IN THE SUPREME COURT OF BELIZE, A.D 2022

(CRIMINAL JURISDICTION)

Central Division

Indictment C29/2018

THE QUEEN

V

PAUL JEX JR

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RAPE

BEFORE the Hon. Mr. Justice Ricardo Sandcroft

Appearances: Mr. Riis Cattouse along with Mr. Robert Lord, both Crown Counsel for the Crown

Mrs. Kia-Marie Diaz-Tillett, for the Accused

Delivered on: July 7, 2022

JUDGE ALONE

Facts

1. The complainant, Ms. Jesenia Orellana testified that she was at Burrell Boom at Mr. Sarkis Abou-Nehra's. That she was in her house at the back of Mr. Abou-Nehra's house. It was about 6:00 in the evening when she heard some dogs barking, so her husband went out to see why they were barking.
2. He had been outside for over an hour when Ms. Orellana went to see what was happening. She did not see anything, so she went back inside and while there, she read a text on the phone.
3. After reading the text, she went back outside and called out her husband's name and he answered. She saw a shadow and then a male ran up to her.
4. The man put a knife around her neck and then another person got her five-year old. Jesenia Orellana also testified that she had her one-year-old in her arms.
5. They took them to the garage. They told them to kneel and then afterwards they dragged her husband to the garage.
6. Afterwards they took them from the garage and they took her and her one-year-old to their house at the back of Mr. Sarkis Abou-Nehra's house. This person put her to sit on the bed.
7. He started to search the house when he found a black box that had $388.00, which he took.

8. He then showed her the cell phone and informed her that someone was calling. The complainant further testified that the call was from Mr. Abou Nehra's son who was calling to find out if anything was happening. The complainant told him that nothing was happening. Meanwhile, one of the intruders had a knife around her neck, so she told Mr. Abou Nehra's son that they were at church.
9. After the phone call ended, someone brought in her husband and her five-year-old. Then they told her and her husband that they were ready to go into the big house.
10. Mr. Abou Nehra's house was to the side. They put Ms. Orellana to sit on a sofa along with her five-year-old and her one-year-old. After she saw them rummaging through the house, she saw them taking things from all around the house. Then, they opened up Mr. Sarkis Abou Nehra's bedroom.
11. Jesenia Orellana testified that she saw them dragging things from his room. After that one of the persons came up to her and asked her if she knew the password for the safe.
12. The complainant also testified that apart from her and her family, six other persons entered Mr. Sarkis Abou Nehra's house. Two persons came out with three guns from Mr. Abou Nehra's bedroom; one of the persons sat on a seat and pointed two of the guns at them.

13. After that, one of the persons came up to her and put the gun to her. He told her to go upstairs. She did not want to go upstairs so he told her that he was going to kill her one-year-old if she didn't go upstairs. So, she went upstairs while he pointed the gun at her back.

14. When they got upstairs, they went into the left room. When they went inside, he locked the door. This person told her to lay the baby on the bed, but the baby started to cry. She picked her up and put her back to lay down. This person got the gun and pointed it to her one-year-old then told her that he was going to kill her one-year-old if she did not have sex with him. This person forced her to take down her underwear, after she took it down, he forced her, telling her to lie down, open up her legs and then he forced her to have sex with him. He put his penis in her vagina, then he started to move up and down. This lasted for about 15 minutes then he took out his penis out of her vagina and came on her stomach.

15. Jesenia Orellana also testified that after the sexual assault, she asked him if she could go and clean up herself. She went into the bathroom leading from that bedroom. Ms. Orellana got some brown and white towel and cleaned up where he came on her stomach. After that, she went back to put on her underwear when he used the same brown and white towel and cleaned his penis and his leg. He put it on the table beside the bed.

16. That after the sexual assault, Jesenia Orellana went back downstairs and the same man told her that he was going to tell the rest of the persons to

make no one else touch her or he was going to kill them. So, he put her to sit on the sofa downstairs.

17. She saw the rest of the persons stealing from the house. They had TV's as well as the DVD camera system. They put everything outside and then when a car came, they packed everything they were stealing from the house into it. Then they left.

18. The complainant further testified that the person who assaulted her was about 6 feet, that she was not too good with height, but he had his hair low, he had brown eyes, and he was light brown in complexion. He had a tattoo on the inside of his right hand.

19. The complainant also testified that from the moment she first saw him to when she last saw him, in her view was for about seven (7) to eight (8) hours. Jesenia Orellana further testified that the man had on a mask, but that whilst he was having sex with her, he took it off for a little while.

20. The only light upstairs came from outside while all the lights were on downstairs.

Discussions and Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. In this case, the defendant, Paul Jex Jr., is represented by Counsel. This fact should not affect my decision in any way. The defendant has the right to represent himself, and he has chosen not to exercise that right.

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

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

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

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

37. There has been some evidence that the defendant loan out his girlfriend's car to some friends and they returned the following day at the said location with some items he believed to have been stolen and that Buller and the other three male persons were armed with guns.

38. This evidence does not prove guilt. A person may associate with persons of questionable character for many reasons but that does not mean the person is guilty by association.

39. I must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

40. The prosecutor does not have to prove that the defendant had a reason to commit the alleged crime. He only has to show that the defendant actually committed the crime and that he meant to do so.

41. The defendant is charged with only one crime. This criminal act is that the defendant, Paul Jex Jr., is said to have had raped the Complainant, Jesenia Orellana who did not consent to the penetration of her vagina at the time of the commission of the offence.

42. The prosecutor says that this crime took place in the home of Mr. Abou Nehr's somewhere in Burrell Boom Village. The prosecutor also says that the crime took place on or about [the 3rd of December 2015]. The prosecutor does not have to prove that the crime was committed on that exact date, but only that it was committed reasonably near to that date.

43. I should not decide this case based on which side presented more witnesses. Instead, I should think about each witness and each piece of evidence and whether I believe them. Then I must decide whether the testimony and evidence I believe proves beyond a reasonable doubt that the defendant is guilty.

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

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

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

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

48. First, that the defendant engaged in an unlawful sexual act that involved: entry into the Complainant's, Ms. Jesenia Orellana's genital opening/vagina by the defendant's penis. Any entry, no matter how

slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

49. That the complainant, Ms. Jesenia Orellana, did not consent at the time of the alleged act of penetration.

50. To prove this charge, it is not necessary that there be evidence other than the testimony of the Complainant, Ms. Jesenia Orellana, if that testimony proves guilt beyond a reasonable doubt.

51. To prove this charge, the prosecutor does not have to show that the complainant, Ms. Jesenia Orellana resisted the defendant.

52. If I find that the defendant is guilty of rape, then I must decide whether the prosecutor has proved each of the following elements beyond a reasonable doubt: First, that the complainant, Ms. Jesenia Orellana did not consent to the act of penetration to her vagina at the time of the act, and, second, that the defendant was either intentional or reckless at the time when the offense occurred.

53. The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The defendant begins with a clean slate. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify.

54. The Prosecution has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, I must acquit the defendant.

While the prosecution’s burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the prosecution’s proof exclude any “reasonable doubt” concerning the defendant’s guilt.

55. A “reasonable doubt” is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of my own affairs.

56. The charge is a charge of rape of a person and alleges a contravention of the section of the Criminal Code referred to in the charge. The crime of rape consists of the intentional or reckless penetration, to any extent, by the accused's penis of the person's vagina or anus.

57. For the avoidance of doubt, it is a defence to this charge that the accused believed that the person had consented. Consent is relevant.

58. So, for the Crown to prove this charge, it must show:

1. intentional penile penetration by the accused
2. the accused was intentional or reckless at the time of penetration
3. the complainant did not consent to the act of penetration at the time.

59. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call my attention to certain facts or inferences that might otherwise escape my

notice. In the final analysis, however, it is my own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon me.

60. In considering the evidence, I am permitted to draw such reasonable inferences from the testimony and exhibits as I feel are justified in the light of common experience. In other words, I may make deductions and reach conclusions that reason, and common sense lead me to draw from the facts which have been established by the evidence.

61. The law makes no distinction between the weights to be given either direct or circumstantial evidence. But the law requires that I, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of the defendant beyond a reasonable doubt before I can find him guilty.

62. I remind myself that it is my job to decide whether the prosecution has proved the guilt of the defendant beyond a reasonable doubt. In doing so, I must consider all of the evidence. This does not mean, however, that I must accept all of the evidence as true or accurate.

63. My job is to think about the testimony of each witness I have heard and decide how much I believe of what each witness had to say. In making up my mind and reaching a verdict, I do not make any decisions simply because there were more witnesses on one side than on the other. I do not reach a conclusion on a particular point just because there were more

witnesses testifying for one side on that point. I will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

64. I am the sole judge of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of my job will be making judgments about the testimony of the witnesses [including the defendant] who gave a dock statement in this case. I should decide whether I believe all, some part, or none of what each person had to say, and how important that testimony was.

65. In evaluating the identification testimony of a witness, I should consider all of the factors already mentioned concerning my assessment of the credibility of any witness in general and should also consider whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. I may consider all matters, including the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

66. I may also consider the circumstances surrounding the identification itself including, for example, the manner in which the defendant was presented to the witness for identification and the length of time that

elapsed between the incident in question and the next opportunity the witness had to observe the defendant.

67. If, after examining all of the testimony and evidence in the case, I have a reasonable doubt as to the identity of the defendant as the perpetrator of the offense charged, I must find the defendant not guilty.

68. In **D**[1] the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that:

    (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response;

    (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and

    (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.

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

69. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in Miller[2]

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

70. In Miller, the Court of Appeal endorsed the following passage from the 2010 Bench book "Directing the Jury":

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

71. There is a real danger that I will be invited by advocates to make unwarranted assumptions. It is important that I should alert myself to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. I must not give any impression of supporting

[2] [2010] EWCA Crim 1578.

a particular conclusion but should warn myself against approaching the evidence with any preconceived assumptions.

72. I have been asked to find that the Complainant's account is true because she has been consistent in what she said to (e.g. the police) and in her evidence about this alleged incident. The mere fact that a person gives a consistent account about an event does not necessarily mean that the account must be true, any more than the fact that a person who gives inconsistent accounts must mean that the event did not happen. In deciding whether or not the Complainant's account is true I should look at all of the evidence. If, having done so, I am sure that the Complainant's account is true then I am entitled to rely on it. If I am not sure that it is true, or sure that it is untrue, then I cannot rely on it.

73. I have been reminded that when the Complainant gave evidence she appeared completely calm and gave her account in a matter-of-fact way and by showing some emotions. It is entirely for me to decide what I make of the Complainant's evidence but it would be wrong to assume that the manner in which she appeared to give evidence is an indication of whether or not it is true.

74. This is because experience has shown that people react to situations and cope with them in different ways. Some people who have experienced an incident of the kind complained of in this case, when they have to speak about it, show obvious signs of emotion and distress, whereas others

show no emotion at all. Consequently, the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

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

> **Rape, contrary to section 46 of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2011.**

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

77. It is pertinent at this stage to discuss corroboration in relation to proof in criminal trials in general and sexual offences in particular. I shall thereafter examine the evidence to see if, in the absence of any other evidence, the testimony of the victim was corroborated in the legal sense. There has never been a general rule in this country that a court in a criminal trial cannot convict an accused person on only the testimony of

one witness if that witness is found to be credible and the evidence of the accused does not raise a reasonable doubt as to his guilt.

78. The English rules of evidence which are applicable in Belize required that in trials for sexual offences the judge must direct himself and the jury that corroboration of the victim's evidence was eminently desirable in order to convict an accused person. See the case of **Reekie v The Queen** (1952) 14 WACA 501. Rationale for this rule was given in the English case of **R. v Henry and Manning** (1969) 53 Crim App Rep 150 where Salmon L.J said as follows at page 153 of the Report:

> **"What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."**

79. If the caution on the need for corroboration was not noted by the judge or properly given to the jury in the judges summing up, a conviction could be set aside on an appeal on that ground. However, it must quickly be added that failure to direct a jury on the need for corroboration was not a fatal error that automatically resulted in a conviction being overturned on appeal. In **Reekie v The Queen (supra)** , a sexual offence case, Foster-Sutton P, relying on section 4(1) of the West African Court of Appeal (Criminal Cases) Ordinance (Cap 265) and the English Criminal Appeal

Act, 1907, at page 502-503 of the Report adopted the following statement of the law in the case of **Rex v Cohen and Bateman**, 2 Cr. App. R., 197 by Channel J at page 207; " Taking section 4 with its proviso, the effect is that if there is a wrong decision on any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown has to show that on the right direction, the jury must have come to the same conclusion."

80. A court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole of the evidence of that witness and other evidence on record.

81. This is a sexual case. And the experience of the Court has shown that people who say that a sexual offence has been committed against them, sometimes and for a variety of reasons, tell lies. Such false allegations are easy to make and frequently difficult to challenge. So, it is dangerous to convict, on the evidence of the Complainant alone, unless it is corroborated. That is, independently confirmed, by other evidence. Corroboration is independent evidence. That is evidence, that does not come from the Complainant, which confirms in some important respect, not only evidence that the crime has been committed, but that it was the Accused, who committed the crime. When I said confirms in some important respect, I do not mean that it is necessary, that there should be independent evidence of everything the Complainant has said. My task is

to point out the evidence which, if I accept it, is capable of independently confirming the evidence of the Virtual Complainant. However, it is up to me to decide whether it does in fact provide independent confirmation. Equally, if I find that, there is no corroboration, and providing I bear in mind the danger of so convicting without it, I may rely on the evidence of [the VC] if I am satisfied, that she is telling the truth. So, what evidence is there, in this case, which I could find, to constitute corroboration? Remember, there are three elements that we are dealing with in unlawful sexual intercourse: sexual intercourse; that the Complainant was over the age of sixteen years old; and the identity of the Perpetrator.

82. I am cognizant that as the law presently stands there is no requirement for the trial judge to give a warning as to corroboration. The English case of **R v. Makanjuola; R v. Easton** [1995] 1 WLR 1348 established guidelines as to how trial judges should now deal with warnings to be given in criminal trials. Delivering the judgment of the Court in **Makanjuola**, Lord Taylor of Gosforth C.J., broadly explained how the trial judge's discretion ought to be exercised at page 1351 of the judgment:

> **"The circumstances and evidence in criminal cases are infinitely variable and it is impossible to characterize how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend**

> **upon the content and manner of the witness' evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness' evidence. We stress that these observations are merely illustrative of some, not all, 11 of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has had the advantage of assessing the manner of a witness' evidence as well as its content."**

83. There is no statutory equivalent of these provisions in Belize. However, in **R v Gilbert** [2002] UKPC 17, a decision on appeal from the Court of Appeal of Grenada, the Privy Council abolished the rule of practice requiring a mandatory corroboration warning to the jury in respect of the evidence of complainants in sexual cases. Delivering the judgment of the Board, Lord Hobhouse (at para. 16) described the belief that, regardless of the circumstances, the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated as "discredited" and "not conducive to the fairness of the trial nor to the safety of the verdict". Thus in that case, in which the only issue on a charge of rape was identification (the appellant having set up an alibi), it was held that the trial judge had been correct to approach the matter on

the basis that a Turnbull warning (**R v Turnbull** [1977] QB 224) was all that was needed and that it was not necessary to give an additional warning on the danger of acting on the uncorroborated evidence of the complainant. In arriving at this conclusion, the Board adopted the approach of the English Court of Appeal in **R v Chance** [1988] QB 932, a decision which predated the formal abolition in England and Wales of the need for a mandatory corroboration warning in sexual cases.

84. In these circumstances it is therefore now a matter entirely within the discretion of the trial judge to determine whether, in the light of the content and manner of the witness' evidence, the circumstances of the case and the issues raised, to give any warning at all; and, if so, in what terms. The salient elements of corroboration in its traditional fashion which dates back to the case of **R v Bakersville** [1916] 2 KB 658 where Lord Reading CJ explained corroboration as follows:

> **"…independent testimony which affects the accused by connecting or tending to connect him with the crime… [I]t must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it." [Emphasis added]**

85. I found the Complainant in this case very credible in the evidence she gave. Although her evidence requires no corroboration, many independent strands of evidence adduced by the prosecution further bolster her narrative of the events.

86. It is not necessary to find corroboration. It is desirable if you can find corroboration or evidence. Corroboration means evidence independent of that witness' evidence - evidence to support what she is saying. It is desirable to find that but it is not an essentiality, it is not the condition. But the law says if you can look for other evidence to support her evidence then that may help you in deciding whether you accept her evidence because of the dangerous nature of it because Ms. Jesenia Orellana is the only witness.

87. Jesenia Orellana also testified that after the sexual assault, she asked him if she could go and clean up herself. So she went into the bathroom, in the same bedroom and got some brown and white towel and cleaned up where he came on her stomach. And then after that, she went back to put on her underwear when this same person got the same brown and white towel and cleaned his penis and his leg. He put it on the table beside the bed.

88. Now, as I've said, corroboration means independent evidence from that witness' evidence. It may be direct evidence or it may be circumstantial evidence which does not come from the witness but which confirms in some material way not only the evidence that the crime has been committed but also that the accused committed it. So, I have to be very careful with Ms. Jesenia Orellana's evidence. But again I should take care before convicting based on the evidence of a single witness. That is

the general rule. However, if after I have listened to Ms. Jesenia Orellana's evidence in this Court, I am sure that she recounted what happened to her and that she told me she was sure that the person who raped her was Paul Jex Jr. and if I am satisfied that when she said all this from the witness stand she was telling me the truth then I am entitled to convict the accused for the offence. So, irrespective, of whether there was corroborative evidence or not if I listen to Ms. Jesenia Orellana's evidence and I warn myself of the dangers of convicting on her evidence alone, in that she may be telling lies or trying to implicate somebody; if having given myself all those warnings, gone through that mental exercise, if I am satisfied with her story so that it makes me sure in my mind and I have no reasonable doubts in my mind, I can convict on her evidence alone. If I find corroborative evidence or evidence from independent witnesses, sources, that support her story, it even makes it stronger for me to accept her story.

89. But the law is saying I can convict on her evidence alone having warned myself of the dangers and having satisfied myself that despite those dangers in convicting on her evidence as the single witness, I am sure that she's telling the truth. Once I make that determination I can find him guilty based on her evidence alone in this case.

90. However, there is corroborative evidence in the form of DNA evidence taken from a towel found at the alleged crime scene:

Q9 16-01110 Towel from scene

Samples were collected from possible stains on this item designated as "A", "C", "D", "E","F", "G", "H", "T", "J", "K", "L" and "M".

Stains designated "A" and "B" Sperm fraction (DLI sample 16-01110.01 SF):

The DNA profile obtained from this sample indicates one male contributor and matches the DNA profile obtained from Paul Jex. The chance that an unrelated person, chosen at random from the general population, would match this DNA profile is approximately 1 in every 4.1 septillion individuals.

Jessena Orellano, Sheldon Grinage, Brandon Baptist, Jerson Grinage, John Grinage, Tyrone Meighan and Randolph Coleman are excluded as contributors to this DNA profile.

91. **Stains designated "A" and "B" Cell fraction (DL1 Sample 16-01110.02 CF)**

The DNA profile obtained from this sample indicates one male contributor and matches the DNA profile obtained from Paul Jex. The chance that an unrelated person, chosen at random from the general population, would match this DNA profile is approximately 1 in every 4.1 septillion individuals.

Jessena Orellano, Sheldon Grinage, Brandon Baptist, Jerson Grinage, John Grinage, Tyrone Meighan and Randolph Coleman are excluded as contributors to this DNA profile.

92. **Stains designated "C", "D" and "E" Sperm fraction (DL1 sample 16-01110.03 SF):**

The DNA profile obtained from this sample indicates one male contributor and matches the DNA profile obtained from Paul Jex. The chance that an unrelated person, chosen at random from the general population, would match this DNA profile is approximately 1 in every 4.1 septillion individuals.

Jessena Orellano, Sheldon Grinage, Brandon Baptist, Jerson Grinage, John Grinage, Tyrone Meighan and Randolph Coleman are excluded as contributors to this DNA profile.

93. **Stains designated "C", "D" and "E" Cell fraction (DL1 sample 16-01110.04 CF):**

The DNA profile obtained from this sample indicates a mixture of two individuals with at least one male contributor. Jessena Orellano and Paul Jex cannot be excluded as contributors to this mixed DNA profile. The chance that an unrelated person, chosen at random from the general population would be included as a contributor to this mix DNA profile is approximately 1 in every 120 million individuals.

Brandon Baptist, Sheldon Grinage, Jerson Grinage, John Grinage, Tyrone Meighan and Randolph Coleman are excluded as contributors to this mixed DNA profile.

94. In my determination of whether Ms. Jesenia Orellana told me the truth or whether she's credible or reliable, I am entitled to examine the evidence lead [sic] by the other witnesses to see if there are major consistencies with her evidence and I may use the consistencies in which I find in the

evidence of the other witnesses in my assessment of Ms. Jesenia Orellana's credibility or reliability.

95. While it is true that different motives may exist for laying false charges, this surely applies to any offence and not only to offences of a sexual nature. Hence one can speculate about motives of complainants in cases such as rape even without any evidence to suggest hidden motives. The question whether such hidden motive will be found by the trial court would depend, it seems to me, to a very large extent upon the fecundity of the presiding officer's imagination.

96. Sexual acts - Because of distinctive considerations, a peculiar cautionary rule applies in the case of alleged sexual offences. Complaints of a sexual nature are distinguished by several unique characteristics which distinguish such offences from other offences against the person. Sexual offences, being inherently intimate, normally take place in seclusion; consequently, direct corroboration is exceptional. Unlike the case of most other impairments of the person, there often are no recognizable effects of such actions. Even those which are recognizable are often just as reconcilable with participation with consent, as participation obtained by force. As in the case of an accomplice, the participant in an alleged sexual offence is obviously also extraordinarily capable of bending the truth without it being possible to detect the distortion. Allegations of sexual

crimes are consequently not only easily made but often difficult to counter.

97. The problem does not only lie with malicious incrimination. The human sexual urge is by its very nature irrational and are often distinguished by deep-seated emotions and passions of which the person himself/herself is unaware; therefore, the versions of the participants are afterwards often unreliable without them being aware of it; Moreover, judicial credibility findings and weighing up of probabilities by Courts are in such instances more fallible than ever. Rational criteria can only be applied to irrational material with great circumspection. When you deal with crimes against women, particularly in tradition-bound communities' cultural beliefs (e.g., that the male person must be seen as the 'hunter) often plays an unexpressed role which should not be underestimated. External factors such as current moral norms or communal or family sanctions often play a role which makes the function of the judes facti more difficult. Known internal factors such as feelings of guilt, shame, disappointment or frustration is even more difficult to establish or to evaluate. Furthermore, experience has taught that there are sometimes psychosexual factors which even common sense cannot detect. Our practice insists that the judicial officer who has to decide the facts, must at all times be aware of the problematic nature of this type of case and that must be recognizable from the evaluation by the said judicial officer of the facts of the case that

he/she was aware of the said problematic nature of the case and duly considered it. (**R v Rautenbach** 1949 1 SA 135 (A) 143; **R v W** 1949 3 SA 772 (A); **R v D and Others** 1951 4 SA 450 (A) 456; **R v J** supra 92A-D; **S v Snvman** 1968 2 SA 582 (A) 585 C-G; **S. v Balhuber** 1987 1 PH H22 (A), which is found more fully reported in **S v F** 1989 3 SA 847 (A) 852H-855B; **S v S** 1990 1 SASV 5 (A) 8). There appears two illuminating quotations from Glanville Williams The Proof of Guilt 3 rd. Ed., 158 - 159 en 160.

98. The adjudicator of the facts must throughout be cautious of the special problems in this type of case and that it must be clear from the Court's evaluation of the facts that the evidence was approached and considered in this manner.

99. Unlike an accomplice in a criminal trial, a complainant in a sexual case is not ex hypothesi a criminal. Nevertheless, in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for a convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires –

(a) the recognition by the Court of the inherent danger aforesaid; and

(b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness... Satisfaction of (a) and (b) will not per se warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt; and this depends upon an appraisal of the totality of the evidence and the degree of safeguard aforesaid... In this connection I respectfully agree with the observations of Macdonald AJP, in the Southern Rhodesian Appellate Division case of **R v I** 1966 (1) SA 88 at 90, 'to the effect that, while there is always need for special caution in scrutinizing and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense.'

100. The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on 'collective wisdom and experience'. This was also the justification, before the reform of the

law, in the UK (see **R v Hester** 1973 AC 296 at 309; **Director of Public Prosecutions v Kilbourne** [1973] AC 729 at 739 et seq.). This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? whose experience? What proof is there of the assumptions underlying the rule?

101. The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses. An English Law Commission Working Paper (No 115, 57-58) also found no evidence to substantiate the cliche that the danger of false accusations is likely to exist merely because of the sexual character of the charge, and the Supreme Court of California, in **P v Rincon - Pineda** (14 Cal 3d 864), despite a detailed examination of empirical data, found no evidence that complainants in sexual cases are more untruthful than complainants in other cases. It concluded that the rule was one without a foundation; that it was unwarranted by law of reason; that it discriminates against women, denies them equal protection of the law and assists in the brutalization of rape victims by providing an unequal balance between their rights and those of the accused.

102. The oft quoted statement by Lord Hale CJ in the seventeenth century that it is easy to bring a charge of rape (and difficult to refute it) is, with respect, insupportable to some extent.

103. Few things may be more difficult and humiliating for a women than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market; and many husbands turn their backs on a 'soiled' wife.

104. Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

105. Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another, without consent, it must be buttressed that the victim does not experience rape as being sexual at all.

The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack"[3] and "as a moment of immense powerlessness and degradation."[4]

106. In formulating my approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the Court of Appeal in **R v Makaniuola, R v Easton** [1995] 3 All ER 730 CA), a decision given after the legislative abrogation of the cautionary rule in England. Although the guidelines in that judgment were developed with a jury system in mind, the same approach, mutatis mutandis, is applicable to our law.

> **At 732f-733a Lord Taylor CJ stated:**
> **'Given that the requirement of a corroboration direction is abrogated in the terms of s 32 (1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend**

[3] Hall "Rape: The Politics of Definition" **(1988) 105 SALJ 67** at 73.
[4] Modiri above n 39 at 145.

upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.'

107. The principles relating to a fair trial, such as the burden on the prosecution to prove the case against an accused beyond reasonable doubt, relating to the evidence of single witnesses are sufficient to ensure that an innocent accused shall not be convicted.

108. The additional burden imposed by the cautionary rules on alleged victims may adversely infringe on the fundamental rights and interests of victims which, include a fair trial also in regard to their rights and interests. The Courts also have a constitutional duty to protect such rights and interests. In this regard the Courts are also required to consider and give some weight to the contemporary norms, views and opinions of

Belizean society. So e.g. the Courts must take into consideration that serious crime is prevalent in Belize, if not escalating. Society is outraged by this phenomenon. Many Belizeans believe that the Courts among others, overemphasise the rights of the perpetrators of crime and under-emphasize those of the victims, including those of the women and child victims in sexual crimes.

109. The cautionary rule in sexual cases, in particular, is perceived by many, including leaders of society, academics and other informed persons as an example of a rule in practice, which places an additional burden on victims in sexual cases which is not only unnecessary, but may lead to grave injustice to the victims involved.

110. In casu the court is alive of the fact that we are dealing with two mutually destructive versions. Where a court is presented with two mutually destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the prosecution and defence cases respectively, but also the probabilities (see **S v Engelbrecht** 2001 NR 224 (HC) at 226E – G). Furthermore, that the evidence presented by the prosecution and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the prosecution's case and determine whether the

defence's case does not establish a reasonable hypothesis. In **S v Radebe** 1991 (2) SACR 166 (T) at 168D-E the court said: **'The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.'**

111. It is common cause that the victim was a single witness on the alleged sexual act. The Common Law has evolved and now makes that an accused may be convicted of an offence on the evidence of a competent single witness.

112. I am mindful of the fact that such evidence must be approached with caution but that the exercise of caution should not be allowed to displace common sense. I share the same view that was applied in **S v Sauls and others** 1981 (3) SA 172 (A) where it was held that such evidence need not be satisfactory in every respect provided that the court at the end is satisfied that the truth has been told. Despite this evidence having some imperfections or shortcomings the court may convict on the evidence of a single witness.

113. Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other.

114. The notion that rape is committed by sexually deviant monsters with no self-control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives. Terming rapists as monsters and degenerates tends to normalise the incidents of rape committed by men we know because they are not "monsters" – they are rational and well-respected men in the community. The abominable behaviour of these men is abhorrent and grotesque and the recognition that they are human does not seek to evoke sympathy – it serves to signify a switch from characterising rapists as out-of-control monsters and centres the notion that rapists are humans who choose to abuse their power. The idea that rape is committed by monsters and animals may have adverse effects in that it may lead to the reinforcement of rape myths and stereotypes.

115. A full good character[5] direction is as follows:

[5] See Bailey [2017] EWCA Crim 35 as to the continuing entitlement to a good character direction in context of a bind over.

(1) Good character is not a defence to the charge.

(2) However, evidence of good character counts in the Defendant's favour in two ways:

(a) Defendant’s good character supports Defendant’s credibility and so is something which I should take into account when deciding whether I believe the Defendant’s evidence (the 'credibility limb'); and

(b) Defendant’s good character may mean that the Defendant is less likely to have committed the offence with which the Defendant is charged (the 'propensity limb').

(3) It is for me to decide what weight I give to the evidence of good character, taking into account everything I have heard about the defendant.

116. Where the Defendant is of good character but has not given evidence, Defendant is entitled to a full good character direction if Defendant has made an out of court statement (usually to the police) on which he relies, and to a good character direction limited to the "propensity limb" if Defendant has not made such a statement.

117. The defendant is a man of previous good character. This does not mean that the defendant could not have committed the offence with which he is

charged but the defendant's good character is something I should take into account in his favour in two ways.

118. First, although the defendant did not give evidence, the defendant did give an account to the police when he was interviewed and the defendant relies on that account in this case. I should take the defendant's good character into account when I am deciding whether I accept what he said in that interview. Bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination.

119. Secondly, the fact that the Defendant has not committed any previous related offence may mean that it is less likely that the Defendant would have committed the offence of rape. I should take the Defendant's good character in his favour in the two ways I have just explained. It is for me to decide what importance I attach to it.

120. The fundamental principle of our law is that in criminal trials, the prosecution has a duty to prove the guilt of an accused beyond reasonable doubt[6]. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[6] see S v Van Den Berg [1996] (1) SACR 19 (NM).

121. I have evaluated the evidence as a whole including the evidence of the accused. What is common cause is that the complainant and the accused were alone on the date and time of the alleged incident with only a one-year-old in the room as well.

122. The issue in dispute is what transpired when the accused and the complainant were in the room. It was already mentioned that the complainant in this case was a single witness as far as the commission of the offence is concerned.

Additionally, regarding the correct approach to be followed when assessing the evidence, I cautioned myself not to approach the evidence in a fragmented fashion but, following the established legal principles, to approach the evidence of the prosecution witnesses holistically.[7]

123. Ms. Jesenia Orellana was a material witness for the prosecution. As a single witness she made a very good impression on the court. Though she was emotional during the commencement of the trial, she remained steadfast in her version that the accused had sexual intercourse with her whilst he was alone with her in a room in her employer's house without her consent. She answered all questions put to her by the prosecution and defence without deviating from her version.

[7] see S v Kapika & others (2) 1997 NR 290 (HC) and S v Gqozo & another 1994 (1) BCLR 10 (Ck).

124. There is no reason to reject her evidence. I am therefore of the view that Ms. Jesenia Orellana was a believable and reliable witness. The court accepts her evidence as being the truth.

125. Having consideration to the accused version the court finds that the accused's version of the incident and his silence to have been irreconcilable with the inundating evidence produced by the prosecution.

126. The right to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person. This protection is important in an open and democratic society which cherishes human dignity, freedom and equality.

127. The protection of the right to pre-trial silence seeks to oust any compulsion to speak. Thus, between suspicion and indictment, the guarantee of a right to silence effectively conveys the absence of a legal obligation to speak. This "distaste of self-incrimination," as Ackermann J puts it, is a response to the oppressive and often barbaric methods of the Star Chamber[8] and indeed to our own dim past of torture and intimidation during police custody. It is therefore vital that an accused person is protected from self-incrimination during detention and police

[8] Ferreira v Levin NO n 48 at para 92.

interrogation which may readily lend itself to intimidation and manipulation of the accused.[9]

128. In **S v Boesak**,[10] Langa DP, speaking for the Court, pointed out that the right to remain silent has different applications at different stages of a criminal prosecution. On arrest a person cannot be compelled to make any confession or admission that may be used against her or him; later at trial there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the Court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will of course depend on the quality of the evidence and the weight given to that evidence by the Court.[11]

129. In **Osman**[12] Madala J held that: ". . . the fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

[9] Chaskalson et al Constitutional Law of South Africa, Frank Snyckers "Criminal Procedure", Juta, Cape Town at 27-44.
[10] See n 57.
[11] Id at para 24.
[12] See n 77 at para 22.

130. Defendant chose not to give evidence. That is the Defendant's right but it has these consequences:

1. Defendant has not given evidence in the trial to contradict, or undermine the evidence of the prosecution witnesses that the DNA evidence points to his presence at the scene of the alleged sexual assault. When the Defendant was interviewed he gave an account to the police on which I know through the Defendant's advocate. That interview is part of the evidence, but unlike the evidence from Ms. Orellana and the DNA expert, witnesses called by the prosecution, that evidence was not given on oath and has not been tested in cross-examination.

2. I remember when I had asked Mrs. K. Diaz Tillett, the Defendant's advocate, when she told us of the Defendant's decision not to give evidence, whether the Defendant understood that if he failed to do so, then I may draw such inferences as appeared proper. In other words, did the Defendant understand that I would be entitled to conclude that the Defendant did not feel he had an answer to the prosecution case that would stand up to cross-examination.

131. It is my decision whether or not the Defendant's failure to give evidence should count against him. It is a decision I should only reach if I am sure that the prosecution case is of such strength that it calls for an answer

AND I am sure that the true reason for not giving evidence is that the Defendant did not have an answer that he believed would stand up to questioning.

132. If I am sure the case is of such a strength that it called for an answer and that the Defendant's reason for not giving evidence was that he did not have an answer or answers that would stand up to the cross examination, then I am entitled to regard the Defendant's failure as providing support for the prosecution case.

133. I must remember it is for the prosecution to prove the guilt of the defendant and while the Defendant's failure to give evidence can provide support for the case I cannot convict the defendant wholly or mainly because of that failure.

134. I am of the view that the cumulative effect of the prosecution's evidence is overwhelming against that of the accused. The fact that the accused was alone with the victim and her one-year-old toddler at the time the alleged offence was committed suggests that the accused/defendant had created an opportunity for himself to commit the alleged offence.

135. I am convinced that the probabilities weigh heavily in favour of the prosecution. The only reasonable inference the court can draw in the circumstance and in applying the holistic view approach with regard to count one is that it was indeed the accused person that performed a sexual act on the complainant, Ms. Jesenia Orellana and therefore the

court is satisfied that the accused/defendant committed the offence of rape.

136. I am satisfied that the sexual act was done under coercive circumstances in that the complainant, Ms. Jesenia Orellana, did not consent to having sexual intercourse with the defendant. The court takes into consideration that the accused/defendant applied physical force by using a gun to threaten the life of her one-year-old and coerced the complainant unto the bed where he performed the sexual act.

137. I am of the view that the prosecution, in this case, has discharged its burden of proof with regard to all the elements of the offense of rape, with which the accused has been charged beyond a reasonable doubt.

138. And I am also satisfied beyond reasonable doubt that the accused committed the act of rape on the complainant, Ms. Jesenia Orellana and hold that the prosecution has proved all the elements contained in Count 1 beyond reasonable doubt.

139. In the circumstances, I convict the accused of the offence as charged.

Dated the 7th day of July, 2022

RICARDO O. SANDCROFT

Justice of the Supreme Court