

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C95 OF 2023

BETWEEN:

THE KING

and

CM¹

Defendant

Appearances:

Mr. Robert Lord, Crown Counsel for the King

Defendant- Self-represented

2024: May 6; 7; 8.

June 7.

JUDGMENT

**RAPE OF A CHILD; ASSAULT OF A CHILD BY PENETRATION- JUDGE ALONE
TRIAL-DECISION**

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

Introduction

- [1] **NANTON, J.:** CM (hereinafter referred to as “the Accused”) was indicted for one count of assault of a child by penetration contrary to **Section 47B of the Criminal Code**, which occurred on the 4th day of April 2022, and one count of rape of a child contrary to **Section 47A of the Criminal Code**² hereinafter “the Code”, which occurred during the period 5th October 2021 and 17th day of December 2021.
- [2] The Accused was indicted on the 7th day of November, 2023. He first appeared before this Court on the 23rd January 2024 when he was arraigned and pleaded Not Guilty to both counts on the indictment.
- [3] His trial by judge alone began on 6th May 2024 pursuant to **Section 65 A (2) (g) of the Indictable Procedure Act**.³
- [4] During the Case Management of this matter, the Accused indicated that he was representing himself. On each occasion that the matter was called this Court enquired into the Accused’s legal representation and the Accused maintained that he wished to represent himself.
- [5] The Court took care to explain the procedures of each relevant stage of the proceedings to the unrepresented Accused, and assisted him in his legal defence as required.
- [6] The Crown relied on the oral evidence of live witnesses, video footage, photographs and documentary evidence.
- [7] At the close of the Crown’s case, the Accused made a submission of no case to answer, which was overruled by the Court.

² Chapter 101 of the Substantive Laws of Belize Revised Edition 2020

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

[8] The Court; thereafter, advised the Accused of the three options available to him i.e. to remain silent, to give a statement from the dock, or to give sworn evidence, and that he could call witnesses, if he so wished. The Accused opted to give sworn evidence on his own behalf, but called no witnesses.

[9] The Crown did not make a closing address as is the usual course in cases where the Accused is unrepresented. The Accused was allowed the opportunity to make his own closing address to the Court, which he did.

[10] The Court having considered the evidence in this case now gives its verdict and written reasons.

Count 1: Assault of a Child by Penetration Contrary to Section 47 B of the Criminal Code

[11] **Section 47B of the Criminal Code states:**

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

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

- i. The Accused intentionally penetrated the VC's vagina with a part of his body other than his penis i.e. his finger.
- ii. That the penetration was sexual in nature.
- iii. That the VC was at the time of that penetration under the age of sixteen years.

Count 2: Rape of a Child

[13] **Section 47A** states:

Every person who rapes another person and that person is under the age of sixteen years commits an offence and is liable on conviction on indictment to–

(b) Imprisonment for not less than fifteen years, but may extend to life, where that other person was under the age of fourteen years at the time the offence was committed

[14] **Section 71** defines rape as follows:

71.-(1) Rape is the penetration of a person's mouth, vagina or anus, with a penis, without that person's consent.

(2) It is hereby declared that if at a trial for rape the jury has to consider whether a man believed that a person was consenting to the penetration by his penis, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction any other relevant matters, in considering whether he so believed

[15] **Section 73** is also instructive:

Whenever, upon the trial for any crime punishable under this Code, it is necessary to prove carnal knowledge, the carnal knowledge shall be deemed complete upon proof of any or the least degree of penetration only.

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

- i. The Accused carnally knew the VC i.e. inserted his penis into her vagina.
- ii. That penetration was done without the consent of the VC.
- iii. That at the time of the penetration the VC was under the age of sixteen years.

The Crown's case

[17] The Crown's case is that on a date unknown between the 5th October 2021 and 17th day of December 2021 the Accused raped the Virtual Complainant (hereinafter the VC) who was 7 years old at the time. The Crown also alleged that on 4th April 2022

the Accused intentionally penetrated the vagina of the VC with his finger, the VC at the time being 7 years old.

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

- 1) AR- Mother of the VC
- 2) VC –Virtual Complainant
- 3) Woman Police Corporal 1271 Kenya Fernandez
- 4) CST Robert Henry Jr
- 5) Justice of the Peace Andrew Godfrey
- 6) Police Corporal 138 Keron Cunningham
- 7) RR- Aunt of VC
- 8) LP- Cousin of VC
- 9) Jolene Sanchez- VC's teacher

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

- 1) **KF 1-** Medical report
- 2) **KF 2-**Birth Certificate of the VC
- 3) **RH 1-4-** Photographs of the scene
- 4) **KC 1-** Video footage

The VC

[20] The VC was 9 years old at the time of her testimony. Before receiving her evidence the Court conducted a detailed examination of the child witness to determine whether she understood the nature of the oath, the duty to tell the truth and the consequences of telling a lie.

[21] Through that examination the witness stated that she was a standard 3 student attending a Roman Catholic Primary School. She indicated that she learnt religion at school from which she learnt about Jesus, Adam and Eve. She stated that she believed in God, and that she went to church at her school. She said that she understood the difference between the truth and a lie, and that the truth was a good thing and a lie was a bad thing. She understood that if she told a lie she could get

into trouble and go to Hell. She said she knew what a sin was and when asked what it was she said that a sin was to disobey God's rules. When asked what she knew about the Bible, she said that she knew that it contains verses that help you know about Jesus and God. She said that she understood what a promise was, and when asked what would happen if she broke a promise to God, she said that God will punish her. She understood that putting her hand on a Bible was a promise to God to tell the absolute truth, and that she could be punished if she told a lie in Court.

[22] The Court found the VC to be exceptionally intelligent and well-spoken for her age. The Court assessed that she understood very clearly the importance of speaking the truth, the nature of an oath and the consequences of telling lies in Court. After being so satisfied the Court allowed the VC to give sworn evidence in this matter.

[23] It should also be noted that the Court employed special measures in this case upon the request of the Prosecution i.e. that it allowed the VC to give evidence while standing next to her mother due to the tender age of the VC. Her mother was not allowed to speak at all during the testimony of the VC. An application for special measures not covered in legislation may be made pursuant to the Courts inherent jurisdiction **R (On the application of S) v Waltham Forest Youth Court and others**⁴. The Court in the exercise of its discretion considered the age of the VC and the fact that the special measure requested would not have affected the Accused's right to confront his Accuser and as such struck a fair balance between protecting the interest of the VC and the rights of the Accused.

[24] The VC testified that she was born on 21st August 2014. She recalled that on 4th April, 2022 the Accused put his finger in her vagina. The VC stated that she was at home in the bedroom with her mother when she wanted some water. Her mother was working from home at the time, so she left the bedroom to get the water herself. She said she went into the kitchen and the Accused, who lived with her and was the father of her step-father, put his finger in her vagina. She described that she was

⁴ [2004] EWHC 715 para 30

able to see him, because it was daylight and he was right next to her, and so she could see his whole body and nothing obstructed her view of him.

[25] She said that sometime between the 5th October and 17th December 2021 the Accused had put his penis in her vagina. She said she had left her bedroom to get water and the Accused placed her on the chair, took off his pants and underwear and placed his penis in her vagina. She said it felt horrible, because it hurt her. She said it didn't take long, because she started to cry and he stopped. She said she put her pants back on and ran into the room. He was in front of her face at the time on top of her as she lay down. She could see his whole body including his private part. At the time there was no one else in the living room.

[26] The witness pointed out different areas in photographs **RH 1-4** including the living room, kitchen and sofa where she said the incidents took place.

[27] She identified the Accused in the dock as the person she had referred to as Mr. M in her testimony.

[28] She said that after the incidents, she told her aunt RR, her other aunt LP, her teacher and her mother that the Accused touched her in inappropriate ways.

[29] Under cross examination by the Accused, the witness accepted that she gave a statement to the police and that she had said in that statement that *"Miky do me that and I slap him and he slap me back"*. She agreed that she had also told the police *"Serena too"*.

[30] The witness denied the suggestion that her mother had insisted that she tell these lies. She said that her mummy does not do that to people.

[31] After the Court explained to the Accused how to put his case to the witness- he put to her that she was lying when she said that he put his finger in her vagina. The witness said that she was not lying. The Accused also put to the witness that she

was lying when she said he put his penis in her vagina, and the witness again said that she was not lying.

AR

- [32]** This witness is the biological mother of the VC and gave birth to her on the 21st August 2014. She said that on the 4th April, 2022 the VC and her brother were at home from school, because they were sick. She said that at that time she worked from home. She said that the VC wanted water and she allowed her to go outside to get it. She said the VC came back into the room and acted like nothing was wrong and went back on her tablet. She said that it was possible that the VC came back and said something to her, but she could not remember.
- [33]** She said that the VC returned to school on the 6th April, 2022 as she was feeling better. AR said later that day she was called into the school. At school she learnt of an incident and the VC was thereafter taken out of her care and placed in the care of the AR's mother.
- [34]** On 9th April, 2022 AR was going through her son's tablet when she came across a video of the VC and her brother dancing. She watched that video, and on it she saw the Accused touch the VC "*inappropriately*" by putting his hands between her legs. She reached out to the social worker and reported what she had seen.
- [35]** The next day she handed over the tablet to the Investigator and a technician who extracted a video from it in her presence.
- [36]** AR stated that in December 2021 the VC had told her that her grandfather tried to touch her but that she (the VC) pushed him away. She said that she advised the VC to stay in her room and to stay away from him. She said at the time the VC looked worried and sad and was not like her usual self.

[37] The witness identified the house in which she lived at 8208 Giles Street, and the sofa, and kitchen and living room in photos **RH 1-4**.

[38] In cross examination the witness denied that she was fabricating this entire incident, because the Accused had objected to her sister staying at his home. She accepted that when the Accused objected, her sister left his home but denied that she hated the Accused because of that. She denied that she wanted to take control of his house. She accepted that there was an allegation against Mikwan and Serena but stated that at the present time (of the trial) the focus was on him.

Jolene Sanchez

[39] This witness was the VC's teacher. On 6th April 2022 she was in her classroom assisting her students. She said that she walked up to the VC, who was her student and asked her if she was adjusting as the child was having issues that week. The VC responded "*no because my grandfather is making me do nasty things*". At that point she asked the VC to come to her desk to speak more privately. The VC then said "*he is making me touch the thing that pee comes out*". She then enquired whether she meant his private part, his penis and the VC said, yes. The witness then asked the VC, if her parents were aware of this and the VC said, yes, but that they asked her to stay away from her grandpa and that she should stay in her room and stay away from him. The witness testified that the VC also said that her grandfather makes her sit on his lap as he tries to kiss her. The witness said that upon hearing this she texted her Vice Principal and then escorted the VC to the Vice Principal's office.

[40] The witness stated that when she received the complaint the VC appeared nervous and shaky, and that she looked sad and worried. At that time she had been teaching her from September to April. She said that the VC was always very quiet and withdrawn. She said that the VC gave her this information of her own free will.

[41] The Accused suggested to the witness in cross examination that what she had told was a concocted story, and that the mother of the child made up the lie. The witness rejected the suggestion.

[42] It should be noted that the Court overruled the Accused's objection to this evidence and held same to be admissible pursuant to **Section 96 of the Evidence Act**⁵ as evidence of recent complaint. The Court found that the evidence in question satisfied the requirements of **Section 96** (below) in that the complaint was made soon after the offence is alleged to have been committed i.e. two days after the incident of 4th April and was obtained voluntarily without questioning or prodding.

96.–(1) The particulars and details of a complaint made soon after the commission of an alleged offence in the absence of an Accused person by the person in respect of whom the crime is alleged to have been committed may be admitted in evidence in prosecutions for rape, indecent assault, other offences against women and boys and offences of indecency between male persons.

(2) Such particulars and details are not to be taken in proof of the facts in issue, but merely as showing the consistency of the conduct of the person complaining and supporting his credibility.

RR

[43] This witness resides in the United States and the Court allowed her to give her testimony virtually.

[44] On 19th December, 2021 the witness returned home from work when she met the VC in her living room with her aunt. She said that the VC told her “*Nana my grandpa kiss me pon my mouth and touch me, and want I sit down pon he lap*”. The next morning she told AR everything that the VC had told her. She said that when the VC told her this she appeared very scared and sad. She said that she did not say anything to her before she told her that.

⁵ Chapter 95 of the Substantive Laws of Belize Revised Edition 2020

- [45] She said that she and the VC are very close, because the VC would visit her house on the weekends when she did not have school. She said that she would always ask her how she is doing, if she is happy, if she is sad, if she is depressed, if anyone is hurting her, and that the VC is very comfortable with her.
- [46] She said that when the VC said her grandpa did those things she knew the VC was referring to the Accused, because he is the only “grandpa” that the VC knows and he is the only grandfather that lived in the house with them.
- [47] In cross examination the witness denied that she was lying and stated that everything she had stated was the truth. She denied the suggestion that she and her sister concocted this story to get the Accused out of his house.
- [48] The witness denied that she and her sister were annoyed, because he put her sister out of his house. She denied that that incident happened, and that she fabricated the lie as a result.
- [49] It should be noted that the Accused also objected to this evidence, but the Court overruled the objection and admitted same as evidence of recent complaint pursuant to **Section 96 of the Code** outlined above at paragraph 42.
- [50] This complaint was made in December 2021; close in time to when the allegation of rape is alleged to have occurred. The Court also considered that the complaint was made freely by the VC without any questioning or prodding by RR.

LP

- [51] This witness is the cousin of the VC. On 13th April, 2022, she witnessed the VC give a statement to PC Fernandez in the presence of a social worker. She said that the VC was very anxious and afraid and was crying when she gave her statement. She said that the social worker had to talk to the VC to calm her down. She said that no one forced the VC to give her statement and that they all just listened as she spoke.

[52] The witness was not cross examined.

Woman Corporal Kenya Fernandez

[53] On 7th April 2022, Officer Fernandez attended the Coral Grove Paediatric Centre with the VC, her mother AR and a Social Worker. She requested that AR sign a consent form, which she did for the doctor to examine her daughter, the VC, a minor. The witness filled out a medico legal form in the name of the VC, which she handed over to Dr Xiloj. Dr Xiloj conducted a medical examination on the VC in her presence. At the conclusion of the examination Dr Xiloj wrote his findings on the medico legal form and handed over same to the WPC. Fernandez.

[54] That medical report was tendered into evidence as **KF 1**.

[55] The witness also retrieved a birth certificate in the name of the VC from the Vital Statistics Unit. That birth certificate was tendered into evidence as **KF 2**.

[56] On 26th April, 2022 she charged the Accused for the offences with which he is indicted.

[57] On 27th April, 2022 she requested CST Robert Henry's assistance to take photos of the scene at Gilles Street.

[58] This witness was not cross examined.

CST Robert Henry

[59] Robert Henry took photographs of the home of the Accused. These photographs were admitted into evidence as **RH 1-4**.

[60] It should be noted that the Accused objected to this admissibility of the photographs on the basis that he was not present when the photographs were taken. The Court overruled the objection as there was no requirement in law that the Accused person

is present when photographs are taken nor would the admission of the photographs result in unfairness or prejudice to the Accused.

JP Andrew Godfrey

[61] On 21st April 2022 Justice of the Peace Andrew Godfrey said that he received a phone call from WPC Fernandez. He proceeded to the Domestic Violence Unit at the Queen's Street Police Station where he met a Hispanic female introduced to him as AR. He spoke to AR privately and explained to her that the reason for his presence was to ensure that her rights were not infringed, and he informed her that she did not have to give the police permission to go through her tablet. AR said that she was freely giving her permission.

[62] Officer Fernandez took a statement from AR to that effect in the presence of the JP. AR signed and then the JP followed with his signature and stamp. AR then handed over the tablet to WPC Fernandez.

[63] JP Godfrey was not cross examined.

Keron Cunningham

[64] On 21st April 2022 Police IT technician Keron Cunningham met WPC Fernandez and AR who handed over to him a black in colour Amazon Fire tablet 10th generation. He extracted video footage from that tablet which he placed firstly, on his work station computer which was password protected and only accessible by him. The video footage was burnt onto a blank DVD-R disc, which could not be altered. That DVD-R was labelled and handed over to the Investigator WPC Fernandez. That DVD-R was identified by this witness and admitted into evidence as **KC 1**.

KC1 – Video Footage

[65] The Court would firstly wish to clarify the basis upon which it admitted **KC 1**. This was done on the conjoint effect of the common law and the provisions of the **Electronic Evidence Act 2021** (hereinafter “the EEA”). The Court accepts the common law test for the admissibility of video evidence as set out in the decision of the Supreme Court of Canada in **R v Alexander Nikolovski**⁶, per Cory J for the majority:

“28. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the Accused.”

[66] This jurisprudence has been adopted in the Caribbean in the Jamaican Court of Appeal decision of **Randeano Allen v R**⁷.

[67] The **EEA** reads, where relevant:

“2... “electronic record” means a record ... stored by electronic means in an information system ...

“information” includes data, text, images, sound, codes, telephone communications, computer programs, software and databases; and

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic records.

4. Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that

⁶ [1996] 3 SCR 1197

⁷ [2021] JMCA Crim 8 paras 38-40

electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.
(emphasis mine)

- [68] It is the Court's view that by virtue of the definition section video footage on a DVD R would be an electronic record stored in an information system, namely the DVD R. **Section 4** provides that a device that "is of a kind" that ordinarily produces an accurate record the Court shall presume it produced an accurate record on the occasion in question unless, there is sufficient evidence to cast doubt on that presumption.
- [69] In the Court's view, it is a notorious fact of which it takes judicial notice, as defined in **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service**⁸ that DVDRs, which are a commonplace technological advancement, are devices which ordinarily produce an accurate record.
- [70] The evidence of Officer Cunningham is that the video footage was extracted in an MP4 file format, which is a multimedia container for audio and video data, the video footage was then placed in a folder on his work station computer, which is locked with a password only known and accessed by him. The video footage was then burnt onto one blank DVD R disc of which the content could not be altered or edited. This evidence supports the presumption that **KC 1** is an accurate record.
- [71] It is noted that the Accused objected to the admissibility of this evidence on the basis of relevance. He submitted that the footage did not relate to the offences on the indictment, and as such ought not to be admitted. The Crown responded that the video footage was probative of the Accused's affinity for touching the VC in an inappropriate manner and while not directly reflective of the offences in question, the footage was probative of the issues in this case.

⁸ [1923] AC 191 at page 212

[72] Although the Court did not agree with the Crown's contention that the video could be used as evidence of an "affinity" or propensity, the Court ruled that the DVD-R was relevant to a fact in issue- i.e. whether the Accused had an unnatural and inappropriate relationship with the VC. The Court held that the video evidence was admissible as evidence capable of being probative of the relationship between the Accused and the VC as it displayed an actual incident of touching of the VC by the Accused. Whether that touching was in fact inappropriate was a fact to be determined by the fact-finder and the footage was probative background evidence, which could provide context for the VC's allegations and was a factor that could support her credibility.

[73] The Court cited the decision of the Belize Court of Appeal in **FW v R**⁹ where it was held that the evidence of rapes with the same virtual complainant not covered by the indictment against FW were properly admitted as background evidence to contextualise the offending in the indictment, per Sosa P:

*[29]...The majority of this Court is of the view that, similarly, in the instant case, there can be no valid complaint against the giving by CW of evidence of alleged sexual abuse during periods other than those referred to in the ten counts of the indictment. **It would not have been right for the judge to restrict her testimony to the periods the subject of those counts and thus permit the jury to form a false and misleading impression that the only episodes of alleged rape were those singled out in the indictment. As in R v W, an absence of background evidence would have militated in favour of a lack of understanding of the true relationship and real situation by the jury.**" (emphasis added)*

[74] The Court also relied on the often cited English authority of **R v Pettman**¹⁰

Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.

⁹ Criminal Appeal No 18 of 2011

¹⁰ 2 May 1985 unreported

[75] The video was played during the course of the trial. It showed the VC and another young boy child dancing in front of the camera. An elderly man closely resembling the Accused is seated on the couch and reaches out his hand to touch the VC. He touches her from the back pushing his hand through her legs onto the area of her buttocks and vagina. The VC appears startled and stops dancing and looks back at the elderly man. The video then stops.

Analysis

[76] 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.

[77] The Court begins firstly with analyzing 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 R¹¹.

[78] 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 R¹² 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 the Court to reject that bit of evidence

¹¹ [2019] CCJ 15 (AJ)

¹² [2018] 3 LRC 552 at para. 60

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.

[79] 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.**¹³ 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.**¹⁴

[80] 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**¹⁵, per Fraser JA

¹³ [2016] 2 Cr. App. R. 19 at para. 27

¹⁴ [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."

¹⁵ [2024] JMCA Crim 10.

(Ag.) *“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.”*

[81] The evidence which has been led by the Crown to make out the elements of the offences of rape 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 an unspecified occasion between 5th October and 17th December 2021.
- b. **That the Accused knew or could reasonably have been expected to know that the VC did not consent** –the VC said that when the VC did this it felt horrible, because it hurt her and she started to cry.

[82] The evidence which has been led to make out the offences of assault of a child by penetration:

- a. **The Accused intentionally penetrated the VC’s vagina with his body part** – the VC’s evidence is that the Accused put his finger in her vagina on 4th April, 2022.
- b. **That touching was sexual in nature-** the evidence of the insertion of his finger in the circumstances can be only be reasonably inferred to have been sexual.
- 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 AR was that she gave birth to the VC on 21st August, 2014, the VC was therefore, 7 years old at the time. The VC’s birth certificate was also tendered into evidence as KF 2.

[83] 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

- [84] On each occasion – the allegation of sexual intercourse and the incident of digital penetration of her vagina- the VC gave evidence that the lighting was good, that the Accused, her step-grandfather whom she lived with, was in touching distance of her and that nothing blocked her view of him, and that she could see his face clearly as he was facing her. Both incidents occurred during the daylight. She said that nothing blocked her view.
- [85] 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 rather than mistaken identification.

Honesty/Credibility

- [86] The VC's manner and demeanour struck the Court as honest and forthright and her evidence was consistent and plausible. The Court was also impressed that there was no attempt by her to gild the lily and when confronted with apparent weaknesses in her evidence, such as the fact of her allegations against other family members. The witness readily accepted that and did not seek to evade or avoid the question.
- [87] The VC, despite her age gave her evidence consistently and clearly.
- [88] The Court in its further assessment of the witness' credibility also considered the factors outlined below.

The Recent Complaints

[89] The Court considered the timing and nature of the VC's prior reports. The evidence coming from the VC was that she reported the incidents to her mother, her aunt, and her teacher.

- i. RR –aunt of the VC- stated that the VC told her in December that “*Nana my grandpa kiss me pon my mouth and touch me and want I sit down pon he lap*”.
- ii. Ms Jolene Sanchez testified that on 6th April 2022 the VC told her that “*my grandfather is making me do nasty things*”. The VC then said “*he is making me touch the thing that pee comes out*”. She then enquired whether she meant his private part his penis and the VC said, yes. The witness then asked the VC, if her parents were aware of this and the VC said, yes, but that they asked her to stay away from her grandpa and that she should stay in her room and stay away from him. The witness testified that the VC also said that her grandfather makes her sit on his lap as he tries to kiss her.
- iii. AR in her evidence indicated in December 2021 the VC had told her that her grandfather tried to touch her but that she (the VC) pushed him away.

[90] The Court notes that the complaints outlined above are generally consistent with each other; in so far as the VC consistently complained against her grandfather that he was doing things of a sexual nature to her. However, the Court also observes that the specific nature of each complaint differed from one complaint to the other. For example, she told her aunt that he kissed her on her mouth; whereas she told her teacher that he makes her touch his penis, and that *he tries to* kiss her. To her mother she omits anything about kissing, but said that he “tried to touch her”.

[91] The Court also observes that the complaints of kissing are notably absent from her evidence in chief. In her testimony, the VC never mentioned kissing at all but

detailed the two incidents of vaginal penetration by the Accused's penis and finger respectively. She never complained specifically about either type of penetration.

[92] The Court acknowledges that the Crown did not seek to obtain an explanation for this apparent inconsistency.

[93] Notwithstanding the absence of an explanation the Court finds that the apparent inconsistencies do not materially diminish the witness' testimony for the following reasons:

- i. It is evident that although the indictment specifically charged two offences there was a history of inappropriate behaviour by the Accused on the VC- this is consistent with the VC's evidence, the evidence of RR, (that there were other complaints to her- these complaints had specifically been excluded by this Court on the basis of lack of relevance to the counts on the indictment), the evidence of Jolene Sanchez and the video footage admitted into evidence. The consistency of the VC's complaints was that her grandfather had been inappropriate with her over a period of time, and that on at least two of those occasions the VC sought to make complaints.
- ii. At the time of the allegations and the complaints the VC was a mere 7 years old. It is not surprising that the VC would speak in generalised and non-specific terms as children that age usually do.

[94] The Court in considering the VC's report notes 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. In the circumstances of this case, the timely reporting of what was clear to the VC as inappropriate conduct is consistent with the VC's present allegations. The Court considers that this is a factor that goes towards support the consistency of her allegations against the Accused.

[95] In this context, the Court also considers that on the 4th April, 2022 after the alleged incident of penetration; AR stated that when the VC returned into the bedroom after getting water she acted like nothing was wrong and went back on her tablet. AR said that it was possible that the VC came back and said something to her, but she could not remember. Whereas, ordinarily the fact that the VC did not make a complaint then and there to her mother may seem questionable, in the circumstances of this case where at least one prior report (in December 2021) was made to her mother and effectively nothing came out of it is unsurprising that the VC would not make further complaints to her mother. What the VC did instead was complain to another adult i.e. her teacher at the very first opportunity. The conduct of the VC has been consistent, she was hurt by the inappropriate conduct of her grandfather and at every reasonable opportunity to complain she did.

[96] The Court also takes into the account the distressed reaction of the VC during each complaint- a factor which goes towards her truthfulness. This is a child of very tender age complaining about sexual abuse to adults with whom she clearly felt comfortable- each adult described the VC as appearing sad, not her usual self, effectively distressed by the incidents of which she was describing. While every victim of sexual abuse may not display these emotions and certainly persons intent to fabricate a story can possibly feign distress- in the circumstances of this case and the age of the child the Court rejects the possibility that the VC was faking or reciting a concocted lie.

[97] The Court believes that the VC was being honest and truthful when she made the complaints to the named persons, which is consistent with her testimony at Court.

The Medical Evidence

[98] Dr Xiloj performed a medical examination on the VC on the 7th April, 2022. He recorded his findings on a medical report of same date, which was tendered into evidence pursuant to **Section 36 of the Evidence Act**. The findings of Dr Xiloj were

that there was no bruising, redness, swelling or scratches shown. There was a complete single tear of her hymen. The doctor's conclusion was that the VC was carnally known.

[99] The medical evidence is therefore consistent with the VC's contention that she had sexual intercourse; however, it cannot confirm with whom the VC had sexual intercourse.

[100] In this regard, the Court also takes into account the VC's evidence under cross examination that she had told the police that "*Miky do me that and I slap him and he slap me back*". It is not clear whether the "**that**" refers to sexual intercourse or more general inappropriate behaviour – it is noted that the VC also said that "*Serena too*"- Serena being a girl – the VC could not have possibly been referring to sexual intercourse regarding Serena.

[101] The Court is therefore satisfied that the medical report is consistent with the VC's allegation that someone penetrated the VC's vagina.

KC1

[102] The Court has examined closely the video footage and concludes that the Accused reached his hand between the VC's legs and groped the VC on her bottom and vagina. The Accused accepted in his evidence in chief that he was the person in the video, and that he touched the VC in the manner shown, but he gave the explanation that he was disciplining her. The Court has rejected his explanation- which is explored more fully in the Court's assessment of the Defence's case. However, at this stage the Court wishes to state that it relied on **KC1** as providing background context to the VC's testimony and that in so far, as the video itself is evidence of inappropriate touching of the VC by the Accused, which is similar to the allegations in the present case it provides some credibility to her allegations.

[103] The Court concludes that the Crown has proven the elements required to prove both counts on the indictment.

Defence Case

[104] 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 Accused, or has a reasonable doubt about whether it is true, must acquit the Accused. It is only if the Court rejects the Accused's case that it returns to the Crown's case and considers the totality of the evidence and determines whether to convict.

[105] 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.

[106] 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 constitutional right to remain silent. The Accused opted to give sworn evidence on his own behalf. He called no witnesses.

[107] The Accused's evidence was in summary that the Crown's witnesses were prejudiced against him. He stated that the VC mentioned two other individuals in her statement: his grandchildren Mikwan and Selena and that nothing came out of those allegations. He said that the investigator's eye was on him, and that she had enough evidence to pursue the two culprits in the case. He said that the story was concocted, because the VC's mother wanted to control his house and that is why she resorted to this situation to try to get him out.

[108] Under cross-examination he accepted that he had touched the VC on her butt in the video KC 1, but explained that he was scolding the VC because he had asked them

to stop their noise, and he was just moving her out of the way with his hand. He denied that he had used the opportunity when the VC would come out of the room alone to take advantage of her. He denied that he penetrated the VC's vagina with his finger or with his penis. He said that she is a rude and spoilt child. He said that the VC is always with her little brother.

Analysis

- [109] The Court notes that the Prosecutor embarked on a line of questioning to the effect that neither the Accused's wife nor any other relative gave statements to the police, or came to give evidence on his behalf. The Court wishes to place on record that it holds that this was an impermissible line of questioning in so far, that it suggested that the Accused bears any burden in this matter to call witnesses or prove anything on his defence. The Court wishes to emphasise that throughout his trial the Accused was never under any onus to prove his defence as such, there was no obligation on him to call any evidence on his own behalf.
- [110] The Court has further 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. It is only if the Court rejects the Accused's case that it returns to the Crown's case and considers the totality of the evidence and determines whether to convict.
- [111] The Accused is a retired Police Inspector and has not previously offended against the laws of Belize with the exception of a minor traffic charge to which this Court places no consideration. He is therefore a man of good character. Although good character is not a defence to the charge, the Court has considered the Accused's good character as relevant in two ways. First, the Accused has given sworn evidence and the Court has taken his good character into account in his favour in its consideration of his evidence, and its determination of whether he has told the

truth. Secondly, the fact that he has not offended in the past may make it less likely that he acted in the manner that the Prosecution alleges in this case

- [112] 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.
- [113] The Defence case is that the Crown's evidence is the product of fabrication between the VC and AR, so that AR could take control of his house. The Court rejects that contention out of hand. Firstly, the Court has already accepted that AR knew of the complaints against the Accused and did not act on same for several months until the VC finally reported the issue to her teacher. If she had been anxious to take control of his house it is also unlikely that she would not have acted sooner in creating this fictional tale. AR herself was quite reluctant to act upon the complaints, because as she admitted she knew they didn't have anywhere to go. Had she been a co-conspirator or the driving force behind the Accused's arrest it would have been her rather than the school teacher, who actually reported the matter to the police. That is simply not the case. There was no urgency on the part of AR to address her daughter's complaints – that is not consistent with someone intent on framing the Accused.
- [114] The Court also considered the evidence of Lucrecia Potts, whom the Court found to be honest and credible, that the VC gave her statement to WPC Fernandez unaided and unprompted in the presence of Ms. Pott and the Social Worker. While children are often good at repeating stories, the Court found it inconceivable that the VC at the age of 7 years would be able to recall the details of the incident with precision and without any prompting by the adults around her. Even during her testimony the VC did not require any prompting from the Prosecutor, her evidence flowed freely and did not seem manipulated at any point.

[115] The Court when looking at it from the VC's and her relatives' side of the equation the evidence of grudge and motive is weak. Now the Court appreciates that the Accused has no evidential burden to establish why a witness would lie. It is for the Crown to demonstrate a witness's credibility. However, if a motive to lie or fabricate is suggested as was done in the evidence of the Accused, then the Court is required to evaluate it. In this regard the Court relies upon the Trinidadian Court of Appeal decision of **Reed Richards v The State** , per Weekes JA, as she then was:

*“23. It is important to note that it is not in every case that counsel is precluded from cross-examining an accused on or questioning a motive to lie. In the case of **R v. Uhrig** (unreported) Court of Criminal Appeal NSW, No 60200 of 1996 Hunt, C.J. recognised that there are two situations which may arise. The first situation, as explained by Priestly, J.A. at page 2 of Jovanovic, is the case where there is no direct evidence of an actual motive to lie, or evidence from which a specific motive to lie could reasonably be inferred, the other case is where a motive to lie is asserted in relation to the evidence of the complainant or witness.*

24. In the former case, where there is no evidence of a motive to lie, to allow the question to be put to the jury “Why would the witness lie?” would run the risk that the jury may think it open to them to infer that because the witness had no apparent motive for lying that fact of itself showed the witness was telling the truth. The second case, where there is a real issue in the case whether the witness had an actual motive to lie is one where that issue is a relevant factor in judging a witness's credit and the question may be asked.”

[116] Thus, the contention that the VC and her mother concocted these allegations is in the view of this Court incredible and without merit whatsoever.

[117] The Court has also considered the Accused's explanation for touching the bottom of the VC in the video footage of KC1 to be unbelievable. Had the Accused been trying to push, discipline, or push the VC out of the way it would make sense to push her or give her a slap – even if on the butt; however, that is not what the Accused did on the video. In KC 1 the Accused is clearly seen groping the VC between the area of her bottom and vagina from between her legs. That is an alarming way to

discipline a 7 year old girl or anyone for that matter. The Court dismissed the Accused's explanation as a blatant and disturbing lie.

[118] On the basis of the independent evidence that is KC1 and I am satisfied so that I am sure that the Accused has deliberately lied while giving evidence in Court when he said that he touched the VC to discipline her. I have also 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 Accused 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.

[119] 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 between 5th October to 17th December 2021, and that he did not use his finger to penetrate her vagina on 4th April 2022. The Court rejects the evidence for the Defence as untrue on the basis of the discrepancies, inconsistencies and implausibility advanced above, and also on the strength of the evidence on the Crown's case, which it is permitted to do on the authority of a decision of the Privy Council in the Dominican case of **Bally Sheng Balson v The State**¹⁶.

Disposition

[120] The Court has looked at the totality of the evidence to reach its 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 is sure and accepts the VC's evidence that the Accused

¹⁶ [2005] 4 LRC 147 at para 38

penetrated her vagina with his finger when she was 7 years old and that he had penetrated her vagina with his penis without her consent, also when she was 7 years old.

[121] 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 on each count of the indictment.

[122] The Accused is found guilty of rape of a child and assault of a child by penetration, and the matter is adjourned for a separate sentencing hearing as advised by the CCJ in Linton Pompey v DPP¹⁷.

Candace Nanton
High Court Judge
Senior Courts Belize
Dated 7th June 2024

¹⁷ [2020] CCJ 7 (AJ) GY at para 32