he alleged took place between her and her father. **RH 4** illustrates clearly an external view of the window to the VC's room. The window is wooden with no handles on the outside. It does not appear from the photo that the window can be opened from the outside which would align with the VC's evidence that the Accused had asked her to open the window for him on the 12th October. According to the Accused's evidence he was able to see through the window which was closed through the third plank which he says was bent. There is no such bend in the photo. It is to be noted that the photos were taken the same week that the Accused said he caught the VC and her father. He also stated that one could see through the space at the side between the window and the wall. There is no apparent space from the photograph. It is clear that when that window is shut as the Accused says it was nothing can be seen from the outside. The Court therefore disbelieves the Accused evidence that he could see through that shut window.

[127] Another discrepancy which arose was whether the Accused had his teeth knocked out on the night of his arrest. In his evidence in chief the Accused stated that the VC's brothers knocked out two of his jaw teeth and that he could not speak properly. He said that he had repeatedly complained to the investigator who denied any such complaint. The Accused was interviewed a few days later and was given an opportunity to speak privately with the JP. Her uncontested evidence was that she had asked him if he was beaten and he replied no. The Court also viewed the video recorded interview and the Accused had no visible injuries to his face and seemingly no difficulty speaking or relating his account. He did not seem uncomfortable or in any degree of pain for someone who would have had his teeth knocked out. The Court disbelieves the Accused's oral testimony. The Court finds that his explanation that his face was not swollen as a reason for his face appearing seemingly normal is disingenuous. While this issue does not go to any material issue in either the Crown or Defence's case it is an issue which was taken into account in the Court's assessment of the Accused's credibility.

[128] The Accused in his evidence in chief stated that he heard the VC's father say to her "*if anyone catch yuh bame it on yuh uncle*". The Court rejects this evidence outright as wholly implausible.

[129] The Court has considered the Accused's evidence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing his credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in his evidence. The Court finds based on the cumulative effect of the inconsistencies, discrepancies and its implausibility advanced above that it will reject the Accused's evidence entirely and more particularly on the portions that relate to the elements of the offences with which he is indicted.

[130] The Court is satisfied beyond a reasonable doubt that the Accused has not told the truth when he says that he did not have sexual intercourse with the VC on two occasions in April 2019 and that he did not touch her vagina in a sexual manner in September,

2020 and on October 12th 2020. I am satisfied so that I am sure that he has lied while giving evidence in Court. I have considered that in my assessment of his credibility. I have considered that the mere fact that he has lied is not in itself evidence of guilt since defendants may lie for innocent reasons unrelated to guilt. However, I feel satisfied so that I am sure that the Defendant did not lie for an innocent reason but rather to deceive the Court. I understand that lies by themselves do not equal guilt, but that in this case having rejected the Accused's account I must return to the Crown's case.

Disposition

[131] The Court now looks at the totality of the evidence to reach a final decision. The Court has examined the VC's evidence bearing in mind the standard and burden of proof of the Crown. The Court is satisfied so that it is sure, for the reasons given above, that the VC's evidence on the material issues is truthful and credible. The Court has rejected the case for the Accused, for the reasons given above. The Court is satisfied so that it is sure and accepts the VC's evidence that:

- A. The Accused had sexual intercourse with the VC, his niece on one occasion in April 2019.
- B. The Accused had sexual intercourse with the VC, his niece on one occasion in April 2019.
- C. The Accused touched the VC's vagina, that touching being sexual in nature on one occasion in September 2020.
- D. The Accused touched the VC's vagina, that touching being sexual in nature on one occasion on 12th October 2020.

[132] The Court having considered all the evidence and the cases for the Crown and the Accused is satisfied so that it is sure of the guilt of the Accused.

[133] The Accused is found guilty of and the matter is adjourned for a separate sentencing hearing as advised by the CCJ in Linton Pompey v DPP ¹³.

¹³ [2020] CCJ 7 (AJ) GY at para 32

Candace Nanton
High Court Judge
Senior Courts Belize
Dated 8th March 2024