

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. ANUHCR 2019/0045

BETWEEN:

THE KING

and

AL SYLVESTER HILAIRE

Appearances:

Mr. Cedric Dyer and Mr. Sean Nelson, Counsel for the Crown
Mr. Michael Archibald, Counsel for the Defendant

2023: March 1st, 2nd

JUDGMENT

- [1] **WILLIAMS, J.:** On 2nd March, 2023 the defendant, Mr. Al Sylvester Hilaire was found guilty of rape following a two-day trial by judge alone.
- [2] An oral decision was delivered at the conclusion of the trial utilizing the Caribbean Association of Judicial Officers (CAJO) Judges Model Checklist for Case Management and Preparation of Decisions.
- [3] This written decision incorporates the findings recorded in the CAJO Judges Model Checklist.

Jurisdiction

- [4] On or about Friday 24th February, 2023 the Defendant through his Counsel, Mr. Michael Archibald, filed the requisite notice pursuant to section 5 of the **Criminal Proceedings (Trial by Judge Alone) Act** No. 8 of 2021, consenting to be tried by a single judge sitting without a jury.

- [5] Case management pursuant to section 12 of the **Criminal Proceedings (Trial by Judge Alone) Act** was conducted immediately preceding the trial.
- [6] The Prosecutor, Mr. Cedric Dyer, indicated that the Crown did not intend to elicit evidence from three of the five witnesses listed on the indictment. Counsel for the Defendant, Mr. Archibald indicated that the three witnesses were not required by the defence to be cross examined. (The testimony of one of the three witnesses consisted substantially of hearsay evidence. The testimony of another witness concerned the undisputed voluntariness of the statement and interview given by the Defendant to the police. The testimony of the third witness was from a medical practitioner who conducted an examination of the Virtual Complainant on 12th March, 2019 which was almost a month after the incident).
- [7] Mr. Dyer also indicated that pursuant to section 13 of the of the **Criminal Proceedings (Trial by Judge Alone) Act**, the Crown's intention was to tender the deposition evidence of the investigating officer, Woman Police Corporal No. 695 Monya Dyer. Counsel for the Defendant consented to the deposition of Corporal Dyer being tendered, as the officer's attendance was not required.
- [8] The Crown also applied for a 'Gag Order' in relation to reporting on the matter for "security reasons." The Defendant supported that application.

Rape – The Offence

- [9] Antigua and Barbuda's **Sexual Offences Act** No. 9 of 1995 states at section 3 (1) that:
- "A male person commits the offence of rape when he has sexual intercourse with a female person who is not his wife either –
- (a) 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; or
- (b) with her consent where the consent –
- (i) is extorted by threat or fear of bodily harm to her or to another; or
- (ii) is obtained by impersonating her husband; or
- (iii) is obtained by false and fraudulent representations as to the nature of the act."
- [10] The indictment did not specifically identify subsection 3 (1) (a) as the provision the Defendant allegedly transgressed. The averment on the indictment said: "Rape, contrary to section 3 (1)." There was no challenge to the indictment, or suggestion that the Defendant was misled in any way as to the allegation against him and the case proceeded on the basis of subsection 3 (1) (a) and not 3 (1) (b).

[11] The particulars as recited in the indictment stated that:

“Al Sylvester Hilaire on the 16th day of February 2019, at Freeman’s Village, in the Parish of Saint Peter in the State of Antigua and Barbuda, had sexual intercourse with Aliana Philo knowing that she did not consent or being reckless as to whether she consented to the said sexual intercourse.”

[12] The Crown was required to prove, so that the forum of fact was sure, that:

- 1) The defendant, Mr. Hilaire, being a male, was not married to the female Virtual Complainant;
- 2) There was sexual intercourse involving the Defendant and the Virtual Complainant;
- 3) The intercourse was without the Virtual Complainant’s consent;
- 4) The Defendant -
 - a. knew that the Virtual Complainant was not consenting to the said intercourse; or
 - b. was reckless as to whether or not she was consenting.

[13] ‘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

Burden and Standard of Proof

[14] The burden of proof rested on the Prosecution. That burden remained on the Prosecution throughout the trial.

[15] The Prosecution was required make the forum of fact feel sure of the guilt of the Defendant. If the evidence marshalled by the Prosecution did not meet the required standard of proof, then the Defendant had to be found not guilty.

Procedural History

[16] On Saturday 9th March, 2019 the Virtual Complainant lodged a report with the Special Victims Unit (SVU) of the Criminal Investigations Department, alleging that three weeks earlier, on Saturday the 16th February, 2019 the defendant, Mr. Al Hilaire had sexual intercourse with her without her consent.

[17] On Monday the 18th March, 2019 the Defendant was detained in relation to the allegation made by Ms. Philo. He was cautioned by Corporal Dyer of the SVU, who informed Mr. Hilaire that he had a right to remain silent. Corporal Dyer also advised Mr. Hilaire of his right to consult with an Attorney.

Mr. Hilaire said that he understood his rights. He then dictated a statement to the police officer in the presence of Senior Sergeant 560 Kleus Lavia.

- [18] At the conclusion of the caution statement that was dictated by the Defendant, Corporal Dyer then invited Mr. Hilaire to participate in an interview. Mr. Hilaire was again cautioned and informed of his rights. The Defendant elected to answer all of the questions he was asked during that interview. Senior Sergeant Lavia was also present for that interview.
- [19] Following the Defendant's interview with Corporal Dyer, Mr. Hilaire was kept in custody at the Saint John's Police Station. The following day, the 19th March, 2019 he was charged with the offence of rape of Ms. Philo. The Defendant was taken to the Magistrate's Court, where he was remanded to prison.
- [20] On the 1st April, 2019 a High Court Judge granted Mr. Hilaire bail.
- [21] The Committal Proceeding was held on the 8th July, 2019. Then on the 13th September, 2019 the Learned Director of Public Prosecutions filed the indictment in this matter.
- [22] Mr. Hilaire was arraigned on the 8th November, 2019. He entered a plea of not guilty.

Live Issues

- [23] Two witnesses gave *viva voce* evidence in this matter: the virtual complainant, Ms. Philo, for the Crown and the defendant, Mr. Hilaire, on his own behalf. The deposition evidence of Officer Dyer along with the Defendant's caution statement and interview with the SVU officer, [Corporal Dyer], were also tendered as part of the Crown's case. The Defendant tendered several short video clips and still photographs that the Virtual Complainant took on the day of the incident at his home sometime after the incident and emailed to herself.
- [24] The Defendant did not deny that there was sexual intercourse between himself and the Virtual Complainant. Mr. Hilaire contended that:
- the sexual intercourse was not forced, nor unwarranted, but consensual; or
 - he had reasonable grounds to believe that the Virtual Complainant was consenting to the intercourse.
- [25] The critical issues for consideration were:
- Did the Virtual Complainant consent to the intercourse?
 - If the Virtual Complainant did not consent to the intercourse, did the Defendant know or ought to have known that she was not consenting?
 - Was the Defendant reckless in ascertaining whether the Virtual Complainant was consenting or not?

- Did the Defendant have reasonable grounds to believe that the Virtual Complainant was in fact consenting?
- Which of the two witnesses to the incident was credible?

Areas of Agreement

- [26] The recollections of both the Virtual Complainant and the Defendant as to what transpired on the 16th February, 2019 corresponded in some respects. There were as well critical differences.
- [27] In 2019, Mr. Hilaire lived with his girlfriend Ms. Tenique Georges at Mount Trulla, All Saints. At the time, they had an infant child.
- [28] Ms. Philo and Ms. Georges were friends from childhood. They knew each other from Kindergarten. They were friends while at Primary School and Secondary School. The Virtual Complainant would visit Ms. Georges' home on Saturdays. Ms. Georges and Mr. Hilaire would go to the Virtual Complainant's home to pick her up.
- [29] On an occasion prior to 16th February, 2019 the Virtual Complainant was approached about having a threesome. Ms. Philo indicated that she was interested. The threesome however never materialized.
- [30] During the week leading up to Saturday 16th February, 2019 Mr. Hilaire called to the Virtual Complainant to inquire whether she would be coming to their home on the Saturday to see Ms. Georges.
- [31] The Virtual Complainant texted Ms. Georges around 9:00 am on the 16th February, 2019 indicating that she was coming over to Mount Trulla, All Saints. Ms. Georges responded.
- [32] Sometime afterwards on the same 16th February, 2019 Ms. Philo was in the shower when she heard the dogs barking. She looked out and saw the Defendant's blue coloured jeep. She got dressed and went outside to the vehicle. When Ms. Philo got outside, she realized that it was only the Defendant in the vehicle.
- [33] Ms. Philo went into the vehicle. The Defendant was speaking on his cell phone at the time the Virtual Complainant entered the vehicle. After the Defendant's telephone conversation ended, the two passengers in the jeep spoke with each other as they journeyed from Ms. Philo's home. Among the matters that came up during the conversation concerned the purchasing of a cellular phone for the Defendant's girlfriend, Ms. Georges.
- [34] The Defendant made a number of stops. The first was at a supermarket. When the Defendant was exiting the vehicle, he kissed Ms. Philo on her shoulder.
- [35] After the Defendant returned to the vehicle, he drove to the hospital to drop off something. Along the way he told the Virtual Complainant that he could take care of her and offered to purchase things for her. Mr. Hilaire inquired of Ms. Philo what kind of phone she liked.

- [36] After leaving the hospital, Mr. Hilaire drove to a business place named the 'Bargain Centre', where he made another stop.
- [37] The Defendant then proceeded to a co-worker's home on Sir Vivian Richards Street. Along the way, Mr. Hilaire touched the Virtual Complainant on her thigh.
- [38] The Defendant then drove from Saint John's in the general direction of All Saints. At the junction close to the Midway Gas Station he made a left turn. He took the Virtual Complainant to a 'safe house' in Freeman's Village. (To go to the Defendant's home at Mount Trulla, All Saints, one would have to make a right turn in the area of the Midway Gas Station and not the left as he did).
- [39] When Mr. Hilaire arrived at the house at Freeman's Village, he exited the vehicle and went into the house. He turned off the cameras at the premises. The Defendant then called the Virtual Complainant. She went into the house. Ms. Philo had been to the house on a previous occasion, but had never gone inside. Ms. Georges was present on that previous occasion that the Virtual Complainant went there.
- [40] Both the Virtual Complainant and the Defendant ended up in a bedroom and there was sex between the Parties.
- [41] After the intercourse, Mr. Hilaire took the Virtual Complainant to his home at Mount Trulla, All Saints. They arrived at the Defendant's home in the early afternoon. Ms. Philo exited the vehicle and she remained at the Defendant's home with Ms. Georges and the baby until well into the night.
- [42] The Defendant left after dropping off the Virtual Complainant at his home. Mr. Hilaire returned bringing lunch for Ms. Georges and the Virtual Complainant then left again. He did not go back to the house until after Ms. Philo left.
- [43] On Monday 18th February, 2019 there was a text conversation between the Virtual Complainant and Ms. Georges. An arrangement was made for them to meet. Ms. Philo, Ms. Georges and Mr. Hilaire then met and had a discussion in the Defendant's vehicle about what transpired the previous Saturday.

Areas of Disagreement

- [44] There were specifics in the testimony of both the Virtual Complainant and the Defendant that were disputed. These included:
- The Virtual Complainant said during the drive from her home the Saturday morning, that the Defendant stated to tell her how his girlfriend was cheating on him and that Ms. Georges thought he did not know. He denied saying so.
 - The Virtual Complainant said she was not paying much attention to the Defendant when he spoke of getting her a telephone. She acknowledged saying that she preferred an iPhone to a Samsung, but stated that she told Mr Hilaire she does not

want any phone and that she was not interested. The Defendant said that Ms. Philo was very interested and he had to caution the Virtual Complainant that he could only get her a second hand phone, equal to what he was getting his wife.

- The Virtual Complainant said that the Defendant while they were in the vehicle and still in Saint John's asked to give him "one touch" and she told him that she is not interested in having sex with him. The Defendant said that never happened.
- The Virtual Complainant testified that the Defendant said to her while they were in the vehicle and after they left the Bargain Centre: "I know you don't want it but I'm going to take it." The Defendant denied saying so.
- The Virtual Complaint went on to say that the Defendant told her she can call rape, but he can go to jail for her. The Defendant denies this.
- The Virtual Complainant said that on one occasion after driving up Sir Vivian Richards Street, the Defendant put his hand between her thighs and touched her vagina. Ms. Philo said that she pushed Mr. Hilaire's hand away and told him 'no'. The Defendant while accepting that he did touch the Virtual Complainant's leg, denies touching her vagina. Mr. Hilaire said that he touched Ms. Philo on two separate occasions and "complemented her" saying "you sexy... hot as ever" and that her legs "look sexy and nice."
- The Virtual Complainant said that at the house at Freeman's Village, it was the Defendant who pulled her pants off. The Defendant said the Virtual Complainant was the one who removed her own clothing.
- The Virtual Complainant said while at the house, she repeatedly told the Defendant to stop. The Defendant said that did not happen.
- The Virtual Complaint said that on Monday 18th February, 2019 while in the Defendant's vehicle along with Ms. Georges, the Defendant said that he was "a man of the law; he knows the law; he could just deny what happened and that will kill the whole story and if I reported the matter nothing will come out of it." Also, he can sue for defamation because the Virtual Complainant was ruining his character. The Defendant acknowledged that he did say to the Virtual Complainant that people sue for defamation, but he denied saying any of the things the Virtual Complainant said he did. Mr. Hilaire said that he told the Virtual Complainant in the presence of his girlfriend: "I did not rape you."
- The Virtual Complainant stated that on some unspecified occasion before the 16th February, 2019 she "was approached" by the Defendant, in the presence of Ms. Georges, about having a threesome. There was no further discussion about it. The Defendant's narrative – which was denied by Ms. Philo – was that an attempt prior to the 16th February, 2019 was abandoned following an observation made by Ms. Georges.

- Mr. Hilaire testified that while driving in Saint John's, the Virtual Complainant confirmed that "this thing" – the threesome – would happen. The Virtual Complainant in cross examination denied that.
- The Defendant said that while in the vehicle, as they approached Cooks Hill, he reminded Ms. Philo of the previous attempt at a threesome and presented options to her, including having sex with him alone. The Virtual Complainant said nothing like that happened.
- The Defendant in his testimony said that it was the Virtual Complainant who pointed indicating to go to in the direction of the house where the incident took place. The Virtual Complainant in cross examination denied that the Defendant asked her any question about where she wanted to go. Ms. Philo said that when the Defendant turned left in the area of Midway Gas Station she did not ask him where he was going.
- The Defendant testified that after returning to the car following the sexual intercourse, the Virtual Complainant took possession of a pair of earphones he had in the vehicle, she pushed back the seat and put her feet up on the dashboard. He said that he had to caution her not to show and changes in order to prevent his girlfriend from finding out. None of that was put to the Virtual Complainant when she was cross examined.
- The Defendant in his testimony said that his girlfriend, Ms. Georges, slapped the Virtual Complainant while they were in the vehicle on Monday the 18th February, 2019 and he reprimanded his girlfriend for doing so. The Virtual Complainant did not testify about any such thing happening, neither was it put to her in cross examination that while in the vehicle on the 18th February, 2019 she was slapped by Ms. Georges.

[45] It was not necessary to resolve where the truth lay in relation to all of those disputed points. Some of them however concern whether there was a basis for the Defendant to reasonably conclude that the Virtual Complainant was consenting and therefore required a determination to be made as to whether one or the other party was credible.

[46] The matters which lingered and required further reflection were:

- (i) In relation to the Virtual Complainant, the fact that she remained in the Defendant's vehicle despite her claiming that she felt uncomfortable with what he was saying and doing; and
- (ii) In relation to the Defendant, whether he was merely seeking to embellish his narrative by adding to what actually took place.

Complainant's Testimony

[47] Upon the commencement of the trial on 1st March, 2023 the Virtual Complainant spent the entire first day giving her evidence in chief and being cross examined.

[48] Ms. Philo recalled the incident happening this way:

“The next thing I remembered, he was in another room on the right side doing something. I was called again by Al Hilaire. I followed. I ended up in a bedroom where he pushed himself on me. I was telling him to stop. And I pushed him. He fell in a sitting position on the bed. I ended up standing between his legs. He tried removing my pants. I remember holding the button of the pants to prevent him from getting in. I repeatedly [kept] telling him to stop; I kept telling him to stop. He kept tussling with my pants. I told him to stop. His head was leaning on my stomach. He [was] still tussling with my jeans. I kept holding and telling him to stop. Next thing I remember I was face down on my stomach. I kept trying to pull myself away from him. Repeatedly telling him to stop. He wouldn't. He kept trying to insert his penis into my vagina. I kept pulling away, telling him to stop. Al was pulling back. He quickly pull his pants all the way down, while the whole ordeal was going on. Next thing I remember I was on my back. He kept pushing himself on me. I kept trying to push him off of me. I repeatedly tell him to stop. He kept going; his penis into my vagina until eventually he pulled out and ejaculated on me, on my vagina.”

Caution Statement and Interview

[49] The Crown as part of its case tendered the caution statement and the interview that Mr. Hilaire gave to the police on the 19th March, 2019.

[50] The Defendant in his caution statement stated that his girlfriend was present during the time he had intercourse with the Virtual Complainant on the 16th February, 2019.

[51] Mr. Hilaire did an interview with Corporal Dyer immediately following the caution statement. Towards the end of the interview, the Defendant recanted on the presence of his girlfriend. Similarly, at trial, while giving evidence on oath, the Defendant acknowledged that his girlfriend was not there.

[52] It is useful however to go over what the Defendant initially said about Ms. Georges being present at Freeman's Village and what he said before recanting. He said in the caution statement:

“I took time off work. I picked up my girlfriend and then I picked her [the Virtual Complainant] up. After I picked her up, I had a few rounds to make. I went to Woods, hospital and I stopped by a friend [and] dropped some money. I left the city and drove to Freeman's Village by a house I have access to. I went inside the house, turned off the cameras and then I went an[d] called her and my girlfriend. She came inside first and then my girlfriend came after. We went straight into the room. My girlfriend sat in a black chair. My girlfriend said 'go ahead nah, let me watch'. So I sat on the bed and she stood by me. My girlfriend stayed in the

chair.... My girlfriend started giggling.... We left the house and drove to Mount Trulla and dropped them off and I left.”

[53] At the commencement of the interview, Mr. Hilaire confirmed the truth of his caution statement:

Q: The statement you just gave to the police, is that statement true and correct?

A: Yes Sir.

Q: Is everything in that statement truthful?

A: Yes Sir.

[54] Questions 19, 20, 27, 28, 32, 48, 49, 50 and 52 of the interview touched on Ms. Georges' presence:

Q: Were you alone when you picked her up?

A: No. I was with my girlfriend and the baby.

Q: When you picked her up, where were you supposed to go?

A: After I pick her up, I was waiting to see what the vibes would be between my girlfriend and her to see if the threesome would come off.

Q: Why would you touch her on the leg with your girlfriend in the vehicle?

A: We have a vibes.

Q: Explain what you mean.

A: You have to have boundaries. It's not that I didn't want it to happen, but I didn't want my girlfriend to think I am into her.

Q: You mention[ed] in the statement earlier you, your girlfriend and Aliana went to the house in Freeman's Village and your girlfriend watch[ed] while you and Aliana had sex. Where was the baby?

A: She was in my girlfriend's hand, that's why she didn't take part.

Q: Aliana stated that [when] you came and picked her up you were alone.

A: That is not true Sir.

Q: Why would Aliana say that your girlfriend was not with you?

A: I don't know Sir. When I went to pick up Aliana, my girlfriend was there.

Q: Did you drop off your girlfriend any time before you went to the house in Freeman's Village?

A: No Sir.

Q: After the sex took place, what was your girlfriend's reaction?

A: She didn't have any reaction.

[55] The issue of Ms. Georges' presence at the house at the time of the intercourse then took a different turn at question 55, as the interview came close to the end:

Q: Did you know why your girlfriend wanted to see her?

A: Yes. Because of what she was saying that I raped her.

Q: If your girlfriend was present on the day, why would your girlfriend still want to find out if you raped Aliana?

A: Let me retract what I said earlier.

- Q: What do you want to retract?
- A: From day one I called her twice the same week and I asked her if she coming and she said yes. The Saturday my girlfriend was not there on the day of the incident but everything else is true. I did not rape her, it was consensual.

Defendant's Testimony

- [56] Mr. Hilaire on the second day of the trial testified that:

"When we reach Clarke's Hill by the corner there by Midway Gas Station, there have three roads: One to go Seaview Farm, one to go Clarke's Hill, [and] the road to the right go to All Saints. I ask her, if we go left, we going by the house. We do thing by we self. If I go right, you done know what might happen. She point and say 'go so'. She point to the left; tell me go left. At that time I get a little excited. I turn the vehicle in style. I lean back and say "yeah man." I just continue with some jokes. I say "I feel like a boss, diamond and pearls." She just keep laughing and say "you not easy"."

- [57] Mr. Hilaire said he took the Virtual Complainant to the 'safe house', which was connected with his work. That house was for authorized persons only. He told Ms. Philo to stay in the vehicle and he went inside and turned off the cameras. He then came to the doorway and called the Virtual Complainant. Mr. Hilaire testified that:

"She go straight into the bedroom. I followed behind her. As she reach in the bedroom she playing with her pants – the button of the pants. I came behind of her. I hug her, kiss her on her neck. I turned around in front of her and I sat on the bed. I rest my head on her stomach, my hands on her hips and it tell her "you sexy." She came closer to me, between my feet. I tell her – make up a lie – say "you make me nervous like wha." She say "nervous like wha." I say "first time, I want to perform good." She button down her pants. I stand up by the side buttoning down my pants. Pull it down. She bend over on the bed. I tell her to put up your foot. I came behind her. I wasn't hard. She was pushing back on me, pushing back on me with her bottom. Skin to skin. I was behind her. Then I go to the side of her. I playing with my penis. She look back. I say "you laughing at me." She say "no." I say "nah laugh at me jack, ah just nervous." She turned. She lay on her back. Put up her two foot in the air. Shortly after that I get hard – got an erection. We started to have sex. She was moaning... I say you want me to cum in you, she say no, no, no."

- [58] The Defendant stated that the Virtual Complainant took off her own clothes. "There was no struggle. She did not say anything to me to indicate she was not willing to have sex."

- [59] There were a number of omissions and deviations in the Defendant's testimony.

- i. In Mr. Hilaire's evidence at trial, he testified that it was the Virtual Complainant who pointed in the direction that he should go when they got close to Midway Gas

Station. Back in 2019, soon after the incident, no mention was made either in his caution statement or the interview that Ms. Philo did any such thing. In those interactions between Mr. Hilaire and the investigator, which were closer in time to the event than the trial, the Defendant appeared to be taking responsibility for going to Freeman's Village. Why was there no mention either in the Defendant's caution statement or custodial interview of Ms. Philo indicating that they should go to Freeman's Village? Why did Mr Hilaire say in 2019 that it was his idea to go to Freeman's Village?

- ii. Part of the Defendant's narrative included an aborted threesome with his girlfriend and the Virtual Complainant at the instance of Ms. Georges. The Virtual Complainant completely denies this. But Mr. Hilaire claimed it was stopped for a health related issue. At trial, he said that this occurred about a week before the 16th February, 2019. He testified that during the week his girlfriend had a conversation with the Virtual Complainant in his presence and Ms. Philo said she took some antibiotics. However during the interview, when Mr. Hilaire was asked when he had sex with the Virtual Complainant on the 16th February, 2019 without a condom, given the prior health-related concern his response was: "She said in the vehicle that she took antibiotics and on the day we had sex she wasn't smelling." This seemed to describe two completely different occasions when the conversation took place.
- iii. The Defendant's testimony was that the Virtual Complainant undressed herself. Is there any significance to what Mr. Hilaire said during the caution statement, that: "She started pulling down her pants and stopped then I got up and went around her back and I hold her to bend her over and put her foot on the bed"? (Emphasis added) The Virtual Complainant's recollection was that she did hold on to the button of her pants, but that was to prevent the Defendant from taking her pants off.
- iv. The Virtual Complainant testified that her pants zip was damaged during the incident. The Defendant in his caution statement said that when he brought back the food to his home at Mount Trulla: "I saw her pants and asked her if her pants burst and she said 'yes'." During the interview, at question 50, the Defendant was asked: "Do you know that Aliana[s] pants zip was broken during the ordeal?" He responded: "No Sir, I learned so afterwards." In Mr. Hilaire's testimony at trial, he said that when he returned to his home and the Virtual Complainant was at the kitchen door, he whispered to her: "Why your pants open?" The Defendant said she responded by saying "the zipper run off." How and when did the pants zip get compromised? Could that be indicative of a struggle?
- v. The Defendant testified that kissing the Virtual Complainant on her shoulder and touching her on her thigh was a customary way of showing affection and "a usual

thing that we do in the house or in the vehicle.” However the Virtual Complainant spoke of being “confused” when the Defendant kissed her on her shoulder in the supermarket parking lot. She also said that when Mr. Hilaire touched her “inappropriately... I pushed his hand away and I told him no.” It was put to the Defendant in cross examination that he was not accustomed to showing any affection to the Virtual Complainant. The Defendant rejected that saying it was “customary.” During the 2019 interview with the police, in a series of questions (5 to 8), the Defendant described the Virtual Complainant as “my girlfriend’s friend... she is not a person I talk to. She is not my friend.” He went on to repeat that “she is not my friend. She’s my girlfriend friend.”

- vi. It was noticeable that in 2019, the reference in the caution statement and interview to the location of the ‘safe house’ that the Defendant drove to was Freeman’s Village. However, at trial, the Defendant referred to it as Clarke’s Hill.

Lies told by the Defendant

- [60] Towards the end of the police interview with Mr. Hilaire, he admitted that he lied in his caution statement and in the earlier part of his interview about his girlfriend being present when the sexual intercourse between himself and the Virtual Complainant took place. At trial, Mr. Hilaire testified that he “came clean in the end.” The Defendant said that his evidence in court was the truth and the whole truth.
- [61] Does the fact that Mr. Hilaire lied to the police, and that there are things which he said in court which contradict what he said to the police support the case against him?
- [62] Is there an innocent explanation for the deliberate and intentional lie the Defendant told to the police?
- [63] The fact that Mr. Hilaire told a lie to the police and that parts of his testimony in court seem inconsistent with his out of court statements, is not necessarily evidence of guilt. Mr. Hilaire may just have been trying to bolster his genuine defence of consent. He may well have said such things out of panic, or confusion, or embarrassment, or for some reason that was unrelated to the commission of the offence.
- [64] Mr. Hilaire, in the interview, after acknowledging that he lied, stated: “I did not rape her. It was consensual.” The Defendant was asked why then did he say his girlfriend was present? Mr. Hilaire explained that: “Because I believe that when people call rape no matter what they say they gone ah ground.”
- [65] Mr. Hilaire in court explained that: “When the police picked me up, I was really mashed up. I think about everything. My kids. Thinking about my job, everything. I put my girl there because at the time if I put her there, when man and woman have sex and the woman cry rape, more than likely he go jail.”

[66] Did the Defendant's explanation sound as an innocent explanation for his deliberate lie? It did not. The concocted narrative of his girlfriend being present throughout and being somewhat of a participant were germane to the defence of consent.

[67] There was as well Mr. Hilaire's assertion that apart from the reference in the statement to his girlfriend's presence, everything else in the statement was true. He also testified that his evidence in court was true. In court he testified that it was Ms. Philo who said "go left" to the house where the intercourse took place and when she said that, he formed the view that she was consenting. But nothing about the Virtual Complainant saying or doing any such thing appears either in his statement or interview. In his caution statement he said: "I left the city and drove to Freeman's Village." Also, questions 34 and 35 of the interview appear to conflict with the Defendant's testimony:

Q: Whose idea it was to go to Freeman's Village?

A: It was my idea.

Q: Did Aliana know you were taking her to Freeman's Village?

A: Yes. I said so more than once while we were in the vehicle.

[68] While Mr. Hilaire acknowledged that he lied to the police, it appears that he lied under oath as well. But the Defendant was not charged with lying. The matter that fell to be determined was whether Mr. Hilaire's lies were designed and intended to conceal his guilt.

No Stereotyping

[69] A fact-finding forum must always guard against assumptions as to what kind of person may be the victim of rape, or what kind of person may commit such a sexual assault, or what an individual who is being or has been sexually violated will do or say. There is no stereotype for a rape, or rapist or a victim of rape. Even though Ms. Philo was a regular visitor to the Defendant's home, or may have engaged in a conversation or conversations about a threesome, does not mean she cannot be a victim of rape.

[70] Counsel, Mr Archibald, for the Defendant in highlighting the aspects of the Virtual Complainant's conduct and appearance on the day in question noted that:

- Ms. Philo never once tried to exit the Defendant's vehicle on the journey from her home and while in Saint John's, even though she said she wanted to get out of the Defendant's company;
- Ms. Philo stated that while in the Defendant's vehicle, Mr. Hilaire on several occasions touched her and that those actions were unwelcomed. However she opted to remain in the Defendant's company;
- Ms. Philo went into the house at Freeman's Village voluntarily when the Defendant called her;

- Ms. Philo was free to leave the precincts of the house at Freeman's rather than go into the house – she was not locked in the car or anything of the sort and the main road was a short distance away - but she chose not to leave;
- Ms. Philo went to the Defendant's home after the incident and remained at his home with the Defendant's girlfriend, Ms. Georges, and the couple's child;
- Ms. Philo while at the Defendant's home ate the food that the Defendant brought;
- Ms. Philo made several short video clips of herself while at the Defendant's home and emailed them to herself.
- Ms. Philo did not have any scratches, or bruises, her nail extensions appeared to be intact and her hair did not look disheveled.

[71] The Virtual Complaint stated that while she remained at the Defendant's home with Ms. Georges, she "wasn't thinking straight" and "didn't know what to do." She testified that: "I was afraid if I reacted a certain way it might be triggering and refreshing."

[72] Ms. Philo said that: "After the incident I was scared and uneasy." She explained why she recorded the videos of herself (and one of Ms. Georges and the baby) then added filters to her image before emailing them to herself. The Virtual Complainant said that she: "took time out to pose and take the photos in effect to keep a calm composure and as a form of distraction from what had just happened."

[73] It is noted that each complainant may respond or react differently. The litmus test as in any trial was whether the witness was found to be honest and telling the truth. There was no prescribed conduct that Ms. Philo was required to exhibit. In Mr Archibald's view, Ms. Philo remaining at the premises, eating food bought by the Defendant, taking videos of herself and not having any of her fingernails broken or hair rumpled were indicative of consensual sexual intercourse. Those matters were put to the Virtual Complainant who gave rational and suitable explanations.

Ms. Philo's Weaknesses

[74] Ms. Philo generally maintained her composure during the course of her testimony. She spoke quietly and clearly and in the main responded in the same manner to both the Prosecutor and Counsel for the Defendant.

[75] On one occasion, when being cross examined, Ms. Philo did seem to anticipate the question and gave an early response of 'no'. She was cautioned not to answer before hearing the entire question was asked and she never did so again. What arose for consideration was whether the witness was adhering to a particular narrative for which she was prepared or whether she was being truthful.

[76] On another occasion, while being cross-examined as to the time something occurred late in the evening of the 16th of February 2019, Ms. Philo responded by saying "I don't recall." There was, however, a basis for Ms Philo to give a reasoned answer based on other answers that she previously provided, as the time in the question fell in sequence with the earlier answers she provided. This

neglect to think things through or lapse in concentration could have resulted in part from the fact that by then, Ms. Philo had already spend hours on the witness stand and possibly could have been tired – although she indicated she wanted to proceed and complete her testimony.

- [77] Counsel sought on two occasions to challenge Ms. Philo for making a previous inconsistent statement when she gave her witness statement to the police. Ms. Philo however provided an explanation or clarification of what was contained in the statement.

Consent and Belief in Consent

- [78] Consent may take various forms, from willing enthusiasm to reluctant acquiesce. The agreement need not be given in words, provided that the woman was agreeing with her mind.
- [79] The Defendant from as early as 18th March, 2019 said to the police that he understood Ms. Philo to be consenting “When she came out the vehicle she came into the house went to the bedroom. I was sitting on the bed, she stood in front me, unbuckled her pants and pulled it down to her thighs. I got up, went around her and told her to bend over and put her foot up on the bed. She turned and looked at me and then laid on her back and put up her feet.”
- [80] Ms. Philo was adamant that she did not consent to the sexual intercourse and she communicated orally and physically to Mr. Hilaire that she was not consenting.
- [81] Even though the Virtual Complainant did not consent, could Mr. Hilaire honestly believe that Ms. Philo was consenting?
- [82] Mr. Hilaire’s belief that there was consent based on Ms. Philo saying “go left” when the Defendant was driving, then she voluntarily went into the house, she took off her pants, bent over in front of him, pushed her bottom towards him and she made moaning sounds during the intercourse.
- [83] No evidence was lead as to the respective ages of the Defendant and the Virtual Complainant. Visually, Mr. Hilaire did appear to be an older, more mature person than Ms. Philo. He described himself as being the Coordinator of Security in the Ministry of Works. Ms. Philo said that she was a Junior Clerk in the Government Service. The designation of the job titles would suggest that there was a difference in age and seniority. Given the Defendant’s maturity and experience, it was not unreasonable to expect a level of prudence.
- [84] The challenge to the matters upon which the Defendant’s reasonable belief may be grounded, was that his testimony on those matters was not accepted as being credible. Rather, Ms. Philo’s was found to be a credible witness.

Conclusion

- [85] The fact that on some prior occasion the Virtual Complainant engaged in sexually explicit conversation in the presence of the Defendant, or that the Virtual Complainant responded favourably on a prior occasion to consider a threesome, may at best be indicative of propensity. It cannot be relied on by itself as translating into consent on the 16th February, 2019. In any event, from the Defendant's own narrative, the point at which the issue of a threesome was converted into sex with him, occurred while approaching Clarke's Hill, when he pointed to the difference between going directly to his house where his girlfriend, Ms. Georges was and going to the house at Freeman's Village.
- [86] Ms. Philo may have been naïve, or trusting, or a combination of both. But her testimony that she did not consent to sexual intercourse with Mr. Hilaire was believed. Having considered the evidence, it is not accepted that Mr. Hilaire honestly believed or could have believed that Ms. Philo was consenting.
- [87] Mr. Al Sylvester Hilaire is guilty as charged of the offence of rape, contrary to the **Sexual Offences Act** No: 9 of 1995, in that on the 16th day of February, 2019 at Freeman's Village in the Parish of Saint Peter in the State of Antigua and Barbuda, had sexual intercourse with Ms. Aliana Philo, knowing that she did not consent to the sexual intercourse, or was reckless as to whether Ms. Philo consented.

Colin Williams
High Court Judge

By the Court

Registrar