

IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N14/2022

BETWEEN

THE KING

and

HILDO PECH

Accused

**Before:**

The Honourable Mr. Justice Raphael Morgan

**Appearances:**

Ms. L. Cuello, Dovini Chell and Mrs. Shanidi Urbina for the Crown

Mr. Hurl Hamilton for the Accused

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2024: March 22<sup>nd</sup>, 25<sup>th</sup>,  
April 18<sup>th</sup>,  
May 9<sup>th</sup>, 20<sup>th</sup>, 31<sup>st</sup>  
June 12<sup>th</sup>, 26<sup>th</sup>  
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## JUDGMENT

VERDICT – REASONS FOR DECISION - SEXUAL ASSAULT – RAPE OF A CHILD

- [1] **MORGAN, J.:** Hildo Pech (“the Accused”) was indicted on one count of Sexual Assault contrary to **section 45A (1)** and two counts of Rape of a Child contrary to **section 47A** of the **Criminal Code**<sup>1</sup> (“the Code”).
- [2] On the 1<sup>st</sup> Count of the Indictment the Accused is alleged to have touched the vagina and buttocks of the virtual complainant (VC) A<sup>2</sup>, on 6 different occasions between the 7<sup>th</sup> day of July 2019 and the 14<sup>th</sup> day of July 2019. On the 2<sup>nd</sup> and 3<sup>rd</sup> Counts the Accused is alleged to have raped the VC, a child under the age of sixteen on the 10<sup>th</sup> day of July 2019 and the 12<sup>th</sup> day of July 2019 respectively.
- [3] The trial by Judge alone began with the arraignment of the Accused on 22<sup>nd</sup> March, 2024 before this Court pursuant to section 65 A (2)(a) of the **Indictable Procedure Act**<sup>3</sup> (the IPA).
- [4] The Crown relied on the oral evidence of four viva-voce witnesses including the VC and her mother R, four agreed witnesses pursuant to **Rule 10** of the **Criminal Procedure Rules** (CPR) and **section 106** of the **Evidence Act**<sup>4</sup> (EA), photographs taken of the crime scene and documentary evidence of A’s Birth Certificate.
- [5] At the close of the Crown’s case, the Court 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. The Accused was also informed that whichever option he chose to exercise, he was entitled to call witnesses. The Accused opted to give a statement from the dock and called no witnesses.
- [6] The parties then made closing addresses and the Court reserved its judgement.
- [7] Prior to the Court giving judgement, upon an inquiry from the Court, an application was made by the Defence to reopen its case to lead the good character evidence of the Accused. The Court found the decision of the English Court of Appeal in **R v Hussain (Ashiq) and Ors**<sup>5</sup> to be extremely helpful on the issue of the reopening of the Defence case. The Court carefully weighed the several competing factors particularly the fairness of the trial, the stage at which the proceedings had reached, any prejudice that would accrue to the Crown by the reopening of the case for the Accused and any delay that may result

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<sup>1</sup> Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020.

<sup>2</sup> The name of the victim is anonymized for her protection as she is a minor

<sup>3</sup> Cap 96 of the Substantive Laws of Belize (Revised Edition) 2020

<sup>4</sup> Cap 95 of the Substantive Laws of Belize (Revised Edition) 2020

<sup>5</sup> [2010] EWCA Crim 1327

from the granting of the application. The Court exercised its discretion, in the interest of justice, to allow the Defence to reopen its case for the limited purpose of leading evidence of the good character of the Accused.

[8] The good character evidence of the Accused was led by formal agreement pursuant to **section 106** of the EA when the case for the Accused was reopened.

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

## **The Elements of the Offences**

### **Sexual Assault**

[10]Section 45A (1) of the Code provides as follows:

*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....commits an offence***

[11]With respect to consent of a person under the age of sixteen in the context of the offence of Sexual Assault, the Code provides as follows in **section 12**:

*12. In construing any provision of this Code by which it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or by which it is required for a matter of justification or exemption that an act should be done with a person's consent, the following rules should be observed, namely-*

*...*

*(b) 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 Code also provides generally in **section 12** that no person shall be prejudiced by the invalidity of any consent if he did not know and could not by the exercise of reasonable diligence have known of such invalidity.

[13]As to what constitutes 'sexual in nature' the Code provides in **section 53** as follows:

*53A(5) For the purposes of this Part-...*

“sexual in nature” in relation to penetration, **touching** or any other activity **is sexual if a reasonable person would consider that whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual or because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it or both, it is sexual;**

...

“touching” includes touching with any part of the body or with anything else, or through anything else; ”  
(emphasis added)

[14] In terms of proof of intention **section 6** of the Code is instructive:

*“6(1) The standard test of intention is–*

*Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?”*

[15] How that question is answered is determined by reference to **section 9(b)** of the Code which provides that the Court must, *“decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”*

[16] The Crown therefore has to prove the following in respect of the charge of Sexual Assault:

- a) The Accused touched A’s buttocks and vagina.
- b) That touching was intentional.
- c) That touching was sexual in nature.
- d) The Accused knew or could have with reasonable diligence, found out that A was under 16 or he knew that she was not consenting or had no reasonable belief in her consent<sup>6</sup>.

## Rape

[17] The statutory framework for the charge of Rape is also contained with the Code. **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–

- (c) 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 [emphasis mine]

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<sup>6</sup> The Court in this regard is guided by the decision of the Court of Appeal in Leiva v R Criminal Appeal No 16 of 2009 para 38

[18]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**.

[19]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.** [emphasis mine]

[20]Section 71(2) also provides as follows:

(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.

[21]This section is applicable whenever an Accused person is charged with rape. In that regard the Court is guided by the decision of the Court of Appeal in **Oscar Escalante and Carlos Reyes v R**<sup>7</sup>. While the section speaks to a jury, with the passage of **section 65 A** of the IPA, it is equally applicable to a judge sitting alone exercising their function as a tribunal of fact.

[22]The Crown must therefore prove the following with respect to the charges of Rape of a Child:

- i. The accused carnally knew the VC i.e. inserted his penis into her anus.
- ii. That penetration was done without the consent of the VC or without any reasonable grounds for belief that the VC was consenting.
- iii. That at the time of the penetration the VC was under the age of sixteen years.

## **The Evidence**

### **The Crown's Case**

[23] The Court heard evidence from the following witnesses for the Crown viva voce:

- a) A – the VC

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<sup>7</sup> Criminal Appeals nos. 1 and 2 of 1991

- b) R<sup>8</sup> – the mother of the VC
- c) Woman Sergeant (W Sgt) Sharaine Jacobs – the Investigating Officer
- d) Dr. Nazaria Corea – the Doctor who examined the VC after the complaint was made to the police

**[24]** The parties also agreed to the reading into evidence of the depositions of three witnesses pursuant to **Rule 10 of the CPR and section 106 of the EA:**

- a) Arian Reneau – Crime Scene Technician (CST)
- b) WPC Patricia Espinosa – Accompanied the VC to be medically examined
- c) WPC Concepcion Marroquin – Accompanied the CST to have the scene photographed

**[25]** The Crown also relied on photographs taken by CST Arian Reneau which were admitted into evidence as **AR 1-7** and documentary evidence in the form of the birth certificate of the VC which was admitted into evidence as **SJ1**.

### **The Virtual Complainant**

**[26]** The Court did not hold a voir dire in relation to the VC's evidence as though she was nine (9) years old at the time of the alleged offence, she was 14 years old at the time of her testimony and is no longer of tender years. In that regard the Court relied on the decision of the Court of Appeal in **Coyseme Salam v R**<sup>9</sup>. There was also nothing that raised any concern in the Court's mind that the VC did not understand the nature of the oath nor that she was incompetent to give evidence.

**[27]** The VC testified that she is currently fourteen (14) years of age. In July 2019 she was nine (9) years of age. She lived at Orange Walk Town, San Andres Street with her mother R, her sister B and her brother W. The house was a two storey house with the upstairs being made out of board and the downstairs being made of concrete. Her father and brother slept downstairs. The upstairs had a living room and one bedroom that was separated into two by a quilt dividing it into halves. There were two beds in the bedroom upstairs. The VC and her sister B slept in the bed on the right side of the bedroom. Her mother slept on the bed on the left side of the room. The quilt that separated the rooms was heavy so that she could not

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<sup>8</sup> Also anonymized to protect her daughter who is a minor

<sup>9</sup> Criminal Appeal No. 5 of 2002 at paras 32-36.

see through the curtain. The bed on which she slept was a really big bed. In July 2019 she also recalled that the Accused would stay in that bedroom. The Accused lived with her mother at that time.

**[28]** On the 8<sup>th</sup> of July 2019, the VC went to bed at around 8:00 pm with her sister B. At the time that she went to sleep the persons she saw upstairs were her mother R, her sister B and the Accused. She was then awakened by someone touching her. When she woke up she saw the Accused who at that point was touching her buttocks and her vagina. When she woke up and saw him, he then brought down her underwear and continued rubbing his hands on her buttocks and her vagina. She was able to see him through the light that was coming through the cracks between the boards that the upstairs has. The light from outside came from the street lights and the neighbour's lights. The Accused was one ruler length away from her when she saw him. She was able to see his full body with nothing obstructing her view. Her sister B was sleeping at the time of the Accused touching her. She was sleeping on the left side of the bed and was about two feet away from the VC. The touching continued for about two to three minutes. She didn't say anything to the Accused but she kicked him in his face because she wanted him to stop touching her. The Accused then left and went behind the curtain. The VC indicated that she didn't tell anyone because she was ashamed and afraid. She was afraid because the Accused threatened her after he touched her and told her that if she was going to tell someone he would kill her and her mother.

**[29]** The VC further indicated in her evidence that on the 9<sup>th</sup> July 2019 at around 8:00 pm she went to bed with her sister B. At the time that she went to sleep it was her mother, her sister B and the Accused that were upstairs. She was again awakened to someone touching her buttocks and her vagina. She saw that it was the Accused who was touching her on her buttocks and her vagina. When she turned around to face him after waking up, he brought down her underwear and continued to touch her on her buttocks and her vagina. He was rubbing his hand on them. She was able to see the face of the Accused through the light that came in through the big cracks in the wall. The Accused was one ruler length away from her when he was touching her. The touching continued for about two to three minutes. She again kicked him off of her and he went behind the curtain. She did not tell anyone because she was ashamed and also because of the threat of the Accused that he was going to kill her and her mother if she told anyone.

**[30]** On the 10<sup>th</sup> July 2019 at around 8:00 pm she went to bed with her sister. She was again awakened at some point during the night by someone touching her. She saw that it was the Accused. He was facing her and touching her. When she awoke he brought down her underwear and continued rubbing her buttocks and her vagina for about two to three minutes. She kicked him again but he remained in the

bed. He then turned her over on her belly and came on top of her. He then inserted his penis into her anus and started to move up and down. She felt pain in her anus and kicked him. He did not say anything to her. She told him to stop when he was on top of her. She continued trying to kick him but she didn't touch him. She didn't say anything to him at the moment he inserted his penis into her anus but right after he inserted it she did. Sometime after she said stop, he left. The Accused was one ruler length away from her. The Accused was in her presence for 9-10 minutes. Her sister B was in the room about two feet away from her but she was sleeping on the left side of the bed. The VC was able to see that B was sleeping through the lights that came through the cracks by the upstairs window. She didn't tell anyone because she was ashamed and afraid.

**[31]** On the 11<sup>th</sup> July 2019 she again went to bed with her sister B at around 8:00 pm. At some point in the night, she was awakened to the Accused touching her on her buttocks and her vagina. He then brought down her underwear and continued touching her on her buttocks and her vagina. He rubbed his hands on them and this lasted for about two to three minutes. He didn't say anything to her but she said to him "Go Hildo" and he left. The VC was able to see him through the light that came in through the cracks that were between the boards of the wall upstairs. Nothing was obstructing her view and he was one ruler length away from her. Her sister B was also asleep in the room. The VC was able to tell that she was sleeping because she saw her face. She also did not tell anyone about this incident because she was ashamed and afraid.

**[32]** On the 12<sup>th</sup> July 2019 she again went to bed with her sister B at around 8:00 pm. Before she went to sleep she only saw her mother, her sister B and the Accused upstairs. She was awakened by someone touching her on her buttocks. When she woke up she saw the Accused. He continued touching her buttocks and vagina for about two to three minutes and she was able to see his entire body when he was touching her and he was one ruler length away. She was able to see him because of the light that came in through the wall cracks. He brought down her underwear and turned her around. He came on top of her and inserted his penis into her anus. He started moving up and down but she could not remember how long. She felt pain when he inserted his penis into her anus. She didn't say anything to him but she tried to kick him off. After she tried to kick him, he left. She again saw that her sister B was sleeping. She didn't tell anyone about this incident because she was ashamed and afraid.

**[33]** On the 13<sup>th</sup> July 2019 the VC was again awoken by someone touching her buttocks. When she woke up she saw the Accused. He brought down her underwear after he woke her up. He continued touching her



buttocks and her vagina. He lay down beside her, then came on top of her and starting rubbing his penis on her vagina. He rubbed his penis on her vagina for like 4-5 minutes. She didn't say anything to the Accused when he was on top of her nor did she do anything to him. He got off and laid down beside her and continued touching her. After that she fell asleep and was awakened on the morning of the 14<sup>th</sup> July 2019 by the sound of her mother screaming at the Accused. At that time he had already gotten off the bed and was standing in front of it talking to her mother. The VC was sitting on the bed while they talked. Her mother R chased him and he left. After the Accused left, her mother came close to her and took her to the window and started searching her to see if she was hurt. She told her mother that he had been touching her. She told her that it had been happening since the 8<sup>th</sup> July 2019. She didn't tell her mother about anything else besides touching but she told her sometime after. She didn't tell her about anything else because she was afraid.

**[34]**The VC further testified that she had known the Accused for 4-5 years. In those 4-5 years he would come to stay at her home for like two weeks for the month. She remembers seeing him at her home for the whole month of July 2019 prior to when he left on the 14<sup>th</sup> July 2019. She further identified him in Court as the person who touched her buttocks and vagina and inserted his penis into her anus.

**[35]**Under cross examination the VC accepted that she did not like the relationship between the Accused and her mother R because her father was right downstairs. However, the VC further indicated that it's not that she didn't like the Accused as he was with her mother and not with her. She considered the Accused as good for her mother and she was seeing him like a father.

**[36]**The VC further in cross examination denied the suggestion by Counsel for the Accused that she fabricated the alleged incidents with the Accused because she was jealous of the attention that her mother was giving to the Accused.

**[37]**It was suggested to the VC that she was mistaken as to who assaulted her on the night in question as her ability to see was affected by the limited light that came through the cracks. The VC maintained that although the lights in the house were not on through the cracks on the window and the wall she could see his face and she was not mistaken.

## **The Mother of the Virtual Complainant R**

[38]R, the mother of the VC, testified that she has three children of which the VC is the second. The VC's date of birth being the 6<sup>th</sup> December, 2009. In 2019, in the month of July she lived with her three children and her husband. The Accused would also stay in the house in July 2019 as they were a couple for about six years prior to this incident. The house that she lived in was a two storey house with the downstairs being made of cement and the upstairs being made out of wood. The house that she lived in was very old and there were openings in the board through which light would come in. In order to go upstairs there was a staircase located outside of the house. There were two rooms upstairs, one being the kitchen and the other being the bedroom. There were two beds in the bedroom, one was her own and the other was for her daughters. That was the reason she had put up the curtain. The curtain was a blanket. There was a three feet division between the beds. The Accused slept on her bed. Her husband and son stayed in the lower flat in the cement house. To access the 2<sup>nd</sup> floor you had to use the staircase and then access the door. The 2<sup>nd</sup> floor could not be accessed at night when she was asleep because she would lock it each night and only she had the keys. In July she would always close the door at night. Her son W was sleeping downstairs with her husband in the month of July 2019.

[39]She further testified that she recalled the 14<sup>th</sup> July 2019 at around 5:30 am. She recalled touching the bed to see if the Accused was there and he wasn't. She slept a little more and she turned around and saw that the Accused was still not there. She came off the bed and began to look around the room and he was in the bed with her daughter the VC. The VC had her panties down to her knees and the Accused was fully dressed. The two of them were sleeping with their feet hanging off the bed and they were on their back. There was no distance between them. Her other daughter was on the bed but she was asleep. When she saw them she spoke to the Accused and asked him if he had mistaken the bed. The Accused replied that he was looking for his socks because he wanted to put on his socks as he was going to work. R then asked the Accused what happened to the VC and whether he had done anything to her. The Accused replied "nothing, nothing" and told her that she was crazy. He then left the house. After he left, R took the VC over by the window and examined her genitals to see if anything was wrong. She looked at her vagina and saw that it was pink with little cuts, fine cuts that were not big. The VC then told her mother that the Accused had passed his penis on her vagina and in her anus but that she was afraid to tell her before as the Accused said he would kill her and R. After that R then went downstairs to tell her husband what happened. She then went to the police station and made a report.

[40] She further testified that around 5:30 pm on the 14<sup>th</sup> July 2019 the Accused came back to her home. He knocked on the door and she opened it for him. When he arrived, he told her that he was sorry for what he had done and asked for forgiveness. He asked her to forgive him because he himself didn't know what happened and he thought the devil went into him. He kept asking her to forgive him ten thousand and twenty thousand times more. He further indicated that he was very sorry for what he had done and he loved her very much. She was able to see him clearly when he told her this and he smelled of rum. She gave him food and he lay down in the hammock and fell asleep. By then the police had already been called and they came and took him.

[41] On the 16<sup>th</sup> July 2019 she took the VC to the police station to give a statement. Also she recalled the 17<sup>th</sup> July, 2019 when she accompanied the VC to the hospital to get medically examined.

[42] Under cross-examination R denied the suggestion that all of her children were sleeping upstairs in the house including her son W who slept on the same bed as her daughters. She denied that the Accused played the role of father figure to the VC. She further indicated that her bed at the time in 2019 didn't make noise when someone moved on it. She also denied the suggestion that the VC was suffering from constipation nor was she taking her daughter to the doctor prior to the alleged incident. R also denied the suggestion that when she found the Accused on the bed of the VC he was putting on his socks and not sleeping as she alleged.

[43] She accepted under cross examination that she did not see the Accused touching her daughter inappropriately, or having sexual intercourse with her.

### **Woman Sergeant Jacobs**

[44] W. Sgt Jacobs testified that in July 2019 she was a Corporal of Police tasked with investigating domestic matters, sexual matters and indictable matters. She recalled the 14<sup>th</sup> July 2019 at around 2 pm when the VC accompanied by her mother came to the Orange Walk Police Station and made a report of sexual assault. On that same day about 6:30 pm she received a call from R who told her that the Accused was at her residence. W. Sgt Jacobs along with a party of officers went to the residence of R where she met the Accused who was pointed out to her by R. She then informed the Accused of the report of sexual assault made against him, cautioned him and informed him of his constitutional rights and privileges after which he was escorted to the Orange Walk Police Station. At the police station she obtained his social

security card and issued him with acknowledgement forms and then explained the process of an interview. At that point the Accused stated he would remain silent until he spoke to an Attorney. The Accused was then further detained pending investigations. On the 15<sup>th</sup> July 2019 she recorded the statement of the VC. The Accused was charged for Sexual Assault on the 15<sup>th</sup> July 2019. On the 16<sup>th</sup> August 2019 she re-interviewed the VC and recorded a further statement in light of the medical findings. On the 17<sup>th</sup> September 2019 the Accused visited the Orange Walk Police Station where she informed him of the further report of Rape of a Child against him. He was formally arrested and charged for the Rape of a Child on the 18<sup>th</sup> September 2019. She was also given the birth certificate of the VC.

**[45]**The birth certificate of the VC was admitted into evidence and tendered and marked **SJ1**.

#### **Dr. Nazaria Corea**

**[46]****Section 45 of the EA** permits the Court to hear evidence of an expert where there is a question on any point of science. Dr. Corea was called by the Crown and deemed to be an expert without objection by the Defence. She testified that she is a paediatrician and currently works at St. Luke's Hospital, Belmopan. Prior to that she worked at the Northern Regional Hospital from 2009 to March 2023. She went to medical school in Mexico at *Universidad de la Fuerza Aire y el Ejercito* for six and a half years and then did a residency at San Carlos Hospital in Guatemala She is registered to practice Medicine in Belize.

**[47]**She recalled the 17<sup>th</sup> July 2019 when she was called to review a patient in the outpatient department who was brought by her mother to be examined. She then requested that the police officer and the social worker be present for the examination. When the examination started she performed a physical examination of the child who was the VC and found her to be well kept. A vaginal exam was done which showed that her vagina was normal. The VC was then placed laterally on her side to do the anal examination and Dr. Corea saw that the external sphincter was lax. There was no sign of any bruising or bleeding. The internal sphincter was shut but the external sphincter was opened. Dr. Corea testified that there are certain medical conditions that could cause the sphincter to be open such as chronic constipation and neurological disorders such as *spina bifida* in children but the injuries can also be consistent with a patient being molested. She asked the VC, on the said day, if she was constipated but the VC denied having constipation. Dr. Corea further indicated that in cases involving molestation, if the

doctors are alerted early in the process, bleeding, fissures and swelling can be observed. She further stated that within seven days of the molestation would be considered early.

[48] Under cross examination Dr. Corea said that if there was penile penetration, the internal sphincter would not necessarily be lax because it would depend on the chronicity of the penetration. She also didn't do any stool examinations for constipation as doctors are not allowed to do any invasion of the anal area when dealing with a potential child victim. However, she didn't see any stool in the rectum.

[49] Dr. Corea was asked by the Court what injuries she would usually expect to see if a child is anally penetrated and she replied that she would expect to see bleeding, fissures and swelling within the first 7-8 days but that it would depend on the forcefulness of the penetration. She further indicated that if it is continuous she would expect to see a lax anal sphincter.

[50] The parties were invited to ask further questions arising out her answers to the Court. In response to the Crown, she indicated that the presence of the injuries depend on the chronicity of what is happening and the forcefulness. In answer to Counsel for the Accused, she answered that if a child is molested continuously, she would expect both the internal and external sphincter to be lax.

### **Arian Reneau**

[51] The agreed evidence of Arian Reneau is that she is a Crime Scene Technician. She along with WPC Concepcion Marroquin went to the home of the VC and her mother on the 25<sup>th</sup> July 2019. There they met the VC and R. The VC pointed out certain areas and Arian Reneau took seven photographs. These photographs were developed, copies made and submitted to the investigator W.Cpl. Jacobs.

[52] The photographs were admitted into evidence, tendered and marked **AR 1-7**.

### **Concepcion Marroquin**

[53] The agreed evidence of WPC Concepcion Marroquin's is that she accompanied CST Arian Reneau to the home of the VC and her mother on the 25<sup>th</sup> July 2019. When they arrived they met the VC and her mother. The VC pointed out certain areas and CST Arian Reneau took seven photographs.

## **Patricia Espinosa**

[54]The agreed evidence of Patricia Espinosa is that she was instructed by W. Cpl Jacobs to assist in accompanying the VC to be medically examined at the Northern Regional Hospital.

## **The Case for the Defence**

[55]At the close of the case for the Crown, the Accused elected to give a statement from the dock where he denied the allegations made by the VC and her mother. He indicated that the reason the VC made these allegation against him is that she was jealous of the relationship that he had with her mother R. He further indicated that as a result of his good relationship with her mother the VC was angry all the time. There eventually was a lot of fighting with R and her children and that is why he could no longer stay with R at her home. He said however they were good people to him.

[56]The Accused called no witnesses and the case for the Accused was initially closed after the dock statement. The Case was later reopened, as indicated above, to allow the Defence to lead evidence of the fact that the Accused has no criminal record. The case for the Accused was then closed again.

## **Analysis**

[57]The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove, The Court also reminds itself that the obligation is on the Crown to prove beyond a reasonable doubt the guilt of the Accused i.e. the Crown must lead evidence so that the Court is sure of the guilt of the Accused. If there is any reasonable doubt the Court is duty bound to acquit him.

[58]The Accused in this case opted to give a statement from the dock. The Court is duty bound to consider it and to give it such weight as it thinks fit when deliberating on the evidence. The Court reminds itself that this is the Accused's right, however the fact that he has not been cross examined may make his dock statement less cogent than sworn evidence. However it is material which may be considered and may show the evidence in a different light.

[59]The Court is reminded of the approach suggested by our apex Court, the Caribbean Court of Justice (CCJ) in Dionicio Salazar v R<sup>10</sup>. The Court will therefore consider the prosecution's evidence first. If the evidence for the Crown seems strong enough to carry a conviction, the Court then will consider the case for the Defence to see whether any reasonable doubt arises. If reasonable doubt arises or the Court accepts the case for the Accused, the Court must acquit the Accused. If the Court rejects the case for the Accused, the Court must still then return to the case for the Crown and consider the totality of the evidence before coming to a final decision.

[60]In considering the evidence, the Court must also assess the credibility and reliability of the witnesses. Credibility refers to a witness's honesty or sincerity. Reliability on the other hand is about the accuracy of the witness's testimony where the Court must scrutinize the witness' ability to observe, recall and recount events<sup>11</sup>. In order to properly assess credibility and reliability the Court must examine inconsistencies, discrepancies and any implausibility that arises on the evidence. The Court need not comb the record for inconsistencies or contradictions<sup>12</sup>.

[61]If there are inconsistencies and discrepancies, the Court must consider whether they are material and if they can be resolved on the evidence. The Court reminds itself that it must consider whether the 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. If there are any unresolved material inconsistencies or discrepancies this would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The cumulative effect of these inconsistencies or discrepancies on a witness's credit and reliability is also important for the Court's consideration. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that bit.

[62]The Court directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of believability. This is not to say that the telling of lies on oath is a trifling thing. The Court further reminds itself 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 lie and the reason for the lie. The Court may still convict if it is sure that the material parts of the evidence are true. The Court in that

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<sup>10</sup> [2019] CCJ 15 (AJ)

<sup>11</sup> R v Kruk 2024 SCC 7 (Supreme Court of Canada) at para 146

<sup>12</sup> August et al v R [2018] 3 LRC 552 at para 60

regard relies on the decision of the CCJ in **James Fields v The State**<sup>13</sup> in relation to evaluating testimony involving intentional lies.

[63]The Court in assessing the evidence must also analyse the evidence dispassionately, clinically, fairly, within the boundaries of the law and with the aid of its human experiences and common sense<sup>14</sup> while avoiding myths and stereotypes.

[64]In assessing the evidence, the Court will consider the case for the Crown on each count and then if necessary consider the case for the Defence before coming to its findings.

### **Count 1: Sexual Assault**

[65]The Crown's case of sexual assault against the Accused is based on the evidence of the VC and the supporting evidence of her mother R who purports to find the VC and the Accused asleep next to each on the VC's bed with the VC's underwear down and to whom the Accused is alleged to have made an admission and asked for forgiveness.

[66]The Court therefore must assess the reliability and honesty of the Crown's witnesses including the VC.

[67]The Court notes the age of the VC when she testified and that she was even younger at the time of the incident. In assessing her evidence the Court notes that she was testifying about events that allegedly occur when she was a nine year old child. The Court reminds itself that the age of the VC at the time of testifying does not automatically mean that her word is any more or less reliable than that of an adult. The Court must assess the VC's evidence in the same dispassionate and clinical way that it would assess any other evidence in the case.

[68]The Court as a tribunal of fact, in assessing the evidence, must bear in mind the following which are matters of common sense and human experience<sup>15</sup>:

- a) A child does not have the same experience of life or the same degree of maturity, logic, perception or understanding as an adult. So, when a child is asked questions, she may find the

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<sup>13</sup> [2023] CCJ 13 (AJ) BB at paras 33-38

<sup>14</sup> Kruk at paras 151-156

<sup>15</sup> **The Crown Court Compendium, Part I, Jury and Trial Management and Summing Up**, (Eng.) June 2022, para 10-28.



questions difficult to understand, may not fully understand what it is she is being asked to describe and may not have the words accurately or precisely to describe things.

- b) A child may be tempted to agree with questions asked by an adult, whom the child may well see as being in authority, particularly in a setting such as this. Also, if a child feels that what she is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that she may get into trouble.
- c) A child may not fully understand the significance of some things that have happened, which may be sexual, at the time they happened, and this may be reflected in the way she remembers or describes them in later life.
- d) A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time, when trying to describe events, even after a fairly short period, and a child's memory of when and in what order events occurred may not be accurate.
- e) A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how she felt at the time or why she did not take a particular course of action.
- f) All these things go to a child's level of understanding rather than to her credibility and so the Court should be cautious about judging a child by the same standards as an adult. None of these things mean that this witness is or is not reliable: that is a matter for the Court's judgment on all of the evidence.

**[69]** The nature of the complaint that is being made by the VC is also relevant as she is testifying to multiple alleged sexual offences. In that regard, the Court must guard against making certain assumptions, which are again, matters of common sense and human experience:

- a) Experience shows that people react differently to the trauma of a serious sexual assault or attack of a sexual nature, that there is no one classic response.
- b) Some may complain immediately whilst others may feel shame and shock and not complain for some time; and

- c) A late complaint does not necessarily mean it is a false complaint, nor does an early complaint mean a true complaint. A judge is entitled to have regard to the shame and embarrassment which may arise from sexual assault<sup>16</sup> particularly by a close family member or relative.

[70]The Court notes that there was no dispute by the Defence that the VC was nine years of age at the time of the incident.

[71]The VC in testifying appeared to the Court to be quiet and reserved. She was forthright in some of her answers and reticent in others. She took her time to answer questions and was able to indicate when she needed more time or she didn't remember. There was nothing in her demeanour which made the Court feel disquiet about her veracity.

[72]The Court notes that there are aspects of the evidence of the VC which could be viewed as implausible. These can be highlighted as follows:

- a) The ability of the Accused to sexually assault the VC while her sister B was asleep next to her a few feet away.
- b) The ability of the Accused to sexually assault the VC while her mother R was in the same room but on a different bed separated by a curtain.
- c) The failure of the VC to raise an alarm while her sister and mother slept in close proximity.

[73]The Court however does not find the account of the VC to be inherently implausible. When the Court looks at the evidence of the VC on each occasion of the alleged sexual assaults, the Accused stands at the edge of the bed and his attention is focused on the VC. He does not speak and there is no attempt to get onto the bed which might have awoken B. The VC also does not speak or raise an alarm that would have awoken her sister except for one occasion when she says "Go Hildo" on the 11<sup>th</sup> July 2019. The Court therefore accepts that B, the sister of the VC, was asleep at the time of the Accused's alleged actions and wasn't awoken by the actions of the Accused. The fact that a young child sleeps through the night, even through disturbances close by, is not inherently improbable.

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<sup>16</sup> **Criminal Bench Book for Barbados, Belize and Guyana** February 2023 at p 631

[74]The Court also accepts that R, the mother of the VC, was also asleep during the times that the Accused allegedly assaulted the VC as she indicated that she was a heavy sleeper and this was never challenged by the Defence. The fact that the assaults were committed within such close proximity to the mother and sister of the VC may speak more to the assurance of the Accused that they would not be awoken by his actions rather than to any logical inconsistency of the VC.

[75]It is also not implausible that a young child who has just been assaulted or is being assaulted by someone who can essentially be called her stepfather would not raise an alarm. The Court is careful not to ascribe adult standards of behaviour to the reaction of the VC in this matter. Further the Court notes that each individual's response to sexual assault is different and is careful not to assume that each person who is assaulted will raise an alarm. This is even more so for a child who has not yet matured and does not possess the same trauma responses as an adult. The Court notes that while the VC did not raise an alarm she kicked the Accused on several occasions or attempted to kick him to get him to leave and on another occasion she told him to go.

[76]The Court also doesn't find it implausible that the VC would not immediately after the attack raise an alarm or report the subsequent actions of the Accused if the Accused threatened her by saying that if she reported it he would kill her and her mother. The fact that the VC didn't raise an alarm or make an initial complaint, due to feelings of shame or fear, after the initial assault may have emboldened the Accused to repeat his actions on a nightly basis thereafter.

### **Improper Motive**

[77]It was also suggested to the VC that her evidence was tainted by an improper motive as she had a grudge against the Accused because she didn't like the fact that he shared a relationship with R while her father lived downstairs. This suggestion also emerged during the dock statement of the Accused. The Court appreciates that there is no legal or evidential burden on an Accused to establish whether a witness may be tainted by an improper motive. The burden remains on the Crown to establish the credibility of any witness on whom it intends to rely on to prove its case. However when such a suggestion is made that the witness may be tainted by an improper motive, the Court must evaluate it. If the Court finds that there is a sufficient evidential basis to hold that the witness may be tainted by an improper motive the Court must then see what impact it has on the credibility of the witness.

[78] Whether or not a witness may be tainted by an improper motive is directly relevant to the credibility of that witness. In **R v Pringle**<sup>17</sup> the Privy Council provided guidance on the treatment of witnesses with interests to serve. Lord Hope indicated as follows:

**“The indications that the evidence may be tainted by an improper motive must be found in the evidence. But this is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence.** Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. **He should then advise them to be cautious before accepting the prisoner's evidence.**”

[79] The VC accepted in cross examination that she did not like the relationship between her mother and the Accused as her father was still living downstairs. While the VC did go on to say that she considered the Accused good for her mother and she was seeing him as a father. The Court does not think that the VC's answers establish an inconsistency or incongruence in her evidence. The Court considers that it is possible for both things to be true. The VC could have liked the Accused and saw that he was good for her mother but disliked the fact that the relationship between R and the Accused meant that R was no longer with her father. It must also be remembered that the father of the VC was living in the downstairs apartment all this time. The Court considers therefore, in light of the statement by the VC that she disliked the relationship between the Accused and R, that there is a sufficient evidential basis to suggest that the VC's evidence may have been tainted by an improper motive in giving evidence against the Accused.

[80] The Court is well aware that the Crown has to deal with their witnesses as they find them. The Court also reminds itself that the fact that a witness may be tainted by an improper motive in giving particular evidence is not necessary fatal to the credibility and reliability of that witness and does not automatically mean that they are not worthy of belief. The Court must be cautious however in accepting the evidence and ought to look at it carefully before accepting it. Further the Court may, although this is not absolutely required, also look to see if there are other corroborative items of evidence which lend support to the witness' account.

### **The Issue of Mistaken Identification**

[81] The Defence through cross examination raised in addition to the issue of fabrication, the issue of mistaken identity to the VC. The Court, even though this is a case of recognition, therefore must consider the circumstances of the recognition of the Accused as the person who assaulted the VC on the

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<sup>17</sup> [2003] UKPC 9

occasions identified. The Court must look carefully at the circumstances of the recognition in deciding whether the witness is an honest witness and whether the recognition evidence can be relied on bearing in mind that a mistaken witness can be a convincing one. Further, the Court reminds itself that while recognition may be more reliable than identification of a stranger, even where a witness is purporting to recognise someone whom they know, mistakes in recognition of close friends and relatives are sometimes made.

**[82]**The Court asked itself the following questions in considering the recognition evidence of the VC in light of the suggestion that she was mistaken in her recognition:

- a) **How long did the VC have the Accused under observation?** – The VC indicates that she had the Accused under observation for the following durations:
- i. 8<sup>th</sup> July 2019 – The VC had him under observation for two to three minutes from the time she was awoken to the time that he left the side of the bedroom where she and B slept.
  - ii. 9<sup>th</sup> July 2019 – The VC had him under observation for two to three minutes from the time she was awoken to the time that he left the side of the bedroom where she and B slept.
  - iii. 10<sup>th</sup> July 2019 – The VC initially had him under observation for two to three minutes while he touched her vagina and buttocks and the Accused remained in her presence thereafter while he allegedly turned her over and placed his penis in her anus. The total time of the Accused being in her presence was in the estimation of the VC about nine to ten minutes.
  - iv. 11<sup>th</sup> July 2019 – The VC had him under observation for two to three minutes from the time that she was awoken to the time that he left the side of the bedroom where she and B slept.
  - v. 12<sup>th</sup> July 2019 – The VC had him under observation for two to three minutes from the time that she was awoken to the time that he left the side of the bedroom where she and B slept. The Accused then allegedly remained in her presence as he proceeded to turn her over and insert his penis in her anus. The VC was unable to say how long he remained in her presence on this night.

- vi. 13<sup>th</sup> July 2019 – The VC had him under observation while he was touching her buttocks and vagina for one minute. Then the Accused came on top of her for four to five minutes and started rubbing his penis on her vagina. The Accused then came off, lay next to her and continued touching her. The VC then fell asleep.
- b) **What was the distance that the observation was made from?** – On all six occasions the VC indicated that when she awoke the Accused while touching her was a ruler length away from her at the base of the right hand side of the bed. On the night of the 13<sup>th</sup> July 2019 the Accused also came on top of her for 4-5 minutes while rubbing his penis on her vagina.
- c) **What were the lighting conditions like at the time the observations were made?** – The VC indicated that she was able to see the Accused from the lights that came through from the cracks in the wall and the cracks that were on the window. The light that came through the cracks came from the street light outside and the neighbour's lights. She accepted however that the lights in the house were off.
- d) **Were there any impediments to the observations made by the VC?** – The VC indicated that there was nothing impeding her view of the Accused at the time that he was touching her as he was at the foot of the bed. She further indicated that when she observed him, she was able to see his full body. The Court also had sight of the photograph AR7 (which was also shown to the VC) and there was nothing in the bedroom or at the foot of the bed which in the Court's objective assessment could have impeded her view.
- e) **Had the Accused been known to the VC before?** – The VC testified that she knew the Accused for 4-5 years prior to the incident and that he would frequently be at their home each month for at least two weeks. The Accused was also at the home of the VC in July 2019 for the beginning of the month. This was not challenged by the Defence.
- f) **How much time elapsed between the original observation and the report made to the police?** – The report was made by the VC and R to the police on the 14<sup>th</sup> July 2019. While the 1<sup>st</sup> incident where the VC observed the Accused occurred on the 8<sup>th</sup> July 2019, the Court is

mindful that this is not a case of a one off incident but rather a series of incidents continuing nightly from the 8<sup>th</sup> July 2019 to the 13<sup>th</sup> July 2019.

g) **Are there any specific weaknesses in the recognition evidence?** – The Court considers as specific weaknesses the following:

- i. The identification was made at night when the lights in the house were off.
- ii. The identification was made by the VC, a child, who had just been awoken from sleep when she sees the Accused.
- iii. The source of the lighting in the home came from the street light outside the home and the lights from the neighbour's house.

h) **Can potential support be found for the identification evidence of the VC from other evidence in the case?** – The Court considers the following as supportive of the recognition evidence of the VC:

- i. The VC says that on the night of the 8<sup>th</sup> July 2019 when she kicked the Accused while he was assaulting her, he went behind the curtain. The only curtain ever mentioned in the evidence was the curtain that divided the two beds. Further, the other side of the curtain led to where the Accused slept with the mother of the VC.
- ii. The VC also testifies that on the night of the 11<sup>th</sup> July 2019 when she says to the Accused while he was assaulting her “Go Hildo”, he then leaves.
- iii. The mother of the VC R testified that on each night in July 2019 she would lock the door and only she would have access. She further testified that when she went to sleep only her daughters and the Accused would be upstairs. The VC also testified that before she went to sleep it was only she, her mother R, her sister B and the Accused that were upstairs.
- iv. The mother of the VC testified that on the morning of the 14<sup>th</sup> July 2019 she found the Accused and the VC asleep next to each other on the bed and the VC's underwear was down to her knees. This coincides with the story of the VC that on the night of the 13<sup>th</sup> July 2019 the Accused brought down her underwear to her knees, touched her with his hands and his penis for some time and then lay next to her while her underwear was still down and she fell asleep.

[83]The incidents are alleged to have occurred at night with the lights in the house being off and the only available light being that coming through the cracks in the wall and from the window. These cracks have been described as “big cracks” by the VC and R as the house was old at the time in 2019. There was nothing obstructing the VC’s view of the Accused and she had him under observation when she was awake and he was touching her for the entire time. On each occasion while he touched her she was able to observe him for at least two to three minutes. The Accused was also only a ruler length away from the VC at the times that she had him under observation up until the time that he left. The VC knew the Accused for 4-5 years prior to the incident and at the time that she went to sleep the only male person who was upstairs in the house with her was the Accused. Further when she kicked the person he went behind the curtain to the other side of the bedroom which is where the Accused slept with her mother.

[84]The Court has considered the specific weaknesses in the VC’s evidence and finds that they are not so material that they diminish the quality of the VC’s recognition evidence. While the lighting conditions were not ideal it must be remembered that these were not fleeting glances that the VC had of the Accused while he touched her buttocks and vagina but rather lengthy periods of observation which went on for minutes at a time. The VC was also very familiar with the features of the Accused having been around him for a period of four to five years.

[85]The Court accepts that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However in these circumstances the Court does not accept that the VC was mistaken and considers that the VC’s opportunities for observation of the Accused on each occasion were sufficiently strong to dispel in the mind of this Court the possibility of mistake.

### **The evidence of Recent Complaint**

[86]The Court heard two items of evidence of recent complaint coming from the VC and her mother R respectively. The VC indicated that she told her mother on the morning of the 14<sup>th</sup> July 2019 that the Accused had been touching her since Monday 8<sup>th</sup> July 2019. The VC further indicated that she did not tell her mother about the Accused inserting his penis into her anus because she was afraid. R, the mother of the VC, indicates that the VC said the Accused had passed his penis on her vagina and in her anus and had threatened that he would kill the VC and her.



**[87]**The Court accepts that this evidence is evidence of recent complaint as defined in **section 96 of the EA** being a complaint made soon after the commission of an alleged offence of Sexual Assault. There was no objection by the Defence to the reception into evidence of the VC and R on this issue.

**[88]**There is however on the face of the evidence a discrepancy with respect to the exact wording of the complaint. The VC maintains that she only said touching but R indicates that the VC said the Accused passed his penis in her anus. In resolving this inconsistency, the Court believes the evidence of the VC and rejects the evidence of R. The evidence of the VC that she only indicated touching is consistent with her initial account to the Police and the fact that the initial charge was only for Sexual Assault. It is also consistent with the fact that it was only after reviewing the evidence and re-interviewing the VC that W. Sgt Jacobs charged the Accused for Rape of a Child.

**[89]**The Court is careful however to point out that this evidence is not used by the Court as proof of the commission of the offence but simply as supportive of the consistency and general credibility of the VC.

**[90]**The Court wishes to stress at this stage that this discrepancy is not fatal to the credibility of R as the Court does not believe that the discrepancy is an attempt by R to deliberately mislead the court. The Court reminds itself that this incident occurred in July 2019 and the matter is now being tried in May 2024 and allowances must be made for victims and witnesses to not remember to exactitudes the events which form the basis of their evidence. The Court, in its further analysis, will scrutinize the evidence carefully to see whether attempts are being made to deliberately mislead the Court but on this issue the Court does not see such an attempt by R.

### **The Evidence of R, the mother of the VC**

**[91]**The Court finds that the mother of the VC R is an honest and reliable witness. The Court has looked at her demeanour and considers that she was forthright, feisty, passionate and reticent at times when relating her story but there was nothing in her demeanour which forced the court to doubt the veracity of her evidence.

**[92]**The Court also found no logical inconsistency or implausibility which caused the Court to doubt her reliability as a witness. While the Court's attention was drawn to the fact that she allowed the Accused back into her home after finding him in such a compromising position with her daughter and gave him

food to eat. The Court also notes that she immediately called the police and made sure that he was arrested. Further, she took her daughter earlier that morning to the police to make a report.

[93] The evidence of R lends support to the account of the VC in a material way. The evidence of the mother of the VC is that on the morning of the 14<sup>th</sup> July 2019 she finds the virtual complainant on her bed asleep with the Accused right next to her with her underwear down to her knees. This is consistent with the VC's account that on the night of the 13<sup>th</sup> July 2019 the Accused had remained next to her after waking her up, bringing her underwear down, rubbing his penis on her vagina for four to five minutes and then lying next to her touching her as she fell asleep.

[94] R however gives further evidence of a statement made by the Accused to her when he came back to her house on the evening of the 14<sup>th</sup> July that he was sorry for what he had done and he begged her forgiveness a thousand times, twenty thousand times and he doesn't know what happened and the Devil took over him. The Crown has urged the Court to see this as a confession by the Accused to the allegations of the VC and thus the Court will look and see whether the statements by the Accused to R amount to a confession and if so, to what.

[95] A confession is an admission made by a person charged with a crime stating or suggesting the inference that he committed the crime<sup>18</sup>. Such an admission if made to a person in Authority is subject to the exclusionary discretion vested in the Court by **section 90 of the EA** which codifies the principles in **Ibrahim v R**<sup>19</sup>. An admission made by a person stating or suggesting that they committed the crime must be unequivocal either through the words stated or the surrounding circumstances pointing to one inexorable conclusion of an admission of culpability to the offence or offences charged.

[96] At first blush and looked at in isolation, the words by themselves seem to support the position for the Crown that the Accused is begging forgiveness for assaulting the VC. However, upon closer analysis this may not be the case. When the Accused is confronted on the morning of the 14<sup>th</sup> July 2019 as to whether he had done anything to the VC he says "Nothing, nothing". It does not end there however as the Accused calls R crazy and then leaves the home. Also, the Court notes that while the Accused asks for forgiveness there is no indication as to what he is asking forgiveness for. Is the Accused asking forgiveness for being

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<sup>18</sup> Phipson on Evidence, 20<sup>th</sup> Edition para 36-01

<sup>19</sup> [1914] AC 599

found with the VC in such a position? Is he asking forgiveness for actually assaulting the VC? Is he asking forgiveness for calling his girlfriend R crazy and then leaving abruptly that morning?

**[97]** In the mind of the Court it isn't clear as to exactly what the Accused is asking forgiveness for and admitting to and therefore the Court sees this admission as equivocal or ambiguous. The surrounding circumstances also do not inexorably point to the conclusion that the Accused was admitting culpability to the offences charged. While that is a distinct possibility there are other plausible alternatives that the Court cannot discount.

**[98]** In the circumstances, the Court therefore while it accepts that the Accused spoke the words attributed to him by R does not view the statement as an unequivocal admission and accordingly the Court does not factor this evidence into its determination of whether the Crown's case is strong enough to carry a conviction.

**Is the case for the Crown on Count 1 (Sexual Assault) strong enough to carry a conviction?**

**[99]** The Court for the foregoing reasons finds that the VC is an honest witness. The Court has approached her evidence with caution after finding that there is a sufficient evidential basis for her to be treated as being tainted by an improper motive but the Court is of the opinion that the VC is honest when giving her evidence. The Court would have reached this conclusion on her honesty even without the supporting evidence of R with respect to the morning of the 14<sup>th</sup> July 2019.

**[100]** The Court having found that the VC is an honest witness also finds that she is a reliable witness. The Court has considered the VC's recognition evidence, with caution and the Court is of the opinion that in addition to being an honest witness she is also a reliable witness. The Court has considered whether she could be honest but mistaken and finds that the circumstances of her recognition of the Accused are sufficient to dispel in the Court's mind, on the Crown's case, the possibility of mistaken recognition.

**[101]** The Court has also found R to be a honest and reliable witness and considers that her evidence lends material support to the evidence of the VC.

**[102]** The Court is therefore of the opinion that the evidence of the Crown on Count 1 (Sexual Assault) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

## **Count 2 – Rape of a Child**

[103] The Court earlier in its analysis of the evidence of the VC on the 1<sup>st</sup> Count found that there is an evidential basis for treating the VC as a witness who may have an improper motive in giving evidence against the Accused. That finding is equally applicable here. The Court will therefore approach her evidence on Count 2 (Rape of a Child) with caution, scrutinizing it carefully before accepting it. The Court will also look to see whether there is any supporting evidence, although the Court is not duty bound to only accept the evidence of the VC if there is other evidence to corroborate it.

[104] The evidence of the VC on this count is that on the 10<sup>th</sup> of July 2019 she went to sleep at around 8:00 pm and she was awoken sometime thereafter by the Accused touching her vagina and buttocks. When she awoke, he proceeded to take down her underwear and continue to touch her vagina and buttocks. After two to three minutes he then turned her over and inserted his penis into her anus. He then began to move up and down and she felt pain. She can't remember for how long he moved up and down. She told him to stop right after he inserted his penis into her anus. He did not stop immediately. He removed his penis from inside her anus and left sometime after she told him to stop. The total time that he was in her presence was nine to ten minutes.

[105] The Court does not find the account of the VC implausible or inherently illogical. While the suggestion has been made that it is implausible that B, the VC's sister, would remain asleep during the assault the Court finds that it is not improbable that a young child would sleep through disturbances very close to them especially as in this case the Accused appears to have timed or calculated his actions to be unnoticed by the rest of the family and not cause too great of a disturbance. Also the VC herself during the alleged rape doesn't raise an alarm that would wake her sister. The Court also notes the actions of the Accused as alleged by the VC were very careful and calculated to be done at a time when B was asleep. The Accused himself also never speaks during the entire interaction where he places his penis in the anus of the VC thus further limiting the possibility that B would wake up.

[106] It is also not implausible or inherently illogical that the mother of the VC also slept through the attack as the unchallenged evidence is that she was a strong sleeper. It is also noted that she was on a separate bed in another portion of the room and divided by a curtain. Also the VC raised no alarm to rouse her out of her sleep.

[107] The Court also does not find it illogical that a child victim would not raise an alarm. The Court is again careful not to ascribe adult standards of behaviour to the reaction of the VC in this matter. Further the Court notes that each individual's response to sexual assault is different and is careful not to assume that each person who is assaulted will raise an alarm. This is even more so for a child who has not yet matured and does not possess the same trauma responses as an adult. The Court notes that while the VC did not raise an alarm she kicked the Accused in an attempt to get him to leave.

### **The issue of Mistaken Identification**

[108] The Defence through cross examination raised in addition to the issue of fabrication, the issue of mistaken identity to the VC. The Court, even though this is a case of recognition, therefore must consider the circumstances of the recognition of the Accused as the person who raped the VC on the 10<sup>th</sup> July 2019. The Court must look carefully at the circumstances of the recognition in deciding whether the witness is an honest witness and whether the recognition evidence can be relied on bearing in mind that a mistaken witness can be a convincing one. Further, the Court reminds itself that while recognition may be more reliable than identification of a stranger, even where a witness is purporting to recognise someone whom they know, mistakes in recognition of close friends and relatives are sometimes made.

[109] The Court asked itself the following questions in considering the recognition evidence of the VC in light of the suggestion that she was mistaken in her identification:

- a) **How long did the VC have the Accused under observation?** – The VC indicates that she initially had the Accused under observation for two to three minutes while he touched her vagina and buttocks and the Accused remained in her presence thereafter while he allegedly placed his penis in her anus. The total time being in the estimation of the VC about nine to ten minutes.
- b) **What was the distance that the observation was made from?** – The VC indicated that when she awoke on the night of the 10<sup>th</sup> July 2019, she awoke to the Accused facing her and touching her and he was a ruler length away. This continued for two to three minutes then he turned her over and placed his penis in her anus. There was no significant gap in time between the Accused turning her over and her feeling his penis in her anus.

- c) **What were the lighting conditions like at the time the observations were made?** – The VC indicated that she was able to see the Accused from the lights that came through from the cracks from the upstairs.
- d) **Were there any impediments to the observations made by the VC?** – The VC indicated that there was nothing impeding her view. The Court also had sight of the photograph AR7 (which was also shown to the VC) and there was nothing in the bedroom which in the Court's view could objectively have impeded her initial view of the Accused when he was touching her.
- e) **Had the Accused been known to the VC before?** – The VC testified that she knew the Accused for 4-5 years prior to the incident as he was the boyfriend of her mother and frequently spent time at their home at least two weeks each month. The Accused was also at the home of the VC in the beginning of July 2019. This was not challenged by the Defence.
- f) **How much time elapsed between the original observation and the report made to the police?** – The report was made by the VC and R to the police on the 14<sup>th</sup> July 2019 while this incident is said to have occurred on the 10<sup>th</sup> July 2019. There was therefore a time lapse of roughly four days between the alleged rape and the complaint. This is however in the context that this was not a one off incident but one in a series of nightly incidents alleged by the VC.
- g) **Are there any specific weaknesses in the recognition evidence?** – The Court considers as specific weaknesses the following:
- i. The initial identification was made at night when the lights in the house were off.
  - ii. The identification was made by the VC, a child, who had just been awoken from sleep when she sees the Accused.
  - iii. The source of the lighting in the home came from the street light outside the home and the lights from the neighbour's house.
  - iv. At the time when the Accused is alleged to have placed his penis in the anus of the VC she was laying on her belly and thus not looking directly at her assailant.
- h) **Can potential support be found for the identification evidence of the VC from other evidence in the case?** – The Court considers the following as supportive of the recognition evidence of the VC:

- i. The previous identifications of the Accused by the VC as the person who sexually assaulted her on the 8<sup>th</sup> and 9<sup>th</sup> of July respectively. The Court considers that this lends support to the identification as it shows a pattern of behaviour by the Accused at the same time of the night towards the same VC. It should be noted that this offence allegedly occurred right after the VC was sexually assaulted by the Accused on the 10<sup>th</sup> July 2019.
- ii. R, the mother of the VC, testified that on each night in July 2019 she would lock the door and only she would have access. She further testified that when she went to sleep only her daughters and the Accused would be upstairs.
- iii. The VC also testified that before she went to sleep it was only she, her mother R, her sister B and the Accused that were upstairs.

**[110]** The Court has considered the specific weaknesses in the VC's evidence and finds that they are not so material that they diminish the quality of the VC's recognition evidence. While the lighting conditions were not ideal it must be remembered as with the VC's identification of the Accused for the multiple sexual assaults, this was not a fleeting glance that the VC had of the Accused while he touched her buttocks and vagina before he turned her over but rather a lengthy period of observation for two to three minutes. The Accused then climbed on top of her after turning her over and remained in her presence for a total of nine to ten minutes. The VC was also very familiar with the features of the Accused having been around him for a period of 4-5 years.

**[111]** The Court accepts that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However in these circumstances the Court does not accept that the VC was mistaken and considers that the VC's opportunities for observation of the Accused on each occasion were sufficiently strong to dispel in the mind of this Court the possibility of mistake.

### **The medical evidence**

**[112]** The evidence of the VC finds further support in the mind of the Court when one considers the medical evidence. Dr. Corea was deemed an expert and the Court accordingly reminds itself that it is not bound to accept the opinion of the expert witness and is free to accept or reject the evidence of the expert in coming to any conclusions on the evidence. The Court also reminds itself of the fact that the medical evidence cannot answer the ultimate question in this case which is whether the Accused carnally knew

the VC. Rather the medical evidence goes to the issue of whether there was penetration of the anus as alleged by the VC. The Court also reminds itself that in deciding what weight, if any, to attach to Dr. Corea's evidence, the Court may take into account her qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

**[113]** Dr. Corea indicated that the external anal sphincter was lax and one of the possible causes could have been molestation of the patient. She further indicated that there were several other possible causes such as chronic constipation or a neurological disorder like spina bifida but the patient did not have a neurological disorder and denied having constipation at the time of the examination.

**[114]** The Defence suggested that the failure of Dr. Corea to conduct a rectal examination diminished the probative value of the evidence as the evidence is inconclusive as to whether there was evidence of chronic constipation. The Court cannot agree with this suggestion. There is no evidence before this Court of what utility a rectal examination would have had in determining whether the VC was suffering from chronic constipation at that time. No questions were asked by the Defence of the Doctor as to what utility such a test would have brought. To ask the Court to assume that such a test would have been useful in establishing that the VC suffered from chronic constipation is to invite the Court to speculate, which it will not do, as the Court is not medically trained and such knowledge cannot come from the Court's human experience and common sense.

**[115]** The VC and R both denied that the VC was suffering from chronic constipation at the time of the incident and further Dr. Corea also indicated that there was no visible stool from her visual examination of the VC.

**[116]** The Defence asked the Court to conclude that the fact that there were no external injuries seen by Dr. Corea in her examination meant that penetration did not occur. The Court notes however that Dr. Corea indicated that the presence of injuries would be dependent on the chronicity of the abuse and the force that was used. There was no evidence coming from the VC as to the force that was used. The Court considers that the circumstances suggest that the Accused would not have been too forceful lest he awake the sleeping B and R. The incidents also happened two days apart and while multiple, in the mind of the Court, could not be considered chronic.

**[117]** The Court therefore based on its analysis of the evidence of Dr. Corea finds that there was laxity of the external sphincter of the anus of the VC. The Court further finds that this laxity can be consistent with



penetration. The Court notes that there is no other cause that arises on the evidence as there is no evidence of the VC suffering from chronic constipation. The Court does not consider the absence of injuries, on these particular facts, as indicative of a lack of penetration.

**Is the case for the Crown on Count 2 (Rape of a Child) strong enough to carry a conviction?**

[118] The Court for reasons indicated above accepts, after approaching her evidence with caution, that the VC is honest and reliable when giving her account of the Accused's actions on the 10<sup>th</sup> July, 2019. The Court has approached her evidence with caution as there is an evidential basis for her to be treated as being tainted by an improper motive but the Court is of the opinion that the VC is honest when giving her evidence.

[119] The Court having found that the VC is an honest witness also finds that she is a reliable witness. The Court has considered the VC's account scrutinizing her recognition evidence with caution and the Court is of the opinion that in addition to being an honest witness she is also a reliable witness. The Court has considered the fact of whether she could be honest but mistaken and finds that the circumstances of her recognition of the Accused are sufficient to dispel in the Court's mind, on the Crown's case, the possibility of mistaken recognition.

[120] The Court also accepts the evidence of Dr. Corea and finds that it supports the evidence of the VC

[121] The Court therefore finds that the case for the Crown on Count 2 (Rape of a Child) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises

**Count 3 – Rape of a Child**

[122] The Court approached the evidence of the VC on Count 3 of the indictment with caution, due to its earlier findings on her status as a witness with an improper motive to give evidence, scrutinizing it carefully before deciding whether the VC could be considered honest and reliable in her account and the Court could therefore rely on it. The Court also looked to see whether there is any supporting evidence, although the Court is not duty bound to only accept the evidence of the VC if there is other evidence to corroborate it.

[123] The evidence of the VC on this count is that on the 12<sup>th</sup> of July 2019 she went to sleep at around 8:00 pm and she was awoken sometime thereafter by the Accused touching her vagina and buttocks. When she awoke, he proceeded to take down her underwear and continue to touch her vagina and buttocks. After two to three minutes he then turned her over and inserted his penis into her anus. He then began to move up and down and she felt pain. She didn't say anything to him this time but she tried to kick him while he was on top of her. She could not remember how long he was moving up and down for. He left sometime after she tried to kick him.

[124] The Court does not find the account of the VC to be inherently implausible or illogical for the same reasons that the Court did not find her account of the rape on 10<sup>th</sup> July 2019 implausible. The Court also finds nothing in the demeanour of the witness to make the Court doubt the veracity of her account.

### **The issue of Mistaken Identification**

[125] The Defence through cross examination raised, in addition to the issue of fabrication, the issue of mistaken identity to the VC. The Court, even though this is a case of recognition, therefore must consider the circumstances of the recognition of the Accused as the person who raped the VC on the 12<sup>th</sup> July 2019. The Court must look carefully at the circumstances of the recognition in deciding whether the witness is an honest witness and whether the recognition evidence can be relied on bearing in mind that a mistaken witness can be a convincing one. Further, the Court reminds itself that while recognition may be more reliable than identification of a stranger, even where a witness is purporting to recognise someone whom they know, mistakes in recognition of close friends and relatives are sometimes made.

[126] The Court asked itself the following questions in considering the recognition evidence of the VC in light of the suggestion that she was mistaken in her identification:

- a) **How long did the VC have the Accused under observation?** – The VC indicates that she initially had him under observation for two to three minutes while he touched her vagina and buttocks and the Accused remained in her presence thereafter while he allegedly placed his penis in her anus. While he was touching her she was able to see his whole body for about one minute. The VC is unable to say how long he remained in her presence for.
- b) **What was the distance that the observation was made from?** – The VC indicated that when she awoke on the night of the 12<sup>th</sup> July 2019, she awoke to the Accused touching her and he

turned her over. While he was touching her he was about a ruler length away from her. This continued for two to three minutes then he turned her over and placed his penis in her anus.

- c) **What were the lighting conditions like at the time the observations were made?** – The VC indicated that she was able to see the Accused from the lights that came through from the cracks of the wall.
- d) **Were there any impediments to the observations made by the VC?** – The VC indicated that there was nothing impeding her view. The Court also had sight of the photograph AR7 (which was also shown to the VC) and there was nothing in the bedroom which in the Court's view could objectively have impeded her view.
- e) **Had the Accused been known to the VC before?** – The VC testified that she knew the Accused for 4-5 years prior to the incident. This was not challenged by the Defence.
- f) **How much time elapsed between the original observation and the report made to the police?** – The report was made by the VC and R to the police on the 14<sup>th</sup> July 2019 while this incident is said to have occurred on the 12<sup>th</sup> July 2019. There was therefore a time lapse of roughly two days between the alleged rape and the complaint. This is however in the context that this was not a one off incident but one in a series of nightly incidents alleged by the VC.
- g) **Are there any specific weaknesses in the recognition evidence?** – The Court considers as specific weaknesses the following:
  - i. The identification was made at night when the lights in the house were off
  - ii. The identification was made by the VC, a child, who had just been awoken from sleep when she sees the Accused
  - iii. The source of the lighting in the home came from the street light outside the home and the lights from the neighbour's house.
  - iv. At the time that the Accused is alleged to have placed his penis on her anus the VC did not have the Accused under observation as she was turned over.

h) **Can potential support be found for the identification evidence of the VC from other evidence in the case?** – The Court considers the following as supportive of the recognition evidence of the VC:

- i. The previous identifications of the Accused by the VC as the person who sexually assaulted her on the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> July 2019 respectively.
- ii. The previous identification of the Accused by the VC as the person who placed his penis in her anus on the 10<sup>th</sup> July 2019.
- iii. R, the mother of the VC testified that on each night in July 2019 she would lock the door and only she would have access. She further testified that when she went to sleep only her daughters and the Accused would be upstairs.
- iv. The VC also testified that before she went to sleep it was only she, her mother R, her sister B and the Accused that were upstairs.

**[127]** The Court has considered the specific weaknesses in the VC's evidence and finds that they are not so material that they diminish the quality of the VC's recognition evidence. While the lighting conditions were not ideal it must be remembered as with the VC's recognition of the Accused for the multiple sexual assaults and the previous incident of rape, this was not a fleeting glance that the VC had of the Accused while he touched her buttocks and vagina before he turned her over but rather a lengthy period of observation for two to three minutes. The Accused immediately climbed on top of her after turning her over and placed his penis in her anus. There was no significant gap in time between the Accused turning the VC over and the insertion of a penis in her anus. The VC was also very familiar with the features of the Accused having been around him for a period of 4-5 years.

**[128]** The Court accepts that an honest witness may be mistaken and even in cases of recognition mistakes can be made in the recognition of close friends and relatives. However in these circumstances the Court does not accept that the VC was mistaken and considers that the VC's opportunities for observation of the Accused on each occasion were sufficiently strong to dispel in the mind of this Court the possibility of mistake.

**[129]** The Court considers that the circumstances of the identification of the Accused by the VC on the night of the 12<sup>th</sup> July 2019 are sufficient to dispel in the mind of the Court the possibility of mistaken identification.

[130] The Court further finds that the evidence of the VC on this Count is also supported by the medical evidence of Dr. Corea. The Court is therefore of the opinion that the medical evidence supports the VC's account that she was sexually penetrated.

**Is the evidence for the Crown in Count 3 (Rape of a Child) strong enough to carry a conviction?**

[131] The Court after approaching the VC's evidence with caution, for reasons indicated above, accepts that the VC is honest and reliable when giving her account of the Accused's actions on the 12<sup>th</sup> July, 2019. The Court has approached her evidence with caution but the Court is of the opinion that the VC is honest when giving her evidence.

[132] The Court having found that the VC is an honest witness also finds that she is a reliable witness on this Count as well. The Court has considered the VC's account scrutinizing her recognition evidence with caution and the Court is firmly of the opinion that in addition to being an honest witness she is also a reliable witness. The Court has considered the fact of whether she could be honest but mistaken and finds that the circumstances of her recognition of the Accused are sufficient to dispel in the Court's mind, on the Crown's case, the possibility of mistaken recognition.

[133] The Court also finds the evidence of Dr. Corea that the anal laxity which the VC presented with upon examination is consistent with the possibility of penetration of the VC's anus. The Court considers this supportive of the VC's testimony that the Accused placed his penis in her anus on the 12<sup>th</sup> July 2019.

[134] The Court therefore finds that the case for the Crown on Count 3 (Rape of a Child) is strong enough to carry a conviction and accordingly will now proceed to consider the case for the Defence to see if any reasonable doubt arises.

**The Case for the Defence**

[135] The Accused opted to give a statement from the dock and not to call witnesses. The Court reminds itself that this is the Accused's right however the fact that he has not been cross examined may make his dock statement less cogent than sworn evidence. However it is material which may be considered and may show the evidence in a different light.

[136] The Court has considered the statement from the dock and gives no weight to it at all. The statement from the dock consists of a bare denial and an attempt to paint the VC as a witness tainted by her feelings

of anger towards the relationship the Accused shared with R. The Court as stated above accepts that there is an evidential basis for treating the VC as a witness who may have an improper motive to make the allegations against the Accused. Equally however the Court has carefully scrutinized the case for the Crown and the VC's evidence and found her testimony with respect to the actions of the Accused to be honest and reliable.

[137] The Court further reminds itself that there is no burden of proof on the Accused in these proceedings. However, there was no effective challenge to the evidence of R neither through the dock statement nor through cross examination of R. R's evidence as to the nature of the relationship that she had with the Accused and the finding of the Accused in a somewhat compromising position with the VC remained strong. The case for the Accused remained throughout that R and himself enjoyed an excellent relationship and the cause of the friction was not R but her children. The implication therefore being that despite their excellent relationship R is simply joining with the VC's fabricated story. The Court finds that aspect of the Defence illogical and implausible.

[138] The Court also notes that even with respect to R finding him in the bed of the VC, it was not suggested to R that the Accused was not on the bed but rather when she found him he was putting on his socks.

[139] The Accused has led evidence that he has no previous convictions and this means that the Accused is entitled to the benefit of a Good Character Direction.

[140] Good character of the Accused can be relevant in two ways: it can go to determinations of credibility and propensity, both of which could be useful in determining guilt or innocence. Good character influences credibility by increasing the likelihood that the Accused will be believed and it influences propensity by making it less likely that the Accused acted as alleged. The standard Good Character direction therefore bears two limbs, one relevant to credibility and the other to propensity. A good character is not a defence and the particular weight to be given to the character of the Accused is a matter for the tribunal of fact to determine when considering the evidence. The content of the direction however must be tailored to the particular facts at bar.

[141] In the matter at bar, the Accused has elected to give a dock statement which is his right. The election by the Accused however means, pursuant to the judgement of the CCJ in **August v R**<sup>20</sup>, the Accused is entitled only to the propensity limb of the Good Character direction. The Court therefore

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<sup>20</sup> Ibid

reminds itself that the fact that the accused has no previous convictions makes it less likely that he has acted as alleged in sexually assaulting the VC and raping the VC.

[142] The Court has looked at the allegations of the VC in light of the good character of the Accused taking into account that his good character makes it less likely that he acted as alleged. However, considering the strength of the evidence of the VC and R, the Court accords little weight to the good character of the Accused.

[143] Therefore In light of the strength of the evidence from the Crown particularly the evidence of the VC and R the Court rejects the case for the Accused which consisted of his unsworn statement from the dock and his previous Good Character. The Court is fortified in this approach by the advice of the Privy Council in **Bally Sheng Balson v The Queen**.

## **The Court's findings**

### **Count 1**

[144] Having now considered the totality of the evidence. The Court is satisfied so that it is sure:

- a) The Accused touched the buttocks and vagina of the VC on six different occasion particularly July 8<sup>th</sup> 2019, July 9<sup>th</sup> 2019, July 10<sup>th</sup> 2019, July 11<sup>th</sup> 2019, July 12<sup>th</sup> 2019 and July 13<sup>th</sup> 2019. The Court accepts the VC's evidence in this regard.
- b) The touching was intentional: The Court accepts as true the evidence of the VC that the Accused woke her up while touching her and when she was awake, took down her underwear so that he could touch her vagina and buttocks. The Accused clearly intended to touch the VC's buttocks and vagina on each occasion.
- c) The touching was sexual in nature: The Court accepts the evidence of the VC that he touched her vagina and buttocks with his hands on five occasions for two to three minutes. Further on the last occasion he additionally got on top of her and rubbed his penis on her vagina for about 4-5 minutes.
- d) The Accused knew the VC was not consenting or had no reasonable belief in her consent: The Accused knew that the VC was not consenting because when the touching was initially started on each occasion she was asleep. Further on the first occasion she kicked him so that he would

stop and continued kicking him on other occasions. On the 11<sup>th</sup> of July 2019 she even says to him to go. The Court also accepts the evidence of the threat made by the Accused and finds that the issuance of the threat by the Accused shows that he knew the VC was not consenting when he assaulted her and therefore the threat was issued to keep her quiet and compliant.

[145] The Court therefore finds the Accused guilty of Count 1 of the indictment.

### **Count 2**

[146] Having looked at the totality of the evidence. The Court is satisfied so that it is sure:

- a) The Accused carnally knew the VC: the Court accepts the evidence of the VC on this Count that the Accused after sexually assaulting her on the 10<sup>th</sup> July 2019, turned her over and placed his penis into her anus.
- b) The penetration was done without the consent of the VC or without a reasonable belief that the VC was consenting: The Court accepts the evidence of the VC that at the time the sexual assault by the Accused was initiated she was asleep and when he inserted his penis into her anus she told him to stop and he continued thereafter. The Court also accepts that the VC was kicking the Accused while his penis was inside of her anus in an attempt to get him off.
- c) The VC was under the age of sixteen years: The Court accepts the evidence of R, the VC, W. Sgt Jacobs and the documentary evidence of the Birth Certificate which establish that the VC was nine years of age at the time of the incident.

[147] The Court therefore finds the Accused guilty of Count 2 of the Indictment

### **Count 3**

[148] Having looked at the totality of the evidence. The Court is satisfied so that it is sure:

- a) The Accused carnally knew the VC: the Court accepts the evidence of the VC on this Count that the Accused after sexually assaulting her on the 12<sup>th</sup> July 2019, turned her over and placed his penis into her anus.
- b) The penetration was done without the consent of the VC or without a reasonable belief that the VC was consenting: The Court accepts the evidence of the VC that at the time the attack by the Accused was initiated she was asleep and when he inserted his penis into her anus she tried to



kick him and he continued thereafter. While the VC did not say stop to him on this occasion, the surrounding circumstances particularly the struggle by the VC to get him to stop indicate clearly that the VC was not consenting.

- c) The VC was under the age of sixteen years: The Court accepts the evidence of R, the VC, W. Sgt Jacobs and the documentary evidence of the Birth Certificate which show that the VC was nine years of age at the time of the incident.

**[149]** The Court therefore finds the Accused guilty of Count 3 of the Indictment.

### **Disposition**

**[150]** The Court finds Hildo Pech guilty of Sexual Assault and Rape of a Child under 16 as charged in the indictment. The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP**<sup>21</sup>.

**Raphael Morgan**  
**High Court Judge**  
**Dated 26<sup>th</sup> June 2024**

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<sup>21</sup> [2020] CCJ 7 (AJ) GY at para 32.