

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: ANUHCR 2021/0016

BETWEEN:

THE QUEEN

and

MICHAEL BROWNE

Appearances:

Mrs. Shannon Jones-Gittens, Counsel for the Crown

Sir Gerald Watt Q.C, Dr. David Dorsett, Mr. Jarid Hewlett, Counsel for the Defendant

Before: The Honourable Mr Justice Colin Williams

2021: November 26th, 29th, 30th,
December 1st, 2nd, 6th, 7th, 8th, 10th, 13th

JUDGMENT

[1] **WILLIAMS J.:** Mr. Michael Browne was the Minister of Education in Antigua and Barbuda in 2020 when, on the 25th October, 2020 a 22-year-old female made a report against him to the police. Mr. Browne, 43-years-old at the time, was subsequently arrested and charged on the 26th November, 2020 with the offences of rape and serious indecency.

[2] On the 28th April, 2021 the District Magistrate, Mrs. Ngaio Emmanuel-Edwards, committed the Defendant to stand trial at the High Court. On the 9th July, 2021 the Learned Director of Public Prosecutions, Mr. Anthony Armstrong indicted the Defendant for one count of rape, contrary to section 3 (1) (a) of the **Sexual Offences Act No. 9 of 1995**. According to the 'Particulars of Offence':

"Michael Browne on the 13th day of October, 2020 at Willikies in the Parish of Saint Phillip had sexual intercourse with [Virtual Complainant's – name withheld], without her consent, knowing that the said [Virtual Complainant] did not consent or was reckless as to whether or not she was consenting to the intercourse."

- [3] Mr. Browne at his arraignment on 23rd July, 2021 pleaded 'not guilty' to the charge. Mr. Browne does not deny that there was sexual intercourse between himself and the Virtual Complainant; but he contends that the sexual intercourse was not forced, nor unwarranted, but consensual.

Jurisdiction

- [4] This matter came on for trial before a single Judge sitting without a jury. The **Criminal Proceedings (Trial by Judge Alone) Act** No. 8 of 2021 entered into force on the 7th June, 2021. That **Act** provides for trials without a jury.
- [5] Pursuant to section 5 (1) (a) of the **Criminal Proceedings (Trial by Judge Alone) Act** a Defendant may consent to be tried by a Judge alone. Any person wishing to consent to a Judge alone trial, having sought and received legal advice from an Attorney-at-law in relation to that mode of trial, must file a Certificate of Confirmation with the Registrar of the High Court in the prescribed Form.
- [6] A 'Certificate of Confirmation of Consent' to be tried by a Judge alone was filed at the High Court on the 16th August, 2021 by Counsel for the Defendant. That Consent stated that it was signed by the Defendant on the 23rd July, 2021 – the same day that the Defendant was arraigned.

Burden and Standard of Proof

- [7] It is the Prosecution that bears the burden of proof. That burden never shifts. The Prosecution is required to prove so that the forum of fact is sure of the guilt of the Defendant. If the Prosecution does not meet the required standard of proof, then the Defendant must be found not guilty.

The Law

- [8] Section 3 (1) (a) of the **Sexual Offences Act** states:
- “A male person commits the offence of rape when he has sexual intercourse with a female person who is not his wife – without her consent where he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.”
- [9] The Crown is required to prove, so that the forum of fact is sure, that:
- 1) The Defendant, being a male, was not married to the female Virtual Complainant;
 - 2) The Defendant had sexual intercourse with the Virtual Complainant;
 - 3) The intercourse was without the Virtual Complainant's consent;

- 4) The Defendant knew that the Virtual Complainant was not consenting to the said intercourse or was reckless as to whether or not she was consenting.

[10] “Sexual intercourse” is the slightest penetration of the female vagina by the male’s penis. It is unnecessary to prove actual emission of seed; sexual intercourse is deemed complete upon proof of penetration only.

Crown’s Case

- [11] On the evening of the 13th October, 2020, the defendant, Mr. Michael Browne journeyed to Willikies where the Virtual Complainant lived. There was a prior arrangement for him to meet up with the Virtual Complainant. The two had never met each other in person before, but they had communicated with each other via various social media platforms.
- [12] Mr. Browne parked his vehicle at the top of the hill above the Virtual Complainant’s home. It was not possible to park where the Virtual Complainant lived. He remained in the vehicle and the Virtual Complainant went up to the vehicle to meet him.
- [13] Mr. Browne and the Virtual Complainant talked in the vehicle for a while about various topics, including politics, about a picture she posted on Facebook in a swimsuit and the firmness of her stomach. The Defendant and the Virtual Complainant had sex in the passenger seat of the vehicle. The Crown is saying that the Virtual Complainant did not consent to the intercourse.
- [14] The Prosecutor, Mrs. Shannon Jones-Gittens, in opening the Crown’s case, stated that “the case turns mainly on the evidence of the complainant.” Mrs. Jones-Gittens noted that as in most cases of a sexual nature, there are no eyewitnesses. The Prosecutor noted that the evidence of the Virtual Complainant would have to be examined carefully. She noted that in the absence of corroboration it may be dangerous to convict on the evidence of the Virtual Complainant only; however, if the testimony of the Virtual Complainant is believed, then a forum of fact is entitled to do so.
- [15] Mrs. Jones-Gittens urged that there be no sympathy or prejudice – whether for the Defendant or the Virtual Complainant. The Prosecutor said it is necessary to look at all of the evidence, not just the Virtual Complainant’s evidence.

Complainant’s Evidence in Chief

- [16] The Virtual Complainant said that she is from Willikies. She now works as a Secretary. She did not know the defendant, Michael Browne personally. In October 2020, she and the Defendant had conversations for two to three days. The Virtual Complainant said that prior to 13th October, 2020 she saw the Defendant on television, at her former secondary school and at “anything that has to do with elections.”

- [17] The Virtual Complainant posted a picture of herself in a swimsuit on Facebook. This was around the 10th or 11th October, 2020. She said that the Defendant “reacted to the picture in my DM or my messenger. He reacted by sending a message to messenger. Some emojis.” One of the emojis she said was an angel; she could not remember what any of the other emojis were.
- “He sent the emojis and I said thank you. I can’t remember exactly what he said, but I replied. He asked me for my Whatsapp number. Less than a minute a message came through Whatsapp. I asked who is this? The picture was showing in Whatsapp but it was not showing on Facebook. It was just plain white.... He said: ‘Michael S.B. Browne.’ Then I went back on Facebook. I opened up the chat and viewed the profile. That’s when I saw it was actually him.... I went back to Whatsapp messages and we continued having several conversations.”
- [18] The Virtual Complainant said that they spoke daily. The Defendant would ask her how her day was. She would answer and ask him back the same questions. She told the Defendant that “he is one of my crush.” They also talked about the same picture of her in a bathing suit that he responded to on Facebook. “I accidentally called his phone via Whatsapp. Then a couple minutes after he returned the call. I explained to him that the call was a mistake.”
- [19] On 13th October, 2020 in the afternoon the Virtual Complainant went to a meeting. She said that after the meeting, she got a message from the Defendant. The Defendant asked her if she drives. She indicated that she did not own a vehicle. “He wanted to meet. But he mentioned he did not want to get shot. I asked him what he meant by that. He said he doesn’t know if I have somebody.”
- [20] The Virtual Complaint said that on the afternoon of 13th October, 2020 the Defendant told her that he was at Seaview Farm Playing Field and that he would like to come and visit her because he had a family member up in her area that he is going to visit. She testified that: “At that moment, I was not going straight home. I made sure and tell him I was not going straight home.”
- [21] When the Virtual Complaint reached home and was about to go into her house she received a message from the Defendant. She went inside, placed her bag in her room and went back outside. Mr. Browne told her that he was in a white truck. She went to meet him.
- [22] It was “going into evening.” The Virtual Complainant could not recall what time it was when she got home, but said that the sun was setting.
- [23] The Virtual Complainant describes the vehicle as being heavily tinted. When one is outside, that person cannot see inside, but when inside the vehicle, one can see outside. She said the vehicle seats are black. The back part of the truck had a cover over it. She did not know the model of the vehicle.
- [24] The Virtual Complainant said that when she got to the vehicle, the door on the passenger side was locked when she tried to open it at first; then the Defendant unlocked the door. She went into the vehicle in the front passenger side.

- [25] The Virtual Complainant said that she and the Defendant spoke about various things; first about politics. She said that the Defendant also told her that he had a godmother who lived nearby, about three houses away from where he was parked. "He asked me if I am in a relationship. I said no. I returned the question to him. He said no. He even mentioned that he has a 2-year-old daughter. Then the conversation stopped there."
- [26] According to the Virtual Complainant, Mr. Browne started talking about the picture of her in the bathing suit; he told her he had taken a screen shot of it on his phone. She tried changing the topic.
- [27] The Virtual Complainant said that she was wearing a red top and a knee length skirt. The skirt was made with a little rip on the right side.
- "He run his hand through the tear part of the skirt. I hit his hand and placed his hand back on his lap and said 'no, we not doing that.' I ignored him."
- [28] The Virtual Complaint said they started to talk about politics again. Then:
- "He changed the topic back on to the picture. He asked how I got my stomach so firm. I told him I attend the gym.... He touched my stomach to feel the firmness for himself. I removed his hand and put it back on his lap. I adjusted my skirt. He said that when females tend to adjust themselves in front of men, is to catch their attention. That is when he grabbed me by my neck and he guided me over to him. He started to kiss my neck; lick my right ear. I pulled myself out of it and sat back in the passenger seat. I told him I was not here for that."
- [29] The Virtual Complainant continued:
- "He asked about the size of my bra. He said it look like a 32B. I wear 32B but I gave him a wrong size. He leant over me and lowered my seat back and I was trying to use both hands to push him up off me. He came over me with his right foot first. He laid all his weight on top of me. He started kissing my neck. He kept asking me: 'Baby, how was your day?' I told him to stop. Then he said: 'Continue saying stop. I like the way how you say stop.' He kept doing it. Licking my neck. He placed both of my hands behind the passenger seat. He held both of my hands behind using his right hand and started unbuttoning his pants with his left hand. While he was doing that I was crying. I told him I do not want to have sex. He said we are not going to have sex. He started fondling my vagina and asked why I am so wet. He released my right hand and guided my right hand to his penis. I kept saying stop. But every time I say stop he said I can continue saying stop because he likes the way I say stop. He held his own penis and pushed it inside of my vagina. At that moment, I didn't know how to feel. He penetrated in and out of me."
- [30] The Virtual complaint related having an 'out of body' experience where she was looking down on herself from above.
- [31] She continued:

“I kept crying. He released me. Flip me over – meaning position changed. He now lying back in the passenger seat. He trying to bring me to come on top of him. I stretched for the wheel on the driver’s side. I used the wheel to pull me off him. I was now in the driver’s seat.”

- [32] The Virtual Complainant said Mr. Browne told her: “This was wild. I did not expect this to happen.”
- [33] The Virtual Complainant then told the Defendant that she wanted to leave. The Defendant told her that she would have to leave through the same door that she entered the vehicle. The Virtual Complainant said that she did not want to cross over the Defendant. She went into the seat behind the driver’s seat; the Defendant then went back into the driver’s seat. The Virtual Complainant then went back into the passenger’s seat and left the vehicle.
- [34] Upon leaving the vehicle, the Virtual Complainant did not go home. “I ran down the road, passing my house. I received a call from him [the Defendant]. I declined it. I went to the peninsular and I sat there and I cried. He kept calling and calling. I didn’t answer. He then started Whatsapping me telling me he will like to meet in person. I told him: ‘No. Why would I want to meet with you after you did what you did to me?’ ”
- [35] The Virtual Complainant testified that she did not go home that night. She left from the peninsular for a friend’s house, where she slept.
- [36] The Virtual Complainant said that she texted Mr. Browne in the third person: “I told him he was someone that I looked up to and if he wanted to have sex, all he had to do was ask and what disgust me the most is the fact that he had sex with me without a condom.”

Cross Examination

- [37] The Virtual Complainant agreed that she was once employed as a P.E teacher. At one time she was an instructor in the Fitness against Obesity programme at a Secondary School. That programme came to an end. She was unemployed after that and had no success finding a job.
- [38] The Virtual Complainant initially denied starting to communicate with Mr. Browne in March 2020. Then she recalled messaging the Defendant “way before” the encounter of October 2020. Initially she was not sure of the date of the communication but later agreed it was in March. The Virtual Complainant said that following a conversation with her mother, she did message the Defendant, because she was having a hard time getting a job; she had just signed up to be a P.E teacher. She informed the Defendant of the subjects that she passed and indicated that she was doing over Math. She also indicated that she represented Antigua in a sporting discipline. She wanted to get a job in Antigua and not have to return to St. Martin.
- [39] The Virtual Complainant agreed that the Defendant told her that it was not a good time to talk about employment. The Covid-19 pandemic had just hit. She could not recall if Antigua and Barbuda was on ‘lock-down’ at the time. She knew that the Defendant was the Minister of Education at the time.

She said it was always her dream to become a teacher and in speaking with Mr. Browne she was seeking his assistance with the P.E teacher job.

[40] The Virtual Complainant agreed that she did speak via Facebook on other matters, such as the difficulty in getting contact lenses from Courts Optical.

[41] With regard to the 13th October, 2020 the Virtual Complainant confirmed to the Defendant's Counsel that there was a decision for her to meet with Mr. Browne in Willikies where she lived, at around 6:00 p.m. They met in the pick-up truck. It was the first time the Virtual Complainant was meeting the Defendant. They spoke about various things. The conversation turned sexual. The Virtual Complainant agreed that the conversation became flirtatious, but said it was not at her end. She denied most of the assertions put to her as to what was said and done:

- i. She did not say to the Defendant that she wants to have a firm stomach.
- ii. She did not say to the Defendant she wants to have a 'six-pack' – she had a 'six-pack'.
- iii. She did not speak about Janet Jackson or Hallie Berry and their 'six-pack'.
- iv. She did not lift up her top to expose her stomach to the Defendant – although the Defendant did touch her stomach.
- v. She did not lift up her top and expose her breasts to the Defendant.
- vi. No one was passing up and down the road.
- vii. She did not mention to the Defendant about some football players who were passing in the road.
- viii. She did not willingly engage in sexual activity.
- ix. She did not unzip the Defendant's pants.
- x. She did not put herself on top of the Defendant during the intercourse.
- xi. There was no "start-and-stop, start-and-stop" because there were persons passing in the road.
- xii. She did not suggest to the Defendant that he drives off to a beach because she did not want people to see what was happening.

xiii. She did not make any of the statements Counsel attributed to her as being said after the intercourse, as she does not speak that way.

xiv. She denied there was any discussion with Mr Browne after the intercourse about any money or payment of any medical tests.

[42] The witness said to the Defendant's counsel that: "He [the Defendant] started kissing my neck and ears. I pulled away from that... pulled back to the passenger's seat. He pulled me over; I pulled back to the passenger's seat, because what he did made me feel uncomfortable."

[43] According to the Virtual Complainant, the Defendant then "slouched over the passenger seat" and reclined it. She said that: "I don't know exactly what he did. I was not looking."

[44] The Virtual Complainant said the Defendant lay his whole body on top of her. Her hands were in front of her in the area of her chest "to stop his body weight coming down on top of me."

[45] The Virtual Complainant demonstrated in Court using a chair how the Defendant was able to climb over her in the passenger seat and hold both of her hands at the back of the seat. She said that the Defendant held both of her hands behind the seat with his right hand, and while lying on her used his left hand to unzip his pants.

[46] The Virtual Complainant in response to Counsel for the Defendant said: "I wanted him to stop. I told him to stop. I did. My mouth alone should tell him to stop. Then and therefore he should have stopped."

[47] The Virtual Complainant said her hands got free when she was on top of the Defendant and she held on to the steering wheel to pull herself off of Mr. Browne.

[48] The only person whom the Defendant saw while she was in the vehicle was an elderly gentleman who was in a verandah nearby – and that person was deaf and blind. She did however say "goodnight" to the deaf and blind gentleman when she passed him on her way to Mr. Browne's vehicle.

[49] The Virtual Complainant accepted that there was a police station in Willikies and that she knows reports about possible offences can be made there. She accepted that she made no report to the police station in Willikies that night nor in the days that followed. She also accepted that she made no report to the police at all on the night of 13th October, 2020 nor the following day.

[50] In response to Counsel's suggestion that the reason she did not make any report, was because there was nothing to report, the Virtual Complainant said: "Yes, there was something to report, however I was not feeling comfortable enough to report anything."

[51] The Virtual Complainant consulted a lawyer on the 23rd October, 2020. The Virtual Complainant said it was after speaking with a friend she went to Mr. Wendel Robinson. This was before she gave a statement to the police.

- [52] (For completeness it ought to be noted that on the day the trial was previously scheduled to commence, Mr. Robinson informed the Court that he has a watching brief in the matter on behalf of the Virtual Complainant, whom Counsel said was out of the State at the time).

Distressed Condition

- [53] During the course of the Virtual Complainant's evidence in chief, there were times when she appeared to be visibly and audibly upset. The sitting was adjourned on one occasion to allow the Virtual Complainant to regain her composure.
- [54] Quite often, a distressed condition at the time of or approximate to the alleged commission of an offence could be used by the finder of fact as being supportive of the fact that something may have taken place.
- [55] At trial, when similar characteristics are apparent, it is incumbent on a forum of fact to evaluate what may be the underlying factors driving such a reaction. Was it the challenge of reliving an event? Or the pressure of testifying in a court room before strangers? Was it a genuine, spontaneous reaction?
- [56] It is entirely up to the forum of fact to decide whether the Virtual Complainant's evidence is true. The assumption cannot be made that because the Virtual Complainant showed some distress or emotion that her testimony must be true. It is perfectly possible for a witness to become distressed and emotional when describing an incident such as this, whether or not their account is true. Conversely, the absence of any display of emotion by a complainant does not mean that a complainant's testimony is untrue. 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.

Previous Inconsistent Statement

- [57] A solitary instance of Previous Inconsistent Statement was drawn to the Court's attention by the Counsel for the Defendant.
- [58] During the Virtual Complainant's evidence in chief she testified that on the night of the 13th October, 2020 after she exited the Defendant's vehicle she went down to the peninsular. "I left [the peninsular] and went by my friend to sleep." In cross examination the Virtual complainant reiterated that she went by her friend Crystal and that it was from Crystal's home that she messaged the Defendant that night.
- [59] The Virtual Complainant's written statement to the police of the 26th October, 2020 was drawn to her attention, where she told the police about the night in question: "Later that evening I got home about 10:00 p.m. and went straight to the bathroom and shower. After I finished bathing, I got the courage and I messaged Mr. Browne and asked him if he called." The Virtual Complainant said that the fact was: she went to Crystal's home and slept, not to her home and shower.

- [60] The two statements are seemingly inconsistent. The Virtual Complainant did not accept the statement recorded from her by the police on the 26th October, 2020 to be true. The Virtual Complainant however was not asked for any explanation as to why in her statement two weeks after the matter in question she said one thing and now, a year after the incident in her evidence at trial she was saying something different.
- [61] Where the Virtual Complainant went to after the incident and what she did could potentially be important. The absence of an explanation being elicited from the witness regarding the inconsistency deprives the forum of fact of critical information needed to assess whether the inconsistency impacts upon the Virtual Complainant's credibility.
- [62] The fact that a person gives a consistent account about an event to the police in a statement and repeats that account in evidence in Court does not necessarily mean that account must be true, any more than the fact that a person who gives inconsistent accounts means that the event did not happen. In deciding whether or not the Virtual Complainant's account is true, requires that all of the evidence be considered – including the real time digital or electronic documentary evidence.

Witness Number 2

- [63] The second witness to testify was the Virtual Complainant's sister. This witness was tendered by the Crown to be cross examined. In order to protect as much as possible the identity of the Virtual Complainant, this witness may be referred to variously as 'Witness number 2' or by her profession – a police officer.
- [64] Witness number 2 and the Virtual Complainant lived in an extended family household along with eleven other persons. Sometime in October 2020 Witness number 2 became aware of a matter involving the Virtual Complainant and the Defendant. Witness number 2 could not remember when she first heard of it, but it was her mother who told her of it.
- [65] Witness number 2 was asked if she did not find it strange given she was a police officer that the Virtual Complainant informed their mother and not her. She said no. The officer did not find it strange either that a lawyer may have been retained to represent her sister even before a report was made to the police about the matter.
- [66] The Defendant's Counsel in his cross examination of Witness number 2 sought to elicit the details of a conversation that this witness had with the Defendant on the telephone.
- [67] On the 12th November, 2020 Witness number 2 got the Defendant's telephone number from the Virtual Complainant. Witness number 2 called Mr. Browne about 3:11 p.m. Witness number 2 and Mr. Browne spoke for 10 to 15 minutes. While Witness number 2 spoke with the Defendant, the Virtual Complainant and an older sister were both in the same room as Witness number 2 and the telephone was on speaker to enable them to hear.

[68] The Officer agreed that during the telephone conversation, Mr. Browne made a number of statements:

- The Defendant said on several occasions that he did not rape the Virtual Complainant.
- The Defendant said he would like the Virtual Complaint to say how, when and where he would have raped her.
- The Defendant said that he has never raped anyone in his life and while he has been called many things, he has never before been accused of rape.

[69] The Officer accepted that she said to the Defendant that there were other persons in the house asking the Virtual Complainant about this matter. But they were trying to keep it as discreet as possible. "I remember telling him we are trying to keep it as low as possible. I said that is the way we are trying to do it, but when people are calling her offering her things, that is something different."

[70] The name "Roshell" came up during the conversation, but Witness number 2 said to the Defendant that Roshell was not the person who made any offers.

[71] Witness number 2 accepted that on more than one occasion Mr. Browne asked her who were the persons that were calling and offering things to the Virtual Complainant and just what were those persons offering? The Defendant also inquired of Witness number 2 whether those persons were saying that they were making the offers on his behalf. Witness number 2 did not tell the Defendant who the persons were that made contact with the Virtual Complainant. Witness number 2 said to the Defendant that since he did not know who those persons were, then they were not speaking on his behalf.

[72] Witness number 2 acknowledged that in response to the Defendant's denial she said: "So then, you're saying no. I guess you'd like to fight the matter in Court then?"

The Hughes Initiative

[73] Mr. Roshell Hughes and the Defendant have been life-long friends. Mr. Hughes and the Virtual Complainant are also friends. In November 2020 sometime after the Independence Anniversary, he heard something. He spoke with the Virtual Complainant and asked if she would like to speak with the Defendant. Having heard her response, Mr. Hughes then approached the Defendant. Mr. Hughes said that the Defendant said he "had no problem with that" but for the Defendant to do so there was a pre-condition: "she would have to drop the case."

[74] Mr. Hughes informed the Virtual Complaint of the Defendant's requirement. She was not willing to comply; however she was still willing to meet with Mr. Browne.

- [75] When Mr. Hughes spoke again to the Defendant, Mr. Browne “decided he will not meet with her, because she had a case against him, it will not look good and doing that will seem like he has something to hide and he has nothing to hide.”
- [76] Mr. Hughes said it was his idea for the Virtual Complainant and the Defendant to meet to “thrash it out.” Mr. Hughes testified that the Defendant never asked him to set up any meeting with the Virtual Complainant; neither did Mr. Browne speak to him about coming to any arrangement with the Virtual Complainant. Mr. Hughes agreed that he was never sent by Mr. Browne to deliver any message to the Virtual Complainant or her family. Mr. Hughes also agreed that the Defendant has always denied raping the Virtual Complainant.
- [77] No precise date in November 2020 was given as to when Mr. Hughes’ conversations with the Virtual Complainant and the Defendant took place, or over what period of time. Based on the evidence of the telephone call Witness number 2 made to Mr. Browne, in which Witness number 2 referred to Roshell, the conversations would have been before the 12th November, 2020.

The Investigator

- [78] On the 25th October, 2020 Senior Sergeant 560 Kleus Lavia was at that time attached to the Special Victims Unit. He received a telephone call from someone identifying themselves the Virtual Complainant. Officer Lavia gave the person advice and directions.
- [79] The following day, on the 26th October, 2020 Mr. Lavia received a copy of a Memorandum from the Officer of the Commissioner of Police dated the 23rd October, 2020. Attached to the Memorandum was correspondence on the letterhead of the law office of Daniels, Phillips and Associates; the letter from the lawyer was dated the 23rd October, 2020 and addressed to the Commissioner of Police. The letter appeared to be signed by Mr. Wendel Robinson, a lawyer.
- [80] Senior Sergeant Lavia also saw the Virtual Complainant at his office on the same day that he received the Memorandum (26th October, 2020). A statement was recorded from the Virtual Complainant. Officer Lavia also took custody of the Virtual Complainant’s cellular phone, with number ending 3328. He took the phone to the Regional Cyber Investigation Laboratory, RCIL, at the Langsford Police Station.
- [81] On the 16th November, 2020 Senior Sergeant Lavia conducted an interview with Mr. Browne. Officer Lavia, prior to conducting the interview, cautioned Mr. Browne and informed the Defendant of his right to remain silent. Of the 47 questions asked, Mr. Browne gave a “no comment” response to 28 of the questions. He denied the allegation made against him and said “I never raped anyone in my life” in five of his responses. The interview was tendered, admitted and marked ‘KL-1’.
- [82] Senior Sergeant Lavia arrested and charged Mr. Browne on the 26th November, 2020.

- [83] During cross examination, Senior Sergeant 560 Lavia said that he has spent 10-years with the Special Victims Unit and its predecessor, the Rape Unit. During that time he has investigated more than 100 cases.
- [84] Officer Lavia said there is not always a delay in time between an alleged incident and when the matter is reported to the police. He said he could not put numbers to how many are reported immediately and those for which there is a delay. Officer Lavia agreed that in his experience a delay of 12-days could be considered a long time.
- [85] Asked if it was the norm to receive a letter from a lawyer asking to initiate a rape investigation, Senior Sergeant Lavia said; "No." He said from time to time letters are received from lawyers about matters, but it is not the norm to receive such correspondence prior to the commencement of an investigation.
- [86] Officer Lavia also received call data logs for the Virtual Complainant's phone and the Defendant's phone. Those exhibits were tendered, admitted and marked 'KL-2a' and 'KL-2b' respectively.

Digital Forensics

- [87] On the 26th October, 2020 when the Virtual Complaint's cellular phone was delivered to the RCIL, Police Corporal No. 531 Owen Rigby forensically extracted the data from the device.
- [88] Corporal 531 Rigby said that on the 28th October, 2020 he provided the investigating officer with copies of the extracted data on a USB drive.
- [89] On the 14th January, 2021 Corporal Rigby prepared a data forensic report. Then on the 11th October, 2021 Officer Rigby copied the extracted data unto four CD's, which he packaged, labeled and sealed with evidence tape. They were tendered, exhibited and marked 'OR-1'.

Facebook Contact

- [90] The extracted data show that on 20th February, 2020 at 3:25 p.m. the Virtual Complainant and the Defendant were connected on Facebook Messenger. No other communication was accessed until October 2020.
- [91] On the 12th October, 2020 at 10:18 a.m. the Defendant responded to a post made by the Virtual Complainant which at the time of the examination of the Facebook account was no longer available (but what is accepted from other evidence to be a picture of the Virtual Complainant in a white bathing suit). The Defendant sent two emojis: one a bottle and the other described by the Defendant as "an angel flirty face."
- [92] Five minutes after Mr. Browne's message, at 10:23 a.m. the Virtual Complainant responded saying thank you and sending three different smiley face emojis including one licking lips.

- [93] Then at 10:36 a.m. the Defendant asked: "That's all you?" to which the Virtual Complainant replied: "Yes it is." The Defendant then said: "Oh wow. Stunning." The Defendant then went on to say: "Made my mouth drop." In relation to the remark about "stunning," the Virtual Complainant said "Thank you." In relation to the comment "Made my mouth drop" the Virtual Complainant replied: "Is that so" followed by a smiley emoji with eyes closed.
- [94] The conversation resumed at 1:44 p.m. that same day, the 12th October, 2020. The Defendant said: "Yeah. Instant goose bumps." To which the Virtual Complainant replied: "Lol I don't believe u." The Defendant asked: "Why don't you believe me?" The Virtual Complainant said: "I bet you've seen better... that pic is nothing." Mr. Browne then asked: "What's your WhatsApp?" The Virtual Complainant then sent the Defendant her number.
- [95] No further exchanges took place via the Facebook Messenger platform.

Whatsapp Communications

- [96] Whatsapp exchanges between the Defendant, Mr. Michael Browne and the Virtual Complainant commenced soon after the Virtual Complainant communicated her number.

12/10, 1.50 pm MB: Hey

12/10 1.50 pm MB: Why you say you bet I've seen better?

12/10 1.50 pm MB: (System generated) All messages to this chat and call are now secured with end-to-end encryption. Tap for more info.

12/10 1.50 pm MB: (System generated) This chat is with a business account. Tap for more info.

12/10 1.52 pm VC: Because U have.

12/10 2.04 pm MB: You don't think your body is all that?

12/10 2.05 pm VC: No I don't

12/10 2.07 pm MB: Reshare that pic abs (sic) tell me what's wrong with the pic

12/10 2.11 pm VC: Nothing is wrong but I sont (sic) think it was all that

12.10 2.14 pm VC: Whats ur name

12/10 2.14 pm MB: Michael

12/10 2.36 pm VC: Oh my crush

12/10 2.43 pm MB: If you need me I'm here! If you don't need me I'm still here! Follow me @sirmshb (FB, IG, TikTok & Twitter). Don't miss: All Saints West Town Hall live on Facebook 1st Sunday of each Month, 3-5pm.

12/10 3.01 pm VC: Huh

12/10 4.01 pm MB: Awww. I am?

12/10 4/01 pm MB: I had no idea

12/10 4.02 pm VC: Hmmm

12/10 4.04 pm MB: How's your day?

12/10 5.19 pm VC: It was okay

12/10 5.19 pm VC: Wbu
 12/10 5.19 pm MB: Writing a report
 12/10 5.19 pm MB: What are you up to?
 12/10 5.30 pm VC: Taking care of my pup she's sick
 12/10 6.00 pm MB: Oh no I'm sorry
 12/10 6.01 pm MB: Where you live?
 12/10 6.30 pm VC: Willikies
 12/10 6.30 pm MB: Ok
 12/10 6.30 pm MB: What happened to your puppy
 12/10 6.31 pm VC: Not sure
 12/10 6.36 pm MB: I'm sorry
 12/10 6.36 pm MB: Worked today?
 12/10 6.36 pm VC: Oh no I don't work
 12/10 6.36 pm MB: What do you do?
 12/10 6.38 pm VC: I used to work at pineapple beach club as a guest service
 attendant. Due to the covid I applied to become a teacher through the job programme ... I
 had my interview last week
 12/10 6.39 pm VC: So waiting hoping for the best
 12/10 6.39 pm MB: Ok. Sounds good
 12/10 6.39 pm MB: Where in Willikies do you live?
 12/10 6.42 pm VC: Tappa hill
 12/10 6.43 pm MB: Have no idea where that is
 12/10 6.45 pm VC: Okay u know where robin live... instead of taking the left take the
 right the second left... when u come up the hill 8 houses on the right
 12/10 6.46 pm MB: Ok. Cool
 12/10 6.46 pm MB: You live with your fam?
 12/10 6.46 pm VC: Yes I do
 12/10 6.46 pm MB: Ok, I'm all up in your business
 12/10 6.47 pm VC: Hahaha that's okay. Tell me about ur self
 12/10 6.49 pm MB: I'm easy going and a workaholic
 12/10 6.59 pm MB: Can you talk? WYD?
 12/10 7.02 pm VC: Do you have time for yourself?
 12/10 7.02 pm VC: I'm listening to music
 12/10 7.03 pm MB: Yeah. Lol
 12/10 7.04 pm VC: (sends a file PTT-20201Q12-WA0046.opus)
 12/10 7.05 pm MB: Ok. Np
 12/10 7.21 pm VC: Back
 12/10 8.02 pm VC: ...outgoing call
 12/10 8.02 pm VC: That was a mistake
 12/10 9.50 pm VC: ...outgoing call
 12/10 11.56 pm MB: Hey

13/10 6.53 am MB: GM
 13/10 8.40 am VC: Gmorning
 13/10 8.41 am MB: How's you're (sic) rest?
 13/10 8.42 am MB: Coming into the city today?
 13/10 8.43 am VC: Its (sic) was good. Was hoping to speak with u before I fell asleep, but (emoji)
 13/10 8.49 am MB: Would have been good
 13/10 8.49 am MB: What you doing today
 13/10 8.50 am VC: I don't think so
 13/10 8.50 am MB: I'll be in your area this afternoon
 13/10 8.50 am VC: Nothing much tbh just at 4 I have a meeting
 13/10 8.50 am VC: Ooh really
 13/10 8.51 am MB: If I won't get shot and you'll come out and say hello I'll pass
 13/10 8.51 am VC: get shot?
 13/10 8.58 am MB: Ok. I'll pass
 13/10 9.01 am VC: Why will u be up in my area, if u don't mind me asking?
 13/10 9.03 am MB: Dropping something for my godmother in Glanvilles
 13/10 9.04 am VC: Around what time?
 13/10 9.30 am MB: I'm not sure as yet
 13/10 10.06 am VC: Ok do remember I have a meeting at 4pm at the stadium
 13/10 11.02 am MB: Yeah. Np
 13/10 11.24 am VC: So tell me about urself
 13/10 11.25 am VC: Besides you being a workaholic and easy going
 13/10 2.36 pm MB: How's your day
 13/10 3.01 pm VC: ...deleted message
 13/10 3.01 pm VC: Its (sic) going good
 13/10 4.55 pm MB: You drive?
 13/10 4.56 pm VC: I do not own my own vehicle
 13/10 4.56 pm MB: Ok
 13/10 4.57 pm MB: I'm by the Freeman's village field. Was going to ask you to pass over after your meeting
 13/10 5.29 pm VC: Oh. I can't
 13/10 5.37 pm MB: Ok. I'll pass by you
 13/10 6.02 pm VC: Just left the stadium
 13/10 6.06 pm MB: Ok. I'm leaving hear (sic) now
 13/10 6.06 pm MB: I'll pass by you
 13/10 6.06 pm VC: Ok np
 13/10 6.13 pm MB: Share your location when you get home
 13/10 6.14 pm VC: I will
 13/10 6.28 pm MB: Hey I'm here

13/10 6.28 pm MB: Only parking is at the corner at the top of the hill
13/10 10.18 pm VC: You called?
13/10 10.18 pm MB: Hey
13/10 10.18 pm MB: I did
13/10 10.19 pm VC: Y
13/10 10.19 pm VC: Wats up
13/10 10.19 pm MB: You ok?
13/10 10.21 pm VC: To tell you the truth no
13/10 10.23 pm MB: Wanna talk tomorrow?
13/10 10.24 pm VC: Talk tomorrow? No

14/10 4.14 pm MB: ???
14/10 4.14 pm MB: ?
14/10 8.17 pm VC: I cant (sic) sleep all im (sic) smelling is ur perfume. I'm disappointed in you. If u wanted sex all I (sic) had to do was ask not because u think I wanted meant I did
14/10 8.18 pm VC: I dont know you at all and to say u did it without fucking condom is what disgust me
14/10 8.23 pm VC: U want to talk so lets talk
14/10 9.24 pm VC: Guess we Dont b
14/10 11.50 pm MB: Was a bit busy

15/10 6.54 am VC: K
15/10 10.44 am MB: Gm
15/10 10.54 am VC: Gm
15/10 8.40 pm VC: ?
15/10 8.40 pm MB: Hey Gn
15/10 8.41 pm VC: ?

17/10 5.48 am VC: Gm Mr Browne you have left a huge dent in my sister life. She doesn't want to speak about it she's hurt. You are a man with Power n she doesnt want anything to do with this. She will speak eventually and thats something you would not like. She's not someone to take advantage of. U did it without a condom. I thought better of u. Knowing the Hiv rate and other STDs going around. This is honestly weak of u.

25/10 9.10 am MB: GM. My mind ran on you. Checking in on you.

Extracted Evidence and Oral Testimony

[97] There were about 55 messages exchanged between the Virtual Complainant and the Defendant on the 12th. 48 on the 13th. The number diminished significantly to seven on the 14th. Six on the 15th. None on the 16th. There was one message on the 17th, which was the last message from the Virtual Complainant to the Defendant. The final exchange was on the 25th October, 2020 when the Defendant messaged the Virtual Complainant.

[98] The retrieved messages capture in real time the exchanges between the Defendant and the Virtual Complainant. The messages capture the actual dialogues between the Virtual Complainant and the Defendant, rather than what either party may or may not recall. A number of things can be gleaned from the date, time and content of the messages:

- i. The Whatsapp messaging started on the afternoon of 12th October, 2020.
- ii. The Defendant did not identify himself as “Michael S. Browne” as the Virtual Complainant said in her testimony in Court. In response to the Virtual Complainant’s query after Whatsapp communication was established as to “Whats ur name” (sic), the reply was one word: “Michael.”
- iii. The accidental Whatsapp call the Virtual complainant said that she made to the Defendant on the night of the 12th October, 2020 was followed immediately with a message from the Virtual Complainant apologizing and saying it was a call made in error. There was another call from the Virtual Complainant to the Defendant about an hour and fifty minutes after the first call.
- iv. The only two phone calls via the Whatsapp platform between the parties were from the Virtual Complainant to the Defendant.
- v. There was no call from the Defendant to the Virtual Complainant right after what she said was the accidental call. The Virtual Complainant’s testimony was that “I accidentally called his phone via Whatsapp. Then a couple minutes after he returned the call.” The returning of a call by the Defendant is not supported by the digital evidence. Rather, the Virtual Complainant was the one who immediately messaged “that call was a mistake.”
- vi. The morning following the two calls to the Defendant, the Virtual Complainant messaged Mr. Browne telling him that she wanted to speak with him the previous night before she fell asleep. That message was followed by an emoji.
- vii. While there are no recorded Whatsapp calls from the Defendant to the Virtual Complainant, it is apparent that calls from the Defendant to the Virtual Complainant

were direct cell phone calls. On the night of the 13th when the Virtual Complainant messaged the Defendant at 10:18 p.m. asking whether he had called, he acknowledged that he did. That call was a regular cell call.

- viii. The records from the telephone company (which will be looked at later), show that there were a total of four calls originating from the Defendant's phone to the Virtual Complainant's phone, all of them on the 13th October, 2020: two at 6: 34 p.m. and two at 8:11 p.m. There were no cellular phone calls from the Virtual Complainant's cell phone to the Defendant's cell phone.
- ix. The Virtual Complainant's testimony was that following the meeting she went to on the 13th October, 2020, the Defendant asked about whether or not she drove and said he wanted to meet. The Defendant, she said, mentioned he did not want to get shot then she asked him what he meant by that. "He said he doesn't know if I have somebody." The extracted messages show that it was in the morning of the 13th October at 8:51 a.m. that the Defendant said: "If I won't get shot and you'll come out and say hello I'll pass." The Virtual Complaint's response was: "get shot?" Mr. Browne did not respond as the Virtual Complainant testified he did by saying "he doesn't know if I have somebody." Rather, it was a statement: "Ok. I'll pass."
- x. The Virtual Complainant's testimony was that it was in the afternoon of the 13th October "I think he was at Seaview Farm Playing Field. He said that he was there. And he would like to come and visit me because he had a family member in my area that he's going to visit and he will pass by me." The Defendant did message the Virtual Complainant at 4:57 p.m. on the 13th October saying that he was at the Freeman's Village field and was going to pass by her after the meeting. It was however earlier, at 9:03 a.m. that the Defendant said he was going to be dropping something in Glanvilles for his godmother and would pass but he did not know what time.
- xi. The Virtual Complainant's testimony was that after the incident in the Defendant's vehicle she exited and the Defendant "called. I declined it. He kept calling and calling." The two phone calls the Defendant made are both logged on the Virtual Complainant's phone as occurring at 8:11.43 pm and one lasting zero seconds and the other six seconds. The records for the Defendant's phone are identically timed at 8:11 p.m.
- xii. The Virtual Complainant testified that after she did not answer the Defendant's call, "he then started Whatsapping me telling me he will like to meet in person." The extracted records show that it was the Virtual Complainant who first messaged the Defendant after the incident, at 10:18 p.m. on the 13th October, 2020. She inquired

of him: "You called?" The Defendant acknowledged that he did and went on to inquire whether the Virtual Complainant was "ok". The Virtual Complainant responded "To tell you the truth no." The only other inquiry the Defendant made was: "Wanna talk tomorrow?" There was no request to meet the Virtual Complainant in person. The Defendant's inquiry was about talking.

- xiii. The Virtual Complainant testified that she responded to the Defendant's request to meet: "I told him no. Why would I want to meet with you after you did what you did to me?" The extracted data showed that what the Virtual Complainant actually said was: "Talk tomorrow? No." That was at 10:24 p.m. on the 13th October, 2020. In the documented messages, there is nothing with the Virtual Complainant saying anything to the Defendant about "Why would I want to meet with you after you did what you did to me?"
- xiv. The Virtual Complainant's next message to the Defendant after responding "no" to the inquiry of "Talk tomorrow?" was not until 8:17 p.m. on the 14th October, 2020. On that occasion was when the Virtual Complainant's message pointed to the Defendant not asking to have sex with her. She said: "If u wanted sex all I (sic) had to do was ask not because u think I wanted meant I did."
- xv. The Virtual Complainant on the night of the 14th October, 2020 also expressed her disgust to the Defendant that the Defendant had sex with her without a condom.
- xvi. The Virtual Complainant testified that after going to her friend Crystal's house after the incident and telling the Defendant that she did not want to meet with him: "I texted him in the third person; meaning I did it as it was not me saying it, as if it was coming from somebody else, but it was actually me. I told him he was someone that I looked up to...." The only Whatsapp message from the Virtual Complainant's phone to the Defendant's phone in the third person was on the morning of the 17th October, 2020 at 5:48 a.m. on the fourth day after the encounter. In that message she said: "Gm Mr. Browne. You have left a huge dent in my sister[s] life. She doesn't want to speak about it; she's hurt. You are a man with power [and] she doesn't want anything to do with this. She will speak eventually and that's something you would not like. She's not someone to take advantage of. U did it without a condom! I thought better of u. Knowing the HIV rate and other STD's going around. This is honestly weak of u." This was the second time the Virtual Complainant pointing to the Defendant's failure to use a condom.

Call Data Records

- [99] Officer Lavia received copies of the call record data records for the phone numbers assigned to the Virtual Complainant as well as the number assigned to the Defendant for the period 12th October, 2020 to the 31st October, 2020.
- [100] The records show that all four cell calls between the two numbers over that period originated from the Defendant's phone. They were all dated the 13th October, 2020.
- [101] The first two calls were both timed at 6:34 p.m. and recorded as lasting 42 seconds each. When this bit of evidence is viewed in conjunction with the Whatsapp message timed at 6:28 p.m. the same day where the Defendant messaged the Virtual Complainant's phone saying: "Hey. I'm here.... Only parking is at the corner at the top of the hill", they provide a basis for understanding what was the earliest possible time that the Virtual Complainant could have gotten into the vehicle.
- [102] The second pair of calls were at 8:11 p.m. and are recorded as lasting zero seconds and six seconds. The testimony from the Virtual Complainant was that the Defendant called her phone after she exited the Defendant's vehicle. The Virtual Complainant's testimony was that upon exiting the vehicle: "I ran down the road. Passing my house. I received a call from him. I went to the peninsular and I sat there and I cried. He kept calling and calling. I didn't answer." Mr. Browne said that after the Virtual Complainant left his vehicle: "I turned at the intersection to drive back down. Something just told me to call her, so I called. The phone rang out. Just that one time I called."
- [103] Based on the times associated with the calls, the Virtual complainant could only have entered the Defendant's vehicle after 6:34 p.m. and exited the vehicle before 8:11 p.m. The Virtual Complainant said that she spent "no longer than 20 to 30 minutes, around that time" in the vehicle.
- [104] During that roughly 95-minute period between 6:34 p.m. and 8:11 p.m. two calls came in to the Virtual Complainant's phone at 7:26 p.m. from a number ending 5323. Those calls were for zero seconds and three seconds. During the course of that evening, after the Virtual Complainant had exited the vehicle, she received a total 12 more calls from that same number ending 5323 between 8:29 p.m. and 10:34 p.m. Those calls ranged in length from 3 seconds to 127 seconds.
- [105] That night, apart from the calls from the number ending 5323, the Virtual Complainant received ten other calls from another number, ending 6735, between 8:55 p.m. and 9:09 p.m. Calls from that latter number ranged in time from zero seconds to 57 seconds.
- [106] In relation to the Defendant's phone, during the period between 6:34 p.m. when he called the Virtual Complainant after arriving in Willikies and 8:11 p.m. when he called the Virtual Complainant before leaving Willikies, there were a total 14 phone calls to or from the Defendant's phone; eight of them were timed at from zero to six seconds. The first incoming call was at 7:29 p.m. and the first outgoing call from the Defendant's phone in that time period was at 7:54 p.m. Eight of the calls originated from the Defendant's number, with most of the outgoing calls in a cluster: 8:00 p.m., 8:02 p.m., 8:06 pm, 8:09 p.m. and then to the Virtual Complainant at 8:11 p.m. The longest of those calls was 127 seconds.

Prima Facie

- [107] From the Virtual Complainant's testimony, there was sufficient evidence to make out a prima facie case. There is no difficulty with identification. The Virtual Complainant identified the Defendant as the person she referred to as Michael Browne. The Defendant did not deny he was the person in the white pick up at Willikies on the night in question.
- [108] In relation to the different elements of the offence:
- 1) The Virtual Complainant was not the Defendant's wife: - They were in fact meeting for the very first time on the 13th October, 2020.
 - 2) There was sexual intercourse: - The Defendant's penis penetrated the Virtual Complainant's vagina. The Defendant does not challenge this;
 - 3) The Virtual Complainant did not consent to the intercourse: - She told him "we not doing that". On more than one occasion the Virtual Complainant removed the Defendant's hands from off of her and placed them in his lap. She told him to stop on more than one occasion; and
 - 4) The Defendant knew (or ought to have known) that she was not consenting to the said intercourse or was reckless as to whether she consented or not. Apart from the Virtual Complainant expressly telling the Defendant to stop, and the Defendant's response being: I like the way how you say stop, the Virtual Complainant tried to physically push the Defendant off of her and she was crying.

Recklessness and the Offence of Rape

- [109] The Virtual Complainant mentioned to the Defendant in two of the messages she sent to the Defendant at varying times after the encounter of the 13th October, 2020 the issue of Mr. Browne having sex with her without a condom and in the second of the messages, doing so when there are various sexually transmitted infections to be concerned about.
- [110] The Defendant testified that he retrieved a condom from the back of the passenger seat and handed it to the Virtual Complainant. He said that the Virtual Complainant rubbed the middle of the packet and asked if the condom was good. He assured her that it was. The condom however, was never used.
- [111] Given the fact that the Parties were unfamiliar with each other and this was the first time that they were ever meeting each other, such conduct could be labeled variously, including being reckless.

- [112] However the 'recklessness' that that may constitute an element of the offence of rape does not relate to the irresponsible or inappropriate conduct of the male, but rather concerns whether or not the male was reckless as to if the female was consenting or not. Being "reckless as to whether she consents" to the sexual intercourse has to do with the lack of regard for the danger or consequences of not ascertaining whether there was consent. Therefore, it is not if there was the absence of good judgment or sensible conduct on the Defendant's part.
- [113] If the fact finding forum is sure that the Defendant knew that the Virtual Complainant did not consent, then the Defendant would be found guilty of rape knowing there was no consent. Where, however the fact finding forum is not sure that the Defendant knew that the Virtual Complainant was not consenting, then the issue of reckless rape will be considered.

Unlawful Detention?

- [114] If the Virtual Complainant did consent, could that consent have been obtained unlawfully? This issue was not expressly canvassed by the Crown, but arises from aspects of the Virtual Complainant's testimony.
- [115] There was evidence that the door to the vehicle was locked when the Virtual Complainant first went to meet the Defendant. Also, the Virtual Complainant testified that the Defendant instructed her to leave through the same door that she entered the vehicle and that the Defendant unlocked the door to permit her to leave.
- [116] It is settled law that if the consent of the complainant is obtained by virtue of an unlawful detention, then such consent is ineffectual.
- [117] However there is no evidence of the Virtual Complainant trying to leave the Defendant's vehicle and being unable to do so, or that she yielded because she felt restrained or imprisoned.

Avoid Stereotyping

- [118] It must be remembered that stereo-typing of victims or perpetrators of sexual offences must be avoided. In this regard, there is no typical victim nor any typical offender. Experience tells the courts that there is no stereotype for a rape, or rapist, or a victim of rape.
- [119] Also, different individuals will respond to trauma and stress in their own particular way. Each individual must be assessed in terms of their own circumstances. It is an offence that can take place in almost any situation or environment, between all kinds of different people who react in a variety of ways. There is no prescribed or required response for a person who is being or has been raped to say or do. Assumptions must not be made about the Virtual Complainant's conduct and response at the time:

- 1) The collective experience of Courts shows that people react differently to the trauma of a serious sexual assault; there is no one classic response.
- 2) Some persons may complain immediately, whilst others may feel shame and shock and not complain for some time.
- 3) A late complaint does not necessarily mean it is a false complaint.

[120] The Virtual Complainant did not report the matter immediately. A formal report to the police was made 12-days after the intercourse. Her explanation for not reporting the matter sooner has to be considered and evaluated. The Virtual Complainant when told in cross examination that she did not make a report earlier because there was nothing to report, said: "There was something to report. However, I was not feeling comfortable enough to report anything."

[121] There are some general behavioral assumptions that are made in matters such as this that a fact finding forum needs to be cautioned about. It is useful to look at some of the false assumptions that can be made, and how they are connected to this case:

- i. "The complainant wore provocative clothing; therefore she must have wanted sex." The Complainant described the clothing she had on at the time. The Virtual Complainant had on a red top and a knee length skirt. The skirt was made with part of it torn. She was wearing the same clothes that she wore to the rehearsal at the stadium for the ushers for the upcoming funeral. She did not put on any special clothing to go and meet the Defendant.
- ii. "An attractive male (or one in a position of power or authority) does not need to have sex without consent." The records will show that even attractive males (and those with power and authority) can commit the offence of rape.
- iii. "A complainant in a relationship with the alleged attacker is likely to have consented." The day of the incident was the first occasion the Virtual Complainant and the Defendant were meeting; that may not be thought of as being 'in a relationship.' However, they were not total strangers. The Virtual Complainant knew of the Defendant, who he was and what he was. The Defendant was her "crush." Her family were, as Witness number 2 said, Labour Party supporters.
- iv. "Rape takes place between strangers." The collective experience of courts has shown that rape takes place in almost any circumstances, between all kinds of different people.
- v. "Rape does not take place without physical resistance from the victim." There is no requirement for a victim to fight and struggle. There is no requirement for a victim to

box, punch, scratch, bite or in any way hurt an attacker. In this case, there may not be much evidence of physical resistance. The Virtual Complainant did say that she tried to push the Defendant off of her, but that she was unable to.

- vi. "If it is rape there must be injuries." There are no reports of injuries in this case. Evidence of violence and forced penetration may not be present in every case. It is undisputed that no medical examination was done in relation to the Virtual Complainant in this matter.
- vii. "A person who has been sexually assaulted reports it as soon as possible." There is no fixed time limit for the reporting of a sexual assault. The report in this case was made almost two weeks after the reported incident.
- viii. "A person who has been sexually assaulted remembers events consistently." While the Virtual Complainant during her evidence in chief and during cross examination was consistent in narrating the events, her evidence differed on occasions from the contemporaneous electronic evidence.

Defendant's Testimony

- [122] Mr. Michael Browne elected to give sworn testimony. The Defendant was examined and cross-examined over a three-day period
- [123] Mr. Browne gave graphic and intimate details of his encounter with the Virtual Complainant. Those details included both the dialogue and mutual acts.
- [124] In the Defendant's recollection, at no time did the Virtual Complaint demonstrate any reluctance or show any dissatisfaction with what was taking place. He said that the Virtual Complainant exposed her stomach to him and later her breasts. He started touching her. Mr. Browne spoke of two separate occasions when the Virtual Complaint told him: "If you don't stop, you're going to get us into trouble." Mr. Browne said the Virtual Complainant also asked him; "What are you doing to my body?" I say: "Wha' yo' ah talk bout?" She said: "You have me body feeling things that my body ain't supposed to feel, because me ain't really in to men."
- [125] The Defendant also pointed out that he wears very tight fitting jeans pants. He said that the Virtual Complainant was having some difficulty in unzipping his pants so he used one hand to hold the waist of the jeans pants he had on that evening to enable the Virtual Complainant to pull the zipper down. The Virtual Complaint's testimony given earlier on this point said that the Defendant held both of her hands "behind the passenger's seat with his right hand and started unbuckling his pants with his left hand." On three different occasions during cross examination of the Virtual Complainant she denied unzipping the Defendant's pants and said on one of these occasions: "I did not unzip him. He did it

himself, then put my hand by his private area. He unzipped himself.” Mr. Browne’s testimony that he was wearing a tight fitting jeans pants was unchallenged.

- [126] The Defendant’s testimony coincides with the Virtual Complainant’s with regard to who reclined the passenger side seat. Mr. Browne agreed that he did so. However the Defendant said he asked the Virtual Complainant to recline the seat. After she apparently could not find the lever, he “reached over and assisted her.” Mr. Browne indicated that he also had to ask her to press her weight against the back of the seat so that it could recline.
- [127] Mr. Browne gave evidence of the things that were put to the Virtual Complainant during cross examination by Dr. Dorsett on behalf of the Defendant such as the changing of positions with the Virtual Complainant going on top of the Defendant and that there were several interruptions while they were in the vehicle having intercourse.
- [128] According to the Defendant, the Virtual Complainant inquired of him whether he was enjoying what was happening and whether or not he had climaxed. Later, they both inquired of each other if they were okay. He said that the Virtual Complainant also asked him what he liked about her and what had just occurred.
- [129] What transpired post-intercourse contrasted with the joy and pleasure the Defendant described as occurring earlier that evening.
- [130] The Defendant, having just had unprotected sex with someone he met for the first time, said he inquired of the Virtual Complainant whether there was anything to be concerned about? She responded: “No” then asked him the same question. That bit of evidence was reminiscent of when the Virtual Complaint testified and said that during the messaging, the Defendant would ask her a question; she would answer him and “return the question” to him.
- [131] The Defendant said he proposed that they go to their respective doctors and keep the results in a sealed envelope, then they will open the results together.
- [132] The Defendant testified that the Virtual Complainant then asked him if he knows that “good pussy gyal supposed to get things?” He asked her what she meant by theat. The Virtual Complainant asked him if he never heard the song. The Defendant asked if there was a song like that after the Virtual Complainant said it a third time Mr. Browne apparently was unaware of the song by Dancehall artist Gage, featuring Jugglerz.
- [133] Mr. Browne said that the Virtual Complainant then said she needed some money. He thought she was referring to money to pay for the doctor. The Defendant assured the Virtual Complainant that he will “take care of everything.” However he was told by the Virtual Complainant it was not that, rather she needed money “to do some things.” At first, she requested \$5,000.00. The Defendant said that he jumped backwards in his seat and said: “\$5,000.00 is a lot of things.” There was some exchange between them as to whether that sum of money was a lot of money for the Defendant. “I said \$5,000.00 is a lot of money for anybody.” Mr. Browne said the Virtual Complaint then suggested

\$3,000.00. He said he told the Virtual Complainant that even if he goes to the ATM he would not be able to get that sum.

- [134] The Defendant said there was a period of silence. When they resumed speaking, Mr. Browne said the Virtual Complainant asked if he was not afraid that she would tell his wife. He replied that he was not married. The Virtual Complainant then asked if he was not afraid she would tell his fiancée or his girlfriend.
- [135] Mr. Browne said he told the Virtual Complainant: "Darling, get to hell out of me pick up please." The Virtual Complainant opened the door and left the vehicle. The Defendant said that before he left Willikies, he called the Virtual Complainant's phone, but he did not get an answer. He called because he felt that he "might have been a little rough, seeing that we just had a good time and that maybe she genuinely needed help. I felt bad."

Cross-Examination of Defendant

- [136] Mrs. Jones-Gittens for the Crown drew to the Defendant's attention about eighteen things he stated during his two-days of evidence in chief that were not put to the Virtual Complainant by the Defendant's Counsel while cross cross-examining the Virtual Complainant. He accepted that they were either not asked of the Virtual Complainant or were being said in the course of this trial for the first time by him. That was a prelude to the Prosecutor putting to the Defendant that those parts of his evidence were not true and were a recent invention. He denied the suggestion.
- [137] Among the things initially drawn to the Defendant's attention that were not put to the Virtual Complainant by his Counsel were that: the Virtual Complainant on coming into the vehicle commented "you smell good. I love a man who smells good"; that the Defendant "leaned over to the left to the passenger seat so the VC could have a whiff" of his cologne; that the Virtual Complainant "pressed her nostrils into my neck; and started to rub her lips against [the Defendant's] neck." Does this bit of evidence about the Defendant's cologne get any credence from the Virtual Complainant's text at 8:20 p.m. on the 14th October, 2020 saying: "I can't sleep all I'm smelling is ur perfume."?
- [138] The Prosecutor pointed to the second part of that very text about the smell of the Defendant's "perfume," which said: "I'm disappointed in you. If u wanted sex all I (sic) had to do was ask not because U think I wanted meant I did" as being indicative of the lack of consent on the Virtual Complaint's part. The Defendant said that he did not get from that message that the Virtual Complainant was accusing him of anything; but he did not respond to it.
- [139] Mr. Browne agreed with the Prosecutor's suggestions that in October 2020 when he saw the picture of the Virtual Complainant he was captivated by it; he was impressed with the Virtual Complainant's body in the white bikini; so impressed that he messaged the Virtual Complainant about it; that he wanted to get to know the Virtual Complainant; and that he was the one, (not the Virtual Complaint), who suggested that they meet. Mr. Browne however disagreed that he was the one who started

making sexual advances to the Virtual Complainant; or that he touched the Virtual Complainant uninvited; or that there was any protest from the Virtual Complainant.

- [140] Mr. Browne denied all the essential elements of the Crown's case that were put to him as evidencing that the Virtual Complainant did not consent and that the Defendant knew that the Virtual Complainant was not consenting.
- [141] Mr. Browne in response to questions from the Prosecutor described his lack of communication with the Virtual Complainant after the night of 13th October, 2020 as being "a typical situation where there's intimacy and then distance." Mr. Browne said on the night of the 13th October, 2020 he did feel as though the Virtual Complainant wanted to blackmail him. The Defendant acknowledged that he did not make any comment about his thought in that regard either to the Virtual Complainant's sister – when she telephoned him on the 25th November, 2020 – or to Senior Sergeant Lavia during the interview, on the 16th November, 2020.

Good Character Direction

- [142] The Defendant is entitled to a good character direction. He was an elected Member of Parliament for All Saints West. He was serving in the capacity of a Minister of Government and Member of Cabinet when the allegation was made. There was no evidence of any previous conviction for any offence.
- [143] The Defendant in his out of court statements denied the allegation made against him and professed his innocence. He also spoke of his own good character in his out of court communication. He gave sworn evidence denying the allegation.
- [144] Good character is relevant to two things: credibility and propensity.
- [145] In this matter, the only incriminating evidence comes from the Virtual Complainant and the Defendant is denying the version advanced against him. The issue of credibility is particularly important. The Defendant's good character ought to be considered with regard to whether it supports his credibility and therefore makes his narrative of the events worthy of belief
- [146] Good character is also relevant as noted earlier to propensity. This might mean that the Defendant is less likely than otherwise to commit the offence as charged.
- [147] It must however be remembered that good character cannot amount to a defence. It is also known that persons of previous good character can and do commit offences.

Defendant's Credibility Consideration

- [148] When Witness number 2 telephoned Mr. Browne on the 12th November, 2020 he recorded the conversation. A copy of that telephone conversation was tendered, admitted and marked 'MB-1'.
- [149] Witness number 2 clearly stated that she did not trust the telephone. At one stage, she also said to Mr. Browne that she does not know if he is recording her. The Defendant did not acknowledge that he was doing so. The Defendant responded: "I am not. Should I?" The first matter that arises for consideration is whether Mr. Browne ought to have made full and frank disclosure to Witness number 2 and whether he in fact mislead Witness number 2. Closely aligned to those concerns is what, if anything does this say about the Defendant, who, having heard the fears of Witness number 2 proceeded to continue recording her without letting her know that he was doing so. Was Mr. Browne entitled to not disclose that he was recording bearing in mind that he was not the one making the call?
- [150] Does the Defendant's response to Witness number 2 "I am not. Should I?" while he was in fact recording provide support to the Virtual Complainant's evidence when she testified that the Defendant came over into the passenger's seat and started unbuckling his pants: "I told him I do not want to have sex. He said we are not going to have sex"?
- [151] During the recorded telephone conversation, Mr. Browne on several occasions expressly denied any wrong-doing. Was Mr. Browne making those denials knowing that he was recording the conversation and that he may have wanted to use the recording in his defence? Can the Defendant's denials be labeled as self-serving?
- [152] With regard to the Defendant's denials to Witness number 2, the Defendant in speaking with Mr. Roshell Hughes and during the interview with Senior Sergeant Lavia, also denied committing the offence.
- [153] Although the Defendant has consistently denied the allegation, it is for the forum of fact to determine the veracity of his statements.

A Call for Settlement

- [154] Was the telephone call that Witness number 2 made in the presence of the Virtual Complaint and their eldest sister to the Defendant and attempt to settle the matter out of Court?
- [155] Witness number 2 denied that the intention of the call was to get the matter settled without going to Court.
- [156] When the recording was played, the caller said to Mr. Browne: "I would want to believe you told Roshell [Hughes] you wanted to make some sort of arrangement." The Defendant responded by saying: "No. Not at all." The caller then said: "No? Okay. If it's no its no. Well, I guess it's no. If it's no, it's no. I guess you want to fight the matter in Court then?"

- [157] Later in the conversation Mr. Browne told the caller that if they got Mr. Hughes on a three-way call to verify what he, the Defendant, said: “Roshell will tell you I am not meeting with anybody because I did not rape anybody.” The caller then informed Mr. Browne: “That wasn’t the message she [referring to the Virtual Complainant] got last night. If that is it, I guess we leave it there and just settle the matter in Court.”
- [158] It does appear that the clear intention of the call was to seek to clarify if there was the possibility of an arrangement, rather than having the matter going to Court. The fact that Witness number 2 sought to explore whether the Defendant had an interest in arriving at “an arrangement” in the matter however, does not ipso facto mean that what the Virtual complainant alleges is false.

The ‘Locus’

- [159] The vehicle in which the Parties agree the sexual intercourse took place was brought to the Court’s parking lot for inspection. It was a white Toyota Hilux twin cab pickup.
- [160] The Crown took no active part in the viewing of the interior of the vehicle.
- [161] There was no indication that the interior of the vehicle has been altered or modified at any time since October 2020. The interior is not the most spacious. There was a console between the driver’s seat and the front passenger’s seat. The vehicle also has an entertainment system that protrudes from the center of the dash board.

Considered or Disregarded?

- [162] Is the Defendant’s recollection of the events of the 13th October, 2020 (1) so discredited by cross examination, or (2) is incapable of belief, such that his evidence ought to be disregarded as being untrue?
- [163] Alternatively, if the Defendant’s evidence has not been conclusively discredited by cross examination or if it is capable of being believed, has he so embellished the facts or exaggerated the events to such a degree that a forum of fact is incapable of ascertaining what is germane in the Defendant’s narrative?
- [164] In essence, the Defendant is saying that that the sexual intercourse was consensual. It was not planned nor intentional. However, given the nature of the interactions that occurred between the Virtual Complainant and himself, a reasonable and rational person would conclude that the Virtual Complainant consented and actively participated in the intercourse. He is of this view because the Virtual Complainant responded positively to his touches; she participated actively in unzipping his jeans pants which was close fitting; and she did not resist in any way. He is saying further, that following the intercourse, while still in the vehicle the Virtual Complainant sought to make monetary demands.

- [165] If the forum of fact accepts Mr. Browne's recollection as to what transpired as being true, then Mr. Browne will be not guilty of the offence as charged.
- [166] Is the essence of the Defendant's narrative plausible? Does it sound real? Is it believable?

Crown's Closing Submissions

- [167] Mrs. Jones-Gittens dismissed the Defendant's testimony as "a farcical account of a poorly written erotica." The Prosecutor was of the view that the Defendant used the Virtual Complainant's account to make what took place look consensual. The Prosecutor pointed to the Defendant's testimony of the Virtual Complainant holding on to the steering wheel to pull herself off of him and of Mr. Browne testifying about passing a condom to the Virtual Complainant as examples of an attempt to incorporate aspects of the Crown's case in the Defendant's narrative.
- [168] The Prosecutor said that Mr. Browne in giving evidence introduced "new material" which was never put to the Virtual Complainant when she was being cross examined. Mrs. Jones-Gittens was of the view that the reason for those parts of the Defendant's evidence not being put to the Virtual Complainant was because "it is all made up; it did not exist."
- [169] The Prosecutor expressed the view that the Crown's case was "cogent, consistent, compelling and credible." The Prosecutor said that the Virtual Complaint was "unshaken" in cross examination.
- [170] Mrs. Jones-Gittens said it was the Defendant who was captivated by the Virtual Complainant's body and pursued her. The Prosecutor said that the Virtual Complainant had no motive to lie. The Defendant, the Prosecutor said, was operating on the stereotype that women want to be paid for sex. Counsel noted that the Defendant's detail regarding what transpired in the vehicle made no sense and that he seemed to remember every irrelevant detail in the midst of the blissful experience he described.
- [171] In addressing the issue of the telephone call Witness number 2 made to Mr. Browne, the Prosecutor noted that nowhere in the conversation was there a request for any money.
- [172] Mrs. Jones-Gittens referred to the appearance of the Virtual Complainant in the Witness box: "She was as though re-living an awful and humiliating event."

Defendant's Closing Submissions

- [173] Mr. Hewlett in his closing address characterized the Virtual Complainant as always seeking some help from Mr. Browne. He noted that:
- I. When the Virtual Complainant first contacted Mr. Browne in February 2020, it was to get his help to obtain a teaching job.

II. Then, in March 2020, it was to obtain contact lens from Courts.

III. In October 2020, after Mr. Browne started messaging the Virtual Complainant, she referred to her trying to get a job as a teacher. (Although it must be said that on this occasion it was more of a response to a question from Mr. Browne to the Virtual Complainant).

[174] Counsel said that the Virtual Complainant's goal was always getting assistance from Mr. Browne.

[175] Counsel agreed that it was the Defendant who initiated the flirtatious conversation with the Virtual Complainant. He said that it was not, however, explicitly sexual.

[176] Mr. Hewlett noted that when the Defendant journeyed to Willikies, Mr. Browne remained on the road in the Virtual Complainant's community; her home was nearby. He said that the Defendant did not take the Virtual Complainant to any remote area where the Virtual Complainant could be in fear of being abandoned. The vehicle, Counsel noted, was parked a couple feet away from a verandah where someone was seated. Counsel said the Virtual Complainant if she wanted could have left the vehicle at any time, but she remained in the vehicle because she was comfortable: "The Virtual Complainant did not leave the vehicle because she did not want to."

[177] Mr. Hewlett said that the "evidence is bereft of violence."

[178] Mr. Hewlett also urged that note be taken of the dimensions of the vehicle.

[179] Counsel for the Defendant referred to the call from Witness number 2 and the fact that the witness acknowledged that the Virtual Complainant was present when the call was made and that Witness number 2 phone was on speaker. Counsel noted that the consequence of Mr. Browne not making an arrangement, was Witness number 2 said to the Defendant: "I guess you will like to fight the matter in Court."

Analysis

[180] There has to be a dispassionate evaluation of all the evidence in this case. The facts must be assessed judicially, without favour, prejudice or bias towards any of the Parties.

[181] According to the Virtual Complainant's testimony, there were acts akin to sexual assaults or indecent assaults prior to the intercourse that is the subject matter of this charge. The Virtual Complainant said:

- 1) The Defendant pushed his hand through the hole at the side of her skirt. She hit his hand and placed it back on his lap and said "no, we not doing that."

- 2) The Defendant touched her stomach, to feel how firm it was. She again hit his hand and placed it back in his lap. She adjusted her skirt.
- 3) The Defendant held on to her and started kissing her neck and her right ear. She pulled away, went back in the passenger's seat and told the Defendant "I not here for that."

[182] On none of the occasions however when there was a touching of the Virtual Complainant by the Defendant, did the Virtual complainant opt to leave the vehicle. It is accepted that although leaving the vehicle was an option open to her, she was not bound to do so in order to demonstrate any rejection of the advances she said the Defendant made – even if leaving may have been the wise and prudent thing to do.

[183] During cross examination, the Virtual Complainant said that the reason she pulled away from Mr. Browne after he started kissing her neck and ear was "because what he did made me feel uncomfortable." The Virtual Complainant however remained in the vehicle.

[184] There was a noticeable absence of any medical evidence. Medical evidence cannot be conclusive in resolving the issue of whether any non-consensual sexual intercourse between the Defendant and the Virtual Complainant on the 13th October, 2020. However, given the description by the Virtual Complainant of forced intercourse in the confined space of the passenger seat of a twin cab Toyota Hilux vehicle, if there was medical evidence available indicating that the Virtual Complainant had cuts or bruises, that evidence could have assisted in bolstering the report. The Virtual Complainant's report stands by itself. The case must be assessed on the available evidence and there cannot be any speculation with regard to anything not before the Court.

[185] It is also noted that:

- 1) The Virtual Complainant said that on the night of the 13th October, 2020 after the incident she went to the peninsular and cried. Later that night, she messaged with the Defendant. She also messaged the Defendant intermittently in the days that followed.
- 2) The Virtual Complainant lived in a household with 12 other persons including Witness number 2. The Virtual Complainant apparently kept the allegation private for some time from members of the family; neither did she say anything after the incident to Witness number 2, who was at all material times a police officer and with whom according to Witness number 2 the relationship was good.
- 3) The Virtual Complainant did not provide a written report to the police until the 26th October, 2020 nearly two weeks after the sexual encounter. Her explanation for not making a timely report came during cross-examination when she said "I was not

feeling comfortable enough to report anything”. There was no indication as to what was causing her discomfort or what made her comfortable enough to do so.

- 4) The Virtual Complainant consulted with a lawyer on the 23rd October, 2020 about the matter. The consultation took place days prior to the Virtual Complainant making a formal report to the police.
- 5) A month after the incident, the Virtual Complainant on the 12th November, 2020 facilitated Witness number 2 in making a telephone call to the Defendant during which there was references to an arrangement in relation to the matter.
- 6) The telephone call by Witness number 2 to the Defendant and for which call the Virtual Complainant was a present, Mr. Browne denied he committed the offence. The Defendant who said to Witness number 2 he spoke to no one about any arrangement, was told: “we’d just settle the matter in Court then.” This occurred before Mr. Browne was arrested and charged for the offence.
- 7) According to the Crown’s witness, Mr. Roshell Hughes, in November 2020 he was a friend of both the Virtual Complainant and the Defendant. Mr. Hughes spoke with the Virtual Complainant and she was willing to meet with Mr. Browne. By this time, the Virtual Complainant had already lodged her report with the police against Mr. Browne. Mr. Hughes’ evidence was that the Defendant’s requirement was that prior to any such meeting the case against him be dropped. The Virtual Complainant did not agree to that; but was nevertheless still willing to meet with the Defendant.
- 8) There is a lingering question as to why would a victim be seeking to maintain contact and communication with the perpetrator of an offence, particularly when the effect of the transgression was so demonstrably horrific, given the Virtual Complainant’s display of emotion while in the witness box.

Disposition

- [186] Having heard and seen the Virtual Complainant, did she impress as a witness of truth in relation to the essential elements of this offence? Upon examination of her testimony and all the other available evidence, could a forum of fact safely and confidently return a verdict of guilty?
- [187] In this matter, where there is available for review electronic digital evidence of when conversations occurred and what was said, a real time record is available which has to be considered in conjunction with the viva voce evidence, particularly since there was a divergence between what was said and what the records show.
- [188] The question to be posed at this stage is: has the Crown discharged its burden in making the forum of fact feel sure of the guilt of the Defendant, Mr. Michael Browne? The answer is no; it has not.

[189] The Defendant, Mr. Browne is accordingly found 'not guilty' of the offence of rape with which he has been charged.

Colin Williams
High Court Judge

By the Court

Registrar