



**IN THE SUPREME COURT
THE TURKS AND CAICOS ISLANDS**

CR 3 of 2023

REX

v

FENEL CHARITABLE

BEFORE: The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag)

**APPEARANCES: Ms. Enjaleek Dickenson for the Crown
Mr. Finbar Grant for the defendant.**

DELIVERED: 6 December 2023



JUDGMENT

1. **Baptiste J:** This is a judge alone trial in which the accused stands charged with the rape of a child under the age of 13, contrary to section 7 of the Sexual Offences Ordinance CAP 3.24. The particulars are that on a day unknown between the 1st of January 2019 and the 31st of December 2020 at Blue Hills, Providenciales, Turks and Caicos Islands, he intentionally penetrated the vagina of a girl RF, under the age of 13 years with his penis.
2. In a criminal trial, the burden of proving the guilt of the accused rests on the prosecution. The accused is under no obligation to prove that he is not guilty or to explain the evidence offered by the prosecution. The accused has nothing to prove. Our system of law requires that an accused person be presumed innocent. The prosecution can only succeed in proving

the guilt of the accused by making me sure of it, nothing less than that will do. If after I have considered all the evidence I am sure of his guilt, my verdict must be guilty. If I am not sure, my verdict must be not guilty.

3. In this judge alone trial, I am the judge of the law as well as the judge of the facts. Facts are the things I choose to believe from the evidence. I must decide what the facts of the case are based on the evidence led in the court room. When I consider the evidence of a witness, I am not bound to accept everything a witness says. I can accept some and reject the rest or can accept all or reject all. It is my decision. I must decide how much or little of the evidence of any witness I believe or can rely on, and how much weight or importance I choose to give to the evidence. In assessing the evidence, I have to decide on the credibility and reliability of the witnesses. The whole of the evidence is to be considered and I have to make my own judgment as to which evidence is reliable and which is not.
4. It is my duty to consider this case in a fair, rational and impartial manner; not on passion, sympathy for or prejudice against the accused, the Crown or anyone else involved in or connected with the case. I will take account of the arguments of counsel in their closing addresses, but I am not bound to accept them.
5. The accused chose not to give evidence. It is a right given to him by law. Therefore, I cannot draw any adverse inference against him for exercising his right to remain silent. I cannot conclude that he is guilty because he has not given evidence.
6. To find the accused guilty of the offence, the Crown must make me feel sure that accused on a day in 2019 to December 2020, penetrated the vagina of RF with his penis and RF was under the age of 13.
7. RF's mother gave evidence that RF was born on 31st August 2010. RF also gave evidence that she lives at Blue Hills, Providenciales and had been living there for four or five years. RF testified as to an incident happening in 2019 or 2020 during the time of Covid 19. She was in primary school at the time in grade 5 and was 10 or 11 years. She had online classes

for school. Her mother sent her to a shop to buy rice and 'Maggie'. The shop is close to where she lived and is owned by Elsa and is attached to Elsa's house but separated by a wall. She met the accused in the shop. When she met the accused in the shop no one was in the shop.

8. The accused gave her the things she bought and asked her 'what kind of man she go marry in the future'. She replied 'white people'. He asked her why she does not want to marry 'black people', she replied, because she does not like them. She gave her mother what she bought.
9. RF said, the next day she went to the same place. The accused asked her what she came to buy. She did not remember. She had five or ten dollars in her hand and bought spaghetti and collected it from the accused. The accused said he gone give her change. He went into the house to get change. To get to the house he had to walk outside the shop to walk into the house. She followed him and stood by inside the house by the front door. He went into the kitchen to get the change. No one was in the house.
10. After giving her the change, the accused asked whether she knows 'what woman and man do'. She said yes. He pulled her inside a room next to the bathroom. There were two beds. Then he stood by the bed. She was standing in front. He then unzipped his pants and put his 'dick' in her 'pussy'. She saw his 'dick'. She said she thought her clothes were lifted but she didn't remember who lifted her clothes. Only she and the accused were in the room. While 'his dick was in her pussy' he put his hands on her waist and pulled her towards him twice.
11. RF stated that the accused unzipped his pants and put his 'dick' out. He did not 'take out' his clothes. She had her clothes on. She saw his 'dick'; it was between his legs. She had a skirt and had a panty on but does not remember if anything happened to her panty. When he put his 'dick' in her 'pussy' she had on her panty and was standing looking at him. He was facing her. She was facing his 'dick'. He was moving a little bit; left, right, right. She was not moving. The accused removed his 'dick' and she saw water coming from 'a little

hole in the middle of his dick’; it dropped on the floor. He was close to her when he had his ‘dick’ in her ‘pussy’ and he said in creole, ‘you see the water?’.

12. RF also testified that when he put his ‘dick’ in her ‘pussy’ she felt a little pain inside her ‘pussy’. After this she heard someone calling the accused and she went through the back door and went home. When she went home she did not tell anybody what happened. She was going to tell her mother but was scared.

13. In cross - examination RF stated she ‘made up no story’. She had her panty on when he put his ‘dick’ in her ‘pussy’. They were both standing close to each other but not touching. She is shorter than the accused. She did not stand on anything. When the accused put his ‘dick’ in her ‘pussy’, they were both standing. When his ‘dick’ was in her ‘pussy’ her body was not touching his body. She remembers saying that the accused put his hands on her waist and pulled her to him twice. She is not the same height as the accused; he is taller than her.

14. RF was re-examined and said when the accused kissed her and asked her which ‘man she wants to marry’, it was a Saturday. She thinks it was a Sunday when he took her to a room and unzipped his pants and put his ‘dick’ in her ‘pussy’.

15. Dr. Sonia Ramirez, a forensic medical examiner in rape and sexual assault, was deemed an expert in that field based on her training and experience. Dr. Ramirez examined RF and concluded that her findings on examination neither confirm nor discard the possibility of penile- vaginal penetration. Her findings and the presence of a hymen do not rule out sexual activity. The hymen is capable of healing. The findings might be supportive of RF’s account.

16. In cross-examination the doctor stated that the hymen she saw was normal. She did not expect to see tears. It is normally not there because of the way the membrane heals. In re-examination the doctor stated that the hymen can be intact and penile penetration can have occurred. In my view, Dr. Ramirez’s evidence is neutral. It does not confirm or discard the possibility of penile vaginal penetration.

17. In his address Dr. Grant stated that the evidence of RF was inconsistent and confusing, with respect to the year and date the incident supposedly happened; the place it happened; how it happened; and whether it was witnessed by anybody.
18. Dr. Grant posited that there was an inconsistency with the year and date the event is said to have happened. RF was unsure of the year. RF stated that the incident happened on a Saturday, yet in her police interview she stated that it happened on a weekday, as she alleged after it happened she returned home and continued classes online. Dr. Grant argued that the evidence is unreliable as it is a known fact that classes were not held on weekends especially during Covid.
19. With respect to how the incident occurred Dr. Grant argued that RF's testimony was that she went to the store by herself, her brother did not go with her. Dr. Grant posited that the testimony of the shop owner was that RF never attended the store alone; her brother was always with her. In her testimony, RF said her brother was not there. However, in an interview RF said her brother was playing with the store owner's son and later on said her brother was with her as the accused pushed him out as he, the accused, pulled her into the house.
20. As to where the incident happened, Dr. Grant referred to RF's testimony that she followed the accused inside to get her change. He took her to a bedroom that was his. RF said that the accused lived on the property. He took her to a bedroom where there were two beds. Dr. Grant referred to the shop owner's evidence that the accused never lived on the property and was only there the days when she needed him. He never had a bedroom. Also, in her interview, RF said that the accused showed her adult movies on his phone. In her testimony RF denied saying that the accused showed her movies.
21. Dr. Grant pointed to RF's testimony that on the Saturday in going for her change the accused pulled out his penis and took her hand to do it. They were standing up and his hands were on her waist. Their bodies did not touch. RF demonstrated the distance between

them. Whereas, in her interview RF said she was in the kitchen, the accused took out his penis and was pulling off her panties. In her testimony, she said her panties were on when this happened and he put his penis in her 'pussy'. He did nothing when he did this, no movement.

22. Dr. Grant submitted that looking at things in a common sense manner, looking at the disparity in the height of the defendant and RF, it would be impossible for the defendant to put his penis in RF's vagina if both were standing, without him bending over or something and worse, to do so if their bodies were not touching.

23. Dr. Grant contended that that the only evidence was that of RF and given the inconsistencies, it cannot be said to be reliable. The doctor's evidence was that RF had her hymen intact. The medical report itself is a source of doubt. In conclusion, Dr Gant argues that the prosecution has failed to meet its burden of proof. Further, reasonable doubt lingers about the credibility of RF and the accused should be found not guilty.

24. Ms. Dickenson, in her closing address pointed out that RF was 9 or 10 at the time of the incident, this was 3 or 4 years ago. A child's memory can fade even in a short time. The fact RF would have said something different at the time of the interview to what was said in her testimony does not mean that her evidence is untrue. Further, considering the period the incident is said to have occurred 2019 and 2020 and the time when the report was made in 2021, a significant period had elapsed between when the incident occurred and when RF spoke to the police.

25. Ms. Dickenson pointed out that inconsistencies in account can happen whether a person is telling the truth or not. Further the materiality of the inconsistencies must also be considered. RF told the court as she had said in her interview, that the accused put his 'dick' in her vagina. This has not changed. She was adamant that it happened when she visited the shop and that it happened at 'Elsa's house' one day when she visited the shop. When it was put to RF as to the events happening in the kitchen, she said she does not remember

saying that and maintained that the evidence she gave in court was true. Ms. Dickenson submitted that the inconsistencies do not demonstrate the lack of truth in RF's testimony.

26. With respect to the testimony of the shop owner, Marie Elsa that RF never went to the shop alone, Ms. Dickenson pointed out that Marie Elsa was not always at the store, as there were times she would let the accused watch the store. Marie therefore was not in a position to say that whether or not RF visited the shop without her brother. Also, the defendant in his interview said he spent most of his time at Marie Elsa's home. The only thing he did not do there was sleep.
27. Ms. Dickenson posited that it is not disputed that RF was born on 31 August 2010; that the accused worked at the store at times when Marie was not present and RF frequented the store. Marie Elsa kept change for the shop in the house. Ms. Dickenson reminded the court of RF's evidence that the accused put his 'dick' in RF's vagina and submitted that on the evidence, the Crown has discharged its burden of satisfying the court so that it feels sure that the accused intentionally penetrated RF's vagina with his penis.
28. I now briefly address the issue of inconsistencies. It is not unusual to find discrepancies or inconsistencies during the course of the evidence of a witness. Such discrepancies do not necessarily mean that the witness is lying. If the inconsistency is minor it may be ignored. If it is serious then I can treat the evidence as unreliable.
29. If I find that there are inconsistencies, I have to first decide whether they are significant. If there is an acceptable explanation for the change, I can conclude that the underlying credibility of the witness is unaffected. If the inconsistency is fundamental to the issue, I will be less willing to overlook it. To what extent such inconsistency in the account influences my account of the credibility of the witness, is a matter for me. The fact that a witness has been inconsistent on an important subject and the inconsistency has not been properly explained may lead me to conclude that I cannot rely on the witness' evidence on that subject.

30. I have identified the matters Dr. Grant relies on as constituting inconsistencies. It is seen that RJ could not recall or remember some things, omitted to mention certain things, denied telling the police some things, and explained why she said certain things. RF was however consistent that the accused put his penis in her vagina and it happened when she visited the shop at Elsa's house.
31. There is no issue that RF was under the age of 13 at the time, or as to where she lived. The time frame in the information spans a period almost two years. The critical issue is whether the prosecution has proved, to the extent that I feel sure, that the accused penetrated RF's vagina with his penis. This calls for a close examination of her evidence on that issue. This case turns fundamentally on the evidence of RJ. Critical to the case is the court's view of the credibility and reliability of her evidence particularly regarding her evidence that the accused put his penis in her vagina.
32. I have to decide how much or how little of RF's testimony I believe or rely on. I may believe some of her evidence and reject the rest. It is also for me to decide how much weight I should attach to any particular evidence - that is, the extent to which the evidence helps me in determining the relevant issues. In assessing the evidence, matters of concern include credibility and reliability. I have to judge whether RF correctly recalled the facts about which she gave evidence. This involves the application of common sense. I have to consider all the evidence, use what I believe is true and reject what I disbelieve. I have to give each part of the evidence the importance I think it should be given or deserves.
33. I believe and accept RJ's evidence that when she went to buy spaghetti, the accused had change for her and went inside the house to get the change. Further, he pulled her inside the room by the bathroom, put his hands on her waist and pulled her twice, unzipped his pants and took out his penis; he was standing very close to her at the time. I emphasize that the critical question for my determination is whether the prosecution has made me feel sure that the accused penetrated RF's vagina with his penis, to use the words of the section under which he is charged, intentionally penetrated her vagina with his penis. In that regard, the doctor's evidence does not assist in making that determination.

34. I note that the defence is a complete denial of the offence. Although RJ expressly stated that the accused put his penis in her vagina, a close examination of her evidence leaves me in reasonable doubt about the plausibility of that happening and the reliability of that particular piece of evidence. This doubt is engaged and fueled by the following significant bits of evidence emanating from RJ. At the time the accused put his penis in her vagina she had on her panty. She cannot remember if anything happened to the panty. Although she thinks it was removed. I note here that there is no concrete evidence that her panty was in any way shifted or removed. The accused was standing facing her and was close to her. They were both standing. They are not of the same height. The accused is taller. She was not standing on anything. When the accused's penis was in her vagina, her body was not touching his body. In the circumstances, I do not find RF's evidence to be plausible or reliable and it does not rise to the level where I can be sure that the accused penetrated her vagina with his penis.

35. In that regard, I am in sync with Dr. Grant's submission that looking at things in a common sense manner, looking at the height disparity between the accused and RF, it would be impossible for him to have put penis in her vagina if both were standing, without him bending over or something and worse to do so if their bodies were not touching.

36. In my judgment, I do not find the evidence of penile vaginal to be reliable, plausible or probable. Given the unsatisfactory nature of that evidence, I am not sure that the accused penetrated RJ's vagina with his penis. I accordingly find the accused not guilty of the offence of rape of a girl under 13 and he is accordingly discharged.

The Hon. Mr. Justice Davidson Kelvin Baptiste

Judge (Ag) of The Supreme Court.

