

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 CRIMINAL SIDE

INDICTMENT NO: 57/2018



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9 THE QUEEN

10  
11 v.

12 R v. JOHN MICHAEL SORIANO  
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18 Appearances:

Mr. Kenneth Ferguson for the Crown

19 Mr. Crister Brady, Counsel for the Defendant

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22 Before:

Justice Marlene I. Carter (Actg.)

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25 Judge Alone Trial:

7<sup>th</sup> to 10<sup>th</sup> January 2019

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28 Delivery of Decision:

21<sup>st</sup> February 2019  
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32 HEADNOTE

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34 *Rape*  
35 - Trial by Judge Alone -  
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40 VERDICT JUDGMENT  
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44 PRAMBLE

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47 1. Section 31 of the *Criminal Procedure Code (2014 Revision)* deals with the "Anonymity of  
48 complainants in rape etc. cases and states:



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“31. (1) *After a person is accused of a rape [etc.] offence, no matter likely to lead members of the public to identify a woman as the woman against whom the offence is alleged to have been committed shall be published in a written publication available to the public or be broadcast, except as authorised by a direction of the court.*”

All references to the Complainant by name/nickname in witnesses’ evidence or in the Agreed Facts, will be shortened or referred to by the initial “M”. There is to be no identification of the Complainant in this case.

## INDICTMENT

1. The Defendant was on trial on a one count indictment for rape. The Indictment read:

### *“Statement of Offence*

*Rape, contrary to section 127 of the Penal Code (2018 Revision).*

### *Particulars of Offence*

*Michael Soriano, on the 3<sup>rd</sup> day of September 2018, at West End Road, in Cayman Brac in the Cayman Islands raped [the Complainant].*

2. The Defendant elected trial by Judge alone pursuant to Section 129 of the *Criminal Procedure Code*.

## THE LAW ON JUDGE ALONE TRIALS

3. The Cayman Islands Court of Appeal (CICA) has given some guidance on the duties of a Judge in a Judge Alone trial. In *K. Richards v R*<sup>1</sup> Rowe JA, stated:

*“When a trial judge sitting alone has advised himself to the applicable principles of law, and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did in order to demonstrate that he has acted with the requisite degree of caution in mind and has therefore heeded his own warning. No specific form of words is necessary for this demonstration, what is necessary is that the Judge’s mind upon the matter should be clearly revealed.”*

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<sup>1</sup> 2001 CILR 496



In *Randy Martin v R*<sup>2</sup>, Mottley JA stated as follows:

*“A judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding is not required to review every fact and to detail each argument on which the prosecution and defence rely as if he were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at that conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law has in any way impacted the conclusion that he has reached.”*

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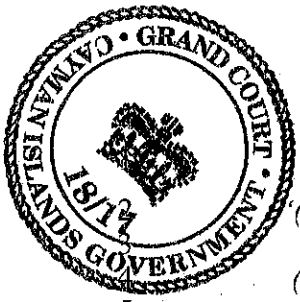
5. As in all criminal trials the burden is on the Crown to prove beyond a reasonable doubt that the Defendant committed the offence of rape.
6. There is no burden on the Defendant to prove that he is innocent. There is no onus on the Defendant to prove anything at all. The Defendant has no obligation to prove that he is not guilty, or to explain the evidence offered by the Prosecution.
7. I will not review every single detail of the evidence, but I will address my mind to the important or prominent aspects of the evidence in deciding the critical issues in this case. I will not decide every single point that has been raised – only such matters that will enable me to determine whether the charge on the indictment have been proved.
8. I remind myself that I am not to speculate about things or matters that are not covered by the evidence. I must have regard only to the whole of the evidence that has been presented at trial and form my own judgment about that evidence. The questions of fact at issue on this trial are for me to determine
9. I must consider all of the evidence in this case and if after having done so, I have any reasonable doubt as to whether the Defendant is guilty or not, I must resolve that doubt in favour of the Defendant and find him not guilty of the offences for which he is charged.
10. On the other hand, if having considered the evidence I am satisfied so that there is no reasonable doubt in my mind, and I am sure of the guilt of the Defendant, then it will be equally my duty in law to find him guilty as charged of rape.

**THE LAW**

11. Section 127 of *the Penal Code (2018 Revision)* states:

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<sup>2</sup> CICA Crim. Appeal No. 2/2010 (Ind. 27/2009)



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(1) *A man who rapes a woman or another man commits an offence.*

(2) *A man commits rape if—*

(a) *he has unlawful sexual intercourse (whether vaginal or anal) with another person who at the time of intercourse did not consent to it; and*

(b) *at the time he knows that the other person does not consent to the intercourse or he is reckless as to whether the other person consents to it.*

(3) *A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.*

(4) *If, at a trial for a rape offence, the jury has to consider whether a man believed that the person was consenting to sexual intercourse, the presence or the absence of reasonable grounds for such belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed.*

(5) *In subsection (4) —*

*“rape offence” means a rape or attempted rape, or aiding, abetting, counselling or procuring rape or attempted rape, or incitement to rape.*

(6) *For the purposes of this section, a person is deemed not to have consented to sexual intercourse if that person’s acquiescence is obtained—*

(a) *by threat of force or use of force;*

(b) *by means of threats or intimidation of any kind;*

(c) *by fear of bodily harm;*

(d) *by means of false representations as to the nature of the act; or,*

(e) *in the case of a married woman, by personating her husband.”*

12. While, unlike the UK legislation,<sup>3</sup> the prosecution is not required to prove, as an element of the offence of rape, that the defendant did not reasonably believe that the complainant was consenting, the issue will arise where, at trial, the defendant alleges that he believed that the complainant was consenting. In such a case, the onus on the prosecution is to show an absence of reasonable grounds for such belief and that the defendant did not hold such reasonable belief that the complainant was consenting.

## THE PROSECUTION CASE

<sup>3</sup>Section 1 of the Sexual Offences Act 2003



The case for the prosecution against the Defendant was supported by the evidence of ten witnesses. The only witnesses to give live evidence for the prosecution were the Complainant and Mavis Simbre.

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5 14. The Complainant, also called "M" stated in evidence that she had been living and working on  
6 Cayman Brac for approximately two years, that period interrupted only by an extended trip to her  
7 home in the Philippines when her mother passed away. When she returned to Cayman Brac, she  
8 met her friend Mavis Simbre's boyfriend. She met Mavis, whom she referred to as Suzanne when  
9 she first came to Cayman Brac and they were good friends.

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11 15. The Complainant stated that she was used to spending time at Suzanne's apartment especially on  
12 the weekends and that the Defendant would be at Suzanne's apartment during those visits. The  
13 Complainant related that on the 3<sup>rd</sup> of September 2018 she had gone to see Suzanne where she  
14 worked and spent close to an hour with her there. She stated that she asked Suzanne if she could  
15 go to her apartment as she was suffering with a headache.

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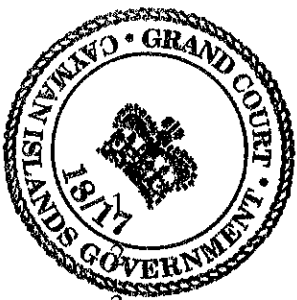
17 16. She stated that the house in which Suzanne lived had three rooms for rent. Suzanne rented one of  
18 these. The Defendant did not live there with Suzanne but he stayed there sometimes. On that  
19 evening she got to the apartment the Defendant was present there and he appeared to be cooking  
20 rice. The Complainant stated that she went into Suzanne's room and lay on the bed. She detailed  
21 that she was on her phone and playing her guitar while there in the room. The door to Suzanne's  
22 room was not closed and she saw the Defendant eating.

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24 17. She related that she was lying on the bed on her stomach playing with her phone when the  
25 Defendant came into the room and sat on the floor close to her. He then suddenly sat on the bed  
26 next to her and she moved further onto the bed away from him. She related that the Defendant  
27 then suddenly groped her breast and moved his body and leaned over her. She stated then that she  
28 told him to stop. The Defendant asked her what she was feeling and she said "no" and "get off".  
29 The Complainant related:

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31 *"When I told him to stop; he did not. My hands was upside. His arms were over*  
32 *mine so I was not able to move my hands. I keep telling him to stop and stop doing*



what he was doing. He was not getting off me. I was starting to get tired trying to get off from his hands, speaking in Filipino.”

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4 18. She went on that she thought that she could get away if she moved off the bed. She started moving  
5 her body to get off the bed as her upper body was close to the edge of the bed. She fell to the floor  
6 and the Defendant went down also on top of her. The more salient portions of the Complainant’s  
7 evidence on this aspect was as follows

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*“I was on my side and then he moved his body over me.*

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*After that, I keep telling him to stop what he is trying to do. He was just saying  
12 “come on”.*

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*He was still trying to touch me everywhere. I kept telling him to stop and don’t do  
15 it. I didn’t scream. I couldn’t scream because a lot was going through my mind.  
16 I was thinking about how Suzanne would feel and it would make a big scandal in  
17 the Brac... so I got scared of screaming and making a big scandal.*

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*He was trying to pull down my shirt and he was trying to kiss me and that’s when  
20 I smelled alcohol. He was using his hands. I was trying to slide down but I could  
21 not with my stomach. He had one of my legs locked with one of his.*

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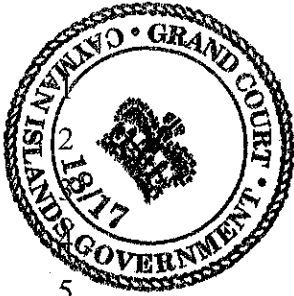
*The only think I could do was cover my breasts and private area. I still had on my  
24 shorts. I was already getting tired. He was able to take off my shorts. I had on  
25 underwear. He was also able to take off my underwear. That’s when he started.  
26 I was not able to cover my breasts. I was covering my private area with both of  
27 my hands. I was very tired, very scared already, scared of what was happening  
28 because I never thought it could happen to me. I felt like I was going to pass out  
29 and he was able to remove one of my overs from my private area and then he  
30 started taking out his genital. I don’t know what he was doing. I told him if I got  
31 pregnant I am going to kill you. I was so tired.*

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*He put his genitals inside my private area. It was inside my vagina. He kept  
34 pushing his genitals inside my vagina. I keep telling him to stop. Then I couldn’t*



do anything anymore, really tired. He suddenly stopped and got out of me and he said "you are so horny". Then he suddenly took a rag from the floor and he wiped the floor and my leg and my vagina.

.....

The door was open and you could see where I was laying down when I was able to gather strength I put on underwear/shorts and I got rag or pad and went to the bathroom to wash myself.

.....

When I was in the bathroom I sat down with the towel and when I pulled the door closed, I saw that my underwear was full with blood. I had never had sexual intercourse before. I never consented or agreed to for John Michael to have sexual intercourse with me at that time."

19. The Complainant described going back to the bedroom and that the Defendant appeared to smirk at her when he saw her. She says that she then sat on the bed, crying. It was maybe five minutes later that Suzanne came to the apartment while she was still sitting on the bed.

*"When Suzanne asked me what happened, I told her everything.*

...

*I told Suzanne I got raped by John Michael."*

20. She further described that the Defendant came into the room while she was speaking to Suzanne:

*"When John Michael came in Suzanne did not say anything to him before he said sorry to her. After I cursed at him, I told Suzanne I am going to leave and I took my things. John Michael was still sitting on the floor."*

21. After the Complainant left Suzanne's apartment, she and Suzanne returned to the Complainant's employer's home. It was at this point that she called the wife of her pastor Marsha Bismark-Clarke who came to the home and spoke to the Complainant. The Complainant stated that she reported what had happened to Mrs. Bismark-Clarke. She said to Mrs. Bismark-Clarke that she was raped by the Defendant. Mrs. Bismark-Clarke and her husband took the Complainant to the Cayman Brac Police Station where she made a report of rape to the police and they also accompanied to the Faith Hospital.



During cross-examination, counsel for the Defendant asked many probing questions seeking to discredit the Complainant. The Complainant's evidence was consistent; she was not shaken in cross-examination. She maintained throughout that she had been trying to get the Defendant to move off of her, that she was continually telling him "no" and "stop".

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23. She denied that she had only made up this account of rape because she was afraid to admit that she had had consensual sex with her best friend's boyfriend. She related that:

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*"I said I couldn't scream because I thought it would be a scandal. At that point I was concerned about being raped. I was also concerned about what is going to happen with me. I was not in my country, I was in a foreign country, what's going to happen. I was thinking about all of that. I was too exhausted to scream. A lot of things were going through my mind already, how it's going to be bad for Suzanne and for him as well because he has children, he has a daughter."*

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24. She described that she sat on the bed after the incident because she was having second thoughts on reporting the incident to the police due to her not being in her own country. She was also thinking about what would happen to the Defendant and to Suzanne.

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25. Mavis Simbre, also called Suzanne, was the second witness to give evidence for the prosecution. She related that she came to the Cayman Islands from the Philippines to work and that she and the Complainant were best friends. She stated that the Complainant would often visit her at her apartment and stay overnight. She met John Michael in January 2018.

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26. Her evidence of what occurred once she returned from work on the 3<sup>rd</sup> of September 2018 was introduced by the prosecution as evidence of the recent complaint. The more relevant aspects of her evidence in relation to her observations, what the Complainant said to her and her interaction with the Defendant at that time are set out here:

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*"John Michael is my boyfriend. It has ended now.*

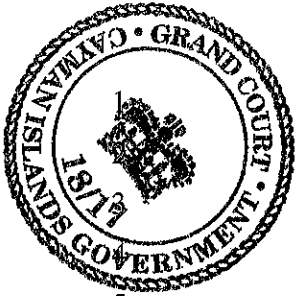
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*It ended after what happened. John Michael lived with me but he was not permanent in my apartment. He had his own apartment in Spot Bay.*

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*There were times all three of us slept on the same bed. It is not strange for three to sleep in one bed. It happened every weekend.*

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*Spring time, John Michael became my boyfriend. I did not have any reason to think that he had a crush on M or M have crush on him.*

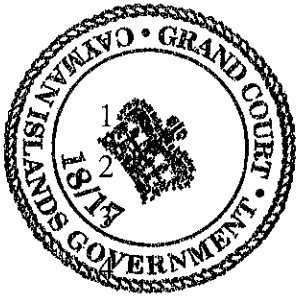
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*I remember Monday, September 3 last year at Asian House Restaurant. I went to work that day. I saw John Michael that evening. I saw M in my apartment. She came there. I think about 6 in the afternoon; stayed for an hour. M wanted to go to my apartment and I told her yes. At the time, I knew where he was. I knew he was at the house at that time.*

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*I went home at 9 that evening. When I went to the apartment, I opened the door, I saw M sitting down on my bed. She was sweating and I asked her if she was not feeling well and if she was sick. She looked scared also. I turned on the A.C. and then I asked her what happened. After that, she asked me to lock the door and I locked the door. I asked her to tell me what happened. She started crying and she hugged me and then she said sorry.*

.....  
*After this I told her what, because I was confused now. She said there is some blood on the bed and when I looked at it, there was no blood. Then she started holding her private parts. She tell me three times saying that John Michael's name. I asked her again and she said he raped her. After she said that I asked why don't she shout it and then I asked her to tell me what really happened.*

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*She said it hurt when she was holding her private parts. After that, I just asked her and she said John Michael was cooking food outside and "M" was inside the room, lying down and playing guitar and after John Michael go inside the room and he go and went down on M's back and he started to touch her breasts with both hands and he asked her how she feel. M said "get off my back" and M tried to move away from John Michael.*

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After that, M said John Michael forced her onto her back with her hands and then John Michael removed M shorts and then her panties and then forced her private parts in M's private parts and after M told me she told John Michael to stop but he continued on and after that M said to John Michael that if he got her pregnant she would kill him.

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John Michael finished what he was doing. After they finish, John Michael wiped her legs.

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When John Michael saw down he started to say sorry to me. I did not say anything to him before that happened.

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I have seen John Michael drunk before. He did not appear drunk to me that night."

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15 27. **In Cross-Examination Ms. Simbre stated:**

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"Nothing was supposed to be happening at work that day. There was no reason for me to come home early. 9:00 is my usual time home.

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When I saw M at my work place, she did not complain about having a headache."

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22 28.

The prosecution also read into evidence the statement of the witness Marsha Bismark-Clarke pursuant to Section 34 of the *Evidence Law (2011 Revision)*. Mrs. Clarke's evidence was that she knew the Complainant, whom she referred to in her evidence as M, as the Complainant attended the church for which her husband was the pastor. She related that she had grown to know the Complainant quite well in the short time that she, the Complainant, had been on the Island. Mrs. Clarke related that on Monday 3<sup>rd</sup> of September 2018 at around 10:15 pm she noticed that she had a missed call from M as well as a WhatsApp message. As a result, she called M and after she spoke to her she went with her husband to the residence where M worked. She related that when she first saw M and Suzanne they both looked distressed.

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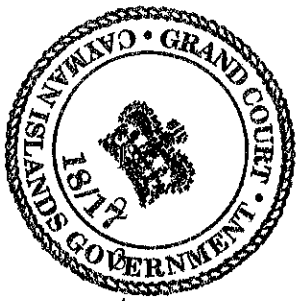
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32 29. Her evidence was:

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*"I don't recall who asked if it was me or my husband but M replied: "I have been raped". Immediately I asked who? M and Suzanne were quiet for a while and they looked at each other, then Suzanne then replied "It was my boyfriend JM (John Michael) who did it. I then asked did he come here. And M replied "No it was at Suzanne apartment in West End. I cannot recall the exact time it happened but it was about 2 hours to 1½ hours before we had reached the house. I asked them how did they get back here to the house and they replied the bus."*

30. Mrs. Clarke described that the Complainant appeared to be in a lot of pain on the way to the hospital and that she *"passed out"* because *"she was so tired and in a lot of pain"*.

31. While at the hospital Mrs. Clarke detailed what she heard the Complainant describe to the doctor about the incident. The Complainant's account, set out in the witness statement of Mrs. Clarke, was substantially the same as the account that she gave at trial.

*"...*

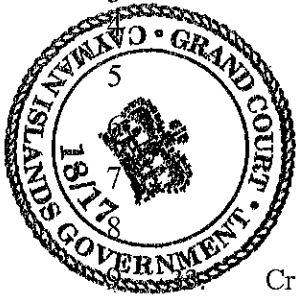
*M said she went into the room of Suzanne and was on the bed on her stomach facing down and on her phone, after being there she heard JM come in the room and he came and sat on the bed next to her, she did not look up and continued looking on her phone as she did not think anything of this as they were all friends and JM is her best friend Suzanne boyfriend.*

*Shortly after she felt a pressure on her legs and turned in shock to see what was happening JM then flipped her over and lifted up her top at this time she was very shock to what was taking place, JM pinned her down by her legs and the weight of his body was on her, she did not scream and she felt very terrified, JM then began to take her shorts and underwear off, this shorts she said she would usually wear with a belt as it is a bit loose but on this day she was not wearing the belt.*

*Before he inserted inside her she tried to fight with him but he was stronger and over powered her, as she could not manage to fight him off, when he penetrated her she then began to scream but no one heard her. M was clearly distressed as she related this to the doctor, she was not crying at this point but when we first meet her at the house she was crying a lot."*

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32. Mrs. Clarke also remembered:



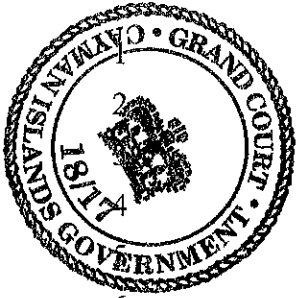
*"M did not say anything to him and he did not say anything to her, just that after the incident JM took his shirt and wiped her leg probably to remove semen, JM then jumped into the shower and then walked out of the room. M said she felt very weak and fell to the ground after the incident."*

Crown counsel and counsel for the Defendant produced agreed facts which were introduced into evidence pursuant to Section 33 of the *Evidence Law (2011 Revision)*. These agreed facts encompassed facts taken from the statements of six (6) police witnesses detailing the course of the investigation as well as the statements of the doctor and nurse who attended upon the Complainant and the Defendant at the Faith Hospital on the 3<sup>rd</sup> and 4<sup>th</sup> September 2018 respectively.

34. A summary of that aspect of the evidence is as follows:

- "1. At 11:15 pm on Monday September 3, 2018 PC 352 Cary Hunte was on duty at the Cayman Brac Police Station when he received a report from [the Complainant] of an alleged rape committed against her by one John Michael Soriano. The Officer observed that [the Complainant] was crying and her face was red and that she appeared very distraught and emotional. The complainant had to take regular breaks in order to compose herself whilst she was narrating what had happened to her to the Officer. PC Hunte then contacted Inspector Myles and informed him of the situation.*
- 2. PC Kadane Hall was then tasked by Inspector Myles to locate the defendant and to arrest him. The key to Mavis Simbre's room at # 88 West End Road was also given to the Officer.*
- 3. PC 352 Hunte then contacted the Faith Hospital and reported the incident and then accompanied the complainant and the other persons there. Along the journey the complainant complained of feeling pain and then lost consciousness before arriving at the hospital.*

...



5. *The complainant was seen and medically examined by Dr. Venkamma Bonigi who subsequently prepared a sexual assault kit in relation to the complainant*
6. *Dr. Venkamma Bonigi examined the complainant [...] and found the following:*
- i. Swelling, tenderness at the dorsum of her left hand and medial 3 fingers and there was difficulty in flexing the 3 medial fingers.*
  - ii. Bleeding was noted from her introitus.*
  - iii. Her vulva was swollen and abrasion with oozing noted from her introitus.*
  - iv. Her hymen was not intact.*
  - v. Cervix healthy.*
- ...
8. *PC Kadane Hall proceed (sic) to # 88 West End Road and went to the room and knocked on the door. He received no answer after identifying himself and gave a command for the door to be opened and so he entered the room with the key that had been given to him.*
9. *There he saw the defendant as he was exiting the room and asked him to identify himself. The defendant gave his name as John Michael Soriano and PC Hall then informed him of the allegation that had been made against him earlier. The officer then arrested the defendant and cautioned him. When asked if he understood the caution he said "yes".*
- ....
12. *Later on the morning of Tuesday September 4, 2018, the defendant was taken to the Faith Hospital where he was processed and examined by Dr. Gregory who collected intimate samples from him and his clothing secured and handed over to PC Hall for evidential purposes.*
13. *On Wednesday September 5, 2018 between the hours of 1:10 pm and 2:05 pm, the defendant was interviewed under caution by Acting Detective Sergeant Devon Bailey and DC Sarah Bodden at the Cayman Islands Detention Centre after telephone consultation (sic) his Attorney Mr. John Furniss.*



...

14. *At 6:15 pm that same evening he was formally charged for rape by PS 56 Ashton Ferguson. After he was cautioned he made no statement.*"

5 35. The Defendant's record of interview: the CD containing the video of the interview and the transcript  
6 of the interview under caution, were entered into evidence by the prosecution. The Court had the  
7 opportunity to view the interview. There was no objection raised by the defence to the admission  
8 of the interview into evidence. The interview was conducted on the 5<sup>th</sup> of September 2018. One of  
9 the police officers involved in the conduct of the interview spoke the Filipino language and  
10 translated the Defendant's answers.

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12 36. During the course of questioning the Defendant related as follows:

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14 *"He was coming from work, feeding cows and checking and chopping on the*  
15 *bushes. He said when he arrived home, he cooked rice and viand and while doing*  
16 *so, he was also continuously drinking the same Bacardi. And then, all he could*  
17 *remember is that he fell asleep and then while he was sleeping he was awakened*  
18 *by the knock on his door saying that it was the police. When he opened the door,*  
19 *it was indeed the police, and the police asked him if he knew the reason why they*  
20 *were there and the reason for his arrest and he said, Mr. Soriano said that he did*  
21 *not know why he was arrested."*

22  
23 37. With regard to the allegation of rape, when the specifics of that allegation were put to the Defendant  
24 he stated in the record of interview:

25  
26 *"I can't remember anything about her complaints. Whatever that is, I can't say if it*  
27 *is true. Because that night I was drunk. Because one time when I am drunk, very*  
28 *drunk, can't remember events.*

29 ..

30 *Because my girlfriend knows that. Suzzane (sic) and M know that.*

31 ...

32 *Suzanne knows that and M knows that, too.*

33 ...

34 *[Many times M objected to your sexual advances and she pushed you away while*  
35 *telling you to stop what you were doing. She further mentioned that you asked her*



1 *how she felt towards your advances. When she fell off the bed because you pushed*  
2 *her, you positioned her facing you while she continually fought you off and begged*  
3 *you to stop. But you did not hear her pleas. Instead you continued with your*  
4 *advances and kissed her then pinned her down and rammed your penis into her*  
5 *vagina. (interviewer)].*

6 ...

7 *I can't remember anything relative to all those things, Ma'am.*

8 ...

9 *I don't remember anything with what she said. All I remember was the knocks on*  
10 *the door by the police, and it was around dawn by then. That is all I remember. I*  
11 *thought it were all a dream.*

12 ...

13 *But the knocks were real after all!*

14 ...

15 *[So you say you don't remember any of this or you just say you don't recall because*  
16 *you are being interviewed now? (interviewer)].*

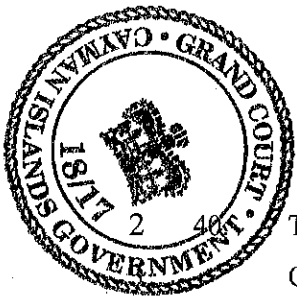
17 ....

18 *No. I really don't recall. Suzanne could attest that a lot of times I lost memory after*  
19 *a drinking binge. I could not recall how I manage go home, get into bed,..how have*  
20 *I slept. Just that I wake up in the morning and she would ask me: "don't you*  
21 *remember anything? I even washed your whole body?" She would say that."*

22  
23 38. That was the extent of the evidence relied on by the prosecution to prove its case against the  
24 Defendant on the Count of Rape.

25  
26 **THE DEFENCE CASE**

27 39. The Defendant elected at the close of the prosecution case to give evidence under caution. I remind  
28 myself that I must assess the evidence of the Defendant in the same objective and dispassionate  
29 manner as I would any witness for the prosecution. I remind myself that if I do not accept the  
30 evidence of the Defendant, I must return to the Crown's case to look for evidence that the crown  
31 has proved its case to the requisite standard before I can find the Defendant guilty, there being no  
32 onus on the Defendant to prove that his is innocent. If the Crown's evidence does not make me sure  
33 of the Defendant's guilt then my verdict must be not guilty.



The Defendant did not deny that sexual intercourse took place between himself and the Complainant. He was adamant that the intercourse was consensual.

4

5 41. He related that when the Complainant came to Suzanne's apartment, he was at the apartment  
6 cooking rice and vegetables, that the Complainant went into Suzanne's room and was at times on  
7 her phone or playing the guitar and that he went into the room and sat by her as she was lying on  
8 the bed. This description all accords with the version of events described by the Complainant. The  
9 Defendant's testimony diverges from the Complainant as to what happened and how it happened  
10 after this point.

11

12 42. The Defendant's testimony was that he started to tease the Complainant and touched her breasts.  
13 He described that he started to hug M and that he touched her breasts as she lay on the bed. He  
14 related that M fell on the floor from the bed and he followed her and was lying beside her. He  
15 stated that she was looking at him seductively, he started to kiss her and she seemed to like it. He  
16 described slowly taking off her clothes. He stated that M did not do anything and neither did she  
17 say anything while he was doing this. He described how he took off the Complainant's clothing  
18 and that they began to have intercourse. He stated that the Complainant only spoke to say:

19

20 *"She talked to me, 'what if I got pregnant' and I said don't worry I will not put the*  
21 *semen inside of you. She said 'ok'.*

22

...

23

24 *We continued having sex until both of us orgasm. After we had sex we had to rest*  
25 *for a little bit and M got her phone, to look at her phone, at what time it is."*

25

26 43. The Defendant testified that after he and M had had sex, that he took a handkerchief and started to  
27 wipe and clean her legs and her private parts. He then went to the bathroom to clean himself. He  
28 stated:

29

30 *"When I come back, I wanted to go back to the room but it was closed so I knocked*  
31 *on the door. Suzanne opened it and I saw her with M inside the room. M stopped*  
32 *talking right away when she saw me. I saw my girlfriend Suzanna; her eyes were*  
33 *looking at me angrily. I assume that my girlfriend knows already I had sex with*  
34 *her best friend.*



*I apologized to my girlfriend Suzanne. After I apologized to Suzanne, M walked out of the room. Suzanne followed her outside.”*

5 44. He stated that after M and Suzanne left the house, he decided to get some rest. The police awakened  
6 him:

7

8 *“Police told me “you are accused of raping M.” I told him, I don’t know. What I*  
9 *meant was I don’t know I rape her. I mean we have sex.*

10

11 *In the interview, I told police, I didn’t know of raping M that I didn’t know anything*  
12 *that happened that night.*

13

14 *I don’t remember raping her. I was so shocked when the police came and ask me, I feel*  
15 *like I lock my mind but what I really meant I did not do it, I did not rape her.”*

16

17 45. At trial, the Defendant’s testimony was emotional at times. In cross-examination the Defendant  
18 was questioned closely by Crown Counsel.

19

20 *“I said M wanted to have consensual sex with me. Before that, she had expressed*  
21 *intimate intention toward me.*

22

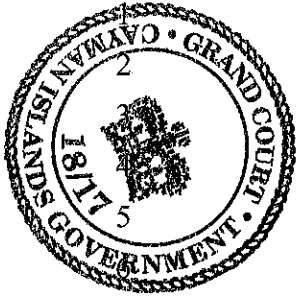
23 *Because she was wearing short pants, sexy shorts and when I told her to not lay*  
24 *on the bed or for herself lying on the bed, she did not do anything.”*

25

26 46. He denied that the Complainant told him to stop when he first touched her breasts or that she told  
27 him to stop at all. Crown Counsel’s questioned the Defendant about his failure, when confronted  
28 with the allegation of rape at various points during the period 3-5<sup>th</sup> September 2018, to explain that  
29 the Complainant had consented to sexual intercourse. Crown Counsel’s questions were related to  
30 the Defendant’s lack of response when he was arrested and the allegation was first put to him and  
31 also when he was interviewed under caution. The Defendant’s response was:

32

33 *“The police officer did tell me that it was my opportunity to state what happened*  
34 *and also to say details. I agree she asked me a number of times to tell her details.*



...  
*My mind was blank. I was blank. I was scared, shocked of what happened. I could not compose myself to say what really happened in interview with police.*

*What I really meant was I don't remember raping her. I did not rape her.*

...  
*I did not say sex was consensual. That is what I really meant but I guess I did not express myself in the proper words that I should have done."*

7

8

9

10 47. He agreed, under cross-examination, that his account at trial, that he and the Complainant had had  
11 consensual sex, was the first time that he had related this version of their encounter. He also agreed  
12 that some of the specifics he related to the Court of that encounter were not put to the Complainant  
13 when she was cross-examined by his counsel.

14

15 48. The Defendant clarified that he was not drunk during the encounter with the Complainant although  
16 he had drunk some alcohol before the incident.

17

18 *"When Suzanne came to the house that night, I only drank a few. I drank a little  
19 bit.*

20 *I drunk some, I was not drunk.*

21 *At that time, earlier in the afternoon, I was a little bit drunk.*

22 *I was not drunk and I know what was happening."*

23

24 49. Apart from the Defendant there were no other witnesses for the defence.

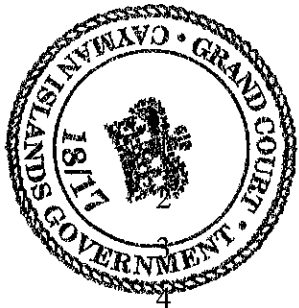
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## 26 COURT'S REASONING AND CONCLUSIONS

27 50. During the course of the closing speeches, counsel for the prosecution and for the Defendant were  
28 agreed that in order to arrive at a verdict on the facts of this case, that I would have to determine  
29 whom I believed, the Complainant or the Defendant. There was no other evidence that went  
30 conclusively to the determination of whether sexual intercourse between the Complainant and the  
31 Defendant was consensual or not.

32

33 51. The medical evidence, the findings upon examination of the Complainant on the night of the 3<sup>rd</sup> of  
34 September 2018, did confirm that the Complainant's hymen was not intact and did support the fact



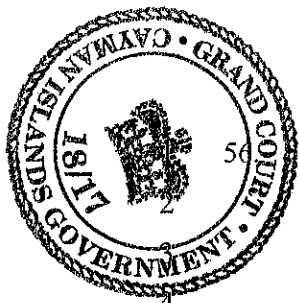
of sexual intercourse. Although the medical evidence detailed, "*Bleeding.. from her introitus*" and "*Her vulva was swollen and abrasion with oozing noted from her introitus*" this evidence in and of itself does not confirm non-consensual sexual intercourse. I consider, as well, the Complainant's evidence; that she was a virgin before the encounter. This could explain the presence of the blood observed upon examination, and again does not support any conclusive finding of non-consensual sexual intercourse.

52. The evidence of Mavis Simbre and Marsha Bismark-Clarke is evidence of a recent complaint and does support the consistency of the Complainant's account of the incident. The Complainant reported to both within a relatively short time: from the Complainant's evidence within five minutes of her returning from the bathroom after the incident she told Mavis Simbre that the Defendant had raped her and she also told Mrs. Clarke within an hour of the incident that it was Jean Michael, the Defendant, who had raped her. The account to both of these witnesses of the manner in which the incident took place is largely consistent with her own evidence of the encounter in Court.

53. There were inconsistencies between the evidence of the Complainant and of Mavis Simbre as to what was discussed, and what were the arrangements made between them before the incident. The Complainant stated that she told Ms. Simbre that she had a headache and that she wanted to go to Suzanne's apartment to lie down. She also said that Suzanne told her that she would be home early. In cross-examination Suzanne stated that she had had no reason to leave work early that evening, that she returned home at her usual time and that the Complainant had not complained to her about having a headache.

54. I do not consider that there matters go to the main issues in this case or that they are inconsistencies of such magnitude to cause me to doubt the account that the Complainant gave of the incident with the Defendant, nor do they cause me to doubt Suzanne's recollection of what the Complainant reported to her on the evening of the 3<sup>rd</sup> September 2018.

55. I have also carefully considered the arguments put forward by counsel for the Defendant that the lack of evidence of the Complainant screaming during the encounter or of her scratching or biting the Defendant in an effort to prevent him from having sexual intercourse with her, should cause me to doubt her version of what occurred between the parties or to prefer the version of events offered by the Defendant at trial. The Complainant's response to this line of questioning is detailed above at paragraph 18 above.



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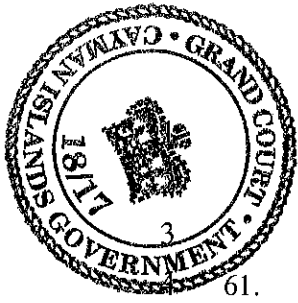
The Complainant's responses appear to be to this Court consistent with her professed faith and evidence of her involvement in the church and the Filipino community. Even where the victim is an adult the fallout from disclosures of sexual assault and the effect on a victim of sexual assault can be unpredictable in such circumstances. Further, experience has shown that people may react differently to the trauma of sexual assault and that this extends to responses or reactions during the incident itself. In any event, victims of rape do not always have injuries to show for it and there is no classic reaction to a demand for unwanted sexual activity.

57. I remind myself that the prosecution does not have to prove that the Complainant communicated her lack of consent by shouting at the Defendant or screaming and scratching him. I do not find that the lack of screaming and scratching in the circumstances of this case are such as to cause me to doubt the Complainant's account. I remind myself that the Complainant has given evidence that at various points during the incident she clearly told the Defendant to stop, that she was saying no and attempting to get away from the Defendant.

58. I observed the Complainant as she gave her evidence of these matters. When she stated that she had fought and fought and she was tired it appeared to this Court that she was resigned to her fate. That is not an indication of consent. The same is true when she says she told the Defendant that she would kill him if she got pregnant. The Complainant's evidence was that at this point, when the Defendant had already managed to take off her clothes despite her protests and efforts to get him to stop, she had become tired from fighting him off. However, these actions do not vitiate her lack of consent.

59. The Defendant has posited a number of scenarios surrounding his reaction to the allegations by the Complainant. *In his interview under caution* he stated that he was drunk and so did not remember the incident or that he had had sexual intercourse with the Complainant at all. On this account the Defendant remembered the events that led up to the moment when the Complainant states the rape occurred but not the act itself.

60. *At trial* the Defendant stated that he was not in fact drunk on the evening of the incident but that he found himself confused during the interview and could not explain himself fully. He explained that what he meant, when he said in interview that he could not remember anything at all, was that he could not remember the encounter being rape as was being alleged. On this version he knew that



he had had sexual intercourse with the Complainant and that it was consensual, but he was confused and afraid and was therefore unable to express what he meant to the police.

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61. *At trial*, the Defendant related what he remembers as the correct version of what happened on the evening of the 3<sup>rd</sup> September 2018. He was clear that he had had consensual sexual intercourse with the Complainant, in which they both freely participated and enjoyed, and that he was not in fact drunk when such consensual intercourse took place.

62. I have had the benefit of viewing the video recording of the Defendant's interview. There was no challenge to the admissibility of the record of interview at trial. The Defendant had the benefit of speaking to counsel before the interview commenced and one of the police officers interviewing the Defendant was able to speak to him in his native language. There did not appear to be any point at which the Defendant did not fully understand what was being asked of him. He never complained of such. He answered freely. I am not persuaded by the Defendant's statements that he was confused and unable to express himself and therefore unable to state that what had occurred between himself and the Complainant was consensual.

63. The Defendant admitted that he was offered many opportunities during that interview to explain what had happened between himself and the Complainant and he did not. I note that he made no explanation when first confronted with the allegation on the 3<sup>rd</sup> of September 2018 upon his arrest. These matters raise some doubt in my mind about the Defendant's explanation and account of the incident.

64. At trial the Defendant related in great detail what he says transpired between himself and the Complainant, yet many of these specifics were not put to the Complainant when she was being cross-examined, raising the spectre of recent fabrication.

65. I do not believe the account given by the Defendant. His lack of response when first taxed with the allegation, the changing versions of what occurred between himself and the Complainant, and the fact that many details were not put to the Complainant cause me to doubt his version of the events of the evening of the 3<sup>rd</sup> September 2018. I remind myself that I cannot convict the Defendant simply because I do not believe his testimony of what happened that evening. I must go back to consider the prosecution's case.

1 66. The prosecution must prove sexual intercourse without consent and that the Defendant knew that  
2 the Complainant was not consenting or was reckless as to whether she was consenting or not. On  
3 the evidence presented by the prosecution the Complainant was clear in her words and by actions  
4 that she did not consent to sexual intercourse with the Defendant. I believe her evidence. She gave  
5 a very detailed account of what transpired. She maintained her account under cross-examination  
6 and the evidence of Mavis Simbre and Marsha Bismark-Clarke bolster her evidence by supporting  
7 the consistency of her account of what transpired that evening.

8  
9 67. It is clear that the Defendant's defence was consent. I find that the prosecution's evidence has  
10 satisfied me so that I am sure that the Complainant did not consent to sexual intercourse with the  
11 Defendant. I am satisfied so that I am sure that the Defendant knew that the Complainant was not  
12 consenting or that he was reckless as to whether she was consenting or not.

13  
14 68. The Defendant did not advance at trial that he reasonably believed that the Complainant was  
15 consenting and counsel for the Defendant did not address me in that regard. However, to the extent  
16 that any of the Defendant's testimony could arguably indicate that he reasonably believed that the  
17 Complainant was consenting to sexual intercourse with him, I have considered whether there were  
18 any grounds for such belief and also whether he could reasonably have held such a belief. I do not  
19 find that there were any grounds upon which he could reasonably have held such a belief in all the  
20 circumstances of this case, and I do not find that he reasonably held such belief.

21  
22 69. **I am satisfied so that I feel sure that the defendant is guilty of rape.**

23  
24  
25 Dated this 21<sup>st</sup> day of February, 2019.

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31  
32 **Madam Justice Marlene I. Carter**  
33 **Judge of the Grand Court (Acting)**

